IN THE MATTER OF AN ARBITRATION

Between:

Hamilton-Wentworth District School Board

-and-

Ontario Secondary School Teachers' Federation District 21

Regarding the Grievances of Haddad and Evangelista (Denial of Benefits).

Award regarding Jurisdiction Preliminary Argument

Before: Arbitrator Brian McLean

For the Employer: Mark J. Zega

For the Federation: Adam Webb

Hearing- Hamilton, December 16, 2015

These are two grievances filed on January 22, 2015 which concern the decision by Great West Life, the insurance company which provides benefits to employees in the bargaining unit on behalf of the Board, to limit the number of physiotherapy sessions which it would reimburse the grievors for. The Board makes a preliminary argument that I am without jurisdiction to hear and determine these grievances. The Federation opposes the Board's argument. This award determines this preliminary issue.

I heard no evidence with respect to the preliminary issue because there is no dispute about the underlying facts which I am required to consider in order to determine the preliminary issue. Those facts are as follows.

The Federation represents teachers, including the two grievors, employed by the Board. The grievors each had a medical issue for which they were prescribed physiotherapy services. They were reimbursed for such services for some time. However, at a certain point GWL decided it would no longer reimburse the grievors for physiotherapy services.

Article 14.02(a) of the collective agreement, provides that teachers will have available, among other benefits, "unlimited" physiotherapy.

The Board made a lengthy argument that I am without jurisdiction to hear these grievances. The essence of the argument is that the collective agreement only

requires the Board to pay for the premiums for a plan that provides for the benefits required under the collective agreement. Any dispute about whether an employee was improperly denied a benefit is between the employee and the insurer (here GWL) and such dispute cannot be the subject of a grievance. The only matter that can be the subject of the grievance is whether the insurance plan purchased by the employer meets the requirements for the provision of benefits set out in the collective agreement. Here, the Board asserts, it has clearly provided a plan which provides for the negotiated benefits.

The Board referred me to several cases in which arbitrators have concluded they have no jurisdiction over benefit claims in similarly worded collective agreements. Typical of these cases is *The Regional Municipality of Niagara and Ontario Nurses Association* -Dan Grievance (Slotnick) (Unreported, April 8, 2011) at p. 9:

> First, turning to the intention of the parties as expressed in the language of the collective agreement, it is my view that the wording of Article 18.07 (a) (together with Schedule B) indicates that the employer's only obligations are to arrange a long term disability plan providing for benefits at 55 per cent of base salary, and to "administer" the plan. In this context, where use of an insurer is envisioned by the wording, administering the plan involves enrolling employees, collecting premiums and remitting them to the carrier, as well as other administrative functions. There is no suggestion that the employer has not met those obligations. Based only on the wording of this clause, there can be little doubt that the parties have agreed on language that fits into the third of the Brown and Beatty categories…where the obligation on the employer is to arrange the plan and to ensure the employees are enrolled, but not to provide the benefits. This language does not incorporate the plan itself into the collective agreement, and therefore an arbitrator cannot adjudicate disputes over payment of benefits.

It is not necessary for me to set out the Board's argument in more detail or describe any of the other authorities it relies on because the union agrees, as the Board argues, that the parties have bargained a provision in which the employer's obligation is to purchase a benefit plan which provides for the benefits that it has, in the collective agreement, agreed to. All of the cases cited state that the union, in those cases, did not challenge whether the employer had provided the promised benefit plan. Here, quite simply, the Federation says that the employer has not done so. In this regard, the grievances allege that the Board has denied unlimited physiotherapy coverage to employees. It has, according to the Federation, breached the collective agreement, because the plan currently in place, which the Board obtained, does not provide for unlimited physiotherapy benefits. The Federation's theory is that there has been a change in GWL's policy regarding reimbursement of physiotherapy charges such that the plan no longer provides unlimited physiotherapy coverage if it ever did.

While, I agree that the Federation's argument treads a fine line between seeking to have the individual claims arbitrated (which is not permitted) and asserting that the benefits set out in the collective agreement have not been provided, it is clear to me that I have the jurisdiction to determine the grievances as framed by the Federation. The issue, and the issue I have jurisdiction over, is whether the Federation can demonstrate that the Board has not purchased a plan that provides the benefits as set out in the collective agreement. The fact that benefit claims have been denied may be evidence in support of the Federation's position. Whether that is sufficient to prove a breach (or, indeed whether the Federation

has other evidence of a breach) can only be determined at a hearing of the matter. On the other hand, it may be that the Board has purchased the required plan in compliance with the collective agreement and GWL's decisions, whether correct or not, have been made under that plan. Those determinations are what I have the jurisdiction to make.

For theses reasons, I find I have the jurisdiction to hear and determine the grievances in so far as they allege that the employer has not obtained a plan that provides for the negotiated benefits. Accordingly, the employer's preliminary objection is denied.

Brian McLean

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Brian McLean

Toronto

January 23, 2016