IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN

IPSWICH POLICE ASSOCIATION, MCOP, LOCAL 310, I.U.P.A., AFL-CIO **-AND-** **TOWN OF IPSWICH**	**GRIEVANCE: AARON WOODWORTH; INJURED-ON-DUTY-LEAVE**

AWARD

The grievance is upheld in part and denied in part.

The Town of Ipswich violated Article 21 of the collective bargaining agreement by not covering Ipswich Police Officer Aaron Woodworth on injury leave from February 25, 2014 to April 14, 2014. Officer Aaron Woodworth's February 25, 2014 to April 14, 2014 incapacity is hereby classified as c. 41 §111F leave, and it shall be so recorded by the Town of Ipswich. The Town of Ipswich shall forthwith provide c. 41 §111F injury leave to Officer Woodworth for the period February 25, 2014 to April 14, 2014. It shall also forthwith reinstate Officer Woodworth's sick leave, utilized from February 25, 2014 to April 14, 2014.

The grievant's claim for c. 41 §100 benefits is not substantively arbitrable.

The arbitrator retains jurisdiction of the case for remedial implementation purposes for thirty (30) calendar days.

Dated: 1/14/15

/s/ Richard G. Boulanger, Esq.
Arbitrator

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The grievance was heard by Arbitrator Richard G. Boulanger, Esq. on October 8, 2014 at the Town Hall, Ipswich, Massachusetts.

MCOP, Local 310, I.U.P.A., AFL-CIO (Union) was represented by Mr. Kenneth Grace, Esq. Mr. Aaron Woodworth was called to testify by the Union. Local Union President Mark Ruggerio was in attendance for the Union.

The Town of Ipswich (Town) was represented by Mr. David Jenkins, Esq. Mr. Timothy Zessin, Esq. was on brief with Attorney Jenkins. Police Chief Paul Nikas and Human Resources Director Jennifer Breaker were in attendance for the Town.

The parties were given full opportunity to present evidence and make arguments.

Witnesses were sworn

The parties' stipulated issue on the merits is as follows:

> Did the Town of Ipswich violate Article 21 of the collective bargaining agreement by not covering Ipswich Police Officer Aaron Woodworth on injury leave from February 25, 2014 to April 14, 2014? If so, what shall be the remedy?

The Town submitted a substantive arbitrability challenge to the Union's claim for M.G.L. c. 41 §100 benefits.

I. COLLECTIVE BARGAINING AGREEMENT

1. **ARTICLE 5: GRIEVANCE AND ARBITRATION PROCEDURE**

2. **ARTICLE 21: HEALTH AND SAFETY AND INJURY LEAVE**

II. SUMMARY OF THE CASE

Police Officer Aaron Woodworth (grievant) suffered an on-duty ankle injury in March, 2009. Following his first ankle surgery in August, 2009, the grievant was placed on Injured-on-Duty (IOD) leave, and his associated medical expenses were financed by the Town. However, the Town did not place the grievant on IOD leave following his second ankle surgery in February, 2014, and the grievant's health insurance carrier covered his medical expenses with some co-pay and deductible contribution by the grievant.

The Union contends that the Town violated the collective bargaining agreement when it rejected the grievant's IOD leave following his February, 2014 surgery, and by failing to indemnify the grievant for all of the medical expenses related to the February, 2014 ankle surgery.

The Town contends that any claim by the Union as to medical costs and indemnification is not substantively arbitrable. Moreover, it was not contractually required to provide IOD leave to the grievant following his second surgery in February, 2014 because that medical procedure was necessitated by the grievant's wear and tear on his ankle.

The arbitrator ruled that the Town violated Article 21 of the collective bargaining agreement by not covering Ipswich Police Officer Aaron Woodworth's injury leave from February 25, 2014 to April 14, 2014, but the grievant's claim for c. 41 §100 benefits is not substantively arbitrable.

III. FACTUAL BACKGROUND

The grievant was appointed a permanent Town civil service police officer in September, 2008. On March 21, 2009, in the course of his duties, the grievant sustained an ankle injury. (See Joint Exhibits #7-#9.) Following a period of physical therapy, it was determined that the grievant needed surgery on his left ankle. (See Joint Exhibits #10 and #12.) The surgery was performed by Dr. Robert Wood, an orthopedic surgeon, on August 7, 2009. (See Joint Exhibit #13.) During his recuperation from the 2009 ankle surgery, the grievant received c. 41 §111F benefits. The Town also paid for the grievant's medical expenses in connection with his August, 2009 surgery pursuant to c. 41 §100. The grievant returned to full duty in October, 2009. In 2010, he was medically cleared to attend a twenty-six (26) week Police Academy (Academy). (See Joint Exhibits #14, #28-#29.) The grievant successfully completed the Academy which ended in October, 2010. Thereafter, he returned to his Town police officer duties and responsibilities.

In March, 2012, the grievant discussed his left ankle pain, and its limited range of motion, with Dr. Margaret Lobo, an orthopedic surgeon. (See Joint Exhibit #16.) Dr. Lobo recommended that the grievant have a second surgical procedure. (See Joint Exhibits #18 and #19.) In March, 2013, the grievant underwent a gastric bypass procedure. (See Joint Exhibits #15 and #20.) In March and November, 2013, Dr. Lobo again suggested ankle surgery. (See Joint Exhibits #20 and #21.) The grievant again underwent ankle surgery on February 25, 2014. (See Union Exhibit #1 and Joint Exhibits #22 and #23.) Following the February, 2014 surgery, the grievant used approximately six (6) weeks of his accrued sick leave because the Town did not grant IOD leave to him. The February, 2014 surgery and related medical costs were paid by the grievant's health insurance with contributions from the grievant by way of co-pays and

deductible payments. The grievant returned to light duty on April 14, 2014, and to full duty on April 28, 2014. (See Joint Exhibits #24-#26.)

The Union grieved the Town's failure to place the grievant on IOD leave for his February, 2014 surgery, and for its failure to indemnify the grievant for all of his related medical expenses. (See Joint Exhibit #2.) The grievance was not resolved during the course of the parties' grievance procedure, and it was appealed to arbitration. (See Joint Exhibit #3 -#6.)

IV. SUMMARIES OF THE PARTIES' ARGUMENTS

A. SUBSTANTIVE ARBITRABILITY

1. TOWN:

The Town contends that the grievance is not arbitrable as to its demand for payment of the grievant's medical expenses related to the February, 2014 surgery. Although the parties incorporated c. 41 §100 into the collective bargaining agreement, the dispute concerning its application in the instant case is not subject to arbitration based on legal precedent. Chapter 41 §100 is not one of the statutes that may be modified by contractual provisions pursuant to the terms of c. 150E §7(d). The grievant's forum for redress relative to c. 41 §100 benefits is the Superior Court. Therefore, that portion of the Union's grievance claiming c. 41 §100 benefits must be denied. The Town cites authority in support of its arguments.

2. UNION:

The Union argues that Article 21.2, which incorporates c. 41 §100, is substantively arbitrable. The provisions of c. 150E §7(d) do not prohibit the arbitration of the Union's Article 21.2 claim because there is no conflict between Article 21.2 and c. 41 §100, a statute not delineated in c. 150E §7(d). Chapter 41 §100 provisions are merely incorporated as such into Article 21.2, and consequently, they are arbitrable. There is no contract provision which excludes Article 21.2 or c. 41 §100 rights from arbitrable review. In any event, the arbitrator could include as part of a c. 41 §111F remedy, the minor co-pays and deductibles made by the grievant because the Town improperly denied his c. 41 §100 claim. The Union cites authority in support of its arguments.

B. **MERITS:**

1. **UNION:**

The Union asserts that the Town violated Article 21 which incorporates c. 41 §111F by failing to place the grievant on IOD leave from February 25, 2014 to April 14, 2014 following his second ankle surgery. Chapter 152, the Massachusetts Worker's Compensation Act, and cases interpreting it, provide the necessary legal guidance as to the causal link between the performance of job tasks, a resulting injury, medical treatment, and leave in c. 41 §111F cases. Application of the workers' compensation causation analysis leads to the conclusion that the grievant's second ankle surgery in February, 2014 resulted from his March, 2009 uncontested on-the-job injury for which the Town granted c. 41 §100 and §111F benefits to him. Following his first ankle surgery in August, 2009, the grievant returned to full-duty in October, 2009, and the Town was aware that he was experiencing some mobility issues. The grievant's ankle pain continued through his participation and completion of the Academy, and upon his return to duty as a Town police officer. As part of his prognosis following the March, 2009 ankle injury, the grievant's then orthopedic surgeon predicted the need for a future surgical procedure. The grievant's recurrence of his March, 2009 injury is compensable per workers' compensation principles. He was entitled to c. 41 §111F benefits because he sustained no intervening injury prior to February, 2014 when his second ankle surgery took place. The medical evidence supports a conclusion that the second ankle surgery in February, 2014 was necessitated by the grievant's original March, 2009 ankle injury. Moreover, the grievant's credible testimony as to his symptoms following the August, 2009 ankle surgery and prior to the February, 2014 surgery, supports a causal connection between the second surgery and the March, 2009 injury.

The arbitrator should reject the Town's assertion that the grievant's February, 2014

surgical procedure on his ankle resulted from a "wear and tear" condition. It submitted no medical evidence supporting its contention. By way of contrast, Dr. Lobo consistently opined that the grievant's second surgery in February, 2014 was necessitated by a recurrence of the grievant's March, 2009 ankle injury. Consequently, for all of the reasons specified above, the grievance should be upheld and the grievant made whole as to c. 41 §100 and §111F benefits. The Union cites authority in support of its arguments.

2. **TOWN**

The grievant's alleged second injury occurred at the Academy, and is therefore not covered by the provisions of c. 41 §111F. The grievant testified that he re-injured or exacerbated his original ankle injury while performing strenuous physical activity at the Academy. Chapter 41 §96(B) terms govern a police officer's attendance at an Academy. It is clear from those provisions that an injury sustained while at the Academy is governed by the provisions of c. 152, but not by c. 41 §111F. Furthermore, there is no contractual provision that specifies a police officer's rights and benefit entitlements while s/he is at a Academy. The provisions of c. 41 §96(B) exempt Academy attendees from collective bargaining agreement coverage while at the Academy. Therefore, Article 21 and c. 41 §111F provisions do not apply to the grievant's claim for such benefits as related to his February, 2014 ankle surgery. Consequently, the Union's grievance was properly denied by the Town.

Assuming without conceding that Article 21 and c. 41 §111F apply to the grievant's claim for IOD leave, it must be denied as there was no evidence of a new injury following his return to duty in October, 2009. Subsequent to his left ankle surgery in August, 2009, the grievant was returned to full duty without reservation in October, 2009 by his orthopedic surgeon. It is a reasonable assumption that the grievant's ankle injury was fully healed at that

time, and that there was no injury that could be aggravated in the future. In order to secure c. 41 §111F benefits, the grievant must show that he re-injured his left ankle as a result of a discrete incident or event while performing his job duties. Following his return to work in October, 2009 from his first ankle surgery, the grievant did not complain of ankle pain until April, 2012. He made general complaints to Dr. Lobo, which do not satisfy the workers' compensation standard. The grievant was unable to point to a specific on-the-job injury or event which necessitated the February, 2014 surgery, a mandatory element of the workers' compensation analysis adopted by the courts for c. 41 §111F eligibility. Rather, the grievant experienced wear and tear of his ankle following the first surgery in August, 2009, which is not compensable per workers' compensation case law.

The grievance should be denied for all of the reasons specified above. The Town cites authority in support of its arguments.

V. FINDINGS AND OPINION

A. CONTRACTUAL AND LEGAL STANDARD

1. COLLECTIVE BARGAINING AGREEMENT

In order to resolve the issues presented by the parties, it is necessary to evaluate the terms of Article 21 (**Health & Safety and Injury Leave**) which provide as follows:

> 21.1. The Town will maintain in effect for the duration of this Agreement an indemnity health insurance plan with premiums equally divided between the Town and the employees; provided sufficient subscribership is sustained to enable said plan to be offered; additional insurance may be elected by the employee at his/her own expense. In addition, the Town shall provide through the Massachusetts Inter- local Insurance Association the HMO Blue Options plan and PPO Blue Options plan, Effective June 30, 2009, the contribution rate of any new HMO plan shall be 65% by the Town and 35% by the employee.
>
> The Town will establish an IRS Section 105 sanctioned Health Reimbursement Account to reimburse HMO Blue and PPO Blue subscribers for co-pays for inpatient hospital services only.
>
> In the event it becomes impossible or impractical to maintain either or both of these HMO plans, the Town, after consultation with the Association, will select an alternative HMO plan(s) that is (are) available and is (are) reasonably equivalent in benefits and cost to the discontinued plans).
>
> Any dispute concerning eligibility for a payment of benefits under any group health insurance plan maintained by the Town shall be settled in accordance with the terms thereof with the carrier and shall not be subject to arbitration hereunder.
>
> 21.2. Chapter 41, section 100 shall be incorporated by reference into this Agreement.
>
> 21.3. Injury Leave and Light Duty
>
> a) When a member of the bargaining unit is incapacitated from duty because of injury or illness sustained in the performance of duty (including details) without fault of his/her own, he/she shall be granted leave without loss of pay in accordance with Massachusetts General Laws Chapter 41, section 111F and will be indemnified for reasonable and customary expenses in accordance with Massachusetts General Laws Chapter 41, section 100, subject to the following provisions herein below:

i. An employee who suffers an alleged work-related illness or injury shall notify his/her supervisor of the illness or injury within twenty-four (24) hours of when said job-related illness or injury occurs.
ii. Whether or not medical attention is then sought, the employee shall submit a complete written report, with respect to the circumstances of the illness or injury, to his/her supervisor and to the Police Chief.
iii. The employee's supervisor shall provide the Police Chief with a detailed report of the circumstances which, in his/her opinion, gave rise to the illness or injury. The Police Chief (and/or the Town Manager) may require additional reports if necessary.
iv. The Police Chief, after consultation with the employee's supervisor and the attending doctor, shall recommend to the Town Manager whether or not the employee shall be placed on injury leave status.
v. If the Town Manager does not determine from the reports that injury leave is justified, he/she may require the submission of a medical statement from the employee's physician on the question of causation. If after having received said statement, the Town Manager does not grant injury leave, the Town Manager may require the employee to submit to a physical or psychological examination, at the Town's expense.
vi. If the employee's doctor and the Town's doctor disagree as to causation, they shall thereupon jointly designate a physician agreeable to both who, at the Town's expense, shall examine the employee and render a written medical opinion on the question of causation, copies of which shall be transmitted by him to the Town's doctor, the employee's doctor, the employee, and the Town Manager. In the event of their inability to agree on a third physician, a physician shall be jointly selected by them from a list or panel of physicians suggested by the Commissioner of Public Health for the Commonwealth of Massachusetts, in cooperation with the parties hereto, in which event such physician, at the Town's expense, shall so examine the employee and render his/her opinion on the question of causation, copies of which shall be transmitted by him to the Town's doctor, the employee's doctor, the employee, and the Town Manager. The opinion of the third physician shall be final and binding on the parties.
vii. Pending the decision of the Town Manager or, in the event of a dispute with respect to the issue of causation, pending receipt of the opinion of the third physician, the employee shall be placed on paid administrative leave. Once a determination with respect to the issue of causation has been made (either by the Town Manager to justify injury leave, or by the doctor(s) to substantiate injury leave or sick leave), the employee shall be placed in the appropriate leave status retroactive to the date of injury.

viii. The employee shall be required to provide medical information release forms from all relevant medical providers regarding the specific work-related illness or injury.

ix. The Town or its designated occupational health consultant shall review all requests for indemnification of medical expenses and shall make payment for reasonable and customary charges.

x. An employee who has been determined by the Town to be eligible for injury-on-duty benefits (hereinafter" IOD") shall have such benefits terminated if any of the following events occurs:

(1) The employee returns to full duty or limited duty (except that the Town will continue to apply for reasonable and customary medical expenses after the employee has returned to work.)

(2) The employee retires or is pensioned in accordance with Massachusetts General Laws.

(3) The employee fails to comply with all obligations set forth herein.

(4) The employee resigns from the department.

(5) The employee is terminated for cause, unrelated to his/her injured-on-duty status and in accordance with applicable law.

(6) The employee has been determined "fit" pursuant to subsections b. And c. Of this section. Failure by the employee, without sufficient reason, to appear at a medical examination called pursuant to this section may result in suspension of IOD benefits until the medical examination is rescheduled and held, and may also result in disciplinary action.

(7) The applicable general laws, as amended, provide for any other reason for termination of IOD benefits.

(8) The employee fails to appear, without good cause, for a medical examination to determine the status of his/her injury leave.

(9) An employee who has been approved for IOD status shall not engage in any gainful employment except as permitted, in advance, by the Police Chief. An employee who engages in gainful employment without the express permission of the Chief shall forfeit his/her IOD benefits, provided such permission is not unreasonably denied.

(10) When so ordered, an employee who has been approved for IOD benefits shall report for physical/psychological examinations, including Independent Medical Examinations (IME's), at reasonable intervals to determine whether the treatment being received is appropriate and/or whether the employee is still incapacitated.

(11) An employee who has been approved for IOD status shall comply with all requests for information and/or other medical case management requirements related to the illness or injury, as may be presented by the Town or its designated occupational health consultant.

(12) The provisions contained in this section shall apply to all new cases, cases ongoing as of the date of execution of this Agreement, and to recurrences of cases which initially arose prior to the execution of this Agreement.

(13) Failure to comply with the procedures set forth in this section shall warrant the Town Manager (or his/her designee), after consultation with the Police Chief, in terminating the employee's IOD status, subject to the employee's right of appeal pursuant to the grievance and arbitration provisions of this Agreement and the applicable provision of Massachusetts General Laws.

b) An employee shall be entitled to examination and treatment by a physician of his/her own choice. A doctor designated by the Town may examine the employee as to the employee's fitness to resume full police duty or light duty as described herein. The employee's doctor shall be afforded full opportunity to consult with the Town's doctor as to the employee's fitness to resume full police duty or light duty as described herein.

i. If the employee's doctor and the Town's doctor disagree as to such "fitness", they shall thereupon jointly designate a physician agreeable to both, who at the Town's expense, shall examine the employee and render a written medical opinion as to the employee's fitness to resume full police duty or light duty, as described herein, copies of which shall be transmitted by him to both the Town's doctor and the employee's doctor. In the event of their inability to agree upon a third physician, a physician shall be jointly selected by them from a list or panel of physicians established or suggested by the Commissioner of Public Health for the Commonwealth of Massachusetts, in cooperation with the parties hereto, upon which event such physician, at the Town's expense, shall so examine the employee and render his/her opinion as aforesaid.

ii. Pending receipt of such opinion, the Town shall not require the officer to return to duty and shall continue to fully compensate him on paid injured leave for lost time due to any such absence. If the third physician shall determine that the employee is not fit to resume full police duty or light duty as described herein, the employee shall remain on fully paid injured leave status. If the third physician shall determine that the employee is fit to resume full police duty or light duty as described herein, the employee shall be so advised, and shall return to work, failing which he/she shall no longer receive injured leave pay as aforesaid.

c) "Light duty" under this Article shall be limited to clerical work, typing, filing, maintenance of weapon and other personal police equipment, crime prevention programs and operation of computer terminals. Light duty shall not include any work wherein the subject officer must deal with or be exposed to the public in uniform. Employees on light duty shall be assigned to the day shift only, wear plain clothes, be allowed to attend Criminal Justice Training Council courses, and not be counted to meet staffing requirements. Employees may only be assigned to light duty if they are expected to return to full duty within a reasonable time. An Employee injured off the job shall be considered for light duty upon joint agreement between the Town and the employee, on the same basis as an employee injured in the line of duty.

i. An employee on injured-on-duty leave status shall accrue paid sick leave and paid vacation leave only during the first nine (9) months of said leave status; if an employee remains on injured-on-duty status in excess of nine (9) months, sick leave and vacation leave benefits shall neither accrue or be paid.

21.4. There shall be a $2,000.00 payment made to an employee (or his/her designated beneficiary or his/her estate in the case of death) who retires on superannuation from the Department pursuant to the provisions of Massachusetts General Laws Chapter 32 or who dies while employed by the Department.

An employee, who retires on superannuation shall receive a lump sum $1,000.00 if said employee shall have used no paid sick leave or injured-on-duty 111F paid leave in the twelve months preceding his/her superannuation retirement; this lump sum figure shall use FY02 as the base year, and be subject to base wage colas for future fiscal years.

Therefore, c. 41 §100 and c. 41 §111F as included in Article 21 respectively provide for Town cost indemnification and leave at full pay for an on-the-job injury.

2. CHAPTER 41 §100 and §111F

In relevant part, c. 41 §100 provides as follows:

Upon application by a fire fighter or police officer of a city, town or fire or water district, or in the event of the physical or mental incapacity or death of such fire fighter or police officer, by someone in his behalf, the board or officer of such city, town or district authorized to appoint fire fighters or police officers, as the case may be, shall determine whether it is appropriate under all the circumstances for such city, town or district to indemnify such fire fighter or police officer for his reasonable hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic and related expenses and reasonable charges for chiropody (podiatry)

> incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to his employment, while acting in the performance and within the scope of his duty without fault of his own. If such board or officer determines that indemnification is appropriate, such board or officer shall certify for payment, either directly or by way of reimbursement, by such city, town or district, in the same manner as a bill lawfully incurred by such board or officer but out of an appropriation for the purposes of clause (32) of section five of chapter forty, such of said expenses as may be specified in such certificate. Whenever such board or officer denies an application in whole or in part, such board or officer shall set forth in writing its or his reasons for such denial and cause a copy thereof to be delivered to the applicant. At any time within two years after the filing of an application as aforesaid, an applicant aggrieved by any denial of his application or by the failure of such board or officer to act thereon within six months from the filing thereof may petition the superior court in equity to determine whether such board or officer has without good cause failed to act on such an application or, in denying the application, in whole or in part, has committed error of law or has been arbitrary or capricious, or has abused its or his discretion, or otherwise has acted not in accordance with law. After due notice and hearing, such court may order such board or officer to act on such application or to consider, or further consider, and determine the same in conformity with law.
>
> In pertinent part, c. 41 §111F includes the following provisions:
>
> Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter.

Therefore, pursuant to Article 21 and c. 41 §100 and §111F, a police officer injured in the line of duty is entitled to IOD leave and indemnification as to all medical expenses related thereto. That portion of the Union's grievance claiming a c. 41 §100 benefit is not substantively arbitrable as its provisions require a denied applicant to petition the Superior Court for relief. However, based

on the evidence presented, particularly the grievant's medical records, it is clear that the condition of the grievant's ankle, necessitating a second February, 2014 surgery, was caused by his March 21, 2009 on-the-job injury.

Pursuant the holding in *Wormstead v. Town Manager of Saugus*, 366 Mass. 659 (1975), a case cited by both parties, and its progeny, c. 41 §111F disputes are resolved by applying workers' compensation law interpreting and applying the provisions of c. 152, the Workers' Compensation statute. The *Wormstead* court held that the c. 41 §111F "in the performance of his duty" standard is analogous to the words "arising out of and in the course of his employment" of c. 152 §26. Id. @663. Therefore, relevant workers' compensation case law will be applied to the facts of the instant case to determine the grievant's entitlement to IOD leave after his second ankle surgery on February 25, 2014.

B. MARCH 21, 2009 INJURY AND AUGUST 8, 2009 SURGERY

On March 21, 2009, the grievant sustained an ankle injury while in the performance of his duties. (See Joint Exhibits #7 & #8.) He was taken by ambulance to Beverly Hospital where an aircast was applied and crutches provided. (See Joint Exhibits #7 & #8.) On April 23, 2009, the grievant was examined by Dr. Hugh O'Flynn of Coastal Orthopedic Associates in Beverly. (See Joint Exhibit #9.) Dr. O'Flynn's March 23, 2009 "Impression" was that the grievant sustained "an ankle sprain with the fibula avulsion fracture primarily ATFL." (See Joint Exhibit #9.) In his March 23, 2009 "History and Present Illness," Dr. O'Flynn causally related the grievant's March 21, 2009 injury to the performance of his job duties:

> Aaron is a police officer in Ipswich who was on the job walking from a walkway when he stepped on a sloped surface and rolled his left nondominant ankle. Immediate pain and swelling. Went to the hospital, X-rays showed an avulsion fracture from the tip of the lateral malleolus. No structural fracture noted. He was

> placed in an air cast and given crutches: Because it happened on the job he follows up here for concerns about return to work.

Dr. O'Flynn opined that the grievant would be able to return to work "by the end of the week." (See Joint Exhibit #9.) The grievant returned to work in a short period of time and received physical therapy. The grievant credibly testified that following his March 21, 2009 injury, his ankle would pop and lock with movement, causing pain, symptoms reported to and recorded by Dr. O'Flynn at the grievant's second office visit on July 8, 2009. (See Joint Exhibit #10.). As a result of the grievant's July 8, 2009 office visit, Dr. O'Flynn's "History of Present Illness" was as follows:

> Aaron is now over 3 months out from an avulsion fracture of his right ankle. He has been going to physical therapy for the last several weeks, has had 13 visits to date, but has not made any progress. He continues to have the anterior and lateral pain that was present at his last visit about 6 weeks ago. He thinks that the pain is slightly worse than it was before but the popping sensation over the anterior ankle is worse. His ankle seems to lock up when he attempts torso flexion and he gets a pain from the base of his second and third toes up to about 6 inches above his ankle. He had tried to use an elliptical machine yesterday and as long as he did it slowly, he had no difficulty, but when he tried to reproduce a more normal walking pace, he had significant pain and popping in his ankle. He is quite discouraged over his lack of progress. (See Joint Exhibit #10.)

Dr. O'Flynn's "Impression" on July 8, 2009 was that the grievant was experiencing "persistent left ankle pain with instability." (See Joint Exhibit #10.) Dr. O'Flynn scheduled an Magnetic Resonance Imaging (MRI) examination of the grievant at the July 8, 2009 office visit. (See Joint Exhibit #10.) An MRI of the grievant's ankle was taken on July 15, 2009. (See Joint Exhibit #11.)

Dr. O'Flynn referred the grievant to Dr. Robert Wood, an orthopedic surgeon specializing in ankle reconstruction, associated with Sports Medicine North in Peabody. (See Joint Exhibit #12.) Dr. Wood met with the grievant on July 28, 2009. (See Joint Exhibit #12.) In

his office note of the July 28, 2009 meeting with the grievant, Dr. Wood reviewed the July 15, 2009 MRI and noted that it revealed "a medial talar dome osteochondral lesion." (See Joint Exhibit #12.) Dr. Wood established the causal connection between the performance of the grievant's job duties and his ankle injury: "He rolled his ankle leaving a crime scene." (See Joint Exhibit #12.) Also included in Dr. Wood's July 28, 2009 office note was the following "Impression and Plan:"

> We had discussion with him today regarding treatment options including surgical versus nonsurgical treatment. He has undergone extensive nonsurgical treatment thus far, and I feel that surgical intervention is warranted at this time. Recommended ankle arthroscopy, debridement, and drilling of osteochondral lesion of his medial talar dome. Potential complications, neurovascular injury, infection. DVT, and persistent worsening of pain postoperatively were discussed with the patient He also understands the potential for needing further surgery on his ankle down the road pending his response to the proposed surgery. He understands that he would need to be four weeks in the cast, nonweightbearing postoperatively and that likely return to work will be at three to four months. He understands and wishes to proceed. We look forward to seeing him at the time of surgery. CPT codes for the proposed surgery 29898 and 29891. (See Joint Exhibit #12.)

Due to the failure of non-surgical intervention to rehabilitate the grievant's ankle injury. Dr. Wood recommended "ankle arthroscopy, debridement, and drilling of osteochondral lesion of his medial talar dome." (See Joint Exhibit #12.) Dr. Wood noted that the grievant would be out of work for "three to four months." (See Joint Exhibit #12.) Significantly, as to the causal relationship between the February 25, 2014 surgery and the March 21, 2009 injury, Dr. Wood noted the "potential for needing further surgery on his ankle down the road pending his response to the proposed surgery." (See Joint Exhibit #12.) Therefore, even prior to the first August 7, 2009 surgery, Dr. Wood was predicting the need for future surgery on the grievant's ankle, injured on March 21, 2009 in the performance of his duties, which second procedure took place on February 25, 2014. Therefore, Dr. Wood's prognosis as to the need for future surgery on the

ankle, injured on March 21, 2009, supports a finding that the February 25, 2014 surgery and the grievant's resulting incapacity from February 25, 2014 through April 14, 2014, resulted from his March 21, 2009 on-duty ankle injury.

In his surgical report of the August 7, 2009 surgery, Dr. Wood noted that "there was, ...a large lesion on the medial aspect of the talar dome." (See Joint Exhibit #13.) He also indicated that he "drilled through the lesion in multiple areas." (See Joint Exhibit #13.) The grievant returned to work in October, 2009 after being cleared by Dr. Wood to do so. Upon his return to work, the grievant continued to engage in physical therapy. The grievant testified that following the surgery and his return to work in October, 2009, he continued to experience a limited range of motion in his ankle with some associated pain. As of March 11, 2010, the grievant reported that he was "approximately 70% better now." (See Joint Exhibit #14.) He also noted that he had "some difficulty in terms of the motion of his ankle..." Significantly, on March 11, 2010, pre-Academy, Dr. Wood observed that the grievant "does have some difficulty in terms of the motion of his ankle..." (See Joint Exhibit #14.) His physical examination of the grievant also revealed "dorsiflexion only to about 5 degrees, plantar flexion to about 50 degrees." (See Joint Exhibit #14.)

The grievant was scheduled to attend the twenty-six (26) week Academy in April, 2010. In connection with his participation in the Academy, the grievant sought Dr. Wood's opinion as to his ability to engage in the physical activity expected of Academy attendees. On March 11, 2010, Dr. Wood and the grievant discussed his attendance at the Academy, specifically his ability to run five (5) miles daily. (See Joint Exhibit #14.) The grievant reported to Dr. Wood that as of March 11, 2010, he was able to run three (3) miles without incident. (See Joint Exhibit #14.) Dr. Wood recommended that the grievant increase his running as tolerated, and in

connection therewith he prescribed a lace-up ankle brace to provide more stability to his ankle. (See Joint Exhibit #14.) On March 18, 2009, again pre-Academy, the grievant was given a prescription for physical therapy "in order to increase ankle mobility and strength." (See Joint Exhibit #14.) Dr. Wood noted that "we do feel that he can proceed forward without restriction." The grievant was also cleared to attend the Academy by the Town's designated physician. (See Joint Exhibits #28 and #29.) The grievant successfully completed the twenty-six (26) week Academy from April, 2010 to October, 2010. It is worthy of note that although the grievant's post-surgical symptoms worsened while at the Academy, the grievant returned to full-duty without restriction in October, 2010. However, the grievant testified that just as before his attendance at the Academy, when his ankle would pop and lock with pain and a limited range of motion, he experienced the same symptoms after the Academy and prior to his second surgery in February, 2014.

On October 14, 2011, the grievant was examined at the Lahey Clinic in Ipswich for "morbid obesity and sleep apnea." (See Joint Exhibit #15.) During his visit, it was noted that he had "on-going left ankle pain with a pain score of 6." (See Joint Exhibit #15.) The grievant testified that he did not report any ankle pain before or after his attendance at the Academy because he was informed by Dr. Wood, even prior to the August 7, 2009 surgery, that he would be required to work through the pain as a result of the March 21, 2009 injury. Therefore, based upon that early warning by Dr. Wood, it was reasonable for the grievant to work and engage in other physical activities despite his ankle pain without complaint. However, based on the medical records, it is clear that the grievant's ankle pain worsened as time went on.

C. **FEBRUARY 25, 2014 SURGERY**

On March 7, 2012, the grievant was evaluated by Dr. Lobo. (See Joint Exhibit #16.)Dr.

Lobo also causally connected the grievant's ankle condition to his 2009 injury:

> This is a 31 year old Ipswich Police Officer who rolled his ankle during a call back in April 2009. He had immediate pain and swelling.(See Joint Exhibit #16.)
>
> In the "History" section of her office note, Dr. Lobo commented as follows:
>
> He reports prior to his surgical procedure he had mechanical symptoms. Since his surgical procedure, he has had no mechanical symptoms, but has had a constant pain in the ankle. He attended the police academy in July 2010 for 26 weeks, which included significant running. He had difficulty with that. He continues to have pain and decreased motion and returns here today for evaluation. (See Joint Exhibit #16.)

Dr. Lobo's March 7, 2012 examination of the grievant revealed decreased range of motion and pain. (See Joint Exhibit #16.) In her "Assessment and Plan," Dr. Lobo noted the probability of a second surgery, but ordered another MRI of the grievant's ankle prior to her final determination. (See Joint Exhibit #16.)

The March 29, 2012 MRI ordered by Dr. Lobo revealed the following issues regarding the grievant's left ankle:

1. Subchondral subtle cystic changes in the medial talar dome associated with significant bone marrow edema are compatible with osteochondral lesion. No displaced fragments or obvious cortical defect.
2. Focal hypertrophic spur formation along the anterior margin of the distal tibia associated with some bone marrow edema is compatible with clinical history of anterior impingement.
3. Suspect mild tenosynovitis flexor hallucis longus and posterior tibial tendon.
4. Mild edema and small ganglion cyst in the sinus tarsi and other findings as detailed above. (See Joint Exhibit #17.)

At an April 4, 2012 office visit, Dr. Lobo reviewed the March 29, 2012 MRI findings with the grievant and noted that they demonstrated "significant bone marrow edema of his medial talar dome with osteochondral defect as well as continued anterior osteophyte formation as visualized on the x-ray." (See Joint Exhibit #18.) As to her "Assessment and Plan," Dr. Lobo wrote that the grievant "is a 31 year old male with medial talar dome OCD." "This is likely

recurrent from his previous injury..." (See Joint Exhibit #18.) Therefore, based on the grievant's March 29, 2012 MRI, Dr. Lobo linked its findings to his March 21, 2009 injury. At a June 11, 2012 follow-up visit, Dr. Lobo compared the findings of the June 15, 2009 MRI with the March 29, 2012 MRI as follows:

> The operative note was reviewed and has been scanned into the system which describes ankle arthroscopy, removal of loose body, and microfracture of the medial talar dome OCD. He also brings his old MRI which is compared to the recent MRI. The area of the lesion is the same, so there is worsening bone marrow edema now than there was in 2009. (See Joint Exhibit #19.)

Significantly, in comparing the pre-surgical 2009 MRI with the 2012 MRI, Dr. Lobo noted that "the area of lesion is the same." (See Joint Exhibits #11, #12, and #19.) It is also worthy of note that the March 29, 2012 MRI finding of a "medial talar dome OCD" is consistent with Dr. Wood's post-surgical X-ray indicating a very small defect on the medial aspect of the talar dome. (See Joint Exhibit #14.) In her June 11, 2012 "Assessment and Plan," Dr. Lobo wrote:

> Aaron Woodworth is a 31-year-old male with a work-related left medial talar dome osteochondral defect that is still symptomatic despite ankle arthroscopy and microfracture back in 2009 based on the significant amount of bone marrow edema. (See Joint Exhibit #19.)

In her June 11, 2012 "Assessment and Plan," Dr. Lobo also recommended "a repeat arthroscopy for reevaluation of the osteochondral defect as well as a repeat microfracture." (See Joint Exhibit #19.) Therefore, not only was the grievant's ankle condition the same in 2012 as it was in 2009, as demonstrated by a comparison of the two (2) MRIs and the post-surgical x-rays, but it was treated by the same two (2) surgical procedures.

On November 15, 2012, the grievant requested IOD leave and c. 41 §100 cost reimbursement from the Town relative to Dr. Lobo's recommended surgical procedure. (See Employer Exhibit #1.) The Town denied the grievant's request. (See Employer Exhibit #1.)

However, despite its Article 21 and c. 41 §111F right to do so, it did not seek and Independent Medical Examination (IME), or any other examination of the grievant. In early March, 2013, the grievant underwent gastric bypass surgery. (See Joint Exhibit #20.) The grievant's second ankle surgery was delayed by his by-pass procedure, and his unwillingness to increase Departmental overtime costs by taking leave at the same time that another same-shift Officer was at the Academy. The grievant next saw Dr. Lobo on March 11, 2013. (See Joint Exhibit #20.) Dr. Lobo's March 11, 2013 Assessment and Plan included the following elements:

> Aaron Woodworth is a 32-year-old male with a persistent osteochondral defect of his medial talar dome since his injury that he sustained in April 2009 that he states was exacerbated in Academy in 2010 and is not resolved to a pain-free state. I do think ultimately he would be best served with an ankle arthroscopy to further debride the osteochondral defect and ultimately may need to have an OATS procedure. The patient is in agreement with this plan and we will once again submit the paperwork for an ankle arthroscopy. (See Joint Exhibit #20.)

Significantly, Dr. Lobo opined that the grievant's osteochondral defect of the medial talar dome is persistent since his 2009 injury, again establishing the causal nexus. In her March 11, 2013 "History," Dr. Lobo also wrote "I feel that this lesion is the same as the lesion that he had in 2009 and is worsened likely secondary to increased activity. (See Joint Exhibit #20.) In her March 11, 2013 office note, Dr. Lobo noted the Town's refusal to consider the second proposed surgery as occasioned by, or as a result of the grievant's March, 2009 injury.

In a November 27, 2013 office note, Dr. Lobo noted that the grievant had lost a considerable amount of weight as a result of the gastric by-pass surgery. (See Joint Exhibit #21.) She also observed that he was recovering from gastric by-pass surgery and had not seen her for a number of months. (See Joint Exhibit #21.) She noted, however, that the grievant's ankle "remains the same." She commented that the grievant complained of "toothache-like pain and locking and catching of the ankle." (See Joint Exhibit #21.) It is noteworthy that in late-

November, 2013, the grievant continued to complain of locking and catching, the same symptoms that he experienced prior to the Academy. As to a resolution of the instant case, Dr. Lobo noted the following:

> We previously discussed ankle arthroscopy with a repeat debridement and microfracture. I still think this is the best approach for this osteochondral lesion that he sustained in a work-related injury. The patient understands the procedure as well as the recovery time involved. He wishes to do this sooner rather than later. We will get this set up for him in a timely manner. (See Joint Exhibit #21.)

Significantly, Dr. Lobo referred to the same osteochondral lesion that was observed on the first July 15, 2009 MRI and second March 29, 2012 MRI, and she concluded that the lesion was "sustained in a work-related injury." (See Joint Exhibits #11, #12, #19, and #20.) In reading Dr. Lobo's office notes together, it is beyond any doubt that she was referring to the grievant's original 2009 injury as no other injury is referenced. The grievant testified without contradiction that prior to his March 21, 2009 on-the-job injury, he had no ankle problems. Moreover, there is no evidence of another injury. The only work-related injury noted in the records is the one that occurred in 2009. It is clear that Dr. Lobo believed that the second surgery was necessary to resolve the ankle defects which resulted from the 2009 on-the-job injury.

On January 23, 2014, the Lahey Clinic's Department of Orthopaedic Surgery notified the Town that the grievant would have ankle surgery on February 25, 2014 and he would be out of work for approximately two (2) to three (3) months. (See Joint Exhibit #22.) The Union attempted to persuade the Town to place the grievant on IOD leave but to no avail. (See Union Exhibit #1.) The grievant submitted a formal report to the Town concerning his surgery, post-surgical progress made, and a likely return to work date following the surgery. (See Joint Exhibit #23.) The Town was also notified of the grievant's physical therapy progress following the February 25, 2014 surgery. (See Joint Exhibits #24 and #25.) The grievant was cleared to return

to light duty work on or about April 14, 2014 while he continued physical therapy. (See Joint Exhibit #24.) The grievant was cleared to return to full duty work on April 28, 2014 with a continuation of physical therapy. (See Joint Exhibits #25 and #26.) In a June 11, 2014 post-surgical visit with the grievant, Dr. Lobo noted in her "Assessment and Plan" as follows:

> Aaron Woodworth is a 33-year-old male who has recovered quite nicely from his recurrent osteochondral lesion sustained in a work-related injury. (See Joint Exhibit #27.)

Significantly, Dr. Lobo noted a "recurrent osteochondral lesion sustained in a work-related injury." The parties contemplated c. 41 §111F coverage for "recurrences" per the following §21.3 (**Injury Leave and Light Duty**) terms:

> The provisions contained in this section shall apply to all new cases, cases on-going as of the date of execution of this Agreement, and to recurrences of cases which initially arose prior to the execution date of this Agreement. (See Joint Exhibit #1.)

There is no evidence that the Town had the grievant examined by its designated physician pursuant to its Article 21 rights, or that it sought to do so. Consequently, from Dr. Lobo's unrebutted assessment, it is clear that the grievant's February 25, 2014 surgery and resulting incapacity resulted from the grievant's "recurrent osteochondral lesion" sustained in his March 21, 2009 on-the-job injury. The grievant's original lesion, which required the first, August 7, 2009 surgery, resulted when the grievant sustained his March 21, 2009 injury, and re-occurred requiring the second, February 24, 2014 surgery.

D. WEAR AND TEAR

Relevant workers' compensation decisions applied to the facts of the instant case, do not support the Town's contention that the February, 2014 surgery and leave was necessitated by non-IOD wear and tear on the left ankle but not by his 2009 on-the-job injury. In *Gentile v.*

Carter Pile Driving, Inc., Mass. Workers' Comp. Rep. 435 (2003), a pile driver sustained an on-the-job fracture of his left arm and a shattered elbow. Id. @435. He underwent a surgical procedure and following a period of recuperation, resumed light duty employment with another employer. Id. @435. Nevertheless, his left arm and wrist symptoms worsened, and he requested a lay-off. Id. @435. The injured employee filed a claim against the insurer of the first employer (where he sustained the fracture), and a dispute arose as to liability, causal relationship, and disability. Id. @436. The impartial medical examiner causally related the claimant's loss of function and associated restrictions to his original injury. Id. @436. The Reviewing Board (Board) of the Department of Industrial Accidents (DIA) rejected the argument that an aggravation of the claimant's symptoms in successive employment constituted a new, identical injury. Id. @436. The Board reasoned that "the medical evidence was uncontroverted that the employee suffered from a recurrence/aggravation of his symptoms rather than a change in his underlying condition." Id. @437. In the instant case, the medical evidence is in accord. In recommending the second, February 14, 2014 surgery, Dr. Lobo causally related the grievant's ankle symptoms to his March 21, 2009 injury, despite their aggravation at the Academy. The exacerbation of the grievant's symptoms at the Academy does not a new injury make based on relevant workers' compensation law. In *Gentile*, the Board also found as follows:

> An employee may suffer a recurrence of incapacity which does not rise to the level of being a new industrial injury under c. 152. See Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 563-564 (1995). The law is well established that the deleterious effects of work subsequent to an industrial injury do not amount to a new industrial injury where the incapacity suffered is "simply the natural physiological progression of a condition following the initial incident." Smick v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 86-88 (1993). Here, (the impartial examiner's) opinion makes it clear that (claimant's) aggravated symptoms experienced while working for (second employer) were of the Smick variety, rather than a new "lesion," as a c. 152 personal injury was described in Burns' Case, 218 Mass. 8, 12 (1914). See

> Costa's Case, 333 Mass. 286, 289 (1955)(upholding administrative judge's adoption of medical opinion causally connecting disability to original injury even in the face of equivocation as to second employment's contribution). Finally, it is of some consequence that the employee in the present case suffered symptoms on a consistent basis throughout the disputed post-1999 injury period of disability. (Tr. 25.) See Rock's Case, 323 Mass. 428, 429-430 (1948)(continual complaints of pain since original injury supported award against insurer on risk at that time). Supra @438.

Similarly, in the instant case, the grievant complained of range of motion restriction and pain following the first surgery and before attending the Academy. Significantly, even prior to the first August 7, 2009 surgery, Dr. Wood forecasted the need for a second surgery. Moreover, the 2009 and 2012 MRIs both showed a lesion of medial talar dome. (See Joint Exhibits #11 and #19.) In the instant case, it is clear from the evidence that the grievant's second February 25, 2014 surgery and his second disability from February 25, 2014 to April 14, 2014 resulted from continued and worsening symptoms of his March 21, 2009 on-the-job injury. Consequently, the grievant should have been placed on IOD leave for his February 25, 2014 to April 14, 2014 incapacity period.

In *Zerofski's Case*, 385 Mass. 590 (1982), the Supreme Judicial Court held that despite the wear and tear of ten (10) years of walking on the shop floor following a compensable on-the-job broken toe, the fractured toe "was a contributing cause of his disability, and a compensable personal injury within the meaning of the act." Id. @595. Therefore, it concluded that Zerofski's disability subsequent to the ten (10) year wear and tear period was compensable by the insurer that paid the original claim when the grievant sustained a broken toe. Id. @596. Similarly, the wear and tear on the grievant's ankle at the twenty-six (26) week Academy did not constitute a new personal injury. Even a non-work incurred wear and tear is not a disqualifier. The holding in *Twomey's Case*, 5 Mass. Workers' Comp. Rep. 156 (1991) stands for the proposition that when a

non-work activity causes a recurrence or aggravation of a work injury, the injury is compensable if the activity was normal and reasonable and not performed negligently. The grievant's second surgical procedure in February, 2014 and his resulting period of disability was necessitated by and is causally related to the grievant's original March 21, 2009 injury.

It is clear from the evidence, including Dr. Lobo's medical records that the grievant was disabled from February 25, 2014 to April 14, 2014 because of his March 21, 2009 on-the-job injury, without fault of his own, for which surgery was required on February 25, 2014. The grievant's February 25, 2014 to April 14, 2014 incapacity is hereby classified as c. 41 §111F leave, and the grievant shall be placed forthwith on c. 41 §111F leave for the period February 25, 2014 to April 14, 2014. The period of leave from February 25, 2014 to April 14, 2014 shall forthwith be recorded by the Town as c. 41 §111F leave. The sick leave taken by the grievant following his February 25, 2014 surgery and prior to his return to work on April 14, 2014 shall be restored to his sick leave account.

E. <u>MEDICAL EXPENSES; FEBRUARY 25, 2014 SURGERY</u>

The Town contends that the grievant's claim for c. 41 §100 benefits is not substantively arbitrable because it is not one of the statutes listed in c. 150E §7(d) that can be modified by a collective bargaining agreement provision. In pertinent part, c. 150E §7(d) provides as follows:

> (d) If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one or of a police commissioner or other head of a police or public safety department of a municipality; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:...
>
> (q) ..., the terms of the collective bargaining agreement shall prevail.

While c. 41 §§111 to 111(I) is included in c. 150E §7(d), c. 41 §100 is not so listed. In *City of Springfield vs. Local Union No. 648, International Association of Fire Fighters*, 79 Mass. App. Ct. 905 (2011), the court, citing *AT&T Technologies, Inc. v. Communications Wkrs. of Am.*, 475 U.S. 643, 650 (1986), held that the exclusion of c. 41 §100 from c. 150E §7(d) is "...forceful evidence of a purpose to exclude the claim from arbitration... " Id. @906. The *Springfield* court went on to reason that,

> "The omission of a statute, such as G. L. c. 41, § 100, from this list strongly suggests that the Legislature intended employers and employees alike to be bound by the particular rights and remedies provided in the omitted statute," Supra., 907.

See also *Lawrence v. Lawrence Patrolmen's Assn.*, 56 Mass. App. Ct. 704 , 708 (2002). Supra @907. Nevertheless, the Union contends that the c. 41 §100 claim is substantively arbitrable because there is no conflict between Article 21 and c. 41 §100 in the instant case. Section 21.2 of the collective bargaining agreement provides as follows:

> "Chapter 41, section100 shall be incorporated into this Agreement."

In relevant part, Article 21 §21.3(a) indicates that a bargaining unit employee "will be indemnified for reasonable expenses in accordance with Massachusetts General Laws c. 41 §100...as a result of an incapacity from an on-the-job injury." The grievant's out-of-pocket co-pays and deductibles, related to his February, 2014 surgery and associated medical treatment before, during, and after the February 25, 2014 to April 14, 2014 disability period, must be considered as "hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic, and related expenses" as specified in c. 41 §100. Consequently, as there is no conflict between the terms of Article 21 and c. 41 §100, the parties' dispute as to c. 41 §100 payments can be determined by the arbitrator, according to the Union. The Union also correctly argues that while Article 5 (**Grievance and Arbitration Procedure**) §5.6 precludes the arbitration of certain civil

service commission and retirement board matters, except under certain circumstances, there is no reference to a c. 41 §100 exclusion. However, the inquiry does not end at this juncture. In evaluating the provisions of §100, it is clear that an employee aggrieved by the decision of a Town board or officer denying his application for §100 benefits:

> "...may petition the superior court in equity to determine whether such board or officer has without good cause failed to act on such an application or, in denying the application, in whole or in part, has committed error of law or has been arbitrary or capricious, or has abused its or his discretion, or otherwise has acted not in accordance with law. After due notice and hearing, such court may order such board or officer to act on such application or to consider, or further consider, and determine the same in conformity with law."

Not only is the Superior Court identified as the appropriate forum for c. 41 §100 disputes, the Legislature also specified the relief that the Superior Court may order to an aggrieved petitioner. The conflict between the collective bargaining agreement's Article 5 and c. 41 §100 is that each prescribe a different avenue of redress in the event of a dispute. Per Article 5, collective bargaining disputes and others such as c. 41 §111F claims, are resolved through the grievance procedure culminating in arbitration, while pursuant to the terms of c. 41 §100, disputed §100 claims are resolved by petitioning the Superior Court.

As to my authority, Article 5.4 identifies the following restrictions:

> The arbitrator shall not have any authority or power to award or determine any change in, modification or alteration of, addition to, or subtraction from, any of the provisions of this Agreement.

While it may be inefficient and redundant to litigate a c. 41 §111F claim through arbitration, and to petition the Superior Court concerning the non-payment of c. 41 §100 benefits in the same case, I am without the authority to supplant the statutory forum prescribed in c. 41 §100, as my jurisdiction as the grievance arbitrator is limited to interpreting the parties' collective bargaining agreement which does not extend to disregarding or amending the statute. Therefore, the

grievant's claim for c. 41 §100 benefits is not substantively arbitrable. However, having concluded that the grievant is eligible for c. 41 §111F leave from February 25, 2014 to April 14, 2014, I encourage the parties to attempt a resolution of his c. 41 §100 claim related to his February 25, 2014 surgery.