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MARGARET A. SHORT, CHAIRMAN  
DECISION  
LETTER DECISION  
PRE-REVIEW REFERRAL

## REVIEW COMMITTEE

RECEIVED by LU 1245  
October 12, 2005

**CASE CLOSED  
FILED & LOGGED**



INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO  
LOCAL UNION 1245, I.B.E.W.  
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SALIM A. TAMIMI, SECRETARY

### Pre-Review Committee No. 15846 OM&C – Gas – San Francisco

Betty Wong  
Company Member  
Local Investigating Committee

Bernard Smallwood  
Union Member  
Local Investigating Committee

#### Subject of the Grievance

This case concerns the discharge of an Apprentice Fitter with eight years of service for intentional misrepresentation of his medical condition in order to receive Workers' Compensation benefits.

#### Facts of the Case

On Friday, February 11, 2005 the grievant was using a jackhammer on a job when the gad got stuck in cement that he was breaking. He tried to pull it loose and felt pain in his back. On Monday, the grievant worked but complained of pain to his Foreman. On Tuesday, he asked to see a doctor and completed a pink slip.

The grievant was taken by his supervisor to the doctor. After examination, the doctor placed the grievant on the following restrictions: no lifting over 10 lbs; no pushing/pulling over 20 lbs; no prolonged standing or sitting; no bending; no squatting; and no climbing ladders. The doctor also prescribed physical therapy two times per week for three weeks. The Department could not accommodate these restrictions (at grievant's request, consideration was given to dump truck driver and mapping) and the grievant was placed on Workers' Compensation Payroll with the expectation that he would be off work approximately 6 weeks.

In addition to the therapy session, Grievant had follow-up doctor appointments on 2/24/05; 3/3/05; 3/10/05; 3/17/05; and 3/24/05. He indicated to the LIC that at the 3/3/05 appointment, he asked the doctor to release him to attend a two week Welding School and a one-week Fieldman training course. He said the doctor agreed to release him to modified duty so he could attend school. The supervisor and superintendent declined sending him to school as it did not fit within his restrictions. The grievant was released for full duty following the 3/24 doctor appointment and returned to work on 3/29/05.

Shortly after the grievant went on Workers' Compensation, the supervisor heard rumors that the grievant needed about six weeks off to do some work on his house; to work on the foundation. This information was relayed to Safety, Health, and Claims who hired a private investigator to conduct a surveillance of the grievant. The investigator video taped the grievant on 2/26; 3/4; 3/16; and 3/17/05.

On 3/3/05, the SH&C Representative told the doctor there may be information indicating the grievant was working outside of his work restrictions. The doctor indicated the grievant arrived two hours late and sweaty for his appointment that day. On 3/31/05, the doctor reviewed the video taken on 2/26. The doctor stated in writing:

"If I was shown the surveillance tape of 2/26/05 I would have released him to full duty because he was clearly tolerating work at an intensity level beyond the restrictions I outlined for him on 2/24/05 at the time of his office visit."

"I believe that Mr. \_\_\_\_\_ misrepresented his condition. It has been my experience when patients misrepresent their condition it is for secondary gain."

"I feel the tape demonstrated his treatment and expected recovery could definitely have been accelerated."

"I usually prescribe physical therapy for most back injuries for 1 – 2 visits when the employee returns to full duty just to encourage compliance with biomechanics stretching and strengthening exercises."

Regarding the claim by the grievant that he attempted to obtain a work restriction of only no use of a jackhammer, the doctor responded.

"Mr. \_\_\_\_\_ never attempted to obtain work restriction of only no use of jackhammer from me. I did attempt to release to modified duty to no jackhammer only but the patient objected secondary to pain. At the last visit he wanted release to full duty without any restriction because he was getting a new job closer to home."

The grievant admitted that he made a mistake digging while he was off on his industrial injury. He also stated that he digs much faster when he is on the job as an Appr. Fitter, compared to the pace that was shown on the video. This in and of itself is an admission of violating the work restrictions which could have exacerbated his condition.

The PRC viewed the video and observed the grievant digging with a shovel at normal speed, sometimes with one hand.

#### Discussion

The PRC discussed this case at length. By reviewing the file and comparing documentation, it is apparent that the grievant was relating different information to the doctor and to the supervisor.

He was telling the doctor that he continued to be in pain and unable to work, while asking the supervisor to make accommodations for him to attend welding school. It is also apparent from the video that the grievant violated the restrictions imposed by the doctor which were based in part on the description of his condition he gave to the doctor.

It is important to note that the "rumors" which caused his supervisor to be concerned turned out to be true and could have only been started based on information he must have shared. But for the "rumors", it doesn't appear that anyone would have questioned his injury.

Union asked that Company reinstate the grievant on a DML without back pay on the basis that he had no active discipline prior to discharge and his admission of having made a mistake. Company declined on the basis that his actions demonstrate that in this instance he did not exercise "fundamental honesty" which is expected of all employees and he did so for personal gain.

Decision

The discharge was for just and sufficient cause. This case is closed without adjustment.

*Margaret Short*

Margaret A. Short, Chairman  
Review Committee

*10/12/05*

Date

*Sam A. Tamimi*

Sam Tamimi, Secretary  
Review Committee

*10-12-05*

Date