IN THE MATTER OF THE ARBITRATION OF A GRIEVANCE PURSUANT TO *THE TRADE UNION ACT*, R.S.S. 1978 c.T-17, AS AMENDED, AND PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT BETWEEN EXTENDICARE (CANADA) INC. AND SERVICE EMPLOYEES INTERNATIONAL UNION (LOCALS #299 AND #333)

BETWEEN:

SEIU-WEST, LOCALS 299 AND 333
AND
LAURA MARCHESSAULT

(UNION/GRIEVOR)

-AND-

EXTENDICARE (CANADA) INC.

(EMPLOYER)

AWARD

HEARD BY: Mr. Bob Pelton, Q.C. – Sole Arbitrator

COUNSEL FOR THE UNION/GRIEVOR: Mr. Larry Dawson

COUNSEL FOR THE EMPLOYER: Ms. Meghan McCreary

Heard at Regina, Saskatchewan January 19, 2012
Supplementary Submissions Filed March 30, 2012, On Behalf of the Employer and April 2, 2012, On Behalf of the Union and Grievor

AWARD

I Background

1. The Parties, in Article 25 of their 2005-2008 Collective Bargaining Agreement, agreed that when an employee was absent as a result of an accident or illness in connection with the employee's employment, and in receipt of Workers' Compensation benefits, the difference between the employee's regular net pay and the Workers' Compensation payment would be "…**paid by the Employer for a period not to exceed one (1) year…** ."

2. The issue is:

    i. Whether the top up for "…a period not to exceed one (1) year…" is for up to 1 calendar year, that is up to 12 consecutive months, from the date the employee's WCB claim starts, as maintained by the Employer; **OR**

    ii. Whether the top up is payable for up to 1 year of benefits, whether it be 1 continuous calendar year or a series of absences attributable to the injury which total a year of absence, as contended by the Union.

3. At the outset the Parties agreed that I had been properly constituted as a sole Arbitrator and that I had jurisdiction to hear and determine the Grievance.

4. Further, the Parties agreed that if, as a result of the Award, a monetary calculation was necessary, that would be left to the Parties in the first instance, with me reserving jurisdiction in case they are unable to agree.

5. Finally, the Parties agreed to a waiver of the time limits for the issuance of this Award for which I thank them.

II Agreed Statement of Facts

6. The case was argued on the basis of an Agreed Statement of Facts, a copy of which is attached as Schedule "A".

7. As noted, the Grievor, Laura Marchessault, was injured at work July 11, 2009. The Workers' Compensation Board accepted her claim July 13, 2009.

8. The Grievor was in receipt of Workers' Compensation benefits from July 13, 2009 to and including October 4, 2009, a period of 84 days. For a portion of that period the Grievor was at work performing modified duties.

9. Despite rehabilitative therapy the Greivor's condition did not improve and she went off work June 29, 2010, to have surgery on her shoulder. The Grievor was off work until September 20, 2010, at which time she returned to work and was on modified duties until October 10, 2010. She was in receipt of Workers' Compensation benefits from June 29, 2010, to and including October 10, 2010, a further 104 days.

10. The Grievor seeks the difference between her regular net pay and the Workers' Compensation benefits which she received for the entire 188 days (July 13 to October 4, 2009 and June 29 to October 10, 2010).

11. The Employer, however, took the position that the top up benefit was only payable for the calendar year commencing July 13, 2009. As such it stopped paying the difference between the Greivor's regular net pay and her Workers' Compensation benefits July 13, 2010, even though she continued off work or on modified duties and in receipt of Workers' Compensation benefits until October 10, 2010.

III Relevant Provisions of the Collective Bargaining Agreement

12. Article 25, which is at the heart of the dispute, reads:

> **ARTICLE 25 – WORKERS' COMPENSTION**
> **25.01 Workers' Compensation Benefits**
> When an employee is absent as a result of an accident or illness in connection with the employee's employment, and benefits are being paid by Workers' Compensation Board, the difference between the employee's regular net pay and the Workers' Compensation payment will be paid by the Employer for a period not to exceed one (1) year and shall not reduce the employee's accumulated sick leave credits. In no event will the amount paid to the employee be less than the amount the Employer receives from Workers' Compensation Board.
>
> The following procedure shall be used to implement the foregoing:
>
> 1. When an employee has applied for Workers' Compensation benefits, the Employer will continue paying the employee his/her regular net pay for a period not to exceed one (1) year.
>
> 2. The hours paid for part-time and casual employees receiving Workers' Compensation benefits shall include all paid hours (e.g. regularly scheduled hours, additional casual hours, vacation hours, sick hours, Statutory Holiday hours and paid leaves of absence) excluding overtime and other premium payments, and shall be based on the previous fifty-two (52) week period. Where the employee's status (full-time, part-time, casual) has changed within the fifty-two (52) week period, the calculation of hours paid will be based upon the period of time since the date of change to the employee's status at the time the Workers' Compensation claim is initiated.
>
> 3. The Workers' Compensation cheque will be made payable to the Employer.
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> 4. Should the employee's claim be disallowed by Workers' Compensation, then any money so paid will be either charged against sick time, or if the employee has no sick time, the amount so paid will be recovered from the employee, and the employee shall make application for Disability Income Plan benefits, in accordance with the terms of the Plan.
>
> 5. At year-end, the employee's gross earnings will be adjusted by the amount paid by Workers' Compensation Board. The Employment Insurance and Canada Pension Plan deductions will be recalculated based on the adjusted gross pay and the difference is to be refunded to the employee by the Employer.

6. Employees absent as a result of a compensable accident or illness under this Article shall not earn Statutory Holidays but for the first (1st) year shall accrue sick leave credits and vacation credits. However, vacation credits accrued during receipt of W.C.B. benefits may only be accessed once such employee has returned to regular employment outside the auspices of a graduated Return to Work Program sponsored by the W.C.B.

   Employees shall earn seniority for the entire period of a W.C.B. claim.

7. For the purposes of maintaining and accessing employee benefits, in accordance with the terms of the Plans, the employee shall request and the Employer shall **forward** the appropriate application forms **to the employee (for Disability Income Plan benefits), and upon receipt of completed forms shall ensure that such completed forms are submitted to SAHO.**

(Bolding in the original)

13. In addition, Counsel for the Union referred me to the Collective Agreement's Preamble and Article 8.05:

PREAMBLE

1. Whereas it is the desire of both parties to this Agreement:
   a) To maintain and improve harmonious relations between the Employer and members of the Union;

   b) To recognize the mutual value of joint process in the negotiation of all matters pertaining to working conditions, employment, hours of work, and rates of pay;

   c) To encourage efficiency and safety in operation;

   d) To promote the morale, well-being, and security of all the employees in the bargaining unit of the Union;

   e) To provide for collaboration between the parties in order to secure optimum health care services to the general public;

   f) To jointly recognize that the exercise of rights and functions is to be carried out reasonably, fairly, and in a manner consistent with the Collective Agreement as a whole.

…

ARTICLE 8 – ARBITRAITON

…

> **8.05 Power of the Arbitrator or Arbitration Board**
> The Arbitrator or Arbitration Board shall not have the authority to add to or subtract from, alter, modify, or amend any of the provisions of this Agreement.

14. Although not referenced by either Party in their initial submissions, the Collective Bargaining Agreement does contain a number of references to "days", "weeks", "months", "calendar days", "calendar weeks", "consecutive weeks", "calendar month", "calendar months", "continuous month", "consecutive calendar days", and "working days".

15. While not an exhaustive list the following are examples of what I have referenced in the previous paragraph.

16. Article 3.04(d) provides that disciplinary investigations are to be completed and a decision rendered "…no later than fourteen (14) calendar days, from the date on which the employee is removed from the schedule.. ."

17. Article 5.02 requires the Employer to remit Union dues "…within fifteen (15) calendar days following the completion of the last pay roll period in the calendar month… ."

18. Article 5.06 permits a Union Steward or representative to meet with new employees "...During the first (1st) sixty (60) calendar days of employment … ."

19. Article 6.03 provides that the Joint Union – Management Committee shall meet "…upon request of either party, within seven (7) calendar days."

20. Both the Grievance Procedure outlined in Article 7 and the Arbitration process contained in Article 8, contain numerous references to certain steps being completed within a stipulated number of "calendar days".

21. Article 9.02 (Accumulation of Seniority) provides in Article 9.02(g) that employees shall earn seniority for "Temporary out-of-scope positions with the Employer not to exceed twelve (12) months during each thirty-six (36) month period calculated from April 1, 2005."

22. Article 9.04 (Loss of Seniority) contains references to "a total of twelve (12) consecutive months"; "one hundred and eighty (180) calendar days" and "thirty-six (36) calendar months".

23. Article 9.05(e) references a "payroll year".

24. Article 9.06 references "…two (2) calendar weeks."

25. Article 10.01(a) provides for a probationary period of "…four hundred and eighty (480) hours worked or the first six (6) months from their date of hire, whichever comes first."

26. Article 10.01(c) requires that the Local Union Office be notified of the discharge of probationary employees "…within seven (7) calendar days."

27. Article 11.02 directs that vacancies be posted for "…at least seven (7) calendar days… ."

28. Article 11.05(c) (Appointment of Applicant) references both "days" and "calendar days".

29. Article 11.06 (Trial Period) provides in subsection (a) for a trial period of "…the first three hundred and twenty (320) hours worked following the date the employee commences work in the new position."

30. Article 11.06(c) permits an employee to be returned to their former position within "…the first thirty (30) calendar days of the trial period… ."

31. Article 11.09 (Temporary Vacancies) contains references to a stipulated number of "months" while Article 11.09(d) provides that "No temporary position shall exceed two (2) years and one hundred and nineteen (119) consecutive calendar days… ."

32. Article 11.10(c)(vi) provides that "An employee on a call-in list who has not worked for one hundred and eighty (180) consecutive calendar days shall be removed therefrom."

33. Article 11.10(c)(ix) defines a day, for the purposes of Article 11.10(c)(vii) and (viii).

34. Article 11.11(b)(ii) references "…three (3) consecutive weeks… ."

35. Article 12.12 (Rights of the Employee upon Re-Employment) provides that sick leave and vacation credits are retained if an employee is "…re-employed within thirty-six (36) calendar months."

36. Articles 13.02, 13.03 and 16.01 contain definitions of "day"; "week" and a "Vacation Year" respectively.

37. Article 15.07 (Medical Care Leave) provides for time off to attend medical appointments provided "Such time off shall not exceed sixteen (16) working hours per fiscal year, except in extenuating circumstances."

38. Article 15.09 (Union Leave) addresses what happens on leaves of absence of "…more than one (1) continuous month… ."

39. Article 26.01 (Disability Income Plan) contains references in sub-Article (c) to a specified number of "…consecutive calendar days" and to a specified number of "…working days."

40. Article 15.04 (Parental Leave) provides in sub-Article (a) for up to "…thirty-seven (37) weeks unpaid leave which can be taken during the three (3) months before or during the twelve (12) months after the birth of the child."

41. Following the Hearing I communicated with both Counsel and noted that there were numerous references within the Collective Bargaining Agreement to "calendar days", "calendar weeks", "calendar months", "consecutive calendar days", and "working days" and invited their comments as to whether the use of more precisely described terms impacts on the issue before me.

IV Arguments

Union

42. Counsel submitted that a purposive interpretation of Article 25 would stipulate that one year total of benefits is the appropriate interpretation.

43. Counsel, in his Brief, suggested that a workplace injury to one's shoulder was not uncommon due to the nature of the work. Further, if it is necessary to wait for surgical scheduling, that is beyond the employee's control.

44. Counsel maintained that it is not unusual for an employee, injured at work, to be off work for a period following an injury and then back to work while awaiting surgery and then off work again. He submitted that Article 25 was an "umbrella recognition" of such a scenario and that the Parties, in Article 25, had recognized that a period of up to a year, whether it was 12 consecutive months or a cumulative period of up to 12 months, was an appropriate benefit to support employees injured in the service of their employer.

45. Relying upon *Re Cranbrook and District Hospital and Registered Nurses' Association of British Columbia* (1980), 24 L.A.C. (2d) 274 (Thompson), Counsel submitted that employees who are injured or disabled at work are entitled to a higher degree of deference from their Employer in terms of administrating

benefits such as a top up of Workers' Compensation benefits, unless the collective agreement addresses those circumstances directly and proscribes such an interpretation.

46. In the *Cranbrook and District Hospital* Case, the issue was whether the grievor was entitled to statutory holiday pay, annual vacation or pay in lieu, an increase in pay and vacation entitlement under the collective agreement while in receipt of WCB payments.

47. In allowing the grievance Arbitrator Thompson, at p 277 stated:

> Both public policy and the parties in collective bargaining have long recognized the special circumstances of employees receiving these payments [WCB payments]. Their absence from work is a direct result of performance of their duties.

48. Counsel referred me to an Award of Arbitrator Jones in *Molson Breweries and Brewery Workers, Local 284* (1997), 59 L.A.C. (4th) 373. In that case the dispute was with respect to the vacation pay which employees who were absent from work and in receipt of disability benefits were entitled to. Arbitrator Jones accepted the union's position that an employee on disability was entitled to a certain sum of money on account of vacation and that amount should be used to top up the employee's compensation for as long as it lasted, rather than restricting it to the number of days of entitled vacation.

49. In addressing the use of sick leave to cover absences due to sickness or accident that does not entitle the employee to Workers' Compensation payments, Arbitrator Jones commented, at para 52 that:

> …The collective agreement allows an employee to elect to use available Sick Leave in certain other circumstances. The purpose of this transferability is obviously to allow the employee to keep himself whole financially when he is unable to work.

50. Similarly, at para 55, Arbitrator Jones stated:

> Just like with the transferability of Sick Leave, the purpose of allowing vacation to be used to supplement disability compensation payments is to keep an employee whole financially for as long as possible.

51. Counsel submitted that the principle addressed by Arbitrator Jones in the *Molson Breweries* Case is the logical purpose behind Article 25 – to keep an employee financially whole for a period of one year whether that year is made up of a continuous calendar year off work or a series of absences totaling a year, particularly when that absence is attributable to the workplace illness or injury.

52. Arbitrator Weatherill's Decision in *Re United Automobile Workers', Local 112 and De Havilland Aircraft of Canada Ltd.* (1970), 21 L.A.C. 236, was cited as another example of the deference accorded employees who have become disabled. There the issue was whether employees, in receipt of disability benefits pursuant to the collective agreement, were subject to lay-off. Arbitrator Weatherill concluded they were not as the collective agreement did not prescribe that disabled employees away from work were subject to lay-off.

53. Counsel also referred me to a Decision of the Alberta Court of Appeal in *U.N.A., Local 121 R v Calgary Health Region* (2008), 167 L.A.C. (4^{th}) 1. Although this was a special leave case, rather than a WCB or disability case, Counsel submitted that it had application in that the Alberta Court of Appeal examined the circumstances of an employer making the test for an entitled benefit so stringent as to deprive the employee of the benefit bargained for on the employee's behalf.

54. In setting aside the majority Decision of a Board of Arbitration denying the grievance, the Court of Appeal held, at para 32:

> In short, the interpretation made by the majority is unreasonable, because it fails to consider the nature and context of the provision in the collective agreement, further fails to consider its object, and imposes a construction inconsistent with its purpose. Further, as previously noted, the narrow and literal construction of the second basis of eligibility for special leave is internally inconsistent with the approach used by the majority to interpret

> the first basis. In result, the provision was interpreted in a fashion which its words did not reasonably bear.

55. Counsel in his Brief submitted:

> …the Employer's interpretation of the terms of Article 25 exactly matches the circumstances which caused the Court to quash the *U.N.A.* award: it fails to consider the nature and context of the provision (to preserve an employee financially while they recover from work-related illnesses or injuries); fails to consider its object (to recognize that an employee is entitled to a year of top-up benefit) and imposes a construction inconsistent with its purpose (mandating that only a calendar year qualifies for top-up benefits, when the construction provides for a year of benefits without distinguishing between calendar or a total of a year).

56. Citing *Ottawa-Carleton (Regional Municipality) and Ottawa-Carleton Public Employees' Union, Loc. 503* (1993), 30 L.A.C. (4th) 257 (Dissanayake); *Re Joseph Brant Memorial Hospital of the Burlington-Nelson Hospital and Canadian Union of Public Employees, Local 1065* (1974), 5 L.A.C. (2d) 15 (Brown); the *Cranbrook and District Hospital* Case and *Re Burns Meats and United Food & Commercial Workers Union, Local 832* (1996), 50 L.A.C. (4th) 415 (Hamilton), Counsel submitted that clear and specific language would be required to deprive the Grievor of a negotiated benefit, especially one the Grievor was entitled to while receiving WCB benefits.

57. *Lambton Kent District School Board and E.T.F.O.* (2007), 164 L.A.C. (4th) 430 (Etherington), was cited as an example of a case where there was clear and concise language within a collective agreement to disentitle an employee to benefits. The issue there was whether a grievor, off on long-term disability, was entitled to accumulate sick leave credits. Arbitrator Etherington denied the grievance on the basis that when the article in question was considered in the context of all of the language pertaining to the granting and accumulation of sick leave credits, the employer's interpretation was the only one that was reasonable and consistent with the general approach to sick leave credits taken by the parties throughout their collective bargaining agreement (p443). He concluded, at pp 443-444:

First and foremost, I am in agreement with employer counsel that when the language of article 15.03.1 is considered in the context of all the language pertaining to the granting and accumulation of sick leave credits, especially the provisions regulating the granting or denial of sick leave credits during paid and unpaid leaves and the pro-rating of sick leave credits for teachers who commenced employment after September 1 … or work part-time … or start a full-time assignment partway through the year … the interpretation proposed by the employer is the only one that is reasonable and consistent with the general approach to sick leave credits taken by the parties throughout the agreement. The provisions of … dealing with pro-rating, the provisions of … dealing with the requirement that persons on LTD must pay full premiums to continue to enjoy benefits, the provisions of … dealing with employees being required to pay premiums for benefits while on unpaid leaves but being entitled to continued benefits and sick leave credit accumulation while on paid leaves of absence, and the provisions of 17, 18, 19, 20 and 23, are all consistent with the parties' agreement on a general approach that viewed sick leave credits and their accumulation as an earned benefit, part of the employee's overall compensation package that is related to the performance of services.

To read article 15.03.1 in isolation and give it the meaning sought by the union would give rise to inconsistencies with other provisions in the agreement concerning pro-rating of sick leave credit, such as 9.06.2, 24.07.1 and 15.03.2. Further, it would give rise to unreasonable and absurd results in terms of unequal treatment for teachers in the accumulation of sick leave depending solely on the timing of year during which they went off on LTD or whether they were off for the entire year rather than simply a part of the year that did not commence until after the first day of school in September. Under the union's proposed interpretation, a teacher who was off work for the entire year on LTD, or at work on the first day of school but had to go off on LTD a few weeks later for the rest of the year would be entitled to full sick leave credits for the year and full accumulation, while the teacher who was off at the start of the year but returned a few weeks later would be subject to pro-rating of sick leave credits. I can not imagine that the parties intended such absurd and inequitable consequences to result from the operation of article 15.03.2. The fact that the employer's proposed interpretation does not result in any absurd, unreasonable or inequitable consequences of this type for teachers who find it necessary to go on LTD at different times of the year indicates that it is more likely that it better reflects the parties' intention when they agreed to the wording of article 15.03.2 than the interpretation proposed by the union. Similarly, the fact that the employer's interpretation is not inconsistent with any of the other provisions of the agreement, does not render any other provisions redundant, and is consistent with the general approach taken in the agreement to entitlement to benefits for employees who are off on unpaid

> authorized leaves of absence, are all indicators that it more likely reflects the intention of the parties than the meaning proposed by the union.

58. Counsel argued that because the Collective Agreement provided a right to the benefit of a top up of WCB payments, that right had to be exercised reasonably (*Re Board of School Trustees of School District No. 37 (Delta) and Canadian Union of Public Employees, Local 1091* (2000), 85 L.A.C. (4th) 33 (McPhillips).

59. *Re Canvin Products Ltd. and Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers Union, Local 351* (1981), 30 L.A.C. (2d) 300 (Ladner) was relied upon in support of the proposition that when a collective agreement provides an obligation for an employer to top up WCB payments, the calculation of the benefit the employer pays must be interpreted liberally, rather than parsimoniously.

60. Counsel in his Brief submitted that:

> …The parties have already recognized that any particular work related injury or illness could potentially result in a payment of the benefit for a period not to exceed one year. The employer's attempt to restrict the right to the benefit by imposing an artificial condition that the period of entitlement can only cover one calendar year is parsimonious. Should an employee's doctor decide that the risk of re-injury might be exacerbated by a return to work while awaiting further treatment, the employer would be compelled to pay the benefit continuously for up to one year. An employee who returns to work while undergoing treatment or awaiting surgery provides the employer with the benefit of her labour in the meantime, and actually may save the employer money in terms of not having to hire additional staff to replace her during that period.

61. As regards the principles of interpretation to be applied in the present case, Counsel referred me to Brown and Beatty's text, *Canadian Labour Arbitration 4th ed.* (paras 4:2100, 4:2110, 4:2120, 4:2130, 4:2140, 4:2141, 4:2142, 4:2150, 4:2300 and 4:2320 together with the Decision of a Board chaired by myself in *Regina Qu'Appelle Health Region and S.U.N. (Schoenhoffen)* (2008), 208 L.A.C. (4th) 346), in which I adopted the reasoning of Arbitration Elliott in *Communication, Energy and Paperworkers Union, Local 777 v Imperial Oil*

Strathcona Refinery (Policy Grievance) (2005), 130 L.A.C. (4th) 239. In the latter case Arbitrator Elliot, at paras 39, 40 and 41 commented:

> [39] I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation. I refer to this approach as the modern principle of interpretation. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in *Halsbury's Laws of England* to which Canadian texts refer, which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.
>
> [40] The modern Canadian approach to interpreting agreements (including collective agreements) and legislation is encompassed by the modern principle of interpretation which, for collective agreements, is:
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> > "In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties."
>
> [41] Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.

62. Counsel noted that both my Award in *Regina Qu'Appelle Health Region* and Arbitrator Elliot's Award in *Imperial Oil*, in examining the wording of the agreements in issue, did so having regard to the preamble (*Regina Qu'Appelle Health Region*) and purpose (*Imperial Oil*) to promote harmonious relations. The preamble in the present case, quoted at p 4 hereof, is similar to that in the *Regina Qu'Appelle Health Region* Case:

> 1. Whereas it is the desire of both parties to this Agreement:
>
> a) To maintain and improve harmonious relations between the Employer and members of the Union.; …

63. Counsel contended that the Union's interpretation was more suited to enhancing harmonious relations between the Employer and the members of the Union.

64. Finally, Counsel noted that Article 8.05 quoted at p 5 hereof, prohibits me, as the Arbitrator, from adding to the Agreement and submitted that adding or reading in the word "calendar" to the definition of a year, would breach that prohibition.

65. Counsel, in his Supplementary Submissions filed April 2, 2012, reiterated that workplace injuries are not amenable to strict timelines when it comes to healing and recovery.

66. Counsel noted that WCB benefits are payable, on acceptance of a claim, until such time as the employee returns to work fully functional, with some exceptions including returning to work on a graduated basis, or a work hardening period. If the employee aggravates the injury the WCB claim continues, a situation which Counsel submitted was a recognition of the unpredictability of such circumstances.

67. Counsel pointed out that Article 4.05 (Return to Work and Duty to Accommodate) directs that a return to work or duty to accommodate must be organized so that it is not discriminatory with regard to an employee's disability or limitations resulting from an illness or injury.

68. Counsel argued in his Supplementary Submissions that:

> The specific circumstances of an employee attempting to return to work on a graduated basis benefits both the employer and the employee. If the employee manages the return or work hardening successfully, the employer's liability to pay the ten percent top up is concurrently reduced. The employee returns to productivity earlier. If the return is unsuccessful, or requires further treatment, the employee is not, and should not, be penalized as a result of her effort.
>
> In this circumstance, that is what the Employer is proposing: a penalty if the employee can not manage to return or a work hardening turns out to be premature, or a re-injury occurs, that extends the claim beyond a calendar year. The Union submits that that is not a result the parties intended when they bargained the language regarding the situation. Were that contemplated, the Union would be reluctant to support such attempts and

> would advise employees that unless a medical assessment provided a strong recommendation that a return to work or hardening program had a significant likelihood of success, an employee could place herself in a position of being penalized if her good faith attempt to return did not prove successful. This could jeopardize employees' future willingness to participate in these programs.

69. Counsel contended that if the Parties had intended to limit the Employer's liability with respect to the WCB top up to a period of one calendar year they would have done so as they did in Articles 15.05 and 15.07.

70. Article 15.05 provides employees with access of up to 45 hours of time off without loss of pay for family illnesses, but specifically limits the access to that 45 hours to a 12 month period, and further, limits the Employer's liability by restricting the benefit so that it does not accumulate from year to year.

71. Similarly the Parties, in Article 15.07 have made express provisions to limit the Employer's liability. There, an employee will be granted 16 hours per fiscal year if necessary, to attend to medical appointments that can not be scheduled outside of regular work hours. The Employer agrees to pay for that time off, however, if a situation arises where the 16 hour limit is exceeded, the Parties have agreed to limit the Employer's liability and the employee must then utilize an earned benefit (sick leave).

72. As regards the argument advanced on behalf of the Employer that the Parties, in Articles which affect eligibility for appointment to Boards of Arbitration or which set out time limits for defining temporary, part-time or full-time employees, had used phrases such as "one year" to designate a continuous period of time, Counsel submitted that they are not appropriate comparators as they are not expressly directed at benefits.

73. Finally, Counsel stressed that in situations such as family illness leaves, bereavement, adoption and parenting leaves, the situations underlying the need for leave are beyond the scope of the Employer's ability to control or manage.

A workplace injury, however, is different and requires a broad and purposive interpretation of Article 25.01 so as not to penalize an employee.

74. In summary, Counsel for the Union and Grievor in his Brief, submitted:

> … that the Union's interpretation of the provision relating to the top up of WCB payments is the correct, logical and reasonable one; that it fits most correctly with the purposive intention of the article, the context of the agreement, and the intention of the parties; that it addresses the deference that ought to be accorded to employees that have been injured in performance of their duties; that it would not provide an absurd, inconsistent, or repugnant result.
>
> It provides a blanket or umbrella income protection to injured employees, which is a desirable effect in a labour relations context; it does not offend the principle of altering the agreement; it fits with the principle that clear language is required to deny a benefit (and no clear such language exists in this agreement); and it promotes harmonious workplace relations, among other effects.

Employer

75. Counsel for the Employer submitted that the Union bears the onus of establishing that the Employer breached the Collective Bargaining Agreement, a proposition which Counsel for the Union and Grievor did not dispute.

76. Further, relying upon *Consolidated Aviation Fueling & Services (Pacific) Ltd. and Teamsters Union, Local 213* (1987), 30 L.A.C. (3rd) 130 (Greyell), Counsel submitted that the onus is not easily discharged where the language is less than clear and the intention of the Parties is not readily ascertained.

77. As regards the principles of interpretation to be applied in this case Counsel, in her Oral Submissions, adopted the "modern approach" to interpretation advocated on behalf of the Union and Grievor.

78. Turning to the case at hand Counsel submitted that there is nothing in the Collective Agreement that expressly states that the time period for which the Grievor is entitled to the WCB top up is cumulative, rather than continuous.

79. As such Counsel maintained that the starting point was the ordinary meaning of the words "a period" and "year".

80. Counsel referred me to a number of dictionary definitions of the word "year".

81. *Black's Law Dictionary, 8th ed.*, defines "year" as follows:

> 1. Twelve calendar months beginning January 1 and ending December 31 – also termed calendar year. 2. A consecutive 365-day period beginning at any point; a span of twelve months.

82. The *Shorter Oxford Dictionary, 5th ed*., defines "year" as follows:

> 2. A period of roughly this length in a calendar… a period of 365 or 366 days divided into twelve months beginning on 1 January and ending on 31 December, denoted by a number in a particular year. Also termed calendar year, civil year.

83. Counsel contended that it is implicit in the concept of a "calendar year" that the days in the year are consecutive. She submitted that while "calendar year" generally means January 1, to December 31, the principle that the days run consecutively is true regardless of whether the year begins on January 1, or on some other date during the year period.

84. Counsel noted that the word "year" is consistently defined in both federal and provincial *Interpretation Acts* as a continuous period of time:

- Saskatchewan – *The Interpretation Act*, 1995, S.S. 1995, c.I-11.2, Section 27 defines "year" as "calendar year".
- Canada – *Interpretation Act*, RSC 1985, c I-21, s. 37
    - The expression "year" means any period of twelve consecutive months, except that a reference to (a) a

"calendar year" means a period of twelve consecutive months commencing on January 1

- British Columbia – *Interpretation Act*, RSBC 1996, c. 238, s. 29
    - "year" means any period of 12 consecutive months; but a reference to a "calendar year" means a period of 12 consecutive months beginning on January 1, and a reference by number to a dominical year means a period of 12 consecutive months beginning on January 1 of that dominical year;
- Manitoba – *The Interpretation Act*, CCSM, c. I80, s.17
    - "year" means a calendar year
- Ontario – *Interpretation Act*, RSO 1990, c.I.11, s29
    - "year" means a calendar year
- New Brunswick – *Interpretation Act*, RSNB 1973, c. I-13, s, 38
    - "year" means twelve consecutive months; and "calendar year" means the period from the first day of January to the last day of December then following, inclusive.
- Prince Edward Island – *Interpretation Act*, RSPEI 1988, c. I-8, s.26(k.2)
    - "year" means any period of twelve consecutive months; but a reference to a "calendar year" means a period of twelve consecutive months commencing on the first day of January, and a reference by number to a dominical year means a period of twelve consecutive months commencing on the first day of January of that dominical year.
- Newfoundland – *Interpretation Act*, RSNL 1990, C. I-19, s.27
    - "year" means a calendar year

85. Counsel submitted that the jurisprudence also supports the proposition that the "plain and ordinary" meaning of the word "year" is a consecutive period of twelve months. In *Casino Rama Services Inc. v Janice Bourne et al and Director*

of Employment Standards [2004] O.E.S.A.D. No. 1385, the Ontario Labour Relations Board held, at paras 52-54 that:

> 52 The plain language meaning of the term year is a period of 365 or 366 days. The New Shorter Oxford English Dictionary defines year as:
>
> > 1. The time taken by the earth to travel once round the sun, equal to 365 days, 5 hours, 48 minutes, and 46 seconds. 2. A period of roughly this length in a calendar, ESP. (in the Gregorian calendar) a period of 365 or 366 days divided into twelve months beginning on 1 January and ending on 31 December … 3. A period of twelve months starting at any point …
>
> 53 The courts have considered the meaning of the term year. In MCDONNELL DOUGLAS CANADA LTD. (1984), 47 O.R. (2d) 78 (Div. Ct.), the Divisional Court commented:
>
> > Standing alone, the word "year" is not ambiguous. It is the period of time that it takes the earth to revolve around the sun. Put in more every day language, it means a period of 12 months or 365 days (366 days in a leap year). I agree with the arbitrator that the word may be ambiguous in different contexts … I expect there may be the same kind of situation in labour relations. The word "year" may refer to a period in the collective bargaining agreement or it may refer to a calendar year or again, simply to a twelve month period.
>
> 54 In WALTON v. COTE (1989), 36 C.P.C. (2d) 113 (Ont. H.C.J.), aff'd (1991), 1 O.R. (3d) 558 (C.A.), in considering the nature of a limitation period, the court noted:
>
> > … a year is complete at the end of the day which the anniversary of the day of the event, thus making a full 365 days (or 366 in the case of a leap year…) …

86. Having regard to the above Counsel submitted that the word "year" in Article 25.01 was intended by the Parties to mean any period of 12 consecutive months which is the plain and ordinary meaning of the word "year".

87. Further, Counsel submitted that the reference to "a period" in Article 25.01 refers to an unbroken passage of time. Counsel argued that if the word "year" was intended to mean 365 or 366 accumulated days, the reference in the Collective Agreement would be to more than one "period" (i.e. to "periods" rather than to "period").

88. In support of that proposition Counsel relied upon *Holz v Bruno Clay Works* (1922), 62 D.L.R. 656 (Sask. K.B.) (Wilson, J.). There an action was brought on behalf of a deceased employee who had been terminated due to disability. The employment agreement contained a disability provision which provided that the employment contract would be null and void if the employee was disabled through sickness or accident "for a period of sixty days or more". The evidence was that the plaintiff had been absent for 25 days; then returned to work for 87 days and was then off work for a further 41 days. The employer argued that the two periods of absence should be counted together in order to make up the 60 days of disability provided for in the agreement. The Court rejected that interpretation at p 657:

> … I think the word "period" in this contract …must be held to mean a continuous period of time. This is what the word "period" when applied to "time" actually means. A somewhat similar point was before the Court in the case of *Tyler v London & India Docks Joint Committee* (1892), 9 Times L.R. 11. The words to be construed in that case were "for a period of not less than ten years"; and the Master of the Rolls delivered the judgment of the Court in which he said, "such a period must mean ten continuous years."

89. Relying on the interpretive principle that all words should be presumed to have some meaning, Counsel submitted that the singular reference to "period" illustrated that the Parties did not intend that the amount of time during which top up is paid should be counted on a cumulative basis.

90. Counsel argued that Article 25.01 provides for supplementary disability insurance "for a period not to exceed one (1) year". She maintained that the object is to provide an assurance to employees that, upon WCB approval, they will suffer no loss of income for a one-year period. Further she maintained that the indemnity is in respect of the first year's net pay and, notably, is not expressed as a benefit the Employer will pay up to a maximum dollar amount. As such she submitted that Article 25.01 provides some limited protection against catastrophic loss, rather than an employment benefit to be accessed in the event of intermittent or occasional absence, such as sick leave.

91. Finally, and in the alternative, it was submitted on behalf of the Employer that if the Parties had intended “year” to be interpreted as something other than its ordinary or normal meaning, they did not state so clearly. She argued that if I conclude that there is no clear meaning to be derived from the language of the Collective Agreement, or, in other words, if there is no evidence of a contrary intention, the ordinary meaning of the word must prevail: see *York University v York University Staff Assn.* (*Ziade Grievance)* [1998] O.L.A.A. No. 95 at para 15.

92. Counsel, in her Supplementary Submissions filed March 30, 2012, argued that the fact precise terms such as "calendar days", "calendar weeks" and "calendar months" appear in some Articles of the Collective Agreement does not change the fact that the plain meaning of the word "year" is a "calendar year".

93. While Counsel acknowledged that when specific words are used they are intended to have specific meanings, she maintained that the principle does not stand for the proposition that if a specific word is not used, then the opposite meaning must apply.

94. Counsel noted that there are a number of examples in the Collective Agreement where the phrase "one year" or "a period of one year" are used without the word "calendar", but the phrase must be interpreted as a continuous period of time in order to make sense.

95. As an example, Article 8.01(d), dealing with the appointment of members to a Board of Arbitration, provides that:

> 8.01(d) A person who has a pecuniary interest in a matter before the Arbitration Board, or is acting or has, within a period of one (1) year prior to the date on which notice of intention to, submit the matter to arbitration as given, acted as solicitor, counsel, or agent of any of the parties to the arbitration, is not eligible for appointment as a member of the Arbitration Board and shall not act as a member of the Arbitration Board.

96. Counsel submitted that for the Article to make sense "…a period of one (1) year …" must be continuous.

97. In a similar vein Counsel pointed to the following Articles which she contended had to be interpreted as meaning a continuous period of time in order to make sense:

- Article 11.09(d) - "The employer agrees to review with the Union all temporary jobs which exceed one (1) year in duration on a semi-annual basis…";
- 15.02(a) Maternity Leave - "…shall be for a period not to exceed eighteen (18) months.";
- 15.03(a) Adoption Leave - "…up to eighteen (18) months…";
- 15.04(a) Parental Leave - "…up to thirty-seven (37) weeks…";
- 18.01 Wage Increments - "Other than full-time employees shall receive a half (1/2) increment on the completion of nine hundred and seventy-four point four (974.4) regular hours… or one (1) year, which ever occurs later.";
- 29.01 Temporary Employee - "A temporary employee shall be an employee who is employed for a predetermined period of time not to exceed one (1) year."

98. Pointing to the fact that the Agreement defines "full-time" and "part-time" employees by the accumulated number of hours they are assigned to work, Counsel argued that demonstrated that when the Parties intended an accumulated calculation of time they expressed that accumulated amount in hours; not in days, weeks or years.

99. As regards the definition of the words "day", "week" and "vacation year" each reference the term "period" to express a continuous length of time. Counsel submitted that supports her argument that the phrase "a period" in Article 25.01 must mean a continuous period of time.

100. In summary Counsel submitted that it is clear that when time is expressed solely as "days", "weeks", "months" or a "year" or "years", the Parties intended to mean "calendar" days, weeks or years, and to run continuously. When time is intended to be measured as cumulative, the Collective Agreement states that by citing an accumulated number of hours, such as in Article 13.01 (Hours of Work), Article 29.02 (Full-time Employees), and Article 18.03 (Recognition of Experience).

101. Accordingly Counsel for the Employer asked that the Grievance be dismissed.

V Determination

102. The Union and Grievor bear the onus of establishing, on a balance of probabilities, that the Employer's interpretation of Article 25.01 breached the Collective Bargaining Agreement.

103. Counsel for the Union and Grievor submitted that clear language is needed to deprive an employee of a negotiated benefit. By the same token the onus on the Union and Grievor must be strictly observed in that a monetary benefit is being sought on behalf of the Grievor.

104. If I were examining Article 25.01 on its own then, having regard to the dictionary definition of a "year", which mirrors the definitions found within federal and provincial *Interpretation Acts*, as well as the use of the phrase "a period" in Article 25.01, I would conclude that the Employer's interpretation that the top up is for a period of up to one calendar year, that is up to twelve consecutive months from the start of the WCB claim, is the correct interpretation.

105. Article 25.01 can not, however, be read on its own or in isolation.

106. As noted in the *McDonnell Douglas Canada* Case referenced in *Casino Rama Services* cited on behalf of the Employer:

> Standing alone, the word "year" is not ambiguous. …I agree with the arbitrator that the word may be ambiguous in different contexts… .

107. Similarly, Arbitrator Etherington in the *Lambton Kent District School Board* Case, cited on behalf of the Union and Grievor, cautioned against reading an article of a collective agreement in isolation as that could give rise to inconsistencies with other provisions of the collective agreement.

108. The modern approach to the interpretation of collective bargaining agreements outlined by Arbitrator Elliott in the *Imperial Oil* Case, and endorsed by both Counsel, requires me to do more than simply read Article 25.01 on its own.

109. Arbitrator Elliott at pp 365 and 366 outlined the components of the modern principle and what they encompass:

> The modern principle directs interpreters:
>
> 1. to consider the entire context of the collective agreement
> 2. to read the words of a collective agreement
>   - in their entire context
>   - in their grammatical and ordinary meaning
> 3. to read the words of a collective agreement harmoniously
>   - with the scheme of the agreement
>   - with the object of the agreement, and
>   - with the intention of the parties
>
> 1. What is the "entire context of a collective agreement"
>
> The "entire context" includes
>
> - the collective agreement as a whole document. One provision of a collective agreement can not be understood before the whole document has been read because what is said in one place will often be qualified, modified or excepted in some fashion, directly or indirectly, in another
> - reading one provision of the collective agreement keeping in mind what is contained in other provisions. In the first instance it must be assumed negotiators knew not only the provisions specifically bargained but all the others contained in the collective agreement. An example is the use of words that have defined meanings. Those meanings must be applied whenever the defined word is used in the collective agreement.
> - keeping in mind the legislative framework within which collective agreements exist and keeping that framework in mind as part of the entire context.
>
> 2. Reading the words

Words in a collective agreement are to be read
(a) within their entire context in order to figure out the scheme and purpose of the agreement and the words in a particular article must be considered within that framework,
(b) in their grammatical and ordinary meaning. Typically this involves taking the appropriate dictionary definition of a word and using it, unless the dictionary meaning is modified by a definition, by common usage of the parties or by the context in which the word is used, and
(c) harmoniously with

- the scheme of the agreement (which could include the arrangement of provisions and the purpose of the agreement or particular part of the agreement)
- its object
- the intention of the parties, assuming intention can be discerned. The intention is to be found in the words used, but evidence of intention from other sources may be appropriate in order to decide on what the words used by the parties actually mean.

3. The meaning of "context"

The word "context" itself means the circumstances that form the setting… for [a] statement… and in terms of which it can be fully understood. Concise Oxford Dictionary (10^{th}) and the Merriam-Webster Dictionary includes in its definition of context:
"the weaving together of words; the parts of a discourse that surround a word or passage and can throw light on its meaning; the inter-related conditions in which something exists or occurs."

And so, entire context in terms of a collective agreement and the interpretation of the words used in it includes considering

- how words have been weaved together
- how those words connect with other words
- the discourse (other information) that can throw light on the text to uncover the meaning
- any conditions that exist or may occur that might affect the meaning to be given to the text.

4. Testing the interpretation

Once an interpretation is settled upon, it should be tested by asking these questions:

- is the interpretation plausible - is it reasonable?
- is the interpretation effective - does it answer the question within the bounds of the collective agreement?
- is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

110. Counsel for the Employer urged me to read "…a period not to exceed one (1) year…" as a calendar year, that is up to twelve consecutive months. Although reading the phrase as Counsel for the Employer has urged me to do would give the words their grammatical and ordinary meaning, I have concluded that the Parties have modified the meaning of the phrase by not using the descriptors "calendar" year or "consecutive" months, as they have elsewhere in the Collective Bargaining Agreement.

111. Article 9.04(b) (Loss of Seniority) provides that an employee loses seniority in the event the employee "Has worked exclusively in a permanent out-of-scope position for a total of twelve (12) consecutive months."

112. Article 9.04(d) provides for a loss of seniority if an employee "Is laid off and has not returned to employment with the Employer for thirty-six (36) calendar months following the last date of lay-off from the Employer."

113. Article 12.12 (Rights of Employee Upon Re-Employment) provides that sick leave and vacation credits are retained if an employee is "…re-employed within thirty-six (36) calendar months."

114. Article 15.09 (Union Leave) addresses what happens on leaves of absence of "…more than one (1) continuous month…".

115. Article 16.01 defines the term "Vacation Year" as the twelve (12) month period commencing July 1 "in each calendar year" and concluding June 30 of the "following calendar year".

116. Additionally, as noted at pp 5-8 hereof, there are numerous references within the Collective Bargaining Agreement to "calendar days", "calendar weeks", "consecutive weeks" and "consecutive calendar days".

117. Counsel for the Employer, in her Supplementary Submissions, noted that there are instances within the Collective Agreement where the term "year" is used without it being described as a "calendar year" or a period of twelve "consecutive months" and yet the term must be read as a continuous period.

118. Article 8.01(d) is illustrative of that:

> 8.01(d) A person who has a pecuniary interest in a matter before the Arbitration Board, or is acting or has, within a period of one (1) year prior to the date on which notice of intention to, submit the matter to arbitration is given, acted as solicitor, counsel, or agent of any of the parties to the arbitration, is not eligible for appointment as a member of the Arbitration Board and shall not act as a member of the Arbitration Board.

119. I agree that the term "…a period of one (1) year prior to the date on which notice of intention, to submit the matter to arbitration is given…" must be read as a continuous period. No other interpretation would, in my view, be reasonable.

120. The same can not be said, however, for the term "…a period not to exceed one (1) year …" in Article 25.01.

121. When one has regard to a purposive interpretation; the deference to be shown to employees injured at work in the administration of negotiated benefits; and being properly careful not to make the test for entitlement so stringent as to deprive an employee of a negotiated benefit, interpreting Article 25.01 as only providing the top up for a calendar year, that is a continuous period, is simply not the only interpretation that makes sense.

122. The fact the Parties have used the descriptors "calendar year"; a stipulated number of "calendar months" and a stipulated number of "consecutive months" elsewhere in the Collective Bargaining Agreement, but have not done so in Article 25.01, dictates that the interpretation advanced on behalf of the Union and Grievor must prevail. As a result, the top up is properly payable for up to one year, whether that be a continuous calendar year or a series of absences, attributable to the injury, which total up to a year.

123. As suggested by Arbitrator Elliott in the *Imperial Oil* Case, once an interpretation is settled upon it should be tested by asking the following questions.

124. *Is the interpretation plausible - is it reasonable?* It must be assumed that the negotiators of the Collective Bargaining Agreement were aware of not only what was bargained in Article 25.01, but elsewhere in the Collective Agreement. Having not described "…a period not to exceed one (1) year…" in Article 25.01 as either a calendar year or twelve consecutive months, when they used those terms elsewhere, interpreting the phrase broadly enough to encompass either a period of up to twelve consecutive months or an accumulated period of time of up to twelve months is, in my view, reasonable.

125. *Is the interpretation effective - does it answer the question within the bounds of the Collective Agreement?* Yes it does.

126. *Is the interpretation acceptable in the sense that it is within the bounds of acceptability to the parties and the legal values of fairness and reasonableness?* I accept, as submitted on behalf of the Union and Grievor, that interpreting Article 25.01 as they have:

> … provides a blanket or umbrella income protection to injured employees, which is a desirable effect in a labour relations context; it does not offend the principle of altering the agreement; it fits with the principle that clear language is required to deny a benefit (and no clear such language exists in this agreement); and it promotes harmonious workplace relations, among other effects.

127. In the *Lambton Kent District School Board* Case Arbitrator Etherington held that allowing a teacher who was off work for an entire year on LTD, or who started the year but then after a few weeks went off on LTD for the remainder of the year, full sick leave credits, but subjecting a teacher who was off at the start of the year and then returned to work a few weeks later, to a pro-rating of sick leave credits would be an "absurd and inequitable" consequence.

128. In my view the Employer's interpretation in this case could also lead to an inequitable consequence as illustrated by the following example. Two employees suffer similar injuries on February 1, 2010, in the same workplace accident and each requires surgery. Each have their WCB claims accepted one week later on February 7, 2010. The first employee remains off work and in receipt of WCB benefits until March 1, 2011, and during that period undergoes the necessary surgery. Under the Employer's interpretation the employee receives a top up of his WCB benefits for the twelve months that follow February 7, 2010. The second employee, however, is unable to arrange surgery as quickly as the first. He is off work for six consecutive months following the accident and then returns to work. Approximately 13 months after the accident the employee goes off work for a second period on March 1, 2011, to undergo the surgery necessitated by the workplace accident. He is off work and in receipt of WCB benefits from March 1, 2011, until May 1, 2011. Under the Employer's interpretation, the second employee only receives the top up from February 7, 2010, until he returned to work six months later on August 6, 2010. In my view that would not fall within the legal values of "fairness and reasonableness".

VI Summary

129. I am satisfied, on a balance of probabilities, that the Employer breached the Collective Bargaining Agreement by interpreting the phrase "…a period not to exceed one (1) year …" solely as being up to one calendar year, that is up to twelve consecutive months.

130. When one interprets the words in accordance with the modern approach to interpreting collective agreements, Article 25.01 must be read as providing a top up for up to one year of benefits, whether it be one continuous calendar year or a series of absences attributable to the workplace injury which total a year of absences.

131. In accordance with the request of the Parties, the calculation of the amount owing by the Employer to the Grievor will be left to the Parties in the first instance, with me reserving jurisdiction in case they are unable to agree.

132. Counsel are to be commended for having reached an Agreed Statement of Facts upon which the matter was argued.

Dated at Regina, Saskatchewan this 11th day of April, 2012.

Bob Pelton, Q.C. – Sole Arbitrator