IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

LONDON POLICE SERVICES BOARD
- The Employer

-and-

LONDON POLICE ASSOCIATION
- The Union

AND IN THE MATTER OF an Employer grievance and a Union grievance each involving the workers' compensation claim for Suanne Thompson

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Elizabeth M. Traynor	- Counsel
Brent Shea	- Superintendent

On behalf of the Union:

Andrew Camman	- Counsel
Dan Axford	- Administrator
Suanne Thompson	- Grievor

Hearing held March 17 and April 13, 2010, in London, Ontario.

AWARD

INTRODUCTION

The Ontario Workplace Safety and Insurance Board (WSIB) awarded workers' compensation benefits to the grievor. Applying a provision of the collective agreement, the Employer topped-up the workers' compensation benefits to the amount of the grievor's usual net pay.

The grievor's benefits were "rescinded" by the WSIB following the Employer's appeal as the grievor's injury had occurred in a parking lot which, although located next to the Employer's premises, was owned by the Union.

The WSIB decided not to pursue the recovery of the workers' compensation benefits from the grievor. However, as a Schedule 2 Employer, the Employer had provided the WSIB benefits to the grievor directly and the Employer wished to recover both the workers' compensation benefits and the top-up benefits. The issue in the Union and Employer grievances is the same: Can this Employer recover both the workers' compensation and top-up benefits from the grievor?

THE EVIDENCE

The London Police Services Board, the Employer, operates the London Police Service. The London Police Association, the Union, represents Suanne Thompson, the grievor, who is a communications operator working in the 911 dispatch office in the police station.

The parties agreed upon the following facts.

December 28, 2007, the grievor fell on ice in a parking lot adjacent to the police station while on her way to work. In her fall the grievor suffered injuries to her arm, back and neck, and she has not yet returned to work.

That parking lot is owned by the Union.

December 31, 2007, the grievor's supervisor filed a claim under the *Workplace Safety and Insurance Act, 1997 (*the *WSIA).* That claim records that the grievor fell in a Union parking lot.

January 11, 2008, the WSIB approved benefits for the grievor.

The Employer is a Schedule 2 employer under the *WSIA*. Unlike Schedule 1 employers who pay a periodic premium for workers' compensation coverage, this Employer and other Schedule 2 employers do not pay a normal premium. Instead Schedule 2 employers pay the amount of the benefits awarded by the WSIB plus an administrative fee of approximately 25%. Rather than paying the amount of the benefits to the WSIB and having the WSIB pay the injured employees, this Employer and other Schedule 2 employers pay their employees the benefits directly.

This practice of a Schedule 2 employer paying WSIB benefits directly to its employees is referred to as the "covered by advances" policy. The WSIB's Operational Policy Manual 18-01-11 provides, in part, as follows:

> If a Schedule 2 employer provides benefits or advances to a worker, the WSIB does not issue compensation cheques. Instead, the WSIB records all payments as a charge against the employer and notes that any compensation payments payable to the worker has been "covered by advances" from the employer.

Pursuant to this "covered by advances" policy, the Employer provided an amount equal to

WSIB benefits directly to the grievor and received a credit from the WSIB.

March 14, 2008, the Employer sought a review of the award of workers' compensation benefits to the grievor on the grounds that her injury occurred in a Union parking lot, was not in the course of her employment and was, therefore, not a compensable injury under the *WSIA*.

April 16, 2008, the WSIB upheld the award of benefits.

May 8, 2008, the Employer appealed.

July 8, 2009, an Appeals Resolution Officer found that the grievor was not in the course of her employment when she was injured, that her injury was not compensable under the *WSIA*, and that her entitlement to benefits was rescinded. In that decision the Appeals Resolution Officer also wrote as follows:

> 3. In implementing this decision, the operating area must have regard for operational policy 18-01-04 relating to the recovery of benefit related debts that are the result of a previous entitlement decision that has been overturned due to a reconsideration or appeal.

In a September 3, 2009, letter to the grievor, the Appeals Resolution Officer who made the above decision noted that her "letter is to further clarify the intent of my decision dated July 8, 2009." After noting that her decision had "rescinded entitlement", the Officer continued as follows:

> In rendering my decision, I attempted to be cognizant of the fact that my decision should not have a negative financial implication, and therefore point 3 of the **Conclusion** heading states:
>
> > *In implementing this decision, the operating area **must** have regard for operational policy 18-01-04 relating to the recovery of benefit related debts that are the result of a previous entitlement decision that has been overturned due to a reconsideration or appeal.*
>
> Operational policy 18-01-04 identifies circumstances under which the WSIB does not pursue recovery of benefit related debts; The policy states the following pertaining to overturning of previous decisions:
>
> > **The WSIB may change a previous decision on reconsideration or appeal if it is apparent that the original decision is not consistent with legislation or approved**

> **policy, or new evidence changes the decision.**
> **The WSIB does not pursue debts resulting from reversed or amended decisions unless there is evidence of fraud, and/or false or misleading statement(s) or representation, in connection with a claim for benefits or an attempt to obtain payment for goods or services provided to the WSIB, or failure to report material change.**
>
> The policy is clear and unequivocal when it states the WSIB will not pursue recovery of benefit related debts resulting from a reversed decision, unless there is evidence of fraud or misrepresentation, which was clearly not the case in the circumstances related to your injury.
> Therefore, I would like to reiterate that it was never my intention that the end result of my decision would result in recovery of a benefit related debt and place a significant financial burden on you. It is my understanding the operating area has not created a benefit related debt and my decision from the WSIB perspective has been implemented as I had intended. [Note: the emphasis is in the original letter.]

The WSIB has made no attempt to recover any money from the grievor.

Moreover, the Income Tax form, 2008 T5007, filed by the WSIB which recorded that the grievor's 2008 benefits were tax free, was not reversed.

In addition to the WSIB issues, the parties disagreed about the provision in the collective agreement which requires the Employer to top-up the workers' compensation benefits for work related injuries to the amount of the employee's usual net pay. The Employer had made those top-up payments to the grievor.

Two witnesses testified at the hearing.

Superintendent Brent Shea testified that for the past several years it has been the Employer policy to always file a *Workplace Safety and Insurance Act* claim when an employee is injured. The WSIB then adjudicates whether the injury is compensable under the *WSIA.* He testified that this policy decision was made following a complicated claim involving a police officer who felt he had suffered a re-occurrence of a previous workplace injury. Since that incident the Employer has filed a WSIB claim whether or

not it had concerns about the validity of the claim, has allowed the WSIB to adjudicate the matter and, in some instances, has sought a review or appeal, as it did in this instance. In cross examination Superintendent Shea agreed that the only reason the Employer paid the grievor WSIB benefits was that it was ordered to do so by the WSIB. He agreed that the Employer routinely paid *WSIA* benefits decided upon by the WSIB. He agreed that there had been no decision by the WSIB indicating that the Employer had overpaid the grievor, that the WSIB had simply decided that the grievor was no longer entitled to receive compensation benefits. He agreed that the grievor had not filed a claim for benefits, but rather that her supervisor had done so on her behalf.

Cindy Mitchell is the Employer's Administrator of Payroll and Benefits. She testified about the Employer's on-going attempts to ensure that the grievor had access to Long Term Disability coverage. The grievor's LTD benefits were approved effective September 19, 2008, the day after the end of her sick leave credits.

Ms Mitchell confirmed that the Employer practice was to file a WSIB claim after an injury and allow the WSIB to adjudicate it. She said the Employer applied Schedule C of the collective agreement (below) when a claim was allowed and this provided the employee with the same net pay as the employee received before the claim.

In cross examination Ms Mitchell agreed that the WSIB advised the Employer of the effective date to make compensation payments. She agreed that the Employer was an agent for the WSIB in making these payments, that the Employer made the payments for the WSIB. She agreed that the WSIB had not reversed its ruling of entitlement for the period before July 8, 2009, and had made no decision regarding an overpayment.

When she was injured in December 2007, the grievor had sufficient sick leave credits to

provide full salary from then until September 18, 2008. The Employer sought repayment by the grievor of all the workers' compensation benefits, both the benefits ordered by the WSIB and the top-up benefits paid under the collective agreement. December 10, 2009, the grievor agreed to apply her sick leave credits and her "accumulated time" credits to the period from her injury to the end of her compensation benefits in July 2009, and she provided a cheque for the balance. However, this repayment agreement was expressly made subject to the resolution of these grievances.

The parties referred to many monetary calculations during the hearing but they ultimately agreed that I would make a decision on the issues involved in this dispute and they would address the monetary calculations following my award. It appears that this dispute involves some $50,000.

Two grievances are before me for resolution, one from the Union, one from the Employer.

THE COLLECTIVE AGREEMENT, STATUTE, AND POLICY

The key portion of the parties' collective agreement is as follows:

> **SCHEDULE "C" - SICK LEAVE BENEFIT**
>
> . . .
>
> **Part A**
>
> . . .
>
> 8. (a) Where a member is absent from duty as a result of a new injury arising out of and in the course of duty and is receiving benefits approved by the Workplace Safety Insurance Board, the member shall continue to receive the same net pay.
>
> . . .

Key sections of the *Workplace Safety and Insurance Act* are as follows:

126 (1) If there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision.

. . .

138 (1) The Board may deduct from money payable to a person by the Board all or part of an amount owing under this Act by the person.

(2) The Board may pursue such other remedies as it considers appropriate to recover an amount owing to it.

. . .

147 (1) An overpayment made by the Board to a person under this Act is an amount owing to the Board at the time the overpayment is made.

(2) The amount of the overpayment is as determined by the Board.

In addition to the portion of WSIB Operational Policy 18-01-04 quoted above in the evidence, the following extract from that same policy is relevant:

> **Credit to employer's account**
> Whether or not the WSIB pursues debt recovery, the benefit costs are removed from the employer's experience account, provided the employer did not contribute to the original decision by providing incorrect information and/or failing to provide requested information.

Finally, the WSIB also has a Merits and Justice Policy, Policy 11-01-03, which includes the following:

> **Merits and justice**
> Every decision made by the WSIB must be based on the merits and justice of the case, which means decision-makers must take into account
>
> · all facts and circumstances relating to the case
> · the relevant WSIB policy or policies, and
> · the relevant provision or provisions of the *Workplace Safety and Insurance Act* or the *Workers' Compensation Act* (the Act).
>
> By applying relevant legislative and policy provisions to similar situations, decision-makers ensure that
> · similar cases are adjudicated in a similar manner
> · each participant in the system is treated fairly, and

· the decision-making is consistent and reliable.

. . .

Role of policy

The WSIB develops policies when the Act is silent or ambiguous, or when it permits a number of possible interpretations.
Within each policy, the WSIB creates a framework that directs the way decision-makers should act when certain facts and circumstances come before them. If such situations arise, the relevant policies must be followed unless there are exceptional circumstances as described below.

. . .

Exceptions to relevant policies
There may be rare dases where the application of a relevant policy would lead to an absurd or unfair result that the WSIB never intended. Therefore, a decision-maker may depart from a policy if it can be shown that the case has exceptional circumstances that justify doing so.
. . .

UNION POSITION

The Union grievance sought a ruling that the Employer has no right to take any money from the grievor claiming it as an overpayment of compensation benefits. The Union grievance also claimed an Employer failure to accommodate the grievor, but the parties agreed to defer consideration of that issue.

The grievor had not requested WSIB benefits. The issue is whether the Employer can claw-back a WSIB payment which the WSIB has not yet found to be an overpayment. The Union said that the Employer is unable to simply help itself to the grievor's money - the Employer needs a legal justification for any recovery.

The Union said that the Employer's obligations and rights flow from the *Workplace Safety and Insurance Act, 1997.* The grievor's benefits were clearly Workplace Safety and Insurance Board benefits, notwithstanding the fact that the Employer paid them.

The Employer paid the benefits at the direction of the WSIB, pursuant to a WSIB order that the payment be made, and as an agent for the WSIB.

Section 126 of the *WSIA* makes it clear that the WSIB policies are to be followed. The WSIB has a clear policy on recovery of benefits, and this was not a situation in which recovery was to take place. The onus was on the Employer to show an entitlement to recover the WSIB benefits ordered by the WSIB, benefits which the WSIB policy does not permit the WSIB itself to recover.

As part of its submission, the Union relied upon an August 11, 2008, letter from Joe Morsillo, the *Workplace Safety and Insurance Act* Director, Benefits and Revenue Policy, to an unrelated party setting out Mr. Morsillo's view regarding the recovery of debts by Schedule 2 employers. He wrote in part as follows:

> It is the position of the WSIB that s. 138 and s. 147 are applicable to overpayments made to Schedule 2 workers. . . .
>
> In summary, the WSIB has the authority both through legislation and policy to deal with all matters concerning overpayments and debt recovery whether the debt is incurred by a worker, Schedule 1 or Schedule 2 employer. . .

The Union did not submit that this letter was binding or authoritative in the usual sense, but did adopt the letter as being logical and persuasive.

In reply to the Employer submissions, the Union said that the grievor should have kept her WSIB benefits, that her sick leave benefits should have begun July 9, 2009, after the payment of WSIB benefits ended, and that the LTD benefits should have begun after the sick leave ended, so that there was no double recovery and no time that the grievor was in receipt of two types of payments.

EMPLOYER POSITION

The Employer grievance sought a ruling that the grievor's sick leave credits be applied to cover the amount of compensation benefits paid the grievor from December 2007 until September 2008, and that the grievor repay the Employer all amounts paid in excess of the sick leave credits.

The Employer made four alternative submissions.

First, the Employer said the decision to award WSIB benefits was "void ab initio", meaning literally "void from the beginning", or as though the order for benefits had never existed. The grievor had no entitlement to WSIB benefits at any time and the Employer should be allowed to recover the money.

Secondly, the Employer said that the WSIB policy was not law. While its policy binds the WSIB, the application of that policy should not prejudice the Employer. The policy cannot be used where the WSIB did not itself pay the money, and where those payments were not made by virtue of a compensable injury under the WSIA. The grievor should not be allowed to keep money she had no right to collect.

Thirdly, if the WSIB policies do apply, then the WSIB Merits and justice policy should be used to avoid this unfair and absurd result.

Fourthly, if the WSIA and policies do not govern, then the collective agreement does govern and under that agreement the parties have a complete code of income support. The grievor was entitled to receive sick pay after her injury, followed by LTD benefits, and that is what she should now be able to collect. The basic idea in the collective agreement is to provide employees with one form of income support at a time and so the grievor should not receive both sick pay and WSIB benefits for the same period.

The Employer relied upon the following authorities: *Hassum and Conestoga College* 2008 CanLII 12838 (ON S.C.); "Merits and justice", WSIB Policy 11-01-03; *Metropolitan Toronto Police Association and Metropolitan Toronto Board of Commissioners of Police* (unreported), May 24, 1997 (Samuels); *Air Canada v. British Columbia* [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161; *Belleville (City) and C.U.P.E. Local 907* (1994), 42 L.A.C. (4th) 224 (Allison); *York University and C.U.P.E. Local 3903* (2004), 125 L.A.C. (4th) 109 (Devlin); and *Capital Health Authority and U.N.A., Local 85* (2002), 108 L.A.C. (4th) 97 (Sims).

CONCLUSIONS

The principal question before me is this:

> Given that the Workplace Safety and Insurance Board decided to award workers' compensation benefits to the grievor, but later reversed that decision and decided not to seek the recovery of those benefits, can this Employer recover the money from the grievor?

Answering this question requires a brief review of the facts.

Workers' compensation benefits are intended for employees who are injured at work.

The grievor was injured while on her way to work when she fell in a parking lot near the Employer's premises, a parking lot owned by the Union and regularly used by its members. The Employer filed a claim for workers' compensation benefits for the grievor. That claim noted that the grievor had not been injured on the Employer's premises but rather at the "London Police Association Parking Lot."

The Workplace Safety and Insurance Board awarded workers' compensation benefits. The Employer paid those benefits and received a credit toward the amount it would otherwise pay the WSIB.

The Employer sought a reconsideration of the award of workers' compensation benefits and specifically drew the adjudicator's attention to the fact that the grievor was injured in a Union owned parking lot, not on the Employer's premises. However, in the reconsideration decision the claims adjudicator upheld the original award of benefits.

The Employer appealed. The initial entitlement decision was then reversed as it was held that the grievor was not in the course of her employment when she was injured and therefore was not entitled to workers' compensation benefits.

Given that the grievor's injuries occurred before work in the Union parking lot, not on the Employer's premises, I agree that the grievor was not injured in the course of her employment and was not entitled to workers' compensation benefits for her injuries. This arbitration proceeded on that understanding.

The WSIB has a policy, above, addressing those situations in which it seeks to recover money paid in a case where it had awarded benefits and later reversed that decision. The question of recovery of benefits was expressly addressed by an Appeals Resolution Officer and she decided that the WSIB would not seek recovery. Consistent with that decision, the WSIB has made no effort to recover any workers' compensation benefits from the grievor.

If this Employer was one of the more numerous Schedule 1 employers such that the

WSIB actually paid the workers' compensation benefits directly to the employees, the Employer, having simply paid its normal insurance premiums, could make no claim for the return of the workers' compensation money. But as a Schedule 2 employer, this Employer had been responsible to pay the grievor the full amount of those workers' compensation benefits, once the WSIB made the decision to award them. So, can the Employer recover the money from the grievor?

The parties advised that they could find no precedents on the issue of a Schedule 2 employer recovering benefits after the Workplace Safety and Insurance Board had rescinded an entitlement decision.

There were two parts to the compensation paid to the grievor - firstly, the workers' compensation benefits awarded by the Workplace Safety and Insurance Board and paid to her by the Employer and, secondly, the top-up benefits paid by the Employer under the collective agreement.

Workplace Safety and Insurance Board benefits

This collective agreement does not deal with workers' compensation benefits awarded by the Workplace Safety and Insurance Board (WSIB benefits). The question of whether the Employer can recover the workers' compensation benefits must be resolved by a consideration of the compensation scheme established under the *Workplace Safety and Insurance Act, 1997* (the *WSIA*) and by consideration of general legal principles.

There is nothing in that compensation scheme which suggests that the Employer is entitled to recover the benefits from the grievor.

This is particularly the case when, as here, the Appeals Resolution Officer considered whether the workers' compensation benefits should be recovered from the grievor and decided that the WSIB would not seek repayment. The WSIB normally adjudicates all aspects of these workers' compensation claims and nothing in the Appeals Resolution Officer's decision suggested that the Employer could recover the money it had paid.

Since the Employer paid the workers' compensation benefits on behalf of, or as an agent of, the WSIB and received credit from the WSIB for those payments, is the Employer in the same situation as the WSIB itself, or does the fact that the Employer paid the money directly to the grievor put the Employer in a different legal situation?

Answering this question requires further consideration of the nature of the payments made by the Employer to the grievor. That money was awarded to the grievor as tax-free workers' compensation benefits. The WSIB filed an income tax form reporting these payments as having been tax free workers' compensation benefits and the WSIB has not reversed or amended that form. The fact that for administrative ease this Schedule 2 Employer made the payments directly to the grievor and then received a credit from the WSIB for that payment against the total amount the Employer owed the WSIB does not change the nature of the benefits.

On this issue I acknowledge that the Employer submitted that the WSIB policy on the recovery of benefits was not law and that the Employer was not bound by the WSIB recovery policy. Since that policy only addresses the recovery by the WSIB itself, not by employers, I agree.

But my conclusion that the WSIB policy does not prevent the Employer from recovering the benefits is not the same as concluding that the WSIB policy provides a right for the

Employer to recover the benefits. Instead, I find nothing in the workers' compensation scheme which suggests a right of recovery for the Employer.

The Employer submitted that the WSIB Merits and justice policy (which provides that the other WSIB policies are to be followed unless applying those policies would lead to an "absurd or unfair result") should entitle the Employer to recover this money. But I find it difficult to see why an outcome in which the grievor need not repay the workers' compensation benefits and the Employer does not recover the workers' compensation payments is absurd or unfair. With that outcome the Employer, as a Schedule 2 employer, would be treated in the same way as the more numerous Schedule 1 employers. Similarly, the grievor would be treated in the same manner as all the employees of Schedule 1 employers. I conclude that consistency of treatment among the various classes of parties under the *WSIA*, treatment that is in conformity with a published WSIB policy on the recovery of benefits, is neither unfair nor absurd under the WSIB's Merits and justice policy. In fact, I think that consistency of treatment between the two classes of employers and among the employees of those two classes of employers is a desirable outcome.

Furthermore, given that the workers' compensation scheme has addressed the issue of fairness, and given that I find an outcome in which the Employer does not recover its money to be fair under that scheme, I am hesitant to import some other more general notion of what is a fair outcome based upon these facts. Instead, it would seem to me preferable that if the Employer's legal situation in relation to the recovery of workers' compensation benefits is to be different from that of the WSIB itself, it should not rest on some vague and/or subjective notion by me as the arbitrator as to what is a fair outcome. Rather, there should be some legal basis for that difference.

My examination of the facts of this case and the workers' compensation scheme have led me to conclude that the Employer has no basis for recovering the money awarded the grievor by the WSIB. But the Employer raised additional grounds to recover the workers' compensation benefits from the grievor.

The Employer said that the order to pay was "void ab initio", that is it was void from the beginning, or it was as though the WSIB order to pay the benefits had never existed. If the award of benefits was void ab initio, I might accept that the Employer could recover its money. But I do not accept this submission. Although the grievor was not injured in the course of her employment and should not have been awarded workers' compensation benefits, such an award of benefits was in fact made. That award of benefits, although later reversed, was valid while it was in effect. For many months the grievor was entitled to the compensation benefits and the Employer was required to pay those benefits. The decision made later during the appeal does not alter the fact that, for some time, the grievor was entitled to workers' compensation benefits. The reversal of the original award of benefits does not make the award of benefits void, that is it does not have the effect of making the legal situation the same as if the award of benefits had never existed.

The Employer also said that, if the workers' compensation scheme established under the *WSIA* does not apply, the collective agreement must apply and under the collective agreement the Employer can recover the money. I noted above that there is nothing in this collective agreement which directly addresses workers' compensation benefits and the recovery of those benefits. But the Employer submission was more subtle. The Employer said that the collective agreement provides a mechanism for income support under which the grievor should have taken sick leave initially and then later received long term disability benefits. Because the grievor should be paid by only one income support scheme at a time, the Employer said that the outcome now should be the same as

it would have been had the matter been handled properly at first instance.

While I agree with the Employer's submission that the grievor should have received sick leave benefits followed by LTD benefits, knowing what should have happened does not lead me to conclude that what should have happened is now the proper remedy. Any remedy must deal with the fact that the WSIB awarded the grievor workers' compensation benefits. Similarly, a remedy must deal with the fact that it was expressly decided that the WSIB itself would not seek the return of the workers' compensation payments it had ordered. In this instance, while acknowledging that the grievor should not have been awarded workers' compensation benefits, and that the Employer should not have been required to pay those benefits, I nevertheless find that the Employer has no right to recover those benefits.

My conclusions that the grievor should have received sick benefits and then long term disability benefits, but that the Employer cannot recover the WSIB benefits from the grievor, leaves the grievor with both the WSIB benefits and sick benefits for the same period of time. I agree with the Employer that the grievor is entitled to only one type of income support at a time and that the receipt of sick pay and workers' compensation together was improper. What, then, is the appropriate remedy?

It was clear as of July 8, 2009, when the initial benefit decision was rescinded, that the WSIB was not seeking the return of the WSIB payments. Given that fact and my conclusion that the Employer cannot recover the WSIB benefits, the grievor's sick leave benefits should have begun July 9, 2009, after the workers' compensation benefits. After those sick leave benefits were exhausted the grievor should have received her LTD benefits, so that the timing of the grievor's LTD benefits should likewise now be corrected so that those benefits follow the new period for which the grievor is in receipt

of sick leave benefits.

Top-up benefits

Not all the benefits received during this period were WSIB workers' compensation benefits. There were two parts, the WSIB benefits and a top-up amount, which together equalled the grievor's usual net pay.

While I have concluded that the Employer is not entitled to recover the WSIB amount, the amount of the top-up is a different matter. Top-up payments under Section 8 (a) of Schedule (C) of the collective agreement (above) are expressly premised on the grievor being "absent as a result of a new injury arising out of and in the course of duty". As noted above, this hearing proceeded on the understanding that the grievor had not been injured during the course of her employment. I find that the grievor did not meet the threshold requirement established in this collective agreement for the Employer to pay the top-up amount. The Employer was under no obligation to pay the top-up. I see no reason why the Employer, having now recognized its error, cannot correct that error and recover this top-up amount.

Although it may be unusual that the Employer can recover one part of the compensation but not the other, the difference flows from the fact that pursuant to a statutory scheme the Employer was ordered by a third party to pay the WSIB benefits and the possibility of the recovery of those benefits was then considered by that third party and rejected. The Employer's status as a Schedule 2 employer gives it no additional rights to recover the money. On the other hand, the top-up was a matter to be decided by the Employer under

the collective agreement and it is able to correct its mistake.

Summary

I find that the Employer cannot recover the Workplace Safety and Insurance Board ordered workers' compensation amounts, but it can recover the top-up amount. In addition, I find that the grievor's sick leave credits should be applied beginning July 9, 2009, and that her LTD benefits should follow the exhaustion of the sick leave benefits. The calculation of who owes how much to whom, and for what periods, remains to be done. The parties agreed that I would deal with only the principles involved in this dispute and allow them the opportunity to make the necessary calculations. I leave the implementation of this award to the parties, but I retain jurisdiction to deal with any issues which arise during its implementation, or to address any other issues in the grievances.

Dated at Port Maitland, Nova Scotia, this 9th day of August, 2010.

Howard Snow, Arbitrator