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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CAMI AUTOMOTIVE INC.

- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW- CANADA) and its LOCAL 88

- The Union

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Susan M. Nicholson and others	- Manager, Corporate Affairs & Legal Counsel

On behalf of the Union:

Mike Reuter	- Plant Chairperson
Arnott Small	- Grievor
Joe Graves	- Advisor and Benefits Committeeperson

Hearing held November 3, 1998, in Ingersoll, Ontario. Written submissions completed February 12, 1999.

AWARD

I. INTRODUCTION

This collective agreement includes an employee benefit program covering absences from work due to accident, sickness, and extended disability. However, the collective agreement says that no difference arising under the benefit program is subject to the grievance procedure.

In March 1998 I issued an award in this matter in which I reinstated the grievor, referred the issue of compensation to the parties, and retained jurisdiction to resolve the compensation issue if the parties were unable to do so. The hearing was reconvened when the parties failed to resolve several issues of compensation. Among the compensation matters was a dispute involving the benefit program in the collective agreement. The Employer submitted that I had no jurisdiction to deal with issues regarding the benefit program since the agreement provided that benefit disputes were not subject to the grievance procedure. It was the Union's position that the provisions purporting to prevent an arbitrator from hearing benefit disputes were contrary to the *Labour Relations Act, 1995*.

This award addresses the issue of whether benefit disputes are excluded from resolution by arbitration under this collective agreement.

II. BACKGROUND TO THE CURRENT DISPUTE

In the winter of 1997 the grievor, Arnott Small, was absent from work due to back problems. The Employer discovered that the grievor had been working at Domino's Pizza. It further believed that he had been playing hockey. In addition, the grievor refused light work offered by the Employer. The grievor was terminated from his employment at CAMI Automotive in March 1997 "for activities inconsistent with [his] stated disability".

The grievor's medical difficulties involving his back began in September of 1996. In January 1998 he had back surgery and a herniated disk was removed.

In March, 1998 I issued an award in this matter. I found that the grievor had not been playing hockey as the Employer had believed. In addition, I noted that the parties had agreed to an impartial medical opinion program, that the parties were contractually bound by those medical opinions, and that the impartial medical examiner had concluded the grievor was not fit for any work with the Employer, including the light work which he had been offered. The expert evidence regarding the grievor's medical condition led me to that same conclusion regarding the light work. There was thus no concern regarding the grievor's refusal of light work.

However, I concluded that the grievor's actions in working for Domino's Pizza were reckless actions. The grievor had failed to follow appropriate treatment recommendations. Those actions were inconsistent with his disabilities and in violation of the duty he owed the Employer to try and recover his health and return to work. Notwithstanding those conclusions, I found that the dismissal had been excessive, substituted a lesser penalty, and retained jurisdiction to deal with the matter of compensation.

Following that award the parties attempted to resolve the issues of compensation but were unsuccessful. The grievor was medically able to resume work in October 1998. The hearing was reconvened in November 1998 to deal with compensation issues.

The Employer and the Union have negotiated a benefit agreement outlining the benefits in the event of absences due to accident, sickness, and extended disability. That benefit agreement is incorporated into and forms part of the collective agreement. The Employer has arranged by means of a group insurance policy with Metropolitan Life to provide the benefits specified in the benefit agreement.

As noted, the grievor was medically able to return to work in October, 1998, having been away from work approximately 25 months. He then served his one month suspension. Excluding the period of suspension, the grievor received sickness and accident benefits or extended disability benefits for most of his absence. During the remaining time the grievor received no benefits as the insurer found that he did not meet the test of total disability under the insurance policy.

At the reconvened hearing in November 1998, the Union submitted that the grievor was entitled to a Christmas bonus for 1996, to additional paid vacation, and to a “top up” of his pension. In addition, the Union submitted that the grievor was entitled either to benefits for the period from his dismissal in March 1997 through to October 1998 or, alternatively, to damages in lieu of benefits in an amount equal to the benefits.

The Union submitted that the grievor was "eligible" for benefits under the Sickness and Accident provisions (Exhibit B-1, Article II, Section 6(a), *infra*) and the Extended Disability provisions (Exhibit B-1, Article II, Section 7(a), *infra*). The Union also noted that the impartial medical examiner twice concluded that the grievor was "totally disabled" and that under the collective agreement both the Employer and the insurance company were bound by that impartial medical opinion (CAMI-CAW Impartial Medical Opinion Program, *infra)*. Therefore the Union submitted that the grievor was entitled to benefits under the program and that the Employer was responsible for paying them. In the alternative, the Union said, if the Employer was not itself responsible for paying benefits, then the Employer was required to obtain insurance that provided the benefits specified in the benefit agreement. As the Employer had secured an insurance contract which did not provide for the benefits specified in the benefit agreement, the Employer had not fulfilled its responsibilities to secure the proper insurance coverage and was therefore liable for damages. In this instance the damages claimed were an amount equivalent to the benefits.

The Union argument was not completed on the issue of the grievor's entitlement to benefits as the Employer raised a preliminary objection to my jurisdiction to consider the issue of benefits. The Employer indicated that most of the money in dispute was the insured benefits denied the grievor. Firstly, the Employer submitted that its obligation to the Union only extended to the payment of insurance premiums and not also to the provision of benefits under the insurance policy. Secondly, the Employer submitted that the parties' benefit agreement stipulated that an arbitrator appointed under the collective agreement did not have jurisdiction to consider the benefit agreement or the payment of benefits.

The Union disagreed with both Employer submissions regarding my jurisdiction over benefits. As the Employer's first submission required the interpretation of the benefit program (something the Employer's second submission said I had no authority to do), the parties focused on the Employer's second submission. Regarding the Employer's second submission that the language of the benefit agreement prevented an arbitrator from dealing with benefit issues, the Union submitted:

1. The parties did not intend to prevent an arbitrator from interpreting and enforcing the provisions of the benefit agreement which forms part of the collective agreement; and,
2. Any agreement to prevent an arbitrator from hearing and resolving a dispute about the terms of the collective agreement, including the benefit agreement, was contrary to Section 48 of the *Labour Relations Act, 1995* and therefore void.

At the hearing I ruled on the Union's first response. I concluded that on its face the collective agreement was as the Employer submitted - that is, the parties had intended that an arbitrator should have no jurisdiction to hear and resolve any dispute under the benefit program.

The parties then agreed to file written argument on the Union submission that those provisions of the agreement removing benefit disputes from the jurisdiction of an arbitrator were contrary to the *Labour Relations Act, 1995*. The final written response was received

on February 12, 1999.

The insurer, Metropolitan Life, was informed of the hearing but did not attend.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the key provisions of the parties' collective agreement. The provisions preventing access to arbitration for benefit disputes are found in Exhibits B and B-1.

38. BENEFITS

The parties to this agreement have also entered into agreements on other matters, as covered by the supplements to this agreement identified below. These agreements are incorporated herein by reference as if wholly set forth herein.

. . .

Exhibit B Supplemental Agreement – Group Life Insurance and Disability Benefit Program

. . .

LETTER 58

IMPARTIAL MEDICAL OPINION PROGRAM

. . .

During the current negotiations, CAMI and the Union discussed the administration of Sickness and Accident Benefits under Section 6 of Exhibit B-1 - CAMI Group Life Insurance and Disability Benefits.

It was agreed that an employee shall receive Sickness and Accident benefits provided that the employee's doctor has certified that the employee meets all of the criteria clearly outlined under Section 6(a)(1) "Eligibility of Benefits".

In the event the insurance company disputes the medical information provided by the employee's doctor, the Impartial Medical Opinion Program as outlined in Document 1 will be invoked.

In addition the collective agreement contains a grievance and arbitration article. It is sufficient to note that the grievance process and the arbitration process are both part of the same Article titled "Grievance and Arbitration Procedure" and that arbitration is only available when the result of the grievance process is unsatisfactory.

Under Article 38, the parties have entered into five other agreements, each a supplement to the collective agreement. The agreement addressing Group Life and Disability Benefits (Exhibit B) is 98 pages in length and reads, in part, as follows:

Supplemental
Agreement
Covering
GROUP LIFE INSURANCE AND
DISABILITY BENEFIT PROGRAM
Exhibit B
to
Labour Agreement

. . .

Section 1. ESTABLISHMENT OF PROGRAM

. . . the Company will establish a CAMI Group Life Insurance and Disability Benefit Program for Hourly-Rate Employees, hereinafter referred to as the "Program", a copy of which is attached hereto as Exhibit B-1 and made a part of this Agreement to the extent applicable to the employees represented by the Union and covered by this Agreement as if fully set out herein . . .

Section 2. FINANCING

(a) The Company agrees to pay the contributions due from it for the Program in accordance with the terms and provisions of Exhibit B-1.

(b) The Company by payment of its contributions shall be relieved of any further liability with respect to the benefits provided under the Program.

. . .

Section 5. CAMI-CAW IMPARTIAL MEDICAL OPINION PROGRAM

The parties have agreed to, and attached hereto, an Impartial Medical Opinion program to provide impartial medical opinion in disputed sickness and accident benefit cases which is final and binding upon the Company, the Union, the insurance company, and the employee. . . .

Examinations . . . shall be performed, whenever possible, by physicians who have been designated as impartial medical examiners in accordance with the above program. The opinion of such an examiner with respect to the existence of total disability as defined in Article II, Section 7(a) or total and permanent disability as defined in Article II, Section 11(a)(2) of the Program shall be final and binding upon the Company, the Union, the insurance company, and the employee. . . .

Section 6. NON-APPLICABILITY OF LABOUR AGREEMENT GRIEVANCE PROCEDURE

No matter respecting the Program as modified and supplemented by this Agreement or any difference arising thereunder shall be subject to the grievance procedure established in the Labour Agreement between the Company and Union.

. . .

Exhibit B-1

THE CAMI GROUP LIFE INSURANCE AND DISABILITY BENEFITS PROGRAM FOR HOURLY-RATE EMPLOYEES

. . .

ARTICLE I

. . .

Section 1. ESTABLISHMENT AND EFFECTIVE DATE OF PROGRAM

(a) Establishment of Program. The CAMI Group Life Insurance and Disability Benefit Program for Hourly-Rate Employees, hereinafter referred to as the "Program", will be established either through a self-insured plan or under a group insurance policy or policies issued by an insurance company or insurance companies or by arrangement with a carrier or carriers, as set forth in Article II.

. . .

Section 5. NET COSTS, ADMINISTRATION OF PROGRAM AND NON-APPLICABILITY OF GRIEVANCE PROCEDURE

. . .

(c) Grievance Procedure Not Applicable. It is understood that the grievance procedure of any Labour Agreement between the Company and any Union representing employees covered by this Program shall not apply to this Program or any insurance contract in connection therewith.

. . .

ARTICLE II

. . .

Section 5. AMOUNT OF DISABILITY BENEFITS

The amount of Sickness and Accident and Extended Disability Benefits shall be as set forth in the following schedule:

. . .

Section 6. SICKNESS AND ACCIDENT BENEFITS

(a) Eligibility for Benefits

(1) If while covered for these benefits, an employee becomes wholly and continuously disabled as a result of any injury or sickness so as to be prevented thereby from performing any and every duty of the employee's occupation, and during the period of such disability is under treatment therefor by a physician legally licensed to practice medicine, the amount of weekly benefits for which the employee is then covered shall be paid to the employee each week during the period the employee is so disabled and under such treatment.

. . .

Section 7 EXTENDED DISABILITY BENEFIT INSURANCE

(a) Eligibility . . . For an employee to be deemed to be totally disabled, such employee must not be engaged in regular employment or occupation for remuneration or profit and be wholly prevented from engaging in regular employment or occupation within the bargaining unit for remuneration or profit as a result of bodily injury or disease, either occupational or non-occupational in cause.

. . .

DOCUMENT 1

CAMI – CAW IMPARTIAL MEDICAL OPINION PROGRAM

Pursuant to Section 5 of Exhibit B, Supplemental Agreement, Group Life Insurance and Disability Benefit Program, the parties have agreed that with respect to disputed sickness and accident insurance benefit claims, doctors to be selected from a list to be mutually established shall provide impartial medical examinations for hourly-rate employees represented by the CAW at CAMI Automotive Inc.

. . .

If the examining doctor determines that the employee is totally disabled, sickness and accident insurance benefits will be paid during the period such disability continues so long as such benefits are otherwise payable. If the examining doctor determines that the employee is not totally disabled, sickness and accident insurance benefits will not be paid for the period subsequent to the date of the examination. The examining doctor's determination will be final and binding on the employee, CAMI, the CAW, and the Insurance Company

. . .

It is further proposed that as [*sic*] the arrangement described herein will also be applied, whenever possible, to disputed claims for Extended Disability and Total and Permanent Disability Insurance benefits. Such application of this agreement will be altered to the extent that the Insurance Company determines who will be scheduled for an examination and to the extent that there are variances in the definition of the term "disability"among the insurance coverages affected by this agreement.

. . .

DOCUMENT 2

PROCEDURE FOR REVIEW OF DENIED CLAIMS

To afford employees a means by which they can seek a review and possible reconsideration of a denied claim, CAMI will provide a review and appeal procedure in accordance with the guidelines outlined below. . . .
[Note: The Document provides a process for review by the employee, the Local Union, CAMI management, the insurance company, and the National Union. Nothing in this review process leads to a binding outcome.]

DOCUMENT 6

IMPARTIAL MEDICAL OPINION PROGRAM

[This document reproduces Letter 58 of the collective agreement, quoted above.]
. . .

IV. POSITION OF THE UNION

The Union submitted that the benefit agreement was incorporated into the collective agreement and, as part of the collective agreement, the provisions of that benefit agreement were arbitrable, in the same way that any provision of the collective agreement was enforceable through the arbitration process.

The Union submitted that the provisions of the benefit agreement by which the parties attempted to deny jurisdiction to an arbitrator were contrary to the *Labour Relations Act, 1995*, Section 48. The Union submitted that I had jurisdiction to interpret and apply employment related statutes.

In its reply, the Union disagreed with the Employer position that the only obligation imposed on the Employer under the benefit agreement was to secure suitable insurance coverage. On that issue, the Union noted that the parties had agreed to deal with the merits of the dispute (that is, the interpretation of the benefit agreement) at another hearing.

The Union relied upon the following authorities: Brown and Beatty, *Canadian Labour Arbitration*, Canada Law Book 3rd edition; *Re Siemens Electric Ltd. and Canadian Auto Workers, Local 127* (1998), 71 L.A.C. (4th) 38 (Barton); *Re Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1* (1980), 111 D.L.R. (3d) 693 (Ont. Div. Ct.); affirmed (1980), 30 O.R. (2nd) 64 (C.A.); *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.); *Re City of Whitehorse and International Union of Operating Engineers, Local 115C* (1997), 68 L.A.C. (4th) 208 (Burke); *Piko v. Hudson's Bay Co.* (November 19, 1998), unreported (Ont. C.A.); *Re Brampton Hydro Electric Commission and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1285 et al.* (1993), 15 O.R. (3d) 773 (Ont. Div. Ct.); *Leisureworld Nursing Homes Limited, Toronto, Ontario and Service Employees International Union, Local 204* (February 28, 1996), unreported (Verity); *Service Employees International Union, Local 204 and Leisureworld Nursing Homes Limited, et al.* (April 17, 1997) unreported (Ont. Div. Ct.); affirmed (December 1, 1997), unreported (Ont. C. A.); *Re Honeywell Ltd. and Canadian Auto Workers* (1997), 65 L.A.C. (4th) 37 (Mitchnick); *Re Honeywell Ltd. and Sun Life Assurance Company of Canada and Canadian Auto Workers* (1997), 68 L.A.C. (4th) 196 (Mitchnick); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1285 (U.A.W.) v. American Motors (Canada) Limited* [1973] O.L.R.B. Rep. 211(April); *Re American Motors (Canada) Ltd. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1285 et al.* (1974), 46 D.L.R. (3d) 75 (Ont. C.A.); and *Labour Relations Act, 1995*, s 48.

V. POSITION OF THE EMPLOYER

The Employer submitted that the grievor was absent from work during all the relevant period and he was therefore not entitled to any wages. The Employer submitted that "the sole issue to be determined is whether the Employer can be held liable for accident and sickness

benefits as well as extended disability benefits", benefits which the insurer had concluded the grievor was not entitled to receive.

Next, the Employer submitted that the Employer's obligation under the benefit agreement was limited to the payment of its contributions - see Section 2 of Exhibit B (Financing), *supra*. While Exhibit B was incorporated into the collective agreement, the Employer submitted as follows:

> . . . this is not the incorporation by reference . . . whereby arbitrability of the denial of benefits would flow. Rather, it is incorporation by reference in a very limited respect. That is, the Supplemental Agreement, which prescribes the levels of benefits to be secured by the Employer through a contract of insurance, is part of the Collective Agreement. However, neither the Collective Agreement nor the Supplemental Agreement disclose an intent that the insurance contract itself is incorporated into the Collective Agreement. To the contrary, the parties . . . clearly set out the Employer's obligations as being limited to the payment of premiums for an insurance policy.

It was the Employer's position that the only effect of this incorporation was "to render arbitrable any dispute as to whether the Employer secured the required insurance policy and/or paid the required premiums". In particular, claims for benefits were not arbitrable. The Employer referred to various authorities on the relationship between collective agreements and benefit plans.

With respect to Section 48 of the *Labour Relations Act, 1995*, the Employer submitted that access to arbitration was dependent on a "difference" between the parties. As the collective agreement contained no "right" alleged to have been denied by the Employer in this matter, there was no "difference" arising under the agreement. The only benefit claims that could be made against the Employer under this agreement were for failure to secure an adequate policy or for failure to remit the premiums. Since neither was alleged to have occurred in this instance, there was no difference and no violation of Section 48. It was the Employer's position that I was without jurisdiction to consider the grievor's claim for benefits.

The Employer relied upon the following authorities: *Re Siemens Electric Ltd. and Canadian*

Auto Workers, Local 127 (1998), 71 L.A.C. (4th) 38 (Barton); *Re Norton Advanced Ceramics of Canada Inc. and Teamsters Union, Local 424* (1998), 69 L.A.C. (4th) 352 (Howe); *Re Dominion Tanners and United Food and Commercial Workers Union, Local 832* (1996), 56 L.A.C. (4th) 392 (Hamilton); Brown and Beatty, *Canadian Labour Arbitration,* 3rd edition, para. 8:3322; *London Life Insurance Company and Dubreuil Brothers Employees Association et al.* (unreported), October 7, 1998 (Ont. Div. Ct.); *Re Canadian Broadcasting Corporation and Burkett et al.* (1997), 155 D.L.R. (4th) 159 (Ont. C. A.); *Re University of Guelph and University of Guelph Staff Association* (1995), 50 L.A.C. (4th) 61 (Kaplan); *Re Sonoco Ltd., Partitions Division and Teamsters Union, Local 1166* (1992), 27 L.A.C. (4th) 353 (Burkett); *Re Andres Wines (B.C.) Ltd. and United Brewery Workers, Local 300* (1981), 30 L.A.C. (2d) 259 (Christie); *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929; *St Anne Nackawic Pulp & Paper Co. Ltd. and Canadian Paper Workers Union, Local 219* [1986] 1 S.C.R. 704; *Pilon v. International Minerals and Chemical Corporation (Canada) Limited et al.* (1996), 31 O.R. (3d) 210 (Ont. C.A.); *Insurance Act,* R.S.O. 1990, c. I-8, s. 201 and 318; *Labour Relations Act, 1995*, S.O. 1995, c.1., Sch. A., s. 48; *Re Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1* (1980), 29 O.R. (2d) 18 (Ont. Div. Ct.); affirmed (1980), 30 O.R. (2nd) 64 (Ont. C.A.); *Re Ontario Hydro and Ontario Hydro Employees' Union, Local 1000 et al.* (1983), 41 O.R. (2d) 669 (Ont. C.A.); *Communications, Energy and Paper Workers Union Local 92 and Abitibi Consolidated Limited* (unreported), October 30, 1998 (Mitchnick); *Re Markham Hydro Electric Commission and International Brotherhood of Electrical Workers, Local 636* (1992), 24 L.A.C. (4th) 412 (Knopf); *Re Cami Automotive Inc. and Canadian Automobile Workers, Local 88* (1991), 19 L.A.C. (4th) 49 (Brandt); *Re Atlantic Packaging Products Ltd. and Graphic Communications International Union, Local N-1* (1997), 68 L.A.C. (4th) 174 (Carrier); and *Re ULS Corporation and Canadian Maritime Union* (1997), 70 L.A.C. (4th) 263 (Davie).

VI. CONCLUSIONS

1. The jurisdiction of an arbitrator under this agreement.

As the benefit program is part of this collective agreement, normally an arbitrator would interpret and enforce the program. However, in this case the Employer submitted that I should not, in fact could not, proceed in that normal way; the Employer said that the collective agreement itself prevented me from doing this. I thus begin with this issue regarding my jurisdiction.

a) The interpretation of the limitations in this collective agreement.

It was the Employer's position that two provisions in this collective agreement prevented an arbitrator from dealing with benefit issues. I repeat the two provisions relied upon by the Employer. Section 6 of Exhibit B reads as follows:

> No matter respecting the Program as modified and supplemented by this Agreement or any difference arising thereunder shall be subject to the grievance procedure established in the Labour Agreement between the Company and Union.

Section 5(c) of Exhibit B-1 reads as follows:

> It is understood that the grievance procedure of any Labour Agreement between the Company and any Union representing employees covered by this Program shall not apply to this Program or any insurance contract in connection therewith.

At the hearing I agreed with the Employer's interpretation of the above language of the agreement and decided that the parties' intention had been that arbitrators were to have no jurisdiction over benefit issues. My reasons follow.

Although the Union submitted that the parties had not intended to exclude the benefit program from the arbitration process, it is difficult to imagine why the parties would have agreed upon the above language for any other reason. The Union offered no alternative

interpretation; it simply denied that the intention had been to exclude arbitration. In this agreement the process for grievances and the process for arbitration are linked - they are included in the same article of the agreement and arbitration is only available for those differences which have not been resolved through the grievance procedure. I conclude that the references to "the grievance procedure" in the two provisions include arbitration. Thus the reference to excluding benefit issues from "the grievance procedure" was intended to also exclude those issues from resolution by arbitration.

In addition, this matter has been addressed in an earlier award between the parties - *CAMI Automotive Inc. and Canadian Automobile Workers, Local 88* (October 16, 1998) an unreported award of Arbitrator Hinnegan. In that award Arbitrator Hinnegan first held that he had no jurisdiction to address the grievance before him because the Union's request for arbitration under Section 49 of the *Labour Relations Act, 1995* had been too early. Having decided that he had no jurisdiction over the grievance, he then considered the meaning of the two provisions of the benefit agreement now before me and stated as follows:

> Given that very clear and express language, there can be no question that the parties have removed the issue raised by this grievance from the grievance procedure in this collective agreement and it is, therefore, not arbitrable. (p. 6)

As Arbitrator Hinnegan had already concluded that he had no jurisdiction to consider the grievance, his comments on the meaning of the benefit provisions were unnecessary. Nevertheless, I note that his interpretation of the parties' intention in using this language was identical to my interpretation.

I confirm my decision at the hearing that Section 6 of Exhibit B and Section 5(c) of Exhibit B-1 were intended to prevent the arbitration of all disputes regarding the benefit program.

b) Is the limitation on access to arbitration contrary to the Labour Relations Act, 1995*?*

I now turn to the Union submission that the parties' agreement to exclude the benefit provisions from arbitration was contrary to Section 48 the *Labour Relations Act, 1995*.

Section 48 (1) of the *Labour Relations Act, 1995* reads as follows:

> Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

In the absence of the jurisprudence which I consider in the next section, this would be a simple matter. The *Labour Relations Act, 1995* regulates this collective agreement. Section 48(1) requires that this collective agreement include a provision that "all differences" are to be arbitrated. Section 48(2) of the statute says that if the agreement does not provide for the arbitration of all differences then it "shall be deemed to contain" a provision which does provide for the arbitration of all differences. Section 48(2) is as follows:

> If a collective agreement does not contain a provision that is mentioned in subsection (1), it shall be deemed to contain a provision to the following effect:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. [Provisions for appointing the rest of the Board follow.] The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. . . .

The parties differ about what rights and obligations are created by the benefit program. They differ about who is liable for paying benefits. Applying the common definition of "difference" - that is, a disagreement or dispute - they have a "difference" about the meaning or interpretation of the benefit program (which is part of the collective agreement) and its application in this situation. This collective agreement attempts to prevent arbitration of this difference. I conclude that the provisions of the collective agreement which purport to

prevent the arbitration of this dispute are contrary to the requirement in Section 48(1) to provide for the arbitration of *all* differences. Moreover I conclude that since, in the words of Section 48(2), this "agreement does not contain a provision that is mentioned in subsection (1)", the agreement is "deemed to contain" the provision in Section 48(2). As arbitrator I can thus proceed under the Section 48(2) provision in the normal fashion to interpret and enforce the benefit agreement. I base this conclusion on the language of Sections 48(1) and 48(2) of the *Labour Relations Act, 1995*.

Limited support for the above conclusion is found in the two decisions in *American Motors*, *supra.* In that case a similar provision in a collective agreement had attempted to prevent the arbitration of disputes regarding the benefit program. The Union proceeded to the Ontario Labour Relations Board and sought relief under what is now Section 48(3). That section allows the Board to modify "inadequate" arbitration provisions. The Board noted the requirement in Section 48(1) to have an arbitration mechanism for all disputes and thus substituted a modified version of the provision now found in Section 48(2) as the arbitration mechanism for any benefit disputes that might arise. The Board's conclusion that the restriction on arbitration of benefit disputes violated Section 48(1) was the same as the conclusion which I have reached.

The Court of Appeal dismissed the Employer's application for judicial review, concluding that the Labour Relations Board had acted within its jurisdiction. The Court also noted that American Motors had submitted that the order of the Board had been unnecessary as what is now Section 48(2) caused the deemed provision to be included automatically, making the Board's order unnecessary. On the issue of the automatic inclusion of the deemed provision the Court concluded:

> Whether that be so or not the Board cannot, by reason thereof, be said to have acted outside the ambit of its jurisdiction and powers. Whether the Board's order was necessary in law or not, it nevertheless clarified the question as to the right of either party to the collective agreement to have access to arbitration procedure to determine the question of arbitrability of differences arising out of [the benefit program] and, hence, was a competent exercise of

> [its powers]. (p. 80)

I interpret the two conditional comments in the above quote - "Whether that be so or not" and "Whether the Board's order was necessary in law or not" - as acknowledging that the deemed provisions may have been automatically included in the collective agreement as it did not otherwise provide for the arbitration of *all* disputes. However, the Court did not need to determine this issue and did not do so.

Having concluded that this collective agreement does not meet the requirements of Section 48(1) and that the provision deemed to be included under Section 48(2) thus applies, I could simply conclude this award on the preliminary point. However, this issue of the effect of the parties' attempt to limit access to arbitration cannot be disposed of so easily. There has been extensive consideration of this question by both arbitrators and the courts which needs to be considered. I now turn to that jurisprudence.

c) The jurisprudence on limitations on access to arbitration.

What is now Section 48(1) was included in earlier versions of the *Labour Relations Act,* and has been the subject of analysis by both the Ontario Court of Appeal and by the Divisional Court. The cases cited to me on this issue arose in the context of attempts to arbitrate the dismissal of probationary employees. The collective agreements considered in those cases specified that an employee could only be discharged for just cause, then attempted to prevent arbitration when a probationary employee had been discharged. The provisions in those collective agreements were similar to the provisions preventing arbitration of benefit disputes contained in the collective agreement before me. The issue which arose was this:

> Was the provision attempting to deny probationary employees access to arbitration contrary to the *Labour Relations Act* and, if so, what was the remedy?

The first court case considered is *Toronto Hydro-Electric, supra.* The collective agreement

contained the following two provisions:

> . . . no employee shall be . . . discharged without just and sufficient cause.
> . . .
> Probationary period for a new employee is six months work and the grievance procedure in respect to dismissal is not applicable to new employees during the first three months of this probationary period. (p. 19, O.R.; p. 694-695, D.L.R.)

In his award, Arbitrator Barton decided that where, as in the case before him, a collective agreement provided a substantive right only to be discharged for just cause, then the collective agreement cannot as a matter of procedure bar access to arbitration. The restriction on arbitration was held to be void. The Divisional Court upheld that award, as did the Court of Appeal in a brief endorsement. There was no mention of simply substituting the "deemed" provision.

The Court of Appeal then addressed the matter more fully in *Ontario Hydro, supra.* As in *Toronto Hydro-Electric,* an arbitrator had determined that a probationary employee was protected by a just cause provision and that the provision attempting to bar access to arbitration was contrary to the *Labour Relations Act* and thus void. In its decision the Court of Appeal reviewed this issue fully. It upheld the arbitration award and agreed that a provision in a collective agreement which prevented an arbitrator from resolving a "difference" between the parties was contrary to the *Labour Relations Act* and therefore void. The Court dealt at length with the approach to be followed and, in particular, with the determination of whether there was a "difference" under what is now Section 48(1). The Court said that the question of whether there is a difference is a matter of statutory interpretation but comes at the end of a two stage process, as follows:

> First, the facts have to be determined, which in this context means that the collective agreement must be interpreted, and then the statutory provision has to be interpreted with a view to deciding whether it is applicable to the facts as determined. In the first stage, if the arbitrator interprets the agreement as conferring on the complaining employee a right assertable in the circumstances against the employer, then there is a "difference" within the meaning of this word . . . In the present case the board of arbitration interpreted the agreement as creating a right in a probationary employee, based on an allegation of discharge without just cause, which could give rise to a "difference". The difference was one relating

> to the interpretation, application or administration of the collective agreement. If this is the conclusion on the interpretation of the agreement, then any provision in the agreement which blocks the resort to arbitration to determine the right would be void as contrary to s. 37(1). [Note: That section is now 48(1)]
>
> Of course, if the process takes a different turn during the first stage then it may be that no "difference" will emerge which would entitle the union or employee to proceed to arbitration. An arbitrator may interpret the agreement as conferring no right on an employee which could give rise to a difference capable of being adjudicated by arbitration.
>
> I do not suggest that the two steps are mutually exclusive and, in this respect, I refer to the relevance of the principle which favours that interpretation which makes the agreement valid in preference to that having the opposite effect. This principle reflects a factor which should be taken into account in the process. (p. 681-2)

The Court of Appeal then reviewed with favour the distinction which had been made between "substantive" and "procedural" rights in a collective agreement (the approach used in *Toronto Hydro-Electric, supra*) and concluded:

> If the impediment to arbitration is an absolute procedural bar, as opposed to an absence of a substantive right to be submitted to arbitration, then there is an arbitrable difference. (p. 682)

Once again the remedy was to treat the offending provision as void.

What did the Court of Appeal decide in *Ontario Hydro*? The Court said that an arbitrator should interpret the collective agreement in the ordinary manner and determine whether the agreement prevented the employer from discharging a probationary employee without just cause. If the agreement did provide that protection then, to repeat the conclusion, the Court said:

> If this is the conclusion on the interpretation of the agreement, then any provision in the agreement which blocks the resort to arbitration to determine the right would be void as contrary to s. 37(1). [now s. 48(1)]

However, if the agreement did not limit the discharge of probationary employees to instances of just cause then the second result flows:

> . . . no "difference" will emerge which would entitle the union or employee to proceed to arbitration. An arbitrator may interpret the agreement as conferring no right on an employee which could give rise to a difference capable of being adjudicated by arbitration.

Returning to the approach to be followed, the Court said that the question depended on whether there was a right "assertable" against the Employer, and whether there was a "difference". I view those approaches as two ways of expressing the same point. I now consider this in greater detail.

If the substantive provision is clear, then there is no problem in applying the Court's directions. If there clearly is a right, then the Court said the restriction on enforcing it is void. If there clearly is no substantive right, then there is nothing to interpret or enforce.

However, if "assertable" means "alleged", or if "difference" means an allegation of a violation, and allows that the provision is ambiguous, the Court still said the restriction was void. The arbitrator will then interpret the ambiguous provision. Once the ambiguous provision is interpreted there either will, or will not, be a right and the outcome will be as described in the last paragraph.

I conclude then that when *provisions* in the collective agreement *regulate* the situation, the restriction on arbitration is void - whether the conclusion about the presence of provisions regulating the situation is reached at the beginning of the hearing or only after the agreement has been interpreted. On the other hand if *no provisions* in the collective agreement *regulate* the situation then there will be nothing further for an arbitrator to do.

I now consider another possible concern. The collective agreement before me attempts to place a general limitation on the jurisdiction of an arbitrator by preventing an arbitrator from even interpreting the benefit program - "no matter respecting the program . . . shall be subject to the grievance procedure" and "the grievance procedure . . . shall not apply to this program or any insurance contract in connection therewith". In the collective agreements considered in *Toronto Hydro-Electric* and *Ontario Hydro* the parties made no general attempt to prevent an arbitrator from "interpreting" the agreement. The restriction on access to arbitration was

narrower in both the *Toronto Hydro-Electric* and *Ontario Hydro* cases than in the collective agreement before me. In those two cases the limitation was simply on access to arbitration to review the discharge of a probationary employees, and no specific attempt had been made to prevent an arbitrator from interpreting the agreement in the way that the collective agreement before me does. Was the Court's direction in *Ontario Hydro* something which applies only in that circumstance?

I conclude that the Court in *Ontario Hydro* directed an arbitrator in every instance to "interpret" the collective agreement. First, Section 48(1) specifically states that matters of "interpretation" are to be arbitrated. Secondly, I think the Court of Appeal in *Ontario Hydro* contemplated disputes over limits on arbitration arising in situations in which ambiguous language requiring interpretation, not only in cases where the just cause provisions were clear. Thirdly, I find nothing in the language of that decision or the earlier decisions in *Toronto Hydro-Electric* to suggest that the Court's directions were limited only to language preventing arbitration of dismissal of probationary employees. I read the Court's directions as applying whenever the agreement attempts to block access to arbitration, including attempts to block the arbitration of issues of interpretation.

This issue of restriction on access to arbitration has been the subject of considerable arbitral opinion since 1983, some of which was referred to by the parties in their submissions. I have considered those awards but I do not find them helpful in considering the question I am faced with in this case, as none of them deal with direct attempts to limit access to arbitration. I will thus comment on them only briefly. In *Cami Automotive, supra,* an earlier award between these parties, the agreement was interpreted as containing no provision limiting the dismissal of probationary employees to instances of just cause. Arbitrator Brandt thus found the grievance, which had alleged that the dismissal of a probationary employee was without just cause, to be "inarbitrable". Similarly in *Markham Hydro* Arbitrator Knopf interpreted the agreement before her as conferring "no substantive right . . . to complain . . . that [the

grievor] had been discharged without just cause". Arbitrator Knopf then went on to conclude that there was a lower standard of protection provided in that collective agreement and retained jurisdiction to review the dismissal on the basis of that lower standard. In *Abitibi Consolidated, supra*, Arbitrator Mitchnick reviewed this area of the jurisprudence fully, including all the cases to which I have referred above. That collective agreement provided that "The decision of the company shall be final within this probationary period regarding continuation of employment" and Arbitrator Mitchnick concluded that the agreement did not provide for a "just cause" review of the dismissal of a probationary employee. Arbitrator Mitchnick then went on to find that the dismissal might be reviewed on the lower standard of arbitrary, discriminatory, or bad faith.

Applying Ontario Hydro to this case.

As arbitrator I am directed by the *Ontario Hydro* decision to interpret the benefit provisions. If I conclude that the grievor has rights under the benefit agreement which are alleged to have been violated here, then the restriction on arbitration will be void as it attempts to limit access to arbitration to enforce those rights. If I conclude that the benefit agreement does not establish any rights for the grievor, or at least no rights that are claimed to have been violated here, then there will be no difference needing to be adjudicated and I will be without jurisdiction to proceed further on the benefit issues.

2. Since the provisions in this agreement attempting to limit access to arbitration do not limit access to arbitration what, if anything, is their impact?

In interpreting any collective agreement, ambiguous provisions must be read in the context of the entire collective agreement. The parties' intention to restrict access to arbitration is part of this agreement. Thus in determining whether the grievor has any rights and the Employer has any obligations under the benefit program I cannot ignore the provisions

seeking to limit access to arbitration.

Applying this approach in the context of the dismissal of a probationary employee such as in *Ontario Hydro*, a provision which restricts access to arbitration may assist an arbitrator in concluding that the intent of an ambiguous provision was to confer no just cause protection in the event of the discharge of a probationary employee. I repeat a portion of the Court's *Ontario Hydro* decision. After outlining the two stage approach and stressing the need to interpret the provisions in each collective agreement, the Court stated as follows:

> I do not suggest that the two steps are mutually exclusive and, in this respect, I refer to the relevance of the principle which favours that interpretation which makes the agreement valid in preference to that having the opposite effect. This principle reflects a factor which should be taken into account in the process.

As the Court noted, a conclusion that the agreement did not provide just cause protection for a probationary employee would make "the agreement valid".

Alternatively, an arbitrator may conclude that if no just cause rights or obligations had been created by the agreement there would have been no reason for the parties to limit access to arbitration and thus the restriction on access to arbitration may assist an arbitrator in resolving the ambiguity in favour of just cause protection.

In any event, these provisions will have to be considered in the interpretation of the rights and obligations created in the agreement.

3. **Reflections on the jurisprudence regarding restrictions upon access to arbitration.**

The Court of Appeal in *Ontario Hydro* provided directions to arbitrators as to how Section 48(1) is to be applied. I have applied that approach above. Significant time and effort has been spent working through the approach indicated in that decision. It is my view that this approach is needlessly cumbersome as restrictions on access to arbitration never directly affect the outcome of the grievance. Thus it is of value to ask the following question:

What is the practical impact when a collective agreement includes language limiting access to arbitration?

To again use the situation of a probationary employee, assume that the collective agreement prohibits the arbitration of the dismissal of a probationary employee. There are then three substantive possibilities to be considered:

1. Just cause protection;
2. No just cause protection; and,
3. Ambiguous wording.

- In the first example, the collective agreement clearly provides protection against dismissal without just cause. The Court said that a provision restricting access to arbitration was void and an arbitrator should hear the just cause matter. I note that the arbitrator does exactly the same thing as he or she would do if the restriction on access to arbitration was not included in the agreement.

- In the second example, the agreement includes no provision limiting dismissal to instances of just cause. In this situation, the Court said that an arbitrator should decline jurisdiction where the agreement contains a restriction on access to arbitration. But I note that this would also be exactly the outcome if there was no provision restricting access to arbitration - an arbitrator would decline jurisdiction to review the dismissal for just cause where no just cause provision regulates the dismissal.

Thus, in both examples the result is ultimately the same as if the provision attempting to limit access to arbitration did not exist. The provision limiting access to arbitration has no practical impact on what an arbitrator ultimately does in either example.

- In the third example, an ambiguous collective agreement needs interpretation before

> one can determine whether the discharge of a probationary employee can only be for just cause. The Court directed an arbitrator to first "interpret the agreement". The Court then said that if the agreement provided just cause protection (thus placing it in the first example, above) the attempt to limit access to arbitration was void. If there was no just cause protection (placing it in the second example, above) then there was no matter to be arbitrated. This is exactly what an arbitrator would do in the absence of a provision restricting arbitration.

In all three examples an arbitrator ultimately does exactly what an arbitrator would do in the absence of the provision limiting access to arbitration.

Of course, as mentioned, these provisions may have value in interpreting other ambiguous provisions of the collective agreement. However, the process to be followed by an arbitrator and the outcome of the case when there is a provision restricting access to arbitration is ultimately the same as if the provision attempting to limit access to arbitration did not exist. I conclude, then, that the restriction on access to arbitration could simply be disregarded as a limitation on the jurisdiction of an arbitrator. Given the clear statutory requirement in Section 48(1) of the *Labour Relations Act, 1995* to provide for the arbitration of "all differences between the parties", such an approach responds more directly to this provision and would certainly be simpler to apply.

4. Issues remaining.

The Employer submitted extensive written argument on the issue of the rights and obligations created by the benefit agreement. The Employer said that it had no obligation to pay benefits - that its only obligation was to pay the premiums. The Employer is free to pursue that position - nothing I have said in this award is intended to resolve that issue or to determine what rights or obligations are created by the benefit program.

The Union did not address this issue fully in its submissions, beyond noting in its reply that the interpretation of the rights and obligations created in the benefit agreement "would be heard before the arbitrator at another date". It is clear however that the Union has a different interpretation of the benefit program.

The issue of the rights and obligations created by the benefit program together with the application of the benefit program in this situation are issues to be addressed when the hearing reconvenes.

5. Summary.

In summary, I conclude that the parties intended that an arbitrator have no jurisdiction to deal with benefit disputes. Nevertheless, I conclude that I do have jurisdiction to interpret and enforce that benefit agreement which is part of the parties' collective agreement. I reach this result based on Section 48(1) of the *Labour Relations Act, 1995.*

I continue to retain jurisdiction to deal with the issue of compensation for the grievor and any other matter which the parties have been unable to resolve in the implementation of my earlier award, that is to exercise the jurisdiction which I retained in my earlier award. The matter may be scheduled for further hearing.

Dated at London, Ontario this 12th day of March, 1999.

Howard Snow, Arbitrator