

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TOWN OF DELAVAN

and

**TOWN OF DELAVAN EMPLOYEES,
LOCAL 2171, AFSCME, AFL-CIO**

Case 16
No. 64267
MA-12854

Appearances:

Thomas Larsen, Staff Representative, AFSCME, Council 40, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, appearing on behalf of the Union.

Wassel Law Offices, by **Steven R. Wassel**, Attorney at Law, 1034D Ann Street, P.O. Box 524, Delavan, Wisconsin 53115-0524.

ARBITRATION AWARD

Town of Delavan, hereafter Town or Employer, and Town of Delavan Employees, Local 2171, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff as Arbitrator to hear and decide the instant grievance. The undersigned was so appointed on January 28, 2005. The hearing was held in Delavan, Wisconsin on March 15, 2005. The hearing was not transcribed and the record was closed on March 15, 2005, following receipt of post-hearing oral argument.

RELEVANT CONTRACT LANGUAGE

ARTICLE XIX-WORKER'S COMPENSATION

Section 1. Employees are entitled to Worker's Compensation coverage. Employees absent due to injury or illness covered by the Worker's Compensation statute (sic) shall receive their regular wage for the period he is absent from work due to such on the job injury or illness for the period that

Worker's Compensation is paid to such employee including the initial (3) three day waiting period. To obtain this pay, the employee shall endorse and turn over such weekly Worker's Compensation payments received by him to the Town Treasurer who will give him a receipt therefore and his regular pay.

...

ADDENDUM II

TOWN OF DELAVAN

SHORT-TERM DISABILITY POLICY

The Town of Delavan is self insuring in it's Short Term Disability (STD) policy and benefits.

This policy governs the terms and conditions of eligibility provided by the Town of Delavan for all full time Town of Delavan Employees, not already provided for in union contract or employment agreement approved by the Town Board. Full time is considered by the Town to be a 40 hour work week.

Short-term disability (STD) pays a percentage of your wages if you become temporarily disabled, meaning that you are not able to work for a short period of time due to sickness or injury (excluding on-the-job injuries, which are covered by workers compensation insurance). To qualify for the Town's (STD), you must be considered a continuous (sic), active employee with the Town of Delavan unless otherwise covered in union contract or employment agreement approved by the Town Board.

Benefit Determination

This policy will compensate you for seventy percent (70%) of your regular weekly wage as an eligible employee for a term not to exceed ninety (90) days. The Town does not consider overtime and other compensation as basic wages in determining your benefit wage amount unless otherwise provided for in union contract or employment agreement approved by the Town Board.

All employees must first use sick benefits (pay) before they will become eligible for (STD) benefits unless otherwise provide (sic) for in union contract or employment agreement approved by the Town Board.

Disability payments begin on the 8th day of illness, or, the first day for injury resulting from an accident.

A physician must certify all claims.

Benefits under this plan are limited to one (1) accident or, one (1) serious health condition per year. A year as defined under this plan is 365 days, however should there be a recurrence of the same condition within the same 365 day period, no waiting period will apply, however no more than 90 days of short term disability will be paid for any one (1) accident or any one (1) serious health condition.

Disability Period

Period of disability means the time that beings (sic) on the day you become disabled and ends on the day before you return to active work but never longer than the 90 day period (STD) is in effect.

Disability Defined:

You are considered disabled if: (1) you are unable to perform your regular or customary work due to any physical, mental illness or injury, including pregnancy, childbirth, or related medical condition, (2) you have been ordered in writing not to work by a state or local health officer because you are infected with a communicable disease, or (3) you are participating as a resident in an alcoholic recovery program or drug-free residential facility program, as the result of referral by a physician.

Limitations:

No Benefits are payable for any Disability which is not supported by a certificate from a Physician stating a diagnosis, a conclusion with respect to the Disability and an opinion with respect to the probable duration of the Disability. The doctor's certificate must be based on a physical examination. If you have been referred or recommended by a licensed medical authority to participate as a resident in an alcoholism recovery program or drug-free residential program, you need not show actual Disability.

The Town of Delavan encourages employee's to return to work as soon as possible. The Town of Delavan will try to find light duty work if it is available so employees may return to work as soon as the doctor approves it. Return to work for light duty may be with physician's statement of what the employee may be capable of. This includes lifting and standing restrictions, as the physician deems necessary.

No benefits will be paid to you if: (1) you are receiving unemployment insurance benefits; (2) if you confined by court order or certification as a drug

addict, or sexual psychopath; (3) if you have knowingly made a false statement or representation in order to obtain any benefits under this Plan; (4) you are incarcerated because of a criminal conviction, or commit a crime and become disabled due to an illness or injury in any way caused by the commission of, arrest, investigation, or prosecution of any crime that results in a felony conviction; or (5) intentionally self-inflicted injury, while sane or insane.

BACKGROUND

On March 2, 2004, Tracy Landt, hereafter Grievant, reported an Industrial Injury involving the lower back. Beginning on April 6, 2004, the Grievant reported small hour increment absences due to a worker's compensation injury. On May 14, 2004, the Town determined that, based upon the Grievant's restrictions, the Town did not have any work available. Beginning with the week ending May 22, 2004, the Grievant received full compensation from Worker's Comp in the amount of \$510.43 per week.

In a letter to the Grievant dated August 2, 2004 and copied to the Town Clerk, the Town's Worker's Comp insurance carrier stated as follows:

Enclosed for your review is a copy of Dr. Pannu's report regarding the independent medical evaluation of 6/26/04. Per Dr. Pannu, your current low back problems are simply a manifestation of pre-existing, degenerative problems and are unrelated to your work with the Town of Delavan. Therefore, we must deny all claims for workers' compensation benefits, both indemnity and medical.

We have paid workers' compensation benefits, both indemnity and medical, in the past. We are not requesting reimbursement at this time, but we reserve the right to do so in the future, if necessary.

You have incurred medical charges in May and June for pre-operative testing and a discogram. We are unable to pay these charges, as they were in preparation for surgery, which is deemed unrelated to your work with the Town of Delavan. You will need to pay these charges yourself, or provide health information to the medical providers.

You may have a Hearing before the Department of Workforce Development, Workers' Compensation Division, if you believe you can show that you are entitled to such benefits, either medical treatment or compensation payments. If you want to apply for a Hearing, you should write to the Department at PO Box 7901, Madison, WI 53707-7901; and request an Application form. You may also write to them if you have any questions.

If you have any questions, please feel free to contact the undersigned at the number below.

In September 2004, the Grievant filed an appeal with the State's Worker's Compensation Division.

On August 16, 2004, the Town issued a letter to the Grievant that includes the following:

Based on the August 2, 2004 denial of Workers Compensation Benefits from EMC, the Town of Delavan has multiple questions regarding your current and future employment status, including past and future wages and benefits. We know that this is a difficult time for you right now, and we want to do everything we can to aid in your recovery, recovery time, coordination of wages/benefits and a timely return to work.

The Town Attorney, Steve Wassel, and I have had multiple conversations regarding your employment, pay options and benefits. Based on the Union Contract, we have come up with the following determinations and options:

- You have been off from work in full day increments since May 14, 2004 and were paid in full. These hours were charged to Workers Compensation, with the Town of Delavan making up the difference in order to pay you full wages. Based on the denial of the claim, all time previously considered as Workers Compensation will need to be converted to another pay method, i.e., Sick, STD, Comp or Vacation.
- Based on your Union Contract, accrued sick time hours must be used prior to going on short-term disability. The single hour absences that you had when you were going for treatment and any full day increments up to the 80 hours of sick time that you have accrued will take you through May 22, 2004.
- Effective May 23, 2004 you have been placed on Short Term Disability. Through the last paycheck you received for period ending 7/31/04, you will have used 70 days of the ninety-day STD allotment, leaving 20 days remaining. Your Short Term Disability benefits will end on August 21, 2004.
- You have been paid for 10 weeks pay (STD) at 100% wages, which should have been paid at 70% as referenced in your Union Contract. As of 7/31/04, the Town has overpaid you \$2,814.81.

- If you opt to use your banked 152 vacation hours, 26 comp hours and 4 sick hours that you have accrued for reimbursement of the \$2,814.81 you would have 34.94 hours of time remaining which I could apply to your next paycheck for reimbursement or keep on the books for future payment. Your medical and dental insurance will remain in effect until 8/31/04.
- If you opt to use all banked time as outlined in previous paragraphs, on August 22, 2004 you may be eligible for Long Term Disability payments if you qualify. The Town of Delavan LTD payments will be paid to you through Fortis, our insurance carrier. I have included the forms to be filled out by you and your physician regarding your disability. You will need to return these forms to me as quickly as possible to expedite the application for the benefit. Fortis has a policy that all forms, including the employer's portion, are returned together. I have notified Fortis of a pending claim. On September 1, 2004 you would be eligible to retain your medical and dental benefits through COBRA, with the premiums being paid in full by you. The COBRA Election form will be sent to you under separate cover.
- We also need to discuss the potential of electing Family Medical Leave under FMLA rules with you, which would give you sufficient time to complete your surgery and allow you to remain on the Town of Delavan's Medical Insurance.

We are concerned as to your course of treatment, work restrictions and a potential return to work date. Steve Wassel, Marvin Herman and I have set up a meeting with you on August 24, 2004 at 3:00 PM at Town Hall. Please confirm your attendance by August 17. Be prepared to address any and all pending issues.

If you have any questions regarding this letter please feel free to contact me at (262) 728-3471.

Representatives of the Town met with the Grievant and his Union Representative on August 24, 2004 to discuss the issues addressed in this letter, but were unable to reach any mutual understanding.

As of August 16, 2004, the Town converted the Grievant's Worker's Compensation time off pay into sick leave and short term disability. The Town determined that the Grievant had been overpaid \$2814.81 because he was paid wages at 100% of compensation and, in the conversion to STD, he should have been paid at 70%. The Town informed the Grievant that if he chose to use his banked vacation hours, comp hours and sick hours, he could be paid STD through the pay period ending August 21, 2004 and his insurance coverage would remain in effect until August 31, 2004.

On August 18, 2004, the Grievant completed his application for Long Term Disability (LTD) and was placed on LTD effective August 22, 2004. In a letter dated August 26, 2004, the Town Clerk advised the Grievant of the following:

In our meeting of August 24, 2004 there were multiple references regarding the potential of your electing to go on Family Medical Leave, which would give you sufficient time to complete your surgery and allow you to remain on the Town of Delavan's Medical Insurance.

I have enclosed a Family Medical Leave Request Form/Notice of Employee FMLA Rights, which you need to return within the fifteen (15) day requirement of the FMLA statutes, along with the Health Care Provider Certification Form to be prepared by your Attending Physician.

If you have any questions regarding this matter, feel free to contact me at (262) 728-3471.

In a letter dated August 30, 2004, the Town Clerk advised the Grievant and his family of the following:

Although you will no longer be eligible to be covered under the Town of Delavan group health and dental plan as of August 31, 2004, you have the option to continue your group benefits under the plan beyond this date. The continuation of your existing plan would be for a period not to exceed 18 months following August 31, 2004. If you have dependents that were covered under the plan, they also have the option to continue their benefits. The enclosed information outlines your rights under the law. **Each person listed on the COBRA Election Form has an independent right to elect COBRA.**

You have 60 days from the date the coverage ends, or the date of this notice, whichever is later, to advise us of your election. **If no election is made, coverage will be terminated as of the date indicated on the enclosed COBRA Election Form.**

The enclosed information included the time limits for electing COBRA coverage and identified the premium amounts for the available medical and dental coverages.

The Town did not receive a response to either letter.

The Grievant continues to receive LTD through the Town's insurance carrier. The Grievant has 34.94 hours of pay remaining on the Town books for which he has not opted to be paid under the Town's letter of August 16, 2004.

On September 1, 2004, a grievance was filed alleging, *inter alia*, that the Grievant injured his back while moving lake buoys. The grievance asserts that the Town violated Article XIX and ADDENDUM II, "Short-term Disability Policy," when:

At a meeting 8/24/04 the Town informed Tracy that the Town was making his S.T.D retroactive to May 14. The Town wants 30% of his wages repaid. The Town is keeping the Worker's Comp. money in case Worker's Comp wants repayment or to offset S.T.D costs. All of Tracy's vacation, sick days and Health Insurance end 9/11/04. Tracy must go on Long Term Dis.

As remedy, the grievance requests that Worker's Compensation ends 8/2/04 and Short Term Disability begins 8/13/04.

DISCUSSION

This grievance was generated by the Town's August, 2004 decision to retroactively deny the Grievant his Article XIX Worker's Compensation pay. When the Town made this decision, it also decided to convert this time off to sick leave and Short Term Disability and determined that the Grievant owed the Town money because the STD benefit was 70% of regular wages, while the Worker's Compensation benefit was 100% of regular wages. The decisions of the Town implicated not only the Grievant's wages, but also many of his fringe benefits.

The Union, contrary to the Town, alleges that the Town violated Article XIX and Addendum II of the parties' collective bargaining agreement when it determined that the Grievant's STD should start on May 14, 2004, rather than August 13, 2004. Relying upon the insurance carrier's letter of August 2, 2004, the Town asserts that the Grievant was not entitled to receive Article XIX Worker's Compensation pay and that its conduct in this matter has been practical, as well as consistent with Addendum II.

Article XIX states as follows:

Section 1. Employees are entitled to Worker's Compensation coverage. Employees absent due to injury or illness covered by the Worker's Compensation statue (sic) shall receive their regular wage for the period he is absent from work due to such on the job injury or illness for the period that Worker's Compensation is paid to such employee including the initial (3) three day waiting period. To obtain this pay, the employee shall endorse and turn over such weekly Worker's Compensation payments received by him to the Town Treasurer who will give him a receipt therefore and his regular pay.

The parties have not introduced any evidence regarding bargaining history or past practice. Thus, the only evidence of mutual intent is that which is reflected in the plain language of the agreement.

Prior to August 2, 2004, the Grievant received Worker's Compensation pay for certain work absences. In its letter of August 2, 2004, the Town's Worker's Compensation Insurance carrier stated that it was denying all claims. The carrier, however, did not, in fact, deny all claims because it expressly stated that it was not requesting reimbursement of past indemnity and medical at that time. This "past indemnity and medical" includes the Worker's Compensation payments that were made to the Grievant prior to August 2, 2004.

By reserving "the right to request reimbursement in the future, if necessary," the carrier has indicated that it may be revisiting its decision to pay "past indemnity and medical." It is not evident that, to date, the carrier has found it necessary to request reimbursement of the Worker's Compensation payments that were made to the Grievant prior to August 2, 2004. Under the facts of this case, the Town's August, 2004 determination that the Grievant's prior absences were not due to injury or illness covered by the Worker's Compensation statute is premature.

In summary, in August, 2004, the Grievant was entitled to the Worker's Compensation payments for the work absences for which he had received Worker's Compensation payments. Thus, under the language of Article XIX, when the Grievant endorsed and turned over these Worker's Compensation payments to the Town, the Town was obligated to pay the Grievant his regular pay.

On August 16, 2004, the Town violated Article XIX of the collective bargaining agreement when it retroactively denied the Grievant worker's comp time off, and the pay therefore, and determined that the Grievant should be paid sick leave and STD for these absences. The appropriate remedy for this contract violation is to restore the Grievant's worker's comp time off and to make the Grievant whole for all losses suffered as a result of the Town's conduct in retroactively denying the Grievant's worker's comp time off. Inasmuch as the Town's decision to retroactively deny the Grievant's worker's comp time off implicates a number of the Grievant's wage and fringe benefit entitlements, the undersigned has retained jurisdiction for a period of sixty days to resolve any disputes regarding remedy.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Town violated the parties' collective bargaining agreement when, in August of 2004, it retroactively denied Worker's Comp time off for the Grievant's work absences and the pay therefore, and determined that the Grievant should be paid sick leave and STD for these absences.

2. In remedy of this violation of the parties' collective bargaining agreement, the Town is to immediately:

- a) restore the retroactively denied Worker's Comp time off
- b) make the Grievant whole for all losses suffered as a result of the Town's conduct in retroactively denying Worker's Comp time off

3. The undersigned retains jurisdiction for sixty days from the date of this Award for the sole purpose of resolving disputes regarding the remedy due the Grievant.

Dated at Madison, Wisconsin this 23rd day of May, 2005.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

