BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF HORICON PUBLIC WORKS, LOCAL 1323H, AFSCME, AFL-CIO, WISCONSIN COUNCIL 40

and

THE CITY OF HORICON

Case #37
No. 66757
MA-13620

(Tammy Hintz - Workers Compensation Supplemental Benefits)

Appearances:

Thomas Wishman, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Post Office Box 2236, Fond du Lac, WI 54936, appearing on behalf of Local 1323H.

Alan M. Levy, Attorney at Law, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Milwaukee WI 53202, appearing on behalf of the City of Horicon.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the City of Horicon (hereinafter referred to as either the City or the Employer) and AFSCME, Local 1323H (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the payment of workers compensation supplemental benefits to Tammy Hintz. The undersigned was so designated. A hearing was held on May 16, 2007 at the City's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. No stenographic record was made. The parties submitted briefs and reply briefs, the last of which were received by the undersigned on July 23, 2007, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUES

The parties agreed that the following issues should be answered herein:

1. Did the Employer violate Section 12.03 of the collective bargaining agreement when they refused to pay Tammy Hintz her regular pay after November 2, 2006?

2. If so, what is the appropriate remedy?

BACKGROUND

The facts of this case are reasonably straightforward. The City provides general municipal services to the people of Horicon, Wisconsin. The Union is the exclusive bargaining representative for the City's DPW employees, including those in the classification of Class I – Trench & Mason. The Grievant, Tammy Hintz, is classified as Trench & Mason.

The Union and the City have been parties to a series of collective bargaining agreements. Among the provisions in the current collective bargaining agreement is Article XII – Health and Retirement. Section 12.03 of that Article provides for a salary supplement for employees who cannot work due to a duty incurred injury or illness:

> **Section 12.03 – Duty Incurred Injury** In the event an employee suffers compensatory injury or illness in the course of performing his duties, he shall receive regular pay for a period not to exceed six months. If the illness or injury is of a duration such that Worker's Compensation is paid, the employee shall receive the difference between the amount paid by Worker's Compensation and his regular pay for the six month period.

The Grievant injured her upper back while working on May 2, 2006. The injury caused her upper back pain and pain in her chest. She filled out an injury report the following day, and was off work until June 30th. During that time she received worker's compensation benefits, and she was also paid supplemental benefits under Section 12.03. She suffered a different injury on September 28th, and was off work until October 6th. Again, she received supplemental benefits per the contract.

On October 24th, the Grievant again experienced back pain while working. The following day, she called off work, leaving a voice mail message that she had a backache. The next day, she left another message, saying she would be off until November 3 due to her back. Supervisor Steven Bogenschneider called her and she told him that this was the same problem she had in May, and that she had never fully recovered. He told her that she should come in to file a worker's compensation report, and she resisted, saying that she had already filed a

report about this problem in May. He insisted, and she came to the office to complete the report. Her report of the accident described it as: "pain in sane (sic) spot – location of back as of 5-02-06." In answer to a question on the form about similar accidents in the past, she wrote: "Never healed from past, always a sore spot." Under "injured body part" she checked "Back" indicating both upper and middle, and wrote "same as 5-02-06." On November 8th, the Grievant's doctor provided a slip to the City, stating that she would be unable to work until a re-evaluation in ten days "due to back strain from work injury 5/2/6."

On November 15th, City Clerk-Treasurer David Pasewald sent the Grievant a letter, advising her that her six months of benefits under Section 12.03 had expired as of November 2nd and that she would not receive supplemental payments beyond that date:

. . .

Dear Tammy:

This letter is to advise you of your compensation status with the City of Horicon. You are currently on a Worker's Compensation leave for an injury originally received on May 2, 2006. Section 12.03 of the Labor Agreement between the City of Horicon and the Public Works Union addresses this situation.

Section 12.03 reads as follows: "In the event an employee suffers compensatory injury or illness in the course of performing his duties, he shall receive regular pay for a period not to exceed six (6) months. If the illness or injury is of a duration such that Worker's Compensation is paid, the employee shall receive the difference between the amount paid by Worker's Compensation and his regular pay for the (six) month period."

Since November 2, 2006 reflects six months from your original injury date of May 2, 2006, the City is no longer required to pay the difference between your regular pay and your Worker's Compensation benefit. Your check, dated November 16, 2006, will represent payment through November 2, 2006. You are still required to turn over any compensation you receive through Worker's Compensation up to and including November 2, 2006. After this date, you are no longer required to turn over your Worker's Compensation benefit to the City of Horicon for this injury.

. . .

The instant grievance was filed on November 21st, contending that the City's method computing the six month period for benefits was incorrect. The grievance contended that the intent of contract provision was to provide a supplement for up to six cumulative months of wage losses, not a supplement for losses during the six calendar months following the date of the injury. The grievance stated that "In the instant circumstance Ms. Hintz's total time off on WC has been less than 6 months because she returned to work during the interim." As a remedy, the grievance requested "payment of supplemental wages to Ms. Hintz or other similarly situated employee until such time as they have received a total of 6 months of WC payments."

At around the time that the grievance was filed, the Grievant noticed that her worker's compensation check had a different claim number than those she had received in the preceding summer, as well as a different claims manager. She contacted the claims manager for her initial claim and asked about this. She was told that because the first case had been closed, and could not be reopened, workers compensation was treating the October claim as a new injury. She conveyed this information to the City at the second step grievance hearing on January 29, 2007, although no new line of argument concerning the grievance was raised at that time.

The Grievant continued off work until March of 2007. The grievance was not resolved in the lower steps of the grievance procedure, and was referred to arbitration.[1] At the arbitration hearing, the Union asserted its basic position that the six month period in the contract referred to six months of supplemental benefits, not six calendar months. It also asserted that the October injury was a new injury, and that a fresh six month period should be applied. The City objected to this as a new argument that had not been raised in the grievance procedure.

In addition to the arguments over whether there was a new injury in October, the parties presented evidence concerning two prior cases involving supplemental compensation, both arising at times when the supplemental benefit was capped at three months. In one case, an employee named Billington received checks for a total of 5 months of benefits across three different periods in 2001, stretching nearly eleven calendar months from the date of the injury. The second case involved an employee named Westphal, who was injured on August 6, 2003. He continued working until late November, when he went out on worker's compensation and started receiving supplemental benefits. The benefits were terminated three months later on February 20, 2004, even though Westphal continued to receive worker's compensation until April 2, 2004.

Additional facts, as necessary, will be set forth below.

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[1] At the arbitration hearing, the Grievant waived her HIPAA rights to allow the introduction of medical records and other information related to her medical care.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the City violated Section 12.03 by ending the Grievant's supplemental benefits after six calendar months from the date of her initial injury on May 2, 2006. There are two reasons for this. First, the City is wrong in claiming that the period of supplemental benefits is measured by counting six calendar months from the date of injury. Second, the City is wrong in treating the October injury as merely a continuation of the May injury in the face of a determination by the Worker's Compensation administrator that it is a new injury.

There is no dispute that the contract is silent as to how the six month benefit is to be determined. It does not define the starting or ending point, nor does it specify whether the six months consists of only work days missed, work days generally, or calendar days. A literal reading of the language leads to the conclusion that an employee who is injured is entitled to six months of supplemental pay. Clearly the Grievant did not receive this benefit, as she only received three months of supplemental pay. The City's argument, that the date of injury starts a six calendar month clock ticking, is inconsistent with the purpose of this provision and with its own administration of the provision in the only two prior cases. In the case of Billington, the employee continued to receive the benefit for eleven months from the date of injury. In the case of Westphal, the employee received the benefit for three continuous months, measured from the date on which benefits started, even though that start date was three and one half months after the date of injury. In neither case did the City attempt to cut off benefits based on three months elapsing from the date of the injury.

The City's interpretation makes little sense, and it can lead to absurd results. An employee who is injured on May 2nd but attempts to work through the injury does not lose pay, and therefore receives no supplemental benefit. If, however, it is determined that surgery is required to repair the injury, and that surgery is not performed until six months later, the employee receives absolutely no benefit, even though she is indisputably absent and losing pay due to a duty incurred disability. If that same person makes no effort to continue working, she receives the full six months of benefits. That cannot be what the parties intended when they negotiated this language. Moreover, the Union points out that the City's interpretation does not take account of the fact that there was an intervening period of benefits for a separate injury in this case. The Grievant was hurt and off work from September 28th until October 6th. The parties agree that each distinct injury produces a distinct entitlement to benefits, yet by counting this period against her six month entitlement, the City effectively denies her a portion of the benefit she is separately entitled to for the September injury.

The Union also argues that, however the six months is measured, the injury in October was a new and distinct injury for worker's compensation purposes. The worker's compensation administrator counted this as a new loss and a new claim. While her injury report says that she "claims the same injury of 5/2/6", that is ambiguous. It may mean that

she re-injured her back in the same place, or in the same manner, and it may mean that it is an aggravation of the original injury. The clearer and more certain evidence is that it has been treated as a fresh claim by the persons who are responsible for assessing these matters for worker's compensation purposes. Accordingly, the Grievant was entitled to a fresh six month period, under either party's method of calculating.

The Position of the City

The City takes the position that the contract provides a specific benefit for a specific limited period of time. That time is six months. It is not six months of benefits, or six months of lost time. It is six calendar months. The contract is replete with references to time periods – employees serve a six month probationary period, there is a thirty day trial period for promotions, disciplinary notices are removed after one year, vacation entitlements are based on years of service. None of these time periods are extended because of employee absences for any portion of the time. Where the parties intend to measure time by days worked or to incorporate other exclusions, they know how to do so. In the grievance procedure, for example, the time for filing a grievance is defined in terms of "working days" rather than simply "days." In the supplemental benefits provision, there is no such language, and that should indicate to the arbitrator that the parties intended a straight calendar measurement of time, as they did in the other cited provisions.

The City argues that there is no useful past practice to guide the arbitrator. There have only been three cases, including this one, in which Section 12.03 benefits came into play. In one, an isolated error led to payment of benefits in excess of those provided under the contract by either party's reckoning. In the second, the employee was paid from the beginning of his absence. In this case, the employee's benefit is measured from the date of the injury, which is also the date of the absence. In short, each case has been handled differently, and thus there is no consistent practice that defines what the parties meant by their agreement to Section 12.03.

The principles of interpretation support the City's view of the language. The Union cannot evade that fact by claiming that the October injury is a new incident for Section 12.03 purposes – a claim first raised on the date of the arbitration hearing. The Union has an obligation to state the basis of its claim in the grievance procedure, and cannot devise a new theory of the case at the arbitration step. Even if the arbitrator did consider this "two injuries" theory, the evidence will not support it. The medical professionals and the Grievant all treated this injury as an extension of the May injury. The worker's compensation carrier used a different claim number for some administrative reason of its own. That clerical oddity can hardly be the basis for a fresh six months of benefits under the contract.

DISCUSSION

Section 12.03 of the parties' labor contract provides a benefit of six months of wage supplement to employees injured in the line of duty. The dispute here is how the six months is to be calculated. The City asserts that it is six calendar months, beginning with the date of the injury, without regard to whether or how much of the benefit the employee actually uses.[2] The Union claims that the six months refers to the total amount of benefit the employee may draw, without regard to how long after the injury the wage loss is realized. There are two components to the parties' differing interpretation. First, when does the six month time period start – at the date of the injury or the date of the first compensated wage loss? Second, once the six month period begins running, it is a single block of six consecutive calendar months, or is it a cumulative measure of periods of wage loss?

The parties did not choose to negotiate language specifying precisely how the six months would be measured – e.g. "six calendar months from the date of injury" or "six months of wage losses" - and thus the provision as worded allows for either interpretation:

> **Section 12.03 – Duty Incurred Injury** In the event an employee suffers compensatory injury or illness in the course of performing his duties, he shall receive regular pay for a period not to exceed six months. If the illness or injury is of a duration such that Worker's Compensation is paid, the employee shall receive the difference between the amount paid by Worker's Compensation and his regular pay for the six month period.

A. When Does The Six Months Begin?

To say that the language is ambiguous and allows for either interpretation is not to say that it fails to provide any guidance. The phrase "he shall receive regular pay for a period not to exceed six months" refers to a period of receiving regular pay, with the implication that during that time, absent the benefit, the employee would not be receiving regular pay. This strongly suggests that the calculation of the six month period begins with the date on which the Section 12.03 benefit is first drawn, rather than the date of injury. This is consistent with the fact that the status of being injured or ill is not the relevant event in triggering the application of the provision. Section 12.03 does not operate in cases of workplace injury or illness, unless there is a loss of pay as a consequence of the injury or illness. This conclusion is strongly buttressed by the second sentence of the provision, referring to "the illness or injury [being] of a duration such that Worker's Compensation is paid…" No matter what the duration of an illness or injury, worker's compensation benefits are not paid, unless there is also an associated absence.

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[2] The City appears to argue the issue of when the six months begins to run in the alternative. Its initial brief takes the position that the six month period begins with the date of injury. The reply brief argues that it begins with the first day of absence, essentially echoing the City's opening statement at hearing. For purposes of analysis, I have treated this as a disputed issue.

A reading of Section 12.03 having the time line commencing on the date of loss rather than injury is consistent with the only two prior cases involving that provision. In the first case the employee went out immediately after the injury, so the case is consistent with either party's interpretation of when to start counting. In the second case, however, the employee did not miss work until two and one-half months after being injured. This was at a time when the benefit was limited to three months of supplemental pay. The benefits were paid for three months after the wage loss began. When they were terminated, five and one-half months had passed since the date of the injury. This is consistent with the notion that the clock runs from the first loss of pay, and inconsistent with the City's view that it runs from the date of injury. The City argues that neither prior case is relevant because the cases are not consistent with one another, and because there are not enough cases to establish a past practice. As for consistency, it is true that in the first case, the amount of benefits paid to the employee was clearly incorrect, since he received a total of five months of benefits at a time when the contract only provided three months. To say that the amount of benefit was incorrect does not necessarily mean that the structure of payments – i.e. when they were paid - was incorrect. Both prior cases are consistent, at least with respect to starting payments when the wage loss started.

Turning to the City's argument that a past practice cannot be made out from only two instances, that is true, as far as it goes. Two instances would not satisfy the customary formulation of a practice being (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. These elements go to the level of proof a practice must satisfy before it may be treated as binding upon the parties. Practices are eventually treated as binding because they are generally the most reliable proof of the parties' mutual intent as to the meaning of ambiguous language – the Employer in the way it chose to administer the disputed provision and the Union in its acceptance of that method of administration. Obviously the more instances there are of the practice, the more persuasive it becomes as evidence of mutual intent. In assessing a claimed practice, however, the arbitrator must consider how often the situation has come up. In this case, the City correctly notes that there are only two examples, but that is because this provision rarely comes into play. There are only two examples because the provision has only been invoked twice.

The past administration of Section 12.03 cannot be said to constitute a binding practice since, even though it is completely consistent with the proposition that the period of benefits begins to run with the payment of benefits rather than the date of injury, two instances cannot be said to reflect a considered, albeit implicit, agreement between the parties. While it does not bind the parties, the evidence of prior instances is useful evidence of how the City as an informed and interested party has read the language in the past, and it is entitled to weight along with all of the other record evidence in this dispute. In this case, it bolsters the interpretation suggested by the contract language itself. I also note that in the letter conveying the information about the other two cases to the Union during the processing of this grievance, City Clerk Treasurer David Pasewald described the second case, in which the benefits were paid out for three months commencing two and one-half months after the injury, as an instance of the contract being administered correctly.[3]

[3] See Joint Exhibit 4, letter of March 9, 2007.

For the reasons outlined above, I find that the greater weight of the evidence is that the six month period begins to run as of the date on which the benefits begin to be paid, rather than the date of injury. The remaining and more substantial question is how the duration of the six month period is defined.

B. How Is The Six Months Calculated?

The City asserts that the six months is a single block of six calendar months, while the Union views it as being six cumulative months of benefits. Part of the premise of the City's argument is that all of the other time periods in the contract are administered as single units of time, and if the parties wished to describe a time period as being cumulative – excluding some time and including other time - they would have included qualifiers – such as "working" days -- to so indicate.

In fact, however, the contract is not completely uniform in terms of the use of qualifiers for time. It does, in several places refer to "working days" to distinguish those from calendar days. However, in §14.01(B) of the "Authorized Absences" provision, for example, reference is made to a "calendar year" in a context showing that it refers to the 365 day period following the employee's anniversary date. In the "Fair Share/Dues Deduction" provision, payment is due for a new employee in the month following 30 "calendar days of employment." These are both examples of an unnecessary flourish if all time periods are presumed to be single blocks of consecutive calendar days. While it does appear that most references to weeks, months and years in the labor agreement refer to continuous blocks of time, that is in most cases dictated by the context, rather than some rigid stylistic choice the negotiators made to distinguish between single blocks and cumulative periods.

The language used in the agreement does provide greater support for the City's interpretation than the Union's. I am not persuaded that the failure to include specific language such as "months of lost time" or "months of benefits" resolves this dispute in the City's favor, since the parties likewise did not use a term such as "calendar months" as they might have if that was their mutual understanding of the language. I do note, though, that the language uses the word "period" when it refers to the six months – "a period not to exceed six months" and "the six month period." In both sentences, the parties refer to a singular period, and this phrasing is far more consistent with a single block of time than it is with an accumulation of multiple periods of absence.[4] Simply put, the result proposed by the Union has benefits being paid from May 2, 2006 through sometime in late January or early February of 2007, a period exceeding six months, when the contract states that the period shall not exceed six months.

[4] This is also consistent with the other reference to a "period" in the labor agreement, the six month probationary period, which is treated as a single block of time.

While the two prior cases are somewhat instructive on the question of when the six month period begins, they shed no light at all on how it is measured. The case in which the benefits were paid for three months straight following the date on which the employee first invoked Section 12.03 is consistent with both parties' interpretation. There was no intervening time back at work to arguably extend the duration of the benefits payments. The other case, in which the employee received five months of benefits over eleven calendar months, at a time when the contract only provided a three month period of benefits, proves nothing, as the duration of the payments was wrong under both parties' reading of the contract.

The Union argues vigorously that the City's interpretation of the contract would lead to harsh and nonsensical results, maintaining that it penalizes an employee who tries to work through an injury relative to one who goes out immediately. Certainly it has that potential, although the countervailing argument would be that it encourages employees to aggressively treat injuries and fully recover as soon as possible. Whether the result is harsh depends upon where one believes the parties struck the balance between the individual's interest in the maximum possible protection against wage loss and the employer's interests in administrative efficiency and discouraging intermittent absences for prolonged periods of time. Neither outcome is harsh in the sense that reasonable negotiators could not have intended that meaning.

The record evidence is not strong on the issue of how the six month period is measured. The prior instances of Section 12.03 benefits being paid are equally consistent with both parties' theories, and neither result is harsh or nonsensical. The language used in the labor agreement provides somewhat greater support for the City's interpretation than it does for the Union's reading of the contract. The Union bears the burden of proof in this language case, and I cannot conclude that the preponderance of the evidence establishes that the City violated the contract by not treating the six month period as extending past November 2, 2006.

C. Was The October Event A New Injury?

Both parties agree that each distinct injury entitles an employee to a distinct benefit under Section 12.03. The Union argues that, whatever the arbitrator decides on the duration of benefits for the May 2nd injury, the Grievant was still entitled to benefits past November 2nd, because her absence beginning in October was due to a new injury. This argument is based on the workers compensation insurance carrier's assignment of a new case number to the injury because their system did not allow them to re-open a closed file. The City argues that this argument should be treated as waived, since it did not arise until arbitration, and that the clerical practices of the carrier do not control benefits under the collective bargaining agreement.

I find, contrary to the City, that the "new injury" aspect of this claim was mentioned relatively early on in the grievance procedure, at the January 29 Personnel and Finance meeting. The very cursory notes of that meeting do not reflect any substantial discussion of the issue, but it cannot have been a completely new issue as of the arbitration hearing.

According to the Grievant, her injury from May had never really healed, and the October absence was due to a flare-up of that injury. This is reflected in her report of injury, and in the medical notes related to her treatment. The insurer did not assign a new number because it had some factual basis to believe that this was a new injury. A new number was assigned because of the limitations of that insurer's administrative procedures. The six month period is triggered when an employee "suffers compensatory injury or illness" and claims benefits for lost time owing to that injury or illness. It is the injury, not the coding system of the insurance carrier, that entitles an employee to supplemental benefits. The Grievant conceded that her absence in October was due to the injury she had suffered in May. Without expressing any opinion on how a true re-injury or aggravation should be treated, I conclude that the number assigned by the insurance carrier, without more, does not define when an injury occurs for Section 12.03 purposes.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The Employer did not violate Section 12.03 of the collective bargaining agreement when they refused to pay Tammy Hintz her regular pay after November 2, 2006.

2. The grievance is denied.

Dated at Racine, Wisconsin, this 27th day of November, 2007.

Dan Nielsen /s/
Daniel Nielsen, Arbitrator

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