STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS "GENERAL" LOCAL NO. 200, Complainant, vs. MARIGOLD FOODS, INC., Respondent.	Case 1 No. 48101 Ce-2131 Decision No. 27536-C

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C. by Mr. John J. Brennan, Attorney at Law, appearing on behalf of the Complainant, Teamsters "General" Local No. 200.

Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee WI 53202-4108 by Mr. Scott C. Beightol, Attorney at Law, appearing on behalf of the Respondent, Marigold Foods, Inc.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Daniel Nielsen, Examiner: Teamsters "General" Local No. 200 (hereinafter referred to as either the Union or the Complainant) filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission (Commission) on September 22, 1992, alleging that Marigold Foods, Inc. (hereinafter referred to as either the Company or the Respondent) had committed unfair labor practices within the meaning of §111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) by failing to compensate chiropractic coverage for bargaining unit employees from the first dollar up to $600.00 or 15 visits per person per calendar year pursuant to the Union's interpretation of a grievance settlement agreement. The Commission appointed Daniel Nielsen of its staff to serve as the hearing examiner, and to conduct a hearing, and make and issue findings of fact, conclusions of law and orders. On October 27, 1992, the Company filed a Motion to Dismiss, with an accompanying memorandum, asserting that the collective bargaining agreement between the parties requires submission of such disputes to grievance arbitration, that the Union had failed to submit the dispute to the grievance and arbitration procedure of the contract, and that the

Commission therefore lacked jurisdiction to hear the case. The Union submitted a responsive memorandum in opposition to the Motion on February 17, 1993, asserting that the grievance procedure had been exhausted in the process of arriving at the settlement agreement, that the settlement agreement had the same standing as a final award from an arbitrator, and that the Company's refusal to accept the settlement agreement was tantamount to refusal to accept an arbitration award. On April 19, 1993, the examiner issued an Order denying the motion to dismiss. The Respondent filed a petition for review with the Commission and, on June 15, 1993, the Commission issued its Order Dismissing Petition for Review, concluding that the Examiner's Order was interlocutory in nature and that the Commission would not exercise its discretion to review that Order.

A hearing was held on August 9, 1993 at the State Office Building in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearing, and a copy of the transcript was received on September 2, 1993. The parties submitted post hearing briefs, which were received by the Examiner on November 9, 1993. Now, having considered the evidence, the arguments of the parties and the record as a whole, and being fully advised in the premises, the Examiner makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Marigold Foods, Inc. (hereinafter referred to as either the Company or the Respondent) is an employer doing business under a variety of brand names in the state of Wisconsin, with its principal offices for the Great Lakes Division at 11805 West Hampton Avenue, Milwaukee, WI 53225. Among the businesses operated by the Respondent is Kemps Dairy in Kewaskum, Wisconsin.

2. That Teamsters "General" Local No. 200 (hereinafter referred to as the Union or the Complainant) is a labor organization, with its principal offices at 6200 West Bluemound Road, Milwaukee, WI 53213.

3. That the Complainant is the exclusive bargaining representative for certain of the Respondent's employees, including approximately 80 at Kemps Dairy. The Business Agent for the Complainant servicing the bargaining unit at Kemps is Don Wetzel. The Complainant and Respondent have entered into a collective bargaining agreement addressing the wages, hours and working conditions for those employees. Among the provisions of the local agreement were detailed commitments concerning health insurance coverage. The Respondent is self-insured. Starting in 1987, these benefits were laid out in a benefit plan booklet distributed to employees. Prior to the 1990 negotiations over the local agreement, the booklet described certain of these benefits as follows:

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MEDICAL BENEFITS (before deductible)

In-Patient Hospital Care:	100% of Usual & Customary
Out-Patient Hospital Care: -Emergency Medical and Accident Care -Surgery -Diagnostic X-Ray and Lab -Radiation Therapy -Kidney Dialysis	100% of Usual & Customary

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DEDUCTIBLE	$100 per person per calendar year, family maximum of 2 deductibles

MEDICAL BENEFITS (after deductible)

Co-Insurance	80% of Usual & Customary
Office Visits	100% of Usual and Customary
Prescription Drugs	100% of Usual and Customary

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MEDICAL BENEFIT LIMITATIONS

Hospital Room & Board	Semi-private room rate for 365 days per confinement. Discharge and readmission establishes a new benefit period.
Intensive Care Unit	Usual and Customary
Kidney Dialysis/Transplant	$30,000 per person per calendar year maximum.
Medical Lifetime Benefit Maximum	$1,000,000 per person
Office Visits:	100% of Usual and Customary

Prescription Drugs:	100% of Usual and Customary

4. That in negotiations over the 1990 local agreement, the parties agreed to make certain changes to the medical insurance plan, including capping chiropractic benefits which had been treated as office visits paid at 100% after the $100 deductible was satisfied. The new cap limited chiropractic care based upon the annual cost and/or the number of visits to the chiropractor.

5. That on August 21, 1990, the Respondent's Human Resources Director, Betsy Rausch, sent a letter to Don Wetzel enclosing the official summary of negotiated Medical Plan changes for Local 200 employees represented by the Complainant. The summary included, inter alia:

> This notice is to inform you of certain changes to the MFI Inc. Employee Benefit Plan and Trust. The changes apply only to Kewaskum Local #200 members who are Plan participants. The explanation which follows updates your Summary Plan Description (your health plan booklet) and should be kept with that booklet. The office visit and prescription drug amendments are effective May 1, 1990. All other changes are effective August 1, 1990.
>
> Schedule of Benefits
>
> On Page 6 of your booklet, under "Medical Benefits" please not the following changes:
>
> | | |
> |---|---|
> | Office Visits: | 80% of Usual & Customary
(no deductible required) |
> | Prescription Drugs: | 80% of Usual and Customary (deductible waived), until out of pocket expenses for covered charges reaches $100 per person ($200 per family), then 100% to the end of the calendar year. |
>
> On page 7 of your booklet, under "Medical Benefit Limitation" the following provisions will be included:
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> | | |
> |---|---|
> | Mental/Nervous Disorders: | $20,000 lifetime maximum |
> | Chemical Dependency Treatment: | $15,000 lifetime maximum. Person must successfully complete treatment program to be eligible for reimbursement. |

Chiropractic Care:	Limited to $600 and 15 visits per person per calendar year.

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6. That on October 4, 1990, a grievance was filed by the Complainant on behalf of Wayne Kirst, an employee of the Respondent:

> GRIEVANCE IN DETAIL: Article 12, Sec. 2. Par. b, Chiropractic Coverage - pays for care at 100% - Company paid 80%.

Another grievance was filed on that same day on behalf of employee James Foerster:

> GRIEVANCE IN DETAIL: Office Visits (Article 12, Sec. 2. Par. d) Office visits payed 80% from first dollar, Company payed none.

During the processing of the Kirst and Foerster grievances, the Union raised an additional issue concerning whether employees were required to reached a minimum age of 57 before claiming retiree health insurance benefits from the Company.

7. That the Respondent took the position that Kirst's grievance was without merit. Kirst's complaint was that the Company had paid only 80% of the cost of chiropractic care. The Company asserted that chiropractic care continued to be treated as an office visit, subject to the new 80% co-payment provision for office visits, in addition to the caps on annual cost and total number of visits.

8. That on November 12th, Don Wetzel sent a proposed Letter of Understanding to Dave O'Connell, the General Manager at Kemps. The letter laid out terms under which the Union would be willing to settle the three grievances. O'Connell did not sign the letter, but discussions continued between the parties on how to resolve the grievances. These discussions focused primarily on the retiree health insurance issue.

9. That by June of 1991, discussion had reached the point that the Respondent felt the need for legal advice and contacted its attorney, John Sapp. On June 20th, O'Connell sent Sapp a letter outlining the disputes and the Company's position:

> Dear John:
>
> For your reference, the three grievances outstanding from the Teamsters files with us are
>
> 1. We did not pay at 80% for "office visit" which is the issue. Grievant was

Jim Forester who claims we did not pay for routine physical exams. Routine physical exams are excluded from coverage as outlined in benefit booklet.

2. Chiropractic coverage is now at 80% coverage with cap of $600.00 or 15 visits. Contract states 80% and reads "600.00 and 15 visits." Obviously not reasonable to think it is both $600.00 and 15 visits. It's whichever comes first.

3. Lastly, is the issue of retirement coverage. Contract is contradictory with reference to employees who retire prior to age 57. Section 2 and 5, Article 12, are areas under discussion.

Our position has not changed since October of 1990. First, grievances one an two are to be dropped. The coverage is clear and spelled out in the employees booklet and subsequent handout material.

Secondly, the union retirement issue is not as clear. We will, however, agree that an employee may retire prior to age 57 with insurance benefits as outlined (if in compliance with union pension requirements) but only for existing employees. We also have no obligation to former retired employees. And, we want to make it clear that the language will be cleared up in the next negotiations so its understood that age 57 is a requirement for retirement.

It also should be pointed out that no grievances on this matter have been made and we're dealing with it now only because an employee asked the questions. We would also rather deal with it now to avoid future grievances.

Please let Mr. Wetzel know of our position as asked in his latest letter of June 5, 1991.

O'Connell instructed Sapp not to make any decisions on the Company's behalf, but only to act as its spokesperson and communicate its position.

10. That Sapp wrote to Wetzel on July 9, 1991. He indicated that the Company was willing to live with the Union's interpretation of the contract as it applied to retirees, for the length of the then-existing contract, and to then negotiate clarification of the contract. Failure to reach agreement in negotiations would allow the parties to pursue their respective arguments concerning the meaning of the contract. In return, Sapp proposed that the Union drop its grievances over office visits and chiropractic coverage. He left a space at the bottom of the letter for Wetzel's signature. The letter was copied to O'Connell and Kurt Kobelt, the attorney for the Union.

11. That Wetzel replied asking about other issues addressed in a previous letter, and seeking clarification of the Company's position. Sapp responded, suggesting that his letter was

clear, and was not intended to address all of the issues Wetzel inquired about. Sapp suggested that Kobelt contact him if any clarifications were required, and reiterated his position that the Company's willingness to compromise over retiree health insurance was tied to the dropping of the Foerster and Kirst grievances.

12. That on August 26th, Kobelt sent a letter to Sapp seeking clarification of the Company's proposal as it related to office visits and chiropractic coverage:

> The grievance regarding chiropractic visits protests the payment of chiropractic visits under the 80/20 major medical plan. An essential term of any settlement of this grievance would be that chiropractic visits are paid at 100% and that the grievant is made whole for his out-of-pocket costs.
>
> The grievance over office visits challenges a refusal to reimburse an employee for any part of an office visit on the grounds that the employee should have been covered under his wife's plan. The union's position is that office visits are covered under the company's plan regardless of the grievant's wife's coverage. However, we are unclear as to whether the company policy was to compensate employees for such visits at 80/20 or 100%. We require some written documentation indicating precisely what the company's policy is in this respect.

13. That Sapp passed Kobelt's letter along to O'Connell and asked him to generate a responsive letter addressed to him that he could then pass along to Kobelt. O'Connell provided the letter on September 20th:

> Dear John:
>
> To further clarify our position and understanding of the grievances involving chiropractic visits and office visits, following is more information as required by the Teamsters in their August 22, 1991 letter to you.
>
> 1. Previously, all office visits were paid at 100% of usual and customary charges after a $100 deductible per calendar year. The new contract changed this to 80/20% coverage without deductible.
>
> 2. Chiropractic coverage was previously paid as part of medical benefits and treated as an office visit. Because the office visit payment changed, so did the chiropractic coverage. The only change made in the contract was the cap of $600 or 15 visits.
>
> 3. The Dreher grievance is really not valid. We followed the plan benefits as previously done. The visit to the doctor for his wife was coded as a

procedure. This is not considered lab work or an office visit, but a miscellaneous service. Dreher had not met his deductible, so the charge was applied to his deductible. If he had met his deductible, it would have been paid at 80% - the rate for the procedures. This rate has not changed from the previous contracts. We did not refuse to pay this claim because of his wife's insurance. If the doctor had coded it as an office visit, not a procedure, we would have paid it at 80% without the deductible requirement.

We do not know if or why his wife's insurance would not pay the bill and we don't really care.

I've enclosed photocopies of the benefits book and subsequent addendum for your reference.

Sapp forwarded O'Connell's letter to Kobelt on September 25th.

14. That on December 16, 1991, Kobelt sent Sapp a letter outlining a proposed settlement of the Kirst and Foerster grievances and the disagreement over retiree health insurance:

Dear John:

This letter sets forth the terms of a settlement agreement in connection with the three outstanding grievance in connection with Kemps Dairies.

1. Grievance of Wayne Kirst, dated October 4, 1990.

Chiropractic coverage will be paid up to $600.00 or 15 visits per person per calendar year, whichever occurs first. The employer will make whole all employees improperly compensated for chiropractic visits.

2. Retiree Health Insurance

Employees who retire prior to age 57 during the term of the current agreement shall receive retiree health insurance in accordance with article 12 of the current agreement.

3. Grievance of James Foerster, dated October 4, 1990.

Office visits will be paid at 80% of the usual and customary charge with no deductible required. The employer agrees to make whole all employees whose office visits have not been reimbursed at this rate.

Please indicate your acceptance of the terms of the settlement by executing one copy of this letter and returning it to Scott Soldon, who will then respond to any questions you may have concerning this matter.

Kobelt left a signature line for Sapp to sign the letter on behalf of Kemps. Sapp forwarded the letter to O'Connell. O'Connell directed him to sign it on behalf of Kemps. Sapp returned the signed letter to Scott Soldon on January 4, 1992.

15. That following the execution of the settlement agreement, the Respondent processed claims for chiropractic coverage by paying 80% of the claims from the first dollar up to either $600 per year, or 15 visits, whichever came first.

16. That in early May of 1992, Sapp was contacted by attorney John Brennan who had taken over the Kemps file when Kobelt left his firm. Brennan informed Sapp that there was a dispute over the Settlement Agreement, in that the Union believed that chiropractic coverage was not subject to the 80/20% co-payment, but instead should be fully paid up to the annual maximums. On May 5th, he followed up his telephone call with a letter to Sapp which said, inter alia:

> The issue with chiropractic coverage appears to be separate and apart from any grievance over office visits and any subsequent agreement the parties came to. However, it is clear at the very least from the letter of August 26 from Kurt Kobelt to your office that "an essential term of any settlement of this grievance would be that chiropractic visits are paid at 100% ..." Nothing in my review of the file indicates to me that Mr. Kobelt ever retreated from this position. The language of the Agreement seems to support this as well. If, however, I am mistaken, and the agreement was understood to mean something else, please call me and I will attempt to get Mr. Kobelt's input.

Sapp replied by letter on June 1st:

> I received your letter regarding the Kemps Dairy matter. It is certainly correct that Mr. Kobelt's position on August 26 was to ask that chiropractic coverage be paid at 100 percent. However, that letter also indicated a desire to receive the Company's position. That was provided on September 30, 1991, copy attached. That letter explained in detail that chiropractic coverage had always been treated as an office visit, that office visits had previously been paid at 100 percent after a deductible and that the new contract had specifically changed this to 80/20 coverage without a deductible. Of course, in many instances, this change would be beneficial to the employee. It was pointed out that since the payment for all office visits had changed, chiropractic payments would also necessarily change. Indeed, the only change in the last agreement was to provide an additional cap for chiropractic coverage.
>
> We heard nothing further from Mr. Kobelt until his December 16 settlement letter. That settlement agreement refers to the $600 or 15 visits cap and says nothing whatsoever about any other change in the chiropractic area. In addition,

it specifically notes on point 3 that office visits will be paid at 80 percent of the usual and customary charges with no deductible required.

In these circumstances, the Company concluded that Mr. Kobelt had agreed to the position set forth in its most recent letter and signed the settlement agreement on that basis.

17. That the grievance procedure applicable to this bargaining unit is set forth in the Master Dairy Agreement, and provides for final and binding arbitration of disputes:

ARTICLE 7
Grievance Machinery and Arbitration

Section 7.1

Disputes or grievances arising under this Agreement shall be divided into the following categories:

(a) Dispute or grievances arising out of the interpretation of this Agreement, exclusive of any Addenda.

(b) Disputes or grievances arising out of the interpretation of the Addenda to the Agreement.

(c) Negotiation of Local Addenda which have become deadlocked at the local level.

The Union and the Company agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement as set forth below.

It is agreed by the parties that all disputes or grievances shall be settled in accordance with the procedure outlined as follows in this Article:

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Section 7.9

(a) Where a dispute or grievance arising out of the interpretation of this Agreement of the Addenda, except disputes arising under Section 7.1(c), has not been settled under the foregoing procedure it shall be referred to an impartial arbitrator for a decision, whose decision shall be final and binding on the Local Union, its affected members and the Employer at the particular facility in question.

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(c) The issue referred to arbitration shall be limited to the issue deadlocked by the Joint Area Committee and the evidence at that hearing. The participants in the arbitration shall include the members of the Joint Area Committee which heard the case, the representatives of the Employer and Union who presented the case to the Joint Area Committee and their witnesses in those proceedings.
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18. That on September 22, 1992, the instant complaint was filed with the Commission, alleging that the Respondent had committed unfair labor practices within the meaning of §111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) by failing to compensate chiropractic coverage for bargaining unit employees from the first dollar up to $600.00 or 15 visits per person per calendar year pursuant to the grievance Settlement Agreement. The Respondent filed an answer acknowledging the existence of the Settlement Agreement, but denying any violation and asserting that any dispute should be resolved by grievance arbitration. On the merits, the Complainant took the position that the Settlement Agreement as written did not modify the Union's previously stated position that chiropractic visits must be paid at 100% until the annual limits were reached, but merely acknowledged the existence of annual caps. The Respondent took the position that the Company's view that chiropractic visits were subject to the 80/20% co-payment for office visits was clearly stated in the discussions leading up to the Settlement Agreement, and that the agreement made no reference to that issue.

19. That the Settlement Agreement had the effect of withdrawing the Foerster grievance over payment for a physical examination.

20. That the Settlement Agreement was silent and thus ambiguous as to the issue of co-payments for chiropractic treatments before the annual caps were reached.

21. That the Settlement Agreement was drafted by Kobelt on behalf of the Union.

22. That the Settlement Agreement resolved the Kirst grievance on the basis of continuing the Company's existing practice of treating chiropractic treatments as office visits, subject to an 80/20% co-payment.

23. That the Respondent has, since the execution of the Settlement Agreement, administered the chiropractic benefit in a manner consistent with its practice prior to the execution of the Settlement Agreement.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issue the following

CONCLUSION OF LAW

The Respondent did not violate the Settlement Agreement concerning chiropractic coverage, and thus did not commit an unfair labor practice in violation of Section 111.06(1)(f), WEPA.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issue the following

ORDER 1/

The instant complaint of unfair labor practices is dismissed in its entirety.

Signed this 7th day of February, 1994 at Racine, Wisconsin:

1/ Any party may file a petition for review with the Commission by following the procedures set forth in section 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or orders of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification in mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of new testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of an exceptional delay in receipt of a copy of any findings or order it may extend the time for another 20 days for filing a petition with the commission.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/
Daniel Nielsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Background Facts

The dispute concerns the meaning and application of a portion of a Settlement Agreement over three grievances arising, at least in large part, from a change in the Company's health insurance plan. Prior to 1990, the Company paid for chiropractic visits as office visits under it health plan, reimbursing 100% of the cost after a $100 deductible was satisfied, with no upper limit on payments other than the plan maximums. In the 1990 negotiations, the health plan was substantially modified. The parties eliminated the $100 deductible for office visits, and instead imposed an 20% co-payment on employees. They also negotiated an upper limit on chiropractic care. In the benefit booklet, this change was reflected as "Limited to $600 and 15 visits per person per calendar year."

Employee Wayne Kirst filed a grievance when he received only 80% payment for a visit to his chiropractor, asserting that he should have been fully reimbursed. This grievance was filed on the same day as a grievance by another employee, James Foerster, over the Company's refusal to pay for an office visit. These two grievance were bundled together with a dispute over retiree health benefits for the purpose of discussions between the Union and the Company.

Of the three grievances, the retiree health benefits issue was the most complex and potentially expensive. Most of the parties' attention was devoted to resolving that dispute. Proposals were exchanged back and forth between the Company's attorney and the Union's Business Agent. In July of 1991 the Company in essence proposed to trade the retiree health insurance for the dropping of Kirst and Foerster's grievances. In August, the Union's attorney sent a letter requesting clarification of the offer. In the portion of the letter addressing the Kirst grievance, the letter stated that "An essential term of any settlement of this grievance would be that chiropractic visits are paid at 100% and that the grievant is made whole for his out-of-pocket costs." In September, the Company's General Manager generated a responsive letter, explaining in part that chiropractic care was considered an office visit and that, under the new contract, office visits were subject to a 20% employee co-payment. Thus chiropractic care was subject to the co-payment as well as the newly negotiated caps on annual usage and costs.

No further discussions were had between the parties until December 16th, when the Union's attorney sent a proposed settlement agreement to the Company's attorney:

> 1. Grievance of Wayne Kirst, dated October 4, 1990.
>
> Chiropractic coverage will be paid up to $600.00 or 15 visits per person per calendar year, whichever occurs first. The employer will make whole all

employees improperly compensated for chiropractic visits.

2. Retiree Health Insurance

Employees who retire prior to age 57 during the term of the current agreement shall receive retiree health insurance in accordance with article 12 of the current agreement.

3. Grievance of James Foerster, dated October 4, 1990.

Office visits will be paid at 80% of the usual and customary charge with no deductible required. The employer agrees to make whole all employees whose office visits have not been reimbursed at this rate.

The Company's attorney executed the agreement in January of 1992, after conferring with his client. There were no direct discussions between the parties before the Settlement Agreement was signed.

The Company thereafter continued to pay only 80% of claims for chiropractic service. The instant dispute arose in May, with the Union asserting that the Settlement Agreement called for full payment of these claims up to the annual limits.

The Complainant's Position:

The Complainant takes the position that its interpretation of the settlement is easily more credible than that of the Respondent. The Union had consistently maintained throughout negotiations that chiropractic visits would have to be paid at 100% rather than being subject to the co-payment provisions of the medical plan. There was no communication between the parties prior to the signing of the settlement agreement that indicated a change in that position, and the terms of the settlement agreement do not indicate a retreat from that stance.

The Complainant notes that the Settlement Agreement calls for a make whole remedy for employees improperly paid chiropractic benefits. Yet the Company's position is that they were paying the benefits properly, and that the Settlement Agreement merely memorialized their existing practice. If this were the case, there would be no need for a make whole remedy. Presumably the parties meant something by this provision for a remedy, and its inclusion in the agreement clearly indicates that a change from existing practices was intended.

The Complainant further argues that the Respondent's interpretation of the agreement would render it identical in effect to the Company's settlement proposal in July of 1991. The Union did not sign that settlement agreement since it was unacceptable. It remained unacceptable to the Union in December of 1992 when the Settlement Agreement was reached and the Company had no

reason whatsoever to think otherwise. The December agreement was materially different than the July proposal in that it did not agree to simply withdrawing the Kirst grievance -- instead it provided 100% payment for chiropractic visits.

The Settlement Agreement made reference to the 80/20% co-payment in paragraph three, referring to the issue of office visits raised by the Foerster grievance. No such mention was made in paragraph one regarding the Kirst grievance over chiropractic coverage. The Union was obviously aware of the co-payment provision, and had it intended to apply the co-payment to chiropractic benefits, it would have said so, just as it did in settling the Foerster grievance.

The Company knew the settlement position of the Union and had no reason to believe that any change had been made in that position. If the Company was confused about the meaning of the Settlement Agreement, it had an obligation to inquire. The Company failed to inquire. Instead it signed the agreement, perhaps on the baseless assumption that the Union had for some reason withdrawn its demand for 100% payment. The Complainant cites the Restatement of Law, Contracts 2d for the proposition that a party who makes a mistake on a basic assumption underlying an agreement must bear the risk of that mistake if the party was aware that it had limited knowledge but treated that limited knowledge as sufficient for reaching agreement. Since the Company made an assumption about the Union's intent without any factual basis and without making any inquiry, it must bear the risk of its own mistake, and should be bound to the Settlement Agreement.

For all of the foregoing reasons, the Complainant asks that the Agreement be enforced, and that all affected employees be made whole.

The Respondent's Position:

The Respondent takes the position that when the negotiations are viewed in context, there can be no doubt that the Kirst grievance was settled in the Company's favor and that chiropractic care remains subject to a 20% employee co-payment. Thus the Complaint should be dismissed.

The Company was presented with a clear demand by the Union for first dollar coverage of chiropractic visits in Kobelt's August letter. The Company just as clearly rejected that demand in September. No further communications were had until Kobelt's draft Settlement Agreement was received in December. That draft made absolutely no mention of first dollar coverage for chiropractic, but did expressly accept the 80/20% co-payment system for office visits in reference to the Foerster grievance. Thus the Union knew when it drafted the Settlement Agreement that the Company regarded chiropractic treatments as office visits, said nothing in the Agreement to rebut the Company's position, and conceded in the Agreement that office visits were subject to the co-payment provisions. The Company reasonably viewed this as acceptance of its position on chiropractic care when it signed the Settlement Agreement. Any ambiguity in the Agreement on this point should be construed against the Union as the drafter.

The thrust of the specific negotiations over chiropractic benefits in the 1990 contract talks was that an upper limits should be placed on the annual use of this benefit. The Union knew or should have known that chiropractic treatment was paid as an office visit, and that the 20% employee co-payment would thus apply to these treatments in addition to newly bargained upper limits. This bargaining history was explained to the Union in O'Connell's September 1991 letter. For the Company to totally reverse its position between that letter and the signing of the Settlement Agreement would have made no sense, and the Union could not reasonably have understood the Company to have so radically changed its views.

For all of the foregoing reasons, the Company asks that the complaint be dismissed with prejudice, and the Complainant's prayer for a remedy be denied.

Discussion:

There is virtually no dispute over the facts underlying this case. It is undisputed in the record that prior to the 1990 negotiations, chiropractic care was paid as an office visit under the Company's medical plan and was fully paid after a $100 deductible was applied. The parties agree that the 1990 contract changed payment for office visits, eliminating the deductible but requiring a 20% payment for services by employees. They also agree that the negotiations also placed annual caps on chiropractic care. These caps were initially expressed as "$600 and 15 visits per person per year" but both parties acknowledge that this phrasing was inaccurate, in that the word "and" should have been "or". The parties further agree that the Kirst grievance was concerned with whether the 20% co-payment for office visits applied to chiropractic care, or if this care should instead have been fully paid up to the annual limits. Finally, they agree that the grievance was resolved on the following terms:

> Chiropractic coverage will be paid up to $600.00 or 15 visits per person per calendar year, whichever occurs first. The employer will make whole all employees improperly compensated for chiropractic visits.

What the parties completely disagree about is what this settlement means for the co-payment dispute. Each contends that the agreement settled the matter in its favor.

I have previously determined that the Settlement Agreement between these parties is a collective bargaining agreement. 2/ Violation of a collective bargaining agreement is an unfair labor practice under Section 111.06 of the Wisconsin Employment Peace Act. Where the Commission's Examiner declines to exercise discretionary deferral to arbitration and proceeds to interpret the agreement, he considers the language of the agreement and the context in which it was

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2/ Marigold Foods, Dec. No. 27536-A (Nielsen, 5/93).

bargained. 3/

3/ Bay Shipbuilding Corp., Dec. No. 19957-B (Shaw, 4/83) at page 12; Affirmed, Dec. No. 19957-C (WERC, 2/84) at page 6.

A. Ambiguity

It is well settled law that in interpreting labor agreements, clear language should be applied and ambiguous language must be interpreted.4/ Neither party here seriously contends that the language of the Settlement Agreement is clear or unambiguous with respect to the actual issue in the Kirst grievance. The grievance itself challenged the Company's right to apply a co-payment to chiropractic services after the 1990 negotiations. The settlement restates the upper limits on annual compensation for these services, and is utterly silent on the means by which payments are to be made before those limits are reached: "Chiropractic coverage will be paid up to $600.00 or 15 visits per person per calendar year, whichever occurs first." While the parties clearly agreed that "coverage will be paid", whether the basis of that coverage is 100% Company contribution or a 20% employee co-payment cannot be determined by simply reading the words employed by the parties. Thus the meaning must be discerned by applying the rules of interpretation to the Agreement.

B. Reading The Agreement As A Whole

The Union argues that the meaning of the Agreement should be gleaned by reading it in its entirety. Specifically, the Union points to the second sentence of the paragraph dealing with chiropractic coverage, which provides that the Company will make whole all improperly compensated employees, and argues that the inclusion of this language proves that the Company had agreed to change its policy on paying for chiropractic care. If, as the Company claims, the Union had withdrawn the Kirst grievance and acquiesced in the Company's method of administering the health plan, there would have been no need for an agreement on a make whole remedy. This is a valid argument, as far as it goes. Parties are presumed to have intended that the language in their agreements have meaning and effect. However, the Union's argument ignores the fact that Paragraph 3 of the Settlement Agreement, settling the Foerster grievance, includes similar remedial language:

> Office visits will be paid at 80% of the usual and customary charge with no deductible required. The employer agrees to make whole all employees whose office visits have not been reimbursed at this rate.

Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA 1984) at pages342-345 (hereinafter cited as "Elkouri").

The Foerster grievance concerned the Company's refusal to pay anything for a routine physical examination 5/ on the grounds that it was specifically excluded from the coverage for "office visits" under the health insurance portion of the contract. The record establishes that the Union withdrew the Foerster grievance as part of the overall Settlement Agreement. 6/ Since Paragraph 3 withdrew a grievance on the Company's terms, without saying so expressly and with remedial language included, I cannot attach any significance to the inclusion of remedial language in Paragraph 1. Indeed, the fact that Paragraph 3 withdrew the Foerster grievance using the device of restating an undisputed portion of the contract and a sentence about remedy, raises a reasonable question as to whether that same device might also have been used in Paragraph 1. Contrary to the Union's position, reading the Agreement as a whole indicates at best that it was drafted in terms that somewhat obscured its actual effect. 7/

C. Bargaining History / Interpretation Against Drafter

Each party argues that the bargaining history of this Agreement supports its interpretation, and for much the same reasons. Each argues that its position was stated unequivocally before the Settlement Agreement was executed, and that the terms of the Agreement do not indicate a change in its position. Each points to the failure of the other to inquire whether there had been a change in position as accepting the risk of any misunderstanding or ambiguity.

Each party made its position clear in the last communications to the other prior to the

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5/ There is some confusion in the record between the Foerster grievance, dealing with the Company's refusal to pay for a child's physical exam and the Dreher grievance, which challenged the Company's application of a deductible to a procedure for an employee's wife. In each case, the Company's position was that the service provided was not an "office visit" within the meaning of the contract.

6/ Testimony of David O'Connell, Transcript, page 53, folios 5-10. Kurt Kobelt, the Union's attorney, had no recollection of the negotiations over the Foerster grievance. Transcript, pages 16-17, foilios 25-4.

7/ Much the same can be said for the Complainant's argument that Paragraph 3 mentions the 80/20 co-payment, proving that the parties were aware of the issue and were able to express their agreement on the subject where there was agreement. The dispute in Foerster was not over full payment versus co-payment. It was over some payment versus no payment. The articulation of the co-payment policy in Paragraph 3 says nothing about the parties' ability to reach agreement on co-payments where they are in dispute, nor can the absence of a reference to a 20% employee co-payment in Paragraph 1 be interpreted as meaning there was agreement on full payment.

execution of the Settlement Agreement, and there were no intervening discussions about the matter. As noted, the issue in the Kirst grievance was whether chiropractic services were to be treated as office visits, subject to the 20% employee co-payment. The last communication on this subject prior to the Agreement was from O'Connell via Sapp, reiterating the Company's position that chiropractic treatments had always been paid as office visits under the contract, and that the introduction of a co-payment for office visits mandated a co-payment for chiropractic visits. The Settlement Agreement was Kobelt's response to this communication, and was silent about the co-payment issue. Given this sequence, I have concluded that the Union must bear the burden of the ambiguity in the Settlement Agreement. Kobelt's letter could reasonably have been viewed by the Company as a response to its position that the contract demanded a co-payment. Neither the text of the letter nor the terms of the Settlement Agreement expressly reject the Company's interpretation of the contract on this point. It was styled not as a counter-offer, but as a write-up of an agreement between the parties. Both Kobelt and Sapp knew at the time that the only terms the Company had expressed any willingness to settle on included dropping the chiropractic grievance. Whether Kobelt intended to resolve the Kirst grievance on the Company's terms, or actually meant to make a counter-offer, the document he drafted was at least susceptible to the former interpretation. As a rule of last resort in contract interpretation, an ambiguous provision is strictly interpreted against the party responsible for creating the ambiguity. In this case, there is no other principle of interpretation that resolves the dispute, and the application of this rule yields a result that appears to be consistent with the sequence of events. Thus I have concluded that the Settlement Agreement resolved the Kirst grievance on the Company's terms, and that the Union has failed to prove a violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act. The complaint has been dismissed in its entirety.

Signed this 7th day of February, 1994 at Racine, Wisconsin:

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/
Daniel Nielsen, Examiner