

ARBITRATION AWARD

PARTIES: **BROWNING HARVEY LIMITED,**
(hereinafter called the "Employer")

AND: **THE NEWFOUNDLAND AND LABRADOR
ASSOCIATION OF PUBLIC AND PRIVATE
EMPLOYEES, LOCAL No. 3001, Grand Falls-
Windsor & Corner Brook**
(hereinafter called the "Union")

REPRESENTATIVES: **Harold Smith, Q.C.
Stewart McKelvey Stirling Scales
(For the Employer)**
**Hubert Sutton
Employee Relations Officer
(For the Union)**

GRIEVOR: **Bruce Budgell**

ARBITRATOR: **Christine A. Fagan, Q.C., C. Arb.,**

HEARING DATE: **December 14, 2006, January 4, 2007 and March 1,
2007, at St. John's, Newfoundland and Labrador**

DECISION DATE: **April 2, 2007**

**COLLECTIVE
AGREEMENT:** **Between Browning Harvey Limited and The
Newfoundland and Labrador Association of
Public and Private Employees, Local No. 3001,
effective May 28, 1998 to May 27, 2003**

PRELIMINARY

The arbitration hearing proceeded on three hearing days: on December 14, 2006, January 4, 2007, and March 1, 2007. The arbitration hearing arises from two grievances filed by Bruce Budgell dated September 9, 2002 and September 10, 2002. Mr. Budgell works as a Service Technician at the Browning Harvey Limited, Grand Falls-Windsor-based operations.

The Employer was represented by Harold Smith, Q.C., and the Union was represented by Hubert Sutton, Employee Relations Officer. The Union called three witnesses:

- Wayne Thomas – now retired, but formerly the Employer's Director of Operations for Central and Western Newfoundland;
- Wilson Stuckless, a Service Technician with the Employer at Grand Falls-Windsor, and also the Union Local President and Chief Steward;
- The Grievor, Bruce Budgell.

The Employer's one witness was Fabian Connors, the Employer's Manager of Human Resources.

A considerable amount of documentary evidence was entered at the hearing, and a list of the approximate 100 documents is appended to this award as Schedule "A".

The parties agreed that the time limit in the Collective Agreement for the issuance of the arbitration award is waived. It was also agreed that the arbitrator

is to stay seized of this matter for ninety days following issuance of the award in the event that there are interpretational issues arising.

THE GRIEVANCES

Bruce Budgell filed two grievances in September 2002.

The first grievance is dated September 9, 2002. That grievance alleges that the Employer violated Article 19.01 of the Collective Agreement. Article 19.01 provides for the Employer's establishment of employee benefit and pension plans. This grievance requests the following redress:

"The Employee be compensated for all lost wages that he was entitled to under the Collective Agreement while the Employee was off work due to a heart attack".

The second grievance is dated September 10, 2002, and it states:

"Violation of Collective Agreement; Employer is making deductions from my wages. Violation of Article 17, Clause 17:01 (a). Requested adjustment: that the Employer cease the deductions".

Article 17.01 of the Collective Agreement states:

17.01 (a) The Company shall pay wages set out in Appendix "B" attached hereto and forming part of this Agreement. Each employee shall be provided with an itemized statement of his wages, overtime and other supplementary and pay deductions. Wages shall be paid weekly by cheque in a sealed envelope, or direct deposit at the employee's choice, at the workplace on Friday by 12:00 noon for the previous week. The Company may not make deductions from wages

unless authorized by Statute, Court Order, Arbitration Award, this Agreement or by personal agreement.

- (b) The Company agrees to pay an employee who is off on Weekly Indemnity, Workers' Compensation and Long Term Disability his pay which he would be entitled to from his L.T.D., Workers' Compensation and/or Weekly Indemnity while he is waiting for his first cheque or any subsequent cheque to be processed. It is further agreed that the first cheque an employee receives from his L.T.D. Workers' Compensation and/or Weekly Indemnity shall serve as payment in whole or in part for the money the Company paid such employee under Clause 17:01(a) above.*
- (c) In the event an employee does not qualify for L.T.D./ Workers' Compensation or Weekly Indemnity, such employee shall be responsible for paying all monies back to the Company.*

EVIDENCE AND BACKGROUND INFORMATION

The Grievor is a Service Technician at the Employer's plant in Grand Falls-Windsor. Browning Harvey Limited manufacturers and distributes carbonated beverages, and the Grand Falls-Windsor division services the central part of Newfoundland. The Grievor is an hourly-paid employee, and he started working with the Employer in 1974. His duties include installing and repairing pre-mix and post-mix equipment, and delivering and repairing coin operated machine dispensers and drink coolers. As a result, the Grievor's workweek varies from working at customer sites or at the Employer's shop. The equipment that the Grievor delivers varies in weights, but can weigh up to 1000 lbs.

The evidence outlines a series of unfortunate events which negatively impacted the Grievor. This started with a January 12, 2000 workplace accident in which he

hurt his back. On that day, he was installing a coin-operated machine. It was full of cans of drinks and fell off the tail end of a truck and knocked him backwards. The Grievor received Worker's Compensation benefits and underwent physiotherapy and work hardening programs. And 8-week ease back program to his job was set to start on May 8, 2000. The second unfortunate incident for the Grievor occurred that day.

During the first morning at work on May 8, 2000 for the ease back program, Mr. Budgell suffered a heart attack. He testified that he had lifted a 75 lb. fountain machine to the workbench, and was working on it. He said that about thirty minutes after the lift, he had the heart attack. He was then hospitalized for eleven days.

In the midst of the Grievor's Workplace Health, Safety, and Compensation Commission (WHSCC) coverage, the Employer changed the insurance company that provided group insurance benefits to employees (this included coverage for health, group life, weekly indemnity, and long-term disability). This change was effective May 1, 2000. The evidence of Human Resources Manager, Fabian Connors, is that the change was made because of rising insurance premium costs from the first carrier, Great West Life. The insurance change was the subject of a Company Memorandum dated April 14, 2000 which was addressed to all employees. The memorandum explained the change of insurance carrier from Great West Life to Sun Life Insurance.

The Employer presented information sessions on the change of insurance carrier to employees at its various work sites. All of the four witnesses at the arbitration hearing were at the information session held in Grand Falls-Windsor in April

2000. The Company presenters were Fabian Connors, and Bill Jenkins of Jenkins Anthony Insurance. Mr. Jenkins explained the coverages under the new Sun Life policy, and assured all present that the coverages and terms of both insurance company group policies were the same. All witnesses at the arbitration hearing remember that the Grievor asked a question at the information session respecting himself and another employee, Dave Brace, who were both then receiving WHSCC benefits. The Grievor's concern was due to the fact that they were receiving Worker's Compensation benefits at that time, and whether this would affect insurance coverage. He was told by Mr. Connors and Mr. Jenkins that nothing would change and benefits would be the same. Mr. Connors remembers the Grievor asking the question at the public session, and then also approaching him directly. He recalls the Grievor's concern being related to eligibility for long-term disability (LTD) benefits. Mr. Connors testified that in a situation where an insurance carrier is being changed, there is sensitivity to the type of issue raised by the Grievor. Mr. Connors' understanding was that where a disability pre-dated the change of insurance carrier, then insurance coverage under the first insurance company was in force. The immediate action taken at that meeting was to provide Mr. Budgell with a GWL disability application to complete for submission to the insurance company. This document was entered into evidence at the arbitration hearing – different parts of the application were completed by the Employer, the Grievor, and the Grievor's physician, Dr. Greenland. The application form shows the date of the Grievor's signature to be May 2, 2000.

Following the Grievor's May 8, 2000 heart attack, his Worker's Compensation benefits continued to be paid to June 25, 2000 which was the scheduled

completion date of his ease back program, even though he could not continue with it.

Mr. Stuckless, as Union Local President and Chief Steward worked with Mr. Budgell to sort out insurance coverage at that time. There appears to be confusion on their part respecting the applicable insurance company, and the Grievor initially made an application to Sun Life Insurance. No copy of that application was submitted into evidence. Mr. Stuckless testified that he had not seen and was not aware of the May GWL application mentioned above. Sun Life Insurance denied coverage to the Grievor in a June 30, 2000 letter addressed to the Employer which states:

"According to the information we have received, Mr. Budgell was participating in a rehabilitation program with Workers' Compensation Board at the date of onset of his non-work related condition. Since Mr. Budgell has not been actively at work since the effective date of this policy, he would not be covered under the Short Term Disability plan. Therefore, we are unable to approve benefits for the period claimed. We suggest that Mr. Budgell submit his claim to the previous carrier for their consideration."

The documentary evidence also shows correspondence throughout June 2000 between GWL and the Grievor and the Employer. A June 5, 2000 GWL letter denied a short-term disability claim because the Grievor's application was not received within three (3) months of the January 12, 2000 incident. There was then a June 21, 2000 GWL letter to the Employer in response to the Employer's June 9, 2000 fax, and GWL requests further WHSCC information, and "medical documentation in support of the non-work-related illness which prevented the continuation of ease back". The Employer provided the WHSCC information to GWL on July 4, 2000, and further provided the requested medical information on

July 11, 2000. The documentary evidence shows further correspondence in August 2000 between GWL, the Employer, and from GWL to Dr. Greenland requesting further information. A letter dated August 29, 2000 from GWL to the Grievor stated the following:

- *The Grievor's LTD claim was approved to July 25, 2000 at \$2,000.00 a month. Given he had received WHSCC benefits until June 25, 2000, payment for one (1) month was made for the period June 26 – July 25, 2000.*
- *"Disability" as defined under the policy for LTD benefits was explained to exist where "there is no combination of duties you can perform that regularly took at least 60% of your time at work to complete".*
- *GWL was still waiting for updated medical information from Dr. Greenland to assess the Grievor's claim for benefits beyond July 25, 2000.*

The documentary evidence includes various correspondence throughout the fall of 2000 between GWL; Dr. Greenland; Cardiac Specialist, Dr. Misson; the Employer; and the Union's lawyer, Sheila Greene.

During the Fall of 2000 while the Grievor was waiting for his LTD claim to be further processed, the Employer paid benefits totalling approximately \$12,500.00 to the Grievor under Article 17:01 (b) of the Collective Agreement. This payment stopped in January 2001, when GWL issued its January 4, 2001 letter to the Union and the Employer denying any further benefits. The denial was based on the report of the Cardiac Specialist from which the conclusion was drawn that the Grievor's heart condition did not prevent him from performing 70% of his job duties, and he was therefore not disabled under the terms of the insurance policy. GWL noted in the same letter that it had been attempting since August 2000 to obtain medical information from Dr. Greenland respecting the Grievor's back injuries and if that was provided, GWL would reconsider its decision on the

basis of that injury. It appears on the evidence that by the end of March, 2001, GWL had received additional medical information as well as a job site analysis for the Grievor's position of Service Technician. GWL's letter dated March 26, 2001 denied coverage because the Grievor was considered to be able to perform at least 60% of his job duties. The letter noted that any additional medical information would be considered, and in the absence of any additional medical information available, there was a right to request an internal appeal of its decision.

The day following this last GWL letter, Dr. Greenland issued a handwritten note saying:

Re: Bruce Budgell. Re: above patient would be able to return to work – but he will not be able to lift objects (upper limits of 60 lbs.).

Two days later, the Employer wrote Dr. Greenland providing job site analyses of the two jobs available at the Grand Falls-Windsor plant (Service Technician and Fork Lift Operator/Checker), which had been completed by an Occupational Therapist in December 1999 as part of the Employer's record-keeping process. This letter asked Dr. Greenland to review those analysis, and advise if the Grievor was capable of performing either of those roles in light of the GWL correspondence. Dr. Greenland's reply of April 2, 2001 was a handwritten note saying:

"Re: Bruce Budgell. The above patient will be able to return to work, former position, with lifting no more than 60 lbs."

Several days later, the Employer wrote another letter to Dr. Greenland requesting further information respecting the lifting restriction, and asking whether it would

be in the Grievor's best interest to transfer him to the warehouse job (Forklift Operator/Checker) on a long-term or short-term basis. The response from Dr. Greenland was a handwritten note of April 12, 2001 saying:

"Unable to lift more than 60 lbs. for cardiac reason".

The Employer then arranged a meeting in late April 2001 with the Grievor, a WHSCC representative, three Employer representatives, two Union representatives, and the Grievor's new lawyer, Karl Inder. Following that meeting, the Employer wrote GWL for clarification of its position and wrote Mr. Inder to obtain a response from Dr. Greenland of the Employer's last two letters. WHSCC also followed up by a letter saying that it could do nothing further because the Grievor's inability to complete the ease back program and return to work, was because of a non-compensable problem, that is, the heart attack.

The Employer in a letter dated May 2001 to Karl Inder once again requested him to obtain medical information and also reiterated a discussion from the April 25 meeting that if Mr. Budgell could not return to work without restrictions, then the Company was willing to offer the Grievor alternative employment in Grand Falls-Windsor if he met the job criteria, or to provide a transfer to another work site subject to the Collective Agreement.

The documentary evidence from May 2001 to the end of December 2001 includes considerable correspondence, much of which was from the Employer to Mr. Inder requesting medical information or asking whether an appeal had been launched with GWL. The Employer also wrote directly to Dr. Greenland

requesting information and to WHSCC providing updated medical information when it was received from Mr. Inder.

Dr. Greenland issued a letter to lawyer Karl Inder, on June 10, 2001, which includes the following statement, which appears at odds with the Employer's previous letters to both Dr. Greenland and to Karl Inder:

"The company [employer] and insurance companies wanted Bruce to return to full duties as prior to his back/neck injuries and myocardio infraction."

The Grievor's circumstances in 2001 did not improve, despite letters, reports, and meetings. Advance payments from the Employer ended in January 2001 when GWL denied his LTD claim. He obtained fifteen (15) weeks employment insurance after that. Then he had no income source. Mr. Budgell testified:

"I was in a turmoil then because it was when the bank was foreclosing on my house. Social Assistance then helped out a bit."

It appears that Mr. Inder in December 2001 requested GWL to further review its file. This request is referred to in GWL's January 10, 2002 reply to Mr. Inder, which denied the LTD claim for the same reasons as earlier.

Thereafter, little of substance occurred, although letters were exchanged between the Employer and Karl Inder. In an April 19, 2002 letter to Mr. Inder, the Employer said:

"To fully clarify the issue, I recommend with permission from your client, a review be completed by a company-appointed medical professional so as to provide a qualified answer to your question."

Our support and concern for Mr. Budgell continues. We trust that you have advised him of our review of transferring him to other operations and roles that he may be capable of completing.

Please provide an indication of your intentions as soon as possible."

The next note in the documentary evidence is a June 20, 2002 handwritten note from Dr. James Black stating that the Grievor could return to normal duties at work. The Employer then requested and received the doctor's confirmation that the Grievor was able to perform the duties of service technician set forth in the job site analysis report. The Grievor returned to work in July 2002.

Shortly after the Grievor returned to work, discussions were held between the Employer and the Union respecting the repayment of the \$12,500.00 owing from the Grievor to the Employer for advance payments made in 2000 under Article 17.01. It appears no agreement was reached on this, and the Employer implemented a repayment schedule set forth in an August 1, 2002 letter to the Union which set forth a weekly deduction of \$125.00. The parties acknowledge that the outstanding amount has been fully paid.

The two grievances were filed the following month. The first grievance of September 9, 2002 requests the Grievor to receive all lost wages when off work because of his heart attack. The second grievance of September 10, 2002 alleges that the Employer has violated the Collective Agreement by making deductions from his wages.

PARTIES' POSITIONS**UNION**

The Union's representative argued that the Grievor's plight resulted from incorrect information or misrepresentation made to him in April 2000 at the employees meeting convened by the Employer regarding the change of insurance company. The Grievor relied on the responses he received from the Employer and its insurance representative that his insurance coverage would continue. As it turned out, that was not the case and the Grievor was left without any income for almost two years (except for 15 weeks employment insurance and Social Assistance) and with a \$12,500.00 debt to the Employer. During that two-year period, the Grievor had no income from work, from WHSCC, or from the insurance company. The Union contends that the Employer could and should have taken steps to ensure that the Grievor was covered by insurance.

In addition, the Union contends that the Employer put roadblocks in the Grievor's way when he tried to return to work. It is argued that the evidence shows the Employer wanted the Grievor to be 100% fit to return to work, and there is no evidence that the Employer took measures to assist a return to work. The Union characterized the Grievor's plight as being caught between the insurance company's 60% definition of disability in its policy and the Employer's requirement to be 100% fit to return to work. Further, the Union says that the evidence does not show any independent expert information relied upon by the Employer as to whether or not the Grievor could return to his job.

The Union argues that the evidence of Human Resources Manager, Fabian Connors, does not explain any established policy or practice of the Employer for the accommodation of injured employees.

The Union's position regarding the grievance allegation of an Article 19 violation is that the Grievor's loss of income was because of the above factors, and the fact that the Employer violated the intent of that Collective Agreement article.

The second grievance regarding the Grievor's repayment to the Employer of advance monies under Article 17 should be upheld, because there is no evidence to show the parties discussed and agreed upon a repayment schedule.

EMPLOYER

The Employer's counsel initially discussed the legal obligation of any employer to accommodate employees on their individual merits. As a result, rigid policies cannot be implemented. The WHSCC legislation and its policies incorporate a duty to accommodate as does Human Rights legislation. Also, employers must ensure that they have safe work places for their employees. Examples of this legislated mandate provided by the Employer's counsel were the *Criminal Code* and the *Occupational Health and Safety Act*.

The Employer noted that its ability to accommodate can only be accomplished once it understands the Employee's disability.

Counsel for the Employer reviewed the evidence and the documentary evidence chronologically, and argued that the examination shows the Employer to have

taken an active interest and position in the Grievor's insurance claim, and his situation.

The Employer noted that it had provided a benefits insurance plan in accordance with Article 19 and Appendix C of the Collective Agreement. It submitted that the Union had made no arguable case respecting a violation of Article 19 of the Collective Agreement by the Employer. The Grievor was provided the insurance required by the Collective Agreement through Great West Life (not Sun Life) because his disability (back problems) first occurred when the GWL policy was in force. GWL confirmed in one of the letters submitted into evidence that it considered the Grievor's heart condition, and the LTD was rejected, not because of the medical condition itself, but because of the definition of disability in the policy.

It was also noted by the Employer in argument that the Grievor had legal representation throughout the period following his heart attack until his return to work. There is no evidence that any appeal was undertaken of the Worker's Compensation decisions. The cardiac specialist, in a November 2000 report, says that the Grievor was asymptomatic cardiac-wise and yet at the same time, he still had lifting restrictions. The cause for the restrictions was never questioned by the Grievor or his advisors. Further information regarding those restrictions was never provided to the Employer despite its efforts to obtain more information via Dr. Greenland and Mr. Inder. The Employer was especially cautious because on the one hand, the Grievor's lawyer was arguing to GWL that he was disabled. On the other hand, the Grievor was stating that he could return to work, although with restrictions that were not clarified. The Employer's overtures to the Grievor's lawyer respecting alternative employment and respecting an independent assessment were not responded to. The Employer's

counsel noted that its caution was for the Grievor's sake to ensure that he did not return to work and further harm himself. As to the grievance respecting an alleged violation of Article 17.01, the Employer submitted that it followed the clear wording of that Article by extending advance payments to the Grievor, and then collecting that money back later under Article 17.01 (c) when he returned to work.

DECISION

The two September 2002 grievances filed by Bruce Budgell result from significant problems that he encountered with the employee group insurance benefit plan between 2000 – 2002, and the insurance company's denial of long term disability benefits during most of that period of time. The Employer is obligated under Article 19 of the Collective Agreement to establish a benefits plan which covers, among other things, group life insurance, weekly indemnity, extended health care, and long term disability benefits. The Grievor's difficulties in this situation was the LTD coverage, and the nature of that coverage is further described in Appendix C of the Collective Agreement:

"Long Term Disability Insurance – 70% of your monthly earnings is payable upon total disability (as defined in the master policy) from the 15th week of disability through to recovery, death, or age 65, whichever occurs first, to a maximum of \$2,000.00 per month".

Appendix C also includes the following note to indicate that the Collective Agreement includes a summary only of the benefit coverages, and the insurance policy itself should be examined to see the specific contractual limitations or exclusions of a particular benefit:

NOTE: It should be noted that this Appendix is intended solely as a confirmation of the benefit to be offered and agreed upon by the Union and the Company. To review specific contractual limitations or exclusion of a particular benefit, reference must be made to the governing Master Policy, currently underwritten by Great West Life Assurance Company, under Group Insurance Plan Master Policy No. 43078 GH, and Great West Life Insurance Company under Master Policy No. H-135621, Browning Harvey Limited Pension Plan Master Policy No. GH590 and Confederation Life Insurance Company Group Pension Plan Contract Master Policy Plan No. GP 75751.

The Grievor's insurance problem was compounded and confused by the fact that the Employer changed its insurance carrier effective May 1, 2000 from Great West Life to Sun Life. The Grievor had a workplace injury to his back on January 12, 2000 and he was still receiving Worker's Compensation benefits on May 1, 2000. Within the first few hours of returning to work on May 8, 2000 to commence at WHSCC 8-week sponsored ease back program, he suffered a heart attack and spent the following eleven days in the hospital. The evidence shows that there was initial confusion by him and his Union advisor, Wilson Stuckless, respecting which insurance policy was in force for his situation. That issue sorted itself out over the following months and GWL took responsibility for coverage.

GWL accepted receipt of the Grievor's claim for LTD benefits, and accepted its responsibility for coverage for both his back condition and his heart attack. Unfortunately for the Grievor, GWL provided coverage only until July 25, 2000 and then decided that the Grievor did not meet the insurance policy definition of "disability". That left the Grievor in limbo from late July 2000 to when he

eventually returned to work in July 2002. The Employer advanced monies pursuant to Article 17 of the Collective Agreement from July 25, 2000 until early January 2001 when GWL issued its ultimate decision that LTD coverage was denied. This protracted period of time appears to result in part from the insurance company not receiving requested medical information. When the Employer stopped its advance payments in January 2001, the Grievor was able to receive fifteen weeks of employment insurance benefits. Thereafter, he was on his own, and eventually received Social Assistance benefits for about six months until he was able to return to work in July 2002. The Grievor provided only a brief glimpse of the difficult time he faced during this period – in his evidence, he made a reference to the bank trying to force the sale of his house and said he was in a turmoil. There can be no doubt that the period was a dire one for the Grievor and his family. His Union representative expressed this in the closing summary when he pointed out that the Grievor was a person who had worked over 25 years with the Employer at that time, and had always been employed and able to support his family. Suddenly, the Grievor found himself without any support or lifelines. The resulting stress surely did not assist his recovery.

The Employer's Human Resources Manager, Fabian Connors, testified that he is not aware of any other similar situation of other employees in the Company. It can be seen from the long list of documents listed in Appendix "A" to this award, that the Grievor had considerable support. He had the support of his Union Local President, Wilson Stuckless; Union Employee Relations representatives; initially, the Union lawyer, Sheila Greene; and then starting around April 2001, the services of lawyer, Karl Inder of Grand Falls-Windsor. The paper trail also includes numerous letters and communications between the Employer and other

parties. However, the lengthy paper trail did little to help out with the Grievor's problem or provide him with an income source while he was off work. A chronological review of the documentary evidence submitted at the arbitration hearing provides some understanding of evolving events over that period of time, although the documents are likely not complete. There may be some gaps, such as written communications to and from WHSCC and the Grievor's lawyer, Karl Inder.

Prior to addressing the grievances, it will be helpful to look at several questions and issues raised by the Union during the course of the arbitration hearing:

- 1) Who decides insurance eligibility?
- 2) Did the Employer pass on all medical information to the insurance company so that it could make an informed decision?
- 3) Did the change of insurance company on May 1, 2000 adversely affect the Grievor?

The first question is who decides insurance eligibility. Union Local President, Wilson Stuckless, was of the opinion in his testimony that the Employer decided that issue or played a key role in the decision. He also thought that the Grievor's physician determined if the Grievor was considered "disabled" (that is, cannot do more than 60% of regular job duties) under the insurance policy terms. Neither assumption is correct. The insurance company receives information from the Employer and physicians, but makes the ultimate decision respecting coverage.

The second question arises from the evidence of Mr. Stuckless and the Grievor. They were not certain if the Employer had forwarded all medical information to

the insurance company and therefore whether it had full information to assess the claim. In particular, Mr. Stuckless wondered if a May 12, 2001 medical report prepared by cardiac specialist, Dr. S. Missan, was sent on. That letter said among other things that by May 2001, the Grievor's cardiac findings were completely normal and added the following note respecting lifting restrictions:

"The question is regarding the time of returning to work. I think that if he is only ask to lift more than 50-60 lbs. for a few seconds once or twice a week it is appropriate that he can go back to his previous job as long as there is another man with him lifting those machines with the help of a fork lift".

The reason for lifting restrictions is not explained in this letter. Nor are reasons given for the same lifting restrictions set out in Dr. Misson's November 3, 2000 letter in which he described the Grievor as "asymptomatic cardiac-wise". By May 2001, the Grievor was represented by lawyer, Karl Inder, and according to the evidence of Fabian Connors, Mr. Inder had taken over the role of communicating with GWL with regard to medical information. The documentation shows that from this period, the Employer was receiving medical reports from Mr. Inder. The documentary evidence contains an April 26, 2001 letter from the Employer to GWL requesting the insurance company's confirmation that it gave full consideration of the Grievor's cardiac condition when deciding to refuse LTD coverage. GWL confirmed this in a letter to the Employer dated May 10, 2001 (although it is noted that this was before Mr. Inder received the May 12, 2001 Dr. Misson report). In summary, there is no evidence to suggest that the Employer did not send to, or withheld any information from the insurance company that it had access to.

The third question relates to the change of insurance companies on May 1, 2000. All witnesses remember an information session held for employees at the Grand Falls-Windsor plant in April 2000 with Fabian Connors and the insurance representative, Bill Jenkins, in attendance to discuss the switch. The clear message was that the terms of the old GWL policy and the new Sun Life policy were the same. The Grievor asked if he and another employee would be negatively affected because they were both receiving Worker's Compensation coverage at that time. They were told no. The Grievor was given at the meeting a disability application form which is entered into the evidence. It is completed in three parts by the Employer, the family physician, Dr. Greenland, and signed by the Grievor on May 2, 2000. Mr. Connors explained that the application form preserved the rights under the GWL policy because there was a disability that pre-dated the May 1, 2000 insurance change. The evidence shows that this was the case, and GWL accepted responsibility, although in the end, it denied coverage based on the definition of "disability" under the policy. Only the GWL insurance policy has been entered into evidence, but I accept the evidence of Fabian Connors that the GWL and Sun Life policies include the same coverages and provisions.

The first of the two grievances is dated September 9, 2002 and it alleges that the Employer violated Article 19 of the Collective Agreement and requests compensation for lost wages while the Grievor was off work due to his heart attack. The Grievor's evidence at the arbitration hearing is that this Grievance is based on the fact that he did not receive insurance coverage when off work.

It has been clarified above that the insurance company and not anyone else, including the Employer, determines if a person is eligible for coverage under the

terms of the insurance policy. Sun Life, early on in June 2000, wrote to say that the Grievor was not eligible under its policy because he did not meet the policy eligibility requirement. That says the employee must be "actively working" (includes working for at least 20 hours a week) and this was not the case when the heart attack occurred on May 8, 2000. Great West Life did accept coverage responsibility for the January and May 2000 medical conditions, and did, therefore, consider him to be an insurable employee eligible under its plan. This was because the Grievor's disability existed before May 1, 2000. The road block encountered by the Grievor is the GWL definition of disability, and the policy says:

"During the initial assessment period, disability is assessed on the basis of the duties a person regularly performed for the employer before disability started. The initial assessment period is the waiting period plus the next 24 months of disability. During this time the person is considered disabled if, because of disease or injury, there is no combination of duties he can perform that regularly took at least 60% of his time at work to complete."

Mr. Budgell acknowledged in cross examination that he could not in 2000 do 100% of his job, but probably could do 60% of his job.

The Employer submitted into evidence two job site analysis completed in December 1999 by Central Rehab Inc., which analyzed the Grievor's position as Service Technician (in the report called Full Service Vendor) and the position of Forklift Operator/Checker. The evidence is that these reports were prepared in the normal course by the Employer to update its records. The evidence is also that these were the only two jobs at the Grand Falls-Windsor operation which were available to the Grievor on the basis of his skills and background. A review

of the job of Forklift Operator/Checker working in the warehouse, indicates that it includes lesser lifting requirements than the Grievor's position as Service Technician. The analysis shows that Service Technicians must lift 100 lbs. for 10% of his shift, and lift and carry 50 lbs. for 34 – 66% of his shift. Of course, the Grievor's evidence is that the coolers and vending machines often weigh considerably more than 100 lbs. By contrast, the analysis of the Forklift Operator position indicates lifting requirements of 55 lbs. occasionally (11-33% of a shift) and 21 lbs. frequently (34-66% of a shift).

The job site analysis are mentioned because the Union and its witnesses are of the opinion that the Grievor was left high and dry by the Employer. This was because the insurance company's threshold for being disabled was 60%, but yet the Employer would not let the Grievor back to work unless he could do 100% of his job. My review of the documentary evidence shows this is not the case, although the Grievor's confusion is understandable because he was relying on third parties to communicate on his behalf. The Grievor attempted a return to work in late March 2001 and submitted a handwritten note dated March 27, 2001 from a Dr. Greenland, which said:

"Re: above patient will be able to return to work – but he will not be able to lift objects (upper limits of 60 lbs.)."

Two days later, the Employer wrote to Dr. Greenland enclosing the job site analysis for the two positions at Grand Falls-Windsor and asked if the Grievor was capable of performing either of those roles in light of his March 27th note. The physician's response dated April 2, 2001 stated: *"Re: above patient will be able to return to work, former position, with no lifting over 60 lbs."* The Employer

again wrote Dr. Greenland two days later on April 6, 2001 and asked for information regarding the 60 lb. restriction. The Employer asked whether that restriction was long-term or short-term; whether it was related to his heart condition or back condition; and whether the doctor thought it was in Mr. Budgell's best interests to transfer him to the warehouse role on either a short-term or long-term basis. Dr. Greenland replied with another handwritten note dated April 12, 2001 which stated: "*Unable to lift over 60 lbs. for cardiac reasons*".

Mr. Connors testified that the information forthcoming from the doctor was of little assistance, because the Company was attempting to obtain sufficient information in order to assess whether the Grievor could safely re-enter the work place. The correspondence clearly shows that the Employer was prepared to provide accommodation to the Grievor but it had little information to go on. Further correspondence shows that the Employer then organized a meeting on April 25, 2001 attended by the insurance company representative, WHSCC representative, Union representatives, the Grievor, the Grievor's lawyer, Karl Inder, and four Employer representatives. The following day, the Company sent a letter to Karl Inder requesting a full response to its earlier two letters from Dr. Greenland. Correspondence shortly after on May 3, 2001 from the Employer to Karl Inder requests Dr. Greenland's response and confirms that if the Grievor could not return to his full duties as Service Technician, the Company was willing to offer the Grievor alternate employment in the shipping department at the Grand Falls-Windsor facility if he met the criteria for that role. This possibility was further mentioned to Mr. Inder in the Employer's letters of July 24, 2001 and April 19, 2002. The Employer also again wrote Dr. Greenland directly on October 1, 2001 requesting whether he could reasonably meet the lifting

requirements of the Service Technician role or the Forklift operator role. The evidence available does not show any responses to these and other communications. Some, but not all, of the above-noted letters were copied to the Grievor.

Mr. Connors was cross examined by the Union representative respecting its accommodation policy, especially as it related to the Grievor. Mr. Connors denied that the Grievor was ever told that he would not be able to return to work unless he could complete 100% of his job duties. Mr. Connors said that the Employer was prepared to accommodate the Grievor in his existing role or the alternative role in Grand Falls-Windsor. When the first medical note was received in late March 2001, the Grievor at that time had been off work since May 2000. Mr. Connors testified that the Employer wanted to protect the individual and wrote to get clarification of the restrictions facing the Grievor. He said the physician's scribbled notes were of no assistance in that regard. Dr. Greenland is now deceased.

The documentary evidence shows the attempts by the Employer to try to clarify the situation. The Employer acknowledged that it accommodates employees return to work when possible. The Employer also acknowledged legislative requirements for accommodation and providing a safe work place, such as those found in the Worker's Compensation legislation, *Occupational Health & Safety Act*, and the *Criminal Code*.

My analysis above has taken me beyond the narrow question raised by the grievance as to whether the Employer violated Article 19 when insurance coverage was refused. The conclusion is that the Employer did not violate Article

19 – the Employer provided the insurance coverage it agreed to in the Collective Agreement. The insurance company decided on the coverage and its decision is not the subject of a Collective Agreement grievance. The analysis above is not exhaustive of the many communications between parties in 2000 and 2002, but it does substantiate that the Employer was prepared to assign the Grievor to the forklift position on a short-term or long-term basis if it received medical confirmation that this was within the Grievor's physical ability, and if he was capable of doing the job.

The second grievance dated September 10, 2002 alleges that the Employer violated Article 17 of the Collective Agreement, and especially Article 17.01 (a) because the Employer was making deductions from the Grievor's wages. The grievance requested that the Employer cease the deductions. This relates to the approximate \$12,500.00 which the Employer advanced to the Grievor in the fall of 2000, while the Grievor was waiting to receive a final decision from GWL respecting his LTD claim. Under Article 17.01 (b), the Employer agrees to pay an employee who is off on LTD while he is waiting for his first cheque to be processed. Article 17.01 (c) states that if the employee does not qualify for LTD, he is responsible for paying all monies back to the Company.

The Grievance focuses on Article 17.01 (a) which states among other things that the Company may not make deductions from wages unless authorized by statute, Court Order, arbitration award, the collective agreement, or by personal agreement. In the circumstances of this case, Article 17.01 (c) provides the requirement for the Grievor to pay back the monies to the Company. The Company did not request monies to be paid back until the Grievor's return to work in July 2002. Correspondence was exchanged between the Union and the

Employer in late July – early August 2002 respecting wage deductions for the amount owed by the Grievor. There did not appear to be any agreement regarding the deductions and in an August 1, 2002 letter to the Union, the Employer recommended the advance re-payment schedule to begin August 5, 2002 which included a weekly deduction from wages of \$125.00. The evidence is that the total amount has now been repaid. The Collective Agreement wording in Article 17.01 (b) (c) is clear and there is no violation of the Collective Agreement by the Employer.

I trust that this award provides an explanation to some of the Grievor's questions from his difficult period of time between 2000 and 2002. The Grievor was given an unqualified clearance by physician, Dr. James Black, on June 20, 2002. The Employer then sent the job site analysis information to Dr. Black, who presumably responded because Mr. Budgell was back to work in July 2002.

The evidence submitted at the arbitration hearing does not include what information was sent to GWL in late 2001 by Mr. Inder for the appeal requested to that company. It appears that all of the evidence considers the heart attack to have been non-work-related. Mr. Budgell testified that no one ever told him if his heart attack was or was not work-related, but his understanding was that WHSCC did not cover heart attacks. An April 30, 2001 letter from WHSCC to the Employer refers to the WHSCC policy on interruptions and delays in work injury recovery, by non-work-related injury factors. I note that a review of the WHSCC policy manual includes policy EN-04 entitled "Cardiac Conditions" and it says that cardiac conditions are compensable when the cardiac condition is established as arising out of and in the course of employment. There is no evidence whether this line of inquiry was followed through with WHSCC.

AWARD

The Grievances of Bruce Budgell dated September 9, 2002 and September 10, 2002 are hereby denied.

DATED AT Moncton, in the Province of New Brunswick, this 2nd day of April, 2007.


CHRISTINE A. FAGAN, Q.C.

SCHEDULE "A"
Documentary Evidence

Consent documents

1. Collective Agreement between Browning Harvey Limited and Newfoundland Association of Public Employees (Locals 7003 and 3001) Effective May 28, 1998 – May 27, 2003.
2. Grievance of Bruce Budgell dated September 9, 2002
3. Grievance of Bruce Budgell dated September 10, 2002
4. Company memo dated April 26, 2000 respecting group insurance rates

Exhibits

- WS#1. Letter dated November 3, 2000 from Dr. Sarab Missan to Dr. David Greenland
- WS#2 Letter dated May 12, 2001 from Dr. Sarab Missan to Dr. David Greenland
- WS#3 Letter dated June 30, 2000 from Sunlife Insurance to the Employer
- WS#4 Letter dated August 29, 2000 from Great West Life to Bruce Budgell
- WS#5 Great West Life insurance application dated May, 2000 for Bruce Budgell
- WS#6 Letter dated March 29, 2001 from the Employer to Dr. David Greenland
- WS#7 Handwritten note dated March 27, 2001 from Dr. David Greenland
- WS#8 Letter dated May 3, 2001 from the Employer to Carl Inder
-
- BB#1 Letter dated March 13, 2000 from Central Rehab Inc. to WHSCC
- BB#2 Letter dated May 2, 2000 from Central Rehab Inc. to WHSCC
- BB#3 Letter dated June 5, 2000 from Great west Life to Bruce Budgell
- BB#5 Fax sheet dated June 30, 2000 from Sun Life Insurance to the Employer
- BB#6 Letter dated July 4, 2000 from the Employer to Great West Life
- BB#7 Letter dated July 11, 2000 from the Employer to Great West Life
- BB#8 Letter dated August 21, 2000 from Great West Life to Dr. Greenland
- BB#9 Letter dated August 21, 2000 from Great West Life to Bruce Budgell
- BB#10 Letter dated August 29, 2000 from Great West Life to the Employer
- BB#11 Great West Life summary of benefits April 26 – June 25, 2000
- BB#12 Great West Life summary of benefits June 26 – July 25, 2000
- BB#13 Letter dated September 18, 2000 from Great West Life to Bruce Budgell
- BB#14 Letter dated September 18, 2000 from Great west Life to Dr. Greenland
- BB#15 Letter dated September 19, 2000 from Dr. Greenland to Great west Life
- BB#16 Letter dated October 28, 2000 from Great West Life to Bruce Budgell
- BB#17 Letter dated October 28, 2000 from Great West Life to WHSCC
- BB#18 Letter dated November 21, 2000 from Sheila Greene, NAPE to Dr. S. Missan

BB#19 Letter dated November 21, 2000 from Sheila Greene, NAPE to Bruce Budgell

BB#20 Letter dated November 22, 2000 from Sheila Greene, NAPE to the Employer

BB#21 Letter dated November 22, 2000 from Sheila Greene, NAPE to Great West Life

BB#22 Letter dated December 13, 2000 from Great West Life to Sheila Greene

BB#23 Letter dated December 20, 2000 from Sheila Greene, NAPE to Great West Life

BB#24 Letter dated January 4, 2001 from Great West Life to Bruce Budgell

BB#25 Letter dated January 4, 2001 from Great West Life to Sheila Greene

BB#26 Letter dated January 15, 2001 from Sheila Greene, NAPE to Great West Life

BB#27 Letter dated January 15, 2001 from Sheila Greene, NAPE to the Employer

BB#28 Letter dated January 23, 2001 from the Employer to Sheila Greene

BB#29 Letter dated January 29, 2001 from Great West Life to Sheila Greene

BB#30 Handwritten note dated April 2, 2001 from Dr. Greenland

BB#31 Letter dated March 26, 2001 from Great west Life to Bruce Budgell

BB#32 Letter dated March 29, 2001 from the Employer to Dr. Greenland

BB#33 Letter dated April 6, 2001 from the Employer to Dr. Greenland

BB#34 Letter dated April 25, 2001 from the Employer to Jenkins Anthony Insurance

BB#35 Letter dated April 26, 2001 from the Employer to Carl Inder

BB#36 Letter dated April 26, 2001 from the Employer to Great West Life

BB#37 Fax dated April 26, 2001 from Sun Life to Bill Jenkins

BB#38 Fax dated April 26, 2001 from Bill Jenkins to Sun Life

BB#39 Fax dated April 30, 2001 from Bill Jenkins to the Employer

BB#40 Letter dated May 1, 2001 from the Employer to Karl Inder

BB#41 Letter dated May 14, 2001 from the Employer to Karl Inder

BB#42 Letter dated May 23, 2001 from Sun Life to Bill Jenkins

BB#43 Sun Life Doctor's questionnaire completed by Dr. Greenland June 6, 2001

BB#44 Letter dated June 10, 2001 from Dr. Greenland to Karl Inder

BB#45 Letter dated June 26, 2001 from Sun Life to Bill Jenkins

BB#46 Letter dated June 30, 2000 from Sun Life to the Employer

BB#47 Letter dated July 24, 2001 from the Employer to Karl Inder

BB#48 Letter dated August 14, 2001 from Sun Life to Karl Inder

BB#49 Letter dated August 14, 2001 from Great West Life to Karl Inder

BB#50 Letter dated August 29, 2001 from Karl Inder to Bruce Budgell

BB#51 Letter dated September 7, 2001 from Karl Inder to the Employer

BB#52 Letter dated October 1, 2001 from the Employer to WHSCC

BB#53 Letter dated October 1, 2001 from the Employer to Dr. Greenland

BB#54 Letter dated October 1, 2001 from the Employer to Karl Inder

BB#55 Letter dated November 6, 2001 from WHSCC to Bruce Budgell

BB#56 Letter dated January 10, 2002 from Great West Life to Karl Inder

BB#57 Letter dated March 20, 2002 from Karl Inder to Great West Life
BB#58 Letter dated March 20, 2002 from the Employer to Karl Inder
BB#59 Letter dated April 4, 2002 from Great west Life to Karl Inder
BB#60 Letter dated April 4, 2002 from Great West Life to Bruce Budgetell
BB#61 Letter dated April 19, 2002 from the Employer to Karl Inder
BB#62 Letter dated July 26, 2002 from NAPE to the Employer
BB#63 Letter dated August 1, 2002 from the Employer to NAPE
BB#64 Letter dated October 31, 2002 from the Employer to NAPE

FC#1 Great West Life group insurance policy for A. Harvey Group of
Companies effective November 1, 1996
FC#2 Letter dated December 21, 1999 from Central Rehab Inc. to
The Employer
FC#3 Letter dated January 21, 2000 from Central Rehab Inc. to the
Employer
FC#4 Letter dated August 21, 2000 from the Employer to Great West Life
FC#5 Letter dated April 6, 2001 from the Employer to Dr. Greenland
FC#6 Handwritten note dated April 12, 2001 by Dr. Greenland
FC#7 Letter dated April 26, 2001 from the Employer to Great West Life
FC#8 Letter dated April 30, 2001 from WHSCC to the Employer
FC#9 Letter dated May 10, 2001 from Great west Life to the Employer
FC#10 Letter dated July 24, 2001 from Karl Inder to the Employer
FC#11 Letter dated June 12, 2001 from the employer to Karl Inder
FC#12 Letter dated August 28, 2001 from the Employer to Karl Inder
FC#13 Letter dated September 28, 2001 from the Employer to WHSCC
FC#14 Letter dated October 1, 2001 from the Employer to WHSCC
FC#15 Letter dated November 15, 2001 from the Employer to Karl Inder
FC#16 Letter dated December 7, 2001 from Karl Inder to the Employer
FC#17 Letter dated January 11, 2002 from Great West Life to the Employer
FC#18 Letter dated March 20, 2002 from Karl Inder to the Employer
FC#19 Letter dated April 19, 2002 from the Employer to Karl Inder
FC#20 Letter dated April 8, 2002 from Karl Inder to the Employer
FC#21 Letter dated March 20, 2002 from the Employer to Karl Inder
FC#22 Handwritten note dated June 20, 2002 from Dr. James Black
FC#23 Letter dated June 25, 2002 from the Employer to Dr. Black