

**IN THE MATTER OF AN ARBITRATION UNDER THE
BRITISH COLUMBIA LABOUR RELATIONS CODE**

BETWEEN:

**HEALTH EMPLOYERS' ASSOCIATION OF BRITISH COLUMBIA
(“HEABC”)**

AND:

**HOSPITAL EMPLOYEES' UNION
(the “Union”)**

(Video Surveillance Policy Grievance – Jurisdictional Issue)

ARBITRATION PANEL:

**Emily M. Burke,
Chris Grant and
Ruth Herman**

COUNSEL FOR HEABC:

Wendy J. Harris, Q.C.

COUNSEL FOR THE UNION:

G. James Baugh & Carol Reardon

DATE and PLACE OF HEARING:

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Vancouver, B.C.**

DATE OF AWARD:

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I. INTRODUCTION

The Hospital Employee' Union, (the "Union") has filed a policy grievance dated July 28, 2006 objecting to the inclusion of video surveillance evidence in the materials provided to a Claims Review Committee ("CRC"). It has also filed an individual grievance on behalf of Katherine Hawrys which raises the same issue. HEABC seeks a preliminary ruling that this arbitration board does not have jurisdiction over the grievance. It maintains in particular issues regarding admissibility of evidence are within the jurisdiction of the CRC, which is itself an arbitration board under the *Labour Relations Code*. Essentially HEABC argues as an arbitration board the CRC has the authority to determine the evidence it will hear subject only to fair hearing requirements or principles expressed in the *Labour Relations Code*.

In response, the Union argues the CRC does not have jurisdiction to deal with videotaped surveillance evidence and HEABC's preliminary objection is the mirror image of the Union grievance. At this stage, the Union points out the only issue for determination is whether the arbitration panel has jurisdiction to hear the grievance; and not the merits of the Union's grievance. The Union maintains it will argue it is inconsistent with the interpretation of Section 11 of the Long-Term Disability ("LTD") addendum of the collective agreement to submit videotaped evidence to the CRC. This amongst other arguments, the Union says squarely raises the question of the proper interpretation of a provision of the collective agreement thereby providing this panel with jurisdiction to determine the matter.

II. BACKGROUND

We note at the outset, many of the following background facts as outlined by HEABC are to provide context in order for the panel to deal with the preliminary matter of jurisdiction. The Union has made clear as this is a

preliminary matter as to whether this panel has the jurisdiction to deal with this grievance; it has not provided evidence that goes to the merits of its case.

HEABC is an Employer's organization accredited by the British Columbia Labour Relations Board. It is a party to the 2006-2010 Health Services and Support Facilities Subsector Collective Agreement (the "collective agreement") which includes the Union. One of the benefits provided to employees in the bargaining unit is a long-term disability plan, as described in the Long-Term Disability Insurance Addendum to the collective agreement.

The LTD plan originated in 1979 under the former HEU master collective agreement. The parties bargained the plan following a binding arbitration award of arbitrator Hope awarding "comparability" with the collective agreement between the provincial government and the B.C. Government Employees' Union. The award directed the parties to negotiate a mutually acceptable LTD plan as part of a benefit package that would be comparable to that in the Government collective agreement. As a result, the LTD plan that was negotiated was based upon the Government LTD plan. It is comparable to the Government plan and has similar provisions prescribing the role of the claims paying agent and recourse to a CRC or grievance/arbitration. This plan has been included in subsequent collective agreements between the parties. While some amendments have occurred over the years in collective bargaining, the relevant sections to this dispute remain the same.

The Healthcare Benefit Trust ("HBT") was established to provide employees of member healthcare organizations, including employees in the HEU bargaining unit, with certain health and welfare benefits including long-term disability benefits. These benefit plans were funded by monies collected by HBT from participating employers, which include members of the HEABC and other employers, and are held in trust by the trustees of HBT. The trustees are entrusted with overseeing the management and provision of the benefit plans.

Other employee groups of participating employers are also provided with health and welfare benefits through the Trust. Approximately 85,000 employees receive benefits through the trust. A variety of benefits are provided through the Trust including LTD, Extended Health Benefits, life insurance and Dental benefits.

The predecessor to HBT was established on January 1, 1979 by an agreement and declaration of trust between the Health Labour Relations Association of British Columbia ("HLRA"), the Hospital Employees' Union, Local 180 and eight named trustees. The Trust provided a means by which employer and employee contributions for health and welfare benefits could be collected, properly invested, and paid out to administrative expenses and eligible employees in accordance with the legal requirements relating to the operation of the trust and the provisions of the collective agreement. The creation of a trust imposed legal obligations on the trustees to carry out their duties in accordance with the terms of the trust agreement and the benefit of the beneficiaries.

The Trust ceased to be jointly administered by HLRA and HEU and became an employer administered trust in 1980. A second trust was established and by resolution, the trustees of the first trust agreed to transfer the assets and liabilities to the second trust. The trustees of the second trust were appointed solely by the HLRA. After a number of changes, on December 1, 1993 the second trust was reconstituted and the successor trustee between HEABC and a named trustee was established and called the Healthcare Benefit Trust, referred to earlier in this decision as HBT. HBT assumed all the assets and liabilities of the second trust. Trustees of the first trust were appointed by both HLRA and HEU. Trustees of the subsequent trust were appointed by HLRA and subsequently HEABC. The trustees of HBT administer the trust in accordance with the trust agreement. HBT is not party to the collective agreement. The Plan must be consistent with the Trust and determinations on that consistence are made by HEABC. Determinations as to whether the Trust is in compliance with

the collective agreements are made by HEABC.

Section 11 of the LTD addendum provides that LTD claims shall be adjudicated and paid by a claims paying agent. The Great West Life Assurance Company ("GWL") was retained by HBT as the claims paying agent in October 31, 1996. GWL is responsible for assessing claims and determining whether claims should be paid by HBT. GWL makes determinations as to what information it may require to adjudicate any particular claim, including video surveillance. At one point when GWL was the new claims paying agent, it was required to obtain approval from HBT for surveillance and functional capability evaluations because of the cost associated with these.

Section 11 of the LTD addendum provides that an employee may dispute a decision of the claims paying agent by having his or her claim reviewed by a claims review committee (CRC). The relevant portion of Section 11 of the LTD addendum reads as follows:

Long-term disability claims shall be adjudicated and paid by a claims-paying agent to be appointed by the Parties. The claims paying agent shall provide toll-free telephone access to claimants. In the event a covered employee disputes a decision of the claims paying agent regarding a claim for benefits under this plan, the employee may arrange to have her/his claim reviewed by a claims review committee composed of three medical doctors -- one designated by the claimants, one by the Employer, and a third agreed to by the first two doctors.

Under Section 12 of the LTD addendum, questions of the interpretation of the plan are to be resolved under the general grievance and arbitration procedures of the collective agreement. Section 12 of the LTD addendum reads in part as follows:

All questions arising as to the interpretation of this Plan shall be subject to the grievance and arbitration procedures in Articles 9, 10 and 11 of the collective agreement.

The CRC process has been in place since the inception of the LTD plan. Approximately 65,000 employees have LTD plans administered by HBT which have CRC's. The first CRC took place in 1985. Approximately 2,300 CRCs have been requested since that time by the various employee groups.

HBT coordinates the CRC process by setting up the committee of physicians and providing it with a "package" of information for the claims review process. This information consists of all information upon which GWL made its adjudication of the claim, as well as any additional information that is provided by the claimant for review by the CRC. HBT and GWL do not receive direction from HEABC in the adjudication of individual claims.

The information used by GWL in its adjudication includes medical information from the claimant's physician; other medical reports obtained by the claimant and by GWL from specialists; reports from the employer regarding job duties and salary information; reports from rehabilitation consultant and other information regarding the claimant's health, functional abilities, employment, education, training and experience, in accordance with the definitions of disability in the LTD plan. It may also and has included video surveillance if GWL has undertaken such surveillance, which it has done in the past.

The CRC is asked to review the package of claim information, interview/examine the claimant, review the decision of GWL and specifically determine whether the claimant is disabled as of a certain date on the basis of the relevant definition of disability under the LTD plan, which is provided to the CRC. The CRC is also provided with general Terms of Reference to guide them in the review process. HBT provides the CRC with all of the information it used in making its decision (the "claim package"). It also provides a copy to the claimant and the Union if consented to by the claimant. The CRC also receives any submissions which have been made by the claimant and/or Union on the

claimant's behalf and any submission made by counsel on behalf of the Employer. The CRCs can also request medical procedures or tests be conducted. The claimant is also interviewed and examined by one of the Doctors of the CRC. If the CRC requires more medical information, they will meet again with the claimant. The CRC then deliberates and renders a decision which generally includes a comprehensive report outlining their decision and its bases. The written decision of the CRC is sent to HBT outlining the reasons for the decision. Their decision is then forwarded to the claimant, Union, Employer and GWL.

CRC decisions are subject to review by the Labour Relations Board under Section 99 of the *Labour Relations Code*. The CRC has been held to be an arbitration board under the Code. The HEU and HEABC have appealed various CRC decisions under Section 99 of the Code. Appeals have been made on various bases including failure to consider evidence, failure to consider submissions, failure to answer or utilize the proper definition of disability.

As noted earlier, in a letter dated July 28, 2006, the Union filed a grievance with HEABC under Articles 9 and 11 of the collective agreement and Section 12 of the LTD Addendum Plan. As part of that grievance, the Union maintains the matter in dispute is whether it is consistent with Section 11 of the LTD addendum and in particular the Claims Review Process to include video surveillance tapes along with the materials that had customarily been provided to a claims review committee. In particular, the Union maintains the question is whether such evidence is admissible in the CRC process and whether CRC is competent and has the jurisdiction to rule on the legal admissibility of such evidence.

III. ARGUMENT

HEABC seeks a preliminary ruling that this arbitration board does not

have jurisdiction over this grievance. HEABC says the matter does not raise the question of interpretation but rather raises issues which come within the jurisdiction of a CRC under Section 11 of the LTD addendum. HEABC maintains that a CRC is an arbitration board and is the proper body to hear and determine matters relating to the admissibility and relevance of video surveillance evidence, subject only to review by the Labour Relations Board. Under the terms of the LTD addendum, recourse to arbitration is limited to questions involving the interpretation of the LTD plan. HEABC says evidentiary issues involving previous surveillance are not questions involving the interpretation of the LTD plan.

HEABC maintains the grievance does not raise any question of interpretation of the LTD plan. The question of admissibility is clearly within the jurisdiction of a CRC under Section 11 of the LTD addendum

In support of its position, HEABC maintains first there are separate arbitration boards under the plan for "medical/vocational" and "interpretive" issues. The question of whether the claimant is disabled for purposes of the LTD plan is a matter squarely within the jurisdiction of a CRC. It is the role of the CRC to consider and weigh the information with regard to disability and to reach a final and binding medical determination on that issue. HEABC points out there are two distinct arbitral tracks under the LTD addendum to the collective agreement. Questions regarding the interpretation of the LTD plan go to a regular grievance arbitrator. If the disagreement is whether a claimant has a medically disabling condition such that he or she is disabled, the adjudication remains on the medical vocational track and goes to a CRC. (See *Royal Jubilee Hospital and Hospital Employees' Union, local 180 (Brown grievance)* (unreported), February 10, 1984 (Trevino).) HEABC maintains the jurisprudence establishes any issue regarding claims adjudication is to be resolved under Section 11 by CRC. It says only where the real substance of the dispute or the

real substance of an essential aspect of the dispute is a matter of interpretation of the word, phrase or section of the Plan itself is the issue properly brought before a regular grievance arbitrator. (See *Lions Gate Hospital and BCNU (Alexander grievance)* (unreported), August 14, 1985 (Munroe); *Health Labour Relations Association on behalf of St. Paul's Hospital and Hospital Employees' Union, Local 180* (unreported), October 9, 1987 (Trevino).)

HEABC notes even a potential interpretive issue cannot go to a regular grievance arbitrator until the issue of interpretation has emerged as the real substance of the dispute or an essential aspect thereof. It is otherwise premature to bring an issue to a regular arbitration board (see *Health Employers Association of British Columbia and Hospital Employees Union (Kavalec grievance)* Award No. 8 - 139/00 (Ready).) Further, HEABC maintains the Labour Relations Board has recently confirmed a CRC is authorized to make incidental interpretive decisions (*Health Employers Association of British Columbia and Hospital Employees' Union (Lyseng CRC)* BCLRB No. B303/2005). HEABC submits an important characteristic of the scope of the interpretive arbitral track is that Section 12 of the LTD addendum only permits the referral of questions of "interpretation" of the LTD plan. It does not authorize a party to grieve questions of the application, operation or alleged violation of the LTD plan to a regular grievance arbitrator. This is consistent with the position of HEABC as the sole administrator of the LTD plan and to be contrasted with the general grievance and arbitration provisions of the collective agreement, which permits the parties to the collective agreement to file grievances regarding the "interpretation, application, operation or any alleged violation of a provision" of the collective agreement. Therefore HEABC maintains questions which raise issues of the application, operation or alleged violation of the plan but not interpretive issues may not be grieved under Section 12 of the LTD addendum.

HEABC also maintains support for its position by pointing out a CRC is an arbitration board and not subject to review or supervision by another arbitration

board. The status of a CRC as an arbitration board has been confirmed by various decisions including *Government of British Columbia and BCGEU*, BCLRB No. 309/85. In addition, decisions of a CRC have been the subject of appeals to the Labour Relations Board. (*Lions Gate Hospital*, BCLRB No. 112/87). As an arbitration board the CRC has the powers, duties and obligations imposed by the Code and stands in the same place in the adjudicative hierarchy as an ordinary arbitration board and is not subject to review by another arbitration board. (See *HLRA (St. Paul's Hospital) and Hospital Employees' Union, Local 180 (Hart Grievance)* (unreported), June 26, 1986 (Trevino); *HEABC and BCGEU* [2007] BCLRB No. 27 (Gallagher); *G.R. Baker Memorial Hospital and Hospital Employees' Union, Local 180 (Preliminary Award, LTD Addendum)* (unreported), December 22, 1986 (Munroe). Therefore, any dispute regarding a CRC's statutory power to admit evidence in its discretion under Section 92(1) of the Code is a matter within the CRC's jurisdiction and subject to review by either the Labour Relations Board or the Court of Appeal. It is not subject to review or supervision by another arbitration board.

HEABC goes on to note the issue of admissibility of video surveillance evidence is within the jurisdiction of a CRC and not this arbitration board. HEABC maintains the real substance of the dispute in this case is one of admissibility of evidence and not an issue of interpretation as the Union seeks to characterize it. HEABC points out the question of whether any evidence is admissible in a proceeding is not one that can be answered in the abstract. It is integrally tied to the issues in dispute before the arbitration board in question. HEABC maintains the question of whether video surveillance evidence may be admissible before a CRC is dependent entirely on the issues before the CRC and whether such evidence is relevant to the "usual kind of medical/vocational judgments" made by CRC. Video surveillance evidence is simply another potential source of information which may assist the CRC and determine a claimant's functional abilities as they relate to the CRC's medical vocational conclusions.

HEABC notes in order for grievance to be within the jurisdiction of a grievance arbitrator, its real substance must be a question of interpretation of the word, phrase or section of the LTD plan itself. The Union has not pointed to a specific word phrase or part of Section 11 which requires interpretation before admissibility can be decided. There is nothing in Section 11 which touches on the issue of admissibility of evidence before a CRC. Such questions are not a matter of interpretation of the LTD plan. HEABC points out the real substance of the matter in dispute in the grievance is the question of the authority of a CRC to receive and accept evidence. That is not a question of interpretation of the plan, but a question of the scope of statutory authority of a CRC as an arbitration board under the Code. Section 92 of the *Labour Relations Code* affords arbitration boards wide latitude in relation to evidence. HEABC says the Board's reference in the *Government of British Columbia and BCGEU (Morley Grievance)* BCLRB LB No. B88/203 goes to refute the Union's contention that CRCs cannot make decisions as to what evidence to admit because they are not lawyers.

Finally, HEABC points out the Labour Relations Board has already ruled it is appropriate for a CRC to consider video surveillance evidence. (*Re Basaran* BCLRB No. B145/2007; *Re British Columbia and BCGEU*, BCLRB No. B 202/205). HEABC maintains these cases demonstrate questions regarding the admissibility of evidence are questions regarding the statutory powers of CRC under the Code. Where issues of admissibility relate to the medical/vocational questions to be answered by a CRC, it is within the CRC's jurisdiction and authority to come to its own conclusions as to whether to receive such evidence or information, pursuant to Section 92(1) of the Code. As such, HEABC submits this arbitration board has no jurisdiction over the issues raised by the Union in the grievance.

In response, the Union strenuously objected to HEABC's reliance on the

Basaran case, on the basis the Union had not been involved in that case on the basis of a May 25, 2006 agreement that it was without prejudice to the Union's policy grievance in this matter. In particular, it noted the agreement between HBT and the Union that:

"Any further CRCs that contain video surveillance as evidence will proceed on a without prejudice basis to the Union's policy objection to the use of such evidence."

Accordingly it argues none of the cases relied upon HEABC for the proposition that the Labour Relations Board has already ruled it is appropriate for a CRC to consider video surveillance evidence can be referred to.

Further the Union argues it is not simply dealing with the admissibility of evidence. Rather as reflected in the letter of July 28, 2006 setting out the policy grievance in this matter, the primary focus of the Union's grievance is whether videotape surveillance evidence can be provided in the package of materials that is customarily provided to the claims review committee. The Union maintains that issue arises before any issue as to whether it is appropriate for CRC to rule on this. The Union maintains the provision of videotaped surveillance was never contemplated under the LTD addendum.

Dealing specifically with HEABC's jurisdictional argument, the Union points out the grievance is one of general scope and not with respect to a particular CRC. The question is whether any and all video tape surveillance evidence should not be included in the package of information provided to the CRC. The Hawrys grievance raises the second issue of whether it is consistent with the LTD addendum for legal arguments to be submitted to the CRC. In dealing with the jurisdictional objection, the Union focuses however on the policy grievance. The Union points out in order to be successful HEABC must establish this arbitration board has no jurisdiction over any aspect of the grievances.

Whether a CRC has jurisdiction to receive videotaped evidence or to rule on videotaped evidence is a matter that goes to the merits of the Union's argument which has yet be heard. Indeed, as this is a preliminary matter, the Union points out it has not led its case with respect to the limited jurisdiction of the CRC.

The Union says the policy grievance was brought under Articles 9 and 11 of the collective agreement. The policy grievance refers to Section 12 of the LTD addendum which provides that all questions arising as to the interpretation of the LTD plan shall be subject to the grievance and arbitration procedures in Articles 10 and 11 of the collective agreement. Accordingly the Union maintains the issue of interpretation of the plan is squarely raised by the policy grievance reference to Section 12 of the LTD addendum. The CRC process is dealt with in Section 11 of the addendum. The Union says it is inconsistent with the interpretation of Section 11 of the addendum to submit videotape surveillance to the CRC. Accordingly, the Union maintains whether it is inconsistent with the proper interpretation of Section 11 for videotapes to be provided in the package to the CRC is squarely raised by the policy grievance. There is nothing in Section 11 to suggest a CRC has jurisdiction to hear a policy grievance. Furthermore, there is nothing in the language of Section 11 that suggests a CRC has jurisdiction over another CRC on the legal issue as to what should be included in the material provided to the CRC. The jurisdiction of the CRC under Section 11 on its face is limited to review a claim by an employee for LTD benefits.

The Union also points out it is a question of interpretation as to whether that language could possibly confer on an individual CRC the ability to consider a general policy grievance from the Union whether or not as a matter of general practice it is consistent with or permitted by the language of Section 11 that videotaped evidence be included in material provided to CRC. The Union points out the only language in the collective agreement that gives an arbitration board jurisdiction to deal with a policy grievance is Article 9.05. There is nothing in

Section 11 of the LTD addendum that says a CRC has the authority under Article 9.05 to hear a policy grievance from the Union. Section 13 of the LTD addendum makes clear the Union's right to put a policy grievance before the board must not be prejudiced by the terms of the LTD addendum. The Union maintains the argument of HEABC boils down to Section 11 of the LTD addendum in effect prejudicing the application of Article 9.05 by depriving this arbitration board of jurisdiction to hear policy grievance from the Union. Whether the language of Section 11 of the LTD addendum has some effect despite the clear wording of Section 13 of the addendum and Article 9.05 of the collective agreement is itself a matter of interpretation of the collective agreement. Section 12 of the LTD addendum further provides all questions of interpretation of the addendum shall be subject to arbitration and grievance provisions in Articles 9 and 11 of the collective agreement. The Union relies on the standard principle of interpretation strengthened by Article 13 of the addendum that the arbitration board must have regard to the language of the collective agreement and cannot view Section 11 in isolation.

The Union emphasizes at this stage in the proceedings, it is not necessary to persuade the panel that its interpretation is correct. All that is necessary is for the Union to show there is a question of interpretation. Once that is done the panel clearly has jurisdiction. The Union maintains a question of interpretation arises in relation to the relationship between the language in Section 11 through to 13 of the LTD addendum and Sections 9.05 and 11.01 of the collective agreement and how these sections interrelate. It is clearly a question of interpretation as to whether Section 11 when read with other sections in the LTD addendum necessarily and without doubt confer exclusive jurisdiction on a CRC to deal with the policy grievance as to what material should be included in a package provided to the CRC.

The Union then maintains Section 11 itself provides a number of interpretive issues. The first question is whether that language even taken in

isolation grants any jurisdiction or even exclusive jurisdiction to a CRC to hear a policy grievance with respect to the review of CRC evidence to claims review committees as a whole. The Union says the only way HEABC can show the CRC has exclusive jurisdiction over that issue is to ask the panel to interpret the language of Section 11 of the LTD addendum which is the only language in the collective agreement that confers jurisdiction on a CRC. In looking at the Section 11 language, the Union points out the reference to a review is to a "review" of an employee claim to LTD benefits by a CRC of three medical doctors. An issue of interpretation arises as to what this language entails in the nature of review by a CRC, especially given that a CRC is composed of three medical doctors. The Union says that language supports the Union position that the review is a review of medical facts and issues and does not include a review of general policy issues as to what kind of material can be put before a CRC. HEABC's position appears to be that a CRC, despite this limitation in Section 11, has not only all the powers of a regular arbitration board but jurisdiction to review any issue with respect to any claim under LTD including the general issue of whether video surveillance can be provided to the CRC. That, the Union maintains, is a matter of interpretation which only an arbitration board has jurisdiction under Section 12.

Further, the Union maintains there is nothing in Section 11 to indicate all the actions or considerations by Great West Life in denying a claim must be submitted to a specific claims review committee to review a particular claim for LTD. The language of Section 11 does not provide a CRC hear an appeal of the decision of the claims paying agent. Rather it is to review the employee claim for benefits. Contrary to HEABC submission, the Union maintains the CRC does not sit as an appellate Tribunal reviewing the decision of Great West Life to ensure Great West Life gave the claimant a fair hearing or made an overriding error of fact or other error. The CRC determination rather is based on its own review of medical/vocational evidence (and a physical exam of the claimant if that has taken place), to determine whether the claimant is disabled. The CRC is not bound by the claims agent findings nor has any deference to the decision. At

this stage of these proceedings, the Union says it does not have to convince the arbitration board the CRC is meant to be a fresh determination rather than an appellate Tribunal. All it needs to show is there is an issue of interpretation with respect to the LTD addendum regarding the scope of review mandated under Section 11.

The Union also points out under Section 11 a question of interpretation arises as to whether the word "decision" refers to a decision to deny benefits or any decision of the claims paying agent in the process of adjudicating the claim such as a decision to conduct video surveillance of a claimant. There is also an issue of interpretation as to what the word "adjudicate" means in this context and whether that includes an investigation such that Great West Life can hire a private investigator and conduct an investigation that becomes part of its decision. The Union maintains the interpretation of "adjudication" should be limited. If Great West Life conducts videotaped surveillance that does not form part of the record of the decision. The CRC reviews the claim for benefits and not the decision of Great West Life. The Union points out these are all issues of interpretation and only this arbitration board has the jurisdiction to deal with them. Read as a whole, it is the Union's position that the LTD addendum and in part Section 11 confers on a CRC limited jurisdiction to determine whether on medical grounds an employee who is denied LTD benefits is disabled or not. The CRC is not to deal with any questions of interpretation including those that go to its jurisdiction and scope of its review. The CRC is not to hear policy grievances and nothing indicates a CRC is to decide upon legal issues including whether video surveillance evidence can be included in the material to the CRC panel and what legal test should be applied to the admissibility of videotaped evidence. The Union reiterates at this stage it does not have to convince the panel that it is right. Rather, the Union just needs to show Section 11 and the LTD addendum as a whole does not incontrovertibly demonstrate that a CRC can deal with any issue such as that of the videotaped evidence and related legal submissions.

The Union notes the broad language of Section 84 of the *Labour Relations Code* is not be found in Section 11 of the LTD addendum. In the absence of such language, Section 11 confers very limited jurisdiction on the CRC and does not deprive this arbitration panel of its broader jurisdiction under Section 11 as that would prejudice Article 11 and be contrary to Section 13 of the LTD addendum.

In addition to the language of the collective agreement, the Union maintains other factors such as bargaining history, arbitration awards and labour relations decisions also support the Union's interpretation. In further support of its position, the Union points to the limited scope of the Terms of Reference and the overview of the LTD process which emphasizes the medical nature of the process. At this time however the Union reiterates it does not have to convince the panel of the merits of its argument but rather simply that there is a question of interpretation that must be answered when dealing with the Union's grievance and therefore this arbitration panel has jurisdiction.

In brief written reply, HEABC maintains the Union's framing of this grievance as a policy grievance cannot avoid its essential character, which is a matter of evidence and not interpretation of the LTD plan. It argues the Union is seeking to regulate the scope of the potentially relevant evidence which is heard by a CRC. On December 1, 2008, HEABC forwarded a decision of the Labour Relations Board issued on November 28, 2008 to the panel in this matter. HEABC maintained it addressed the consideration of video surveillance by a Claims Review Committee (See *Roberta Jordan et al* BCLRB No. B 207/2008). The Union strenuously objected to this after the close of proceedings respecting HEABC's preliminary objection to jurisdiction. It noted in any event, the jurisdiction of the CRC to receive video surveillance evidence was not in issue in the *Roberta Jordan* case.

III. ANALYSIS

After considering the facts and thoughtful arguments as outlined by the parties in this matter, a majority of the panel, Mr Grant dissenting, concludes this arbitration panel has the jurisdiction to determine the matter raised by the Union in its policy grievance filed on July 28, 2006. The majority of the panel are of the view the essential character of the matter at issue is an interpretive dispute of a "word, phrase or section" of the LTD plan itself (see *G.R.Baker Hospital, supra*).

While HEABC argues the essential character is a matter of evidence i.e. whether a CRC should consider video surveillance evidence, we disagree. As set out in *Lions Gate Hospital, supra* "claims adjudication" is to be done by a CRC except where the real substance or the essential aspect of the dispute appears to be a matter of interpretation as distinct from an application of the plan to the particular circumstances of an individual claimant. The Union has referenced a number of specific phrases which it maintains need to be interpreted in order to understand the nature of the review contemplated by the parties when establishing claim review committees under the collective agreement. This includes the phrases "review" and "decision" and "adjudicate" in Section 11 of the LTD addendum. The Union essentially maintains the provision of videotape surveillance to a CRC was never contemplated under the process agreed to by the parties under the LTD addendum.

A recent decision of the Labour Relations Board lends support to the view this is an interpretive issue when it comments:

The CRC process is an example of an alternative dispute resolution process that has been fashioned by agreement of the parties. They expressly choose to employ a much less formal inquisitorial process, in preference to the adversarial grievance arbitration model. The CRC process has been fashioned to fit the parties' long-standing relationships within the healthcare sector and

its deals exclusively with appeals by employees who have been denied LTD benefits. The parties fashioned the CRC process to provide a method of resolving disputed LTD benefit claims by answering the question of whether or not the applicant employee has been disabled in accordance with the definition of disability that is provided in the Collective Agreement. It is specified in the TOR [Terms of Reference] that it is a "medical procedure" that is not in the nature of an appeal in the usual sense of that term. The CRC is a "review" that has been determined through arbitration to be a "court of last resort" on all medical matters: *Royal Jubilee Hospital and HEU, Local 180*, unreported arbitration board, February 10, 1984, Ministry number A- 66/84, (Trevino Abrahamson, O'Neal)

The parties agreed that the CRC process would involve findings made by three independent and qualified medical doctors. The doctors are not identified as arbitrators or adjudicators; rather, it is apparent that the TOR contemplates these doctors will conduct their CRC duties in a manner that harmonizes with the way they routinely carry out the duties of their profession.

The parties designed the specific procedures that attend the CRC process. In order to respect and protect the confidentiality of the employee claimant, the Employer is not provided with a copy of the information package that goes to the CRC. The CRC does not deal with "evidence" in the sense that evidence is called in grievance arbitration. The CRC is provided with "information" that includes all relevant medical and vocational reports that were in the possession of the claims- paying agent. The CRC conducts a "meeting"; not a hearing. No representatives of the principal parties are allowed to attend and the doctors are not give instructions about how they are to conduct the examination or interview. The contractual terms that establish the CRC process do not contemplate that a party can challenge the truth or accuracy of the information provided by the employee during the interview process.

(*HEABC & HBT & BCGEU, BCLRB B27/2007* at par 41-43)

There is no doubt, as reflected in the above passage, that the CRC process is a process that has been created by the agreement of the parties as reflected in the collective agreement. The Union's argument as set out is that this arbitration panel has the ability to deal with the matter at issue as it involves an interpretation of the agreement between the parties as reflected in the language

of the collective agreement. Indeed the Union maintains the only way HEABC can show the CRC has exclusive jurisdiction over the issue of video surveillance evidence is to ask the panel to interpret the language of section 11 of the LTD addendum, which it maintains is the only language in the collective agreement that confers jurisdiction on a CRC.

Essentially as the panel understand it, the Union's argument will be that the parties agreed to a review system by virtue of the CRC that is a narrow review of medical facts and issues. Amongst other arguments, the Union maintains this is reflected by the composition of the panel set out in the agreement being three medical doctors and the language referring to a "review". Fundamentally the Union argues there is an issue of interpretation with respect to the LTD addendum regarding the scope of review mandated under section 11. In this context we note the word "adjudicate" was commented upon by the arbitration panel in *Royal Jubilee Hospital, supra*, as part of a question of interpretation of the Plan under the collective agreement.

Further as argued by the Union, section 12 of the LTD addendum says in part:

All questions arising as to the interpretation of this Plan shall be subject to the grievance and arbitration procedures in articles 9, 10 and 11 of the collective agreement.

Section 13 of the addendum also notes:

The terms of the Plan set out above shall not prejudice the application or interpretation of the collective agreement.

This language, in our view, lends support to the Union's argument that this panel has jurisdiction to deal with this matter. While HEABC has cited a number of cases including *HLRA on behalf of St. Paul's hospital, supra*, which concluded

any quarrel with a medical/vocational decision or the procedures under which it was reached lay with the Labour Relations Board of the BC Court of Appeal, we are not persuaded this grievance asks us to review or supervise a claims review committee making a medical/ vocational judgment. Indeed in an earlier decision between these same parties the arbitrator commented upon the scope of the task of the claims review committee in the context of section 11 of the LTD addendum as an interpretive task. (*HLRA on behalf of St. Paul's Hospital and HEU (Hart grievance)* June 26, 1986 at p.27)

HEABC has also relied on a number of decisions of the Labour Relations Board including the most recent cases of *Re Roberta Jordan et al* BCLRB No. B207/2008 and *HEABC on behalf of Fraser Health Authority (Simon Fraser Home Support)* BCLRB B1/2009. It argues the Board has already ruled it is appropriate for a CRC to consider video surveillance evidence. HEABC maintains these cases demonstrate questions regarding the admissibility of evidence are questions regarding the statutory powers of a CRC under the Labour Relations Code. We do not agree. In our view these cases do not directly address this issue. Moreover, as set out above, this grievance involves interpretive issues under the collective agreement. Until those issues are determined by arbitration, this is not something that the Labour Relations Board can definitively determine. While the Board has confirmed the status of a CRC as an arbitration board and matters of fair hearing do proceed before the Labour Relations Board, the Board has also made clear it is not the role or within the jurisdiction of the Labour Relations Board to interpret collective agreements under section 99 of the Code. (See *Government of BC and BCGEU (Re Barclay)* [2006] BCLRBD No. 154)

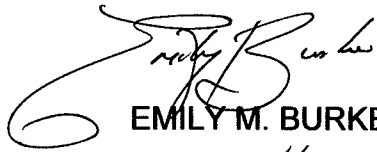
We note further both the Labour Relations Board and arbitration panels have commented upon the special nature or purpose of CRCs as arbitration panels within this context. (See *Re HEABC and HEU* BCLRB 194/2006; *HEABC and BCGEU* [2007] BCLRBD No. B27; *HLRA (Kelowna General Hospital)* and

HEU, Local 180 [1989] BCLRBD No. 72; *GR Baker Memorial Hospital and HEU, Local 180* (December 22, 1986) (Munroe, QC)). In the latter decision, the arbitration panel noted "within its proper jurisdiction, a Claims review committee stands in the same adjudicative hierarchy, so to speak an ordinary arbitration board." The question raised in this case, as argued by both HEABC and the Union concerns that proper jurisdiction. In our view that jurisdiction arises under the collective agreement as reflected by the nature of the agreement of the parties set out in that collective agreement. In summary we note, while HEABC argues the Labour Relations Board has made clear the matter of what information a CRC reviews is firmly within its purview we conclude that matter has not been squarely addressed as it pertains to an interpretation of the collective agreement. We have concluded the essential character of the matter at issue is an interpretive dispute under the collective agreement. The panel therefore has the jurisdiction to deal with this matter.

We note in closing that while we have considered the many cases cited in this matter, we have not commented on all. We are of the view that is more appropriately done as part of the merits of this matter.

The preliminary objection of HEABC is accordingly dismissed. The matter will proceed to the hearing on the merits on the dates presently scheduled on February 26 & 27 and March 2-4, 2009.

Dated at Vancouver, British Columbia, this 7th day of January, 2009


EMILY M. BURKE, Chair
"Ruth Herman"
RUTH HERMAN

CHRIS GRANT (Dissents)