

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4834

Heard in Edmonton, June 22, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The denial of WIB Manulife Weekly Indemnity Benefits to [Mr. M] between June 14, 2016 and November 1, 2016 as well as wage loss for this period.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

May 10, 2016 [Mr. M] goes off injured. June 14, 2016 Mr. M.'s benefits are stopped. Mr. M. is suffering through his medical issues and further suffers with denied benefits and income adding unwarranted stress on him.

Mr. M. is arbitrarily determined by Manulife not to be fully disabled.

September 13, 2016 Mr. M/ attending physician writes to Manulife with his professional opinion that Mr. M. cannot fulfill his duties and ought to be paid WIB until recovery with a projected return to work at the end of October 2016.

Mr. M. was not cleared to return to a Safety Critical Position.

January 12, 2017 Union Local files Step 2 grievance to have these benefits paid.

The Company does not respond.

Under agreed upon TLE, the Step 3 is presented December 12, 2020.

Union Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends as below.

The Company failed to respond to the step two and step three appeals which is a violation of Article 40.02 of the Collective Agreement and the May 29, 2018 Agreement on Management of Grievances.

The Company has violated the Collective Agreement provisions, the RTW Accommodation Policy and process, and the Canadian Human Rights Act and the wages associated under the Canada Labour Code Part III Section 132(5).

The Union contends that Mr. M. be handled properly and the CPR works with the benefits provider to have these benefits paid for June 14, 2016 until November 1, 2016.

The CP Memorandum to Physicians clearly outlines the parameters to be met to be cleared for Safety Critical Positions and the Physicians Reports provided to the Company clearly disclosed that Mr. M. could not return to Safety Critical duties yet Manulife denied the benefit. All documentation supported Mr. M. absence from work.

The Company felt he was not totally disabled yet did not progress with RTW accommodation which left the Mr. M. in limbo. This is unfair and inequitable as Mr. M. had no wages, no benefits. The Company cannot have it both ways.

The Company is in violation of Article 37 Health and Welfare, all modifications to payment through relevant language in Memorandum of Settlements and Awards, Disability and Life Insurance Plan Agreement, Weekly Indemnity Benefit Claim for Unionized Employees at Canadian Pacific, Manulife (Sunlife) Benefits at a Glance, Canadian Human Rights legislation, Canada Labour Code statutes, in addition to any and all other provisions.

The Union requests the approval of Mr. M.'s WIB and compensate him accordingly for the period between June 14, 2016 and November 1, 2016 as well as any wages that should have been paid during an accommodation. The Union further request Mr. M.'s Pension/Benefits be adjusted positively, and in addition to such further relief the Arbitrator deems necessary in order to ensure future compliance with the above provisions.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On May 10, 2016, Mr. M. booked off on "off duty injury". Mr. M.'s WIB claim was adjudicated as follows:

- a. On June 24, 2016, Mr. M.'s initial claim was approved for the period of May 13 – 26, 2016;
- b. On July 21, 2016, Mr. M.'s claim for benefits after May 26, 2016 was declined on the basis that Manulife "did not receive evidence of ongoing restrictions and limitations or a severity of condition that would prevent you from working beyond May 26, 2016.";
- c. On July 25, 2016 Mr. M. spoke to a Manulife representative who advised of the appeal process and would also require documentation to support disability retroactive to May 2016.
- d. Mr. M. appealed this determination and on December 12, 2016, Manulife approved benefits to June 14, 2016.
- e. On November 2, 2016, Mr. M. returned to work.

Union Position:

The CP Memorandum to Physicians outlines the parameters to be met to be cleared for Safety Critical Positions and the Union maintains Mr. M.'s Physicians Reports provided to the Company disclosed that Mr. M. could not return to Safety Critical duties yet Manulife denied the benefit. The Union takes the position that all documentation supported Mr. M.'s absence from work. Concurrently the Company did not accommodate the Grievor. The Union argues this is unfair and inequitable.

The Union requests the approval of Mr. M.'s WIB and compensate him accordingly for the period between June 14, 2016 and November 1, 2016 or, in the alternative, any wages that should have been paid during an accommodated return to work during the period. The Union further requests Mr. M.'s Pension/Benefits be adjusted to reflect the aforementioned payments.

Company Position:

Manulife, the Company's third party benefits administrator, adjudicates WIB claims based on the evaluation of pertinent policy provisions and relevant medical documentation. The Company's Health Services department is required to evaluate medical information supplied to the Company in making Fitness to Work determinations.

The Company maintains that the Grievor's WIB claim was appropriately denied because the Grievor's claim did not meet the requirements to be eligible for WIB. Concurrently, the Company maintains the Grievor was Unfit for all work based on information provided by the Grievor's

treating physician during the period in question. CP was unable to provide any accommodation as it would be contrary to the direction provided by the Grievor's physician.

The Company maintains there was no violation of the Collective Agreement, any Company Policy, the CHRA nor the Canada Labour Code.

The Company maintains that Manulife and Health Services' decisions were appropriate in all of the circumstances and asks that the arbitrator be drawn to the same conclusion.

FOR THE UNION:

(SGD.) E. Mogus

General Chairperson LE-E

FOR THE COMPANY:

(SGD.) L. McGinley

Director, Labour Relations

There appeared on behalf of the Company:

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| L. McGinley | – Director Labour Relations, Calgary |
| D. Guerin | – Managing Director, Labour Relations, Calgary |
| S. Mitchell | – Benefits Specialist (zoom) |
| R. Araya | – Labour Relations, Officer, Calgary, (Observer) |

And on behalf of the Union:

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|-------------|---|
| K. Stuebing | – Counsel, Caley Wray, Toronto |
| E. Mogus | – General Chairperson, LE East, Oakville |
| J. Bishop | – Senior Vice General Chairperson, LE East, MacTier |
| M. | – Grievor |

AWARD OF THE ARBITRATOR

1. The issue in this Grievance is whether Mr. M. was improperly denied Weekly Indemnity Benefits (WIB) for the period between June 14, 2016 and November 1, 2016.

2. For the reasons which follow, I find that he was.

Facts

3. Two disabilities are at issue in this case. Due to the very private and sensitive nature of certain of the Grievor's background information leading to one of his disabilities, the Grievor's name has been anonymized (with agreement of the parties).

4. Disability #1 resulted in the Grievor being off work beginning on May 9, 2016. The Grievor was cleared to returned to work by his physician as of November 1, 2016. A supporting Employee and Attending Physician Statement was provided to Manulife to

support the Grievor's absence from disability #1. The diagnosis was given as "acute stress disorder". This was dated May 11, 2016.

5. Manulife acknowledged receiving the Statement, noted the diagnosis and the symptoms and what faculties had been impacted by his condition. Manulife did not seek any clarification from the Grievor's physician – including any questions relating to the diagnosis - from that point to July 4, 2016.

6. A few days after the Grievor began his time off work for disability #1, he suffered from disability #2. Disability #2 began on May 13, 2016. It resulted from a mass on the Grievor's left kidney and was short-term in nature. Disability #2 resolved by June 14, 2016.

7. Manulife attempted to contact the Grievor between May 30, 2016 and June 24, 2016. The Company submitted in its argument that this was to "clarify why Mr. M was unable to work and to confirm the treatment plan". The Grievor and Manulife did connect on June 24, 2016, by telephone. Notes were entered into evidence from Manulife's file materials. During the phone call with the Grievor on June 24, 2016, the Grievor had not provided any indication to Manulife that disability #1 had resolved. He indicated to Manulife he was still suffering from loss of concentration, irritability and that he had therapy set up. He noted he was unable to start certain of the medication given to him for disability #1 because of the medication he had been given for disability #2, as he was instructed not to take them together.

8. Manulife appeared satisfied with the Grievor's clarification that the original reason he was off work was due to disability #1, but that after several days off work, he experienced pain in his kidney, and received treatment at the hospital for that issue,

(disability #2). According to Manulife's records, benefits were approved for two weeks "to allow recover and request medical from Dr. regarding new diagnosis".

9. Meanwhile, the internal Health Services department of the Company was itself receiving information from the Grievor's doctor regarding the Grievor's medical condition. The Company had requested this information from the Grievor's physician, by way of a Functional Abilities Form (FAF). That Form included a requirement the physician complete a medical report regarding the Grievor's condition. The first FAF was completed May 18, 2016. A second FAF was completed on August of 2016, another on September 27, 2016 and the final FAF on October 24, 2016. The last FAF indicated the Grievor was capable of returning to work on November 1, 2016.

10. The Company had no information as of July 4, 2016 that the Grievor's disability #1 had resolved. Neither did Manulife.

11. On July 4, 2016, approximately 11 days after this call with the Grievor, Manulife contacted the Grievor's physician requesting an updated report relating to disability #1. This was the first contact Manulife had made with the Grievor's doctor to seek further information regarding the Grievor's condition, since it had received the Statement, dated May 11, 2016, almost two months earlier.

12. Manulife requested the specific diagnosis, whether there were any changes to that diagnosis, the treatment plan, the medications prescribed (duration and dosage); response to treatment; plans for referral; compliance with treatment; the functional restrictions and limitations imposed on the Grievor's activity; and expected duration and additional comments to clarify the current condition and functional status". While the Union urged Manulife had all of the information it requested in the original report of May

11, 2016, I am satisfied it was not unreasonable or arbitrary for Manulife to request this updated information.

13. This is where significant confusion began.

14. The Grievor's doctor obviously misunderstood Manulife's request for further information about disability #1, which was named in the request. Instead of providing information regarding disability #1, the doctor only provided information to Manulife regarding disability #2 – the right kidney issue. The doctor indicated the symptoms “of right flank and right back pain” (which were the symptoms relating to disability #2, not disability #1) had completely ameliorated” by June 14, 2016.

15. Manulife did not write back to the physician's doctor to correct his error and let him know that Manulife actually was requesting information about disability #1, rather than disability #2.

16. Interestingly, even though Manulife had this updated medical information regarding disability #2, it did not approve benefits to the Grievor for disability #2 to June 14, 2016. That change was not made until December of 2016, in response to one of the Grievor's appeals.

17. By letter dated July 5, 2016, Manulife declined the Grievor's benefits for disability #1. Manulife stated there was not “clinical evidence that the condition is causing functional limitation such that you are unable to perform the duties of your own occupation”. Manulife went on:

The medical submitted by your physician did not include details or updates pertaining to your diagnosis of [deleted]. The medical we received indicated your pain as well as all symptoms has completed [sic] ameliorated. As we did not receive evidence of ongoing

restrictions and limitations or a severity of condition that would prevent you from working beyond May 26, 2016, we are terminating your claim.

Summary of Arguments

18. The Union argued the Grievor was wrongly denied benefits to which he was entitled, from June 14, 2016 to November 1, 2016. It urged the Company violated the collective agreement, the return to work accommodation policy and process, the *Canadian Human Rights Act*, R.S.C., 1985, C. H-6, and wages associated under the *Canada Labour Code*, R.S.C. 1985, c. L-2; Part III, section 132(5). It noted the Grievor was totally disabled from any occupation. If the Company did not agree the Grievor was totally disabled, it had an obligation to either determine the Grievor could work, or accommodate him. It argued it did neither. It noted Manulife misidentified the disability which was continuing to act on the Grievor and that Manulife failed to evaluate disability #1 and its impact on the Grievor's ability to work in his safety critical position.

19. Even if the Company was justified in not paying benefits to the Grievor, the Union argued it then had a duty to accommodate him, which it has not met. It urged the Company cannot "play both sides" by supporting Manulife in its determination the Grievor was "not" disabled, but at the same time making no effort to accommodate him if he supposedly was not. This puts employees into a "limbo" at a time when they are particularly vulnerable. The Union relied on **CROA 4667**; **AH 834**; *Re Bayer Rubber Inc. and C.E.P. Local 914* (1997) 65 L.A.C. (4th) 261; and **CROA 4273**.

20. The Company argued it is entitled to rely on eligibility decisions made by third party insurers. It noted that the only limitation for that reliance was that the decision must not be motivated by a purpose that is "arbitrary, discriminatory or in bad faith": **CROA 4679**;

4270. It urged the Union had not argued that these criteria had not been met. It argued the Manulife's decision was based on the medical information provided and discussion with the grievor about his day-to-day activities. It argued there was no basis to interfere with that determination.

Analysis and Decision

21. Article 37 of the Collective Agreement outlines the obligation on the Company to provide benefits to Union members "in accordance with the terms of the Disability and Life Insurance Plan Agreement dated November 27, 1988.... as amended" (the "Plan"). It is not disputed that the terms of the Plan would provide benefits to the Grievor when he is totally unfit to work in his own occupation. I am satisfied the Plan has been incorporated by reference into the Collective Agreement, as was the plan in **CROA 4679** and **2849**. I am also satisfied the obligation ultimately falls on the Company to ensure that it does not breach Article 37 of the Collective Agreement regarding the provision benefits: **CROA 2945**.

22. I do not take issue with Manulife's ability to seek updated medical information from the Grievor. That is a part of its role in adjudicating the claims based on a basis of "fact" and not arbitrarily.

23. I am also satisfied from the evidence that Manulife knew – or *should have known had they read the information received with due care and attention* – that the Grievor's physician had responded to its July 4, 2016 request for updated information *about disability #1*, with information *about disability #2*. Manulife knew – or should have known – that the "symptoms" referred to by the doctor as "ameliorated" related only to disability #2 – back and flank pain – and not to disability #1, which did not involve physical

symptoms. The Grievor's doctor was confused. This confusion on the part of the physician was apparent to this Arbitrator and should have been apparent to Manulife.

24. In this case, Manulife treated the doctor's obvious confusion as acquiescence that disability #1 no longer existed. However, neither the Grievor nor his doctor had provided any basis for Manulife to make that conclusion.

25. This is distinct from the fact situation in **CROA 4679**. In that case, the medical evidence that had been received did not accord with the facts as found regarding the reason for the grievor's absence. It was factually determined in that case that the "primary reason" for the Grievor's absence "was not related to his own anxiety issues, but rather the need to provide care to his wife who was being treated for alcoholism". Manulife therefore had a "basis in fact" to distrust the medical information it had received and to deny the benefits. It was found the determination to deny benefits to the Grievor in that case was not based on an arbitrary assessment, was not discriminatory, and was not in bad faith. This is not surprising, given those facts.

26. A conclusion that is not based on facts, however, *is* a conclusion which is arbitrary. When it involves an assessment of a disability, it is also a conclusion that is discriminatory.

27. In this case, Manulife had no basis in fact to determine that the Grievor's symptoms had resolved. To act as a reasonable disability adjudicator and make a decision that was not arbitrary, Manulife was required to contact the Grievor's doctor, note the error and ask for the correct information about disability #1. Instead, Manulife considered that "silence" was an answer to its inquiry. It was unreasonable for it to do so. Only when it had the answer to the question it had asked would it be able to make a decision that was based on fact and was not an "arbitrary assessment".

28. Manulife's actions are particularly troublesome when it is recalled that Manulife had received information from the Grievor just 10 days earlier - on June 24, 2016 – where he clarified for Manulife that there were in fact two disabilities acting on him and that – while one was resolved – the other was not. Manulife was placed on alert by this conversation not to confuse those two disabilities.

29. Manulife compounded its own error during the appeals process. After the initial denial of benefits, the Grievor made several attempts to draw attention to the error and have Manulife reverse its decision (on July 25, 2016, September 18, 2016 and December 12, 2016). The only change Manulife was willing to take was to extend his benefits to June 14, 2016 and then not until December of 2016, even though in July of 2016 it had medical information to support that determination.

30. Not only did Manulife refuse to correct its own error, I agree with the Union that it marginalized the Grievor's disability in its responses, by describing him as someone who was taking time to "deal with his emotions" – rather than dealing with a specific diagnoses supported by a medical practitioner; a diagnosis which Manulife did not choose to question between May 11, 2016 and July 4, 2016 and a statement for which Manulife had no basis in fact to make.

31. I agree with the Union that this comment was demeaning and discriminatory to the Grievor, based on his disability.

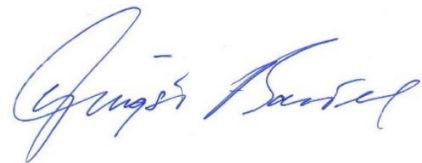
32. For all these reasons, the Grievance is allowed. I am satisfied on the evidence that the Grievor was entitled to WIB benefits and was wrongly denied those benefits due to actions by the insurer which were arbitrary, discriminatory and unreasonable. The Company was not entitled to rely on the arbitrary and discriminatory decision by Manulife

to deny the Grievor's WIB benefits. By doing so, the Company has breached Article 37 of the Collective Agreement.

33. The Grievor is to be made whole by the Company for all outstanding benefits, plus interest, to the date of this Award.

34. I remain seized to address the quantum of those benefits, should the parties be unable to agree, and for any other issues relating to the implementation of this Award.

July 7, 2023



**CHERYL YINGST BARTEL
ARBITRATOR**