STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION,<br><br>Complainant,<br><br>vs.<br><br>CITY OF WHITEWATER,<br><br>Respondent. | Case 53<br>No. 53185 MP-3081<br>Decision No. 28972-A |

Appearances:

Mr. Gordon E. McQuillen, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, for Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, referred to below as the Association.

Mr. James R. Scott, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, for City of Whitewater, referred to below as the City.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 19, 1995, the Association filed a complaint of prohibited practices alleging that the City had violated Secs. 111.70(3)(a)1 and 5, Stats., by refusing to submit a grievance to arbitration. After informal attempts to resolve the matter and informal attempts to stipulate the facts proved unsuccessful, the Wisconsin Employment Relations Commission, on January 17, 1997, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07, Stats. Hearing on the matter was held on February 27, 1997, in Whitewater, Wisconsin. At that hearing, the parties were able to stipulate the facts and evidence necessary to pose their dispute. A transcript of the hearing was provided to the Commission on March 10, 1997, and a copy of the parties' stipulation beyond that transcribed at the hearing was provided to the Commission on February 28,

1997. The parties filed written briefs, the last of which was received by the Commission on May 2, 1997. In a letter dated July 21, 1997, I supplied the parties with a "Stipulation of Fact" which combined their written stipulation with the material added at the February 27, 1997 hearing, and asked the parties to verify its accuracy. Each party affirmed the accuracy of the stipulation by August 11, 1997.

## FINDINGS OF FACT

1. The Association and the City agreed that the following Stipulation of Fact could be taken as the evidentiary record upon which the complaint should be resolved:

### STIPULATION OF FACT

The Complainant, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (hereinafter referred to as WPPA/LEER) and the Respondent, the City of Whitewater (hereinafter referred to as "the City") are parties to the above-captioned prohibited practices action and, in lieu of an evidentiary hearing into this matter, hereby stipulate as follows:

1. At all times material to this action, WPPA/LEER was a labor organization within the meaning of section 111.70(1)(h), Stats.

2. At all times material to this action, WPPA/LEER was the sole and exclusive collective bargaining representative for a bargaining unit composed of all sworn law enforcement officers employed by the City of Whitewater, excluding all supervisory, managerial, confidential and executive employees.

3. At all times material herein, WPPA/LEER's principal representatives in this proceeding, their addresses and phone numbers were:

Robert Pechanach
Business Agent
WPPA/LEER
9730 West Bluemound Road
Wauwatosa, WI 53226
(414) 257-4000
Fax: (414) 774-7080

Attorney Gordon E. McQuillen
Cullen, Weston, Pines & Bach
20 North Carroll Street
Madison, WI 53703
(608) 251-0101
Fax: (608) 251-2883.

4. At all times material to this action, the City was an employer within the meaning of section 111.70(1)(j), Wis. Stats.

5. At all times material to this action, the City was represented by the following individuals:

Gary W. Boden
City Manager
312 W. Whitewater Street
Whitewater, WI 53190
(414) 473-0500
Fax: (414) 473-0509

James R. Scott, Attorney
Lindner & Marsack, S.C.
411 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 273-3910
Fax: (414) 273-0522

6. At all times material to this action, the WPPA/LEER and the City were parties to a collective bargaining agreement (Joint Exhibit 1) having as its term January 1, 1993 through December 31, 1995 (hereinafter referred to as the Agreement).

7. The Agreement contained, in relevant part, the following provision relating to health insurance coverage for the members of the bargaining unit described in Paragraph 2 above:

ARTICLE XIX - HEALTH AND WELFARE

Section 1. The City of Whitewater is presently covered under a comprehensive health care plan. The City will continue to pay the premiums for both the single and family plans including any increase any [sic] in premiums during the life of this contract.

8. The Agreement also contained, in relevant part, the following provision relating to Grievance Arbitration:

ARTICLE VI - GRIEVANCE ARBITRATION

The parties agree that grievances are to be resolved as soon as possible and in order to do so, establish this procedure:

Section 1. Definition. A grievance is defined as any dispute involving the meaning or interpretation of the terms and provisions of this Agreement. A grievance shall be processed within ten (10) calendar days of its occurrence or knowledge thereof. Failure to abide by such time limits, any extension thereof of the prescribed procedure set forth herein, shall cause the grievance to be barred.

Section 2. Procedure. All such grievances shall be processed as follows:

Step 1. If an employee has a grievance, the Association's representative and/or employee shall present such grievance in writing, specifying the contract provision alleged to have been violated by the City to the Lieutenant of Police who shall render his decision in writing within seven (7) calendar days after receiving the grievance.

Step 2. If the Lieutenant and employee cannot reach a mutually satisfactory decision, the grievance may be referred to the Chief of Police by the Association within seven (7) calendar days. The Chief of Police may confer with the aggrieved employee, Steward and the Association Representative before making his determination. His decision shall be in writing and submitted to the aggrieved employee within seven (7) calendar days from the Chief of Police's receipt of the grievance. This period of time may be extended upon mutual consent of both parties involved.

Step 3. If the parties are unable to resolve the grievance at Step 2, either party will have fifteen (15) days from the date of the receipt of the decision made in Step 2, or fifteen (15) days from the date on which the decision was due, to request by written notice to the other party, the matter to be advanced to arbitration. The party seeking arbitration shall request that the Wisconsin Employment Relations Commission submit a panel of five (5) potential arbitrators. The parties shall alternately strike panel members with the last remaining

panel member to serve as the arbitrator. The parties shall determine who strikes first by the flip of a coin.

The arbitrator shall have the authority to determine issues concerning the interpretation and application of all articles or sections of this Agreement. While he shall have no authority to change any part of this Agreement, he may make recommendations for such changes which, in his opinion, would add clarity or brevity or which might avoid future controversy. The determination of the arbitrator shall be binding upon both parties, but his recommendations shall not be.

Grievances not decided by the City within the prescribed time limits or any extension thereof, shall proceed automatically to the next step, except that it shall not include Step 3.

9. Effective January 1, 1994, the City changed the provider for health insurance benefits for the employees in the bargaining unit described in paragraph 2, above, from Wisconsin Physician's Service (WPS) to Employers Insurance of Wausau (hereinafter referred to as Wausau), and gave to each of the employees represented by the WPPA/LEER a document purporting to set forth a comparison between the two insurance carriers (Joint Exhibit 2).

10. On January 10, 1994, WPPA/LEER business agent, Robert Pechanach, hereinafter referred to as Pechanach, sent a letter to the City Manager, Gary Boden, hereinafter referred to as Boden, concerning changes in the health insurance carriers. A copy of that letter is attached hereto as Joint Exhibit 3.

11. On February 21, 1995, Wausau Insurance Companies notified City Police Sergeant Jerry A. Grant (hereinafter referred to as Sgt. Grant) and Brian W. Veale, D.C. (hereinafter referred to as Dr. Veale), that Wausau had determined that certain benefits paid to the spouse of Sgt. Grant had been paid in error and that Wausau was seeking reimbursement of overpayments of $1,048.00. A copy of the letter from Wausau Insurance Company to Grant has been identified as Joint Exhibit 4.

12. On March 24, 1995, Wausau again wrote to Dr. Veale (Joint Exhibit 5), reminding him of the overpayment due and threatening that if the overpayment were not reimbursed to Wausau the matter would be submitted to a collection agency.

13. On March 30, 1995, Sgt. Grant filed a grievance (Joint Exhibit 6), pursuant to Article VI of the Agreement, alleging that the refusal of Wausau to pay the disputed benefits for his spouse violated the Agreement.

14. On July 19, 1995, following completion of the preliminary steps of the grievance procedure, Boden responded in writing to Ray Trost, Steward for the WPPA/LEER local, denying the grievance (Joint Exhibit 7).

15. On July 31, 1995, Pechanach notified Boden by letter (Joint Exhibit 8) that the WPPA/LEER was appealing the matter to arbitration, consistent with the provisions of the Agreement.

16. Also on July 31, 1995, Pechanach wrote to the Wisconsin Employment Relations Commission (Joint Exhibit 9) requesting a panel of arbitrators, again consistent with the terms of Article VI of the Agreement.

17. On September 7, 1995, the City, by its counsel, James R. Scott, notified the WPPA/LEER by letter to Pechanach that the City was refusing to submit to the arbitration process set forth in the collective bargaining agreement, the dispute which formed the basis for Sergeant Grant's grievance. A copy of that letter is attached hereto as Joint Exhibit 10.

18. On or about September 18, 1995, the WPPA filed a complaint with the WERC alleging that the City had committed certain prohibited practices within the meaning of section 111.70(3)(a)5 and (3)(a)1, Wis. Stats. The City has not filed a formal answer to the complaint filed by the WPPA but the parties hereto acknowledge that the City denies that it has violated section 111.70(3)(a)5 and (3)(a)1, Wis. Stats.

19. By letter dated February 21, 1995, (Joint Exhibit 4) Wausau Insurance Company determined that the treatments provided by Dr. Veale to Sandra J. Grant, spouse of Jerry A. Grant, were not medically necessary.

20. Both the WPS Plan (Joint Exhibits 11 and 12) and the Wausau Insurance Company Plan, (Joint Exhibit 13) reserve to the insurer the right to make a determination as to whether or not the treatment was medically necessary and to decline to pay for those

treatments or services which the insurer deemed not to be medically necessary.

21. Wausau Insurance Company maintained an internal administrative appeal procedure for challenging its determinations that a particular type of treatment was not medically necessary, as set forth at pages 2 and 3 in Joint Exhibit 13.

22. Sergeant Grant filed a complaint with the Office of the Commissioner of Insurance of the State of Wisconsin concerning the denial of benefits by Wausau Insurance Company. Correspondence disposing of that complaint is attached hereto as Joint Exhibit 14.

23. The City of Whitewater had no input in the decision as to whether the payments at issue would be made by Wausau Insurance Company.

2. The January 10, 1994 letter referred to in Paragraph 10 of the Stipulation of Fact states:

I'm writing in regards to the City's change in Health Insurance Carriers.

On December 16, 1993, I met with you at the Whitewater Police Department, in the presence of Sergeant Grant. At that time you assured me that the change in carries (sic) would not effect (sic) coverage to employees. The coverage would be the same as under the former plan and the employees would suffer no additional costs.

I have been made aware of the fact that the Teamsters and AFSCME unions have filed grievances regarding the change in insurance carriers.

At this time, I am reserving the right to file a grievance based on your written assurance that there is no change in coverage or cost to employees. Should I receive no written assurance, I have no choice but to file a grievance.

. . .

3. The February 21, 1995 letter referred to in Paragraph 11 of the Stipulation of Fact noted that the $1,048.00 in charges "are determined to be not medically necessary."

4. The grievance form referred to in Paragraph 13 of the Stipulation of Fact is entitled "Grievance No. 95-181," and states the "BASIS FOR GRIEVANCE" thus: "Failure to provide health sinurance (sic) coverage as agreed to be (sic) the labor agreement." The grievance form states the "REMEDY FOR GRIEVANCE" thus: "Payment of the medical services refused, if not paid by the contracted insurance carrier, to be paid by the City of Whitewater as assured in December 1993." The City's response to the grievance, noted in Paragraph 14 of the Stipulation of Fact states:

> . . . (T)his letter is being written to notify the WPPA of the City's denial of Sgt. Grant's grievance. The City finds that the contract benefits and the administration of the current Wausau health insurance plan are consistent with benefits previously established in the Wisconsin Physician's Service Plan. This assertion is based upon input received from the State Office of the Commissioner of Insurance.

The State Office of the Commissioner of Insurance is referred to below as the OCI.

5. The September 7, 1995 letter referred to in Paragraph 17 of the Stipulation of Fact states:

> On behalf of the City of Whitewater, we decline to participate in the arbitration of this matter for the reason that the grievance does not allege nor constitute a violation of the contract and is, therefore, not arbitrable.
>
> First of all, we note that this is not a coverage issue. Assuming (without conceding) that the City promised that all benefits payable under the respective plans were the same, this grievance does not raise a differentiation in coverage levels. Both plans reserved to the insurer the right to make the determination that the care provided is, in fact, "medically necessary". That language is, in fact, contained in all health insurance plans for obvious reasons. That determination is reserved to the insurance company. (*See* Policy "(M) Services which We determine are not medically necessary ...".) As noted in Wausau's letter to Mr. Grant of April 4, 1995, the previous policy

contained the same language.

> The City of Whitewater does not "insure" its employees nor is it contractually obligated to do so. We provide a plan and that plan contains various terms and conditions. If the employee has a particular benefit or claim denied, his dispute lies with the insurer, not his employer. The employee has a variety of remedies available to him but one is not a grievance against his employer.
>
> For your information, I have enclosed a copy of the recent decision of the U.S. Court of Appeals for the Seventh Circuit in IAM v. Waukesha Engine, 17 F.3d 196 (1994). While the case addresses the same issue in the private sector, the result and rationale is equally applicable here.
>
> We believe the decision is substantial authority supporting our position and accordingly the City will not agree to arbitrate this matter.

6. The "(c)orrespondence disposing" of Grant's complaint, referred to in Paragraph 22 of the Stipulation of Fact includes a letter dated March 7, 1995, from Grant to the OCI which states:

. . .

> Employers Insurance of Wausau became the contracted health insurance provider for employees of the City of Whitewater as of January 01, 1994. There was an informational meeting held for the employees shortly before the coverage was to begin. During this meeting three believed to be executives from the Employers Insurance of Wausuau (sic) informed the employees of the City of Whitewater that there would be no change in health insurance coverage. A copy of the insurance policy was not available at that time. The city employees were told that a copy of the policy would be in front of the City Counceil (sic) at their next meeting, which is when the City was to approve the contract for the insurance coverage. I believe this was in the month of December 1993. A copy of the policy did not become available until about June 1994 . . .

That correspondence also includes a response from Wausau to Grant dated April 4, 1995, which

states:

. . .

> During informal meetings with the employees of the City of Whitewater, representatives from our company advised we would attempt to match up as closely as possible with the previous contractual language through WPS.
>
> Your plan with WPS also had a medically necessary provision . . . Therefore, there is no contractual issue involved with your claims, as both plans allow those services which are medically necessary . . .

That correspondence also includes a letter from Grant to Wausau dated April 28, 1995, which states:

> . . . You declare the previous, W.P.S. insurance carrier had the provision medically necessary wording the same as you do in the contract. W.P.S. paid for the services you are refusing. Because you interpret the language different, this makes it a change in coverage.

That correspondence also includes a letter dated May 22, 1995, from Wausau to the OCI which states:

> Information from our regional office is that at least three or four meetings were held with various groups of employees as well as with the policyholder. In those meetings, we indicated deductibles and copays would be matched to the prior carriers. As far as matching similar language throughout the plan, we indicated we would attempt to match as closely as possible our plan provisions to the prior carriers (sic). The prior carrier does have similar language to our plan. If the primary carrier chose to interpret their plan differently or poorly administer their plan, this should not be perceived as a change in coverage . . .

That correspondence also includes a letter from the OCI to Grant, dated June 8, 1995, which states:

> . . . Our impression is that the replacement policy language is substantially the same as that in the prior plan. However, the replacement insurer apparently has a different standard or philosophy regarding medical necessity and may use different statistical data to determine usual and customary charges.
>
> From the information we have, we do not question the insurer's position . . .

## CONCLUSIONS OF LAW

1. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. Grant is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

3. The City is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. The City's refusal to arbitrate Grievance No. 95-181 violates Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1, Stats.

## ORDER 1/

To remedy its violation of Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1 Stats., the City, its officers and agents, shall immediately:

1. Cease and desist from refusing to submit Grievance No. 95-181 to grievance arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

   a. Participate in the arbitration of Grievance No. 95-181.

   b. Notify the Wisconsin Employment Relations Commission, in writing, within twenty days following the date of this Order, as to what steps the County has taken to comply with this Order.

Dated at Madison, Wisconsin, this 22nd day of August, 1997.

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1/ See footnote on page 12.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 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 order 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 is 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 additional 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 exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

**This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).**

CITY OF WHITEWATER (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

## THE PARTIES' POSITIONS

### The Association's Initial Brief

After a review of the evidence, the Association notes that the City has not contended that Grievance No. 95-181 is untimely or suffers from any procedural defects. Rather, the City contends that it does not pose a "coverage" issue governed by the contract. Stressing that it does not challenge the assertion that a "medically necessary" determination is, in the first instance, reserved to the insurer, the Association argues that the grievance does pose a coverage issue. Specifically, the grievance challenges whether the City changed the "level of benefits" when it changed insurers.

The issue posed is not whether Wausau can determine whether a given treatment procedure is "medically necessary." Rather, the issue is whether "a successor insurer can change the 'medically necessary' determination made by its predecessor insurer . . . solely because the City chose to change the insurance carrier."

The labor agreement does not expressly permit the City to change carriers, nor does it expressly preclude such a change. Against this background, it is unpersuasive to deny the Association the ability to challenge a change in the level of benefits. Since Grant's wife had the treatment denied by Wausau granted by its predecessor, it is apparent that something more than a "medically necessary" determination is posed here. It is, according to the Association, apparent that coverage changed in the City's move from WPS to Wausau. Who is liable for this change in coverage is, the Association asserts, an arbitrable issue.

The Association concludes that the City's refusal to arbitrate the grievance plainly violates Sec. 111.70(3)(a)5, Stats., and derivatively Sec. 111.70(3)(a)1, Stats. To remedy this violation, the Association requests that the Commission determine the violation and order the City "to submit the dispute to arbitration" together with any other "remedial measures" the Commission deems appropriate.

### The City's Reply Brief

After a review of the evidence, the City argues that Article VI, Section 1 does not define a

"grievance" in a broad enough fashion to include disputes over "insurance eligibility issues." Under Article XIX, Section 1, the City has "obligated itself to provide a health insurance benefit to employees." Under the "benefit" provided to employees, the determination whether a particular procedure is "medically necessary" is the insurer's unilateral right. To conclude otherwise makes the City "the guarantor of benefits." This conclusion violates the agreement and would lead to absurd results. The "medical necessity" of "(b)reast implants, lyposuction and nose jobs are far afield from the traditional areas of arbitral expertise."

The Association's assertion that the denial of a claim is a denial of coverage has, at most, "surface appeal." That appeal fades, however, on closer inspection. The City has never failed to provide Grant the health insurance benefit the Association and the City agreed to in Article XIX. That Wausau has denied a form of treatment is a definition of the health insurance benefit, not a violation of the labor agreement.

Beyond this, the City concludes that IAM v. Waukesha Engine Div. of Dresser Industries, 17 F.3d 196, 145 LRRM 2521 (7th Cir. 1996) "is both factually and legally directly on point." The only distinction between that case and this complaint is that "Whitewater changed carriers," and that distinction "is without consequence." In that case, as in this one, a denial of a claim cannot be considered the equivalent of a denial of coverage.

The City concludes that the "prohibited practice complaint should be dismissed."

The Association's Reply Brief

The Association challenges the City's assertion that the grievance questions "insurance eligibility" since that "issue was decided when the City's predecessor insurance carrier paid for services for the grievant." This leaves the issue whether the City could change the level of benefits by changing the identity of the insurance carrier. That issue is arbitrable.

DISCUSSION

The complaint alleges the City violated Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1, Stats., by refusing to arbitrate Grievance No. 95-181. Sec. 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties . . . including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . ."

The standards governing the enforcement of an agreement to arbitrate date from the Steelworkers Trilogy: United Steelworkers v. American Mfg. Co., 363 US 564, 46 LRRM 2414 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574, 46 LRRM 2416

(1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593, 46 LRRM 2423 (1960). The Wisconsin Supreme Court incorporated, from the Steelworkers Trilogy, the teaching of the limited function served by a court or an administrative body in addressing arbitrability issues. Dehnart v. Waukesha Brewing Co., Inc., 17 Wis.2d 44 (1962). The Court stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. Jt. School Dist. No. 10 v. Jefferson Ed. Asso., 78 Wis.2d 94, 111 (1977).

The Jefferson Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. Ibid., at 113.

The first element of the Jefferson analysis focuses on the arbitration clause. Section 1 of Article VI defines "grievance" as "any dispute involving the meaning or interpretation of the terms and provisions of this agreement." The parties dispute whether Grievance No. 95-181 questions any "term" or "provision" of the labor agreement. More specifically, the City contends the grievance fails to question insurance coverage under Article XIX because it questions the eligibility of a specific treatment for reimbursement under the City's contract with Wausau. That dispute is not, according to the City, arbitrable, since a party can be compelled to arbitrate "only those issues the parties have agreed by contract to arbitrate." AT & T Technologies, Inc. v. Communications Workers of America, 475 US 643, 121 LRRM 3329, 3331 (1986). Wausau's unilateral right to determine "medical necessity" under its insurance agreement with the City is not arbitrable under the labor agreement between it and the Association.

The parties' dispute concerning the first element of the Jefferson analysis turns on a tension between the first and second sentences of Section 1 of Article XIX. During the term of the 1993-95 labor agreement, the City changed insurance carriers from WPS to Wausau. The Association contends that the "presently covered under a comprehensive health care plan" reference within the first sentence precludes an alteration in coverage due to a change of carriers. The City counters that the second sentence obligates the City to pay a premium, not to provide any specific benefit other than those established by its contract with its chosen insurance company. Since the contracts between the City and WPS and between the City and Wausau provide the insurer the authority to determine the "medical necessity" of a treatment, there has been no coverage change.

As preface to addressing this dispute, it is necessary to determine the scope of the dispute. The grievance does not challenge the City's authority to change carriers as shown in Pechanach's

letter to Boden of January 10, 1994. Nor can the grievance be read to put the medical component of the "medical necessity" determination underlying the treatment of Grant's spouse before an arbitrator. The narrow issue is whether a specific treatment for Grant's spouse, having been approved by WPS, could be denied by Wausau without violating Section 1 of Article XIX.

On the stipulation of facts posed here, the second sentence obligates the City to do no more than pay a premium for single and family health insurance coverage. Standing alone, it does not necessarily pose an interpretive issue. The sentence does not, however, stand alone. The terms of the first sentence are arguably less than clear and unambiguous in themselves and in their relationship to the second sentence. The first sentence can plausibly be read, as the City asserts, to do no more than note the existence of a health insurance plan for which the City, in the second sentence, agrees to pay the premiums. However, it can also plausibly be read, as the Association asserts, to note the existence of "a comprehensive health care plan" which presumes the existence of a specific level of benefits. This view cannot be summarily dismissed. Boden's letter of July 19, 1995, asserts the Wausau plan "benefits and administration . . . are consistent with benefits previously established in the (WPS) Plan." If the level of benefits provided by the insurers must, under Section 1 of Article XIX, be consistent, it is less than self-evident how a treatment regimen approved by WPS can be denied by Wausau without raising an issue concerning a denial of coverage. This poses a dispute regarding the interpretation of Article XIX, and thus meets the first element of the Jefferson analysis.

Neither party asserts the agreement contains a provision specifically excluding arbitration of an issue of insurance coverage. Thus, the second element of the Jefferson analysis has been met and Grievance No. 95-181 must be considered substantively arbitrable.

Before closing, it is necessary to tie this conclusion more tightly to the parties' arguments. The City's citation of Dresser Industries is not inappropriate. Dresser Industries is, however, persuasive authority. More significantly, its persuasive force is undercut by the stipulated facts underlying the complaint. The Association plausibly contends that Wausau has denied a medical treatment approved by WPS. While this can be characterized as a function of the "medical necessity" determination, it can also be characterized as a denial of coverage. Doubt on this point poses a factual issue and an interpretive issue regarding the scope of Article XIX. This precludes concluding with "positive assurance" that Article VI, Section 1 cannot be read to cover Grievance No. 95-181.

The Dresser Industries court distinguished its conclusion from Local 232, Allied Industrial Workers v. Briggs & Stratton Corp., 837 F.2d 782, 127 LRRM 2451 (7th Cir. 1988). In Briggs & Stratton, the court determined a change affecting retired non-represented employes could be considered a change in the terms of a retirement plan also covering represented employes. This change could, the court reasoned, call into question a contract provision which stated that "the existing Retirement Plan as amended by this agreement will be maintained during the term of this agreement" (127 LRRM at 2452). The arguable impact on Article XIX, Section 1 of the change in

carriers on a treatment regimen paid by one insurer but denied by its successor makes the complaint as analogous to Briggs & Stratton as to Dresser Industries.

The City's admonition that labor arbitrators are dubiously equipped to venture into an insurer's determination of "medical necessity" has persuasive force. The issue raised by Grievance No. 95-181 does not, however, focus on the medical basis of Wausau's "medical necessity" determination. Rather, the focus is on Section 1 of Article XIX. If the parties intended that section to set a level of benefits, and if WPS payment for the claim Grant made on Wausau can be considered within that level of benefits, then Wausau's denial of the treatment could be considered a violation of Article XIX. The correspondence surrounding Grant's OCI claim may indicate the possibility of evidence of bargaining history which conceivably could assist in the determination of the parties' intent regarding Article XIX if the grievance arbitrator finds ambiguity in the governing language. This type of inquiry, as opposed to the medical basis of a "medical necessity" claim, is grist for the mill of labor arbitration.

Nothing stated above should be read to indicate how Article XIX should be applied to the grievance or to establish any fact relevant to that application. That the parties assert plausible views of the labor agreement says nothing about the determination of which of those views is more persuasive. The issue posed here is whether that determination should be made by an arbitrator. Under Jefferson, it should.

Dated at Madison, Wisconsin, this 22nd day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner