

C# 01396

UNITED STATES POSTAL SERVICE

AND

NATIONAL ASSOCIATION OF LETTER
CARRIERS

Re: SIN-3U-C-191
H. Ortega
Corpus Christi, TX

APPEARANCES:

FOR THE UNION:

S. P. Pantoja
Local Business Agent

FOR THE POSTAL SERVICE:

Charles Weiser
Labor Relations Representative

ARBITRATOR:

John F. Caraway, selected by
mutual agreement of the parties.

Mr. Ortega, the grievant, was employed by the Postal Service as a carrier. On August 27, 1981 he suffered an injury to his right ankle when a basket fell and struck his ankle. This caused pain and discomfort to his leg and thigh. He saw Dr. O'Keefe on August 27, 1981 who advised that he should rest his ankle for two to three days. The treatment was to apply Myoflex and heat to the ankle and to return to see Dr. O'Keefe on August 31, 1981. He saw Dr. O'Keefe on August 31, 1981 and was given a certificate that he could return to work.

Mr. Ortega filed a continuation of pay claim for August 29, 1981. Mrs. M. S. Russell testified that the claim was rejected on the basis of a telephone statement to her by Dr. O'Keefe that Mr. Ortega could perform limited duty, working while seated. Mr. Ortega did not report for work, according to Mrs. Russell on August 29. Because of these factors the continuation of pay claim was denied by the Postal Service.

The grievant explained he did attempt to report to work on August 29, 1981 but the weather was extremely bad with rain and flooding. His foot was swollen. He was taking medication. He got out of his car

and attempted to walk but his leg hurt him. He then called his supervisor at the main post office and reported that he could not make it to work. He then went home where he soaked his leg and used Myoflex.

The Postal Service at the outset of the case entered the objection that the grievance was not timely filed. The basis of this defense was a testimony of Mr. Valez and Mr. Sanchez who testified that on September 1, 1981 the grievant was told that his request for continuation of pay August 29, 1981 was denied. It was therefore required under Article 15 Section 2, Step 1 (a) that Mr. Ortega file his grievance no later than September 14, 1981. The grievance was not filed until September 18, 1981 which the Postal Service relied on form 3971 which has a date of "Date Submitted" of 9/1/81.

To refute the defense of untimeliness, the Union submitted into evidence form 3971 for 16 hours and 50 minutes. This was submitted to Mr. Mota, carrier foreman, according to the Union witnesses. Mr. Mota did not approve or disapprove the document. The time covered was August 27, 28 and 29. Mr. Mota's signature appears on the document but he denied that it was his signature. Mr. Ortega then on September 4, 1981 submitted form 3971 for 8 hours of continuation of pay. This was not approved or disapproved by Mr. Valdez, carrier foreman. Mr. Valdez's signature is on the document. The claim for Continuation of Pay was rejected and Mr. Ortega was advised to file a claim for 8 hours sick pay. He did this on September 4, 1981.

ISSUES

I.

Was the girevance timely filed?

II.

Was the grievance arbitrable?

III.

Did the Postal Service violate the National Agreement by refusing to pay Mr. Ortega continuation of pay for August 29, 1981?

ARGUMENT

I.

TIMELINESS

The Postal Service maintains that the grievance is not arbitrable because it was not timely filed. Mr. Oretga filed his continuation of pay claim on September 1, 1981 and was rejected on that date. This meant that he had to file his grievance on or before September 14, 1981. His filing on September 18, 1981 was untimely.

The Union's defense as to timeliness is that the continuation of pay claim was filed on September 1, 1981 by Mr. Ortega but it was not approved or disapproved. Later Mr. Ortega on September 4, 1981 filed a continuation of pay for August 29 just for 8 hours. It was only on September 4, 1981 that he was advised that his continuation of pay was rejected and told to file a sick leave claim. He did this on September 4, 1981. The grievance being filed on September 18, 1981 was timely filed.

II.

ARBITRABILITY

The Postal Service maintains that the grievance is not arbitrable because the Secretary of Labor is the sole official who can issue an award for or against payment of compensation. Mr. Ortega's claim was for workmen's compensation for August 29, 1981 for an injury to his right ankle suffered on August 27, 1981 while at his work station. On August 27, 1981 the grievant filed form CA-1 which is a

Department of Labor, Office of Workers' Compensation Document. By executing this form Mr. Ortega elected to come under the Office of Workers' Compensation. This means that the United States Department of Labor is the sole agency who can rule on his continuation of pay claim. The arbitrator has no authority to render a decision on this claim.

The Union contends that the Postal Service waited too long to urge its point of arbitrability. This was not done in steps 1, 2, or 3 of the grievance procedure. Further the Union cites Postal Service bulletin 21310 dated August 6, 1981 which has a statement that continuation of pay paid by the United States Postal Service is not considered compensation. Because of these considerations the grievance should be deemed arbitrable.

But if the arbitrator decides that the issue is one reserved for the Secretary of Labor, then the arbitrator is requested to fashion his award in a manner that the grievant will have an appeal to the Secretary of Labor with the arbitrator retaining authority over the issue until finally adjudicated.

MERITS

The Postal Service maintains that the Union has cited no relevant article of the National Agreement which was violated by the Postal Service. The article cited had no relevance. Article 14. 3(c) deals with health service. It does not outline a procedure for handling of pay claims. Further there were no formulated regulations which are deemed relevant to this dispute. In a similar matter Article 21.4 only mandates the Postal Service to arbitrate appropriate regulations to cover The Office of Workers' Compensation Program. There is no showing

that the Postal Service breaks this particular provision.

The agency concludes that since no article was shown to have been breached, the grievance must fall.

The Union shows that the evidence is undisputed that Mr. Ortega was hurt on the job on August 27, 1981. He was treated by Dr. O'Keefe who placed his on disability until August 31, 1981. Mr. Ortega attempted to report to work on August 29, but could not do so because of his physical condition and the weather. The grievant complied with the agency's request and did provide a certificate from Dr. O'Keefe. In view of this evidence the grievant is entitled to payment of his continuation of pay for August 29, 1981.

DECISION

I.

The grievance was timely filed.

The Postal Service argues that the 14 day period should be tolled from September 1, 1981. Under Article 15, Section 2, Step 1(a) this meant that the grievant should file his grievance on or before September 14, 1981. The grievance on, September 18, 1981 was therefore untimely. The Postal Service's designation of September 1, 1981 was based on its copy of form 3971 and the testimony of Supervisors Valdez and Sanchez that Mr. Ortega was told on September that his claim for continuation of pay was denied on September 1, 1981.

The Union denied that the claim was disapproved on September 1, 1981. Its position was that the Postal Service advised Mr. Ortega on September 4, 1981 of rejection of his claim. Mr. Rojas testified that Mr. Ortega told him on September 4, 1981 that he did not know the status of his claim. Finally on that date Mr. Sanchez told the grievant his form 3971 was disapproved. Mr. Rojas said that when he

saw the form 3971, dated September 1, 1981, [P. O. E,h No. 1], it did not have "disapprove" marked.

Mr. Ortega testified that he talked to Mr. Sanchez on September 4, 1981 regarding his continuance of pay. Up to that point he did not know if it was approved or disapproved as no supervisor had told him. Mr. Sanchez told him it was denied and advised him to file for annual or sick leave. Mr. Ortega then filed for sick leave on September 4, 1981. [Un Exh 2-A].

The arbitrator holds that the grievance was timely filed. There are so many conflicts in the testimony and in the exhibits that it cannot be positively said that Mr. Ortega knew that his claim was rejected on September 1, 1981. The testimony of Mr. Rojas is particularly persuasive. Doubts as to procedural arbitrability must be resolved in favor of the grievant because he is entitled to a hearing on the merits of his grievance.

II.

The United States Department of Labor Workers' Compensation Programs, has exclusive jurisdiction over this dispute.

Article 21, Section 4 provides that employees covered by the National Agreement shall have their Workers' Compensation claims governed by Chapter 81 of Title 5. This statute provides that the Secretary of Labor or his designee shall have exclusive jurisdiction over injuries which are work related.5 U.S.C.A. 8128 (a) and (b). His decision shall be final and conclusive. This means that the authority of the arbitrator under the National Agreement in this specific area is subordinated to that of the Secretary of Labor. This is the clear intent of Article 21, Section 4.

The grievant in fact recognized the authority of the Secretary of Labor to decide his claim. He filed a form CA-1 [Federal Employee's Notice of Traumatic Injury and claim for Continuation of Pay/Compensation]. [Un Exh No. 5]. In his claim he set forth the facts of his injury and his claim for continuance of pay. In support thereof he filed form CA-17 Duty Status Report, which was the medical report of Dr. O'Keefe. Clearly Mr. Ortega elected to be covered by Chapter 81 of Title 5, which right is set forth in the National Agreement.

Once the employee has filed a CA-1 with the Department of Labor, that Agency has sole authority to decide the merits of Mr. Ortega's claim. The arbitrator is divested of jurisdictional authority. Any doubt is promptly settled by study of Pittman vs. United States of America, 312 F.Supp. 818 [U.S. Dist. Ct. E.D. Vig. 1970]. The court held that the Federal Employees Compensatory Act is the exclusive remedy for work incurred injuries. The Secretary of Labor or his designee has sole authority to decide the claim. It is not subject to judicial review. Since the courts are devoid of jurisdiction, it logically follows that an arbitrator would likewise have no jurisdictional authority. Section 5 U.S.C.A. 8128 (a) and (b).

The Union in its brief asks that the arbitrator, if he rules that this grievance must be decided by the Office of the Secretary of Labor, retain jurisdiction to see that there is proper implementation. The arbitrator, cannot do this. In effect the Union asks the arbitrator to exercise review authority over the Office of the Secretary of Labor. A court cannot do this. Neither can the arbitrator.

AWARD

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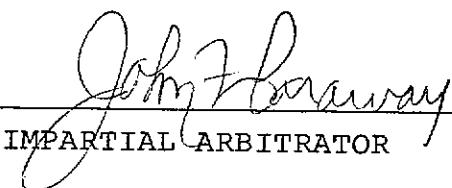
The Union grievance was timely filed.

II

The Union grievance is denied as the arbitrator has no authority over this Workmen's compensation claim.

New Orleans, Louisiana

August 23, 1982


John F. Baraway

IMPARTIAL ARBITRATOR