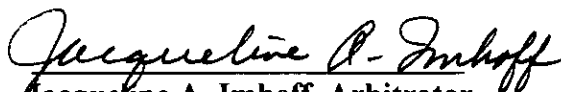




**AWARD SUMMARY**

**The grievance is sustained. The Postal Service did not discharge the Grievant for just cause. The record shows that his medical problem was legitimate, that he followed the doctor's instructions, and there was no collusion between the doctor and the Grievant. The Grievant is to be reinstated with full back pay and benefits, minus interim earnings, for any losses he sustained as a result of the discharge.**

  
Jacqueline A. Imhoff, Arbitrator

## **ISSUE**

Did the Postal Service have just cause to discharge the Grievant, Edward Miranda?  
If not, what shall be the remedy?

## **BACKGROUND**

Edward Miranda, the Grievant, has been employed as a letter carrier by the United States Postal Service since January 14, 1989. He has been a letter carrier at the Caparra Heights Station in San Juan, Puerto Rico since 1995. On October 28, 2002, he experienced back pain while lifting mail. He was taken to the emergency room of Hospital Del Maestro in Hato Rey, Puerto Rico where he was x-rayed, evaluated and released by Dr. Carlos Perez Vizcarrondo with the recommendation of bedrest for the remainder of the day and a return to work the following day. A follow-up visit to a Postal Service doctor was also recommended. The Grievant was examined by Dr. Luis A Echavarria, a Postal Service doctor, the following day. Dr. Echavarria found the Grievant unfit to return to work. The Grievant told Dr. Echavarria that he preferred to be treated by his own doctor, Luis E. Rodriguez, and visited Dr. Rodriguez that same day, October 29. The Grievant continued treatment under Dr. Rodriguez who did not release him to return to work until December 2, 2002. The Grievant returned to work with restrictions, after being evaluated by Dr. Echavarria and reevaluated by Dr. Rodriguez, on December 5, 2002. The Grievant elected to continue to be paid during his absence.

On March 1, 2003 the Grievant was terminated for misrepresenting his physical abilities to secure continuation of pay (COP) under the OWCP Act. In making the decision of termination, the Postal Service relied on a Postal Service inspection report, Sections 661.53, 665.2, and 666.2 of the Employee and Labor Relations Manual and Section 101 of the Principles of Ethical Conduct. The Union filed a grievance on behalf of Mr. Miranda which was moved to arbitration. A hearing was held on August 7, 2002 at

the General Post Office in San Juan, Puerto Rico. Testimony and evidence were admitted into the record which was closed on that day.

### **DISCUSSION**

The pain the Grievant incurred as a result of lifting mail on October 28, 2002 was not caused by failure to work in a safe manner. Supervisor Josean Pineiro testified that he observed the Grievant at the time he felt the pain and stated that he was working in a safe manner lifting mail from trays. It was Mr. Pineiro who drove the Grievant to the hospital and stayed with him approximately an hour until another supervisor, Lillian Rodriguez, arrived to remain with him.

On October 29, 2003, the Grievant, as recommended by Dr. Vizcarrondo, visited Dr. Echavarria, the Postal Service doctor. According to Exhibit 4 under Tab 5<sup>1</sup> of the moving papers, Dr. Echavarria examined the Grievant on October 29 and advised him not to return to work. The Grievant then elected to be treated by his own doctor, Luis E. Rodriguez. This was his right under the Federal Employees' Compensation Act. Rule 10.300 (d) states:

“The employing agency must advise an injured employee of the right to his or her initial choice of physician.”

Dr. Echavarria offered to correlate therapy with the Grievant's doctor, but his offer was declined.

On October 29, Dr. Rodriguez examined the Grievant, found him totally incapacitated for work until November 14 because of an acute and severe lumbar sprain, and recommended that the Grievant be evaluated by a rheumatologist (Tab 5, Exhibit 3, ). According to copies of prescriptions (Tab 4) signed by Radames Sierra-Zorita, a rheumatologist, a MRI of the thoracic spine and a bone scan were ordered.

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<sup>1</sup>All tabs are found in the moving papers. The papers themselves are not numbered.

A report of a "Three Phase Bone Scan" (Tab 4) was issued on November 18, 2002 by Dr. Carlos D. Garcia Rodriguez, a nuclear medicine physician. The report states that the bone scan study was coordinated with "the x-rays of the cervical, dorsal and lumbar spine dated 10/28/02. Presumably those were taken at Hospital Del Maestro. Dr. Carlos Rodriguez's impression was:

"Arthritic changes in the described joints. The activity in the right tibia may be related to trauma. Please correlate clinically. No findings are observed to suggest fractures in the dorsal spine."

A report of the results of a MRI of the thoracic spine was issued by Dr. J. Enrique Hernandez Bonilla, a neuroradiologist with the C.T. Radiology Complex, on November 25, 2002. Dr. Bonilla's impression states:

"Mild paravertebral muscle spasm with minimal anterior spondylotic changes without evidence of spinal cord compression or central spinal canal stenosis, please correlate clinically."

The Grievant testified that he was on complete bed rest until November 12. The prescription signed by Dr. Rodriguez on October 29, 2002 (Tab 4) prescribes medication and bedrest pending a rheumatology evaluation. On November 13, the Grievant was reevaluated by Dr. Rodriguez who filled out a CA-17 (Tab 4) stating that the Grievant was not advised to return to work but made no mention of bedrest. On November 22, the Grievant was examined again, and the CA-17 (Tab 4) signed by Dr. Rodriguez stated that the Grievant could do nothing until Dr. Rodriguez evaluated the results of the MRI. He indicated that the Grievant would be advised to return to work on December 1, 2002; presumably if the MRI results showed no injury. The Grievant was reexamined on November 26, 2002. The CA-17 (Tab 4) shows that he was advised to return to work with restrictions on December 2, 2002. A follow-up visit was ordered for December 3. The Grievant reported to Dr... Echavarria on December 2 and was examined by him. Dr. Echavarria, in a CA-17 dated December 2, 2002 (Tab 4), found that the Grievant could

return to work with the identical restrictions Dr. Rodriguez had noted in his CA-17 of November 26, 2002 (Tab 4). The Grievant was reexamined by Dr. Rodriguez on December 4 and returned to work on December 5. No reason was given for the change in the appointment from December 3 to December 4. The Grievant received therapy and remained on restricted duty for at least two months after his return to work, according to a CA-17 signed by Dr. Echavarria on February 13, 2003 (Tab 4).

On November 13, 2001 U.S. Postal Inspections Service received a request from the injury compensation office to conduct an investigation regarding the Grievant's alleged incapacity to perform the duties of his job. Claudia Passos and Cynthia Shoffner, U. S. Postal Inspectors, conducted a surveillance of the Grievant on November 14, 15 and 20. The inspectors' report of November 27, 2002 (Tab 5) described the following observed behavior.

On November 14, 2002 at approximately 1:20 p.m., the Grievant was videotaped (Jt. Ex. 3) driving his automobile from his home in Barrio Higuillar, Dorado, PR to the center of Dorado (approximately four miles) to purchase flowers at a flower shop. The Grievant testified that he was buying flowers for his daughter's birthday and that he was no longer on bed rest.

On November 15, 2002 the Grievant was observed standing in front of the Policlinica Dr. Luis Rodriguez at 7:30 a.m. At 9:15 a.m. he was observed leaving the clinic and driving to his home. The report, but not the videotape, stated that he was also observed, at about 11:00 a.m., buying a drink at a refreshment stand, visiting the Dorodo Post Office, visiting a residence in the Barrio, stopping at Walgreen's Pharmacy and carrying a bag away from it. The Grievant explained that he made an appointment with his doctor that morning and returned for it that afternoon. Afterwards he went to Walgreen's to pick up his prescription. Union Exhibit 8 consists of a label from Walgreen's showing that a prescription was to be picked up at 2:10 p.m. on November 15,

2002, and an authorization form showing that Dr. R. Sierra Zorita ordered thirty, Vioxx 25MG tablets on November 15, 2002.

On November 20, 2002 at approximately 9:10 a.m., the Grievant was observed leaving his home with a "suitcase type bag" which he placed in his car. He was observed (but not videotaped) driving to a gas station, pumping gas, and visiting the house he had visited on November 15. In the afternoon, from 1:30 until approximately 2:30 p.m. he was observed driving, parking his vehicle and walking. The Grievant testified that he picked up the bone scan results that day. Presumably, those were the bone scan results exhibited in Tab 4.

Postal inspectors Passos and Shoffner visited Dr. Rodriguez in his office on November 20, 2002 because they felt that the observations they had made of the Grievant were inconsistent with his medical restrictions. They showed Dr. Rodriguez the video tape. Ms. Passos and Ms. Shoffner testified that Dr. Rodriguez was surprised that the Grievant was driving an automobile because the medication he was taking restricted him from driving. Dr. Rodriguez told the inspectors that he would reevaluate the Grievant's condition after he reviewed the results of the rheumatology evaluation. Follow up telephone calls were made to Dr. Rodriguez on November 21, November 22 and November 25. On each occasion, he stated that he was awaiting the results of the bone scan and MRI tests. Attempts to contact Dr. Rodriguez on November 27 were unsuccessful.

The report of the Postal Inspection Service (Tab 5) was written by Claudia P. Passos on November 27, 2002. The report noted that the Grievant was restricted from "lifting/ carrying (regardless of weight), sitting, standing, walking, climbing, kneeling, bending/stooping, twisting, pulling/pushing, simple grasping, fine manipulation, reaching above shoulder, driving a motor vehicle, operating machinery, exposure to extreme temperature, high humidity, chemicals/solvents and/or fumes/dust" (Tab 5), and that he was observed and/or videotaped engaging in some of these activities, i.e., walking, sitting,

standing, carrying a bag, driving a motor vehicle, twisting his neck, and holding a drink, without apparent discomfort.

Supervisor Josiah Pineiro testified that he considered the inspection report, Postal Service rules and regulations and the Grievant's length of service in making the decision to discharge him. The Postal Service contends that the Grievant was misrepresenting the severity of his injury while receiving his wages for being totally incapacitated.

The Union contends that the Grievant's absence was for legitimate medical reasons as confirmed by the documentation. The Union also argues that Dr. Rodriguez did not restrict the Grievant from activities shown on the video tape, which are those normally used in daily living. The Grievant was restricted from performing those activities at work where the actions would be longer and more repetitive and thus possibly worsen his condition. The Union also noted that the Grievant was on pain medication (a controlled substance) which prohibited him from driving and using machinery. The Union contends that there is no proof the Grievant misrepresented his physical condition or was in collusion with Dr. Rodriguez and asks that the Grievant be returned to his job.

### OPINION

The detailed medical documentation in evidence here makes it abundantly clear that the Grievant was following the instructions of his physician who had valid medical reasons for ordering the Grievant to remain at home during the period of October 28 until December 5. There is no question that the Grievant was injured on the job. Supervisor Pineiro saw the incident occur and drove the Grievant to the hospital. The issue is how long he should have remained on medical leave.

The Postal Service put great emphasis on the fact that Dr. Vizcarrondo, the emergency room doctor, felt that the Grievant could return to work the following day. However, Dr. Vizcarrondo also suggested that the Grievant be examined by a Postal Service doctor. The x-rays were positive, and it apparently was Dr. Vizcarrondo's belief that the patient would feel better after resting. However, Dr. Echavarria, the Postal

Service doctor, did not believe the Grievant should return to work as he indicated on the CA-17 signed on October 29, 2002. The Grievant then went to his own doctor, Dr. Rodriguez, which he had a right to do, and was put on bedrest pending an evaluation by a rheumatologist. The rheumatologist, Dr. R. Sierra Zorita, ordered a MRI and a bone scan and prescribed a muscle relaxant for the Grievant. Immediately after Dr. Rodriguez received the results of the MRI and bone scan, and presumably Dr. Zorita's evaluation, he examined the Grievant and returned him to work with restrictions. The Grievant continued with physical therapy for a period after his return to work.

The fact that during the period after November 15, the Grievant was seen going for a doctor's appointment (which the date on the prescription seems to verify), picking up the prescription and x-rays and performing another errand does not mean that he was able to return to work. Dr. Rodriguez examined the Grievant on November 12 and found that he still was unable to perform the duties of his job description as listed on the CA-17. That did not mean that the doctor's diagnosis was that the Grievant was physically incapable of performing those activities, as the Postal Service suggested. It meant only that Dr. Rodriguez doctor did not want him performing them at work. The Grievant was physically able to stand, sit, walk and twist his neck, but the doctor believed that doing so with the frequency required on the job could possibly do him harm. The doctor wanted to be certain there were no potential physical weaknesses not seen in an x-ray or a physical examination before returning the Grievant to work. The Grievant was obeying his doctor's instructions. He was disobeying them by driving while on medication, but that does not mean that he should have returned to work.

The Postal Service's decision to issue discipline appears to be based entirely on the fact that the Postal Service inspectors observed the Grievant performing ordinary daily activities without apparent pain. However, the Grievant was on medication to relieve pain which otherwise might have been apparent to others. As explained above, whether or not the Grievant appeared to be in pain is not relevant to the question of whether those daily



actions performed at work might subject him to injury. Dr. Rodriguez and Dr. Zorita were in a much better position to judge that.

I find no evidence of collusion between the Grievant and Dr. Rodriguez. There was nothing in the record of other incidents in which Dr. Rodriguez had given medical documentation for any other absence by the Grievant. In fact there was testimony from Inspector Passos that the Grievant was the only postal worker the doctor had treated and that he knew little about Postal Service duties. Dr. Rodriguez, who had been practicing medicine for seventeen years according to Inspector Passos, was following a reasonable course of treatment by prescribing bedrest and an evaluation by a rheumatologist. It was the rheumatologist who prescribed the MRI and bone scan, and there was no suggestion of any collusion between Dr. Zorita and the Grievant. There is no significance in the fact that Dr. Rodriguez was unable to make an evaluation by November 25. The results of the MRI were not known until November 25. Dr. Rodriguez examined the Grievant on November 26, the first time he could reasonably have done so after receiving the medical records. I do not find it unusual that the Postal Service inspectors were unable to reach Dr. Rodriguez on November 27, the day before Thanksgiving. The relevant point is that, as soon as Dr. Rodriguez had the medical evidence he needed, he made a decision to return the Grievant to work with restrictions. Dr. Echavarria concurred with those restrictions, and the Grievant returned to work as directed. He saw the Postal Service doctor on December 2 and Dr. Rodriguez on December 4. The Grievant's preference for having only his own doctor handle the physical therapy he received after returning to work was his right as mentioned above, and no negative inference should be drawn from that decision.

In summary, I find that the Grievant acted appropriately and within his rights when he went to his personal physician for a consultation after receiving an injury on the job. He followed his physician's prescribed course of treatment and returned to work when his physician was assured that he could do so without subjecting himself to further injury.

That the Grievant was able to perform normal, simple activities of daily life without apparent injury does not mean that he should have been found capable of returning to work. There is nothing in the record to support a charge of collusion between the Grievant and Dr. Rodriguez. Therefore, I find that the Postal Service did not have just cause to terminate the Grievant. The Grievant is to be reinstated in his job as a mail carrier with full back pay, minus interim earnings, and any benefits he lost as a result of his discharge. The grievance is sustained.

HP OfficeJet  
Personal Printer/Fax/Copier

Fax Log Report for  
N.Y. Letter Carriers Br.36  
212 268 1267  
Sep-04-03 12:09 PM

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<u>Identification</u>	<u>Result</u>	<u>Pages</u>	<u>Type</u>	<u>Date</u>	<u>Time</u>	<u>Duration</u>	<u>Diagnostic</u>
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