

IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE LABOUR RELATIONS CODE, R.S.B.C. 1996 c. 244

BETWEEN:

BRITISH COLUMBIA EMERGENCY HEALTH SERVICES
(as represented by the Health Employers Association of BC)

(the "Employer" or "BCEHS")

AND:

AMBULANCE PARAMEDICS OF BRITISH COLUMBIA - CUPE,
LOCAL 873

(the "Union")

SECTION 104 – POLICY GRIEVANCE – LTD BENEFITS RETROACTIVE PAY

AWARD

Arbitrator: Koml Kandola

Counsel: Andrew Nathan, for the Employer
Michael Shapiro, for the Union

Date of Hearing: December 11 and 12, 2023 (via
videoconference)

Date of Decision: January 5, 2024

1 This is a collective agreement interpretation case. The issue is whether long-term disability (LTD) benefits, which are determined as a specified percentage of “regular monthly income”, are to be calculated based on an employee’s pre-disability income (as BCEHS asserts), or the income the employee would have earned but for the disability, i.e. inclusive of negotiated wage increases over the disability period (as the Union asserts). This matter was referred to me under Section 104 of the *Labour Relations Code* and, accordingly, my reasons are brief.

2 BCEHS operates a provincial ambulance service. The Union is certified to represent a bargaining unit of BCEHS employees. BCEHS and the Union are parties to a collective agreement with a term of April 1, 2022 to March 31, 2025 (the “Collective Agreement”). On September 1, 2023, the Union filed a policy grievance regarding BCEHS’ refusal to apply recently negotiated retroactive wage increases to employees who received LTD benefits after April 1, 2022 (the “Grievance”).

3 The Grievance also alleged that BCEHS improperly capped LTD benefits at \$6,000 per month. Prior to the hearing, BCEHS advised the Union that it would raise the cap to \$8,000 per month. The Union advised this resolved the matter as there were no employees who would receive LTD benefits greater than that amount. Accordingly, I do not address the LTD cap in this Award.

I. COLLECTIVE AGREEMENT PROVISIONS

4 The Collective Agreement provides for various disability related benefits, including: short-term disability income insurance (STIIP) benefits; LTD benefits; and a short-term Employer top-up of benefits received in relation to a recognized WorkSafe BC claim.

5 Specifically, Article 20, entitled Sick Leave Provisions, addresses both STIIP and LTD benefits. Article 20.01(a) sets out the entitlement to STIIP benefits as follows:

In the event an employee is unable to work because of illness or injury they will be entitled to an amount equal to seventy-five per cent (75%) of the employee’s regular salary for up to twenty-six (26) weeks. ... [emphasis added]

6 LTD benefits are addressed in Article 20.02, which states:

Should an employee remain continuously and totally disabled due to any injury or illness, including an occupational injury, beyond twenty-six (26) weeks, or its equivalent as set out in Schedule A, the employee shall receive a monthly benefit equal to the sum of:

1. seventy per cent (70%) of the first \$2,200 of regular monthly income; and
2. fifty per cent (50%) of regular monthly income above \$2,200,

including benefits payable under any government or other employer-related disability plan. Payments will continue until recovery, death, or the mandatory retirement age, which ever occurs first. [emphasis added]

7 Article 24 addresses various other employee benefits, such as dental, extended health, and group life. In particular, Article 24.04 provides a benefit to employees on approved WorkSafeBC claims, as follows:

- (a) Where an employee is on a claim recognized by the Workers' Compensation Board while the employee was on Employer business, the employee shall be entitled to leave, at their regular rate of pay, up to a maximum of one hundred eight-two (182) calendar days for any one (1) claim. Where an employee elects to claim leave with pay under this Article, the compensation payable by the Workers' Compensation Board shall be remitted to the Employer.
- (b) For the purposes of this Article, "regular rate of pay" will be the employee's pre-injury "normal net take home pay". ... [emphasis added]

8 As discussed below, BCEHS relies on Article 24.12, which says:

The Liability of the Employer in the provision of benefits under this Article is limited to the conditions outlined in the appropriate contracts entered into with various carriers at the date of signing of this Agreement as well as any agreed to or negotiated changes; provided however, that employees on benefits as of the date of signing of the 12th Collective Agreement shall continue to be to be eligible for benefits according to the terms and conditions of the insurance contracts at the time the benefit entitlement arose. [emphasis added]

9 Article 24.11 states that "enrolment in all benefit plans is effective from the first day of the month immediately following the completion of the qualifying period if any", and lists various benefits to which this requirement applies, including STIIP and LTD.

10 Since approximately April 1, 1986, BCEHS has contracted with Canada Life (previously Great West Life) for a group insurance policy pursuant to which Canada Life provides and administers LTD benefits (the "LTD Policy"). I will discuss the LTD Policy further below.

11 II. EVIDENCE

11 The Union called Jason Jackson, the current Union President, as its witness. The Employer called two witnesses: Kiren Gill, its Director of Labour Relations; and Amy Saville, who is employed as a Team Manager at Canada Life.

12 Mr. Jackson has been employed by BCEHS as a paramedic since 1997, and as a paramedic chief since 2006. He has held various roles within the Union since 2010, including serving as the Union's lead negotiator in the last round of bargaining, which ended in early 2023. In that round, the parties negotiated various retroactive wage and premium increases effective April 1, 2022, April 1, 2023, and April 1, 2024. BCEHS took some time to operationalize the increases into its payroll system, which triggered a grievance that resulted in a consent order requiring retroactive payments to be made by August 25, 2023. Mr. Jackson testified as follows in that regard. Ultimately, all active-duty employees were paid a retroactive wage increase with respect to work performed after April 1, 2022. All employees who received STIIP benefits after April 1, 2022 were also paid retroactive pay with respect to those benefits, regardless of their date of injury. Similarly, all employees who received benefits under Article 24.04 were paid retroactive pay with respect to those benefits. However, employees who received LTD benefits after April 1, 2022 did not receive any retroactive payments with respect to those benefits.

13 As noted, the Union filed the Grievance in September 2023. Subsequently, the Employer indicated that it would make retroactive payments to employees who received LTD benefits after April 1, 2022 with respect to wage increases that took effect prior to the date of disability, but not

with respect to any subsequent wage increases. Thus, for example, an employee with a disability date of May 1, 2022 would receive a retroactive payment with respect to the April 1, 2022 wage increase, but not with respect to the April 1, 2023 wage increase if they remained on LTD through April 1, 2023.

14 Mr. Jackson testified that, in his 27 years with BCEHS and in his 14 years as a Union officer, he had never seen the LTD Policy before this proceeding. He testified that the Union does not play any role in negotiating the LTD Policy, nor is it aware of how Canada Life administers the LTD Policy. Further, the Union is not copied on correspondence between Canada Life and BCEHS, or Canada Life and Union members. Mr. Jackson testified that, to his knowledge, prior to this proceeding, the Union had never received an inquiry from its members about LTD benefit calculations. His understanding was that LTD benefits would be calculated based on an employee's monthly income incorporating any wage raises that would have applied.

15 Ms. Saville is employed as a Team Manager at Canada Life. She oversees four case managers who handle claims under the LTD Policy. She testified that the LTD Policy specifies a benefit formula of "70% of the first \$2,200 in monthly earnings, plus 50% of monthly earnings in excess of \$2,200". She testified that Canada Life calculates LTD benefits based on that benefit formula, and using the gross monthly earnings reported by BCEHS. In that respect, her evidence was that the LTD Policy defines monthly earnings as follows:

Monthly earnings for benefit calculations and in assessing a person's ability to be gainfully employed are the person's monthly earnings in effect the day before the disability period started. [emphasis added]

16 Ms. Saville testified that, using this definition, Canada Life calculates an employee's monthly earnings, for benefit calculations purposes, based on their earnings prior to the date of the disability: any changes in wages that occurred after the date of disability would not be considered. She testified that BCEHS reports the employee's monthly earnings to Canada Life by completing an Employer Statement, which is a fillable form with pre-formulated questions (the "Employer Statement"). The Employer Statement asks BCEHS to, among other things, report the employee's gross monthly earnings prior to the disability.

17 Ms. Saville also gave evidence regarding the "actively at work" requirement in the LTD Policy, which states that increases in insurance only take effect when an employee is actively at work. The LTD Policy states that "an employee is considered actively at work if: 1. he is not disabled; and 2. he is either at work or absent due to vacation, weekends, statutory holidays, or shift differentials". She testified that, pursuant to this requirement, Canada Life will not consider wage increases that occur while an employee was already on an existing disability claim, as the employee is not "actively at work" at that time.

18 Ms. Saville testified that the "monthly earnings" definition and the "actively at work" requirement are standard terms in insurance contracts, and that to her knowledge, they have never been changed in the LTD Policy. She further testified that, to her knowledge, Canada Life would have administered LTD benefits in a manner consistent with the terms of the LTD Policy.

19 However, in cross-examination, Ms. Saville agreed that while she has been employed at Canada Life for 19 years, she was not directly involved with the LTD Policy, or with claims involving BCEHS, before she became a Team Manager in January 2021. She acknowledged she had no first-hand or direct knowledge of how Canada Life administered the LTD Policy prior to January 2021. She also confirmed that while she oversees the four case managers, she is not involved in every claim determination they make in relation to the LTD Policy.

20 Ms. Gill testified that she has been employed with either BCEHS or the Provincial Health Services Authority for approximately eight years. She testified about her understanding of Canada Life's administration of the LTD Policy, as follows. BCEHS pays premiums to Canada Life, who then administers monthly benefits to eligible employees. BCEHS pays the premiums based on employees' pre-disability income. Ms. Gill's understanding of "regular monthly income" for LTD benefits calculation purposes was that it was based on an employee's earnings the day prior to the start of the disability period. Ms. Gill also referred to the Employer Statement and testified that BCEHS reports the employee's pre-disability gross monthly earnings to Canada Life. Ms. Gill also testified that, to her knowledge, prior to this hearing, the Union had never taken issue with how monthly LTD benefits are calculated.

21 In cross-examination, Ms. Gill acknowledged that in her eight years of employment, she has never been directly involved with LTD benefits issues. She also testified that she is not involved in the preparation of the Employer Statement, nor is it provided to the Union. She further agreed that, because the Union is unaware of communications between BCEHS and Canada Life regarding LTD benefit calculations, the Union would not be aware of a problem in that regard even if one existed.

III. POSITIONS OF THE PARTIES

22 The Union submits that when considered in the context of the Collective Agreement as a whole, Article 20.02 shows that the parties did not intend LTD benefits to be based on pre-injury income, but rather on the regular monthly income the employee would have earned but for the disability. In other words, it says the parties' mutual intention was for LTD benefits to incorporate retroactive and future wage increases. The Union says that if the parties intended LTD benefits to be based on pre-injury regular income, they would have expressly said so in Article 20.02. It notes that where the parties intended other disability-related benefits to be based on pre-injury income, they said so expressly, as they did in Article 24.04(b). The Union submits that, given the absence of any such language in Article 20.02, it is inherently unlikely that the parties intended LTD benefits to also be based on pre-injury income. It says that, to the contrary, the inclusion of the words "for the purpose of this article" in Article 24.04(b) suggests that the parties did not intend that definition to apply in other Articles.

23 In the Union's submission, Article 20.02 contains a promise by BCEHS to provide specific LTD benefits, and not merely to pay premiums for the LTD plan. The Union says the terms of the LTD Policy are inconsistent with the Collective Agreement, and the fact that BCEHS purchased a plan that does not live up to its promise in Article 20.02 is not an answer to the Grievance: BCEHS must either renegotiate the terms of the LTD Policy, or make up the difference.

24 Anticipating BCEHS' reliance on Article 24.12, the Union says the limitation of liability in Article 24.12 applies only to "the provision of benefits under this Article". It says LTD benefits are provided under Article 20.02, not Article 24, and therefore, the limitation in Article 24.12 does not apply to LTD benefits. It says the reference in Article 24.11 to the enrollment date of benefit plans does not somehow incorporate LTD benefits into Article 24. Further, and in any event, the Union says Article 24.12 cannot be interpreted to limit BCEHS's liability for purchasing an LTD plan that provides less than what is required by the Collective Agreement.

25 BCEHS submits that "regular monthly income" in Article 20.02 must mean the income that an employee regularly earned on a monthly basis before the disability period. It says Article 20.02 does not provide an entitlement to recalculated LTD benefits for wage increases that come into effect during the disability period, and without the employee having returned to active duty. BCEHS

further submits that as Article 20.02 provides for a monetary benefit, the language must be interpreted and applied strictly.

26 BCEHS says that Article 24.04(b) supports its interpretation, not the Union's. Specifically, it says that the phrase "regular rate of pay" in Article 24.04 and "regular monthly income" in Article 20.02 are similar and should be interpreted in a similar way. It says that where the parties imported a definition in Article 24.04(b), the same definition should apply to Article 20.02. Further, in BCEHS' submission, Article 24 shows that the parties intended for LTD benefits to be provided through enrolment in a third-party benefit plan (Article 24.11), and which are subject to the standard terms and conditions of that contract (Article 24.12). BCEHS says that, pursuant to Article 24.12, its liability in the provision of benefits under the Article (and it says LTD benefits are incorporated in Article 24 by virtue of Article 24.11) is limited to standard terms and conditions outlined in the LTD Policy, including the "monthly earnings" definition and "actively at work" requirement. BCEHS relies on the decision in *Elk Valley Coal Corp. and UMWA, Local 7292*, [2007] B.C.C.A.A. No. 27 (Taylor) ("*Elk Valley*") in this respect.

27 According to BCEHS, the evidence also establishes a longstanding past practice that confirms its interpretation. It says there is a decades-long practice whereby Canada Life has calculated monthly LTD benefits based on an employee's pre-disability monthly income, and LTD benefits have been paid on that basis. It further asserts that the Union never previously objected to the manner in which LTD benefits were calculated. It says the Union has acquiesced to the practice and, to the extent Union officials were not aware of it, they ought to have been. BCEHS says this practice also constitutes an acquired right under Article 30.01 and, alternatively, renders the Union estopped from asserting its interpretation.

IV. ANALYSIS AND DECISION

28 While the parties cited some helpful case law, each case turns on the specific contract language involved.

29 The principles of collective agreement interpretation are well-established and were summarized in *Pacific Press v. GCIU Local 25-C*, [1995] B.C.C.A.A. No. 637 (Bird, QC), at paragraph 27, which I rely on but do not fully reproduce here. Very briefly, and non-exhaustively, the object of interpretation is to discover the mutual intention of the parties, with the primary resource being the collective agreement itself. When looking at more than one provision, harmonious interpretations are to be preferred. Further, all clauses and words should be given meaning, and their plain meaning. Importantly, to determine the parties' intent, language in one clause of a collective agreement should not be interpreted in isolation. The words must be interpreted in the context of the agreement as a whole: *Canadian Newspapers Company Ltd.*, BCLRB No. 56/80, cited by the Union.

30 For the reasons set out below, and in the context of the Collective Agreement as a whole, I prefer the interpretation advanced by the Union as being consistent with the above principles.

31 In Article 20.02, the parties chose to express LTD benefits as based on a specified percentage of "regular monthly income". In Article 20.01, the parties referenced STIIP benefits as relating to "regular" salary. In Article 24.04, they have stated that an employee on a recognized WorkSafe BC claim is entitled to leave "at their regular rate of pay", for a prescribed time. On a cursory and superficial review, it may seem that the parties chose the word "regular" in each of Articles 20.01, 20.02, and 24.04 and therefore it should be assumed that they intended for that word to have the same meaning in each of the three provisions.

32 However, there are two further important aspects of Article 24.04 that must be contended with and given meaning. First, the parties went on in Article 24.04(b) to expressly define “regular rate of pay” as “the employee’s pre-injury ‘normal net take home pay’”. Second, they expressly stated that that definition was “for the purposes of this Article”. In my view, by doing so, the parties must reasonably be taken to have turned their minds to the issue of whether the benefit under Article 24.04 would be calculated based on pre-injury pay, versus pay the employee would have received but for the disability. They expressly chose to define that benefit as being based on pre-injury pay. Having turned their minds to that issue, they also chose to limit the application of that definition “for the purposes of this Article”. These words must be given meaning. LTD benefits are addressed in Article 20.02, not Article 24, and therefore are not subject to this definition. In addition, the parties did not include a similar definition in Article 20.02 though they could easily have done so.

33 In my view, given the similarity of language between Articles 20.01 and 20.02, and the distinct differences between Articles 20.02 and 24.04, it is more likely that the parties intended LTD benefits to be dealt with similar to STIIP benefits, as opposed to WorkSafe related benefits. I find that, objectively, and in all the circumstances, the parties’ mutual intention was for LTD benefits to be calculated based on an employee’s monthly income reflecting the negotiated wage increases that would have occurred during the disability period, and not based on pre-disability income.

34 Thus, in the context of the Collective Agreement as a whole, I find the language of Article 20.02 is clear and unambiguous and reflects the interpretation advanced by the Union. Further, that interpretation gives effect to all the relevant provisions, gives them their plain and ordinary meaning, and does so in a harmonious manner.

35 Respectfully, the interpretation advanced by BCEHS does not do so. BCEHS argues that LTD benefits are incorporated into Article 24 by virtue of Article 24.11; therefore, it says LTD benefits are subject to the definition in 24.04(b) as well as the limitation of liability in Article 24.12. I disagree. The express purpose of Article 24.11 is to set out the benefit plan effective date for the listed plans, of which the LTD plan is but one. In my view, Article 24.11 cannot reasonably be interpreted as evidencing a mutual intention for LTD benefits to thereby also be subject to the definition of “regular rate of pay” set out in Article 24.04(b). If the parties intended that result, there were much simpler and direct ways of doing so, such as expressly stating that intent, or including a similar definition in Article 20.02. Further, to accept this argument would be to ignore the normal and plain meaning of Article 24.11 and instead impose an unreasonably and unnaturally strained and stretched interpretation.

36 I also find that *Elk Valley* does not advance BCEHS’ position. In *Elk Valley*, there was no provision equivalent to Article 24.04(b). Further, in that case, the collective agreement expressly stated that the employer’s obligation regarding group insurance plans “was limited to paying premium costs”, and that the actual “coverage provided is subject to the terms of the respective policies”. I have already found that LTD benefits are not incorporated into Article 24. As a result, they are not subject to the limitation of liability in Article 24.12. Further and in any event, as BCEHS quite rightly acknowledged, the limitation of liability in Article 24.12 cannot be interpreted in a manner that would allow the Employer to negotiate an LTD policy that provides for lesser benefits than required by the Collective Agreement. Article 20.02 does not simply require BCEHS to pay for premiums for LTD coverage. It requires BCEHS to provide a specific level of the benefit, and I have found that is to be based on the regular monthly income the employee would have received but for the disability. The LTD Policy, and in particular the definition of “monthly earnings” as being based on pre-disability earnings, as well as the “actively at work” requirement, are inconsistent with BCEHS’s obligations as expressed under the Collective Agreement. While the definition of “monthly earnings” and the “actively at work requirement” may be standard terms and conditions in

insurance contracts generally, they do not accord with the specific and express requirements that the parties have imposed upon BCEHS in Article 20.02.

37 I have found that Article 20.02 is clear and unambiguous. As a result, I do not need to resort to extrinsic evidence in my interpretive analysis: *Nanaimo Times Ltd.*, BCLRB No. B40/96. In any event, I find the evidence before me did not establish a clear and unequivocal longstanding practice of LTD benefits being administered in the manner suggested by BCEHS. In this regard, both Ms. Gill and Ms. Saville could only speak to their general understanding. Neither of them had direct or first-hand knowledge and experience regarding the administration of benefits under the LTD Policy. Ms. Gill's evidence was that she is not directly involved in LTD benefits issues at all. Ms. Saville testified that she had no involvement with the administration of the LTD Policy until after January 2021. Even after that period, she would not have been aware of all claims determinations made under the LTD Policy. This is not to say their evidence was untrustworthy. However, in the circumstances, and given that the LTD Policy has been in place since 1986, I would have expected there to be some evidence as to whether negotiated wage increases in the past had been addressed in the calculation of LTD benefits. I was not provided with any such evidence. In these circumstances, I find there is insufficient evidence to establish the longstanding practice alleged by BCEHS. Further and in any event, there is no dispute that the Union had no knowledge of how Canada Life administered the LTD Policy. Accordingly, I cannot find the Union was aware of, or ought to have been aware of, the alleged longstanding practice. Given these findings, I also dismiss BCEHS' arguments regarding acquired rights and estoppel.

38 For the reasons given, the Grievance is allowed. I declare that BCEHS breached Article 20.02 of the Collective Agreement. I order BCEHS to comply with the Collective Agreement and to make the Union and the impacted employees whole in this respect. As per the parties' request, I remit the matter of remedy to them to determine specific calculations in that regard. I retain jurisdiction should the parties be unable to come to a mutual agreement.

DATED this 5th day of January 2024, in the District of North Vancouver, BC.

"KOML KANDOLA"

Koml Kandola
Arbitrator