IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CORPORATION OF THE COUNTY OF ESSEX
- The Employer

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2974.1
- The Union

AND IN THE MATTER OF a Union policy grievance regarding sick leave

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Leonard P. Kavanaugh - Counsel
and others

On behalf of the Union:

James A. Renaud - Counsel
and others

Hearing held April 4, June 21, 2005, and February 14, February 16, May 19, and May 30, 2006, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This grievance raises the following issue:

> Can the Employer require an employee to provide a doctor's certificate to receive short term disability benefits for the first day of an absence due to accident?

If the Union was correct that the Employer could not require such a certificate, the Employer submitted that the principle of estoppel should prevent the Union from enforcing its interpretation of the collective agreement until the end of this agreement.

II. THE EVIDENCE

In 2000 the Ontario government initiated a change in the delivery of ambulance services within the province. January 1, 2001, the paramedics providing ambulance service in this county ceased to be employed by the province and became employees of the Corporation of the County of Essex, the Employer. The Canadian Union of Public Employees, Local 2974.1, the Union, became the bargaining agent for the paramedics under this collective agreement.

This had been a much smaller bargaining unit before the paramedics were added. The paramedics are now the largest occupational group within the unit. There are 138 paramedics in the 189 person unit.

Unlike the other members of the bargaining unit, the paramedics provide service all day, every day. There are minimum staffing levels so that if a paramedic is absent for illness, accident or hospitalization, the Employer replaces the paramedic for that shift. The Employer

does not replace sick employees in the rest of the bargaining unit and, more generally, this collective agreement is administered somewhat differently for paramedics than it is for the other bargaining unit members.

Included within this collective agreement is a short term disability plan. Under the provisions of the short term disability plan, paramedics are paid for certain absences. Of particular relevance here, paramedics are paid for the first and subsequent days of an absence due to accident or hospitalization but only for the second and subsequent days of an absence for illness.

During 2003 the Employer observed that a disproportionate number of paramedic absences were said to be for accident, as opposed to illness. The Employer was concerned that the paramedics were improperly labelling their illness as "accident" in order to receive a day of paid absence. February 2004 the Employer decided that paramedics would be required to provide doctors' certificates in order to be paid for the first day of an absence due to accident.

The Union grieved that the requirement for a doctor's certificate in the above situation was contrary to the provisions of the collective agreement.

The Union advised the paramedics that under the "work now, grieve later" principle they should provide a doctor's certificate in such a situation and all have done so. No remedy is requested for any individual employee.

The Employer submitted that if the Union interpretation was correct, the Union was nevertheless prevented under the principle of estoppel from enforcing its interpretation until this collective agreement had expired. The parties therefore presented evidence about how

the Employer came to require the doctor's certificate, how it communicated this new requirement for a doctor's certificate, and what the Union did in response.

Len Letourneau, a paramedic and the Local Union president, testified first. Mr. Letourneau had filed the grievance on behalf of the Union because the Employer had begun to routinely ask for doctors' certificates on the first day of an absence due to accident. He said he had spoken with Joe Nardone, the supervisor in charge of scheduling paramedics and the person responsible for implementing this change in practice, shortly before November 25, 2004, when Mr. Letourneau wrote a letter protesting the new practice. Mr. Letourneau then filed this grievance December 12, 2004. Mr. Letourneau said the Employer practice had previously been to require a doctor's certificate only for absences of more than three days.

Because of the Employer's estoppel argument, Mr. Letourneau testified about the details of the timing of the grievance. Mr. Letourneau said he had been advised by another paramedic in late summer 2004 of having been asked for a certificate for the first day of absence. He said he spoke briefly to Mr. Nardone then and assumed the employee provided a certificate and was paid for the absence.

Mr. Letourneau agreed that the paramedics were paid under Schedule B when off work for illness or non-work related injury. While he acknowledged that he was aware earlier in 2004 that some requests were being made for doctors' certificates after one day of absence due to accident, and that at least one member complained, he said no grievance had been filed because he felt there might be cases of abuse, etc., where the Employer could properly seek a medical certificate. Mr. Letourneau was uncertain when he leaned that this practice of requesting doctors' certificates had become widespread, but he thought it was in November 2004.

The Employer suggested to Mr. Letourneau that Mr. Nardone, the supervisor, spoke to him in January or February, 2004, about this change. Mr. Letourneau was unable to agree or disagree with that suggestion - he said he had no memory of such a conversation. It was suggested that in January/February Mr. Letourneau had told Mr. Nardone to do what the Employer had to do, but Mr. Letourneau said he thought that comment was in the August conversation.

Joe Nardone, the supervisor in charge of scheduling paramedics, testified about the change. He explained that he became concerned about the increase in the number of "accident" claims as compared with the number of illness claims, that he did a review of the claims on an individual basis and that he met in early 2004 with full time paramedics to explain his concerns regarding absences. Mr. Nardone said he decided in late February 2004, about the time he finished his meetings with the paramedics, to change the practice to require a doctor's certificate for the first day of an accident. The new practice was to require a doctor's certificate for payment for any absence due to accident. He said he then instructed the field supervisors to make this change and they had done so, with the first such doctor's certificate being required for an absence February 27, 2004.

Mr. Nardone said he had spoken to Mr. Letourneau, the Union president, in passing about the change before implementing it. He said Mr. Letourneau had commented along the line of "you do what you have to do and we will do what we have to do." Mr. Nardone said he had also spoken about sick leave with Dave Thibideau, another member of the Union executive, in early April.

Mr. Nardone said the change had resulted in a decrease in the accident claims from the paramedics.

Brian Bildfell is the Director of the Employer's Ambulance Service. He was a member of the Employer negotiating team in 2004 and he testified about the negotiations. He said during the negotiations the parties had discussed sick leave and absenteeism as a problem but the Union had not raised any issue regarding this change in the Employer's practice. The negotiations concluded May 18, 2004.

Greg Schlosser is the Employer's Manager of Human Resources. He said he was not aware of any employees in the other bargaining units covered by the Employer's short term disability plan being required to produce certificates for the first day of absence due to accident. He said there had been no issue in the other units similar to the concerns with the paramedics' non-work related accidents.

III. THE AGREEMENT

The key provisions of the 2003-2006 collective agreement are as follows:

ARTICLE 19 SICK LEAVE PROVISIONS

19.01	The Corporation agrees to provide a Short Term Disability (STD) plan without cost to the employee. The benefits of the plan are described in Schedule "B" attached.
19.02	A Doctor's certificate must be presented to the Administrator after sickness exceeding three (3) days.
19.03	Immediately after the close of each calendar year, the Employer shall advise each employee in writing of the amount of sick leave accrued to his credit.
19.04	No employee hired by the Corporation after September 12, 1979, shall be entitled to accumulate sick leave under the terms of this Agreement, for the purpose of a payment for the unused sick leave on termination of employment.
19.05	[Deals with sick leave payment on termination.]
19.06	Any employee failing to report to work due to sickness shall attempt to notify his/her immediate Supervisor or Department Head no later than thirty (30) minutes before commencement of his/her normal work day.
19.07	Payment for sick leave shall be calculated to reflect the total number of hours for which an employee is scheduled at a regular rate of pay.

SCHEDULE "B"

Short Term Disability Plan

[The Plan provides for 15 weeks of benefits at varying percentages of earnings based on years of service, the details of which do not affect this grievance.]

1. Benefit will be paid on the first (1st) day of hospitalization, on first (1st) day of accident and on the second (2nd) day of illness.
2. Benefit levels will be determined by the employee's length of service with the corporation. Service for all employees shall be based upon date of hire.
3. Earnings are those in effect on the last day the employee was actively at work. For full-time employees, earnings mean the usual straight time earnings of the employee. For part-time employees, earnings will be based on scheduled time lost.
4. Benefits are payable for up to fifteen (15) calendar weeks for each separate claim based on the periodic medical certification the employee's doctor provides the Corporation.
5. [Deals with the integration of WSIB benefits and other benefits.]
6. The Corporation will pay the costs of this Short Term Disability plan. The Corporation further agrees that it will pay the cost of a doctor's certificate required to qualify for the Short Term Disability Plan and any subsequent certificates as may be required from time to time.
7. [Deals with payment for an employee who becomes ill while performing a job in a higher classification.]
8. Current sick leave banks may be applied until depleted to cover any waiting period and to top up any partial benefit to 100%.
9. Employees employed prior to September 12, 1979, shall retain their right to a payment for unused sick leave credits upon retirement provided such payment does not exceed fifty percent (50%) of the accumulated sick leave credits calculated at the rate in effect when leaving, the maximum not to exceed six (6) months wages.

IV. UNION POSITION

The Union noted that this was an issue of interpretation of the collective agreement. No question of compensation arose.

The Union submitted that Article 19.02 describes when medical certificates can be required - certificates are limited to absences exceeding three days. While the Employer has certain management rights, those rights are subject to the collective agreement, in this case subject to Article 19.02. Although the Employer claimed Schedule B permits the Employer to require a certificate in order for an employee to be paid for the first day of an accident, the Union submitted that it was not within the Employer's ability to require a certificate for an absence until that absence exceeded three days because of the clear language of Article

19.02. The parties had addressed the issue of doctors' certificates in Article 19.02 and the issue of certificates had been fully resolved by that Article.

The evidence was clear that the Employer had not previously required a doctor's certificate for absences of three or fewer days. The practice had changed to routinely require certificates when paramedics were absent for an accident beginning with the first day of the accident.

Although there is language in paragraph 6 of Schedule B on doctors' certificates, the interpretation of the language of that paragraph must reflect the clear language of Article 19.02. If the Employer wished to be able to require a certificate for the first day of an absence for accident, it needed to negotiate such a change. To interpret Article 19.02 as allowing the Employer a unilateral right to require additional certificates beyond the certificates required for an absence exceeding three days is to give that Article an unreasonable interpretation.

The Employer may examine specific cases in which it has concerns about sick leave abuse, but in those instances the Employer must do an investigation and base its actions on cogent evidence. Article 19.02 was specifically bargained and it limits what the Employer can do.

The Union asked for a declaration that the Employer was improperly requiring a doctor's certificate for the first day of an absence due to an accident, and a direction that the Employer not act in any way inconsistent with the provisions of Article 19.02.

As for the Employer's estoppel argument, the Union submitted that the evidence did not indicate the Union was aware of the Employer's practice until just prior to the time the Union filed this grievance. It defies common sense to conclude that the Union knew during

negotiations of the Employer's practice of requiring a certificate on the first day of an absence due to accident, discussed the sick leave issue, and yet failed to raise this new Employer practice. On the contrary, it makes much more sense to conclude from all the evidence that the Union only discovered the Employer's practice later.

As for a representation by the Union, at most the Union president, Mr. Letourneau, when this issue of absences was discussed, said that the Employer should do what it had to do and the Union would do what it had to do. That cannot be interpreted as a representation that the Union would not rely on its rights under the collective agreement.

As for the suggestion that the Employer had lost an opportunity to bargain, the Union submitted the Employer had been hiding in the closet. The Employer did not tell the Union directly of this major change in practice. To the extent that estoppel is discretionary, the Employer did not have "clean hands" and should not benefit from a discretionary remedy.

The Union relied upon the following authorities: *Re City of Toronto and Canadian Union of Public Employees, Local 79* (1984), 16 L.A.C. (3d) 384 (M. G. Picher); *Re Women's Christian Association of London (Parkwood Hospital Veterans Care Centre) and London and District Service Workers' Union, Local 220* (1983), 10 L.A.C. (3d) 336 (H. D. Brown); *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79* (1986), 23 L.A.C. (3d) 271 (Burkett); and *Re Toronto Police Services Board and Toronto Police Association* (2002), 104 L.A.C. (4th) 422 (Knopf).

V. EMPLOYER POSITION

The Employer noted that paramedics are paid under Schedule B, that Article 19.02 has nothing to do with pay, and said that the focus should be on Schedule B to a much greater

extent than the Union suggested.

Unlike the Union position that the Employer needed to show clear language authorizing the request for a doctor's certificate, the Employer's position was that there should be clear language that the Employer had given up this right. The Employer said it had all rights of management except those it had bargained away in the collective agreement. It would be a tortured reading of Article 19.02 to say that provision means the Employer can only ask for a certificate after an absence exceeding three days, especially in light of paragraph 6 of the Schedule. The Employer said I should interpret the collective agreement as a whole, not simply Article 19.02 in isolation.

The Employer submitted that "sickness" in Article 19.02 was the same as "illness" in Schedule B paragraph 1, but that accident was something else. All Article 19.02 speaks of is the situation of certificates required for sickness, not for accident.

Pay for absences for paramedics is contained entirely within Schedule B. Paragraph 6 says clearly that the Employer pays for doctors' certificates, including doctors' certificates to qualify for short term disability. That means if an employee wants pay, then the employee should give the Employer a certificate. The fact that the Employer had not enforced that right for years has no impact on the meaning of the words. This situation of an increase in "accidents" amounted to a wake-up call for the Employer and the Employer decided to exercise its rights. Paragraph 6 means that if there is no certificate the employee does not qualify for short term disability benefits. The Union interpretation of Article 19.02 negates the meaning of paragraph 6.

As for the issue of estoppel, there was no reason for the Employer to raise this change during the negotiations. The Employer felt it had the right to do as it was doing and the Union

knew what the Employer was doing. If anyone wished to raise the issue, it was the Union which should have done so. The Union could not engage in the negotiations knowing what the Employer was doing, say nothing, and then, after signing a new agreement, grieve the practice. The Employer had been open about the change, speaking both to the Union leaders and to other employees.

The Employer had made this change in practice in January/February 2004, told the Union executive members of the change, had enforced the change, negotiations had proceeded until May 18, 2004, employees had been complying with the change, and only much later did the Union grieve. If the Union interpretation of the agreement was correct, the Union was prevented under the notion of estoppel from enforcing that interpretation as the Employer had lost an opportunity to negotiate the issue in the 2004 negotiations. The Union knew the effect which the Union's silence on this issue would have with the Employer, that silence was a representation that the Employer could request the medical certificates as it was openly doing. It would now be unfair to allow the Union to enforce its interpretation until the end of the current agreement.

The Employer relied upon the following authorities: *Re Robson-Lang Leathers Ltd. and Canadian Food and Allied Workers, Local 250L* (1973), 2 L.A.C. (2d) 400 (Hinnegan); *Re Royal Ontario Museum and Ontario Public Service Employees' Union* (1982), 4 L.A.C. (3d) 251 (Brent); *Re Corporation of the City of Windsor and Canadian Union of Public Employees, Local 82* (1985), 18 L.A.C. (3d) 332 (Weatherill); *Re Greyhound Lines of Canada Ltd. and Amalgamated Transit Union, Division 1374* (1974), 5 L.A.C. (2d) 1 (Forsyth); *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.* (1981), 33 O.R. (2d) 476 (C.A.); *Re City of Lethbridge and Canadian Union of Public Employees, Local 70* (1986), 26 L.A.C. (3d) 81 (England); *Re McKechnie Ambulance Service Inc. and Ontario Public Service Employees Union, Local*

347 (1987), 27 L.A.C. (3d) 385 (Verity); *Re City of Cornwall and Canadian Union of Public Employees, Local 234* (1997), 61 L.A.C. (4th) 177 (Keller); and *Re Center Manufacturing, Inc. and Canadian Auto Workers, Local 222* (1999), 81 L.A.C. (4th) 281 (Knopf).

VI. CONCLUSIONS

Although both parties suggested the meanings of the collective agreement provisions in dispute were clear, they gave the provisions very different interpretations.

When interpreting collective agreements, the objective is to determine the intention of the parties. First, it is necessary to carefully examine the language of the disputed provisions, together with any related provisions of the parties' agreement. From that examination the parties' intention may become apparent.

Sickness compared with Illness

Article 19.02, which is headed "Sick Leave Provisions," uses the word "sickness" and indicates that, after sickness exceeding three days, a doctor's certificate must be provided. Although Schedule B, paragraph 1, refers to "hospitalization," to "accident," and to "illness," in my view, the parties intended the word sickness within Article 19 to cover all three of the situations which are dealt with separately in the Schedule. I reject the Employer submission that sickness in Article 19.02 is limited to situations of illness, as illness is used in the Schedule. If the parties had intended the same meaning in both Article 19 and Schedule B I think they would have used the same word in both places. Instead, the parties used two different words and I believe they intended two different meanings. I conclude that under Article 19.02 any absence due to hospitalization, accident or illness which lasts more

than three days is an absence for sickness for which the employee is required to provide a doctor's certificate.

Article 19.02 compared with Schedule B, paragraph 6

The real difference between the parties then arises. The two primary provisions in dispute are Article 19.02 and Schedule "B", paragraph 6, which I repeat for ease of reference:

Article 19.02 A Doctor's certificate must be presented to the Administrator after sickness exceeding three (3) days.

Schedule B, Paragraph 6

The Corporation will pay the costs of this Short Term Disability plan**.** The Corporation further agrees that it will pay the cost of a doctor's certificate required to qualify for the Short Term Disability Plan and any subsequent certificates as may be required from time to time.

The above provisions are in the same collective agreement and should be read together. The fact that one is part of an Article and the other is part of a Schedule has no impact on the interpretation, as the Schedule is expressly incorporated by Article 19.01 of the collective agreement. The issue before me is this:

> Did the parties intend the requirement in Article 19.02 to provide a doctor's certificate after sickness exceeding three days to also mean that an employee cannot be required under paragraph 6 to provide a doctor's certificate for an absence of three or fewer days?

The Union submitted that the parties had directed their mind to the provision of doctors' certificates and had fully addressed this issue within Article 19.02. The Union said that the only doctor's certificate which the Employer can require an employee to provide, except perhaps in a case of abuse, was the certificate required after more than three days absence

due to sickness as is specified in Article 19.02.

On the other hand, the Employer submitted that the Union submission ignored, and gave no meaning to, paragraph 6 of the Schedule.

What is the intention conveyed in Paragraph 6 of the Schedule? In addition to the statement that the Employer pays the cost of the short term disability plan, there are two parts to Paragraph 6:

1. The Employer pays the costs of a doctor's certificate required to qualify for short term disability benefits: and,
2. The Employer pays the costs of any subsequent required doctors' certificates.

Article 19.02 compared with paragraph 6 "a doctor's certificate required to qualify"

What is the meaning of the "certificate required to qualify" for short term disability, included in paragraph 6 (#1, above)? Clearly an employee may be entitled to benefits for an absence of three or fewer days - that is, for example, beginning on the first day of an absence due to hospitalization or accident and beginning on the second day of an absence due to illness. Are the certificates for an absence exceeding three days the only certificates which the Employer can require, as was suggested by the Union? If so, the Employer is prevented from requiring a medical certificate for an absence of three or fewer days and the reference to "doctor's certificate required to qualify" would seem to be meaningless in a great many employee absences.

Parties do not normally include meaningless provisions in their collective agreement. Instead, the assumption is that the parties intended this to have meaning, to serve a purpose. Although the Union submission that the certificates required to qualify for short term

disability benefits under paragraph 6 were those specified in Article 19.02 has some appeal, I note that nothing in Article 19.02 states that those certificates are required for the purpose of qualifying for the benefits. Not only is there nothing in Article 19.02 which suggests that the purpose of those certificates is to allow employees to qualify for short term disability benefits, but the timing does not seem appropriate for such a purpose in many absences. The Union interpretation does not allow for any doctor's certificate for an employee to qualify for benefits in an absence of three or fewer days. Moreover if the parties had intended the "certificate required to qualify" to have the identical meaning as the "certificate presented to the Administrator after sickness exceeding three days" one might have expected them to use the same language. Instead they used different language and that often indicates they had a different intention.

When the words most directly at issue do not make the intention clear, as in this case, the next step in determining the parties' intention is to examine the related provisions to see whether they shed light on the parties' intention.

Article 19.02 compared with paragraph 6 "any subsequent certificates as may be required"

What is the intention of the reference to the "subsequent certificates" in paragraph 6 (# 2 above)? It is clear that "subsequent certificates" refers to certificates which are paid for by the Employer as it administers the short term disability plan. But what is the meaning of "required" in this context? There is no reference to any subsequent certificates that "may be required from time to time" elsewhere in this collective agreement. Since these subsequent certificates are not mentioned elsewhere, are not otherwise "required" by any other provision of the agreement, they must be "required" in some other manner. The Employer provides the short term disability plan (Article 19.01) and pays the costs (Article 19.01 and Paragraph 6 of Schedule B). I conclude that the reference to "subsequent

certificates" is a reference to certain certificates which the Employer decides are "required." For example, a few days, or perhaps weeks, after an employee has qualified for benefits under the short term disability plan, and after the employee has provided the certificate required under Article 19.02, the Employer may wish to follow up on the employee's medical situation and require a "subsequent" certificate to satisfy itself that the employee remains entitled to benefits. Such an interpretation makes sense looking solely at the words used, and the interpretation also makes sense on a policy basis for an employer administering a benefit plan of this nature. Similarly, the Employer may decide to require an employee who has been absent for a considerable time and now wishes to return to work to provide a doctor's certificate indicating that the employee is well enough to resume work. I conclude that in paragraph 6 the parties intended to give the Employer a right to "require" other certificates, that is "subsequent" certificates, after an employee has initially qualified for benefits under the short term disability plan and that these subsequent certificates are different from those required under Article 19.02.

Article 19.02 and paragraph 6 "a doctor's certificate required to qualify" revisited

I now return to the main provisions in dispute. Given my conclusion about the second part of paragraph 6, I am unable to accept the Union interpretation on this issue. Instead, consistent with my conclusions on "subsequent certificates," I find that the certificates required to qualify in paragraph 6 are those certificates which the Employer decides are required in order for an employee to qualify. As the Employer is paying for all these certificates, it seems reasonable that the parties, having agreed that certificates would be required after absences exceeding three days, would have intended that the Employer may, based on its experience in administering the short term disability plan, require other doctors' certificates in order for employees to qualify for benefits, such as in absences of under four days or in absences claimed for certain reasons such as accidents, and that the Employer

might change those requirements for medical certificates from time to time. In particular, I conclude that the Employer is entitled under paragraph 6 to decide when it will require a doctor's certificate for an employee to qualify for benefits, in the same way that I concluded it could decide when it required "subsequent certificates."

Conclusions examined against paragraph 4 "periodic medical certification"

Although neither party made specific reference to it, I find it helpful to also examine paragraph 4 of Schedule B which reads as follows:

> 4. Benefits are payable for up to fifteen (15) calendar weeks for each separate claim based on the periodic medical certification the employee's doctor provides the Corporation.

The collective agreement must be read as a whole and the interpretation of one provision must be made in the context of other related provisions. Paragraph 4 speaks of an employee receiving benefits based on the "periodic medical certification the employee's doctor provides the" Employer. I am unable to reconcile the reference to "the periodic medical certification" in this paragraph 4 with the Union submission that the parties addressed medical certificates in Article 19.02, fully resolved the issue there, and that the only medical certificates are the ones required under Article 19.02. Instead this paragraph 4 clearly suggests that there may be more medical certificates than the one certificate which is required under Article 19.02 after an absence exceeding three days. In so doing it supports the conclusions I have reached above.

Summary

In my view, then, there are three types of doctors' certificates in this collective agreement:

1. Article 19.02 expresses the parties' agreement that a doctor's certificate must be provided after an absence exceeding three days.

But paragraph 6 of Schedule B allows the Employer to require certificates in two other situations:

2. The Employer may require a doctor's certificate in order for an employee to qualify for benefits, such as for an absence of three days or less; and,
3. The Employer may also require "subsequent" certificates after an employee has qualified for benefits in order to demonstrate either that the employee remains qualified for benefits or that the employee is fit to return to work.

Assuming that there is a limit on what the Employer can do in terms of requiring a certificate to qualify for short term disability benefits (e.g., not act in a discriminatory manner, contrary to Article 3 of the collective agreement), there was nothing in the evidence before me that suggested the Employer was acting improperly in this instance. It follows that I find the Employer did not violate the collective agreement when it required the paramedics to provide a doctor's certificate for the first day of an absence due to accident.

The grievance is therefore dismissed.

Estoppel

In view of my interpretation of the collective agreement, it is unnecessary to consider the Employer's alternative submission regarding estoppel.

Disposition of the grievance

The grievance is dismissed.

Dated at London, Ontario this 13th day of July, 2006.

Howard Snow, Arbitrator