

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, AFL-CIO, LOCAL 546B, Complainant,

vs.

CLARK COUNTY, Respondent.

Case 110
No. 56435
MP-3423

Decision No. 29480-A

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of AFSCME, AFL-CIO, Local 546-B.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Clark County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AFSCME, AFL-CIO, Local 546-B filed a complaint with the Wisconsin Employment Relations Commission on April 17, 1998, alleging that Clark County had committed prohibited practices in violation of Sec. 111.70(3)(a)5, Stats. On October 27, 1998, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on December 17, 1998, in Neillsville, Wisconsin. The parties filed briefs and reply briefs, the last of which were exchanged on February 26, 1999. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

No. 29480-A

FINDINGS OF FACT

1. AFSCME, AFL-CIO, Local 546-B, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and at all times material herein was the exclusive collective bargaining representative of all regular full-time and regular part-time, non-professional employees of the County, excluding sworn law enforcement, blue collar highway, social service, health care center, professional, managerial, confidential and supervisory employees, as well as the elected officials. The Union's principal offices are located at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717.

2. Clark County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principal offices at 517 Court Street, Neillsville, Wisconsin 54456-0111.

3. At all times material herein, the Union and the County have been parties to a collective bargaining agreement. The 1996-97 collective bargaining agreement contained, in pertinent part, the following provisions:

ARTICLE III – GRIEVANCE PROCEDURE

3.1 A grievance is defined to be any matter involving an alleged violation of this Agreement by the County as a result of which an aggrieved employee(s) maintains that their rights or privileges have been violated by reason of the County's interpretation or application of the provisions of this Agreement.

. . .

3.3 The County and the Union agree to the following system of presenting and adjusting grievances which must be presented or processed in accord with the following steps, time limits and conditions:

. . .

Step 4: If the grievance is not settled in the preceding step, the Union may appeal the grievance to arbitration by giving written notice of its desire to arbitrate to the County within the ten (10) working days after the date of the County's final answer in the above step. If the grievance is appealed to arbitration, representatives of the County and the Union shall meet to select an arbitrator. If the parties are unable to agree on an arbitrator within ten (10) working days after the Union has served its written notice upon the County, the

parties shall request the Wisconsin Employment Relations Commission to submit a list of seven (7) arbitrators. The parties shall choose the arbitrator by alternately striking from the list. The right of the first strike shall be determined by lot.

The arbitrator shall be notified of his/her selection by a letter from the County or the Union requesting that he/she set a time and place for the hearing, subject to availability of the County and the Union Representatives, and the letter shall specify the issue(s) to the arbitrator. The arbitrator shall have no right to amend, modify, nullify, ignore, or add to the provisions of this Agreement. He/she shall consider and decide only the particular issue(s) presented to him/her in writing by the County and the Union, and his/her decision in writing shall be based solely upon his/her interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented. If the matter sought to be arbitrated does not involve an interpretation of the terms or provisions of this Agreement, the arbitrator shall so rule in his/her award. The award of the arbitrator shall be final and binding on the County, Union and the employee or employees involved.

. . .

ARTICLE XIII – INSURANCE

13.1 Employees covered by the Agreement shall be covered by the group hospital and surgical plan. The County agrees to pay one hundred percent (100%) of the cost of the single premium and eighty-five percent (85%) of the family premium. Employees electing to participate in the HMO Marshfield Plan shall have the option to do so with the employer contributing the same dollar amount to the plan as in the group insurance and the employee bearing the additional cost of the respective premiums. For part-time employees first hired after the date of ratification of the 1990-91 contract, the County's contribution toward health insurance shall be prorated and said employees must work at least twenty (20) hours per week to be eligible for participation in the health insurance program.

The County will continue to pay one hundred percent (100%) of the single and family insurance premium for Forestry Department employees hired prior to January 1, 1983. The employer may, from time to time, change the insurance carrier and/or self-fund its health care programs if it elects to do so provided the level of benefits is equivalent to the current level of coverage. Any unpaid benefits at the time of a carrier change (i.e. from self-funding to a carrier) will be the responsibility of the County.

4. The County has self-funded its health insurance plan since 1986, and has contracted with a third-party administrator to administer and implement its health insurance plan. On January 1, 1997, the County changed its third party administrator from Blue Cross/Blue Shield United of Wisconsin to Claim Management Services.

5. In 1995, a County social worker, who is in another bargaining unit represented by AFSCME, filed a grievance alleging the County violated the contract language set out above because the third party administrator treated his daughter's visit to the emergency room as not a medical emergency and would only pay a resulting sum after the deductible and co-payment required of the insured. The insured filed a grievance which was heard by Arbitrator David E. Shaw. On May 21, 1997, the arbitrator held the grievance was not arbitrable on the grounds that there was no agreement that the determination on individual claims was subject to challenge under the parties' grievance procedure. Arbitrator Shaw's award was appealed to the Circuit Court which confirmed Arbitrator Shaw's award on December 22, 1997.

6. On January 30, 1998, a grievance was filed by Renee Drescher, a member of the Union's bargaining unit who asserted that certain tests that had been paid by Blue Cross/Blue Shield United of Wisconsin were not paid by Claims Management Services and alleged that "Management is not providing same benefits as past coverage (Blue Cross/Shield)." The grievance was processed through the grievance procedure and denied. On March 4, 1998, the Union gave the County notice of its intent to arbitrate the grievance. The County, by a letter dated April 6, 1998, stated it did not agree that the grievance should be advanced to arbitration asserting that the rationale by Arbitrator Shaw in the prior arbitration applied in Drescher's case.

7. The County continues to assert that the grievance is not arbitrable and precluded by Arbitrator Shaw's award and therefore it refuses to proceed to arbitration on the Drescher grievance.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The County's refusal to arbitrate the Drescher grievance constitutes a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that Clark County, its officers and agents, shall immediately:

1. Cease and desist from refusing to arbitrate the Drescher grievance.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Immediately proceed to arbitration on the Drescher grievance.

(b) Post in conspicuous places in its offices where notices to employees are customarily posted copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by an official of the County and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 11th day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL proceed to arbitration with AFSCME, AFL-CIO, Local 546B on the January 30, 1998 grievance filed by Renee Drescher.

Clark County

Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

CLARK COUNTY

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER**

In its complaint, the Union alleged that the County violated Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate the Drescher grievance. The County answered the complaint denying it committed any prohibited practice and asserted that Arbitrator Shaw's decision precluded relitigation of the same issue.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the grievance before Arbitrator Shaw involved a different bargaining unit, a different contract, different facts and a different type of contract challenge. It submits the issue in the prior grievance was whether the insurance plan provided coverage for a claim and there was no assertion that this benefit had been provided by another carrier or third party administrator. It submits that the instant case involves the refusal of the third party administrator to provide the same level of coverage as the previous administrator had. It asserts that the grievance alleges that the new third party administrator reduced the benefit level and therefore the level of benefits is not "equivalent." It notes that the County effectively challenged the arbitrability question in arbitration before Arbitrator Shaw and questions why it will not do so before an arbitrator in the instant case. It concludes that for these reasons the County's reliance on the Shaw award is flawed and should be dismissed.

The Union argues that there is an extremely long line of cases which hold that where the parties voluntarily agreed to the arbitration process, that is the preferred method to resolve union-management disputes. In support of its position, the Union cites the CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98), a decision regarding arbitrability of a contractual health insurance dispute wherein the Commission relied on the standard for arbitrability articulated by the Wisconsin Supreme Court. It submits that the grievance is arbitrable and in the case relied on by the County, the arbitrator decided the question of arbitrability and the Commission should direct the County to submit the instant grievance to that forum.

County's Position

The County contends that it committed no prohibited practice because the doctrines of issue preclusion and claim preclusion prevent relitigation of the same issue. It asserts that the resolution of the Drescher grievance is controlled by the Shaw arbitration award.

As to issue preclusion, the County argues that Arbitrator Shaw held that the third-party administrator's determination on individual claims is not subject to challenge under the grievance procedure. In the prior case, the challenge was to the definition of "emergency medical care" and the instant case involves the definition of "reasonable and customary charges" and the grievants are disputing the third-party administrator's determinations, thus the issues are the same. It claims that the doctrine of issue preclusion bars relitigation of the same issue that was decided in a prior action. It notes that issue preclusion, unlike claim preclusion, does not require an identity of parties. The County observes that the doctrines of claim and issue preclusion provide a means of relieving the parties of the cost and vexation of multiple claims, conserving judicial resources, preventing inconsistent decisions and encouraging reliance on adjudication.

The County takes the position that in this case the parties are one and the same, although the bargaining units are different, the Union representative is the same and the contract language is identical. It maintains that Arbitrator Shaw's award was appealed by the Union to the Circuit Court and could have been appealed to the Court of Appeals but was not. It alleges that there are no changed circumstances, the contract language is the same and no new changes were negotiated in the contract between grievances. It insists there are no equitable or public issues which negate a finding of issue preclusion.

The County, citing ELKOURI AND ELKOURI, HOW ARBITRATION WORKS (5TH ED. 1997) states that the theories of issue preclusion and claim preclusion apply to arbitration in that an award interpreting a collective bargaining agreement becomes a binding part of the agreement and will usually be applied by arbitrators thereafter. It concludes that legal and arbitration case law supports the County's position that the instant complaint must fail as the doctrine of issue preclusion precludes the relitigation of the issue raised by the Drescher grievance.

The County contends that the doctrine of claim preclusion bars relitigation of the instant dispute. It submits that three elements are necessary to apply claim preclusion: the same parties, the same cause of action and a final judgment on the merits and in arbitration arbitrators follow a prior arbitrator's decision unless they find that arbitrator was erroneous in fact or the award is unpalatable or clearly wrong. The County maintains the parties are virtually identical, the factual situation presented is the same, the issue is the same and the same contractual provision is at issue. It suggests that the prior award by Arbitrator Shaw should be given preclusive effect.

In conclusion, the County argues that the Union failed to prove that the County unlawfully failed to process the Drescher grievance. It insists there has been no violation of the contract and the dispute concerns the third-party administrator's interpretation of the Plan Document and Arbitrator Shaw's May 21, 1997 award has preclusive effect with respect to the Drescher grievance as the issue, contract language and the parties are the same. It claims that as there is no legal or contractual basis for arbitrating the grievance, the complaint should be dismissed in its entirety.

Union's Reply

The Union replies to two points raised by the County. It notes that although the Personnel Director had no role in the decision of the third-party administrator, he testified that the County could direct the third-party administrator to pay any rejected claim and has done so in the past as a result of a grievance. The Union contends that the County's statement in its brief at page 12 that "In both instances, the charge was applied towards the grievant's deductible" is not supported by any evidence in the record, and besides, it is not true.

County's Reply

The County contends that the facts and circumstances as well as the contractual challenges raised in the instant case and that before Arbitrator Shaw are identical and his decision is therefore controlling. The County disagrees with the Union's argument that Arbitrator Shaw relied exclusively on the fact that the health insurance plan book was not included in the contract and it was not specifically referenced. It points out that Arbitrator Shaw relied on the labor agreement, past practice and current case law. It asserts that Arbitrator Shaw concluded that the County is not in a contractual position to guarantee that all claims will be paid to the satisfaction of the individual claimant.

The County distinguishes the CITY OF WHITEWATER, SUPRA, relied on by the Union because that case is factually distinct from the instant case. It insists that in WHITEWATER there was a denial of coverage triggering the loss of coverage issue governed by the contract whereas here, there is no loss of coverage, but a determination of "usual and customary" fees. The County also claims the issues are different. In WHITEWATER, the issue was whether a treatment approved by WPS could be denied by Wausau without violating the agreement, whereas here the issue is who can make the "usual and customary" determinations. It insists that no coverage has been denied to the claimant.

In WHITEWATER, the County insists the grievance raised an issue on its face regarding the scope of health insurance benefits, whereas in the instant case, the issue is denial of a claim based on what is "usual and customary." It argues that no construction of the arbitration clause covers the grievance "on its face." The County claims that there is no contractual violation and it has no duty to proceed to arbitration. The County relies on INTERNATIONAL ASS'N OF MACHINISTS AND AEROSPACE WORKERS, DIST. NO. 10 V. DRESSER INDUSTRIES, INC., 17 F.3D 196 (7TH CIR. 1994) where the union sought to arbitrate a grievance concerning "medical necessity" of coverage. It notes the Court rejected the union's argument concluding the collective bargaining agreement did not provide that determinations of medical necessity would be subject to arbitration. It submits that the collective bargaining agreement requires it to maintain the level of benefits equivalent to the current level of coverage but nothing reveals that the parties intended that disputes regarding usual and customary charges would be subject to arbitration. It submits there is no authority for an arbitrator to assume the role of the third

party administrator in situations where coverage is provided. It concludes that the parties did not intend the arbitrator to determine “medical necessity” or “usual and customary charges” and it requests that the complaint be dismissed in its entirety.

DISCUSSION

In determining whether a grievance is substantively arbitrable, the Commission’s limited functions are to determine: (1) if there is a construction of the arbitration clause that would cover the grievance on its face; and (2) if another provision specifically excludes it. *JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO.*, 78 Wis.2d 94 (1977); *KIMBERLY AREA SCHOOL DIST. V. ZDANOVEC*, 222 Wis.2d 27 (1998); *CITY OF WHITEWATER*, DEC. NO. 28972-B (WERC, 4/98). In *JEFFERSON*, SUPRA, the Court stated 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 is arbitrable. A review of Article III, Section 3.1 defines a grievance broadly and the arbitrator is given authority under Section 3.3 to determine the meaning and application of the terms of the agreement. This is known as a “broad” arbitration provision. The grievance alleges a violation of Article XIII and states: “Management is not providing same benefits as past coverage (Blue Cross/Shield)” (Exhibit 2). The grievance further states in the request for relief that “County needs to provide equivalent benefits to what Blue Cross/Shield provided regardless of reasoning Claims Management provides.” Article XIII provides, in part, as follows:

The employer may, from time to time, change the insurance carrier and/or self-fund its health care programs if it elects to do so provided the level of benefits is equivalent to the current level of coverage.

On its face, the grievance raises an issue whether the County is currently providing the level of benefits equivalent to the level of coverage provided prior to the change in third party administrators. The broad arbitration clause covers the grievance on its face. There is no contractual provision that specifically excludes it. Under *JEFFERSON*, SUPRA, the grievance is substantively arbitrable and it is up to the arbitrator to decide whether the level of benefits is equivalent.

The County’s arguments are more appropriately for the arbitrator. The issue is not one of interpreting coverage, i.e. it is not one of determining an individual’s claim but rather whether there has been a change in the level of benefits equivalent to the current coverage. The County’s argument attempts to limit the grievance to a third party determination of an individual’s claim. The County’s reliance on Arbitrator Shaw’s award for issue and claim preclusion is misplaced in this proceeding. The issue before Arbitrator Shaw was whether there was a qualifying event that entitled the grievant to a benefit, i.e. whether the grievant’s daughter’s trip to the emergency room qualified as “emergency medical care.” In the instant

case, the issue is whether the denial of a benefit violated the provision requiring benefits be equivalent and not to the determination of whether the claim was usual and customary. As Arbitrator Shaw noted in his decision at page 19:

It also must be noted that the instant case does not involve the wholesale denial of a benefit that employees once enjoyed under the plan. While the Union asserts that because the plan is self-funded, such could occur if the County prevails on its arbitrability argument, the Arbitrator would point out that the parties' Agreement does require the County to maintain the level of benefits "equivalent to the current level of coverage" and that such action would be the equivalent of eliminating or decreasing coverage and would be subject to challenge through the Agreement's grievance procedure."

In the instant case there may have been a change in the level of benefits which is not equivalent to the current level of benefits. The County suggests that the grievant's clinic was a little too "pricy" and the third party administrator decided it was above the usual and customary rate. The record fails to show that the clinic's rates changed from Blue Cross/Blue Shield as administrator to Claim Management Services. Had the evidence shown there had been a large increase in the clinic's rates, the County's argument would be stronger, but where one administrator pays in full and the other does not, an issue of equivalent coverage is raised.

Although the instant case does not involve the wholesale denial of a benefit, as the County seems to argue must occur, the grievance alleges a decrease in the current level of coverage and this is sufficient to challenge whether the benefits are equivalent through the grievance procedure.

Thus, the instant dispute does involve a dispute as to the interpretation or application of the provisions of the agreement and the grievance is substantially arbitrable. The standard remedy has been ordered. Although the Union asked for interest, the relief provides for no monetary award on which interest is applicable. Whether or not the grievant is successful in her grievance is left to the arbitrator and whatever remedy may be applicable. Thus, it is inappropriate to direct any interest in this matter and none is.

Dated at Madison, Wisconsin, this 11th day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner