

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(“Company”)

-and-

UNIFOR, LOCAL 101R

(“Union”)

**Grievance of “AB”
Denial of Short Term Disability Benefits**

Arbitrator:

Richard I. Hornung, Q.C.

For the Union

Jim Wiens

Joel Kennedy

President, Local 101R

National Representative

For the Company

William McMillan

Diana Zurbuchen

Manager, Labour Relations

Manager, Labour Relations

Hearing

June 3, 2020

Calgary, Alberta

DISPUTE:

The denial of Weekly Indemnity Benefits to Rail Car Mechanic, Mr. B. from September 04, 2018 to March 06, 2019.

JOINT STATEMENT OF FACTS:

On September 04, 2018, Mr. B. left Company Service on Medical Leave. On September 20, 2018, Mr. B. submitted a Functional Abilities Form (FAF) to the Companies Disability Management Department.

On October 04, 2018, Mr. B. submitted a WIB benefit form to Manulife in order to receive benefits.

On October 16, 2018, Mr. B's claim was denied by Manulife. Mr. B. appealed Manulife's decision, and his appeal was subsequently denied by Manulife on January 15, 2019. An additional appeal of Mr. B's claim commenced on January 29, 2019 which was subsequently denied on March 06, 2019.

On March 06, 2019, Mr. B. returned to work.

UNION POSITION:

In reference to the Companies preliminary objection, the Union considers that this is a dispute concerning mutually agreed terms and conditions of work in a Unionized workplace and is therefore under the arbitrator's jurisdiction.

It is the Union's position that Mr. B. has met the definition of being fully disabled from performing his normal duties. The Union further maintains that the medical reports submitted provides the sufficient evidence in this regard.

The Union requests that Company compensate for the lost weekly indemnity benefits from September 04, 2018 to February 26, 2019, compensate any out of pocket medical costs not covered by Mr. B's benefits plan during this period with the interest incurred on such costs.

COMPANY POSITION:

The Company puts forward a preliminary objection in regards to the arbitrability of the grievance of Mr. B. Manulife is the chosen adjudicator of claims for WIB for which an appeal process already exists. As a result, it is the position of the Company that the grievance as presented is outside the jurisdiction of the arbitrator.

In addition to the noted preliminary objection, the Company submits that Manulife, the Companies third party benefits administrator, adjudicates claims based on the evaluation of pertinent policy provisions and relevant medical documentation.

On October 16, 2018, the Company was advised that Mr. B's claim had been declined on the basis that "he is not totally disabled within the meaning of the contract". The decision of Manulife was sustained after further requests for medical documentation and two appeals following Mr. B's initial declination for WIB on October 16, 2018.

Following Mr. B's declination and subsequent appeals for Weekly Indemnity Benefits, Manulife advised that they had not received medical evidence that would support a severity of symptoms that would prevent Mr. B. from performing the duties of his occupation.

As a result, 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.

Accordingly, it is for these reasons the Company denied this grievance.

AWARD

1. The issue giving rise to this dispute is the declination of Weekly Indemnity Benefits ("WIB") to the Grievor, a Rail Car Mechanic, between the dates of September 4, 2018 to March 6, 2019.

Preliminary Objection

2. As indicated in the JSI, the Company gave notice of a preliminary objection regarding the arbitrability of this matter. The parties agreed that the board would hear the objection and the merits together and provide its decision on both at the conclusion.
3. The Company argues that the grievance is not arbitral on the basis that the parties agreed, pursuant to the terms of the *Plan Member Document for Mechanical Employees*, that the primary judge of the employees' claims for WIB was to be Manulife (defined in the Plan as the "service organization"). It asserts that the denial of benefits to the Grievor was in accordance with the terms of the Manulife Plan and is therefore not grievable.
4. The Union asserts that its grievance concerns the interpretation and application of the "*Disability Benefit Plan*" forming part of an "*Employee Benefit Plan*", which is incorporated under the Collective Agreement by Rule 51.1 which provides:

51.1 *The provisions of the Employee Benefit Plan -- Supplemental Agreements, dated April 21, 1989, as revised, amended or superseded by any*

Agreement between the Company and UNIFOR Local 101R, will apply to employees covered by this Agreement.

5. In addition, the Union points out that Article 69.01 of the Collective Agreement refers directly to the Disability and Life Insurance Plan:

69.01 Weekly Indemnity and Life Insurance Benefits shall be available in accordance with the terms of the Disability and Life Insurance Plan Agreement dated November 29, 1988, establishing the Benefit Plan for Train and Engine Service Employees, as amended

6. It argues that, accordingly, the dispute is *prima facie* arbitrable by virtue of Rule 29.1 which provides that:

29.1 A grievance concerning the interpretation or alleged violation of this agreement...may be referred by the designated representative of either party to a single arbitrator for final and binding settlement without stoppage of work.

7. The Union points out that while the Company is correct in its assertion that Manulife decides eligibility of WIB claims, and provides an appeal process, that does not immunize Manulife's "*final*" decision against challenge by a direct grievance. It asserts that, after the conclusion of Manulife's internal appeal process, the unresolved denials of WIB benefit claims remain subject to a grievance pursuant to Article 29 of the Collective Agreement.
8. The objection raised by the Company has been previously addressed in several CROA awards. In **CROA 2945**, Arbitrator Picher stated:

The first issue to be resolved in this dispute is whether, as the Company contends, the grievance is inarbitrable. The Company submits that the weekly sickness indemnity benefits which the grievor claims are not a matter arising out of the collective agreement, but rather that they relate entirely to the application and administration of the weekly indemnity plan document overseen by Sun Life.

The Arbitrator cannot sustain the Company's position on the issue of arbitrability. As Counsel for the Brotherhood points out, the insurance policy which is the subject of this dispute is fully incorporated by reference within the terms of the collective agreement. In this regard article 41.1 provides as follows:

41.1 Health and Welfare benefits will be provided in accordance with Employee Benefit Plan Supplemental Agreement (the "EBP") dated July 25, 1986, as revised, amended or superseded by any agreement to which the parties to this collective agreement are signatory.

I am satisfied that by the foregoing provision the parties agreed that the Company bears the collective agreement obligation to provide benefits as described in the plan referred to, and that any failure to provide such benefits is a matter which can be grieved as part of the enforcement of article 41.1. Consequently, the rejection of an employee's claim for reasons which are arguably beyond the terms of the benefit plan must itself be arbitrable. ...

9. I accept and endorse the comments of Arbitrator Picher as well as those referred to in **CROA 4679**. The rejection of an employee's disability claim, as occurred with the Grievor in this case, is in itself proper subject matter for a grievance and arbitration.
10. The Company's preliminary objection regarding arbitrability is therefore dismissed.

Merits

11. The crux of the Union's claim is that the Company failed to make every reasonable effort to verify the Grievor's disability subjecting him to an arbitrary denial of Weekly Indemnity Benefits.
12. It is not necessary to recite in detail what the Grievor saw as his frustrating ordeal to have his benefits claim paid by Manulife. In a nutshell: in December 2017, the Grievor developed mental issues which led to two absences from work. The first absence was from December 2017 to March 2018 (these claims were paid by Manulife); the second absence was from September 2018 to March 2019. His application for WIB during the second period was declined by Manulife after all appropriate appeals were exhausted.

13. The Union relies largely on the evidence of the Grievor's psychologist who reports in the Attending Physician's Statement on September 20, that the Grievor's illness made it impossible for him to perform essential elements of his job.
14. On Sept 20, 2018 an application for WIB benefits was submitted to Manulife via the Grievor's psychologist (Union Tab 9/10). Manulife's Mental Health Specialist reviewed the Grievor's file and arrived at conclusions which led to the Company sending a letter to the Grievor on October 16, 2018 (Union Tab 11) declining his claim on, *inter alia*, the following grounds:

When adjudicating total disability from your own occupation, we consider whether the medical information supports the stated functional limitations. The existence of a medical condition or its symptom does not mean that there is total disability. Rather, there must be clinical evidence that the condition is causing functional limitation such that you are unable to perform the duties of your own occupation.

...

While we do appreciate that this may be a difficult time for you; it does not by itself constitute a medical illness that satisfies the required definition of Total Disability. In order to determine Total Disability, as defined above, you must provide proof of a restriction or lack of ability to perform the essential duties of your occupation, due to an illness or injury. While Manulife Financial acknowledged that you feel you must take some time away from work, an assessment of the evidence on file indicates that you suffer from no restrictions or lack of ability due to illness or injury, such that you would be unable to perform the essential duties of your own occupation. As such, benefits are declined.

15. On December 11, 2018, the Grievor appealed the declination letter of October 16, 2018. That same day, Manulife answered his request and outlined to him what would be required to proceed with the appeal process. The Grievor was asked to provide specific information to assist in the appeal and the further adjudication of his claim.
16. The Grievor supplied the additional medical information, outlined in the request from Manulife, on December 14, 2018. In addition, his psychologist submitted an

assessment of the Grievor's condition *via* a letter dated December 12, 2018 in which she concludes that:

(The Grievor) is currently unfit for work and for modified duties at this time. Approval of his medical leave will go a long way to help him focus on his recovery so he may return to work.

17. The file was then forwarded to Manulife's Psychiatric Medical Consultant, Dr. Betsy Bishop, for review. Dr. Bishop reviewed the information including the Grievor's psychologist's notes and concluded in her report (Company Tab 14):

There is no doubt that this individual has experienced some anxiety symptoms and unhappiness in relationship to his work situation but it is not clear based on the information provided how severe and persistent these symptoms are and how limiting they have been... Furthermore, treatment has been lacking from a medical perspective with no family physician notes having been included and no changes in medication attempted. As well, no referral made to psychiatry.

18. On January 15, 2019, a letter was sent to the Grievor by Manulife's appeal specialist declining the Grievor's appeal and explaining:

To ensure an accurate interpretation of the medical evidence, your file was reviewed in conjunction with our Psychiatric Consultant and it was determined that the diagnoses provided by Dr. MacDonald were not certain. Though symptoms were listed in Dr. Macdonald's notes from April to September 2018, there was no comment on your mental status to confirm the presence of anxiety or a depressive disorder. We were also told that you have severe impairment in cognition and socialization, but there was no indication of specific examples from your daily life to indicate difficulties with depression. Although the diagnosis of PTSD was provided, our Psychiatric consultant advised that there are no concrete details of how this diagnosis was made. For instance, what was Criterion A (such exposure to actual or threatened death, serious injury or sexual violence) and no sufficient detail to confirm other symptoms necessary for a diagnosis of PTSD. It was obvious that you were unhappy with the work situation and likely has some symptoms of depression and anxiety, but the information provided does not clearly indicate the severity and persistence of these symptoms and how limiting they have been.

19. Following a personal intervention by Mr. Wiens, the President of Local 101, the Company's Labour Relations Department contacted the Benefits Department at CP to inquire as to whether the Grievor could provide additional information from

his psychologist and treatment providers. As a result of that request, Manulife allowed that the file could proceed with a further review and provided the Grievor with an opportunity to provide additional information.

20. On February 21, 2019, the required information was forward to Manulife's Medical Consultant and Supervising Psychiatrist, Dr. Bishop. After reviewing the information the Doctor came to the following conclusion:

I cannot determine if there were any functional or cognitive limitations since September 4, 2018 onwards. As noted, there has been no comment on abnormality in mental status noted and no clinical scales have been provided. In the initial note provided by Dr. Darby there is actually no description of ongoing symptoms of depression noted. We are told that "he has seen good improvement since going there", meaning going to counseling. We are told his focus and concentration are average and that regarding his energy he tried to stay active but he is tired during the day. His strength is noted to be okay so aside from low mood there is really no abnormality noted in terms of ongoing symptoms and his mental status is noted to be normal.

21. Following Dr. Bishop's review, a final letter was sent to the Grievor on March 6, 2019 declining his request for WIB and stating, inter alia, the following:

When adjudicating total disability from your own occupation, we consider whether the medical information supports the stated functional limitations. The existence of a medical condition or its symptoms does not mean that there is total disability. Rather there must be clinical evidence that the condition is causing functional limitation such that you are unable to perform the duties of your own occupation.

Conclusion

22. The provisions in Article 4.8.4 of the Plan Member Document (Company Tab 4) provides that:

Any Employee who is denied all or any part of a claim for reimbursement by the Service Organization shall receive, from the Service Organization, a notice in writing setting forth the specific reasons for such denial, specific reference to the Disability Benefit Plan's provisions on which the denial is based, a description of any additional material necessary for such Employee to support the claim, and explanations both as to why such material is necessary and as to the terms of the Disability Benefit Plan's claims review procedure, all written

in a manner calculated to be understood by such Employee whose claim has been denied.

23. After examining Article 4.8.4, I am satisfied that the process followed by the Company/Manulife in: examining the Grievor's claim; requesting additional information; dealing with the processing of the Grievor's claim; describing the necessity of additional information required; and, notifying him of the denial of his claim, met the requirements of Article 4.8.4.

24. In **CROA 2945**, Arbitrator Picher dealt with a similar grievance and concluded:

*... On what basis, therefore, can the Arbitrator ... determine whether the decision of the insurance company's claims examiner was rendered in good faith, for valid business purposes and without arbitrariness or discrimination? **In this matter the Brotherhood bears the burden of proof.** All that is presented to the Arbitrator are the medical opinion of the grievor's physician, which it appears the insurance examiner rejected ...*

... It was, of course, open to the bargaining agent to use this Office's subpoena power to obtain the presence of those individuals, and to bring forth testimony which would have allowed a more substantial basis for a determination of the merits of this matter. Absent any such evidence, however, I am compelled to the conclusion that the Brotherhood has failed to discharge its burden of proof to establish, on the balance of probabilities, that the decision of the insurance examiner, and by extension of the Company, was taken in a manner which was arbitrary, discriminatory, in bad faith or without any valid business purpose.

25. Similarly in **CROA 4270** he concludes that:

It is well established that in a case such as this to overturn the considered conclusion of a Company such as Manulife, evidence must be adduced to establish that the decision of the insurer proceeded on a basis found to be arbitrary, discriminatory, or in bad faith. That has been repeatedly confirmed by this Office, since the award in CROA 2849.

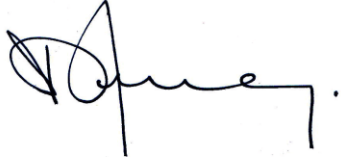
At best, what the instant case reveals is a difference of opinion between the grievor's own physician and the physicians and consultants of Manulife. On the whole, therefore, the material before me does not allow me to conclude, on any responsible basis, that in the instant case the insurer Manulife, or the employer, have acted in a manner that is arbitrary, discriminatory or in bad faith in relation to the assessment of the grievor's entitlement to disability benefits.

(See also **CROA 4679**)

26. Having reviewed the extensive medical reports provided, it is apparent that there is a genuine difference of opinion between the Grievor's attending psychologist and the physician and psychiatric consultant at Manulife. That professional difference of opinion is not, in and of itself, sufficient to arrive at a conclusion that the determination of the Company/Manulife was taken in bad faith or in a discriminatory or arbitrary manner. There was nothing in the evidence that would lead to a conclusion that Manulife's decision was made randomly or capriciously. Nor was there any evidence on which I could conclude that the method employed in arriving at a decision on the Grievor's WIB claim did not systematically follow Manulife's established process.
27. I can understand that the Grievor must feel frustrated by the fact that the medical reports he provided were not accepted, on their face, as determinative of his medical condition. However, in order for me to grant his grievance I must be satisfied, on the evidence (the burden of which falls to the Union), that the Company/Manulife's decision was taken arbitrarily. With respect, it is apparent that the Grievor's case was properly evaluated by Manulife who, in fact, provided him with an extended opportunity to provide further information at each level of his appeal - and ultimately provided a comprehensive explanation for the declination.
28. There was no obligation on the Company, as suggested by the Union, to obtain a "*second opinion*" to corroborate the medical conclusions arrived at by Manulife. The obligation remained on the Union to support its argument that the conclusions of its expert ought to be preferred. On the whole, the evidence does not warrant a conclusion that Manulife, or the Company, acted in a manner that is arbitrary, discriminatory or in bad faith in relation to the assessment of the Grievor's entitlement to disability benefits.
29. While I have considerable sympathy for the Grievor's plight, I am unable to provide him with a remedy in the circumstances.

30. Accordingly, the grievance is dismissed.

Dated at Calgary, Alberta this 28th day of June, 2020.

A handwritten signature in black ink, appearing to read "R. Hornung", with a vertical line extending downwards from the end of the signature.

Richard I. Hornung, Q.C.
Arbitrator