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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CAMI AUTOMOTIVE INC.

- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS UNION OF CANADA (CAW- CANADA)
and its LOCAL 88

- The Union

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Susan M. Nicholson	- Manager, Corporate Affairs & Legal Counsel
Grahame Wright	- Assistant Manager, Employee Relations
Marlene Armitage	- Specialist, Claims
Joe Blanch	- Specialist, Employee Relations

On behalf of the Union:

Mike Reuter	- Plant Chairperson
Arnott Small	- Grievor
Kevin Brooke	- Committeeperson
Mike VanBoekel	- Committeeperson

Hearings held October 3, 1997, January 14, 15, and 16, March 5 and 6, 1998, in Ingersoll, Ontario.

AWARD

I. INTRODUCTION

The grievor, Arnott Small, was terminated from his employment at CAMI Automotive for engaging in "activities inconsistent with [his] stated disability". He had been on Sickness and Accident leave as a result of a bad back from late September, 1996 until his termination in March, 1997.

The following factors caused the Employer to conclude that the grievor was engaged in a fraud. The grievor was offered and refused light work at CAMI. He did, however, work part-time for Domino's Pizza (the Employer had received surveillance information from the Insurer about the Domino's work). The Employer also understood that the grievor had played hockey during his leave. In addition the grievor had moved his residence some 220 km from his place of work. The Employer believed the grievor was either not injured at all, or was greatly exaggerating his injury, or alternatively that he was engaging in activities which showed a recklessness and a disregard for his obligations to recover his health and return to work.

Near the end of the hearing the Employer submitted that a report in a Union publication had both violated my order for the exclusion of witnesses and had intimidated witnesses.

II. THE EVIDENCE

There was little dispute about most of the evidence. I first outline the events which led to the grievor's termination; the evidence on the disputed points, details of the medical evidence and the evidence on the Union publication follow.

The grievor was employed at the CAMI Automotive plant in Ingersoll, Ontario. He began work there on July 31, 1989 during the early days of the operation of that facility. The grievor worked in production jobs, including the job of forklift operator. In the summer of 1996 he was assigned to a team of production employees who replaced absent employees.

During the grievor's employment he had several absences from work because of back problems. For the most part his back problems had been the result of work-related injuries and in most instances he claimed Workers' Compensation, although in some instances he first claimed Sickness and Accident Benefits while awaiting a determination of his Workers' Compensation claim.

The grievor lived in London, Ontario until the end of August, 1996. The grievor and his family then moved their residence to Windsor, approximately 220 km from the grievor's work in Ingersoll. During September, 1996 the grievor stayed in Ingersoll during the work week rather than commuting from Windsor on a daily basis.

On September 29, 1996 the grievor suffered another injury to his back while he was lifting his young son at home. The grievor claimed Sickness and Accident Benefits under the parties' collective agreement. He was seen by his own physician, Dr. Caroline Despard, who knew the grievor had responded well to physiotherapy treatment at the Canadian Back Institute in the past. Dr. Despard felt that such treatment would be desirable in this instance. However, this treatment was not covered by the provincial health plan and the grievor had to await approval for the treatment from the Sickness and Accident Insurer. In the interim, the grievor received physiotherapy that was covered by the provincial health plan. The grievor continued to be treated in London by Dr. Despard during the following months.

There is a provision in the parties' collective agreement under which a disputed Sickness and Accident Insurance benefit claim can be referred for an "impartial medical examination" and

that doctor's determination is said to “be final and binding on the employee, CAMI, the CAW, and the Insurance Company”. The Sickness and Accident Insurer, Metropolitan Life Insurance Company, referred the grievor to Dr. Richard W. McCalden for this impartial medical opinion.

The grievor was seen by Dr. McCalden on October 17, 1996 and his report dated October 21, 1996 was provided in evidence. Dr. McCalden recommended that the grievor be referred for physiotherapy and noted that the grievor had reported success with the Canadian Back Institute. In the event the grievor had no significant improvement after six weeks of physiotherapy, Dr. McCalden recommended a CAT scan in order "to rule out any disc protrusion and possible nerve root impingement". At that time a decision would have to be taken as to whether to continue physiotherapy or to consult with a spinal surgeon. Dr. McCalden raised the possibility of a graduated return to work following physiotherapy, but indicated that at the time of his report the grievor was “totally disabled from any occupation”. Finally, Dr. McCalden recognized that a “discectomy” might be required following a CAT scan and a referral to a spinal surgeon.

In due course the Sickness and Accident Insurer agreed to fund the grievor's treatment at the Canadian Back Institute. The grievor started treatment at the Canadian Back Institute near his home in Windsor in late November, 1996 and he continued treatment there until he was terminated from his employment and lost his insurance coverage.

Several of the periodic reports from the Canadian Back Institute were introduced in evidence. Those reports indicated an initial improvement in the grievor’s condition and advised of a possible early return to work - perhaps as early as January 20, 1997. However, later reports noted that the grievor had suffered a setback and, for example, the report dated January 24, 1997 did not mention the possibility of a return to work.

On February 10, 1997 a second impartial opinion was obtained from Dr. McCalden. By that time the grievor had undergone a CAT scan. In his report Dr. McCalden noted that the grievor suffered from a disc "herniation" and recommended referral to a spinal surgeon. Finally, in this report, Dr. McCalden noted that the grievor remained “unemployable until this evaluation is completed” (referring to the evaluation by the spinal surgeon).

Shortly thereafter, in late February, 1997, CAMI offered the grievor modified work. The work consisted of placing labels on bins. The work was described to me in detail and a demonstration of the work was performed at the hearing. There can be no doubt that this work was light work. However, the grievor consulted his physician, Dr. Despard, and ultimately rejected the light work.

More importantly, for some six weeks during February and early March the grievor worked at a Domino's Pizza outlet in Windsor. This was the same employer the grievor had worked for prior to his employment at CAMI. The Sickness and Accident Insurer conducted surveillance on the grievor. From the surveillance reports, video tapes, and oral testimony I conclude the grievor worked two or three hours a day and some ten to fifteen hours per week taking orders, preparing pizza and making pizza deliveries in his own automobile. When making deliveries the grievor would ordinarily leave the store carrying insulated bags containing pizza, get in his car, drive away and then return some fifteen to twenty minutes later with the empty bags. In addition, he sometimes helped other employees load pizza into a van and, on one occasion, carried two cases of soft drinks from Domino's.

The Employer received the surveillance reports from the Insurer and then met with the grievor for a disciplinary interview on March 14, 1997. At that meeting the Employer confronted the grievor with its concerns and in particular its concerns regarding his work at Domino's. The grievor made no substantive response; his employment was then terminated for actions inconsistent with his stated disabilities.

To continue with the outline of events, the grievor continued to see his physician. He saw the spinal surgeon in May, 1997 and the spinal surgeon agreed that the grievor required surgery. In early January, 1998 the grievor had surgery and a herniated disc was removed.

During the hearing, I received medical or expert opinions on the grievor's disability from three sources. They were as follows:

1. Dr. Richard W. McCalden, the physician who conducted the "impartial medical examinations".

Dr. McCalden did not testify but his two reports were placed in evidence. As noted above, in October, 1996 he found the grievor to be "totally disabled from any occupation". In February, 1997 he recommended that the grievor be referred to a spinal surgeon for consideration for a "possible nerve root decompression". He noted that the grievor may "benefit from surgery". In that same report he advised that the grievor remained "unemployable until this evaluation is completed." While it was not clear when the spinal surgeon completed "this evaluation", I note that the grievor did not see the surgeon until May, 1997.

2. Jack Miller, an Employer witness, a registered physiotherapist and the clinical manager of the London region of the Canadian Back Institute.

Although Mr. Miller had not examined the grievor, he provided evidence regarding back injuries and their treatment, and he expressed opinions based on the documentary evidence of the grievor's condition. In particular, Mr. Miller expressed the opinion that the modified work of bin labelling, as proposed by CAMI, may have been appropriate for the grievor but Mr. Miller would first have wished to do a controlled trial in a clinical setting. If the grievor had performed adequately in that controlled trial, Mr. Miller felt it may have been

appropriate for the grievor to have undertaken this work at CAMI.

In addition, Mr. Miller indicated that it surprised him that the grievor was involved in pizza delivery. Mr. Miller expressed a concern that a person with the grievor's condition was engaging in activities that required extended sitting and he was concerned about the effects of the vibration from driving in the automobile. It was his view that delivering pizzas could have aggravated the grievor's condition and delayed his return to work.

Mr. Miller agreed that the question of return to work was generally a matter dealt with by the family physician. Finally, Mr. Miller expressed a high regard for Dr. McCalden and for his views on back injuries.

3. Dr. Caroline Despard, the grievor's physician and a Union witness.

Dr. Despard has been the grievor's physician for some eight years. Dr. Despard reviewed the grievor's early injuries but dealt primarily with his current injury which occurred in late September, 1996. She testified that when she first saw the grievor regarding this injury he had poor flexion and extension and little ability to rotate his trunk. The early treatment involved painkillers such as Tylenol 3.

As had been suggested by Dr. McCalden, Dr. Despard noted that the grievor had undergone a CAT scan. She indicated that the CAT scan showed disc "herniation", with the bulging going forward from the centre, rather than to the side. She testified that a disc herniation to the front was much more serious and could affect the nerves to the buttocks, bladder, bowel and genitals. She indicated that if the condition were to have deteriorated, the grievor ran the risk of impotence and the permanent loss of bowel and bladder functions. She testified that by February, 1997 she had advised the grievor that if he were to notice symptoms such as a loss of bowel or bladder control he should go directly to the hospital where he would

require immediate surgery.

Dr. Despard acknowledged that she had been informed by the Employer of the proposed modified duties involving bin labelling. She had discussed the work with a representative of the Employer. She indicated that the work had sounded "too good to be true". Dr. Despard indicated she had been concerned about the length of the drive that the grievor would have had to make from Windsor to Ingersoll. She also expressed concern that, as the grievor would require surgery for his back in any event, the light duties and gradual return to work through this type of work-hardening process made little sense. As a result she recommended against the grievor taking this work. I note that the grievor relied heavily on Dr. Despard's opinion as to whether or not he should return to this work, and about his medical situation generally.

Dr. Despard was asked her opinion about the advisability of the grievor's work for Domino's Pizza. Dr. Despard indicated that any number of things could have aggravated the grievor's condition. She noted, for example, that getting in or out of bed required bending and could have aggravated his back. Similarly, getting on and off the toilet for a bowel movement may have aggravated his condition. She expressed the view that while his work for Domino's Pizza could similarly have aggravated the grievor's back, there was nothing in his medical condition or the restrictions which she had suggested to him which prevented the grievor from doing such work.

No detailed information as to the medical restrictions or limitations imposed or suggested by Dr. Despard for the grievor during this period was provided at the hearing. Dr. Despard did note that it would have been necessary for the grievor to stop and stretch frequently (approximately every twenty minutes) on a long drive such as the drive from Windsor to Ingersoll. This was one factor which concerned her about the modified work proposal.

Regarding this last point, I note that when the grievor was under surveillance at the request of the Insurer, he drove non-stop from Windsor to Ingersoll. After a meeting at the CAMI plant he drove to London and after a short stop in London he drove non-stop to Windsor.

A matter in dispute between the parties was the issue of whether the grievor had played hockey while off work with his back problem. The Employer submitted that the grievor had played hockey during the early winter of 1997.

Gord Rose, a CAMI supervisor, testified that he had been a player on a CAMI hockey team which had participated in a tournament in Port Stanley in early 1997. Mr. Rose indicated that he had not known the grievor prior to the tournament. Mr. Rose testified that during the tournament one of the players made negative comments about members of management playing on the team. Mr. Rose asked a third player who had made those negative comments and he was advised that it had been "Arnie Small". Mr. Rose testified that the person who had been identified to him as Arnie Small played hockey with sufficient skill and ability that he did not stand out among the players. Mr. Rose also testified that the person identified to him as Arnie Small looked very much like the grievor. When asked if he was 100% sure if it was the grievor, he replied that the grievor "looks like the same guy to me".

Mr. Rose's testimony was challenged by the Union and I received additional evidence on this question of whether the grievor had played hockey, as alleged.

Dean Crocker is another CAMI employee and he testified that he commonly organizes hockey teams consisting of CAMI employees. He testified that he was one of the organizers of a team of CAMI employees who played in the Kettle Creek Classic in Port Stanley in early 1997. He noted that this was an “old-timers” tournament requiring all players to be 35 years of age or older, and that the age limit was strictly enforced. He testified that Gord Rose played on the CAMI team in this tournament. Mr. Crocker further testified that he had

known the grievor for some six years and that he was "100% positive" that the grievor had not played in the tournament. Finally, Mr. Crocker indicated that he had organized a large number of hockey teams of CAMI employees and, as far as he knew, the grievor had never played hockey.

Christine Small, the grievor's mother, also testified. She testified that the grievor had been born in 1967, and thus in January of 1997 the grievor would have been 29 years old [and under the age limit for the tournament described by Mr. Crocker]. She further testified that to her knowledge the grievor had only played ice hockey in one game and that had been a church game when he was about 14 years old. She testified that during that game the grievor had simply stood in the goal and did not skate. Mrs. Small was not cross-examined.

The grievor testified that he had only played hockey "once" and that had been in a church hockey league when he was a teenager. He denied that he had ever been in Port Stanley.

Finally, and related to the issue of hockey, between the hearing on January 16 and the continuation on March 5, the Union published a report on this arbitration in a Union publication titled "On The Floor" which is distributed to the Local Union members. A dispute arose between the parties regarding that report.

The report on the arbitration was written by Mr. Reuter, the plant chairperson and the representative of the Union in this arbitration. The section which troubled the Employer was part of a general report from Mr. Reuter as plant chairperson to the membership. One paragraph in particular troubled the Employer and I quote it in full as follows:

> On the Thursday, the company called a Supervisor by the name of Gord Rose. It was his evidence that he played ice hockey with the grievor in a weekend tournament in Port Stanley, but when Mr. Rose was asked what hand his partner, the grievor, shot with, he couldn't remember. The ironic thing is the grievor doesn't play hockey. So, we had to call his mother to give evidence. I have seen a lot in front of various arbitrators and have seen how counsel for the company puts a funny twist on their case, which is fine, but I have never seen this

company actually fabricate evidence. This is shameful.

At the beginning of the hearing I made an order for the exclusion of witnesses, allowing one advisor for each party and the grievor (each of whom might later testify) to remain. At the time of the publication of the disputed piece, Dr. Despard had finished her examination-in-chief but she had not been cross-examined. In addition, the grievor had not yet testified.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the parties' collective agreement:

3. MANAGEMENT RIGHTS

The Union recognizes the right of CAMI to . . . discharge or otherwise discipline employees for just cause . . .

38. BENEFITS

The parties to this agreement have also entered into agreements on other matters, as covered by the supplements to this agreement identified below. These agreements are incorporated herein by reference as if wholly set forth herein.

. . .

Exhibit B Supplemental Agreement – Group Life Insurance and Disability Benefit Program

...

Supplemental
Agreement
Covering
GROUP LIFE INSURANCE AND
DISABILITY BENEFIT PROGRAM

. . .

Section 6. **SICKNESS AND ACCIDENT BENEFITS**

(a) Eligibility for Benefits

1. If while covered for these benefits, an employee becomes wholly and continuously disabled as a result of any injury or sickness so as to be prevented thereby from performing any and every duty of the employee's occupation, and during the period of such disability is under treatment therefor by a physician legally licensed to practice

medicine, the amount of weekly benefits for which the employee is then covered shall be paid to the employee each week during the period the employee is so disabled and under such treatment.

. . .

DOCUMENT 1
CAMI – CAW IMPARTIAL MEDICAL OPINION PROGRAM

Pursuant to Section 5 of Exhibit B, Supplemental Agreement, Group Life Insurance and Disability Benefit Program, the parties have agreed that with respect to disputed sickness and accident insurance benefit claims, doctors to be selected from a list to be mutually established shall provide impartial medical examinations for hourly-rate employees represented by the CAW at CAMI Automotive Inc.

. . .

If the examining doctor determines that the employee is totally disabled, sickness and accident insurance benefits will be paid during the period such disability continues so long as such benefits are otherwise payable. If the examining doctor determines that the employee is not totally disabled, sickness and accident insurance benefits will not be paid for the period subsequent to the date of the examination. The examining doctor's determination will be final and binding on the employee, CAMI, the CAW, and the Insurance Company

. . .

IV. POSITION OF THE EMPLOYER

The Employer submitted that the grievor had misled the Employer, his physician, the Union, and me as arbitrator. The Employer acknowledged that this case would turn on its own facts. Although some of its early evidence suggested the Employer believed the grievor was not injured, in closing argument the Employer acknowledged that the grievor had an injury which prevented him from doing his regular work.

The Employer reviewed the facts in considerable detail, pointing out inconsistencies and indicating instances in which it felt the grievor had been misleading the Employer and his physician. The Employer submitted the grievor had misled the Employer as to the true nature of his limitations, as he had his own physician. In addition the grievor had misled the Employer as to when he had spoken with or would speak with his doctor, and he misled his doctor as to his actual daily activities. In the Employer view the grievor was not nearly as

limited in his abilities as he pretended to be. His early Canadian Back Institute reports had been positive but, shortly after he suffered a "turn for the worse", the grievor started working at Domino's without having consulted anyone and performed work which was no easier than the bin labelling offered to him by CAMI.

The Employer submitted that it must be able to trust its employees. An employee who tries deliberately to deceive violates that trust. The Employer submitted that the grievor had deliberately misled the Employer and violated that trust. As a result, the Employer submitted that the grievor's dismissal should be upheld.

The Employer referred to the following arbitration decisions: *Hoover Canada Inc. and United Electrical, Radio and Machine Workers of Canada, Local 520* (December 10, 1987), unreported (Samuels); *The Letter Carriers' Union of Canada and Canada Post Corporation (Pozzo)* (January 10, 1989), unreported (Jolliffe); *The New Village Retirement Home Limited and Canadian Union of Public Employees, Local 3009* (November 23, 1988) unreported (Hinnegan); *Canada Post Corporation and The Canadian Union of Postal Workers (Scarponi)* (July 29, 1991), unreported (Hinnegan); and *Re Midas Canada Inc. and United Steelworkers of America (Honigan)* (1993), 37 L.A.C. (4th) 1 (Briggs).

As for the article published by the Union, the Employer submitted the Union had violated the order for the exclusion of witnesses. In addition, the Employer submitted that the article had been designed to intimidate witnesses, contrary to Section 87 of the *Labour Relations Act, 1995*. The Employer sought a retraction, an apology, and an order that the Union cease and desist from violating Section 87 of the *Act.*

V. POSITION OF THE UNION

The Union submitted that in a dismissal case the onus of proof was on the Employer. In

particular, the Union submitted that where the Employer alleged, as here, a fraud or misrepresentation, the evidence required of the Employer was at a higher level.

The Union also reviewed the evidence in considerable detail and submitted that the evidence showed the grievor met the requirements in the collective agreement for Sickness and Accident benefits and also that the grievor had complied fully with the provisions for an impartial medical opinion. The collective agreement makes clear that the results of the impartial medical opinion process are final and binding on, among others, the Employer. In any event, the Union submitted that the grievor had at no time misrepresented his condition and had not acted outside of his stated disabilities.

Thus the Union sought reinstatement of the grievor with no loss of seniority, and with compensation. The Union asked that I remain seised to deal with issues of compensation.

The Union referred to the following arbitration awards: *Boart Canada Incorporated and the National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW), Local 1256* (July 15, 1988), unreported (Palmer); and *Chrysler Canada Ltd. and National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW – Canada), Local 444* (October 28, 1991), unreported (Kennedy).

On the matter of the article in the Union paper, the Union submitted that the article had been written to inform the membership. There had been no intent to intimidate and the article did not violate the order for exclusion of witnesses. The Union submitted that there had been no violation of Section 87 of the *Labour Relations Act, 1995*. However, Mr. Reuter, the representative of Union, did apologize for not having advised me of his views of the evidence before he advised his members.

VI. CONCLUSIONS

The major issue between the parties was the matter of the grievor's dismissal. I thus begin with that issue.

The discharge of the grievor:

In this case, as in any dismissal case, in assessing the issue of just cause I find it preferable to address three distinct questions as follows:

1. Were the actions of the grievor such as to merit the imposition of discipline?
2. If so, was discharge an excessive response to the grievor's actions?
3. If so, what penalty should be substituted for the discharge?

1. Were the actions of the grievor such as to merit the imposition of discipline?

The grievor's employment was terminated for activities "inconsistent with [his] stated disability." In closing argument the Employer acknowledged that the grievor was unable to perform his regular duties during the relevant period but questioned the extent of his disabilities.

There is no doubt that the grievor suffered from a back injury and that this injury ultimately required surgery in early 1998. The reports of the impartial medical examiner support this. His own physician, Dr. Despard, felt that his injury was serious and by February 1997 (about the time that the contested activities occurred) she had advised the grievor that he would require surgery. Dr. Despard also advised the grievor that, in the event he suffered from loss of bowel or bladder control, he should take himself promptly to the hospital where he would require emergency surgery. There was no suggestion, then, that the grievor was fabricating

his injury entirely. The only questions raised were with regard to the extent of his injury or the level of his incapacity, and with respect to the wisdom of his activities during this period.

The grievor was discharged for activities "inconsistent with [his] stated disability". The Employer's intent in using that phrase was not explained but it appears that the Employer felt either:

1. The grievor's conduct demonstrated that he was exaggerating his disabilities and thus defrauding the Employer of the benefits; or, alternatively,
2. The grievor's conduct was so foolhardy as to demonstrate that he was acting contrary to the duty he owed to the Employer - the duty to make good use of his sickness and accident benefits by attempting to recover his health and return to work.

At the time of the dismissal the Employer had no way to be certain, and did not specify, which it thought the grievor had done. Although the first is a more serious charge, in my view the grievor's conduct would justify discipline if either of the two interpretations were supported by the evidence.

The Employer was concerned about the grievor playing hockey, about his refusal to take the modified work and about his employment for Domino's Pizza. I address each in turn. While the Employer also raised concern about the grievor's move to Windsor, this was done in support of its suspicions that the grievor was engaged in a fraud, in essence that it showed that his conduct was premeditated.

The Employer raised concerns about the grievor playing hockey. The Employer was not troubled by an employee engaging in an active sport in general, or hockey in particular, but submitted that the grievor's participation suggested he was dishonest as he was either exaggerating the extent of his injury, or alternatively that he was acting in a very foolhardy manner and thereby risking further injury and a further delay in his return to work.

The Union disputed that the grievor played hockey as alleged and thus the factual issue must first be resolved.

I have no doubt that Mr. Rose believed he played hockey with the grievor. At this point, I should note that the grievor is a tall man. While I heard no evidence as to his height, from my own observations I would estimate him to be only an inch or so shorter than I am, making the grievor about six feet, six inches tall. In addition to his height, the grievor's colouring (fair skin and reddish blond hair) and his mustache are such that he could reasonably be described as distinctive in appearance. The grievor is commonly called "Arnie". Someone would not easily mistake the large Arnie Small for another person and Mr. Rose's testimony was thus fairly persuasive.

However, I note that Mr. Rose did not know Mr. Small prior to the tournament, and that he relied upon a fellow hockey player advising him of the name of the player. Mr. Rose sought the person's name (identified to him as Arnie Small) after that person had made negative comments about members of management playing on the team. The tournament took place several months before Mr. Rose testified, at a time when there was no particular reason for Mr. Rose to be concerned about having to later identify the person identified to him as "Arnie Small".

Mr. Rose's testimony was contested and it was put to him by the Union that the grievor did not play in the tournament. The Employer had the opportunity to call other witnesses who knew the grievor and could attest that the grievor played for the hockey team, but no such witnesses were called.

On the other hand, Mr. Crocker was the organizer of a CAMI hockey team which played in a tournament at that time in Port Stanley, the team on which Mr. Rose had played, and the team about which I conclude Mr. Rose testified. Mr. Crocker knew the grievor and he was

certain that the grievor had not played on the team. I note as well that the grievor denied playing.

Both the grievor and his mother indicated that the grievor had only played hockey once. The person whom Mr. Rose identified as Arnie Small appears to have been a hockey player of sufficient skill to make it unlikely that it was someone who had played only once some fifteen years earlier and who, on the grievor's mother's uncontested evidence, just stood in goal for that game.

Finally I note that the tournament was for players 35 years of age and older, that the age limit was enforced and that the grievor was then only 29 years old.

It is possible that the person who identified "Arnie Small" did not wish to give Mr. Rose, himself a member of management, the correct name of the player who had made negative comments about management and thus provided another name altogether, using the name of Arnie Small. There may be another explanation. In any event, given the weaknesses in Mr. Rose's identification and all the evidence to the contrary, I conclude that the grievor did not participate in the hockey tournament.

In view of my conclusion that the grievor did not play hockey as alleged, no further concern arises on this point.

With respect to the second issue of the modified work at CAMI, the grievor did reject the Employer proposal for light work. The questions arising are thus:

- Was he wrong in so doing? and,
- If so, does it support disciplinary action?

I begin with the provisions of the parties' agreement. The parties have agreed to an

"Impartial Medical Opinion Program". Under their agreement, the opinion of Dr. McCalden, conducted as it was under this program, was final and binding on the Employer, the Union, the Insurance Company and the grievor. In October Dr. McCalden concluded that the grievor was "totally disabled from any occupation" and in February, only two weeks before the modified work proposal, stated that the grievor "remains unemployable" until after he had seen the spinal surgeon. Whatever the precise meaning of the term "unemployable" in that February letter, given his use of "remains" and his earlier October views, I would conclude that Dr. McCalden found that the grievor was not fit for any work for the Employer until after the evaluation by the surgeon (an evaluation which did not begin until May) and not simply "unemployable" in his previous job. Both the Employer and the Union were contractually bound by this opinion and on this basis I conclude that the grievor's refusal to take the modified work was in keeping with his disabilities and, as such, did not merit any form of discipline.

Since the parties led considerable medical evidence on the question of the grievor's refusal of light duties I will review that evidence although, given the above conclusion, it is not necessary to do so. I reach the same conclusion based on that evidence.

Even if the parties were not bound by his opinion, Dr. McCalden did conclude that the grievor was “unemployable”.

The modified work was explained to Mr. Miller of the Canadian Back Institute at the hearing and a demonstration of it was performed for him. Mr. Miller expressed the opinion that, although it would appear the grievor could have done the work, if he had been consulted in advance about the proposed work he would have preferred to have conducted a controlled test before the grievor undertook those duties in the plant. If the grievor had performed well in that controlled test, Mr. Miller would then have recommended that the grievor do the work in the plant. No such controlled test was proposed or conducted in this instance. I conclude

from this that Mr. Miller had serious reservations about the grievor undertaking this modified work.

Mr. Miller also suggested that questions of returning to work were generally left to the employee's physician, in this case Dr. Despard. Dr. Despard was not in favour of the grievor undertaking this work. She expressed concerns about the length of the drive the grievor would have in getting to work in Ingersoll from his home in Windsor. The grievor could not remain during the work week in Ingersoll (as he had done in September 1996) if he were also to continue his treatment at the Canadian Back Institute in Windsor. In addition, Dr. Despard felt there was little benefit in the grievor undertaking light duties as part of a work-hardening exercise to enable him to return to full time employment. Even if the work hardening was successful, she felt it would be of no lasting value as the grievor would soon be required to take a further leave for his back surgery.

Based on the above medical and other expert opinion, and without relying on the parties' agreement to be bound by Dr. McCalden's opinion, I would conclude that it was reasonable for the grievor to refuse the modified work, or using the language of his dismissal letter, that in so doing the grievor was acting in a manner consistent with his medical disabilities.

I have concluded that the parties are contractually bound by Dr. McCalden's opinion that the grievor was not fit for the modified work at CAMI and I have reached the same conclusion from the medical and expert evidence presented in the hearing. It follows that the grievor did nothing wrong in declining the modified duties. Given my conclusion that the grievor did nothing wrong in refusing the modified duties, I do not need to address the second question of whether that action merited discipline.

The Union submitted that modified work programs were not part of the Sickness and Accident program and thus the grievor could not have committed a "wrong" in declining the

modified duties. As I have found the grievor acted properly in declining the modified work, it is not necessary for me to consider that disputed issue. I believe the question is better left for a case in which it arises directly and is fully argued.

I now turn to the question of whether the grievor's work at Domino's Pizza was something which merited discipline. In my view, this is the central issue in this case.

I heard no evidence that would suggest that the grievor had consulted with or even notified Dr. Despard (his own physician), Dr. McCalden (who provided the impartial medical opinions), the Canadian Back Institute, the Sickness and Accident insurer, his Union or his Employer about his employment at Domino's Pizza. Based on the evidence I did hear, I conclude that the grievor did not inform any of them.

I begin my examination of this issue with several general comments.

Employees are employed to do useful work for their employer - employees are not hired in order for them to be sick and collect sick benefits. An employee who is on sick leave remains an employee and still has obligations to the employer, although those obligations differ from the usual ones such as coming to work on time and doing the assigned work.

As a general rule an employee can have other part-time, or even full-time, work. There was no suggestion that there was anything in this collective agreement which prevented the grievor or any other employee from working elsewhere.

However, again as a general rule, an employee's other work should not interfere with his or her obligations to the first employer. Again there was no suggestion that this collective agreement provided otherwise. Instead the concern raised by the Employer was that the work performed by the grievor for the second employer (Domino's) was done in violation of

his obligations to this Employer.

Finally, as a general rule, benefits, such as the sickness and accident benefits paid to the grievor in this case, are paid to sick or injured workers for the purpose of assisting them financially while they recover their health so that they can return to work. It is common, at least in absences of more than a couple of days for a cold or flu or similar reason, to expect the employee to consult with a doctor and to follow the treatment recommended by the doctor. Under the Supplemental Agreement, Section 6(a) above, among the criteria for the receipt of Sickness and Accident benefits is treatment by a physician. During the time the grievor was employed at Domino's his employment obligation to this Employer was to use his sick leave appropriately by devoting himself to recovering his health under the care of his physician, enabling him to return to work. He had indicated that he was devoting himself to receiving treatment at the Canadian Back Institute and to resting his back. He was not. During this time, while in receipt of Sickness and Accident benefits, he undertook employment at Domino's. This employment activity was neither suggested nor condoned by his doctor and was not part of any treatment program.

I received little medical opinion on this work at Domino's. Dr. McCalden knew nothing of it and thus made no comment on it. Mr. Miller indicated discontent with a person in the grievor’s condition delivering pizzas. Dr. Despard expressed concern that the grievor might injure himself in such an activity but felt that it was within his restrictions.

I acknowledge that, after the fact, Dr. Despard testified that the work did not involve an excessive risk for the grievor. However, I am not persuaded by this testimony. From her testimony I conclude that Dr. Despard was not aware of the full extent of the grievor's employment activities at Domino's. In addition, on this issue I felt Dr. Despard was particularly sympathetic to the situation which confronted the grievor who had lost his employment, and that she was unwilling to criticize her patient about this activity. I thus

discount this aspect of her testimony. I prefer the views of Mr. Miller on this point.

Finally, and apart altogether from whether the Domino's work was within his restrictions or caused further injury, this Domino's employment was not a matter for the grievor as an employee off work, in receipt of sickness and accident benefits, and under the treatment of his physician and the Canadian Back Institute, to decide on his own.

I believe that there are instances in which taking other employment while on sick leave would cause no concern. For example, assume an employee has a broken bone in his leg which makes it impossible to work for his employer as a labourer on a construction project. The employee is then asked to work part-time answering the phone for another employer, something which can easily be done by this employee even with his broken leg. Assuming the employee participates in the full treatment plan for his broken leg, it is difficult to see any basis on which that activity of phone answering might interfere with the mending of the broken bone in the leg, difficult to see how that activity would interfere with the obligation to recover his health and return to work, and thus difficult to see any reason why that employee would have to consult his physician.

Although the Domino's employment did not lead the grievor to incur further injury, it differed substantially from the above example. The work at Domino's involved lifting, bending, stretching and driving, each of which posed some risk to his health. I conclude that this employment involved a considerable risk to the grievor, a risk on which he consulted with no one.

The risk from working at Domino's was similar in some aspects to the grievor's non-stop drive from Ingersoll to London when he was under surveillance. Dr. Despard testified that the grievor should stop and stretch and relax his back on long drives. This was one of her concerns about the Employer's modified work proposal. I am confident she expressed her

views on this issue to the grievor during his treatment. However, he did not do as suggested on this particular drive. His conduct during the drive thus also involved a risk to his health and to his recovery.

The grievor's conduct in taking employment at Domino's was similar to his conduct in driving without any breaks in that both were reckless, but it differed on the grounds that the drive might have been an impetuous or spur-of-the-moment activity. His six weeks of work cannot be considered impulsive.

I find that in working at Domino's the grievor was not devoting himself to recovering his health, and during this time his obligation to this Employer was to recover his health so as to return to work. The Domino's employment was undertaken entirely on his own initiative. The grievor was thus solely responsible for being in violation of his employment obligations to this Employer. I believe the grievor's breach of his obligations to the Employer, in essence his breach of his sole obligation at this time, warranted discipline.

This collective agreement employs the common "just cause" standard. In simplified terms, just cause means that:

- An employee can be disciplined only when that employee has done something wrong in relation to his employment;
- The wrong must be something for which that employee is blameworthy or responsible (i.e. it was not an accident, etc.); and,
- The discipline imposed for that wrong must bear a reasonable relationship to the seriousness of the employee's wrong.

In adopting a "just cause" standard, parties to a collective agreement commonly expect that it will be interpreted in a consistent manner. Thus, in assessing just cause, it is often helpful to consider what other arbitrators have decided in similar cases, and in particular, to consider

the factors which have been key to those decisions. The arbitration awards referred to by the parties dealt with just cause in somewhat similar situations. I thus outline each of them briefly and then assess whether my conclusion above that the grievor's conduct warranted discipline is consistent with the views of other arbitrators.

In *Hoover Canada, supra,* the grievor had been a short-term employee with a poor work record. He requested a leave to play in the World Fastball Tournament. That leave was denied. Arbitrator Samuels found that the grievor then engaged in a quite deliberate and deceptive fraud in order to participate in the Fastball tournament. The grievor in that case enlisted the unwitting support of his physician. Arbitrator Samuels found that the grievor had not been telling the truth about his condition and maintained his "big lie" even at the arbitration hearing. The grievor had not, in fact, suffered from any illness. Given the grievor's record and his deliberate conduct, Arbitrator Samuels upheld the dismissal.

In *Canada Post (Pozzo), supra*, the grievor had been off work for some time, during which he engaged in other employment. He was participating in a landscape business. Arbitrator Jolliffe concluded that the grievor had been abusing the sick leave provisions. It appears that Arbitrator Jolliffe found the grievor had not in fact been sick at all, but instead had claimed to be sick in order to work in his landscape business. The grievor's dismissal was upheld.

In *New Village Retirement Home, supra*, the grievor was a part-time employee with little seniority. The grievor had another part-time job and over a period of time the grievor booked off sick at the New Village Retirement Home whenever it was possible for her to obtain work with her other employer. Arbitrator Hinnegan found that she had not been sick during her several absences, had deliberately booked off sick, and he upheld her termination.

In *Canada Post (Scarponi), supra*, the grievor was similarly found to have been deceptive about his illness. While claiming to be ill, he had taken a real estate agent course and found

alternate employment as a real estate agent. Arbitrator Hinnegan upheld the dismissal.

In *Midas Canada, supra*, the grievor was working elsewhere and appeared physically fit while claiming weekly indemnity benefits from the employer. Arbitrator Briggs found that the grievor had misled the employer as to the level of his activity and as to his physical condition. She held that the grievor's continuing dishonesty throughout the hearing made a review of various mitigating factors impossible and thus she upheld the grievor's discharge.

In *Boart Canada, supra*, the grievor had participated in two bowling leagues on a weekly basis while off work sick. While the company claimed in that case that the grievor really had no injury, Arbitrator Palmer rejected that position. He concluded that the grievor had suffered a back injury. He concluded that the degree of the pain was impossible to determine and noted that pain which incapacitates one person may have a different impact on another person. Arbitrator Palmer concluded that the employer had not been justified in dismissing the grievor, and ordered him reinstated. He did, however, substitute a lesser penalty of a one-month suspension, in large part because the grievor had lied about his participation in bowling.

Finally, in *Chrysler Canada, supra*, the grievor had been off work because of back difficulties. During that time he participated in slow pitch softball. Arbitrator Kennedy concluded that there had been no fraud in this. The grievor had been open with his physician about playing softball, and Arbitrator Kennedy noted that Chrysler had a provision, somewhat similar to the one between CAMI and the CAW, for an impartial medical opinion. Because of the independent medical opinion, Arbitrator Kennedy concluded as follows:

> . . . discharge was not an appropriate response on the part of the Company. The Grievor had been found under that programme to be totally disabled ... for an indefinite period, and it requires further relevant evidence and appropriate medical evaluation of that evidence for the Company to change that status. (at page 18)

The grievor was thus reinstated.

The above cases highlight some of the factors which other arbitrators have felt to be important in similar situations. A number of the grievors in the above cases were fabricating their illness; this grievor was not. I have already determined that the grievor was unwise in working at Domino's Pizza, that he violated the duty he owed to the Employer to recover his health and return to work. Thus this case is similar to those cases in which grievors participated in an athletic event or other activity which suggested their injury was exaggerated, or which, accepting their injury, was foolhardy and posed a risk to their recovery.

Given his medical condition, the grievor's employment at Domino's amounted to a very considerable risk. He should not have worked at Domino's without first consulting his physician and/or the Canadian Back Institute, in the same way that he consulted Dr. Despard about the modified work when it was offered to him by the Employer. The only grievor in the above cases whose conduct was found not to warrant any discipline was the grievor in *Chrysler Canada, supra,* who had been open with his physician. I would highlight that, unlike the grievor in *Chrysler*, the grievor in this case did not consult his physician before undertaking this Domino's employment.

Generally, then, the approach followed by those arbitrators in assessing cause is similar to the one I have followed in this case.

To summarize my conclusions so far, I find that the grievor's conduct in taking employment was inconsistent with his injury and his disabilities and demonstrated that he was acting in a foolhardy or reckless manner. The grievor's actions in working at Domino's were inconsistent with those actions which a reasonable employee concerned about returning to his employment would take, and were contrary to the obligation he had to the Employer. In particular, he acted contrary to the obligation which he owed to the Employer to make good use of his sickness and accident benefits and his sick leave by following his treatment

recommendations and attempting to recover his health and thereby return to work. Finally the Domino's employment was undertaken deliberately by the grievor; it was not a spur-of-the-moment or isolated incident which might be excused on that basis.

I thus find that the grievor's actions in working for Domino's Pizza were inconsistent with his disabilities and in violation of his obligations to his Employer. Those actions were wrongful and provide just cause for the imposition of discipline.

2. Was discharge an excessive response to the grievor's actions?

I note that the grievor has had a history of back injury, that he had a back injury here, and that there was thus no fraud in the basic question of whether there was an injury. In addition he had been employed at CAMI since the early days of the operation of the plant, a period of some eight years. The question at this point is whether, given his back injury and his employment history, his foolishness in undertaking other employment justified the penalty of discharge.

I am of the view that the purpose of many disciplinary systems, and the purpose of the just cause for discipline approach under this collective agreement, is not simply to punish employees but rather to correct their behaviour. It is common in such a system of discipline for the parties, and for arbitrators, to employ the concept of progressive discipline in which increasingly more serious forms of discipline are used in attempting to alter employees' behaviour. Thus warnings and suspensions are usually invoked first, and only when these lesser forms of discipline do not succeed in changing an employee's behaviour do employers and arbitrators resort to discharge. Discharge is used in cases when the conduct cannot be corrected or when the misconduct is exceptionally serious. In my view the grievor's misconduct in having taken this part-time employment could have been corrected by another less serious form of discipline.

In working for Domino's the grievor was reckless or foolish, as he was in driving non-stop to Ingersoll, but I am not convinced his conduct was part of a deliberate scheme to defraud either the Employer or the Insurer. He participated in all the prescribed treatments. He participated in the impartial medical process. I find no basis on which to conclude that the element of trust which I acknowledge is important in the employment relationship has been fundamentally broken by his foolishness in working at Domino's. Similarly discharge implies that the employment relationship cannot be restored; I do not think that is the situation here.

It appears that at the time the Employer made the decision to dismiss the grievor, the Employer had concluded the grievor had been playing hockey, had been working for Domino's, and had wrongly rejected the modified work as part of an overall effort to defraud. The grievor's move from London to Windsor shortly before his injury was seen as support for that conclusion. While I have not agreed with all the Employer's conclusions of fact, I can sympathize with the Employer's choice of discharge based, as it appears to have been, upon those conclusions.

But the facts were not as the Employer thought and in these circumstances, on the facts as I have found them, I conclude that the dismissal was an excessive disciplinary response to the grievor's actions.

3. What penalty should be substituted for the discharge?

Having concluded that the grievor's conduct merited discipline but that discharge was too severe a penalty, I now consider the appropriate penalty.

I will not repeat the various factors discussed above which led me to conclude that discharge was excessive. Suffice it to say that, given the activities of the grievor and the purpose of

discipline as a means of changing behaviour, I believe a suspension would have been appropriate. Under the concept of progressive discipline, a warning is often the first form of discipline used. However, the initial discipline is often more serious when the employee's wrong is more serious. The grievor's actions were serious. I thus substitute for the discharge a one month suspension without pay. I believe this measure of discipline is appropriate to the level of wrong done by the grievor and is sufficiently serious as to demonstrate to the grievor and to other employees the mistake that he made in not having used his sick leave to recover his health but instead used it to take on part-time employment.

I thus order the Employer to reinstate the grievor in his employment with no loss of seniority. In addition I direct that the grievor be compensated for his losses, subject to the one month suspension without pay. As noted earlier, the grievor had been on sickness and accident benefits at the time of his dismissal. Since then he has remained under the treatment of Dr. Despard and has undergone surgery. It is not clear when the grievor was, or will be, medically fit to return to work. I thus leave the details of the compensation owing to the grievor to be resolved by the parties.

The Union Publication:

I now turn to the Employer's submission that the article published by the Union in “On The Floor” was improper.

I received little evidence about this publication. I was advised that it was provided to the bargaining unit members and was distributed within the plant, but I understand that it was not distributed widely outside of the plant membership. In addition, I received no evidence about any actual impact that the article, or the paragraph which particularly concerned the Employer, had upon anyone. I am thus left to draw reasonable inferences from the words as written, given the distribution as noted.

The Employer submitted that the paragraph violated the order for the exclusion of witnesses. The purpose of an exclusion of witnesses order is to ensure that witnesses will testify, insofar as possible, from their own independent recollection of events and not be influenced by the testimony of other witnesses which they might otherwise hear if they were allowed to remain in the hearing room prior to testifying.

I have no evidence that any witness' testimony was influenced by this publication. Both parties were aware at the time of the publication that the grievor had not testified. However, the grievor was exempt from the order for the exclusion of witnesses and was present throughout the hearing. In addition, it was not at all clear, since the grievor was not working in the plant, that he would have seen, or did see, the publication prior to the Employer's submission. Moreover, even if the publication had affected the grievor's testimony, given that he was exempt from the exclusion order, it would not have done so in violation of the order for the exclusion of witnesses.

In addition, Dr. Despard had testified in examination-in-chief but had not yet been subject to cross-examination. There was no evidence that Dr. Despard saw this article and nothing which suggested it caused her to alter her testimony. In any event, even if she had seen the article, I do not perceive how the Union's position in the dispute regarding whether the grievor had played hockey, an issue about which Dr. Despard provided no testimony, might have influenced Dr. Despard’s recollection of her treatment of the grievor or influenced her testimony in any other way.

I thus conclude that the publication of this article did not violate my order for the exclusion of witnesses.

I move on to the question of intimidation of witnesses and the alleged violation of Section 87 of the *Labour Relations Act, 1995*. I will not reproduce that section; however the section

provides that it is an unfair labour practice for a union to intimidate a witness.

The Employer submitted firstly that the motivation behind the publication was to intimidate witnesses. It may therefore be appropriate at this point to note that I believe that it is a sensible thing for unions to advise their members of how union dues are being spent and the way in which the union is defending the interests of its members. This paragraph was part of a longer article in which Mr. Reuter, the plant chairperson, reported to his members on the activities of the Union Local and other matters of interest to the membership. Unions are political organisations and the article has a distinctly political tone. It was, after all, the plant chairperson's column, not an impartial news report. In light of these other possible motivations for publishing this report, and in the absence of any evidence as to motivation, I cannot conclude the Union's, or Mr. Reuter's, motivation was to intimidate witnesses.

There was no evidence of any actual intimidation. Thus I am not able to conclude, nor can I infer, that this paragraph or this article did actually intimidate either Mr. Rose or any other witness. That being the case, I conclude that this paragraph did not violate Section 87 of the *Labour Relations Act, 1995.*

Finally, I note that Mr. Reuter stated that the publication of this paragraph was unwise as it would have been preferable if he had made those submissions in the arbitration hearing prior to publishing them in his report to the membership. I express no opinion on this point. Given my own conclusions above and Mr. Reuter's views, I find no basis for me as arbitrator to intervene in this matter. I thus reject the Employer's complaint regarding the publication of this paragraph.

Summary:

In summary, I have ordered the Employer to reinstate the grievor in his employment with no

loss of seniority. In addition I have directed that the grievor be compensated for his losses, subject to a one month suspension without pay. I have left the details of the compensation owing to the grievor to be worked out by the parties.

I have also concluded there are no grounds for me to intervene regarding the Union publication of its comment on this arbitration.

I retain jurisdiction to deal with the issue of compensation for the grievor and any other matter which the parties may be unable to resolve in the implementation of this award.

Dated at London, Ontario this 30th day of March, 1998.

Howard Snow, Arbitrator