BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
THE LABOR ASSOCIATION OF WISCONSIN, INC., LOCAL 113	Case 70 No. 48102 MA-7509
and	
ADAMS COUNTY	

Appearances:
Mr. Thomas A. Bauer, for the Association.
Atty. Michael J. McKenna, Corporation Counsel, for the County.

ARBITRATION AWARD

The Labor Association of Wisconsin, Inc., Local 113 ("the Association") and Adams County ("the County") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to health insurance. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held on June 30, 1993, with a stenographic transcript being prepared by July 26, 1993. The parties filed written arguments on August 31, 1993, and waived their right to file reply briefs.

ISSUE

Did the County violate Article VIII, Section 1 of the collective bargaining agreement when it denied continued payment of the health insurance premiums for Carol Buss after February, 1992? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE VIII -- HEALTH AND WELFARE

Section 1 -- Health Insurance: The County shall continue to provide the employees with hospital, surgical and major medical insurance, with the County paying the full cost of such protection for 1991. Effective January 1, 1992, the County shall pay up to the greater of $444.31 towards the monthly premiums for employees eligible for the family plan and up to $177.72 towards the premiums for employees eligible for the single plan; or 90% of the respective monthly premiums.

. . .

In the event that an employee is absent from his employment because of any illness, or because of injury incurred in the course of employment, the County agrees to continue the plan of hospital and health insurance then in effect at no cost to the employee for a period of one (1) year from the date of injury or onset of

illness.

ARTICLE X -- SICK LEAVE

Section 1: When eligible, sick leave as used shall be defined as "absence from duty or of an employee because of illness, bodily injury, exposure to a contagious disease, attendance upon members of the immediate family whose illness requires the care of such employee".

. . .

Section 3: If an employee is absent from work for any reasons set forth under (1) of this Article, and at such time has accumulated insufficient sick leave to cover the time lost, the time lost shall be considered as leave without pay, except that, an employee may use available vacation, comp time, etc. while on such absence to maintain a "with pay" status.

Section 4 - Sick Leave Extension by Overtime and Vacations: Accumulated overtime may be used as a matter of right by an employee who is entitled to sick leave and has at that time accumulated insufficient sick leave to cover the period of illness or disability. In such cases, an employee may also elect to use accumulated vacation credits.

Section 5: The employer may require an employee to provide a doctor's certification of ability to return to work in cases of sick leave absence of greater than three (3) consecutive work days. The physician used shall be at the discretion of the employee. The employer shall pay the expense of obtaining the certification, if required. In the event the County challenges the employee's medical evidence, the County may seek medical evidence from a physician of its choice at County expense.

Section 6: Employees who retire from the service of the Employer, or whose job has been eliminated and/or terminated shall be entitled to pay for any unused sick leave at times of retirement or elimination and/or termination, providing however, that payment under this Section shall be limited to thirty-five (35) days or fifty percent (50%) of the number of days accumulated by any given employee as of the date of retirement or job elimination and/or termination, whichever is less. Employees who quit shall receive ten (10) days or fifty percent (50%) of the accumulated unused sick days, whichever is less under this Section.

. . .

ARTICLE XVIII -- LEAVES OF ABSENCE

Section 1 - Sick Leave: Inability to work because of proven sickness or injury shall not result in loss of seniority rights.

. . .

> **Section 4 - Illness and Disability:** A period of up to but not more than one (1) year, if needed, shall be granted as leave of absence due to personal illness or for disability due to injury provided a physician's certificate is furnished from time to time to substantiate the need for continuing the leave. Additional time may be extended in such cases by mutual agreement of the employee and the Law Enforcement Committee.
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> . . .
>
> **Section 6 - Health Insurance:** The County's contribution toward health insurance premiums shall continue to be paid by the County for an employee on a leave of absence if that employee worked for at least 85 hours during the previous month. If the time worked is less than 85 hours, the County shall not pay any of the premium. An employee on a leave of absence may elect to continue with the County's health insurance program, provided that the employees pays the full premium each month. (This provision only applies where an employee is on a leave without pay status. If an employee is utilizing accrued time off such as vacation, compensatory time, sick leave, etc., then that employee is not considered on leave without pay and, accordingly, the County's contribution continues as it does for a working employee.) The provisions of this section, regarding health insurance contributions in cases of certain leaves absence, shall only apply to leaves not already covered by Article VIII, Section 1.

BACKGROUND

This grievance concerns the extent of the County's liability for the health insurance premiums for an employe on a one-year unpaid medical leave of absence. With allowances for differing interpretations, the basic facts are largely undisputed.

Pursuant to the 1972 collective bargaining agreement between the County and the Teamsters Union Local No. 695, the employer could require any employe absent on sick leave for four (4) or more days to "submit to an examination by a medical Doctor designated and paid for by the Employer." That agreement also included an Article VII - Health and Welfare, which read, in its entirety, "The County shall continue the present hospital and surgical insurance plan now in effect, the cost thereof shall be paid by the County."

In the 1973 agreement between those parties, the requirement for a medical examination was changed to a two (2)-day threshold. The Health and Welfare article was also amended, to read as follows:

> Section 1. Health Insurance - The company (sic) shall continue the present hospital and surgical insurance coverage plan now in effect, the cost thereof shall be paid by the county, except that health insurance provided to new employes shall be limited to single persons coverage for the first year of employment. After one (1) year, family coverage shall be provided if the employe qualifies.

In the event that an employe is absent from his employment

> because of any illness, or because of injury incurred in the course of employment, the county agrees to continue the plan of the hospital and health insurance then in effect at no cost to the employe for a period of one (1) year from the date of the injury or the onset of the illness.

The 1985-86 agreement, the last agreement negotiated by the Teamsters, included the following Article VIII - Health and Welfare:

ARTICLE VIII - HEALTH AND WELFARE

> Section 1. Health Insurance: The County shall continue to provide the employees with hospital, surgical and major medical insurance, with the County paying the full cost of such protection. Present levels of coverage shall be maintained, although the County shall be free to change insurance carriers or to self-insure as long as coverage is equal to the present coverage.
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> In the event that an employee is absent from his employment because of any illness, or because of injury incurred in the course of employment, the County agrees to continue the plan of hospital and health insurance then in effect at no cost to the employee for a period of one (1) year from the date of injury or onset of the illness.

The 1987-88 agreement, the first agreement negotiated by the Labor Association of Wisconsin, repeated verbatim the applicable language, namely the two paragraphs of Section 1, Article VIII.

The relevant language of the applicable agreement has been excerpted above.

Carol Buss, the grievant, began work as a dispatcher for the County on or about September 1, 1984. On or about December 5, 1990, she was diagnosed as having cirrhosis of the liver, as related in the following correspondence from her physician, dated February 5, 1992:

RE:Carol Buss

To Whom It May Concern:

> Mrs. Buss has been under my care for many years. Presently her most significant problem is advanced cirrhosis of the liver and our records indicate that in December of 1990 this condition was suspected. Laboratory testing and xray examinations including a CT Scan confirmed the diagnosis. Subsequently she had a consultation with the liver clinic at University Hospitals which also confirmed the diagnosis of liver cirrhosis. This condition is presumed to be related to her past history of excessive alcohol consumption.
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> Approximately one year after we established this diagnosis, and while she was under evaluation and follow up at the University Hospital's liver clinic, Mrs. Buss had an auto accident in December of 1991 for which she was hospitalized and observed. The diagnosis of liver cirrhosis pre-existed this auto accident and

was in no way related to being the cause of her liver cirrhosis she is now suffering from.

Sincerely,

M. Esmaili M.D. /s/
M. Esmaili M.D.

In December, 1991, Buss had an off-duty auto accident which caused her hospitalization and required her to use her remaining sick leave days. Her last day of work was January 8, 1992, 1/ on which date she requested a medical leave of absence. On January 22, the County's Personnel Committee voted to pay Buss's health insurance premium for that month, and that month only. On January 24, Corporation Counsel Bryan Fischer recommended to the Committee that it also pay the premiums for the month of February, which advice the Committee endorsed, leading to the payment of that premium. On January 29, Buss was informed she would have to have a liver transplant, which transplant was performed on July 25. On February 7, Association representative Dennis Pederson, citing Article VIII, Section 1, wrote to Fischer to relate the Association position that the County was responsible for paying Buss's health insurance premiums "for at least a year." On February 11, Fischer wrote to reject Pederson's analysis. On February 12, Buss requested of the County that it continue to pay her health insurance premiums, which request was rejected by Sheriff Robert Farber on February 13. On or about October 10, the Association grieved the County's action in declining to pay Buss's health insurance premiums after February, which grievance was subsequently brought to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

> The intent of the parties was clear when they negotiated the 1973 collective bargaining agreement, and the language has continued into each successor agreement, without challenge from the employer. It is that intent which governs, not the meaning which could possibly be read into the language.
>
> The testimony of former County Board Supervisor Howard McClain clearly stated it was the parties' intent to provide insurance coverage for one year following the exhaustion of leave and vacation. Even under cross examination, McClain testified that, as a member of the bargaining team that negotiated the instant language, his interpretation was that the phrase, "onset of illness" meant the date of absence. McClain further testified this benefit was given by the County in exchange for the predecessor Union's agreeing to a County request for language requiring a doctor's certificate after two consecutive sick leave days. Both parties benefitted from this quid pro quo.
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> McClain's testimony that "onset of illness" meant the time when other benefits and leaves were exhausted was further supported by Teamster's Local 695 recording

1/ Unless otherwise noted, all dates cited hereafter are 1992.

secretary Michael Spencer, who negotiated the original language on behalf of the predecessor union, and Det. Ken Probyn, former Vice-President and negotiator for the predecessor union.

The agreement requires an employe to use all available paid leave time prior to becoming eligible for the County to pay their health insurance premiums for one year. While on paid status, there is no need for the employer to pay the premiums, because the employe is already receiving pay and benefits under the agreement. Both the predecessor union and the employer understood that the intent of the language they agreed to was that "onset of illness" meant that the one-year period during which the County would pay the premiums commenced when the employe had exhausted all leaves and was absent from work.

The County failed to rebut this clear testimony of the intent of the original agreement. The original language was negotiated into the 1973 agreement, was incorporated into the first agreement negotiated by the Labor Association of Wisconsin, and continues through the 1991-92 agreement.

The language of the agreement is clear and unequivocal on its face. It is well-settled that an arbitrator cannot ignore clear-cut contractual language. Such is present here, providing for employer payment of health insurance premiums for one year after an employe exhausts all leaves and is absent from work. Any attempt by the employer to suggest that the language is ambiguous is patently flawed, as the language is not reasonably susceptible of more than one meaning.

An award in favor of the employer would grant the County a benefit through grievance arbitration which it did not obtain through the collective bargaining process. The County, contrary to the understanding and intent of those who negotiated the instant language, now seeks to achieve a drastic change in the intent, unreasonably and improperly seeking to gain a benefit it has not bargained for.

Accordingly, the arbitrator should sustain the grievance and order the County to reimburse the grievant $1,888.81, reflecting the premiums for the period March, 1992 to January, 1993.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

A basic rule of construction is that where the collective bargaining agreement clearly and unambiguously resolves the issue, the clear language must be followed. The instant language here clearly and unambiguously states that insurance is to be provided for one year from the onset of the illness. "Onset" means "beginning." The grievant's illness began on or before December 5, 1990, when she was diagnosed. Under the clear and unambiguous language of the agreement, the employer was well within the bargained-for rights to not pay

insurance premiums on or after December 5, 1991.

The Association feels that the agreement should be rewritten to reflect its position that insurance should be provided by the employer for one year after all leaves are expired regardless of the date of the onset of illness. This language ignores the clear and unambiguous language of the agreement regarding "onset of illness."

A further maxim of contract interpretation is that terms should be interpreted against the draftsman. The Association's own witness testified that the original proposal was made by the predecessor union, at the request of bargaining unit members. Any doubts should thus be resolved against the Association, and the grievance denied.

The grievant's premiums were properly paid by the County until February, 1992. The County was well within its rights in refusing to pay premiums more than one year after the onset of illness. The subject language was proposed by the Association or its predecessor, so any doubts should be resolved against the draftsman. In any event, the language of the agreement is clear and unambiguous and should be enforced.

Accordingly, the grievance should be denied.

DISCUSSION

Both parties contend that the language before me is clear and unambiguous, and should be applied as written. I agree that the collective bargaining agreement should be applied as written; I do not agree that the language before me is clear and unambiguous.

The ambiguity arises due to the inclusion in the paragraph of the two conditional clauses, "(i)n the event that an employee is absent from his employment because of illness, or because of injury incurred in the course of employment. . . ." These clauses establish that an employe's absence is a necessary prerequisite for the operation of the rest of the paragraph, and that operation is prospective. The paragraph's final provision, the employer's payment of insurance premiums "for a period of one (1) year from the date of injury or onset of illness," however, could, under a strict constructionist approach, have an application that harkens back to a time before the employe was absent from work. But can the agreement count against the year's time period a length of time measured during a period when neither employe nor employer may have known of an upcoming absence?

That question, of course, not only highlights the ambiguity of the relevant contractual language -- it focuses on an ultimate issue implicated in this grievance. Namely, if an employe remains at work for a period of time after the onset of an illness that subsequently causes the employe to seek a medical leave of absence, does that period of time count against the year's time period during which the employer is obligated to pay the health insurance premiums?

The record evidence of the bargaining history supports the association's analysis. The association presented three witnesses with varying degrees of knowledge of the bargaining history. While the importance of the testimony of Michael Spencer, Teamsters Union Local 695 recording secretary, could be minimized because he was not directly involved in the negotiations with this

employer at the time of the inclusion of the subject language, and the importance of the testimony of Det. Ken Probyn, who was involved in the negotiations that resulted in this language, could be minimized as representing a vested institutional interest, the testimony of former County Supervisor Howard McClain cannot be minimized. McClain was personally and directly involved in the negotiations. And, having been a member of the management side, he is completely free of the self-interest that might attach to the testimony of Probyn and Spencer.

McClain testified that the benefit of the year's insurance "would start after they used up all their other benefits." 2/ As McClain explained, "(w)e felt that we had good employes for the County, and if they became sick or something like that, that this one year after they used up their vacation and sick leave or whatever they may have had at that time, that we would get that time, pay their insurance for one year, hoping they would get back on their feet and help their family, for them to come back to work, because at that time we had a lot of changeover employes." (emphasis added) 3/

The County sought to shake McClain's testimony, but he maintained his position that parties intended to provide paid insurance for a period of one year after an employe left pay status. This interpretation is not inconsistent with the text of the provision under review.

Because the language under review is ambiguous, consideration of its intent and impact is legitimate. In that regard, a "rule of reason" which preserves the interests of both parties, is appropriate. MorFlo Industries, 83 LA 480, 483 (Cocalis, 1984). Such a rule is implicitly inherent in **The Steelworkers' Trilogy** (United Steelworkers of America v. Warrior & Gull Navigation Company, 363 U.S. 574, at 582 (1960)), and explicitly referenced in the Restatement (Second) of Contracts, at Section 205.

2/ Tr., p. 37.

3/ Tr., p. 36.

The intent of Article VIII, Section 1 was to provide a benefit to employes who became absent due to illness or injury. To protect the employer from open-ended financial liability, that benefit was capped at one year. The testimony indicated that this benefit was in exchange for a reduction from four consecutive sick leave days to two consecutive sick leave days as the threshold needing a doctor's certificate. 4/

Only the Association's interpretation is consistent with the dual purposes of the provision. The employe's interests are protected by the providing of a year's paid health insurance after the employe is unable to work. The employer's interests are protected by the assurance that the benefit is capped at one year, and that the year does not start until the employe has (a), become unable to work, and (b), exhausted the applicable paid leaves.

Further, this interpretation is consistent with a practical application of the provision. Under the County's interpretation, if an employe suffered an injury or contracted an illness, and remained on pay status (at work or on paid leave) for a year, that employe would lose the benefit of the year's paid insurance. Thus, an employe could be forced to choose between continued employment and maximization of the Article VIII benefit, while the employer would not reap the benefit, as explained by McClain, of lowering the turnover rate. While "fairness" is an ephemeral concept which should not have a persuasive role in contract interpretation cases, I cannot entirely disregard the anticipated outcomes if the parties' positions were to prevail.

The County has agreed to provide health insurance for its employes, and those employes absent due to illness or injury. The insurance the County provides to an employe still in pay status should not also be counted as meeting the County's obligation to those employes absent due to illness or injury. Allowing the County to count a year's insurance provided to an on-duty employe again in the event that employe turns out to have had a progressive disease during that period is not what the parties agreed to.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The County shall pay to Carol Buss $1,888.81, representing the employer's share of her health insurance premiums ($171.71) for the period March, 1992 through January, 1993.

Dated at Madison, Wisconsin this 16th day of November, 1993.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator

4/ The record is silent on the subsequent change to a three-day threshold.