

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 BROWN COUNTY (SHERIFF'S DEPARTMENT) : Case 460  
 : No. 45676  
 and : MA-6699  
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 BROWN COUNTY SHERIFF'S DEPARTMENT :  
 NON-SUPERVISORY EMPLOYEES ASSOCIATION :  
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Appearances:

Mr. Frederick J. Mohr, Esq., 414 E. Walnut Street, Suite 261, P.O. Box 1015, Green Bay, Wisconsin 54305, on behalf of the Association.  
Mr. John C. Jacques, Esq., Assistant Corporation Counsel, 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1989-1991 collective bargaining agreement between Brown County Sheriff's Department (hereafter the County) and Brown County Sheriff's Department Non-Supervisory Employees Association (hereafter the Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving Robert Shaha's claim for County reimbursement of certain dental/ medical expenses which reimbursement was denied by the County's insurance administrator. The Commission designated Sharon Gallagher Dobish as arbitrator. Full written disclosures were made by the undersigned to which no objections were raised. Hearing was held at Green Bay, Wisconsin on July 24, 1991. A stenographic transcript of the proceedings was taken and received by August 7, 1991. The parties filed their written briefs herein by September 16, 1991 and the undersigned thereafter exchanged the briefs for the parties. The parties waived their right to file reply briefs herein at the instant hearing.

ISSUES:

The parties stipulated that the following issues are to be decided in this case:

- 1) Whether the surgical and dental procedure of Bob Shaha qualifies for 50% or 80% coverage under the dental and/or group plans pursuant to Article 35 of the collective bargaining agreement?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT AND INSURANCE PLAN PROVISIONS:

Article 35. HEALTH INSURANCE

The County agrees to continue to make available to the employees, a group insurance program. Such plan shall retain the terms and conditions in effect as of the date of the signing of this Agreement and benefits shall be improved as negotiated by the County and Association.

The employee shall pay five percent (5%) of the family premium per month for the Basic Health and dental insurance. The County shall pay 95% of the family premium and 100% of the single premium for the Basic Health Plan.

Employees may also participate in the THCP (Total Health Care Plan) or the Co-Pay HSP and the County will pay up to the premium amount paid for the Basic Health Plan with the employee paying the balance of the premium. If an employee is laid off, the County shall pay its share of the insurance premium for any premiums due for the month following the month for which the layoff occurred.

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RELEVANT MEDICAL INSURANCE PLAN PROVISIONS:

BENEFITS

Physician's Services

The Basic Plan will pay your physician's customary, usual and reasonable charges. A charge will be considered customary, usual and reasonable if it does not exceed the general level of charges by other physicians in the community for similar services. If you receive bills for balance due they should be sent to EHIC for review.

Your Basic Surgical-Medical plan pays physicians' customary, usual and reasonable charges up to \$10,000 per illness for each member. Resumption of full-time duties for employees, or normal activities for their dependents, establishes a new illness. The Basic Plan will pay charges for these physician's services:

1. Surgery. Recognized operative and cutting procedures and treatment of accidents, wherever performed, by physicians, surgeons, and assistant surgeons when medically necessary. This includes unusual in-hospital pre-and post-operative care. Emergency first-aid care for accidental injury is limited to services incurred within 72 hours of the injury;
2. Treatment by the physician while you are a hospital bed patient.

. . .

8. Oral Surgery. Customary, usual and reasonable charge of a physician, surgeon or dentist for the following services, wherever performed:
- a. Surgical removal of impacted teeth.
  - b. Excision of tumors and cysts of the jaws, cheeks, lips, tongue, roof and floor of the mouth, when such conditions require pathological examination.
  - c. Surgical procedures required to correct accidental injuries of the jaws, cheeks, lips, tongue, roof and floor of the mouth.
  - d. Excision of apex of tooth root (Apicoectomy).
  - e. Excision of exostoses of the jaws and hard palate.
  - f. Treatment of fractures of facial bones.
  - g. External incision and drainage of cellulitis.
  - h. Incision of accessory sinuses, salivary glands or ducts.
  - i. Reduction of dislocations of an excision of the temporomandibular joints.
  - j. Excision of loose gum tissues to eliminate infection (Gingivectomy).
  - k. The leveling of structures supporting teeth for the purposes of fitting dentures (Alveolectomy).
  - l. The cutting of the tissue in the midline of the tongue (Frenulum). This procedure is usually done to prevent tongue-tie conditions (Frenectomy).

RELEVANT DENTAL INSURANCE PLAN PROVISIONS:

Provisions

SCHEDULE OF DENTAL BENEFITS

Preventive and Diagnostic Services . . . . .	100% of Customary, Usual, and Reasonable Charges.
Basic (Routine Services) . . . . .	80% of Customary, Usual, and Reasonable Charges.
Orthodontic Services . . . . .	50% of Customary, Usual, and Reasonable charges for any covered person age 6 and older at the time treatment begins.

You pay NO DEDUCTIBLE. There is a calendar year maximum of \$1000 combined for Preventive and Diagnostic, Basic and Major Restorative Services.

There is a separate \$1500 maximum for Orthodontic treatment for each complete course of treatment.

. . .

Orthodontic Services

Treatment and appliances for guidance, interception and correction of malposed teeth.

If other services described in this Plan are performed as part of the treatment plan for the orthodontic services, they will be payable at the orthodontic coinsurance of 50%.

Orthodontic benefits are available for covered dependent's ages of 6 and older.

The dentist will submit a treatment plan to EHIC. The treatment plan describes the expected services and appliances to be rendered by the dentist. If the treatment plan is terminated before completion of the services, no further benefits are available. The dentist must notify you and EHIC in writing if he is terminating the treatment plan.

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DENTAL EXCLUSIONS

Benefits will not be paid:

. . .

4. For cosmetic dentistry, including personalization or characterization of

dentures and facing on crowns or pontics posterior to the second bicuspid.

. . .

6. For appliances or restorations for: increasing vertical dimension, restoring occlusion, replacing tooth structure lost by attrition, correction of congenital or developmental malformations, or for implantology techniques.

. . .

21. For Orthodontic Services unless specified in the Schedule of Benefits.

. . .

COVERED DENTAL BENEFITS

. . .

Basic (Routine) Services

. . .

Dental surgery, including consultations by the attending dentist prior to such surgery and necessary pre-and post-operative care.

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DEFINITIONS

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Cosmetic Dentistry means those services provided by Dentists solely for the purpose of improving the appearance when form and function are satisfactory and no pathological conditions exist.

. . .

Customary, Usual and Reasonable means the lesser of: the fee most often charged by the provider; the fee most often charged in the locality where the service was performed; or the fee which is recognized as reasonable by a prudent person.

Dentally Necessary means the extent of care and treatment which is the generally accepted, proven and established practice by most dentists with similar experience and training where the service is provided.

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FACTS:

Robert Shaha is a sergeant in patrol for the Brown County Sheriff's

Department and he has been employed by the Department for the past 18 years. Shaha had been having headaches and jaw pain just below the ears on a regular basis for sometime prior to receiving the treatment in dispute in this case. Shaha consulted a dentist who recommended Shaha see an oral surgeon regarding the fact that his front teeth did not touch at all and that he was chewing solely on his back teeth. Shaha consulted oral surgeon Dr. LeMoine who advised that Shaha have his jaw surgically broken in three places, rearranged and reassembled so that his bite could be corrected. Dr. LeMoine also indicated that prior to this surgery, he would recommend that Shaha have braces put on to move his teeth and create gaps so that there would be no teeth in the places where LeMoine would have to cut through the jaw to affect the realignment. This would avoid possible complications such as root canal work or injured teeth and the contraction of periodontal disease. Dr. LeMoine told Shaha he did not have to have the braces placed but LeMoine was hesitant to try the surgery unless the teeth were moved prior to the operation being done.

Shaha had the braces placed on December 15, 1989 by Dr. Steinke, an orthodontist, and he wore them for more than one year before he had his jaw surgery on March 5, 1991.

Initially, at the time Shaha submitted his claims for reimbursement for the braces, he was told by former Brown County insurance administrator Peter Boss that because braces were cosmetic, Shaha would only be reimbursed at a 50% rate. Shaha properly appealed this ruling to the County's current insurance administrator Employers Health Insurance Company, EHIC, and he received letters dated February 1, 1990 and April 12, 1990 from EHIC employees Ms. Stachura and Dr. Brodhagen respectively. Relevant portions of those letters are as follows:

Ms. Stachura's February 1, 1990 letter

. . .

This matter has been brought to my attention for review and response. Employers Health Insurance is the administrator of the plan that your employer has provided for you. We are responsible for providing benefits according to the plan you have with them.

I am enclosing copies of the plan booklet indicating orthodontic services are paid at fifty percent of customary, usual and reasonable charges. Also on page nine, number one under Surgery, it states In-Hospital Pre-and Post-Operative Care, this is for in-patient visits by a physician and is paid under the medical plan.

We will be following the schedule of dental benefits for orthodontic services for payment.

. . .

Dr. Brodhagen's April 12, 1990 letter:

. . .

I wish to address your specific concerns over orthodontic coverage by Dr. Steinke before and after your surgery by Dr. LeMoine.

Listed under the Covered Dental Benefits, it states that you have a benefit for Orthodontic Services of fifty percent (50%) of Customary, Usual and Reasonable charges for any covered person age six and older at the time treatment begins. This (sic) is a \$1,500.00 maximum for orthodontic treatment for each complete course of treatment.

You have asked that the orthodontic care be covered under the Major Medical portion of the policy and or the basic services of the dental policy. You feel that the orthodontic treatment constitutes pre or post surgical care under both policies.

We view and it is standard interpretation that pre or post operative care for surgery involves treatments such as necessary x-rays, pre-admission to hospital for confinement care, necessary review of medical histories, blood work-ups, dressings changed, doctor visits, removal of stitches and the like. These are the types of care allowed under these benefits.

In your case any specific pre-surgical models, changes of arch wires or brackets for fixation, necessary x-rays and consults with the oral surgeon would be the only part of the orthodontic care that would be covered under the surgical benefit.

. . .

Ms. Stachura, Brown County's Dental Plan Supervisor employed by EHIC, 1/ testified that she granted 50% payment for Shaha's braces because braces constituted orthodontic services under the Dental Plan described as "Treatment and appliances for guidance, interception and correction of malposed teeth," (Dental Plan, p. 162) which was to be paid at 50%. Ms. Stachura stated that Shaha's braces were not "in-hospital pre- and post-operative care," under the medical plan (Basic Plan, p. 16). Ms. Stachura emphasized that she went "strictly" by the Dental Plan as it was written in denying Shaha's claim for 80% payment of his orthodontic treatment. Stachura admitted that there is no "in-hospital" requirement stated in the Dental Plan for "necessary pre-and post-operative care" which would be paid at 80% under the Basic Plan. Stachura further admitted that EHIC did not have Mr. Shaha examined by an independent doctor or dentist; that Dr. Brodhagen, on retainer with EHIC, did not personally examine Mr. Shaha; that the procedure that Shaha had done is not dental but medical although it would be covered by both Plans; and that the medical plan does not show or list the exact name of the procedure/treatment which Shaha had done. Notably, Ms. Stachura refused to characterize Mr. Shaha's braces as "cosmetic." Ms. Stachura did not question Shaha's doctors' opinions, that Mr. Shaha's braces were necessary for successful treatment of Mr. Shaha's condition.

These medical/dental opinions, submitted by Shaha to EHIC from Doctors Sevenich and Steinke were dated December 11, 1989 and March 27, 1989,

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1/ Ms. Stachura stated that she is neither a doctor of dentistry nor a medical doctor. Ms. Stachura stated that her experience in the dental field was as follows: she had served as an orthodontist's assistant for two years after graduating from High School and then took a job with EHIC.

respectively and relevant portions of them read as follows:

Dr. Sevenich's letter of December 11, 1989:

This letter is in regards to ongoing treatment of Robert Shaha's deformity of his maxiofacial structures. Bob is currently under the care of Drs. LeMoine and Steinke for its condition. The question has been raised as to the nature of the orthodontic care. The orthodontic portion of this treatment is subordinate to the surgical portion of this treatment. The mechanical constraints of the planned surgery dictate the teeth be moved into positions appropriate to the planned resolutions of Bob's deformity without orthodontics. The two are inseparable. The orthodontic care is functional in nature and necessary for successful treatment. The orthodontic is neither esthetic in nature nor can the treatment be completed without it.

. . .

Dr. Steinke's letter of March 27, 1989:

. . .

Records for Mr. Shaha have recently been obtained, which include x-rays, photographs and plaster study models, in order to evaluate his skeletal malrelationship. I have been in contact with Dr. LeMoine (an oral surgeon), and we are in agreement that treatment for Mr. Shaha would require a combined orthodontic/orthognathic procedure.

Mr. Shaha's skeletal malrelationship results in an improper coordination of the mandible and maxilla. When he attempts to close his mouth, the only teeth in contact are the last molars. This is resulting in excessive posterior tooth wear and leaves him with a significant possibility of developing temporomandibular joint dysfunction, as well as periodontal problems.

Mr. Shaha's situation is skeletal in nature, and provides a significant functional concern. Treatment would require approximately 9 to 12 months of pre-surgical preparation, utilizing orthodontic appliances, so that the orthognathic procedure could properly be accomplished. Mr. Shaha's skeletal malrelationship cannot properly be dealt with by surgical procedure alone. Therefore, it is necessary that both steps of treatment be completed.

. . .

POSITIONS OF THE PARTIES:

Union

The Union argued that the terms of the dental and medical policies should be construed against the County and its insurance administrator, citing



Stanhope v. Brown County, 90 Wis. 2d 823, 849 (1979). The Union attacked as flawed, the County's argument that Shaha's surgical claim should only be considered under the medical policy and that his orthodontic claim should only be considered under the dental policy such that only a 50% payment was due. The Union asserted this is true because the dental policy language tends to support the Union's claims that Mr. Shaha's braces were necessary pre-operative care having to do with dental surgery, as attested by Shaha's doctors in writing. The Union further contended that the Insurance Administrator's expert, Dr. Brodhagen, did not dispute Shaha's doctors' assertions, above. Rather, Dr. Brodhagen ruled that since the orthodontic care did not occur "in-hospital" it could not be paid for at an 80% level under the medical/surgical plan. The Union noted that "necessary pre- and post-operative care" is not limited to "in-hospital" care nor is it otherwise defined in the dental insurance plan. In sum, the Union asserted that any ambiguity extant between the medical and dental policies should be resolved in favor of the grievant. The Union therefore sought that the grievance be sustained and as a remedy that the County be ordered to pay 80% of the \$2400 cost for Mr. Shaha's braces.

#### County

The County asserted that the braces placed on Mr. Shaha's teeth prior to his dental surgery were orthodontic and should not be considered as a component of dental surgery. The braces Mr. Shaha received were intended to be covered as orthodontic services, and the County contended, Shaha's orthodontic plan of care was separate and distinct from the dental surgery plan of care. As such, the County claimed, each plan of care must be separately defined and they must be paid differently according to the two insurance plans involved.

In the instant case, the County admitted that Article 35 incorporates by reference the terms and conditions of the Dental Plan into the collective bargaining agreement and that the terms and conditions of the Dental Plan are binding on the parties, citing Elkouri and Elkouri, How Arbitration Works, 4th Ed., 1985) p. 364. In interpreting the Dental Plan benefits, then, the County asserted, the undersigned must "review what specific provisions govern the orthodontic treatment received." In this regard, the County contended that Shaha's orthodontic braces could not be considered as a component of pre-operative care. Rather, they must be found to be "a separate treatment plan."

The County further asserted that the Union had the burden of proving the grievant's entitlement to more than a 50% reimbursement and implied that the Union failed to meet this burden. The County noted that only "limited orthodontic services can be considered a part or component of dental surgery," and that the treatment Shaha received "was different in nature and different in time from the surgical treatment." For these reasons, the County sought denial and dismissal of the grievance.

#### DISCUSSION:

Mr. Shaha's doctors concurred that the braces that were placed on his teeth were neither elective nor cosmetic but rather that they were necessary for "the successful treatment" of Shaha's "maxiofacial deformity" and that the braces had to be placed and do their job before the surgery could be done to alleviate Shaha's "skeletal malrelationships." EHIC's doctor did not disagree with this view. Rather, Dr. Brodhagen implied that any braces would be paid for at a 50% rate under the Dental Plan and that braces do not constitute "pre- or post-operative care" under a "standard interpretation of the Basic Medical/Surgical Plan (hereafter Basic Plan). The only witness at the instant hearing (who was neither a doctor nor a dentist) who addressed the dental/medical subjects here, Ms. Stachura, refused to state that Mr. Shaha's doctors' were incorrect in their opinions and she refused to state that Shaha's

braces were cosmetic. Rather, Stachura asserted that she had applied the Dental Plan language "strictly." It was in this context that the County, while not denying that Shaha's braces were a necessary precondition of his oral surgery, asserted that the cost of Shaha's braces was payable only at a 50% rate under the dental plan.

The contract incorporates into the collective bargaining agreement the terms of the dental and health plans by reference, and therefore the County is correct that given the dispute between it and the Union regarding the proper interpretation of the plan language, I must determine this dispute for the parties. 2/ Initially, I note that the Basic Plan does not specifically list as covered, the procedure which Shaha had performed either in the "surgery" section or in the "oral surgery" section of that plan. In addition, the "surgery" section of the Basic Plan includes "unusual in-hospital pre- and post-operative care" and treatment "while . . . a hospital bed patient." Because Shaha's braces were neither done in-hospital nor as a hospital bed patient, I find his braces are not covered by the Basic Plan on its face.

Regarding the Dental Plan, I note that in its introductory language that plan lists "orthodontic services" as payable at "50% of Customary, Usual and Reasonable charges." At this juncture, no mention is made of any distinction between types of orthodontic treatment (i.e., cosmetic or non-cosmetic) -- all orthodontic services are impliedly included in the above description and paid at 50%. Later in the Dental Plan booklet, Orthodontic Services are listed again, and again a 50% payment is described for "treatment and appliances for guidance, interception and correction of malposed teeth" "performed as part of the treatment plan for the orthodontic services." No distinction is made between braces which are necessary prior to successful oral surgery and braces intended merely to move crooked teeth to make the patient's teeth look better. Under the Dental Plan, all orthodontic services are treated the same.

The Dental Plan lists certain exclusions. This is the area, (at number 4) where "cosmetic dentistry" is listed. It is significant that braces are not listed as an exclusion in this section. Rather, the specific cosmetic dentistry exclusions named include "personalization or characterization" of "dentures and facing on crowns or pontics" which are apparently farther back in the mouth ("posterior to the second bicuspid") and therefore not easily seen by others. Although this section may include other cosmetic items by implication or based on dental custom or practice, in my view, Shaha's braces would not fit within the number 4 exclusion. 3/ Certainly, no one in this proceeding has argued that Shaha's braces were not "dentally necessary." In number 21 of the Dental Exclusions the Plan language indicates that orthodontic services are not payable unless (and impliedly only to the extent) specified in the "Schedule of Benefits" portion of the Dental Plan, which indicates that only a 50% payment could be expected by the covered person.

The Union has contended that the following Dental Plan language requires that an 80% payment for Shaha's braces should have been made:

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- 2/ It is clear on the record here that the terms of the labor agreement do not conflict with the Basic Plan or the Dental Plan language.
- 3/ I find it of no relevance that the County's previous insurance administrator, Peter Boss, initially told Shaha that his braces were cosmetic. The overwhelming evidence here indicates that Shaha's braces were never treated or considered by EHC to be cosmetic, and that Shaha was aware of this at least by February 1, 1990, the date of Ms. Stachura's letter.

Dental surgery, including consultations by the attending dentist prior to such surgery and necessary pre- and post-operative care . . . .

The Union's argument essentially requires that the following analysis be applied here. Because the Dental Plan does not require that pre- and post-operative care for dental surgeries be "in-hospital" we must read out the "in-hospital" requirement for such dental surgeries from the clear language of the Basic Plan so that Shaha's braces can be found to constitute pre-operative care under the Basic Plan which care would then be paid at 80%. The above analysis if applied here would require rewriting the Basic Plan in a way the parties never intended. For this reason alone, the Union's argument should fail.

Beyond this point, I note that other valid reasons, and/or arguments are apparent here which support denial of the grievance. The definition of included "Dental Surgery" items (listed under the Basic Routine Services) in the Dental Plan strongly implies that such pre- and post-operative services should be provided by the "attending" oral surgeon. In Shaha's case, his braces were placed by an orthodontist, not by his oral surgeon. Furthermore, to adopt the Union's broad definition of pre- and post-operative care would require me to conclude that Shaha's braces should be found to constitute pre-operative care, paid at an 80% rate. Given the fact that such a benefit paid at an 80% rate is not specifically or clearly stated in either the Basic or the Dental Plan, it would be stretching the language of both plans to include Shaha's year-long course of orthodontic treatment with his orthodontist as "pre-operative care."

The Union has implied by its arguments that all costs associated with an oral surgical procedure should be covered under the Basic Plan at an 80% rate. As noted above, this implication is not supported by the terms of the Basic Plan or by the terms of the Dental Plan. In regard to what should properly be considered pre- and post-operative care, the record contains only Dr. Brodhagen's April 12, 1990 letter, listing what items EHIC considers to be such pre- and post-operative care. Notably, all of the items Dr. Brodhagen listed were more closely associated in both time and space with the performance of the surgery itself than was Mr. Shaha's orthodontic treatment. In any event, as stated above, the schedule of Dental Benefits "clearly states that orthodontic services (presumably of any kind) will be paid at 50%.

Under the provisions of Article 35 of the collective bargaining agreement, the terms of the Basic and Dental Plans and for the reasons discussed supra, the record fails to demonstrate that the orthodontic services Mr. Shaha received should have been paid at an 80% rather than a 50% rate. Based upon the foregoing and the record as a whole, the undersigned issues the following

AWARD

The surgical and dental procedure of Bob Shaha qualified for 50% coverage under the dental and/or group plans pursuant to Article 35 of the collective bargaining agreement.

Therefore, the grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 19th day of December, 1991.

By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator

