

IN THE MATTER OF AN EXPEDITED ARBITRATION UNDER THE
LABOUR RELATIONS CODE, R.S.B.C. 1996

BETWEEN:

Northwest Community College

(the "Employer")

AND:

B.C. Government and Service Employees' Union,
Local 712

(the "Union")

Re: Sandra Clark Grievance

ARBITRATOR:

John Steeves

COUNSEL:

Bruce Grist
for the Employer

Kate Campbell
for the Union

DATE OF HEARING:

July 18, 2006

PLACE OF HEARING:

Vancouver, B.C.

DATE OF AWARD:

August 24, 2006

A. INTRODUCTION

1. This is a decision about whether the Employer has the primary obligation to pay short-term disability benefits to the Grievor, Ms. Sandra Clark, or whether the Employer's obligation is limited to paying premiums for a private carrier to administer the disability plan, including making decisions about the payment of benefits.

2. The Employer submits their obligation ends with the payment of premiums and the provision of a short-term disability plan, administered by a private carrier. This is raised as a preliminary issue. According to the Employer, they contracted with a carrier to provide short-term disability (STD) payments and then the Grievor made application for those benefits through the carrier. She was not successful and the Employer submits that they do not have any obligation under the collective agreement to provide benefits to the Grievor. The Employer seeks dismissal of the grievance on the basis of their preliminary objection.

3. The Union submits that the mutual intention of the parties is contained in the collective agreement. This requires the Employer to specifically provide for certain benefits, not just for a general benefit scheme, and whether an insurance carrier is involved is not determinative of the Employer's obligations. In this case, according to the Union, the specific STD plan has been, directly or by reference, incorporated into the agreement and that fact makes the Employer liable for payment of the STD benefits. The Union submits that this grievance is properly before me, because entitlement to benefits is incorporated into the agreement, and they seek a denial of the Employer's preliminary objection.

4. With regards to the substance of the grievance itself, the Union seeks a direction that the Employer pay the Grievor short-term disability payments for the period December 2, 2002 to June 30, 2003. That issue would be decided by arbitration if the Employer's preliminary objection fails.

B. BACKGROUND

5. The facts are agreed between the parties. At all material times the Grievor, Ms. Sandra Clark, was employed by the Employer as an Instructor in a bargaining unit represented by the Union.

6. There are two collective agreements between the parties. The first is a “Common Agreement” negotiated on a province-wide basis and dated March 30, 2001. The Common Agreement, Article 9.3 (cited below), is relevant to this grievance. There is also a second agreement, the “Local Agreement”, which applies to Northwest Community College and the B.C. Government and Service Employees’ Union, Local 712, and it is also dated March 30, 2001.

7. In December 2002 the Grievor was ill and she made an application for STD benefits with a private carrier, Maritime Life. Her application was considered in a letter dated December 23, 2002. The carrier accepted that the Grievor was totally disabled within the meaning of the plan from November 8 to December 6, 2002. However, that period was covered by a thirty-day elimination or waiting period. The carrier did not accept that the Grievor was totally disabled after December 6, 2002 and, therefore, her claim was denied. She appealed to Maritime Life, with the support of two doctors, but this was also unsuccessful.

8. The Grievor filed a grievance dated March 10, 2003. She wrote that Article 9.3.2 of the Common Agreement “states that the College is to provide its employees with disability benefits” but “no benefits have been paid to date”. The remedy sought was for full STD benefits for the period December 6, 2002 to January 8, 2003 and then ninety percent benefits for the period January 9, 2003 to March 31, 2003, “or such date as my doctor advises I should return to work”.

C. THE COLLECTIVE AGREEMENT

9. Article 9.3 of the Common Agreement is relevant and it is as follows,

9.3 Disability Benefits

9.3.1 Effective April 1, 2002 the Employers shall implement a single plan for the provision of disability benefits for eligible employees who are covered by this Agreement and whose local bargaining unit has opted into this agreement's Plan pursuant to Article 9.3.3.

9.3.2 The disability benefits plans will be set out in the findings of the Joint Committee on Benefits Administration (JCBA) entitled *Long-Term Disability Benefit Initiative*, but will be an insured plan and will include the following elements:

- Benefit level of sick leave at one hundred percent (100%) for the first thirty (30) calendar days, short-term disability at seventy percent (70%) weekly indemnity for the next twenty one (21) weeks, and long-term disability leave of seventy percent (70%) thereafter
- Long-term disability as defined on the basis of two-year own occupation and any other occupation thereafter as described by the JCBA plan
- Health and Welfare premiums will be paid by the Employer or the Plan for employees on sick leave, short-term disability and long-term disability
- Employer payment of premiums for both short-term and long-term disability benefits
- Claims Review Committee made up of three (3) medical doctors (one designated by the claimant, one by the Employer and the third agreed to by the first two doctors)
- Mandatory rehabilitation as described in the JCBA plan
- Subject to provisions of the Plan, enrolment is mandatory for all active regular employees and for active non-regular employees on a continuing basis for at least a four (4) month period with fifty percent (50%) or more of a full-time workload as defined by local provisions.

10. The Union opted into the disability plan pursuant to Article 9.3.3, effective April 1, 2002.

D. DECISION AND REASONS

(a) General Context

11. As above, the issue in this case involves the payment of short-term disability benefits. The Union submits that the collective agreement requires the Employer to pay the Grievor her short-term disability benefits. On the other hand, the Employer submits that its obligation under the collective agreement ends with providing a plan (to be administered by a private carrier) and paying premiums.

12. The resolution of this issue is a matter of interpretation of the collective agreement between the parties, specifically Article 9.3 as set out above. Indeed, this case might be described as one of “pure” contract interpretation since neither party submitted evidence of bargaining history to assist in understanding the intention of the parties when they negotiated Article 9.3. Similarly, there is no evidence of past practice because this provision is relatively new. Therefore, the objective is to determine the intention of the parties and the “cardinal presumption” is that the parties are “assumed to have intended what they have said” (Brown and Beatty, *Canadian Labour Arbitration*, 3rd Edition, (Aurora: Canada Law Book), paragraph 4:2100). And, the parties must be assumed to have negotiated their collective agreement “conscious of the various mechanisms by which a long-term disability plan can be related to the collective agreement” (*Re Andres Wines (B.C.) Ltd. and United Brewery Workers, Local 300* (1981), 30 L.A.C. (2d) 259 (Christie), at 266). Clearly, the same assumption is to be made with short-term disability plans.

13. There is considerable case law on the arbitrability of disputes such as this one. If a plan forms part of the agreement then a dispute about the plan is arbitrable and the employer has the “primary obligation” to pay the negotiated benefits (*Wilpark Foods Ltd. and United Food & Commercial Workers Union, Local 1518* (1991), 21 L.A.C. (4th) 441 (Ladner) at 447). Another arbitrator has characterized the employer’s status in this circumstance as one of a “guarantor” (*Re British Columbia Rapid Transit Co. and Office and Technical Employees Union, Local 378* (1989), 6 L.A.C. (4th) 310 (McColl), at 322). It is also well established that the presence of an insurer or private carrier alone, or the fact that a claim has been denied by an insurer, is not determinative of my jurisdiction

over this grievance (*Canada Safeway Limited and United Food and Commercial Workers Union, Local 1518* (1998), 44 C.L.R.B. (2d) 121 (BCLRB), at 140).

14. If a plan is not part of the agreement then an employee, as a beneficiary of the plan, is left with seeking a remedy through litigation in the courts. The carrier of the plan would typically be the defendant and the employer would have minimal, if any, involvement.

15. The situation can be summarized as follows,

... the question in all of these cases is whether the employee is left to his or her rights in the courts against an insurance company under an insurance plan, or whether the employee may require the employer to pay the benefits directly, and pursue its own rights against the insurer.

(*Coca-Cola Bottling Ltd.* (1994), 44 L.A.C. (4th) 151 (Swan), at 156).

16. Counsel for both parties adopted an analysis of the various awards from Brown and Beatty, paragraph 4:1400. This includes four categories developed to assist in understanding whether a pension, insurance or welfare plan forms part of the collective agreement. For ease of reference I paraphrase the four categories and the significance of each, generally, for determining whether a matter is arbitrable,

1. The Plan or policy is not mentioned in the collective agreement. In this case a dispute about the plan is not arbitrable.
2. The collective agreement specifically provides for certain benefits. A dispute will be arbitrable.
3. The agreement only provides for the payment of premiums by the employer. A dispute is not arbitrable.
4. Specific plans or policies are incorporated by reference into the agreement. A dispute is arbitrable.

17. The issue is always one of construction of the collective agreement so it is necessary in every case to consider the particular language of the agreement at issue (*Coca-Cola Bottling Ltd.*, (Swan) at 155). I take from this that the four categories should not be

applied rigidly and the intention of the parties, as reflected in their agreement, is paramount. This logic also means that there can be “hybrid” provisions, as noted by Brown and Beatty. In summary, there cannot be “blind adherence to precedents” (*Re Andres Wines (B.C.) Ltd.*, at 266).

18. A further aspect of the arbitral jurisprudence is the line of cases that arose from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and *New Brunswick v. O’Leary*, [1995] 2 S.C.R. 967. Those judgments generally expanded the jurisdiction of arbitrators by considering whether a dispute in its “essential character” or “expressly or inferentially” arises from the collective agreement. A number of cases discuss the specific application of this test, including whether it changed the law with respect to the issue in the above cases.

19. For example, in *Pilon v. International Minerals & Chemical Corp. (Canada) Ltd. (IMC)* (1996), 31 O.R. (3d) 210 (Ont. C.A.) the issue was whether the employee was entitled to bring an action against the insurer for long-term disability benefits, or whether he was required to use the grievance arbitration provisions in the collective agreement. In that case the employee wanted to use litigation to obtain a remedy against the insurer, rather than use the collective agreement against his employer.

20. The facts in *Pilon* were that the agreement did not define the criteria for eligibility for benefits, but it incorporated by reference the terms of the handbook that was given to employees. The Ontario Court of Appeal held that the dispute arose under the collective agreement because, in the absence of a group insurance scheme established by the agreement, the employee had no claim to benefits whatsoever (page 215 O.R.; cited in *Canada Safeway Ltd.* (BCLRB), at page 131). This result has been questioned (*Re MacMillan Bloedel Ltd., Powell River Division and C.E.P.U., Local 76*, unreported (B.C.), August 30, 1997 (Germaine), for example).

21. In any event, the B.C. Labour Relations Board declined to follow *Pilon*, described it as “non-binding authority” in B.C. and has suggested that *Weber* or *O’Leary* has not

really changed the arbitral jurisprudence in this area. The result in British Columbia is as follows,

... The question in all cases remains whether the dispute, in its essential character, arises expressly or inferentially from the parties' collective agreement.

59. ... Finding an employer liable for disability benefits, where the obligation does not arise either expressly or impliedly under the agreement, effectively alters the nature of the bargain between the parties. Arbitrators lack statutory authority to amend provisions of a collective agreement, and the affirmation in *Weber* that disputes must arise "under a collective agreement" makes it difficult to hold that the Supreme Court intended to remove this traditional limit on jurisdiction.

Canada Safeway Ltd. (BCLRB), at page 140.

(b) Article 9.3: "Disability Benefits"

22. The Employer submits that the collective agreement provision in this case – Article 9.3 - is best described by category three above: it only provides for the payment of premiums by the Employer. Therefore, the dispute raised by this grievance is not arbitrable. On the other hand, the Union says that this dispute involves categories two and four: the agreement specifically provides for benefits or they are incorporated by reference. Therefore, the dispute is arbitrable. Category one is not relied on by either party and it is not applicable to this grievance.

23. I take the following features from Article 9.3,

- (a) The Employer is required to "implement" a "Plan" or "plan" for disability benefits.
- (b) The plan is the one "set out" by the findings of a joint committee, it will be an "insured plan" and it "will include" seven elements.
- (c) Benefit levels are defined for short-term disability (seventy percent) and other benefits such as sick leave, weekly indemnity and long-term disability.
- (d) Long-term disability is defined on the basis of two-year, own occupation.

- (e) The Employer pays the premiums for short-term disability and other benefits.
- (f) There is mandatory rehabilitation, enrolment is mandatory and there is a Claims Review Committee for long-term disability.

24. Clearly, the intention of the parties, as reflected in Article 9.3, was to have a plan for short-term disability. It is also clear that the parties put their minds to some elements of the plan but, significantly, the plan is not part of Article 9.3 (or any other part of the common agreement). Indeed, the plan is a separate document that goes into some detail about various subjects including eligibility, qualifying period, benefits, subrogation duration of benefits and other matters. It follows that I do not agree with the statement in the grievance, dated March 10, 2003, that “Article 9.3.2 states that the College is to provide its employees with disability benefits”. That provision states that the disability benefits plan will be “as set out” in the joint committee findings, it “will be an insured plan” and it will “include” seven elements. I cannot find that this language goes as far as the statement in the grievance that the Employer has a contractual obligation to pay benefits.

25. In *Coca-Cola Bottling Ltd.* (Swan) the collective agreement provision at issue was,

It is agreed that ... the Company’s Extended Group Plan ... will be continued in force during the life of this agreement. In addition, improvements will be *implemented* as set out below: ... [Emphasis added].

There was also a Letter of Agreement in *Coca-Cola Bottling Ltd.* (Swan) that stated that a “Long-Term Disability Plan shall be introduced”. The Letter of Agreement then stated that the long-term disability program “will include the following features” and, in the words of the arbitrator, the benefits were “set out in a fair degree of detail” (page 155). The conclusion of the arbitrator was that these provisions reflected an intention by the parties that the employer’s obligation went no further than the payment of premiums. This is the third category of Brown and Beatty and so the dispute was not arbitrable.

26. In my view, there are important similarities between the provision at issue in the *Coca Cola Bottling Ltd.* (Swan) award and the provision at issue in this case, Article 9.3. Article 9.3.2 states that the plan “will include” seven “elements” and they are described in some detail. It can be fairly stated that this detail is an “outline of the kind” of benefits the Employer is required to provide rather than a description of the benefits the Employer is required to pay (*Coca Cola Bottling Ltd.*, (Swan) at 159). Further, “The fact that the benefits are identified in the collective agreement does not give rise inferentially to a right in employees to hold the employer accountable under the grievance and arbitration provisions of the agreement for the payment of benefits as opposed to the payment of premiums” (*Canada Safeway and United Food and Commercial Workers, Local 1518* (1997), 68 L.A.C. (4th) 265 (Hope), at paragraph 32; see also, *Kwantlen University College and Kwantlen College Faculty Association, Local 5, College Institute Educators Association*, unreported, January 22, 2001 (Germaine), at paragraph 44).

27. A related matter is that Arbitrator Swan, in *Coca Cola Bottling Ltd.* (Swan), found that the agreement between the parties in that case provided quite specific “features” of the benefits and qualifications of the plan in that case. This fact did not mean the plan was incorporated into the agreement but, again, it was an outline of the plan the parties agreed to. In this case, the parties have agreed to a plan with the seven “elements” identified in Article 9.3.2. In my view it is fair to equate “elements” with “features” and this supports the same result in this case as in *Coca Cola Bottling Ltd.* (Swan).

28. Finally, in *Coca Cola Bottling Ltd.* (Swan) the provision in the collective agreement stated that certain improvements in the plan would be “implemented” and that word is used in Article 9.3. It is true that there is no discussion in the reasoning of the award of the significance of this word or any discussion at all about it. However, nor does the award draw attention to this word as being contrary to the ultimate result that the plan was not part of the collective agreement. In my view the word “implement” is consistent with the meaning of the other words used in the *Coca Cola Bottling Ltd.* (Swan) award as well as here, in Article 9.3. In this case the Employer is required to “implement” a plan as “set out” by the joint committee and that “will include” certain elements and the language of Article 9.3 cannot be read to mean that the Employer here has agreed to

more than what is meant by category three of the Brown and Beatty categories (see also, *Canada Safeway (Re)* (1995), 52 L.A.C. (4th) 295 (Hope), at paragraph 67). This language also indicates a prospective voice in Article 9.3 since the plan they had in mind was not yet in existence; the plan itself was a future event. This aspect of Article 9.3 also supports a finding that there should be a separation between the plan and the collective agreement.

29. All of this is consistent with an intention by the parties to put into effect a plan that is outlined in Article 9.3.2. It will be an insured plan and the Employer will pay the premiums. There is a prospective voice to Article 9.3 with the use of “will” But I cannot find that the collective agreement specifically provides for certain benefits as described in the second category of Brown and Beatty.

30. The Union relied on the award in *Coca-Cola Bottling Ltd. and R.W.D.S.U., Loc. 1065 (Colpitts) (Re)* (1998), 76 L.A.C. (4th) 105 (Christie) (to be distinguished from the *Coca Cola Bottling Ltd. (Swan)* award discussed above). The provision of the collective agreement at issue in *Coca-Cola Bottling Ltd. (Christie)* stated, “From the fourth working day ... the employee will receive benefits in accordance with the Group Health Insurance Agreement”. Arbitrator Christie agreed with the union in that case that a “natural reading” of this language “takes the reader” to the disability provisions of the Group Insurance Agreement. Significantly, “without reference to those provisions, which are specifically referred to in [the provision], that paragraph has no meaning”. The result was incorporation by reference (*Nova Scotia Civil Service Commission and N.S.G.E.A.* (1980), 24 L.A.C. (2d) 319, at 326) of the plan into the collective agreement. This came under the fourth category of Brown and Beatty and, therefore, the dispute was arbitrable.

31. I am unable to agree with the Union’s submission that the plan in this case has been incorporated by reference into the collective agreement. I note the statement in *Nova Scotia Civil Service Commission* that “the mere acknowledgement in the primary document that another document exists or may come into existence does not constitute incorporation by reference”. It seems to me that that the reference to an “insured plan” in Article 9.3.2 is an

acknowledgement of that plan rather its incorporation into the agreement. Similarly, the statement that the plan “will be as set out” in the joint committee findings sets something of a benchmark for the plan, rather than the incorporation of the plan into the agreement. I conclude that the probable intention of the parties was to refer to the plan in the sense of the *Coca-Cola Bottling Ltd.* (Swan) award and the third category of Brown and Beatty.

32. The Union also relied on *A.E. McKenzie Co. and U.E.C.W., Loc. 832, Re* (1993), 37 L.A.C. (4th) 129 (Hamilton) where the collective agreement stated that benefits “shall be arranged” by the employer and “shall be subject to the terms and conditions of the master policies and contracts in force which shall form part of this collective agreement”. Arbitrator Hamilton found that this language came under the fourth category of Brown and Beatty since the parties had “gone beyond simply referencing or mentioning the Policy. Rather, they have expressly agreed that the policy “...shall form part of this collective agreement” (page 140).

33. In my view, Article 9.3 in this case is worded very differently than the provision in *A. E. McKenzie Co.* Article 9.3 does not state in the clear terms of the provision in *A. E. McKenzie Co.* that the plan shall form part of the agreement and I am unable to otherwise characterize it in that way. The fact that the benefits are identified in the collective agreement does not give rise to an inference that the Employer is accountable as a matter of arbitration for the payment of benefits (*Canada Safeway Limited* (1997), at paragraph 32; cited in the B.C. Labour Relations Board decision, *Canada Safeway Limited*, (BCLRB), at paragraph 53; also upholding Arbitrator Hope’s 1997 decision).

34. As a final matter, I note a conclusion that there is a lack of jurisdiction to determine eligibility for benefits does not foreclose the right of the Union to grieve all issues relating to short-term disability (*Canada Safeway Ltd.* (BCLRB), paragraph 60; *Canada Safeway Ltd. (Re)* (1995), at paragraphs 72-3¹). I say this because the

¹ The 1995 Hope Award was the subject of an application for review by the union. That application was dismissed except for a referral to Arbitrator Hope to consider the applicability of the *Weber* and *O’Leary* decisions (BCLRB No. B234/96). The 1997 Hope award considered those decisions and there was another application for review by the union to the Board. The second Board decision cited above was the result.

“elements” of the benefit plan have been negotiated between the parties and the results of those negotiations are described in Article 9.3. If there were a dispute, for example, about whether the Employer was paying the premiums as it agreed to do in Article 9.3.2, then I think that dispute would be arbitrable.

35. I have concluded above that the dispute raised by the grievance in this case relates to a decision of the private carrier about eligibility under the plan. This is not a dispute about one of the elements of the plan as described in Article 9.3 and the Employer is not responsible for payment of benefits, provided the plan is consistent with the elements set out in the collective agreement (*The Port Hope Police Association and The Port Hope Police Services Board*, unreported, October 23, 1994 (Kirkwood), at page 10).

E. CONCLUSION

36. I conclude that the parties’ intention, as reflected in Article 9.3, is an agreement that the Employer will only pay premiums for the short-term disability plan. While the agreement includes some elements of the plan these are an outline of the kind of benefits rather than the incorporation, by reference or otherwise, of the plan into the agreement. I find that for the grievance in this case, Article 9.3 fits most comfortably with category three of the Brown and Beatty categories. Put another way, the essential character of this dispute is one between the carrier, who administers the plan, rather than between the Employer and the Grievor and I am unable to find that the dispute is one that expressly or inherently arises from the collective agreement.

37. It follows that the Employer’s preliminary objection succeeds and the dispute raised by the grievance of March 10, 2003 is not arbitrable under the collective agreement between the parties. The issue identified by the Grievor is one properly before the courts.

38. For all of these reasons the grievance is denied.

It is so awarded.

Dated this 24th day of August, 2006, in the City of Burnaby, Province of British Columbia.

John Steeves