IN THE MATTER ON AN ARBITRATION

BETWEEN:

The Port Hope Police Association

Hereinafter referred to as the "Association"

and

The Port Hope Police Services Board

Hereinafter referred to as the "Board"

Before:

B. A. Kirkwood, Sole Arbitrator

Appearances For the Association:

Jim Dunn, Vice-President of the Association, Presenting
Paul Spencer, President of the Association

Appearances For the Board:

Terry Whyte, Counsel
Chris Clifford, Student at Law
Rick Austin, Chair Labour Relations Committee of the Board
Vickie Barrie, Deputy Treasurer
Barbara Sheppard, Treasurer

Date of Hearing:

September 9, 1997, in Port Hope, Ontario

AWARD

The Grievor, Angela Davis is a member of the Police Association (Uniformed Service) and the grievor Brenda Johns, is a member of the Police Service (Civilian Service). The Uniformed Service and the Civilian Service, each have their own collective agreements. The grievors applied for short term disability during this year to compensate them for absences for medical reasons. The Board paid the grievors for the first seven days as set out in the collective agreement. Great West Life Insurance Company provided them with benefits at the rate of 66.7% of their current wages for a period of time and then discontinued payments. The Board supplemented the payments provided by the insurance company at the rate of 33.3% of their current wage rate until the Board was advised that the insurance company had denied the grievors coverage, claiming that they were not eligible under the policy, at which point the Board discontinued its payments. These grievances arise from the failure of the insurance company to continue to pay short term disability and from the Board's discontinuance of its payments.

The Board brought a preliminary motion arguing that I had no jurisdiction to hear the grievances, as under the collective agreement the Board's liability was limited to paying the premiums for insurance coverage. It had provided coverage for the employees through Great West Life Insurance Company and had paid the premiums for the insurance coverage. It had met its obligations. Counsel submitted that the weekly indemnity plan was not part of the collective agreement. The Board argued that pursuant to the collective agreement, the issue of eligibility is a matter that is determined by the insurance company. Board's counsel argued that the arbitrator is not permitted to amend the agreement and is restricted to applying the collective agreement as it stands. Therefore any issue of eligibility was an issue between the employee and the insurance company, and falls outside the collective agreement and is therefore inarbitrable.

The Association's position is that the matter is arbitrable, as under the collective agreement, the Board is obliged to provide weekly indemnity payments, which it failed to do. The Association's position is that the Board's obligation under the collective agreement was to provide disability coverage for its employees during their absences due to illness, either by supplementing the difference between the insurance coverage of two thirds the current wage rate and the one third top-up, or by paying the entire amount, if the insurance company fails to make the payments.

The parties agreed that I determine the scope of the Board's liability for short term disability coverage prior to hearing the issues on the merits of the grievances.

The relevant portions of the collective agreements are as follows:

ARTICLE XIX - HEALTH AND WELFARE

19.01 The Board shall provide a Weekly Indemnity Benefit and Long Term Disability Insurance Programme for all employees and agrees to pay 100% of the premiums of such an approved insurance plan. It is understood that eligibility for benefits pursuant to the programme shall be subject to the terms of the plan itself.

The parties acknowledge that the plan does not provide coverage to an employee for the first seven (7) days in the event of absence from work due to sickness, and accordingly, the Board agrees to supplement the plan by providing sick leave with pay for the first seven (7) days of absence due to sickness to a maximum of one hundred and fifty (150) hours annually, non-accumulative of absence due to sickness. The parties acknowledge that the Board, for the first seventeen (17) weeks in the event of absence from work due to sickness or injury, agrees to supplement the plan by providing, with pay, the difference received by the employee from the Weekly Indemnity Benefit and the then-current rate of pay. The supplement is to be paid to the employee bi-weekly on leave due to illness or injury for a maximum of seventeen (17) weeks.

19.02 Where an employee has been warned in writing regarding an alleged misuse of sick leave credits, the Board may, for a reasonable period of time, require a medical certificate for a period of absence of less than (3) days. The Board agrees to provide the Association with a copy of the above policy and such policy shall not be changed, assigned or amended in any which which might have effect upon the benefits to be provided to employees or any employee's eligibility for such benefit without the agreement of the Association.

The policy will provide the following benefits:

(i) A weekly indemnity equal to 66.7% of regular weekly earnings to a maximum of nine hundred and twenty dollars ($920.00).

(ii) Long term disability insurance providing payments to employees absent from work due to sickness or accident not compensable under the *Workers' Compensation Act.* Following a (17) week waiting period, payments shall provide a 66.7% benefits' payment of employees' monthly earnings to a maximum for four thousand dollars ($4,000.00) per month.

Article 13.01 provides:

13.01 The Board shall provide a Weekly Indemnity Benefit and Long Term Disability Insurance Programme for all employees and agrees to pay 100% of the premiums of such an approved insurance plan. It is understood that eligibility for benefits pursuant to the programme shall be subject to the terms of the plan itself.

> The parties acknowledge that the plan does not provide coverage to an employee for the first seven (7) days in the event of absence from work due to sickness, and accordingly, the Board agrees to supplement the plan by providing sick leave with pay for the first seven (7) days of absence due to sickness to a maximum of one hundred and fifty (150) hours annually, non-accumulative of absence due to sickness and will revert to one hundred and eighty (180) hours as of March 31, 1996. (The maximum annual amount of non-accumulative absence due to sickness shall extend for the duration of the current Social Contract Local Agreement, thereafter it shall revert to the traditional amount of eighteen (18) days, one hundred eighty (180) hours annually {WITHOUT PREJUDICE}). The parties acknowledge that the Board, for the first seventeen (17) weeks in the event of absence from work due to sickness or injury, agrees to supplement the plan by providing, with pay, the difference received by the employee from the Weekly Indemnity Benefits and the then current rate of pay. The supplement is to be paid to the employee bi-weekly while on leave due to illness or injury for a maximum of seventeen (17) weeks.
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> Where an employee has been warned in writing regarding an alleged misuse of sick leave credits, the Board may, for a reasonable period of time, require a medical certificate for a period of absence of less than (5) days. The Board agrees to provide the Association with a copy of the above policy and such policy shall not be changed, assigned or amended in any way which might have effect upon the benefits to be provided to employees or any employee's eligibility for such benefit without the agreement of the Association.
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> The policy will provide the following benefits:
>
> (i) A weekly indemnity equal to 66.7% of regular weekly earnings to a maximum of nine hundred and twenty dollars ($690.00).
>
> (ii) Long term disability insurance providing payments to employees absent from work due to sickness or accident not compensable under the *Workers' Compensation Act.* Following a (4) month waiting period, payments shall provide a 66.7% benefits' payment of employees' monthly earnings to a maximum for four thousand dollars ($3,000.00) per month.

Board's counsel submitted that Brown & Beatty, in **Canadian Labour Arbitration,** at paragraph 4:1300 has summarized the jurisprudence on the use of documents, such as insurance policies in the interpretation of collective agreements into four categories, and this summary has been accepted by most arbitrators. Brown and Beatty state at paragraph 4:1300:

> Pension, insurance and welfare plans are types of extrinsic documents or agreements which are commonly physically separate from collective agreements. Whether they form part of the agreement or are otherwise relevant as an aid to interpretation depends upon the surrounding

> circumstances together with the specific language used. Commonly, the relationship between such ancillary documents and the collective agreement will fall into one or four categories. In one, the plan or policy is not mentioned in the agreement. In the second situation the collective agreement specifically provides for certain benefits, while in the third it only provides for the payment of premiums. In the last, specific plans or policies are incorporated by reference into the agreement.

Board's counsel argued that the language of article 19.01 of the Uniformed collective agreement and article 13.01 of the Civilian agreement requires the employer only to pay the insurance premiums, and therefore falls into the third category referred to by Brown and Beatty.

Board's counsel argued that to incorporate a policy into the collective agreement, as set out in Brown and Beatty's fourth category, requires strong clear language which demonstrates the parties intention to do so. (**Re A.E. McKenzie Co. Ltd. and United Food & Commercial Workers, Union Local 832**, 37, L.A.C. (4th) 129 (W.D. Hamilton), **Re Canada Safeway Ltd. and United Food & Commercial Workers, Local 1518**, 52, L.A.C. (4th) 295 (Hope)). He submitted that such language is not found in this case. Board's counsel argued that the language in this agreement was not even as strong as the language found in **Re Dominion Tanners and United Food and Commercial Workers, Local 832**, 56 L.A.C. (4th) 392 (Hamilton) in which the arbitrator held that the plan was not part of the collective agreement, and that the schedule to the agreement only provided the level of benefits that had to be made available through a policy or plan and was not a clear intention that the policy was incorporated into the collective agreement. Accordingly, Arbitrator Hamilton found that issues arising under the plan were inarbitrable.

Board's Counsel argued that the **Re Green Valley Fertilizer Ltd. and United Food and Commercial Workers, Local 1528**, 22, L.A.C. (4th) 417 (Hope) case which is an example of the second category, requires language that supports a clear intention to confer a benefit. Board's counsel submitted that the clear language in this collective agreement requires the Board to pay 100% of the premiums, which it did. Board's counsel argued that in our case, at most, the Board was to provide benefits and to pay premiums. The parties had agreed that the plan was deficient and the negotiated above and beyond the plan. Board's counsel submitted that if I were to find that our case falls into the second category, then the Board has provided a standard short term disability plan and is entitled to establish that the rejection of the claim was based on a standard provision which is not inconsistent with the collective agreement.

Board's Counsel relied on **Re Coca-Cola Bottling Ltd. and United Food & Commercial Workers International Union** 44 L.A.C. (4th) (Swan) in which the employer

was required under the collective agreement to provide an insurance plan containing certain features, as an illustration of a situation where parties intended the employer to provide an insurance plan to cover certain benefits and pay premiums, but not to oblige the employer to provide the benefits. Board's Counsel argued that in the same manner, the issue over the denial of disability benefits by the insurance company was not arbitrable.

Association's counsel argued that the language of the collective agreement required the Board to provide a weekly indemnity. He agreed the weekly indemnity plan did not provide full payment of wages, and the Board agreed to supplement the difference between the weekly indemnity paid and the current wage rate. He argued that payment covered all illnesses. He argued that the situation is similar to the **Green Valley** (supra) case where the payments were stopped by the carrier, and the grievor's entitlement continued, such that the grievors could claim entitlement from the employer, who would seek indemnification from the insurer for any benefits paid. The Association Representative argued that in the case before me, when the carrier failed to cover one of the grievors, the Town of Port Hope had agreed to maintain coverage.

Association's counsel relied on the recent Court of Appeal decision in **Pilon v. International Minerals and Chemical Corporation (Canada) Limited et al.** 31 O.R. (3d) 210 in which an employee covered under a collective agreement sued the insurance company for her denial of benefits and was deprived of a recourse through the courts as the matter was an issue arising under the collective agreement and courts did not have concurrent jurisdiction. He argued that this change in the court's approach to the jurisdiction of insurance matters in a labour context must be applied in this situation.

Decision

I have been asked on a preliminary motion to determine the arbitrability of the grievances and the eligibility for benefits, based upon a determination whether the Board was liable for benefits (Weekly Indemnity Benefits) or whether it was liable only for the payment of premiums for a short term disability plan.

Similar questions have been raised in many arbitrations between various parties, and the response to that question has been based upon the particular wordings found in the collective agreements, and from time to time, negotiating history, where the collective agreement being ambiguous enabled the arbitrator to determine the intention of the parties. In this case, no evidence of negotiating history was relied upon. Therefore, the clauses must be analyzed in the

context of the collective agreement itself.

Brown and Beatty (supra) at paragraph 4:13000 has also been referred to in most decisions as guidelines to determining how extrinsic documents such as insurance policies have been used in interpreting collective agreements. Brown and Beatty refer to four categories, which are useful guidelines in analysis, although not determinative of all categories. The broad categories referred to are:

1. the plan or policy is not mentioned in the agreement;
2. the agreement provides for certain benefits;
3. the agreement requires only the payment of premiums; and
4. the plans or policies are incorporated by reference into the agreement.

Clearly, this agreement does not fall into the first category as regards a short term disability plan, and it does include payment of premiums, a requisite of the third category. However, whether the obligation goes beyond the payment of premiums, is dependent upon whether the intention of the parties as evidenced by the agreement requires the Board to be responsible for the benefits or whether the parties intended the policy to be incorporated into the collective agreement.

A reference to an outside document does not imply that the document is incorporated into the collective agreement unless it can be shown that it was the intention of the parties to do so. In **Re A.E. McKenzie** (supra) the arbitrator found that insurance policies were incorporated into the collective agreement on the language of the collective agreement, which says "The following Health and Welfare benefits shall be arranged for by the Company for employees covered by this Collective Agreement and their eligible dependents, 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* (my emphasis)." He found that "which" in "which shall form part of this Collective Agreement" as referring to the master policies and contracts themselves, and therefore found that the parties intended that they form part of the agreement. As a result the issues surrounding the terms and conditions fell into Brown and Beatty's fourth category and were arbitrable.

Arbitrator Hamilton, who was the arbitrator in **Re A.E. McKenzie** (supra) and was approached with the same issue, reached a different conclusion in **Re Dominion Tanners** (supra), but the wording in the collective agreement was different. That collective agreement stated "Health and welfare benefits shall be contained in Schedule "B" of this Agreement and shall form part of this Agreement." Schedule "B" stated "The following Health and Welfare *benefits shall be*

arranged for by the Company for employees covered by this Collective Agreement, and shall be *subject to the terms and conditions of the master policies and contracts in force* (my emphasis). The Company shall have the right to make arrangements for the replacement of such benefits provided the benefit levels are maintained." He found that in the context of the wording of that particular collective agreement, the schedule only provided the level of benefits that must be made available through a policy or plan, and was not a evidence of a clear intention that the policy is incorporated into the collective agreement. This situation fell basically into the third category.

In the case before me, the first sentence of article 19.01 of the Uniformed Agreement and Article 13.01 of the Civilian Agreement sets out obligations of the Board. The obligations are three fold, to provide a short term disability programme, a long term disability programme and to pay the premiums required to maintaining the programmes. Therefore the Board's obligation in this first sentence is to provide a mechanism which is paid for by the Board, to enable the employees to obtain benefits.

As Articles 19.02 and 13.02 state "The policy will include the following benefits...", and then sets out the benefits, this is evidence that the parties have agreed to certain criteria which an outside third party must provide. In my view the obligation on the Board is therefore to provide the policy that meets the obligations under the collective agreement, but not to provide for the benefits themselves. The collective agreement refers to the level of benefits that must be provided, that is 66.7% coverage for short term and long term disability, and the triggering point for the long term disability, and the caps on the coverage, but it is the policy that must contain these benefits. This case is unlike the **Green Valley Fertilizer Ltd.** (supra) case, which is an example of the second Brown and Beatty category. In that case, although there was no reference to a plan, and the arbitrator held that the employer was entitled to arrange for a policy to meets its obligations, the arbitrator found an obligation on the employer for weekly indemnity payments, as the wording of the collective agreement required that "weekly indemnity payments shall be paid" and "it is understood ... that Weekly Indemnity payments to the employee shall be the responsibility of the employer." Unlike this case, the language of this collective agreement directs the Board is to provide the policy that meets certain critera, but does not direct it to be liable for the benefits, presuming that the policy does meet the criteria. Therefore these obligations do not fall into Brown and Beatty's second category.

Articles 19.01 and 13.01 state "It is understood that eligibility for benefits pursuant to the programme *shall be subject to the terms of the plan itself* (my emphasis)." The programme provided is a short term and long term disability insurance programme, and that programme sets out the eligibility for the benefits. The parties did not set out in the collective agreement the terms of eligibility that the employer must meet either directly or through an insurance plan, as is found in

many agreements. On the wording of this agreement, the parties have agreed that the parties are not determining the eligibility for payment in the collective agreement, but were satisfied with the criteria for eligibility set out in the policy. They deferred or "subjected" the issue of eligibility to the plan itself. Therefore provided that the policy or plan was not "changed, assigned or amended in any way which might have effect upon the benefits to be provided to employees or any employee's eligibility for such benefit without the agreement of the Association" as stated in articles 19.02 and 13.02, during the term of the contract, the parties must therefore me taken to be satisfied with the terms of the policy itself. Although there had been a change in carrier at some earlier time, I had been advised by the Association that there was no issue with the change to Great West Life Insurance company, and therefore the change does not effect my finding.

The insurance policy states" Great-West Life has full responsibility for the assessment of person's entitlement to benefits". Had the Employer entered into an agreement with the insurance company that was in conflict with its obligations under the collective agreement the Employer would be held liable for the obligations under the collective agreement. However, this is not in conflict to the collective agreement, but reflective of the collective agreement in which the parties agreed that "eligibility shall be subject to the terms of the policy itself."

There are no specific references in the agreement that the policies are to be incorporated into the agreement, which would therefore make them part of the agreement and arbitrable. On the contrary, where the parties recognized that the policy was deficient, they negotiated additional obligations which were set out in the collective agreement. They agreed that the employer was to cover the employees for the first seven days, and to "supplement" the difference between the plan and the current wage rate. To "supplement" is not to substitute for, as urged upon me by the Association. It is an additional amount that is added. The parties therefore distinguished between the policy which was outside the collective agreement and did not provide sufficient coverage, and the coverage or obligations required of the Board.

In the case before me, the Board is not a guarantor of benefit payments. The parties have made distinctions where they have believed that the obligations of a third party were not sufficient. Even looking beyond articles 19.01 and 19.02 and 13.01 and 13.02, the articles which the parties agreed to in the Health and Welfare provisions do not provide any evidence that the parties intended the Board to be a guarantor for payments as soon as a person is absent due to illness. As Arbitrator Swan points out in his award in **Coca-Cola** (supra) decision, it would be illogical that an employer would be liable for the payments of premiums and be a guarantor for the payments at the same time. To hold the Board liable for those two obligations would require clear language in the collective agreement.

The Association's representative urged me to find that the issue of eligibility was a matter arising under the collective agreement as was found in the case of **Pilon** (supra) and therefore was arbitrable. In the **Pilon** (supra) decision the Court of Appeal stated that the collective agreement provided for a group insurance plan, with comprehensive benefits. The long term disability benefits were to be provided by an insurer, administered by the company and paid for by the employees. Eligibility for the benefits was not defined in the collective agreement. A benefits handbook which was distributed to the employees outlined the benefits. The action arose when the company denied the employee her short and long term benefits, and refused to process her application. The employee applied directly to the insurer, and was refused. She brought an action against the company and the insurer. The parties agreed that the issue of short term disability benefits was arbitrable, but did not agree on the arbitrability of the long term benefits. In the **Pilon** (supra) decision the Court of Appeal held that a grievor could not use the courts to determine the insurer's obligation towards the employee as the entitlement to an insurance benefit arose from the collective agreement and was arbitrable under the collective agreement. The Courts would not take concurrent jurisdiction with matters provided for in collective agreements. The approach taken was consistent with the policy expressed by the Supreme Court in **St. Anne Nackawic Pulp & Paper Co. v. Canadian Paperworkers Union, Local 219**, [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1 and **St. Anne Nackawic in Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929, 30 C.R.R. (2d) 1 in which the Court held that jurisdiction over matters arising from collective agreements is a matter for labour tribunals. However, the **Pilon** (supra) case is not of assistance to me as the case relied on the fact that the policies were incorporated into the agreement, before holding that the plaintiff was precluded from pursuing her remedy in the courts. Therefore it did not expand the jurisdiction of labour tribunals to all the categories set out in Brown and Beatty to any matter that may touch a labour matter, and nor did it disregard the intention of the parties as expressed in a collective agreement. I view the decision as an illustration of the effect of the arbitrability of an issue which flows from the fourth category set out by Brown and Beatty where the policy is incorporated into the collective agreement.

In summary, the Association was unable to discharge its onus to show that the parties intended to incorporate the policy, which set out the requirements for eligibility, into the collective agreement. As in **Re Dominion Tanners** (supra), the obligations in the collective agreement before me basically falls into the third category described by Brown and Beatty, but goes slightly beyond it in that the Board must not only pay for the premiums on a policy, but it must also arrange a policy that meets certain criteria set out by the parties in their collective agreement.

The Board is not responsible for the benefits, provided that the policy is consistent with the standards set out in the collective agreement. I make no finding on the consistency of the

policy to the standards of the collective agreement as the parties did not present any submissions that would indicate that this was an issue. Although I was given information for future reference should the hearing proceed, due to the information that was before me on the preliminary matter, I have concerns about making a blanket award on inarbitrability. Therefore as the policy must be consistent with the collective agreement, I limit this award to a declaration that disputes arising between these grievors and the insurance carrier as to the interpretation and application of the criteria for eligiblity for short term disability benefits is not an issue that arises from this collective agreement but arises from the interpretation of the insurance policy, which is outside the collective agreement and is therefore inarbitrable, provided that the relevant parts of the policy are consistent with the standards set out in the collective agreement. If the parties wish to raise any further issue in relation to this case, based upon this declaration, they may do so. Otherwise this matter is adjourned sine die, and if no arbitrable issue based upon this declaration can be shown, will be deemed to be denied.

Dated at North York, this 23rd day of October 1997.

Belinda A. Kirkwood