IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CORPORATION OF THE CITY OF LONDON
- The Employer

-and-

THE LONDON CIVIC EMPLOYEES LOCAL UNION NO. 107
- The Union

AND IN THE MATTER OF the dismissal grievance of Evan Jones

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Kelly M. Dawtrey - Counsel
Scott Stafford - Division Manager, Parks and Recreation Operations
and others

On behalf of the Union:

Michael Klug - Counsel
Eric Townshend - President, Local 107
Evan Jones - Grievor
and others

Hearing held January 26, February 5, 13, 26, March 3, April 17, 30, May 20, 27, June 12, 29, September 23, 24, October 1, 2, 14, November 10, December 2, 17, 2009, February 9, 16, 18 and March 5, 2010, in London, Ontario.

AWARD

INTRODUCTION

This grievor is addicted to alcohol and drugs and, as a result, was dismissed for excessive absenteeism. Following his dismissal the grievor received treatment for his addiction and by the end of the arbitration hearing he had not used alcohol or drugs for nearly two years. There was considerable medical evidence that the grievor now had a good chance of maintaining reasonable attendance at work.

The main difference between the parties was whether the post-discharge evidence could be used in reviewing the discharge.

THE FACTS

This collective agreement between the Corporation of the City of London, the Employer, and the London Civic Employees Local Union No. 107, the Union, covers the outside workers. Evan Jones, the grievor, was employed by the Employer as an outside worker from April 1992 until his dismissal in November 2007. He held various jobs during his employment but at the time of discharge worked in the arenas during the winter and in the parks during the summer.

Ten witnesses testified during the 20 hearing days devoted to the presentation of evidence. There was little dispute over the relevant facts.

The grievor has had a along history of alcohol and drug abuse which has had a very negative impact on his life and on his work. The grievor is 45 years old and he drank alcohol nearly every day from age 13 or 14. In addition he used drugs, initially

marijuana and in later years cocaine on a regular basis and at times used other illicit drugs. The grievor stopped drinking in February 2008 and ceased using drugs in April 2008.

The parties agreed that the grievor suffered from the disease of addiction and that the Employer was required to accommodate his illness.

The grievor had a very poor attendance record during his employment. The Employer relied upon the grievor's absences from 2000 onward in dismissing him. His absences during that period were as follows:

Year	% of time absent from work
2000	21%
2001	29%
2002	30%
2003	46%
2004	31%
2005	66%
2006	78%
2007	80% (for the period from January 1 to the date of dismissal)

During those same years the average rate of absences for other Union members was always less than 10%. The Union conceded that the grievor's absences were excessive.

In recent years the Employer was very supportive of the grievor's efforts to deal with his illness and provided considerable assistance to the grievor. Beginning in 2005 the Employer helped the grievor gain admission to residential treatment facilities on three separate occasions. The Employer assisted the grievor in pursuing and obtaining

benefits under the short term and long term disability plans. The Employer helped the grievor in other ways, including paying out vacation pay when the grievor was low on cash, allowing the grievor to work three days per week as suggested by one of the grievor's physicians and, after the grievor encountered difficulties with his supervisor, moving him to work under a new supervisor.

The grievor's addictions interfered greatly with his attending work regularly. In addition to absences directly caused by the grievor being drunk or under the influence, his use of alcohol and illicit drugs caused him related medical conditions such as gout and either irritable bowel syndrome or Crohn's disease. The Employer accommodated those assorted medical complaints. It also accommodated a shoulder injury and an ankle injury.

During his employment the grievor was also diagnosed with Post Traumatic Stress Disorder and Attention Deficit, Hyperactivity Disorder, conditions which were perhaps exacerbated by his addictions.

The grievor's various medical problems, caused or exacerbated by his addictions, were fully explored at the hearing. It is not necessary for this award, nor helpful to the parties, to detail all those problems here.

The grievor was discharged in November 2007. In a lengthy discharge letter the Employer reviewed the grievor's attendance problems and the Employer's efforts to assist him with those problems, noted that the Employer had accommodated any medical issues and had assisted him in attending an in-patient treatment facility for his addiction in 2005, a similar second in-patient treatment centre in 2006, and a third in-patient treatment centre in 2007. The letter detailed the grievor's attendance especially after the 2007 in-patient treatment, noted how seldom the grievor had attended work after that treatment,

notwithstanding the modified work schedule suggested by his doctor and accepted by the Employer. The Employer also noted the lack of medical information to explain the grievor's absences and, further, noted that repeated requests for medical information had been ignored.

The facts known by the Employer at the time of the dismissal in November 2007, together with facts not known to the Employer then but disclosed later at the hearing, strongly support the Employer's position that at the time of the dismissal there was no reasonable likelihood that the grievor would have regular attendance at work in the foreseeable future.

Following his discharge in November 2007 the grievor continued his use of alcohol and cocaine. He reached a low point in February 2008 when it hit home to him that continued substance abuse would lead to his early death.

The grievor took matters in hand. He attended a detox centre. He stopped drinking alcohol. He obtained admission to a six month in-patient treatment facility beginning in April 2008. The grievor testified that he used cocaine once more after detox but before his time in the treatment facility. He testified that he has been clean of alcohol since February 2008 and from cocaine and other drugs since early April 2008. All the evidence at the hearing supported that assertion.

In addition to abstaining from both alcohol and drugs, the grievor made strides in turning his life around more generally. The grievor and three of the grievor's physicians testified about the changes the grievor made in his life. Each physician provided his written opinion regarding the grievor's health and the prospects of regular attendance at work.

Dr. Thomas P. Janzen was the grievor's family doctor from 1988 until 2003. Since 2003 Dr. Janzen has been working at the Regional Mental Health Centre in London and St. Thomas as an enhanced primary care doctor providing psychiatric care. As part of his small private practice, Dr. Janzen has been counselling the grievor since September 2008, that is since the grievor completed his six months of in-patient treatment.

Dr. Janzen testified at the hearing. Dr. Janzen wrote two reports outlining his views and in his first report he wrote as follows:

> I have been aware for many years that Evan has abused both alcohol and drugs including cocaine and marijuana. I have facilitated several different treatment programs in the past but he has been much more committed since discharge from this particular inpatient program. Evan has always been very open in discussing his substance abuse with me and his desire to make the needed changes. It appears that this most recent program has changed his outlook and he is optimistic about the future. He has not used any alcohol or drugs since April 1, 2008 and remains committed to his program which involves monthly visits with me and daily participation in AA meetings. He has reacquainted himself with a lifelong friend who has now been clean for the past 16 years and he has made it his goal to follow in his friends footsteps. His friend has returned to school and recently graduated with a PhD in biochemistry.
>
> This period of sobriety represents the longest period in Evan's life since he was 13 years old!
>
> Currently Evan is clean and we have been testing him sporadically with toxicology tests which have verified this. He has recently been seen by Dr. Judson, a local expert in addictions in order to gain additional outpatient support.
>
> It is my opinion that Evan is more committed than I have ever seen him before. He has actively sought out the supports that he needs in his efforts to accomplish his goals. The current network that he has in place is sufficient to succeed and I will continue to support his efforts. He is anxious to re-establish his employment as part of his rehabilitation and I believe that this is a critical element of his ongoing recovery.
>
> If he were to succeed in regaining his employment with the City of London, I believe that they would see the dramatic changes that I have personally witnessed. His absenteeism as documented was clearly unacceptable but understandable in light of his addictions and complicating medical complaints. He is now clean and I have every reason to believe that his current state would result in a totally different attendance profile in his work. His past attempts to achieve sobriety were brief programs with little motivation on the part of Evan. This time has been dramatically different in that he went for treatment not in an effort to save his job but rather in an effort to save his life. This program was a six month program focussed more on not only sobriety but also on the lifestyle change needed to maintain this. Part of the program involved

> employment with a supervisor for janitorial services and his efforts resulted in a personal letter of thanks for his services. He appears to have a resolve to do this for all the right reasons and the consideration of this by his past employer as they contemplate rehiring him is important.
>
> It is always difficult to predict the future when there has been such a history of relapse following rehab. His pattern has been one of short term sobriety followed by relapse. The supports in place this time as well, as Evan's commitment to his goals are quite different from the past. I support the desire to regain his position with the City and will continue to follow Evan as he faces the challenges ahead. (Letter January 20, 2009, at page 2)

When he testified in November 2009 Dr. Janzen said that there were no aspects of the above letter which he wished to amend. On his second day of testimony the following month Dr. Janzen said that he would change the letter based on the additional 11 months of sobriety and testified that, given the longer period of sobriety, he felt even more strongly about the grievor's prospects for a successful return to employment.

Dr. Janzen said that he saw the grievor monthly provided that he was able to accommodate the grievor, that the sessions depended upon Dr. Janzen's schedule. Dr. Janzen testified that he felt the grievor had been clean and in compliance with treatment recommendations.

Dr. Janzen also wrote a second report in November 2009 in which he addressed some of the grievor's other medical complaints. He wrote in part as follows:

> . . . he voluntarily admit [sic] himself to an alcohol and drug rehabilitation program . . . The impact of this program to date has resulted in 18 months of remission of his drug and alcohol problems. Coincident with this remission has been a resolution of his symptoms of depression, ADHD and PTSD. As well he has had no complaints of the medical concerns which were so troubling to him during the period when he was continuing to abuse drugs and alcohol.
>
> In summary, Mr. Jones has had a long-standing history of alcohol and drug abuse which appears to have accelerated at a time in his life when he experienced significant stress (loss of his father, loss of employment, conflicts with fellow employees, miscarriage of child, loss of girlfriend). During this period of increased stress, Mr. Jones began to experience symptoms of posttraumatic stress disorder as well as depression.
>
> After undergoing a comprehensive treatment program, he has now been free of drugs and alcohol for the longest period in his life. He has also been free of symptoms in connection with

> depression, ADHD and PTSD. As such, I do not recommend the need for CBT, pharmacotherapy or any other intervention for these illnesses. . . . I do support his continued involvement in the post inpatient rehab program including his involvement with AA.
>
> Although it is difficult to predict the future, his resolve appears to be completely different than it has been following previous rehabilitation programs. It is my belief that he is now stable and capable of resuming gainful employment. I have considerable confidence in his ability to maintain good attendance if he were to be reinstated in his previous position with the city. I will continue to follow him on a regular monthly basis and monitor his weekly toxicology screens which as you know have been negative for both alcohol and illicit drugs. (Letter November 12, 2009, at page 2)

Dr. Janzen acknowledged that he had known the grievor before the grievor became his patient but he said that he did not believe that fact had influenced his treatment. Dr. Janzen also acknowledged that he had an interest in the grievor succeeding. Dr. Janzen said that he did not set goals for his patients but, if a patient had a goal that he felt would be good for that patient, he tried to help the patient achieve it.

Dr. Janzen clarified that when he wrote that the grievor was clean it was based on what the grievor reported, the results of regular toxicology tests, and his own assessment made during his meetings with the grievor.

Dr. Janzen acknowledged that there were various stressors which could cause the grievor to relapse. He agreed that the grievor's history of relapse made another relapse more likely. He agreed that if the grievor had even one drink, that would create problems. He agreed that working for the City had been a stress for the grievor. But Dr. Janzen said that the longer the grievor was clean, the more likely it was that he would remain clean and Dr. Janzen also indicated that if he felt the grievor's return to work at the City of London would create a high likelihood of relapse, he would not support a return.

Dr. Jonathan B. Horne is the grievor's current family doctor. Dr. Horne testified at the hearing and he provided two written reports. In his first report, after outlining the

positive changes the grievor had made, Dr. Horne concluded as follows:

> He has a history of alcohol and drug abuse but to the best of my knowledge he is not currently using these substances. He has made significant efforts to deal with these problems as demonstrated by his six-month participation in a residential treatment program. He is engaged in ongoing psychotherapy to deal with his underlying psychological problems. To the best of my knowledge, Mr. Jones last used drugs or alcohol in March of 2008. His current efforts at rehabilitation seem appropriate and sufficient to me. If he were reinstated to the employ of the city of London I believe he would be able to maintain reasonable attendance. (Letter January 25, 2009, at page 3)

Dr. Horne then wrote a second letter in which he addressed the issue of the grievor's gout and bowel problems. Dr. Horne wrote as follows:

> It is my opinion that his bowel condition and his gout were exacerbated by previous alcohol and drug abuse. This is supported by the observation that in the last 16 months he has not used drugs or alcohol, and he has not had any bowel or gout related problems. It is my belief that if he continues to abstain from alcohol and illicit drugs he will be much less likely to have problems with bowel symptoms or gout. Thus I do not believe these issues will cause excessive absences from work if Mr. Jones is reinstated at his job. (Letter May 21, 2009)

Dr. Horne testified in December 2009 and adopted the opinions in his two letters. He said nothing had changed in the period from May to December to cause him to change his view. Dr. Horne testified that he was uncertain as to whether the grievor ever had Crohn's disease or whether his bowel had simply been irritated by the abuse of alcohol and drugs. He also indicated that his views about the grievor's reasonable attendance in the future were speculative since it was impossible to be sure one way or the other, and he indicated that his view of what was reasonable attendance was based on his experience with other similar patients. He confirmed that he was not treating the grievor for substance abuse, that his role in that area was supportive. Finally, he said that he felt that after being in a family medical practice for more than 20 years he was able to recognize the clues as to whether a patient was actually abstaining from the use of substances.

Dr. Martyn Judson is a doctor in private practice in the Specialty of Addiction Medicine

and Substance Abuse Treatment. As with the other two doctors, he testified at the hearing and he provided two written reports. In his first report Dr. Judson indicated that he had treated the grievor on and off since June 2005. As for the grievor's condition, he wrote:

> The disabling condition suffered by Mr. Jones is that of substance dependence, otherwise known as addiction. Individuals are never cured of this condition but have to learn to live with it and seek treatment on a daily basis. Accordingly, Mr. Jones will always suffer with this disease but provided he maintains his program of recovery, there is no reason for him not to be able to return to some form of gainful occupation. (Letter January 2, 2009, at page 2).

As for the prospects of regular attendance at work in the future, Dr. Judson wrote:

> Provided Mr. Jones maintains his program of recovery by attending the Fellowship meetings in the evening and working his program, then there is no reason for him not to be able to return to work. If Mr. Jones remains healthy, he will likewise be able to meet his employment responsibilities. (Letter January 2, 2009, at page 3)

In a second brief report Dr. Judson wrote as follows:

> Please be advised that Mr. Jones attended this office on January 14, 2009 when it was clearly evident that he maintains his program of recovery and is demonstrating a healthy attitude. Accordingly, the prognosis for Mr. Jones is considered favourable. (Letter January 14, 2009)

In his oral evidence Dr. Judson expanded upon his opinions. He testified that he began as a family doctor, gradually developed a specialty in addictions, and has worked full-time in addiction medicine since 1993. He said his role was not to provide treatment, but rather to guide his patients and provide feedback. The individual patient must take care of the treatment.

When he testified in February 2010, Dr. Judson said that his opinion remained as it was in his two January 2009 letters, but that the prognosis with time was now more favourable. He said that time helps to consolidate an addict's recovery and provides proof that the person is truly well.

Dr. Judson testified that abstinence was helpful but of little long-term value. He said it

was important that the person be in recovery. He said that in assessing recovery he looks for seven signs, as follows:

1. Changed attitude - the best indicator of recovery is a pro-social attitude.
2. Hopefulness - does the person feel they can remain abstinent.
3. Alternative activity - an addict needs healthy alternative activities.
4. Recognize the harm in using alcohol and drugs.
5. Modification of lifestyle - avoiding the lifestyle associated with using.
6. Enhanced self esteem - addicts needs to feel good about themselves.
7. Support - a person needs to have support for the recovery.

If a person responds affirmatively in all seven areas, that person is on the road to recovery. Dr. Judson testified that the grievor had displayed all seven signs of recovery in October 2008 and had done so consistently since January 2009.

Dr. Judson testified that while "active in addiction" the grievor had deceived, lied, minimized, and rationalized, that is he had not told the truth, out of a fear of rejection. But as of the time of his testifying at the hearing Dr. Judson said an addict could not be doing better than the grievor in terms of his recovery. While acknowledging that every addict has the potential for relapse, Dr. Judson reiterated how well the grievor was doing in terms of his recovery.

Dr. Judson also addressed the various psychiatric illnesses the grievor had been identified as having over the years when active in his addiction, that is, depression, Post Traumatic Stress Disorder and Attention Deficit, Hyperactivity Disorder. Dr. Judson testified that addicts often have psychiatric illnesses, that addictions feed psychiatric illnesses, but he said that if the addiction is successfully treated up to 90% of the psychiatric illnesses simply evaporate.

Dr. Judson reiterated that the grievor would have to be vigilant every day about his disease of addiction, but said that the attitude which the grievor had exhibited recently was the best thing that the grievor could do in terms of addressing his illness.

Dr. Judson testified that the number of treatments an addict had attended did not really matter; an addict only stops using when he or she decides to stop. He said that the number of relapses a person had was not relevant once a person is in recovery, as the grievor is. He expressed the view that the grievor is healthy now and had been healthy for nearly two years.

As for the risk of drinking if the grievor returned to work for the Employer, a workplace where the grievor had previously engaged in drinking, Dr. Judson said that alcoholics drink because they are alcoholics, that drinking is simply what alcoholics do, and that drinking at work is characteristic of alcoholics. He said that he had many patients who were employed by this Employer. Dr. Judson said that, as the grievor was in recovery, he thought the grievor would be “an exemplary employee” if reinstated and that the grievor was probably healthier than the majority of the Employer’s employees.

THE COLLECTIVE AGREEMENT AND STATUTE

The key provisions of the parties’ 2006-2009 collective agreement are as follows:

ARTICLE 3 - MANAGEMENT FUNCTIONS

3.1 The Union recognizes . . . the rights of the Corporation to . . . discharge an employee for proper cause . . .

. . .

ARTICLE 18 - DISCHARGE AND DISCIPLINE CASES

18.1 In the event an employee, who has attained seniority, is discharged or disciplined and the employee considers that an injustice has been done, the matter may be taken up at Step 2 of the Grievance Procedure. . . . .

. . .

18.4 Where an employee's grievance against his/her discharge or discipline duly comes before an Arbitration Board the Board may make a ruling,

(i) confirming the Corporation's action, or

(ii) reinstating the employee with or without compensation for wages lost (except for the amount of any remuneration the employee has received elsewhere pending the disposition of his/her case), or

(iii) disposing [sic] the grievance in any other manner which may be just and equitable

The Union also relied upon the following section of the Ontario *Labour Relations Act, 1995*:

48 (17) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.

EMPLOYER POSITION

The Employer made an extensive submission of which the following is a brief summary.

The Employer submitted that there were three questions:

1. Was the grievor's absenteeism excessive?
2. Was there a positive prognosis for regular attendance at the time of the dismissal? and,
3. Did the Employer accommodate the grievor to the point of undue hardship?

The Employer reviewed the evidence of the grievor's absences and asserted that the absences were excessive and noted that from 2000 until the time of the dismissal the

grievor's attendance had steadily deteriorated.

The Employer said that at the time the grievor was dismissed there was no reasonable prospect for regular attendance in the future. The Employer noted that concerns about the grievor's attendance had been raised with him throughout his employment and there was no doubt that the grievor was aware of the Employer concerns. The Employer had worked with the grievor in an effort to deal with his attendance problems. After his 2007 treatment for addiction the grievor was cleared to return to work three days per week but the grievor did not attend regularly, and did not provide medical information when requested. Looking at this history of absences and the lack of information provided by the grievor, the Employer was right to conclude in November 2007 that there was no reasonable prospect for regular attendance.

As for accommodating the grievor to the point of undue hardship, the Employer reviewed the evidence on the grievor's extensive absences and said that the Employer had accommodated the grievor's excessive absences for several years. The duty to accommodate is designed to allow employees to continue to work, not to relieve employees of the need to perform work. The Employer had made extensive efforts to accommodate the grievor. Despite the Employer efforts there was no improvement in the grievor's attendance and the grievor was not meeting his basic obligations as an employee. The Employer had therefore accommodated the grievor to the point of undue hardship.

The Employer submitted that the prospects for regular attendance should not be assessed as of the end of the arbitration hearing. The evidence of events after the discharge should not be used to show that the grievor's prospects for regular attendance have now improved. The post-discharge evidence simply was not clear enough to allow a

conclusion about regular attendance. The onus was on the Union to prove that the grievor would have good attendance in the future and the evidence simply did not demonstrate that. The evidence of the grievor was weakened by his acknowledgement that he had often lied to the Employer about medical matters, and it seemed clear that he now had an overly optimistic view of his prognosis. The evidence of regular urine analysis was of little value; even the medical witnesses indicated they placed little or no reliance upon it. As for the three doctors, each acknowledged the risk of relapse. As each of the grievor's doctors tended to advocate for the grievor, their evidence should be discounted.

The Employer sought the dismissal of the grievance. The Employer said any reinstatement should be on strict conditions, and suggested several such conditions.
The Employer relied upon the following cases: *Hydro-Quebéc v. Syndicat des employé-e-s de techniques professionelles et de bureau d'Hydro-Quebéc and Section Locale 2000,* (2008), 174 L.A.C. (4th) 1 (S.C.C.); *Compagnie minière Quebéc Cartier v. United Steelworkers of America, Local 6869,* [1995] 2 S.C.R. 1095, [1995] S.C.J. No. 65 (S.C.C.); *Re Case Corporation and United Steelworkers of America, Local 2868,* [1996] O.L.A.A. No. 232, 43 C.L.A.S. 461 (H. D. Brown); *The Great Atlantic and Pacific Company of Canada Limited and Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414,* [1997] O.L.A.A. No. 753, 65 L.A.C. (4th) 306, 49 C.L.A.S. 118 (E. Newman); *Shelter Regent Industries and Industrial, Wood and Allied Workers of Canada, Local 1-207,* [2003] A.G.A.A. No. 114, 124 L.A.C. (4th) 129 (Ponak); *Petro-Canada, Lubricants Centre and Communications, Energy & Paperworkers Union, Local 593,* [2004] O.L.A.A. No. 386, 129 L.A.C. (4th) 353 (Craven); *Alcan Rolled Products Co. and United Steelworkers of America, Local 343,* [1996] O.L.A.A. No. 44 (Gray); *Re International Forest Products Ltd. and Industrial, Wood and Allied Workers Union, Local 1-3567,* (1996), 60 L.A.C. (4th) 184 (Blasina); *Uniroyal Goodrich Canada Inc. and United Steelworkers of America, Local 677,* [1999]

O.L.A.A. No. 278, 79 L.A.C. (4th) 129 (Knopf); and *Communications, Energy and Paperworkers Union, Local 707 and Suncor Energy Inc.,* [2006] 8 W.W.R. 137, 382 A.R. 270, 53 Alta. L. R. (4th) 288 (Alta. Q. B.).

UNION POSITION

The Union also made an extensive submission briefly summarized here.

The Union said that I should do what was just and equitable based on all the evidence that I had heard. The Union said the just and equitable solution was reinstatement and the Union did not oppose conditions being placed on that reinstatement.

As for the facts, the Union said that (1) from soon after his dismissal the grievor had totally abstained from alcohol and drugs for about two years, (2) this period of abstinence was without precedent since the grievor was in his early teens, (3) the grievor's disability (addiction) was under control, (4) the grievor was in recovery, (5) over the last 18 months the grievor had been healthier than he had been for many years, and (6) for the last 12 months the grievor had a positive prognosis in terms of his addiction, his other medical conditions, and his ability to attend work regularly.

The Union said the above six factual points were essentially uncontested and they were the key facts. Although the Employer said I ought not to rely upon the facts which occurred after the dismissal, the Union said that it disagreed as a matter of law. The Union said that I had the authority under Section 48 (17) of *The Labour Relations Act, 1995* and under the collective agreement, Article 18, to consider events after the discharge. The Union also submitted that, as a practical matter, it made no sense to ignore those post-discharge facts. The use of post-discharge evidence was important not

just to this case but more generally - employees with addictions should be encouraged to go to a rehabilitation facility and get clean. If arbitrators concluded that dealing with an addiction following a discharge had no impact on a dismissal, that conclusion would have a negative societal impact.

The Union said that while the grievor's absences had been excessive, the grievor had not been clearly advised that his job was in jeopardy, and had not been treated in the same way as other employees who had missed extensive time, such as those on long term disability. In any event, I should look at all the mitigating factors including the grievor's seniority and improved prognosis for regular attendance in the future. As this was a discharge for just cause, the onus was on the Employer to demonstrate that the grievor was unable to maintain reasonable attendance in the future and the Employer had not done so. All three doctor's gave the grievor a positive prognosis regarding future attendance.
Moreover, the grievor had a disability under the *Human Rights Code* and had not been accommodated to the point of undue hardship. Given the Employer's size and the complexity of its operations, it would not have been an undue hardship for this Employer to have maintained the grievor as an employee.

The Union asked that the grievor be reinstated and noted that it had no difficulty with the type of conditions the Employer had suggested.

The Union relied upon the following: *Canada Post Corporation and Canadian Union of Postal Workers,* [1982] C.L.A.D. No. 3, 6 L.A.C. (3d) 385 (Burkett); *Dynamex Express and Teamsters' Union, Local 141,* [2001] C.L.A.D. No. 676, [2001] O.L.A.A. No. 869, 102 L.A.C. (4th) 284 (Rayner); *Oxford Automotive Inc., Oxford Suspension Division and*

International Union United Automobile, Aerospace and Agricultural Implement Workers of America, Local 251, [2004] C.L.A.D. No. 228, 131 L.A.C. (4th) 84 (Weatherill); *Health Sciences Association of Alberta and Alberta Health Sciences,* [2009] A.G.A.A. No. 43 (Price); *Ontario Public Service Employees Union and Ontario (Liquour Control Board of Ontario),* [2008] O.G.S.B.A. No. 65, 93 C.L.A.S. 211 (GSB, Gray); *Re Northern Telecom Canada Ltd. and C.A.W., Local 1915,* [1991] O.L.A.A. No. 38, 19 L.A.C. (4th) 362 (Kennedy); *The Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation, District 15,* [1997] 1 S.C.R. 487, 1997 CanLII 378 (S.C.C.); *Board of Governors of Lethbridge Community College v. Alberta Union of Provincial Employees,* [2004] 1 S.C.R. 727, 2004 SCC 28 (CanLII); *McGill University Health Centre and Syndicat des employés de l'Hôpital général de Montréal,* [2007] 1 S.C.R. 161, 2007 SCC 4 (CanLII); *Hydro-Quebéc v. Syndicat des employé-e-s de techniques professionelles et de bureau d'Hydro-Quebéc, section locale 2000 (SCFP-FTQ),* [2008] 2 S.C.R. 561, 2008 SCC 43 (CanLII); *Canadian Broadcasting Corp. v. Canadian Media Guild,* [2007] 12 W.W.R. 228, 281 D.L.R. (4th) 394, 2007 BCCA 232 (CanLII); *Banque Laurentienne du Canada and Syndicat des employés et employées professionnels-les et de bureau, section locale 434,* 2003 CanLII 14640 (QC C.A.); *Alcan Smelters and Chemicals Ltd. and Canadian Auto Workers, Local 2301,* [1996] B.C.C.A.A.A. No. 185, 55 L.A.C. (4th) 261 (Hope); *Re Holland Hitch of Canada Limited and The National Union, United Automobile, Aerospace and Agricultural Implement Workers of America (C.A.W.) and its Local 636,* [1996] O.L.A.A. No. 944, 46 C.L.A.S. 347 (H.D. Brown); *Colonial Cookies (A Division of Beatrice Foods) and United Food and Commercial Workers, Local 617P,* [1997] O.L.A.A. No. 490, 48 C.L.A.S. 233 (Brandt); *Reynolds-Lemmerz Industries and National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) and its local union,* [1997] O.L.A.A. No. 696, 48 C.L.A.S. 448 (H.D. Brown); *Canada Post Corporation and Canadian Union of Postal Workers,* [1996] C.L.A.D. No. 30, [1996]

C.P.A.S. No. 1(Shime); *Durham Catholic District School Board and Canadian Union of Public Employees, Local 218,* [1998] O.L.A.A. No. 388 (Roberts); *Grober Inc. and United Food & Commercial Workers, Local 175,* [2002] O.L.A.A. No. 478, 109 L.A.C. (4th) 53 (Williamson); *Maple Lodge Farms Ltd. and United Food and Commercial Workers International Union, Locals 175 and 633,* [2002] O.L.A.A. No. 446 (Faubert); *Petro-Canada, Lubricants Centre and Communications, Energy & Paperworkers Union, Local 593,* [2004] O.L.A.A. No. 386, 129 L.A.C. (4th) 353 (Craven); *Natrel Inc. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 674,* [2004] O.L.A.A. No. 963, 134 L.A.C. (4th) 142 (Albertyn); *Gates Canada and United Steelworkers, Local 9193,* [2006] O.L.A.A. No. 683, 157 L.A.C. (4th) 337 (Reilly); *Avenor Inc. and Communications, Energy and Paperworkers Union of Canada, Local 39,* [1998] O.L.A.A. No. 660 (Howe); *Uniroyal Goodrich Canada Inc. and United Steelworkers of America, Local 677,* [1999] O.L.A.A. No. 278, 79 L.A.C. (4th) 129 (Knopf); *Toronto District School Board and Canadian Union of Public Employees, Local 4400,* [1999] O.L.A.A. No. 177, 80 L.A.C. (4th) 168 (Knopf); *Maple Leaf Meats Inc. and United Food and Commercial Workers International Union, Locals 175 and 633,* [2000] O.L.A.A. No. 429, 89 L.A.C. (4th) 18 (Tims); *Corporation of the Town of Ingersoll and London Civic Employees, Local 107 Canadian Union of Public Employees,* [2003] O.L.A.A. No. 554, 122 L.A.C. (4th) 402 (Williamson); *Re Masonite International Corporation and United Brotherhood of Carpenters and Joiners of America, Local 1072,* [2007] O.L.A.A. No. 522, 161 L.A.C. (4th) 426 (Reilly); *Mustapha v. Culligan of Canada Ltd.,* [2008] 2 S.C.R. 114, 2008 SCC 27 (CanLII); and *University of Western Ontario and University of Western Ontario Staff Association,* 2008 CanLII 16058 (ON L.A.) (Knopf).

CONCLUSIONS

Discharge for innocent absenteeism

The grievor suffers from an addiction to alcohol and drugs and he always will. His addiction was acknowledged as an illness.

The grievor was not discharged because of his illness but rather because of his absences from work. I set out above his absences over the final eight years of his employment. I have no hesitation in finding that the grievor's absences during that lengthy period were excessive, a point which the Union conceded.

Discharge for absenteeism is a form of discharge for just cause. This collective agreement uses the term "proper" cause, but the two terms are equivalent and I have used just cause, the more common term, throughout this award. It is generally accepted that when an employee has had excessive absences an employer may discharge that employee for just cause, whether or not blame can be placed on the employee for those absences.

Blameless absenteeism is also often called "innocent absenteeism." Dismissal for innocent absenteeism flows from the principle that an employer is entitled to employ a person who can attend work on a regular basis. If an employee does not attend work regularly the employer has lost the fundamental benefit normally provided to an employer through the employment relationship. It is viewed as just for an employer to discharge an employee who cannot live up to his or her side of the employment bargain.

It has long been held that in order for a dismissal for innocent absenteeism to be just, in addition to a record of excessive absences, there must also be an expectation that the absences will continue. The rationale for this is simply that it would not be just to allow a dismissal for absences that the employee cannot control if the cause of those absences is

likely to be corrected soon. For example, if an employee misses work due to a broken leg, a dismissal is not thought to be just at a time when the broken leg has almost healed and the expectation is that the employee will soon be able to return to work and maintain reasonable attendance. Similarly, with respect to an employee suffering from an addiction, dismissal is not considered just if the expectation is that the employee will be able to return to work and maintain reasonable attendance.

I agree with this approach.

When is future attendance to be assessed - the use of post-discharge evidence

Although the above approach to innocent absenteeism seems clear, the problem, particularly in addiction cases, is whether an arbitrator should determine the prospects of regular attendance in the future based on the evidence as it existed at the time of the discharge or the evidence available later at the time of the arbitration hearing. An employee who has been discharged for excessive absences due to addiction may take steps to deal with that addiction such that the fact situation at the hearing will be quite different from the fact situation at the time of discharge. The question which then confronts arbitrators is whether to consider this "post-discharge" evidence.

The crux of the parties' disagreement in this case is this very issue: What evidence can be used to evaluate the likelihood of the grievor having regular attendance in the future? The Employer said that this should be assessed on the basis of the evidence available at dismissal and the Union said I should make the assessment based on the evidence available as of the end of the arbitration hearing.

The use of post-discharge evidence in this instance would be of assistance to the

Union/grievor. But that is not always the case as, for example, in the *Board of Education for the City of Toronto* decision of the Supreme Court of Canada (above) discussed more fully later in this award. In the *Board of Education* decision the Supreme Court concluded that post-discharge evidence should have been used by an arbitration board to uphold a discharge and its use there was of assistance to the employer.

As noted above, the Union conceded that the grievor's absences were excessive. If I am required under the *Labour Relations Act, 1995* and this collective agreement to decide the grievor's prospects of regular attendance in the future on the basis of the evidence available at the time of discharge, I would conclude that there was no real likelihood that the grievor would attend work regularly in the future. He had not attended regularly for some eight years and at the time of discharge there was no evidence to suggest that the situation would likely change. If I am limited to using only the evidence available at the time of discharge, I would find the Employer had just cause to dismiss the grievor.

My jurisdiction as arbitrator is derived primarily from the parties' collective agreement. As noted, this agreement allows the Employer to discharge employees for proper cause (Article 3, above). But a seniority employee, such as the grievor, can grieve that discharge and as arbitrator I have the authority to dispose of that grievance in a manner which is "just and equitable" (see Article 18.4 (iii), above).

My jurisdiction is also derived from the *Labour Relations Act, 1995* which contains provisions which govern arbitrations conducted under this collective agreement. One of those provisions is of particular relevance; Section 48 (17) (above) provides that in a discharge grievance an arbitrator can substitute another penalty which seems "just and reasonable in all the circumstances", unless the collective agreement contains a specific penalty for the employee infraction. This collective agreement contains no specific

penalty to deal with absenteeism.

Taken together the collective agreement and the *Act* provide a broad discretion to fashion a remedy which seems just, equitable and reasonable “in all the circumstances”. “All the circumstances” would normally include the post-discharge circumstances. Moreover, I can fashion such a remedy when there is just cause for discharge. However, the parties referred me to a great many authorities which they said ought to influence how I exercise my authority.

As indicated by the large number of cases cited above, there is no uniform opinion as to whether an arbitrator should consider post-discharge evidence in assessing the prospects for regular attendance in the future, but it is helpful to review some of the history of this issue.

While arbitrators have long agreed on the two-part approach to dealing with innocent absenteeism - that is, were the absences excessive? and, if so, what is the likelihood of regular attendance in the future? - they have long disagreed over this issue of when the prospects for future attendance should be assessed.

The rationale for using the evidence available at the time of discharge varies among arbitrators. However, in general, its use is supported on the basis that it provides a fixed date for assessing the situation and is fair to both the employer and union/employee. It is also thought to provide finality - if the evidence at the time of discharge supports the employer’s opinion that the employee will not be able to attend work regularly, it is considered unfair to make that conclusion subject to continual review, depending on the medical treatment and other events, for some years after the date of discharge, especially considering that an employer has normally already endured considerable inconvenience

due to the absences.

Other arbitrators assess the prospect of future attendance based on the evidence available at the end of the hearing. Again the rationale for this varies, but usually originates with the concept that the employee has been absent for reasons beyond the employee's control. If it is shown at the hearing that the employee is likely to attend regularly, these arbitrators conclude that fairness suggests that this fact should be considered. An employee considered likely to attend work regularly should not be prejudiced by a conclusion reached earlier, a conclusion which was shown to be incorrect. The interests of the employer and employee should be balanced.

While arbitrators need not follow the conclusions of other arbitrators, arbitrators are expected to follow court decisions. In 1995, the Supreme Court of Canada in *Quebéc Cartier*, above, reviewed an arbitration award issued under the Quebec *Labour Code.* That arbitrator had relied upon post-discharge evidence, assessed the prospects of future attendance as of the time of the hearing and reinstated the employee on the basis of that evidence. The Supreme Court addressed when the prospects of future attendance should be decided and what use should be made of post-discharge evidence.

In reviewing this arbitration award, the Supreme Court summarized the award as follows:

> The arbitrator found that the Company had been justified in dismissing Mr. Beaudin at the time it had done so but that, in light of the subsequent successful treatment of Mr. Beaudin's alcohol problem, it would be appropriate to annul his dismissal and order his reintegration into the Company. (At para. 5)

The Supreme Court held that the arbitrator's jurisdiction under that statute and collective agreement was to "determine whether or not the Company had just and sufficient cause for dismissing the employee **as at the time when the employee was actually dismissed**" (at para. 11, my emphasis).

Not surprisingly, having determined the arbitrator's jurisdiction was as set out above, the Court concluded that the arbitrator in that case should only consider subsequent event evidence if that evidence:

> . . . helps to shed light on the reasonableness and appropriateness of the dismissal **under review at the time that it was implemented**. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable. (at para. 13, my emphasis)

As the arbitrator had used the evidence for other purposes and had found that while the dismissal was just at the time it was implemented, but was not just in light of the later treatment for alcoholism, the Court set aside the arbitration award on the grounds that the arbitrator had exceeded his jurisdiction.

As noted, arbitrators are expected to follow a decision of the Supreme Court which is "on point." In this case it would mean that not only must the issue be similar to the one before me, which it clearly is, but the collective agreement and statutory provisions must also be similar.

I note that the Supreme Court decision was made under a statutory and collective agreement framework which differed from the one in this case. The Court stated that:

> There is no provision in Quebec labour law or in the collective agreement between the Company and the Union which would permit a labour arbitrator to overturn a decision by the Company to dismiss an employee notwithstanding the fact that the Company demonstrated just cause for the dismissal. (At para. 14)

However, this collective agreement provides as follows:

> 18.4 Where an employee's grievance against his/her discharge or discipline duly comes before an Arbitration Board the Board may make a ruling,
>
> . . .

> (iii) disposing [sic] the grievance in any other manner which may be just and equitable

I interpret this collective agreement provision as allowing an arbitrator in a dismissal case to dispose of a grievance in a way that is just and equitable, whether or not the Employer had just cause for the dismissal.

Perhaps more importantly, the Ontario *Labour Relations Act, 1995*, Section 48 (17) (above) is clearly designed to, using the Supreme Court's language, "permit a labour arbitrator to overturn a decision by the Company to dismiss an employee notwithstanding the fact that the Company demonstrated just cause for the dismissal". Since there is no specific penalty in this collective agreement for excessive absenteeism, which would make the section inapplicable, this section provides:

> 48 (17) Where an arbitrator . . . determines that an employee has been discharged . . . by an employer for cause . . . the arbitrator . . . may substitute such other penalty for the discharge . . . as to the arbitrator . . . seems just and reasonable in all the circumstances.

As an aside, I note that until 2004 there was a commonly held view in the labour relations community that this section only applied to discipline/discharge for culpable or blameworthy conduct and, as such, would have no application in a case such as this involving innocent absenteeism. However, the Supreme Court of Canada in the *Lethbridge Community College* case, above, rejected that view. In interpreting Section 142 (2) of the Alberta *Labour Relations Code,* a provision which is nearly identical to section 48 (17) of the Ontario *Act,* an arbitration board had concluded the provision was applicable to non-culpable dismissals. The Court of Appeal reversed the award and ruled that Section 142 (2) only applied to culpable dismissals. The Supreme Court, in turn, found that the arbitration decision was reasonable and restored the arbitration award. Although the Court concluded that its standard of review of the arbitration board's interpretation was one of reasonableness, not correctness, nevertheless, in reaching its conclusion the Court wrote:

> In my opinion, the Court of Appeal's interpretation of s. 142 (2) is somewhat incompatible with the object of the legislation and the overall purpose of the provision. As discussed earlier in these reasons, the purpose of the legislation is to facilitate arbitral dispute resolution, and the content of the legislative scheme provides for arbitrators to do so. Given this context, there is no practical reason why arbitrators ought to be stripped of remedial jurisdiction when confronted by labour disputes that turn on a distinction between culpable and non-culpable conduct and a finding of cause thereafter. (At para. 47)

I can find no policy or other reason in this case to prevent the application of Section 48 (17). Instead I find that the application of the section here would be entirely appropriate.

Returning to the effect of the *Quebéc Cartier* decision, I conclude that the Court's conclusions in *Quebéc Cartier* must be read in the context of the Court's finding as to that arbitrator's jurisdiction, a jurisdiction which was quite different from mine.

My conclusion as to the impact of the *Quebéc Cartier* decision is supported by the later Supreme Court decision in *Board of Education for the City of Toronto* (above). *Quebéc Cartier* was decided in 1995 and in 1997 the Court issued its judgement in the *Board of Education* case. In the *Board of Education* case a teacher (Bhadauria) had been dismissed in January 1990 in part because of two disturbing letters the teacher had written to his employer. In August 1990, after the dismissal but before the arbitration hearing began, the teacher wrote another similar disturbing letter. The majority of the arbitration board referred to only the first two letters and concluded that the teacher's "aberrant conduct" was "temporary and not likely to be repeated in the future" (as quoted by the Supreme Court in para. 23) and ordered his reinstatement. The employer sought to judicially review that award. One of the issues was the use of the post-discharge third letter. The Supreme Court concluded as follows with respect to the third letter:

> It is true that the third letter is, to some extent, "subsequent-event evidence" since it was written after the dismissal of Mr. Bhadauria. However it has been decided that such evidence can properly be considered "if it helps to shed light on the reasonableness and appropriateness of the dismissal" [citing *Quebéc Cartier*]. In this case, it would not only have been reasonable for the arbitrators to consider the third letter, it was a serious error for them not to do so. (At para. 74)

The Court went on to conclude that "In the face of this [third] letter, it was patently unreasonable for the arbitrators to conclude that his conduct was temporary and to return him to the classroom." (at para. 76)

I note that when quoting from its earlier *Quebec Cartier* decision, the Court omitted the last part of the sentence on the use of subsequent-event evidence. The end of that sentence was "if it helps to shed light on the reasonableness and appropriateness of the dismissal **under review at the time that it was implemented**." (my emphasis). I view the seemingly deliberate omission of the language tying the use of post-discharge evidence to the reasonableness of the discharge "at the time that it was implemented" as significant. In *Quebec Cartier* the Court said the arbitrator was wrong to use post-discharge evidence, but in *Board of Education* the Court said it was a serious error for the arbitration board not to use the post-discharge evidence. The purpose for which the post-discharge evidence was to be used was similar in both cases - in one instance, to assess the likelihood of maintaining regular attendance in the future and, in the second instance, to assess the likelihood of writing similar disturbing letters in the future.

It is possible that the difference in the outcomes can be explained by differences in the jurisdiction of the arbitrators, but there is nothing explicit in the *Board of Education* decision to suggest that was a factor. In *Quebec Cartier* the Court quoted the relevant section of the collective agreement, in translation, as providing as follows:

> 10.01 In the event that an employee is dismissed and considers that he was not dismissed for just and sufficient cause, the case may be filed as a grievance in the manner described below.

In the *Board of Education* decision the Court quoted the collective agreement as providing as follows:

> 1.4.22.0.0. If a grievance concerns the discipline of a Teacher, including disciplinary dismissal, or discharge for incompetence, or just cause, the arbitration board may confirm the decision of the Board or reinstate the Teacher with or without full

compensation or otherwise modify the penalty.

No reference was made to the difference in the language of the two agreements. Moreover, the Court made no reference to any statutory authority with respect to the arbitration board's jurisdiction regarding remedy in the *Board of Education* decision, although in *Quebec Cartier* the Court had indicated the arbitrator could not alter the penalty if there was cause for dismissal. It is not obvious, then, that the differing outcome in the two decisions can be explained by any differences in the arbitrators' jurisdiction.

I read the *Board of Education* case as significantly limiting the application of the *Quebéc Cartier* decision. The Court's omission in its *Board of Education* decision of the phrase **"under review at the time that it was implemented",** together with the conclusions actually reached in that case, indicate to me that the Court was not following its earlier *Quebec Cartier* approach, but instead was adopting a different approach. The *Board of Education* decision appears to require consideration of the post-discharge evidence.

Returning to the issue before me, I conclude from the significant differences in the statutory and collective agreement provisions applicable in this case and from the Supreme Court's later *Board of Education* decision, that the *Quebec Cartier* approach requiring that the assessment of the prospects for regular attendance in the future be made as of the date of the discharge need not be applied here.

I conclude that I have the jurisdiction to substitute another penalty for the dismissal if that other penalty seems "just and reasonable in all the circumstances." I will do as I am authorized by section 48 (17) of the *Labour Relations Act, 1995*, and consider "all the circumstances", including those events which happened after the dismissal. In light of the *Board of Education* decision it seems "patently unreasonable" (using the language of

judicial review from the Court's decision) for me to ignore the evidence of events following the discharge which throw light on the issue of the grievor's prospects for regular attendance in the future. Accordingly, I will consider the evidence of the three physicians and the other evidence of events which followed the grievor's discharge.

What is the prospect for the grievor having regular attendance in the future?

I return to the question of whether there is a reasonable expectation that the grievor would have regular attendance at work in the future. The grievor's situation as of the time of his dismissal was bleak. But the situation that developed between the dismissal and the end of the hearing was quite different.

During that interval between the dismissal and the end of the hearing the grievor said that he had been "clean" of both alcohol and drugs for about two years and three doctors supported that view. The grievor had attended at a detox centre, then a six month treatment facility and had maintained sobriety since. His repeated urine analysis reports showed no evidence of either alcohol or drugs. There was no contrary evidence suggesting the grievor had used alcohol or drugs in that period. I accept that the grievor has not used alcohol since February 2008 and has not used illicit drugs since April 2008.

Three doctors testified about the grievor's health. If the grievor returned to work, each doctor said he expected that the grievor's attendance would be much better than it had been and that the grievor's attendance would be similar to, or better than, that of an average employee. Given the nature of alcoholism and drug abuse none of the three doctors could say with any certainty that the grievor would remain in recovery or attend work regularly, but each expressed considerable optimism about the prospects for the grievor.

The Employer submitted that I should discount the three physicians' evidence because they were advocating for the grievor. While I agree that the grievor's physicians were to some extent advocating for him, that alone does not persuade me to discount their evidence. Instead it appeared to me that each doctor was very positive about the steps the grievor had taken to address his addiction and about the improvements he had made in his life. For example, Dr. Judson, the specialist in this area, said that the grievor was doing as well as any addict could possibly be expected to do in terms of his recovery. I interpreted their advocacy as an expression of their very positive views about what the grievor has done to date in terms of his recovery and their favourable views regarding the future.

The parties agreed that the grievor suffers from the disease of addiction. When dealing with a disease, medical evidence is particularly helpful. All the medical evidence on the issue of the grievor's illness was positive. All three doctors expressed a positive view about the grievor's attendance at work in the future, and there was no medical evidence to the contrary. My own assessment of the grievor based on his testimony is that he is now much healthier than he was. I conclude from all the evidence before me that, if the grievor is reinstated, it is likely that he will maintain reasonable attendance at work.

What is the remedy?

Can it be said to be "just and equitable" (using the language of this collective agreement) or "just and reasonable" (using the language of the *Act*) to order the grievor's reinstatement?

The application of either standard calls for a balancing of the interests of the grievor and the Employer. At the time of his discharge the grievor was a long-time employee of the

Employer. If I uphold the grievor's dismissal there will be considerable prejudice to him. Given the current economic climate, the grievor's age, his dismissal, and the fact that he has now been out of the work force for more than two years, I do not think it would be easy for the grievor to find a comparable job. On the other hand, if I reinstate the grievor I see less prejudice to the Employer, given the state of the grievor's recovery and the likelihood that he will attend work regularly.

On balance, I see greater prejudice to the grievor if I uphold the termination than I see for the Employer if I reinstate the grievor. I therefore direct the Employer to reinstate the grievor.

In addition, I have considered whether the grievor should immediately return to work on a full-time basis. Due to his illness and his dismissal the grievor has not worked full-time for several years. Dr. Judson testified at the hearing that he thought a gradual return to work over some eight weeks would be best for the grievor, although he did not specify the details of any such return to work. I have decided that the grievor should return to work in accordance with a program recommended by Dr. Judson. I direct the parties to consult with Dr. Judson and gradually return the grievor to full-time status. As I anticipate that it will take the parties and the grievor some time to make the necessary arrangements, I direct that the grievor be returned to work beginning about two weeks after the parties receive this award.

The grievor is to be reinstated with full seniority. In all the circumstances of this case, including the fact that the grievor was unable to work for much of the time since his dismissal, I do not think that it would be reasonable to order the Employer to pay any compensation. I award the grievor no compensation.

Most of the possible prejudice to the Employer from reinstatement flows from the risk that the grievor may resume drinking and/or the use of drugs. Much of that possible prejudice can, I believe, be addressed by the type of conditions the Employer suggested and which the Union indicated it was prepared to accept. The reinstatement is subject to the following conditions:

1. The grievor shall abstain from all alcohol and from all drugs, with the exception of drugs prescribed by his attending physician(s).
2. The grievor shall have no absences from work due to the use of alcohol or drugs.
3. On request, the grievor shall promptly make himself available for examination by a physician of the Employer's choosing in order for the physician to determine whether the grievor has breached condition #1.
4. In addition, the grievor shall submit to random drug and alcohol testing at such times as the Employer may request and shall make available to the Employer copies of those test reports.
5. The grievor shall continue to see Dr. Judson (or another substance abuse specialist should Dr. Judson leave practice) for substance abuse counselling, and to see Dr. Janzen (or another similar person should Dr. Janzen leave his practice) for counselling and the grievor shall provide appropriate consents to the Employer so that the Employer may confirm that the grievor is meeting this condition.
6. The grievor shall continue to participate in Alcoholics Anonymous meetings in accordance with any recommendations made by Dr. Judson or Dr. Janzen.
7. Should the grievor have any absences due to medical reasons, he shall upon his return to work promptly provide a medical note to substantiate that absence.
8. Excluding only absences due to workplace injuries, the grievor shall maintain attendance at work equivalent to that of the average for Local 107 members. If the Employer adopts an attendance management program applicable to all its employees, this condition # 8 is to be automatically revised so that the calculation

of the grievor's absences is thereafter to be assessed under that program - that is, if the new program excludes other absences or includes workplace injuries, then the grievor is to be subject to those same standards in calculating his absences and the average absences for Local 107 members.

9. The grievor shall attend any training or retraining which the Employer may feel is necessary for the grievor upon his return to work.
10. These conditions shall remain in force until June 30, 2013.

While the above conditions provide some protection for the Employer, most are also measures the grievor needs to take if he is to remain in recovery.

I trust that it is clear to all persons involved in this arbitration that this reinstatement on conditions should be viewed as a final opportunity for the grievor. For clarity, I have decided to make the following condition explicit:

> Should the Employer believe that the grievor violated any of the above conditions the Employer may discharge him and the issue in any subsequent grievance or arbitration contesting that dismissal is to be limited to whether the grievor violated any of the conditions of his reinstatement.

Accommodation

Regardless of any decision I might make on this issue of accommodation, there is a already another basis, dealt with above, upon which I have decided to reinstate the grievor. In view of that conclusion, there is no need to address the issue of the duty to accommodate.

Retention of jurisdiction

Finally, I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 18th day of May, 2010.

____

Howard Snow, Arbitrator