Case Name:

Health Employers' Assn. of British Columbia v. Hospital Employees' Union (Video Surveillance Grievance)

IN THE MATTER OF an Arbitration under the British Columbia Labour Relations Code
Between
Health Employers' Association of British Columbia ("HEABC" or the "Employer"), and
Hospital Employees' Union (the "Union")
(Video Surveillance Policy Grievance)

[2010] B.C.C.A.A.A. No. 163

No. A-123/10

British Columbia
Collective Agreement Arbitration
Vancouver, British Columbia

Panel: Emily M. Burke (Chair); Chris Grant (Member); Ruth Herman (Member)

Heard: November 19-21, 2008; (Jurisdictional Issue) June 4-5, October 19-20, 27, November 16-18, and December 7, 10-11, 2009; January 5, March 1 and 19, 2010.
Award: July 9, 2010.

(220 paras.)

Appearances:

Counsel for HEABC: Wendy J. Harris QC.

Counsel for the Union: G. James Baugh and Carol Reardon.

AWARD

Reasons for award were delivered by Emily M. Burke (Chair) and Ruth Herman (Member). Chris Grant (Member) dissented without separate reasons.

EMILY M. BURKE (CHAIR) and RUTH HERMAN (MEMBER):--

1 INTRODUCTION

1 On July 28, 2006, the Union filed a policy grievance regarding the submission and use of video surveillance evidence before Claims Review Committees ("CRC") appointed pursuant to Section 11 of the LTD Addendum in the Collective Agreement between the parties. The Union maintains it is inconsistent with a proper interpretation of Section 11 of the LTD Addendum to submit video surveillance tapes to a CRC. The Union raises the same issue in a grievance filed on behalf of K. Hawrys on April 20, 2007 and, also challenges the submission by the Employer of legal argument to CRCs during the CRC process.

2 The parties agreed to consolidate the policy grievance and the Hawrys grievance with respect to the submission of video surveillance evidence and written argument to the CRCs. The remainder of the Hawrys grievance is being held in abeyance pending the conclusion of this arbitration.

3 As this case proceeded through the hearing process a number of objections were raised. As a result, the background to this case has been set out in a number of previous decisions dated January 7, 2009; March 10, 2009; April 30, 2009; July 16, 2009, and November 3, 2009.

4 A more detailed background will be set out in this decision. That background includes a consideration of the evidence provided in the November 2008 hearing on jurisdiction agreed by the parties to be evidence in the merits of this case. In addition, we note where the facts are relatively non-contentious, we have largely set them out as outlined by the respective party relying upon them in written argument; in particular, the process used by the claims-paying agent. I.

1 BACKGROUND

5 HEABC is an Employers' organization accredited by the British Columbia Labour Relations Board. It is a party to the 2006-2010 Health Services and Support Facilities Subsector Collective Agreement, which includes the Union. One of the benefits provided to employees in the bargaining unit is a long-term disability (the "LTD Plan"), as described in the Long Term Disability Insurance Addendum to the Collective Agreement.

6 The LTD plan originated in 1979 under the former HEU master collective agreement. The parties bargained the plan following a binding arbitration award of Arbitrator Hope awarding "comparability with" the collective agreement between the provincial government and the B.C. Government Employees' Union. The award directed the parties

to negotiate a mutually acceptable LTD plan as part of a benefit package that would be comparable to that in the Government collective agreement. The LTD plan negotiated was based upon and is comparable to the Government LTD plan. While there are some differences, similar provisions prescribe the role of the claims-paying agent and recourse to a CRC or grievance/arbitration. This plan has been included in subsequent collective agreements between the parties. Although some amendments have occurred over the years in collective bargaining, the relevant sections to this dispute remain the same.

7 The parties to the Collective Agreement agreed to administer the LTD Plan through the vehicle of a trust. A joint trust was first established on January 1, 1979, by an Agreement and Declaration of Trust between the Health Labour Relations Association of British Columbia ("HLRA") (the predecessor of HEABC), the Union and eight named trustees appointed by HLRA and the Union. This trust was known as the HEU-HLRA Health and Benefit Trust (the "First Trust").

8 The Joint Trust was established to provide employees of member healthcare organizations, including employees in the HEU bargaining unit, with certain health and welfare benefits including long-term disability benefits. These benefit plans were funded by monies collected from participating employers; which include members of the HEABC and other employers, and are held in trust. The trustees are entrusted with overseeing the management and provision of the benefit plans in accordance with the Trust Agreement. Their authority is provided for in Article 4.01 of the Agreement. The Plan must be consistent with the Trust and determinations on that consistency are made by HEABC. Determinations as to whether the Trust is in compliance with the collective agreements are made by HEABC.

9 Other employee groups of participating employers are also provided with health and welfare benefits through the Trust. Approximately 85,000 employees receive benefits through the trust. A variety of benefits are provided through the Trust including LTD, Extended Health Group Life, A/D & D and Dental benefits.

10 As a result of subsequent collective bargaining with the Union, the parties agreed long term disability benefits would be paid for and administered solely by the employer through a trust which was established as the HLRA Health and Benefit Trust (the "Second Trust"), effective May 1, 1980. The trustees of the Second Trust were appointed solely by the HLRA.

11 The Second Trust was later reconstituted as the Healthcare Benefit Trust ("HBT") on December 1, 1993 by Agreement and Declaration of Trust (the "Trust Agreement"). The Trust Agreement provides employees of member health care organizations, including but not limited to employees in the Facilities bargaining unit, with health and welfare benefits including long term disability benefits.

12 Article 39 of the Collective Agreement requires the Employer to provide a mutually acceptable long-term disability insurance plan. The specific terms that must be included in the LTD Plan are set out in detail in the LTD Addendum that is incorporated as part of the Collective Agreement. HBT is not party to the Collective Agreement.

13 Section 11 of the LTD addendum provides LTD claims shall be adjudicated and

paid by a claims-paying agent. The Great West Life Assurance Company ("GWL") was retained by HBT as the claims-paying agent in October 31, 1996 and remains as such today. GWL is responsible for assessing claims and determining whether claims should be paid by HBT. GWL makes determinations as to what information it may require to adjudicate any particular claim, including video surveillance.

14 Section 11 of the LTD addendum provides that an employee may dispute a decision of the claims paying agent by having his or her claim reviewed by a Claims Review Committee ("CRC"). Under Section 12 of the LTD addendum, questions arising as to the interpretation of the plan are to be resolved under the general grievance and arbitration procedures of the collective agreement in Articles 9, 10 and 11 of the collective agreement.

A. Claims-Paying Agent

15 As noted earlier, GWL has been retained as the claims-paying agent by HBT since October 31, 1996. Prior to GWL, the claims-paying agent was Mutual Life. The claims-paying agent adjudicates claims at first instance and determines whether LTD benefits should or should not be paid. Cheryl Foster, a Team manager from GWL, testified about GWL. She has worked in claims adjudication with GWL for 13 years and been involved in adjudication of HBT claims from the time the GWL became the claims-paying agent for HBT.

16 GWL the largest health and welfare benefit provider in Canada, adjudicates the long term disability claims for employees of all HBT member health care organizations using the same procedures and tools for adjudication. These are the same procedures and tools used in the adjudication by GWL in administering other long term disability benefits.

17 GWL has over 50 staff, with a team manager for each health authority and eight to ten case managers for each team. There is an associate manager for the whole of the team. GWL has a number of medical specialists and other health care professionals available to advise the managers responsible for the adjudication of claims.

18 When an employee wishes to make a claim for LTD benefits under the LTD Addendum, the relevant claim forms from the employee, the employer and the employee's physician are sent to the GWL.

19 The claimant's statement includes information regarding the employee, including the employee's description of what is preventing them from working, information on treatment by physicians and information on their education, training and experience. The Employer's statement includes information on the identity of the employer and employee, earnings information, possibilities for accommodation, nature of work and any additional information the employer feels is necessary for the assessment of the claim. The attending Physician's statement sets out information such as diagnosis/es, functional limitations, functional overlay and psychosocial factors that may impact the claimant's condition.

20 The HBT Administration Manual includes a section on Employer's Rights which notes an employer may notify GWL of any facts that may assist with the adjudication of the employee LTD claim, including whether the employee has been working since the date of disability, and whether the employee has "been seen involved in activities which

are inconsistent with the known physical limitations".

21 Following review of the initial forms, GWL gathers additional information it considers necessary to adjudicate the claim, including from the employee, employer, general practitioner, specialists and others. The case manager may conduct phone interviews, may write to physicians with a questionnaire or request clinical notes, and may request an independent medical examination ("IME") or functional capacity evaluation ("FCE").

22 The core information from the claim file is summarized by GWL in a Portfolio Assessment Management Plan ("PAMP"). The PAMP includes fields for information such as "Reported Restrictions", "Clinical Findings", "Treatment" and "Other Claims Info". The section on "Assessment" summarizes the rationale for decisions and management of the claim.

23 Where the claim is initially accepted, GWL continues to obtain further updates during the life of the claim, including from physicians and from the claimant, to determine if the claimant continues to be eligible under the "own occupation" or "any occupation" definition of disability. In some cases, the case manager may receive anonymous tips, which could come in any form, including newspaper articles, letters, websites or phone calls. When such information is received, the case manager looks at the claim in its entirety to assess whether there is any validity to the information, whether there is a need to obtain further information in respect of the matter and, ultimately, whether the claimant continues to meet the definition of disability under the Plan.

24 GWL may use video surveillance in adjudicating claims for LTD benefits. This is not frequently used and is based upon a consideration of the particular claim. It is estimated surveillance is conducted in less than 1% of claims. Decisions as to when to use video surveillance are up to GWL, not HBT or HEABC. Video surveillance has been used by the claims-paying agents as one of its adjudicative tools since the early 1990s.

25 GWL uses industry standards in claims adjudication, including on issues of when to conduct surveillance. When considering use of video surveillance, case managers use GWL's internal Activity Investigation Guidelines. These guidelines set out when surveillance is warranted as follows:

> WHEN IS AN ACTIVITY INVESTIGATION WARRANTED?
>
> Guidelines for Determining when an Activity Investigation is Warranted
>
> While activity investigation is a valuable claims management tool, it is also a sensitive matter. Therefore, it must be conducted by Great-West Life and external investigators in a manner that is beyond reproach. The use of surveillance must be reasonable and justified and the criteria used to select this tool must be fully documented. In deciding to have an activity investigation:
>
> - other claim management tools should be considered (Independent Medical Examination, Functional Capacity Evaluation, etc.)

along with whether:

- the potential savings in benefits exceed/justify the cost of the investigation when compared to or performed concurrently with other claim management tools.

In keeping with a Quebec Court of Appeal decision, we must ensure that surveillance is used only after considering all of the other tools available to us. Further, for an insurer to institute surveillance there must be serious grounds to doubt the honesty and integrity of the employee's claim. For example:

- discrepancies between the alleged symptoms and the clinical findings of the treating physicians or test results,

- discrepancies between the opinions of the experts, not merely because of a different opinion, but in light of different or incompatible symptoms and findings,

- incompatible behaviours arising from other sources such as employers or field representatives,

- discrepancies between the insured's statements to the insurer and other statements to public plans such as (EI),

- when there is the possibility of malingering.

For these reasons, investigations should always be approved by appropriate claims personnel.

A number of more specific questions are then considered. Specific instructions are also provided to the firms conducting the surveillance.

26 When video surveillance is obtained, it is reviewed by GWL along with the rest of the available information in the claim file to determine the claimant's functional capacity. The information from the video surveillance may be of assistance in the determination of a claimant's claim for disability under the LTD Plan.

27 At any time during the adjudication process, a claimant or authorized union representative can request disclosure of the claim file. The file disclosure includes a copy of any video surveillance report and the surveillance video or disk.

28 Where a claim for benefits is denied or terminated by GWL, the employee can appeal that decision internally to GWL by submitting additional information and asking the claims-paying agent to adjudicate the claim again. The Union may seek file disclosure of the claim file at this stage to assist in making an appeal to GWL or to a CRC.

B. Claims Review Committee

29 Under Section 11 of the LTD Plan, an employee may dispute a decision of the claims-paying agent by arranging to have his or her claim reviewed by a CRC. The CRC process has been in place since the inception of the LTD plan. Approximately 65,000 employees have LTD plans administered by HBT which had CRCs. The first CRC took place in 1985. There have been approximately 2,300 CRCs since that time.

30 HBT coordinates the CRC process by setting up the committee of physicians and providing it with information for the claims review process. Leslie Ward, the Chief Knowledge Officer for HBT testified this information consists of all information used by the GWL in its adjudication of the claim, as well as any additional information that is provided by the claimant for review by the CRC. HBT and GWL receive no direction from HEABC in the adjudication of individual claims.

31 There is some dispute between the parties as to what is generally included in this package. The information used by GWL in its adjudication includes medical from the claimant's physician, other medical reports obtained by the claimant and by GWL from specialists; reports from the employer regarding job duties and salary information; reports from rehabilitation consultant and other information regarding the claimant's health, functional abilities, employment, education, training and experience, in accordance with the definitions of disability in the LTD plan. It may also and has included video surveillance if GWL has undertaken such surveillance.

32 When an employee requests to have his or her claim reviewed by a CRC, HBT coordinates the CRC process. HBT prepared a number of checklists and other information regarding the adjudication and appeal processes for the employee, the Employer and the Doctor. The document headed "To the Employee: Appealing a Denied or Terminated Claim" confirms the role of HBT in "coordinating" the CRC and states "the Trust will prepare a package containing all the medical and vocational information in your claim file and copies of relevant correspondence. The package will be sent to the three doctors, to you, and to your union (if authorized by you)." This the Employer argues demonstrates the concept of disclosure of the entire claim file to the CRC is recognized by the Union.

33 As the coordinator of the CRC, HBT obtains a copy of the whole of GWL's file and prepares a package of documents for the CRC, which includes all of the information GWL used in making its decision (the "claim package"). If this information included video surveillance reports or videos/disks, these are included in the CRC package. Ward indicated HBT consistently discloses the information to the CRC as well as the employee and authorized union representative. It also provides a copy to the claimant and the Union if consented to by the claimant. The Union maintains however that not all information has been provided to the CRC in this package.

34 HBT has internal documents which guide staff in preparing the CRC package. Ward noted the underlying principle is to provide the CRC with all of the documentation and correspondence relevant to the adjudication of the claim. Administrative material not related to the adjudication of the claim is excluded. Ward noted if in doubt the material is put in. If any material is inadvertently omitted, it is later included at the request of the employee or Union.

35 The CRC package also includes other documents which provide guidance to the CRC, including the Terms of Reference, an Overview of the Appeal Process, the Questions to be Answered, Information on the Claim and Expense Guidelines. These documents, including the Terms of Reference, were ultimately developed by HBT.

36 The Terms of Reference provide guidance to CRCs and were developed prior to the time when video surveillance was used in adjudication. The Employer says as video surveillance has been incorporated into the adjudication of claims, such evidence has been consistently disclosed by HBT to CRCs as part of the claim file. There is a dispute however over whether the video surveillance going to the CRCs has been consistently disclosed to the Union.

37 The Union has made submissions to the CRC over the years. In such cases, HBT provides copies of any submissions to the CRC for consideration. If the Union's submission was provided to GWL before the CRC was requested by the claimant, the submission would be in the claim file included in the CRC package, and numbered sequentially along with the other documents in the CRC package. If the submission was received by HBT after the CRC package had been prepared, then the submission is provided to the CRC physicians, but as a separate document, rather than as part of the CRC package itself. There is dispute over whether all Union submissions have consistently been sent to the CRC by HBT.

38 The Employer notes the CRC is asked to review the package of claim information, interview/examine the claimant, review the decision of GWL and specifically determine whether the claimant is disabled as of a certain date on the basis of the relevant definition of disability under the LTD plan, which is provided to the CRC. The Union says in argument the CRC is not reviewing the decision of the GWL, but rather determines the latter question only.

39 The CRC meets with the claimant, conducts an interview and may also conduct an examination of the claimant. It also has the authority to order additional medical tests, if necessary. The CRC then deliberates and renders a decision which generally includes a detailed review of their findings and conclusions as to whether the claimant was disabled at the relevant time. The written decision of the CRC is sent to HBT outlining the reasons for the decision. A copy of the CRC decision is sent to the claimant, the employer and the Union if it is authorized to represent the employee.

40 CRC decisions are subject to review by the Labour Relations Board under Section 99 of the *Labour Relations Code.* The CRC has been held to be an arbitration board under the Code. The HEU and HEABC have appealed various CRC decisions under Section 99 of the Code. Appeals have been made on various bases including failure to consider evidence, failure to consider submissions, failure to answer or utilize the proper definition of disability.

C. Bargaining/Negotiation History

41 The Union called evidence of bargaining history in support of its argument. Lee Whyte testified on behalf of the Union. Whyte was a Director at the Union from 1973 to 1978 and Assistant Business Manager from 1978 to 1989.

42 The parties entered into a process where Alan Hope acted as an interest arbitrator with respect to the terms of a new collective agreement between HLRA and the HEU. The Union sought the inclusion of an LTD Plan under the Collective Agreement in the 1978 negotiations. The Health Labour Relations Association (now HEABC) initially rejected this proposal. The Union maintained its proposal for an LTD Plan. On July 28, 1978, the majority of the Hope Arbitration Board published an award requiring the Employer to implement a mutually acceptable LTD plan. In that Award, Hope awarded "comparability" rather than "parity" that the Union was seeking with the hospital services component of the BCGEU covered by a collective agreement with the B.C. Government.

43 The parties met in the fall of 1978 to negotiate the terms of the LTD Plan. Lee Whyte and Grant McArthur represented the Union. The parties agreed to Sections 11, 12 and 13 of the LTD Addendum by December 1978 including the provision allowing for an employee to have his/her claim reviewed by a claims review committee composed of three medical doctors. From the outset, the claims-paying agent under the LTD Addendum was envisioned to be an insurance company, engaged for its expertise. The parties wanted a claims-paying agent which was "reputable, experienced and cost-efficient".

44 Whyte indicated there was little if any discussion as to how the CRC would operate at this stage. At this point the parties did not even have a plan in place. Whyte noted there was some discussion in the meeting with Wyatt on October 25, 1978 about CRC procedures but it was not contentious. A note in the minutes of that meeting indicates a comment from a Wyatt administrator when discussing the definition of disability that: "If employees disagree with administrator then they get opinion of three doctors." Whyte also agreed there was no discussion of the procedures for the CRC in the Union brochure sent to the employees. The Union was more concerned with the overall plan and how it was going to be integrated with the collective agreement. It was a new benefit which the Union did not have much experience with.

45 The parties also agreed to include Section 13 of the LTD Addendum, a clause providing that the terms of the LTD Plan shall not prejudice the application or interpretation of the Collective Agreement. This wording was not included in the BCGEU Collective Agreement. Whyte indicated this was not contentious between the parties. A Memorandum of Understanding on the LTD plan was ultimately signed on April 3, 1979, effective January 1, 1979.

46 Some time later, in May 1983, Whyte sent a letter to the HLRA Health and Benefit Plan and proposed a list of ten written procedures for CRCs. This letter was forwarded to HLRA. Gordon Austin, Vice-President of HLRA responded in a letter of August 23, 1983 and said:

. . .

> In your letter you enclose a proposal regarding the procedures which the Union suggests should be adopted by claims review committees. You will recall that claims review committees are established pursuant to Section 11 of the Addendum to the Master Agreement on Group Life

and Long-Term Disability Plans. By virtue of this provision employees who dispute a decision of the claims paying agent regarding a claim are provided with the opportunity of having the claim reviewed by a committee of three medical doctors.

The Association considers that claims review committees should be at liberty to determine their own procedure. These committees were intended to provide an independent assessment of an employee's medical condition. The role of the committees is to determine a medical diagnosis. The committee members are medical doctors who have been chosen by the parties because of their medical expertise. It is, therefore, appropriate that the committees be able to make their assessment in whatever manner and by whatever means they consider appropriate.

47 On September 2, 1983, Lee Whyte replied on behalf of the Union addressing the ten points:

. . .

There is no disagreement with your contention that the committee was intended to provide an independent assessment of an employee's medical condition and that they should be able to determine their own procedure in order to make that decision. However, I do not think that absolves us from the responsibility of providing some parameters within which the committee works in order to ensure that the intent of the Agreement is realized.

Please consider the following comments about the various points in our proposal of May 9, 1983:

1 In addition to the question or questions put before them, the committee shall be provided with copies of all medical reports considered to the date of the decision disallowing the claim.

In many cases the employee is not aware of what medical reports the plan carrier has obtained. Certainly there should be no suggestion that the carrier might withhold some reports from the panel. Therefore, it seems reasonable to provide a requirement that the panel receive all medical reports considered to the date of the decision disallowing the claim.

. . .

48 In April 1984, HLRA and the Union agreed on procedures for a CRC involving B. Hailles, a copy of which was attached to Whyte's January 16, 1985 letter. These were as follows:

PROCEDURES FOR CLAIMS REVIEW COMMITTEE

1 A Claims Review Committee shall consist of three medical doctors, one designated by the employee, one designated by the employer and the third to be agreed to by the first two.

1 The third doctor appointed shall act as chairperson.

1 Representatives of both parties shall agree on the medical question or questions to be determined by the committee.

1 In addition to the question or questions put before them the Committee shall be provided with copies of all medical reports considered to the date of the last decision disallowing the claim.

1 The employee or his/her representative will, on written request of the employee, be provided with a copy of all documents in the files maintained by the H.L.R.A. Health and Benefit Plan, and the claims paying agent, including medical reports referred to in point four above. Where there have been rehabilitation consultant reports, medical reports and reports from previous claims, they shall also be provided. The only exception to the disclosure of the claim files from Mutual Life shall be for correspondence internal to Mutual Life and then only if such correspondence has not been provided to either the employee or the employer or their respective representatives. If either party has received a copy of such internal correspondence then it shall be disclosed to the other party as well.

1 The employee or his/her representative shall have the right to submit whatever further medical or other evidence they wish to be considered by the committee.

1 The employee shall undergo an examination by at least two members of the committee.

1 If, following the meeting of the employee with the committee, the committee requests Mutual Life or H.L.R.A. to make further submissions to it or if those parties make further submissions on their own initiative then the employee shall be advised in order that he/she may have an opportunity to respond to that submission.

1 The committee shall render their decision in writing giving reasons for same.

49 The first four points of the agreed procedures were similar to the procedures

proposed by Whyte in May 1983. Point 4 set forth that the CRC was to be provided with copies of "all medical reports considered to the date of the last decision disallowing the claim". Whyte said there was no issue between the parties that the parties were talking about medical evidence and medical procedures. In her view, the parties understood a CRC to be a panel of medical doctors looking at medical evidence in the form of medical reports.

50 Point 5 of the agreed procedures is the same as Point 5 in the procedures proposed by Whyte in her September 2, 1983 letter and provided for access by the employee, upon written request, "of all documents in the files maintained by the HLRA Health and Benefit Plan, and the claims-paying agent, including medical reports referred to in point four above."

51 In her letter of September 2, 1983 responding to the HLRA, Whyte had proposed if the CRC requested further submissions, the employee should have the right to attend and to be represented by counsel. This proposal was not incorporated in the agreed procedures. The CRC could request further submissions from the claims-paying agent or HLRA, with the employee having an opportunity to respond. Under the current Terms of Reference, the CRC may establish further medical procedures and medical tests to be undertaken prior to issuing a final decision. Only the claimant is now permitted to submit additional material for review by the CRC. Neither the claimant nor the employer is entitled to any representation before the CRC.

52 By December 31, 1984, the CRC procedures had been renamed as the "Terms of Reference". The December 1984 CRC Terms of Reference emphasized the need for the Committee to be "established and perform its functions as quickly as possible".

53 The December 1984 Terms of Reference indicated in addition to medical reports held by the claims-paying agent, vocational reports "if applicable" were also to be provided to the CRC. This is the same language as Point 4 of the current Terms of Reference.

54 In 1984, a dispute arose between the parties regarding whether a claimant could be required by the Trust to attend interviews with a vocational consultant. The Union took the position an interview with a vocational consultant could only take place if the claimant could require the presence of a Union representative at the interview. This matter ultimately went to arbitration. In December 1986, an arbitration board chaired by Don Munroe, QC, noted that it would be "a violation of the Collective Agreement for an employee to be cut off from long-term disability benefits by reason of the employee's refusal to participate in a vocational interview except with the assistance of a union representative" (*G.R. Baker Memorial Hospital and Hospital Employees' Union, Local 180* (December 22, 1986 (Munroe)).

55 In April 1987, the Trust prepared revised procedures for the CRCs. These procedures contained more detail regarding the material to be provided to the CRC, which was to include the Terms of Reference, expense guidelines, an overview of the LTD Plan and arbitrations and information regarding the claimant's case, including personal information, "medical reports, vocational reports and/or job description and correspondence from Mutual Life re denial/termination of benefits". Vocational reports

were referenced in the Terms of Reference for the first time. Whyte has no specific recollection as to how that was added. Claimants are requested to provide the Plan Administrator with any further material for review by the Committee not less than ten working days prior to the Committee's meeting. There is no provision in the April 1987 CRC procedures for the submission by the employer of legal argument to the Committee prior to its meeting. The March/April 1987 Terms of Reference continued to provide that the CRC was to be given "all medical reports, and vocational reports if applicable, held by the claims-paying agent prior to the date of the Committee's first meeting".

56 In February 1988, the Union made some proposals regarding the CRC procedures. Among other things, the Union proposal sought agreement the CRC decisions were to be final and binding upon "medical disputes, that is, where medical reasons have been the basis for the denial of a claim". The Union proposed the Committee "be provided with all of the medical evidence prior to the date of their first meeting". The Union also proposed the claimant or his/her representative "have the right to submit whatever further medical or other evidence they wish to be considered by the Committee". This Whyte noted was consistent with the Union's position that the purpose of the CRC was to make medical decisions. The Union also sought the right of the claimant to opt for a full hearing before the Committee, including "calling witnesses, cross-examination and oral argument by counsel".

57 In a letter dated March 10, 1988, Barbara Junker of HLRA responded indicating it was the position of the "Plan" (HLRA/the Trust) that the CRC mandate was not limited to dealing with medical questions but the Committee had "a mandate to review medical and vocational issues". Junker also indicated with respect to the Union's proposal that a claimant could opt for a full a hearing, that the Labour Relations Board had made clear that the CRC process was to be "non-adversarial," such that a CRC could "not provide the forum for the kind of hearing" suggested by the Union.

58 Ultimately, HLRA/the Trust did not agree to limit the mandate of the CRC to medical issues only, or to give claimants the right to a full hearing. When indicating the existing procedures would continue to be followed, Junker noted HLRA/the Trust believed they had "support in the Arbitration decisions that have been issued in relation to the Long-Term Disability Plan, as well as the practice associated with the Claims Review Committee, to continue the present procedures outlined in the Committee's Term of Reference". Whyte said video surveillance was never mentioned as it was not in the mind of HLRA at the time. Whyte noted she would have found it extremely surprising as her view was the claims-paying agent did not generate evidence of its own. Its role was to decide the claim on the basis of the evidence submitted to it.

59 Carmela Allevato, the Secretary Business Manager of the Union from 1989 to 1996, also testified on this matter. She indicated by 1993 when she was involved in negotiations concerning Continuing Care Employer Relations Association and Pricare, there was an agreement there would be an eventual melding of these agreements with the HLRA agreements. One of the key issues was the LTD Plan and specifically the CRC. The idea was to bring the sector up to the standard in the Facilities sub-sector. The demand was one collective agreement with the same wages and benefits for the HEU members who work in long-term care facilities. In cross-examination, Allevato noted while it was not

discussed by the Union in 1993 when the LTD Plan was incorporated into the Collective Agreement, it was understood the CRC process was a non-adversarial process in which three medical doctors would endeavour to examine the claimant and come to a decision as to whether the claimant was disabled within the own or any occupation definitions. The members would attend on their own in an informal safe and comfortable environment replicating a Doctor's office. The CRC would not decide interpretive or legal issues unless the issue was whether that person was disabled.

60 Allevato noted the Terms of Reference were to provide the CRC with the provisions in the collective agreement, to explain to them the process they should follow. In cross-examination, Allevato agreed she was not involved in the bargaining in 1979/80 when the LTD Plan was added. Although Allevato could not say the Employer agreed the process was to replicate a Doctor's office, she noted that is how the Terms of Reference presented it. She also agreed the Union appealed the decision of Ms. Marshall to the Labour Relations Board under Section 108 on the basis of concern with the fairness of the CRC process.

61 During the 1998 negotiations for the renewal of the Facilities Sub-Sector Collective Agreement, the Union brought two LTD claimants to one meeting to register concerns. One of the claimants complained about being subjected to video surveillance by the claims-paying Agent (GWL). Both Chris Allnutt, the Union Secretary Business Manager at the time, and Najeeb Hassan, who was on the HEABC bargaining team agreed there was no discussion about videotape surveillance evidence obtained by GWL being provided to CRCs. Allnutt was unaware HBT was providing videotape surveillance evidence to CRCs for their review. In those negotiations there were no discussions about what evidence could be put before a CRC.

D. Practice

62 The evidence of Ward, Foster, Tony Sulpher an employee of HBT involved in the co-ordination of the CRC process from 1999-2002, and Hassan was clear that neither HEABC nor HBT has any role in the adjudication of individual claims. HBT expects GWL to use industry standards in claims adjudication, including on issues of whether to conduct surveillance.

63 Foster added GWL uses the same adjudication and video surveillance practices in respect of the Provincial Government LTD Plan as the LTD Addendum was designed to be "comparable" to the Provincial Government LTD. This the Employer says is an indication of what the parties would have intended if they had addressed this matter when the Plan was first negotiated.

64 The Union was familiar with the type of material obtained by the claims-paying agent and the decisions made based on this information. The Union has been aware video surveillance evidence was used as a tool in the adjudication of claims by GWL. There is some dispute about how familiar the Union was with information provided to CRCs.

65 The Union provides services to its members with respect to LTD claims, generally after GWL (or Mutual) has made a decision not to provide benefits. The Union will assist the employee with an internal appeal to GWL and/or to a CRC and obtain the disclosure

of the claim file for this purpose. There have been a number of Union officials with particular responsibility for LTD matters, in addition to the Union representatives responsible for assisting members with their particular LTD claims. The Union regularly sought file disclosure to determine what information had been obtained in the source of adjudicating claims.

66 Ward and Foster noted any time a copy of the claim file was sent to the claimant and Union representative, it would include a copy of a video surveillance report where surveillance had been conducted. A copy of the video tapes was also provided, generally at the time of the disclosure, although sometimes at a later date.

67 Documentation was submitted and referenced by Ward concerning approximately 16 files in which the Employer maintains the Union received a CRC package with video surveillance. In 10 - 12 of these files the CRC refers to the video surveillance. Two were at or within the time frame the Union raised the issue concerning the admissibility and use of video type surveillance evidence.

68 Kathy Jessome, a Service Director for the Union's Northern Region, agreed she has been aware of GWL's use of video surveillance in adjudication since at least 1990. She was also aware that video surveillance reports are made to the claims-paying agent which contain a summary of the company's analysis of the video.

69 Jessome gave evidence that if an LTD claim had been denied or terminated by GWL, the Union would generally write to GWL to seek file disclosure and review the file to see what could be done to assist the member. The Union would ensure the information was accurate and assist in obtaining additional medical or vocational reports to be forwarded to GWL. Both Jessome and Allevato agreed the Union made submissions to the CRC on behalf of the claimants. Jessome stopped this relatively quickly after a physician advised it was not either helpful or necessary.

70 Jessome agreed if video surveillance reports were in GWL's file, the Union would receive those reports as part of the file disclosure.

71 The relevant Collective Agreement terms are set out as follows for ease of reference:

> **9.05 Policy Grievance**
>
> Where either party to this agreement disputes the general application, interpretation or alleged violation of an article to this agreement, the dispute shall be discussed initially with the Employer, her/his designate or the Union within fourteen (14) calendar days of the occurrence. Where no satisfactory resolution is reached, either party within a further 28 calendar days may submit the dispute to arbitration as set out in Article 11 of this agreement.
>
> ...
>
> **ADDENDUM**

-- Long Term Disability Insurance Plans --

Section 11 - Claims

Long-term disability claims shall be adjudicated and paid by a claims-paying agent to be appointed by the Parties. The claims-paying agent shall provide toll-free telephone access to claimants. In the event a covered employee disputes the decision of the claims-paying agent regarding a claim for benefits under this Plan, the employee may arrange to have her/his claim reviewed by a claims review committee composed of three medical doctors -- one designated by the claimant, one by the Employer, and a third agreed to by the first two doctors.

Written notice of a claim under this Plan shall be sent to the claims-paying agent no later than forty-five (45) days after the earliest foreseeable commencement date of benefit payments from this Plan or as soon thereafter as is reasonably possible. Failure to furnish the required notice of claim within the time stated shall not invalidate nor reduce the claim if it was not reasonably possible to file the required within such time, provided the notice is furnished no later than six (6) months from the time notice of claim is otherwise required.

Claims Adjudicative Committee

During the term of the Agreement, one person from HEABC and one person from the Health and Benefit Plan shall meet with two (2) representatives of the Association. The parties will work together to improve the claims adjudication process.

The Committee will arrange to have an information brochure prepared to explain detailed procedures for claims adjudication.

Section 12 -- Administration

The Employer shall administer and be the sole trustee of the Plan. The Association shall have access to any reports provided by the claims-paying agent regarding experience information.

All questions arising as to the interpretation of this Plan shall be subject to the grievance and arbitration procedures in Articles 9, 10 and 11 of the collective agreement.

Section 13 -- Collective Agreement Unprejudiced

The terms of the Plan set out above shall not prejudice the application or interpretation of the collective agreement.

The most recent CRC Terms of Reference read:

- The Long Term Disability Claims Review Committee shall be composed of three (3) medical doctors: one designated by the employee, one designated by the employer and the third (the Chairperson) to be mutually agreed upon and designated by the first two doctors. To the best of their knowledge and where it is practical, the doctors should select a Chairperson who has had no relationship to the claimant.

- It is important the Committee be established and perform its functions as quickly as possible. Accordingly, the medical doctor designated by the employer will contact the medical doctor designated by the employee to co-ordinate the designation of the third medical doctor

- The third medical doctor appointed shall act as Chairperson.

- Each member of the Committee shall be provided with all medical reports, and vocational reports if applicable, held by the claims paying agent prior to the date of the Committee's first meeting.

- Date, time and location of the meetings of the Committee shall be with the concurrence of all members of the Committee.

- The Committee shall make every reasonable effort to examine and/or the Committee wish to have a nurse present during the physical examination, they should write to the Trust with their request. The Trust will make the necessary arrangements.

- The members of the Claims Review Committee shall either jointly or at the discretion of the Chairperson, establish the medical procedure and any tests required in order to come to a conclusion. All information from such medical procedures or tests shall be forwarded to the Plan Administration Services department at the Healthcare Benefit Trust for distribution.

- When a subsequent meeting of the CRC is scheduled following the receipt of test or examination reports, the Plan Administration Services department is to be advised of the date, time and location of the meeting, allowing sufficient time for the claimant to submit any other

material for review by the CRC to the Plan Administration Services department for distribution.

1 The Committee shall determine whether or not the employee is disabled in accordance with the definition of disability contained in the Health Services and Support Facilities Subsector Collective Agreement.

Total Disability Means:

1 Employees Disabled Prior to April 1/98

Total disability, as used in this Plan, means the complete inability because of an accident or sickness, of a covered employee to perform the duties of his/her own occupation for the first two (2) years of disability. Thereafter, an employee who is able by reason of education, training, or experience to perform the duties of any gainful occupation for which the rate of pay equals or exceeds eighty-five percent (85%) of the rate of pay of his/her regular occupation at date of disability shall no longer be considered totally disabled and therefore, shall not continue to be eligible for benefits under this Long-Term Disability Plan.

1 Employees Disabled On or After April 1/ 98

Total Disability, as used in the Plan, means complete inability because of an accident or sickness, of a covered employee to perform the duties of his/her own occupation for the first two (2) years of disability. Thereafter, an employee who is able by reason of education, training, or experience to perform the duties of any gainful occupation for which the rate of pay equals or exceeds seventy percent (70%) of the current rate of pay for his/her regular occupation at the date of disability shall no longer be considered totally disabled under the Plan. However, the employee may be eligible for a Residual Monthly Disability benefit.

1 Findings shall be based on a majority decision of the Claims Review Committee, and shall be in writing. The report shall provide sufficient detail to disclose the factual basis for the Committee's decision and shall clearly state the decision. The report shall be signed by all members of the Claims Review Committee. Where the decision of the Claims Review Committee is not unanimous, the third

signature will represent only an acknowledgement of the report. The report shall be forwarded to the Plan Administration Services department who will forward a copy to the employee, the claims paying agent, the employer and the union.

1 Personal expenses of the two nominees to the Claims Review Committee shall be the responsibility of each appointing party. All expenses for medical procedures and expenses for a nurse to be present during the physical examination shall be paid by the Trust. The expenses of the Chairperson shall be shares equally between the employee (and union) and the Trust.

1 ARGUMENT

72 The argument in this case was extensive. We will provide a general outline or summary of those arguments. We have however considered all arguments, along with the extensive authorities cited.

73 The Union maintains under the plain language of Section 11 of the LTD Addendum, when an employee disputes the decision of the claims-paying agent Great West Life ("GWL") regarding a claim made by that employee for disability benefits under the LTD Plan, that employee may arrange to have her/his claim reviewed by a CRC composed of three medical doctors. The Union says it is not the decision of the claims-paying agent that is to be reviewed by the CRC. Rather, it is the claim of the employee for disability benefits that is to be reviewed by the CRC, which is to be composed of three medical doctors.

74 The Union maintains the matter in dispute is whether it is consistent with Section 11 of the LTD addendum and in particular the Claims Review Process to include video surveillance tapes along with the materials that had customarily been provided to a claims review committee. The grievance does not concern the issue of whether Great-West Life can videotape or otherwise spy on people. Rather, it is concerned with whether such evidence is admissible in the CRC process and whether a CRC has the jurisdiction to rule on the admissibility of such evidence.

75 Pursuant to Section 12 of the LTD Addendum, the Union points out any question arising as to the interpretation of the LTD Plan and Addendum must be decided by a regular rights arbitration board pursuant to the grievance and arbitration procedures set forth in Articles 9 through 11 of the Collective Agreement. Thus, the jurisdiction of the CRC is expressly limited under the terms of the LTD Addendum to reviewing claims for disability benefits. The CRC is not to deal with any questions arising as to the interpretation of the LTD Plan or Addendum. Furthermore, the Union says the specific expertise which the CRC is to exercise in reviewing a claim for disability benefits is medical, not legal expertise given that the CRC is to be composed of three medical doctors.

76 The Union points out the narrowly circumscribed jurisdiction of the CRC, which is limited by the plain wording of Section 11 of the LTD Addendum to reviewing claims for disability benefits only, is to be contrasted to the broad general jurisdiction conferred on a regular rights arbitration panel under Articles 9.05 and 11.01 of the Collective Agreement. Pursuant to Article 9.05 of the Collective Agreement, only a rights arbitration panel has jurisdiction to resolve disputes regarding "the general application, interpretation, or alleged violation" of any article to the Collective Agreement. Pursuant to Article 11.01 of the Collective Agreement, only a rights arbitration panel has the general jurisdiction to resolve "any difference, grievance, or dispute whatsoever arising between the Employer and the Union, or the employees concerned...including any question as to whether any matter is arbitrable". This language incorporates the language of Section 84(1) of the *Labour Relations Code.* In contrast, there is no such language in Section 11 of the LTD Addendum, emphasizing the limited *medical* jurisdiction of a CRC.

77 As the Board held in *HEABC,* BCLRB Decision No. B39/2009,"the parties have agreed that medical and vocational issues arising in a claim for LTD benefits will be decided by a CRC" and "that issues arising from the interpretation of the Collective Agreement will be decided by conventional arbitration. This bifurcation of decision-making logically allows medical issues to be decided by doctors and legal issues to be decided by arbitrators" (at para. 25).

78 In other words, the Union argues the parties have agreed through this bifurcated decision-making system to have medical and related vocational issues decided by an expert medical panel composed of three doctors. Legal issues, interpretation issues and any other disputes arising between the parties are to be dealt with by a rights arbitration panel appointed under Article 11.01 of the Collective Agreement. The case of *G.R. Baker, supra,* is an example of a rights arbitration board superintending the claims review process with respect to an issue that is not within the jurisdiction or the expertise of a CRC.

79 Section 11 of the LTD Addendum does not provide all of the material considered by the claims-paying agent in denying a claim shall be provided to the CRC. This is because the CRC is to review the employee's claim for disability benefits, not the decision of the claims-paying agent. Section 11 of the LTD Addendum does not require the CRC to determine whether the claims-payment agent followed proper procedure, gave the claimant a fair hearing, or reached a reasonable decision based on the evidence before it.

80 A CRC review of a claim for disability benefits is a medical review. The panel of three doctors is to determine whether or not the claimant is disabled. To make that determination, the CRC must review the available medical information and may conduct a medical examination of the complainant.

81 As the Labour Relations Board notes in *HEABC,* BCLRB No. B27/2007 (at para. 43), a CRC "does not deal with 'evidence' in the sense that evidence is called in grievance arbitration." Rather, the CRC is to deal with all relevant medical and vocational information, without cross-examination of the claimant, without representation of the Union or the Employer at the CRC meeting itself, without challenge the admissibility of

any "evidence," and without calling or cross-examining witnesses or presenting legal argument.

82 Thus, the Union argues the CRC system as set forth in Section 11 of the LTD Addendum does not expressly or implicitly provide or contemplate a panel of three medical doctors dealing with legal issues regarding the admissibility of videotape surveillance evidence. The CRC is to perform a medical review to determine whether the claimant is disabled. It does not conduct a legal review of the correctness or reasonableness of the claims-paying agent's decision to deny or discontinue disability benefits. Being limited to a medical review and assessment of the employee's claim for benefits, it is not part of the CRC's mandate or function to review the manner by which the claims-payment agent obtained evidence regarding the claimant, or whether the material upon which the claims-payment agent based its decision to deny benefits is legally admissible, because the CRC does not review the fairness, reasonableness or correctness of the claims-paying agent's decision. The CRC has no legal expertise and is not supposed to deal with these kinds of legal issues (*HEABC, supra,* at para. 25).

83 The Union also maintains pursuant to Section 13 of the LTD Addendum, the terms of the Addendum, including Section 11, must not prejudice the application or interpretation of the Collective Agreement. To confer a broad, general jurisdiction on a panel of three medical doctors to deal with complex legal issues regarding the admissibility of evidence and privacy rights would prejudice the application of Articles 9.05 and 11.01 of the Collective Agreement. It would deprive an employee of the right to use the Collective Agreement grievance procedure to challenge issues regarding the admissibility and use of videotape surveillance evidence. Under the regular rights arbitration procedure in Article 11 of the Collective Agreement, the claimant has the right to call evidence, to cross-examine witnesses, to be represented by an advocate and to present legal argument to an arbitrator, in order to challenge the admissibility, relevance and legal import of any videotape surveillance evidence. None of these rights are contemplated or permitted under the CRC procedure mandated by Section 11 of the LTD Addendum.

84 The Union points out further the Labour Relations Board has indicated on numerous occasions when determining the proper jurisdiction of a CRC, the nature of its proceedings and the scope of its enquiries, one must look at the Terms of Reference for the CRC. Consistent with Section 11 of the LTD Addendum, paragraph 1 of the Terms of Reference provides the CRC shall be composed of three medical doctors: one designated by the employee, one designated by the employer and the third (the Chairperson) to be mutually agreed upon and designated by the first two doctors.

85 Paragraph 2 provides the CRC is to be established and to perform its functions as quickly as possible. Typically, a CRC will meet only once, and the only other person attending the meeting is the complainant. The CRC is not supposed to get bogged down in preliminary objections, or the sequential resolution of various legal issues and disputes.

86 As per Paragraph 4 only medical reports and applicable vocational reports are to be provided to the CRC. This is in marked contrast to the Terms of Reference under the Nurses' Collective Agreement which instead provides other relevant documentation will

be provided.

87 The CRC does not hold a hearing, but rather holds a meeting where it reviews the medical and applicable vocational reports regarding the claimant. Paragraphs 5 and 8 refer to the "meetings" of the CRC. Paragraph 7 requires the CRC to "establish the medical procedure and any test required in order to come to a conclusion", emphasizing the medical "inquisitorial," rather than the adversarial, nature of a CRC meeting.

88 Pursuant to Paragraph 9 of the Terms of Reference, the CRC is to determine whether or not the employee is disabled in accordance with the definition of disability contained in the Collective Agreement. This fundamental question to be answered by the CRC, is a medical question; not a legal one. Under Paragraph 10 of the Terms of Reference, the Committee is to provide sufficient detail to disclose the factual basis for its decision. The CRC is not required to provide any legal analysis or the legal basis for its decision.

89 The Union points out in *Royal Jubilee Hospital and HEU, Local 180,* February 10, 1984, (Trevino) the arbitrator stated "the parties have agreed to a self-contained system of arbitration for medical disputes...the Claims Review Committee set out in Section 11 of the Addendum constitutes the 'court of last resort' on all medical matters and its decision on medical matters if final and binding on medical issues" (at p. 23). The parties did not agree that CRCs were to deal with legal disputes regarding the admissibility of videotape surveillance evidence, including the balancing of interests that must be undertaken when dealing with the invasion of personal privacy that such surveillance entails.

90 Turning to legal authorities, the Union notes the intention of the parties regarding the jurisdiction of a CRC is ascertained by considering intentions at the time the language in question was agreed, and then only if the wording of the Collective Agreement is ambiguous: *B.C. Public School Employers' Association, v. B.C. Teachers' Federation,* [2007] BCCAAA No. 60.

91 The Union maintains it is clear from the language negotiated between the parties in 1978-1979 the CRC was to have limited jurisdiction to deal with medical issues. The parties never intended for a CRC to rule on complex legal issues, such as the admissibility of videotape surveillance evidence. Consequently, the Employer's evidence of an alleged "past practice" of HBT, not HEABC, providing copies of videotape surveillance or surveillance reports to CRCs beginning in 1998, about 20 years after the LTD Addendum language was agreed to, cannot be used as an aid of interpretation because the evidence of the alleged "past practice" is not contemporaneous with the negotiation of the disputed contract language. The Union says the evidence in the 1998 negotiations is unhelpful as it shows the parties did not even consider the issue regarding the admissibility and use of videotape surveillance evidence before CRCs.

92 While the Terms of Reference that have been developed for the CRCs may be used as an aid to the interpretation of the LTD Addendum, the Union says the Terms of Reference for the CRC under the Collective Agreement never went beyond authorizing the submission of medical and applicable vocational reports to the Claims Review Committees: *Pacific Press Ltd. v. Newspaper Guild Local 115* [1987] BCCAAA No. 102. The Union, when negotiating the Terms of Reference with the Employer, never

agreed, and the Employer never proposed, that in addition, CRCs are to receive videotape surveillance evidence and surveillance reports.

93 The Union maintains further evidence of past practice, as with any other extrinsic evidence, is not helpful as an aid to interpretation unless it discloses a mutual agreement between the parties. The past practice must be unambiguously based on one meaning attributed to the relevant contract language: *Findlay Industries v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 127* [2008] OLAA No. 429. Here, the Union maintains there was no past practice or conduct by HEABC which the Union allegedly acquiesced to. The alleged conduct was that of HBT, which is not a party to the Collective Agreement. Furthermore, there is no evidence HEABC was aware of and relied on the alleged past practice. There is no evidence of such a practice having been adopted and followed in February 1998, when Hassan was on the HEABC negotiating committee. The alleged practice, on the evidence, arose after February 1998.

94 The Union also says with respect to the handful of the hundreds of LTD claims by Union members under the Facilities Sub-Sector Collective Agreement where HBT provided videotape surveillance evidence to CRCs and where the Committee actually held a meeting, the only Union people aware of this were staff representatives with no authority to bind the Union in this regard, as confirmed by Kathy Jessome. See also, *BCIT v. BC Institute of Technology Faculty and Staff Association,* [2008] BCCAAA No. 110.

95 The Union seeks a declaration that it is inconsistent with a proper interpretation of Section 11 of the LTD Addendum and the Collective Agreement as a whole for video surveillance tapes and surveillance reports to be provided to CRCs for their review and that CRCs do not have jurisdiction to make legal rulings on the admissibility and use of videotape surveillance evidence and surveillance reports, only a rights arbitration panel appointed under Section 11 of the Collective Agreement has that jurisdiction. In addition, the Union seeks a declaration that it is inconsistent with the proper interpretation of Section 11 of the LTD Addendum and the Collective Agreement as a whole for the Employer to be permitted to submit legal arguments to CRCs and that CRCs do not have jurisdiction to decide legal issues as distinct from medical and related vocational issues.

96 In response, the Employer says the Union is asking this Arbitration Board to conclude the language of this Collective Agreement precludes a CRC from exercising its statutory authority, and prevents it from ever seeing or even considering the admissibility of relevant video surveillance evidence. The Union seeks this determination, the Employer points out despite numerous decisions of the Labour Relations Board confirming CRCs have the authority under the *Labour Relations Code* to receive video surveillance and to consider any arguments in relation to its admissibility and the fact those Labour Relations Board decisions pertain to both CRCs under the Provincial Government's LTD plan, upon which this LTD Plan was originally based; and plans in the health sector with identical Collective Agreement language for all relevant purposes. The Employer says this is an extraordinary proposition requiring language in the Collective Agreement to sustain it. The Employer maintains no such language exists.

97 The Employer argues not only does the grievance fail on a plain reading of the

Collective Agreement, but the past practice of the parties conclusively demonstrates the parties' mutual understanding that there is no negotiated restriction on receipt of video surveillance by a CRC.

98 The Employer argues the evidence shows for years, video surveillance evidence has been utilized by GWL and included in the materials provided to CRCs, with responsible Union officials being well aware and acquiescing in this practice, without any dispute or challenge.

99 The Employer maintains during negotiations for the LTD Addendum to the Collective Agreement, a lack of discussion on the evidence a CRC would hear does not lead to a conclusion the parties thereby intended to restrict the evidence. Clearly, the intention of the parties was to create a body which would have the necessary authority to determine the entitlement of individual claimants to benefits under the LTD Plan. The Employer maintains nothing in the language in Section 11 of the LTD Plan indicates an intention to limit the CRC's statutory authority. The past practice supports this position.

100 The Employer argues the Union's position in the grievance is entirely inconsistent with both the case law and the practice of the parties. The parties agreed under Section 11 of the LTD Plan that adjudication of LTD claims be done by an independent claims-paying agent. GWL has determined that in some cases, video surveillance is an appropriate and necessary tool to adjudicate the claim. The use of this tool is, according to the evidence, undertaken in accordance with both industry norms and privacy regulations. The role of the CRC is to review the claim, including the relevant information used by GWL in adjudicating the claim. This includes video surveillance where it is part of the claim file.

101 The Employer also maintains the law regarding the nature of a CRC as an arbitration board under the *Labour Relations* Code creates strict parameters that restrict the scope of the grievance. The Labour Relations Board has issued a number of decisions which specifically address the role of CRCs generally and their use of evidence, including video surveillance evidence.

102 The Employer notes the status of a CRC as an "arbitration board" as defined in Section 81 of the Code is well established. CRCs have been described as a specialized form of arbitration for particular disputes (*Government of the Province of British Columbia and BCGEU*, BCLRB No. 309/85).

103 The CRC as an arbitration board has a number of statutory powers under the Code. Under Section 92(1)(a), a CRC has the authority to determine its own procedures (*G.R. Baker Memorial Hospital and Hospital Employees' Union, Local 180, supra.* Under Section 92(1)(b), a CRC may receive and accept evidence and information as in its discretion it considers proper.

104 The Employer maintains numerous recent decisions of the Labour Relations Board have confirmed subject to any limitations which may arise from an interpretation of the collective agreement, CRCs have clear statutory authority to receive evidence and information as they consider proper. (See *Jordan v. HEABC on behalf of Fraser Health Authority (Royal Columbian Hospital),* BCLRB No. 207/2008.)

105 The Union has argued as an alternative argument a CRC may not consider submissions concerning video surveillance evidence. The Employer maintains like the Union's primary position, this argument must fail. The CRCs have the authority to determine their own procedure, including accepting submissions.

106 The Employer says the starting point for assessing whether, as the Union submits, the LTD Addendum can be interpreted so as to restrict the ability of the parties to make submissions, is the statutory authority of a CRC under Section 92 of the Code to consider arguments of the parties, including arguments regarding the admissibility of evidence.

107 Under Section 92(1)(a) of the Code, CRCs have the authority to determine their own procedure and this includes the ability to receive and review any written submissions provided by the parties. (*Jordan CRC -- Section 99 decision, supra).*

108 The Employer points out not only has the Union made submissions to the CRC over the years, since the 1980s, it even brought an application for review of a CRC decision by the Labour Relations Board on the ground that the Union's submission had allegedly not been reviewed by the CRC prior to coming to its decision. (*Peace Arch District Hospital and HEU, Local 180(Marshall)* (August 14, 1986), BCLRB Ref: 108/15/86; application for reconsideration dismissed; BCLRB No. 149/87).

109 In fact, the Employer maintains if a party does make a written submission to a CRC, it would be a denial of a fair hearing if the CRC rendered a decision without considering that submission. In *Peace Arch District Hospital, supra,* the Union applied under what was then Section 108 of the Code for review of a CRC decision alleging that it was denied a fair hearing when the CRC issued its decision prior to considering the Union's written submission to the CRC. The Board acknowledged if this had occurred, this would create a concern. However, evidence was provided to the Board that the submission of the Union was in fact considered by the CRC prior to finalizing and approving of the CRC decision.

110 The Employer says the Labour Relations Board has specifically ruled CRCs, in their role as adjudicators of medical/vocational evidence, have the authority to make decisions concerning the admissibility of video surveillance evidence. Very clear collective agreement language would be required to demonstrate that the parties intended to derogate from that authority of CRCs for purposes of this Collective Agreement. No such language exists.

111 The Employer maintains first CRCs have the authority to make decisions regarding procedure and admissibility of evidence, including video surveillance evidence. The LTD Addendum does not limit what is submitted to the CRC, nor does it limit the CRC's authority to consider submissions of the parties or the admissibility of evidence. There is nothing inherent in the role of CRCs under the Collective Agreement which prevent them from considering videotaped observations of a claimant's functional ability or submissions in relation to such evidence. Rather, in the context of the whole of the LTD Plan, it is clear that the CRC was designed to be the exclusive body to review and determine the evidence in relation to a disputed claim of disability.

112 The Employer says the Union seeks with its arguments on the interpretation of

Section 11 to undermine the clear intent of the parties, by having a third party circumscribe the evidence available to a CRC or the CRC's consideration of such evidence.

113 The Employer says in the alternative, if the language in the LTD addendum is ambiguous, extrinsic evidence, and specifically, the long-standing practice with regard to the CRC process informs the meaning to be attributed to the CRC process provided for in the Collective Agreement. The practice confirms HEABC's position that video surveillance evidence and submissions of the parties are to be provided to the CRC and that it is within the authority of the CRC to make any decisions in relation to admissibility of video surveillance evidence. CRCs have functioned on this basis for many years.

114 Finally, in the further alternative, the Employer says if the Arbitration Board accepts the language of the LTD Addendum limits the ability of HBT to provide video surveillance evidence or written submissions to the CRC, the Union is estopped from relying on this interpretation.

115 Pursuant to the decision of this panel on jurisdiction, the Employer points out the issue before this Arbitration Board concerns an interpretation of Section 11 of the LTD Addendum, specifically, whether the parties have agreed in the LTD Addendum to restrict a CRC from receiving video surveillance evidence or making determinations considering the admissibility of such evidence.

116 The Employer maintains on its face, the LTD Addendum contains no limitations on a CRC's authority to receive evidence or make decisions concerning admissibility of evidence in relation to a disputed claim or disability. There is no language in Section 11 touching on the issue of admissibility of evidence before a CRC. As such, there is no basis for the Union's grievance and it must necessarily fail.

117 Notwithstanding the lack of language restricting the authority of CRCs, the Employer points out the Union contends the interpretation of certain words in Section 11 (i.e., "adjudicate", "decision" and "review") should lead to the conclusion that CRCs are restricted from exercising their statutory authority in receiving or considering admissibility of video surveillance evidence. The Union's argument cannot be sustained on the face of the language or on a purposive interpretation of the Collective Agreement. There is no basis in law for implying a limitation on the role of CRCs. This is evident from an application of the principles of collective agreement interpretation to the language in the Collective Agreement.

118 The Employer argues the assertion the Collective Agreement contains a provision stripping a CRC of its statutory authority to consider video surveillance evidence cannot be construed as anything but significant. Only the clearest of language could possibly establish such a proposition.

119 In applying Collective Agreement principles of interpretation, the Employer says it must be recognized it is inherently improbable any employer would agree to collective agreement language preventing a CRC from receiving or considering the admissibility of relevant information that formed part of the adjudication of a claim. Very clear collective agreement language would be required to demonstrate such a restriction was ever

contemplated by the parties. No such language exists.

120 The Employer says further the terms "adjudicate", "decision" and "review" do not support the Union's claim that surveillance conducted by GWL cannot be considered by a CRC. To the contrary, the Employer maintains it is clear from the language of Section 11 the purpose of the CRC is to review the adjudication of the claim by GWL which must include the information used to make its decision.

121 The meaning of these words must be considered in the context of what the parties intended to achieve under the LTD Addendum, that is, to establish a process for third party adjudication of LTD claims by a claims-paying agent; to authorize the claims-paying agent to make decisions on a claimant's entitlement to LTD benefits; and to provide for a process of review of disputed claims by a committee of three physicians. This was the clear intention of the parties based upon the language of Article 11 of the LTD Plan.

122 The clear intention of the parties, as confirmed by the practice evidence, is that the claims-paying agent and the CRC were to be afforded all necessary authority to carry out their respective roles, which includes the ability to adjudicate using video surveillance, when appropriate; to review all the information pertaining to a disputed claim, including video surveillance; and to consider any submissions which are made in relation to the claim.

123 The Employer argues applying the ordinary meaning of "adjudicate" to its use in the LTD Addendum, it is evident the parties intended the claims-paying agent was to act independently (not being directed by another in the adjudication decision), sensibly (considering claims of disability in relation to the applicable definition) and practically (using accepted process and tools for adjudication) in making decisions as to whether a claimant is disabled within the meaning of the Plan.

124 The Employer maintains surveillance is a recognized and established method that may be used by claims adjudicators, whether as a method of determining whether a claimant's functional ability is impaired, or where the reliability of the claimant's self-reports is in question. The case *Ditomaso v. Manufacturers Life Insurance Co.* (2002) BCSC 502, demonstrates it is an accepted part of the adjudication process under an LTD plan to make use of and take into account surveillance in appropriate cases along with other available information regarding whether the claimant was capable of working. The value of video surveillance as an adjudicative tool was also confirmed in *PSEC v. BCGEU (Stadnyk Grievance),* [2000] BCCAAA No. 122.

125 The Employer points out Section 11 provides if a claimant disputes the decision of the claims-paying agent, the claimant may arrange to have her/his claim "reviewed" by a CRC. What is being reviewed is the "claim" (not simply the decision"), and any assessment of the meaning of "review" must include an assessment of what constitutes the "claim". The intended scope of the "review" by a CRC under Section 11 of the LTD Addendum has been described in early arbitration awards to involve a re-examination of the claim, with a view to making a fresh determination of the matter. (See (*HLRA, on behalf of St. Paul's Hospital v. HEU, Local 180 (Hart Grievance)* (unreported), June 26, 1986, p. 27)

126 In other words, what is involved in a CRC's "review" of a claim is to look at the claim again, which necessarily involves looking at the claim file that forms the basis for the claims-paying agent's decision. The Employer maintains it would be absurd to suggest the CRC cannot "review" all of the information which has been obtained regarding the claim which is relevant to the determination of disability.

127 The Employer argues if a CRC is to review a claim, it must look at or look over the whole claim again. It is wholly impractical and inconsistent with the notion of "looking again" to argue that part of the claim (that is, the part of the claim involving video surveillance) should not be reviewed. What the Union appears to suggest is that blinders should be placed on CRCs so that they can only consider certain types of evidence of a claimant's functional ability. This the Employer maintains does not make sense and does not allow the CRC to properly carry out its statutory duties.

128 The Employer maintains fairness also dictates disclosure of all relevant information from the claim file to the CRC for the purpose of its review. Consistent with the case law and the practice of the parties is the requirement of fairness, which requires disclosure of all relevant information from the claim file to the CRC for the purpose of its "review", and also requires the CRC to review any submissions made by the parties, whether in relation to the admissibility of evidence or on any other issue.

129 As CRCs are arbitration boards, CRC decisions are subject to review by the Labour Relations Board under Section 99 of the *Labour Relations Code,* which includes a requirement the parties be provided a fair hearing. Any hearing by a CRC is therefore subject to a statutory requirement of fairness.

130 The Employer says the issue of fairness arose in *British Columbia (Re),* BCLRB No. B202/2005 and the Board agreed the employer was denied a fair hearing when the CRC failed to review one of the CDs. Where video surveillance forms part of the basis of the decision of the claims-paying agent, the Employer argues it would be contrary to the principles of a fair hearing to prevent such information from being provided to the CRC for consideration. The question of whether to admit such evidence and the weight to be placed on it are issues for the CRC. However, the LTD Plan and, in particular, the word "review", should not be interpreted in a manner that would be inconsistent the principles of fairness.

131 Based upon the case law and the evidence of how the parties have actually carried out the terms of Section 11, over the course of many years, the Employer maintains it is clear a "review" of the "claim" includes a review of all the materials in the claims-paying agent's file on which the claims-paying agent relied in coming to its decision. Further, as part of that review, CRCs may consider any submissions made to it.

132 The Employer maintains as evidenced by the above, none of the words identified by the Union provide support for its notion that Section 11 of the LTD Addendum prevents a CRC from exercising its statutory discretion to receive evidence and submissions.

133 The Union does not challenge the right of the claims-paying agent to obtain and rely on video surveillance evidence in its adjudication of a claim for LTD benefits. Nor

can it challenge the *prima facie* statutory right of a CRC to accept submissions and receive such evidence in its discretion. Despite this, the Union asserts the materials in GWL's claims file which pertain to video surveillance evidence should not be included with the rest of the claim file in the materials to be given to the CRC. The Employer maintains this would be an absurd outcome wholly impractical and contrary to the fundamental notions of procedural fairness.

134 The parties simply could not have intended the CRC would conduct its review of the claim and come to a decision without seeing what the basis for the decision of the claims-paying agent, including the materials relied on by the claims-paying agent in coming to that decision. The only sensible interpretation of Section 11 is that the CRC was intended to review all of the information used by the claims-paying agent in coming to its decision.

135 The Employer maintains as set out above, the plain language of the Collective Agreement supports its position. If however there is an ambiguity in the Collective Agreement language, the extrinsic evidence confirms the Employer's position.

136 The Employer says where a significant number of union officials are aware of a practice over a period of time, it can be inferred the practice must have come to the attention of responsible union officials. At the very least, it places a burden on the union to call evidence that it was not aware of the practice, and a failure to do so raises an adverse inference. Even where the current union executive claims that it was not aware of the practice (and in this case there was no one for the Union Executive who gave such evidence), it does not make "good labour relations sense" to conclude the union did not learn of the practice known to others (*ICBC v. OPEIU, Loc. 378* (2002), 106 LAC (4th) 97 (Hall) p. 109).

137 Further, the Employer argues where the practice in question is consistent and unchallenged for a significant period of time, this is persuasive evidence of the mutual intent of the parties. (*Coast Hotels v. Hotel, Restaurant and Culinary Employers Union, Local 40* (1995), 50 LAC (4th) 1 (Chertkow), para. 50).

138 Where a union ought to have been aware of a particular practice, this is sufficient to support a finding of mutual intention. Knowledge of the practice may be imputed where there is sufficient evidence of the practice such that it would be unreasonable to find that a responsible representative of the union would not have been aware of the practice. In the absence of testimony from the responsible union officials to the contrary, such responsible union officials must then be imputed with knowledge of the practice. (*Coast Hotels, supra,* para. 50 and 51).

139 HEABC submits these principles confirm past practice can and should be considered in this case, where there were paid Union officials who were aware of the practices in question over a significant period of time. The attempts by the Union try to discount the specific involvement of many staff representatives in reviewing claim files and claims review committee decisions which expressly refer to video surveillance cannot, on any reasonable basis, be countenanced. There were numerous Union officials in Union offices all over the province who saw such files and decisions.

140 The Employer says the evidence in this case reveals a long-standing and pervasive practice of CRCs being provided with all relevant information concerning GWL's adjudication of a claim, including video surveillance. This practice was well known to the officials of the Union and acquiesced in for years without objection or dispute. This unchallenged past practice conclusively demonstrates the parties' mutual understanding concerning the authority of HBT in coordinating CRCs and the authority of CRCs in reviewing claims under the Collective Agreement.

141 Foster's evidence is that the use of video surveillance is an adjudicative tool used in a specific and limited sub-set of claims, in accordance with GWL's policies and guidelines. The use of video surveillance is consistent with industry norms on adjudication and is an accepted and lawful means of obtaining information for the adjudication of LTD claims. The evidence of Ward is that GWL has used video surveillance since at least the early 1990s, and continues to use this as an adjudication tool to date. Surveillance is used by GWL in respect of the LTD Plan for members of the Union, but also in respect of other LTD Plans covered by HBT. GWL also uses surveillance in adjudication of other LTD plans, including the B.C. Government LTD Plan with the BCGEU.

142 The Union was well aware of the long-standing practice of how the claims-paying agent performed the adjudicative role and specifically admitted its knowledge of the use of video surveillance in claims adjudication.

143 The Employer points out Allevato and Jessome gave evidence as to their knowledge of the process of file disclosure which allowed the claimant to review the file of the claims-paying agent. Their evidence was the Union would routinely seek the disclosure to determine what information had been obtained in the course of adjudicating claims. Thus, the Union was familiar with the type of material obtained by the claims-paying agent and the decisions made based on this information. The Union was also familiar with the information provided to CRCs.

144 With respect to the use of video surveillance by the claims-paying agent in the course of adjudicating claims, it is clear the Union has long been aware that video surveillance evidence was used as a tool in the adjudication of claims. The Union has accepted, as it must, that it is the role of the claims-paying agent to adjudicate claims and to determine what information they require in order to adjudicate particular claims. The claims-paying agent has consistently used video surveillance since at least the mid-1990s as one of the tools of adjudication. The Employer maintains through file disclosure, the Union has been aware of this practice and, in fact, expected to see video surveillance in the file disclosure if it had been used during the adjudication of the claim.

145 Although the Union has attempted to discount the clear evidence that Union representatives were aware video surveillance was used in claims adjudication and submitted to claims review committee by describing some as trainee or casual staff representatives, the Employer points out Jessome had to concede most were not and that, in any event, these representatives hold important positions in the Union. They are paid employees whose specific role is to represent members on a wide variety of issues including representing members in respect of their claim for long term disability benefits.

In Jessome's role as Director, she said if a representative thought an idea was significant, the representative would bring it to her attention.

146 The Employer maintains what is even more compelling is the breadth of the Union's knowledge of video surveillance. The evidence demonstrates that in virtually every Union office (e.g., Kelowna, Victoria, Nanaimo, Abbotsford, Nelson, Kamloops and Vancouver) there were representatives who received and viewed a CRC package which contained video surveillance. In addition, the Employer points out a Union's senior official, LaPlante, received the accounts of the CRC chairs, in which they specifically charged for their time in relation to viewing the surveillance videos.

147 Further, the Employer says at least by the collective bargaining between the parties in 1998, senior Union officials were aware of the use of video surveillance. Allnutt, LaPlante, Norgren, Dorais and other senior officials of the Union were present during this round of bargaining, in which the Union raised and bargained numerous issues in relation to the LTD Plan. During these discussions, the Union brought a number of LTD claimants to the table to make a presentation on the circumstances of claimants. The claimants mentioned concerns of being subjected to video surveillance by GWL and the use of video surveillance was subsequently referred to Allnutt, the Secretary Business Manager of the Union in that same bargaining session.

148 The Employer points out during the 1998 collective bargaining, while the Union made numerous proposals for revisions to the LTD Plan, none of the proposals related to changes the Union wishes to make to the CRC process or in the material to be provided to CRCs, nor where there any proposals in relation to the use of video surveillance. Substantive changes were made to the LTD Addendum in this round of bargaining, but not in relation to Section 11.

149 In the alternative, should the Arbitration Board accept that a proper interpretation of the LTD Addendum leads to the conclusion that a CRC may not receive video surveillance evidence and submissions of the parties, the Employer submits the Union is estopped from relying on this particular interpretation of the Collective Agreement. The evidence is that video surveillance had been a consistent use by the claims-paying agent since at least the early 1990s. That information has consistently been included in file disclosure to the Union and as part of the CRC package. The Union has been aware of this and made submissions to CRCs as part of the services provided to its members.

150 Hassan gave evidence the LTD Plan was discussed at length during the 1998 bargaining. The issue was an important feature in that round of negotiations. There was very real and substantive discussion of the LTD Plan during bargaining. During these discussions, the Union brought a number of LTD claimants to the table to do a presentation to bring home the circumstances of claimants. One of the claimants mentioned concerns of being subjected to video surveillance by GWL.

151 The Employer notes Hassan further testified during this round of collective bargaining, the Union made numerous proposals for revisions to the LTD Plan, but none of the proposals related to changes the Union wishes to make to the CRC process, nor were there any proposals in relation to video surveillance.

152 The Employer maintains it is clear the Union's failure to grieve (until this grievance) the use of video surveillance; the provision of such information to CRCs; and the provision of submissions to CRCs, amounts to a representation by conduct that it had no objection to these practices. If the Union did not agree with the consistent practices in relation to the use and provision of video surveillance and submissions, then it ought to have advised HEABC of its position, especially, for example, in 1997 and 1998 when the issue of video surveillance was specifically raised by the Union.

153 The Employer further submits, given the consistent practice and the Union's acquiescence, it was reasonable for HEABC to rely on the Union's implied representation that it had no objection to these practices. However, because of the Union's representation, HEABC was denied the opportunity to bargain on these issues, at least until the latest round of collective bargaining.

154 The Employer notes the Union also argues CRC physicians are limited to making decisions which are strictly "medical" in nature and that consideration of video surveillance is somehow outside of a CRC's role. This argument fails given that the Labour Relations Board has specifically ruled in *Roberta Jordan* that a CRC within its role in considering medical/vocational matters has the statutory authority to receive video surveillance evidence.

155 Further, the Employer says it has long been recognized in the jurisprudence a CRC is not restricted solely to making strictly "medical" findings. The CRC's jurisdiction is over "a claim for benefits under this Plan". Section 89 of the Code provides an arbitration board (such as the CRC) has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement. In the case of a CRC, Section 89 gives it the necessary authority to provide a final and conclusive settlement of a claim for benefits under the LTD Addendum. This statutory authority is not limited to reviewing "medical" reports. Rather, CRCs have the authority to consider all relevant information and to make whatever decisions are necessary to come to a conclusion on the claim for benefits under the LTD Plan.

156 The CRC must address the real issue in dispute between the parties. The "real issue in dispute" which forms the CRC's mandate is whether a claimant was "totally disabled" for purposes of receiving long-term disability benefits (*Re Willingdon Park Hospital Ltd.,* BCLRB No. B536/98, [1998] BCLRBC No. 536).

157 Contrary to the Union's assertion that CRCs are somehow restricted solely to "medical" decisions, the Employer notes a number of examples of issues which clearly come within the jurisdiction and mandate of a CRC but which are not strictly "medical". The question of whether a claimant is "totally disabled" involves both a medical and a vocational aspect, and a CRC must address both parts of a claim. A failure to address both medical and vocational aspects of a claim in a CRC decision constitutes a denial of a fair hearing. *(Re Fraser Health Authority (Eagle Ridge Hospital),* BCLRB No. B128/2008, [2008] BCLRBD No. 128.

158 The Employer points out during cross-examination, Whyte agreed the Union contemplated CRC physicians would examine a claimant and the examination could

include an assessment of the claimant's ability to do certain tasks. She agreed it would be part of a medical assessment for a CRC physician to look at a claimant's range of motion, sitting, lifting, grip strength, and so on. She agreed the scope of a medical examination would include engaging the claimant in activities to assess the claimant's functional capacity to work. This the Employer says is consistent with its position that observations made of a claimant's activities constitute part of the "medical and vocational information" in the file.

159 Observations of a claimant's activities constitute medical information which may assist a CRC in assessing a claimant's level of functioning. The medical information taken from a video, for example, could include: whether there is continuity in the claimant's symptoms; whether there is consistency between the demonstrated actives and the anatomy and physiology of the claimed disability; and whether there is congruency between the demonstrated activities and the physician's findings on examination. See also *City of Victoria v. CUPE (Carbone Grievance)*, (October 14, 2009) Victoria, B.C. (Diebolt) where Arbitrator Diebolt accepted evidence of a physician who likened the evidence available through observations of the grievor's activities to a functional evaluation.

160 The Employer notes the Union appears to take the position the Terms of Reference somehow limit the information which can be considered by a CRC, specifically, because it refers to the CRC receiving "all medical reports and vocational reports". The difficulty with the Union position is the Terms of Reference were unilaterally established by HBT and not the subject of agreement with the Union; second, the Terms of Reference on their face do not preclude additional information being provided to the CRC; and, most significantly, there is a long and well established practice, known to the Union, of providing the CRC (and the claimant and authorized Union representative) with all of the information relevant adjudication of the claim, including video surveillance.

161 Finally, in response to the Union's argument CRC physicians are somehow not qualified or capable of making decisions as to the admissibility of evidence, this assertion is directly inconsistent with the Labour Relations Board's findings that CRCs are in fact capable of making such decisions. Just because CRC physicians are not lawyers, does not mean they are incapable of deciding issues peripheral to their mandate of determining whether a claimant was "total disabled". Numerous other quasi-judicial decision-makers are not required to have any formal legal training, but are permitted to make such incidental decisions on admissibility of evidence and process, such as arbitrators, Vice-Chairs of the Labour Relations Board, Employment Standards Review Officers, Workers' Compensation Review Officers, Employment Insurance Adjudicators, and so on.

162 The Employer also maintains bargaining history does not support the Union's claims. The Union appears to argue the bargaining history of Section 11 of the LTD Addendum supports its claim there was an agreed limit to the statutory authority of CRCs to review video surveillance and submissions. The evidence concerning the bargaining history of the LTD Plan does not support this claim. Such an agreement would constitute a significant restriction on a CRC's statutory right to receive submissions and evidence. The collective agreement itself is silent on this purported agreement. While Whyte spoke about the Union's intent, the Employer points out nothing from her evidence demonstrates

any mutual intent of the parties regarding the limitations the Union seeks to place on the materials which may be provided to a CRC.

163 Ultimately, the Employer submits the Union has failed to demonstrate a mutual intention to limit the authority of a CRC under section 92 of the Code to receive submissions from the parties or to make its own decisions as to the admissibility and relevance of the evidence before it, including video surveillance evidence. There is accordingly no foundation for the Union's grievance. II.

1 ANALYSIS

164 At the outset of our analysis we will consider some pertinent arbitration and Labour Relations Board decisions which comment on the nature of the CRCs. While some of these involve other unions in the health care sector, the comments referenced are those that arise from common features in the collective agreement and/or LTD Plan.

165 In 1984, an arbitration panel chaired by Ben Trevino, in *Royal Jubilee Hospital, supra,* made a number of relevant comments. The panel noted the Government of BC/BCGEU agreement was used as the backdrop to negotiations to establish a mutually acceptable LTD Plan between these parties. Two differences in the Plan were noted. Section 12 of the Addendum reads:

> All questions arising as to the interpretation of this Plan shall be subject to the grievance and arbitration procedures in Articles IV and V of the Master Agreement.

Section 13 of the Addendum was also noted:

> The terms of the Plan set out above shall not prejudice the application or interpretation of the Master Agreement.

Neither of these terms were contained in the BCGEU agreement.

The panel in *Royal Jubilee Hospital, supra,* noted Section 11 of the Addendum:

> In the event a covered employee disputes the decision of the claims-paying agent regarding the claim for benefits under this plan, the employee may arrange to have his/her claim reviewed by a claims review committee composed of three medical doctors -- one designated by the claimant, one by the Employer, and a third agreed to by the first two doctors.

and commented:

> In our view, the parties have agreed to a self-contained system of arbitration for *medical* disputes. The format to which the parties have agreed is a typical dispute resolution system. In our view, the agreement of the parties is that the claims review committee set out in Section 11 of the Addendum constitutes the "court of last resort" on all medical matters

> and its decision on medical matters is final and binding on medical issues.
>
> (at p. 23)

166 As per Section 12 of the Addendum noted above, the parties provided all questions arising as to the interpretation of the Plan are subject to the grievance and arbitration procedures in the Master Agreement.

167 In describing the nature of the agreement, the arbitration panel noted:

> The parties have shaped an agreement which casts special obligations on the claims-paying agent and the claims review committee. Because the Plan defines total disability as a measurement of the ability of a covered employee to perform the duties "of his/her own occupation", and later sets up a measurement of total disability relating to the employee's ability by reason of education, training, or experience "to perform the duties of any gainful occupation for which the rate of pay equals or exceeds 85 per cent of the rate of pay of his/her regular occupation at date of disability", the claims-paying agent has imposed on it a special duty in "adjudication".
>
> The word "adjudicate" connotes a requirement for a judicial approach to an employee's claim. That approach, in this particular agreement, and with this particular plan, involves and requires more precision than might otherwise be the case in separating *medical* reasons for disallowance and reasons for the disallowance of a claim involving the *interpretation* of the Plan. The reasons for that, spring from the nature of the bargain which the parties have made. The agreement contemplates two distinct "tracks" of potential disputes. While the tracks are distinct, they are not necessarily separate. The "medical" track ends with the claims review committee comprising three doctors as indicated by the agreement. The "interpretation" track is subject to the grievance and arbitration procedures in the Master Agreement.
>
> This means that the claims-paying agent, particularly in a case in which it is declining benefits, has a duty to articulate its reasons for declining claims in a manner which attempts to separate medical issues from interpretation issues. There should be a clear statement of all of the reasons for declining a claim, and a statement of the evidence relied upon.
>
> That duty arises because the clear contemplation of the parties was that the employee have the option of considering asking for a further medical review, or of invoking the grievance and arbitration procedures for recourse.

> There will no doubt be many cases in which the main reason for declining benefits is a disagreement as to whether or not a medically disabling condition is present. We presume a claimant, faced with a clearly stated opinion to that effect, would have to decide whether to stay on the "medical track" to provide further information or medical opinion calculated to persuade the claims-paying agent that a medical condition, in fact, is present. The final process for that type of question and dispute is the Claims Review Committee.
>
> (at p. 25-26)

In the summary of its analysis, the panel said with respect to the denial of a claim for long-term disability that:

> 1 To the extent that the reasons for denial are *medical reasons*, the parties have agreed to a self-contained system of adjudicating such disputes. Those issues are not arbitrable through the grievance and arbitration procedures, but are to be decided by the claims review committee.
>
> 1 To the extent that a decision of the claims review committee involves an interpretation of the Plan, the claims review committee should differentiate medical findings from interpretation to the extent possible. Any questions of *interpretation* arising from the decision of the claims review committee are arbitrable.
>
> (at p. 30)

What is curious about this summary is the conclusion ultimately that CRCs are arbitration boards in the face of the commentary that "medical reasons" for denial of a claim are not arbitrable through the grievance and arbitration procedures, but are to be decided by the CRC. There appears some conflict inherent in this which may ultimately lead to where we are today.

168 In 1986, Arbitrator Munroe commented upon this question in *G.R. Baker Memorial Hospital, supra*, where he referenced both *Royal Jubilee Hospital* and an earlier decision of his own in *Lions Gate Hospital*, August 15, 1985 (Munroe). He summarized his conclusion on whether a disputed decision of the claims-paying agent may be regarded as an arbitrable matter by noting:

> In summary on this first issue, then, our conclusion that any dispute that the trade union may have with the adjudications by the claims-paying agent of the grievors' claims must be referred for determination to a claims review committee, except to the extent that the trade union can show that "the real substance, or the real substance of an essential aspect of the dispute, is a matter of "interpretation" of the word, phrase, or section of the plan itself i.e. as distinct from an application of the plan to the particular circumstances of an individual claimant".

(at p. 6)

169 In *G.R. Baker Memorial Hospital, supra,* the union raised a concern about the procedures adopted by a claims review committee in its review of a decision of the claims-paying agent. It noted not all materials or reports relied upon by the CRC in its review of the adjudication of the claims-paying agent were disclosed to the applicant employee prior to the review decision being reached. This caused a concern of procedural fairness. Arbitrator Munroe noted the Labour Relations Board had recently in *Province of British Columbia*, BCLRB 309/85 concluded a CRC is an arbitration board resulting in the Board's ability to review the decision under Section 108 of the *Labour Code.* In pointing out the implications of that decision, the arbitrator noted:

> ...within its proper jurisdiction, a CRC stands in the same position in the adjudicative hierarchy as an ordinary arbitration board. Like any other arbitration board it is empowered to determine its own procedures. To the extent those procedures run afoul of the requirement that a "fair hearing" be afforded, or that the principles of the *Labour Code* be observed, or that the "general law" be followed (Sections 108 and 109 of the *Labour* Code) it is for the Labour Relations Board or Court of Appeal to intervene and to make remedial orders. It is not for arbitration boards of co-ordinate jurisdiction to superintend or review the actions of each other. It follows that any concerns about the fairness of the committees' procedures must be aired before the Labour Relations Board pursuant to Section 108 of the *Labour Code.*
>
> (at p. 9 and 10)

170 The arbitrator then went on to deal with the issue of whether a Union representative could be present at a "vocational interview" with a claimant. The arbitrator noted the vocational interview is a critical part of the process by which the claims-paying agent makes an adjudication (Section 11 of the Addendum) which directly or indirectly can have a profound effect on the claimant's vital job interests in both the short and long-term. The arbitrator went on to note the resulting question of whether claims-paying agent would be entitled to discontinue the claimants benefits by reason of the insistence on the presence of a union representative could not be answered in the broadly affirmative especially bearing in mind the adjudicative purpose of the interview, a purpose for which the Union representative may well be uniquely suited to assist the claimant. It would be a question of fact as to whether the union representative's conduct at a vocational interview is improperly disruptive. (at p. 15-16).

171 This finding, the Union points out is an example of a rights arbitration board superintending the claims review process with respect to an issue that is not within the jurisdiction or the expertise of a claims review committee. The Employer says however this decision says the opposite of what the Union claims as the panel held the CRC is empowered to determine its own procedures. We note on this point while those comments are made in *G.R. Baker, supra,* they are tempered as noted in that decision by

the requirements of a fair hearing and that the principles of the *Labour Code* be observed and the "general law" (108/109) be followed. They are also tempered by subsequent comments made in later Labour Relations Board and arbitration decisions reinforcing the unique nature of a CRC.

172 In 1987, the Labour Relations Board commented upon the nature of CRCs in *Lions Gate Hospital and BCNU* (1987) BCLRB No. 112. In dealing with one of a number of identified concerns of the BCNU that the claimant was not permitted to have a union representative with her when she met with the new CRC, the Board commented as follows:

> We do not agree with the Trust that a claims review committee is strictly an "inquisitorial" tribunal. In the *Government of the Province of British Columbia, supra* (309/85) the Board stated "... a claims review committee... does not fit the adversarial model. It is more in the nature of an "inquisitorial" tribunal" (at page 19; emphasis added). In fact, there are elements of both models in the process. Arbitration boards considering similar provisions, including the interim award in this case, have held that a claims review committee has jurisdiction with respect to "medical/ vocational judgments" made by the claims paying agent under the Plan. It would seem to us that the latter judgment i.e. vocational could be "adversarial" especially where conflicting documentation has been submitted. Having said that, it is obvious that allowing representation before a claims review committee could significantly alter the current procedure. The wisdom and implications of such an arrangement should initially be discussed by the parties...
>
> (at p. 9-10)

173 In 1989, the Labour Relations Board in *HLRA (Kelowna General Hospital) and HEU Local 180*, (1989) BCLRB No. 72 addressed the nature of a CRC's duty to provide the parties with the reasoned analysis of the evidence and issues to be addressed. While ultimately deciding the parties were entitled to an explanation of the committee's findings which rationalizes the decision with both the evidence and the arguments presented, the Board noted first:

> While a claims review committee is not a traditional "arbitration board" the Panel is satisfied the committee's decision may be reviewed under Section 108 because the committee is "another tribunal or body appointed or constituted under this part or a collective agreement" (as defined by Section 92(1)(b.). In this regard, I adopt the jurisdictional conclusion of the Labour Relations Board (the "Board") in *Government of the Province of British Columbia* in BCLRB No. 309/85. Equally, neither the special character of the Committee nor its limited jurisdiction to review long-term disability appeals, relieves its members from the duty to accord the parties a fair hearing. This is not to say however that the requirement of a fair hearing carried with it the

> same stringent standards of procedure found appropriate in normal rights arbitration proceedings. What constitutes a fair hearing must vary with the circumstances of the case...

This principle is discussed by the Board by *Pullman Trailmobile Can Ltd.*, BCLRB No. 43/79, [1979] 2 Can LRBR 458:

> In our view, the definition of a fair hearing, as that phrase is used in Section 108(1)(a), must depend on the nature of the process under consideration. In the traditional arbitration setting, the basic criteria of a fair hearing are well established and understood: the right to notice, the right to counsel, the right to call evidence, and the like...[D]epending on the mechanism that is agreed upon, it may be quite inappropriate, and well beyond the contemplation of the parties, to import or insist upon all of the procedures and paraphernalia of the traditional "fair hearing"...
>
> That is not to say that decent standards of fairness can be ignored. Obviously, where the rights of an employee, employer or trade-union are being determined, the process must in all cases be fair. However, what we do say is this: where the parties have agreed on a new or different method for the resolution of a particular class of dispute, the fair hearing standard should be no more stringent than is logically and sensibly implied by the nature and usual characteristics of the agreed-upon method itself...If Section 108(1)(a) is to be superimposed on a whole range of techniques, it must be interpreted and administered with equal flexibility and must be responsive to the reasonable expectations of the industrial relations community.
>
> (at p.4-5)

The Board went on to note:

> An examination of the claims review committee's terms of reference clearly show the Committee does not fit the traditional adversarial model of dispute resolution; it is more in the nature of an inquisitorial tribunal...
>
> (at p. 5)

174 In 1992, the Board in *Bonita Mae Jennings, and the Government of B.C. and BCGEU No. C239/92,* concluded the Terms of Reference between the Government of B.C. and the BCGEU could no longer be regarded as constituting a reasonable concept of fairness with respect to the procedures of the CRC. It then set out minimum standards to be included in the guidelines once again noting the reasons of a CRC should:

> ...distinguish between the medical, vocational and/or interpretive judgments which a committee is required to make -- particularly where an employee is challenging a discontinuance of the benefits following the initial two-year period of disability."
>
> (at p. 5)

175 In a subsequent decision in 1993 involving the same parties (B142/93), the Board again said:

> ...the very focus of the process is an inquiry involving a medical examination of the employee (see paragraph 4 of the revised Terms of Reference). It is not expected the parties will make appearances for the purposes of making representations (paragraph 7 of the revised Terms of Reference). However the latter provision implicitly allows written submissions to be made to a CRC provided: the others (employee, union or employer) have... an opportunity to review and respond to that submission." This would appear to include any written communication made under either paragraph 6 or 9 of the Terms of Reference. The claimant thus had the opportunity to respond where questions of clarification arise.
>
> (at p. 4)

176 In both *Government of B.C. and BCNU* (McAlpine) [1997] BCCAAA No. 248 and *HEABC v. HEU* (Kavalec) [2000] BCCAAA No. 1999, Arbitrator Lanyon and Arbitrator Ready respectively referred to the CRC as making a medical/vocational assessment and the medical expertise of the three doctors who were part of the "specialized tribunal"; the CRC (at par. 44 and par. 38 respectively).

177 Of note is a more recent decision of the Labour Relations Board made in 2007 in *Health Employers of British Columbia and Healthcare Benefit Trust and BCGEU* [2007] BCLRBD No. 27 where the employer applied for review of a CRC decision on the basis the decision contained a number of factual errors that reflected inaccurate information provided by the claimant when she was interviewed during a review meeting with the CRC. In that case the Board made extensive comments about the nature of the CRC and noted:

> The CRC process is an example of an alternative dispute resolution process that has been fashioned by agreement of the parties. They expressly chose to employ a much less formal inquisitorial process, in preference to the adversarial grievance arbitration model. The CRC process has been fashioned to fit the parties' long-standing relationships within the health-care sector and it deals exclusively with appeals by employees who have been denied LTD benefits. The parties fashioned the CRC process to provide a method of resolving disputed LTD benefit claims by answering the question of whether or not the applicant employee

has been disabled in accordance with the definition of disability that is provided in their Collective Agreement. It is specified in the TOR that it is a "medical procedure", that is not in the nature of an appeal in the usual sense of that term. A CRC is a "review" that has been determined through arbitration to be a "court of last resort" on all medical matters: *Royal Jubilee Hospital and HEU, Local 180* unreported arbitration board, February 10, 1984, Ministry No. 80/66/84, (Trevino, Abrahamson, O'Neal).

The parties agreed that the CRC process would involve findings made by three independent qualified medical doctors. The doctors are not identified as arbitrators or adjudicators; rather, it is apparent that the TOR contemplates these doctors will conduct their CRC duties in a manner that harmonizes with the way they routinely carry out the duties of their profession.

The parties designed the specific procedures that attend the CRC process. In order to respect and protect the confidentiality of the employee claimants, the Employer is not provided with a copy of the information package that goes to the CRC. The CRC does not deal with "evidence" in the sense that evidence is called in grievance arbitration. The CRC is provided with "information" that includes all relevant medical and vocational reports that were in the possession of the claims paying agent. The CRC conducts a "meeting" not a hearing. No representatives of the principal parties are allowed to attend and the doctors are not given instructions about how they conduct the examination or interview. The contractual terms that establish the CRC process do not contemplate that party can challenge the truth or accuracy of the information provided by the employee during the interview process.

...I recognize the specialized nature of the CRC process and the particular role cast for the doctors.; I respect the integrity and professionalism of the doctors who were not required to be lawyers, nor are they required to be trained as adjudicators; I have assessed the appropriateness of the manner in which the doctors approached and conducted their assigned task; and the decision I make must reflect an appropriate application of the Law the Contract and the correct application of the Laws of the Code.

(at p. 41-45)

I find it striking that the Employer argues that the CRC erred for the very reason that it adhered to the relaxed requirements of an informal process that the Employer contractually agreed to. It is the TOR and the specifics of the agreed upon procedures that serve to establish a

> purely inquisitorial process and to preclude the adversarial participation that the Employer argues for...
>
> (at par. 51)

> If I were to accept the Employer's arguments in this matter, it would represent a fundamental shift from the CRC process being inquisitorial in nature, introducing an adversarial element that was not identified by the Board in BCLRB No. 309/85 or any decision issued since then. In order to arrive at that result, I would have to read into the parties' Collective Agreement and Appendix 9 new and substantive rights and obligations...
>
> (at par. 54)

178 As is evident from the above, the Labour Relations Board has found the CRC to be an arbitration board. These cases however demonstrate this determination does not preclude the parties from designing their own unique dispute resolution system (i.e. no lawyers or cross-examination). The Board has consistently noted the specialized medical nature of a CRC with an essentially inquisitorial mandate. This mandate is considered when a CRC decision is reviewed under Section 99 of the *Labour Code* as reflected in *HLRA (Kelowna General Hospital), supra,* and others.

179 The Employer however argues as the CRC is an arbitration board under Section 92 (1)(a) and (b), it is empowered to determine its own proceedings as reflected in the award of *G.R. Baker, supra*, by Arbitrator Munroe. The Employer also relies upon the recent decision in *Roberta Jordan v. HEABC on behalf of Fraser Health Authority (Royal Columbian Hospital)*, BCLRB No. B207/2008; B102/2009 to argue the Board has concluded video surveillance evidence is to be treated as any other relevant evidence by a CRC. This case however contains a pertinent caveat as follows:

> That conclusion is separate and apart from the issues of the admissibility of the evidence under any relevant provisions in the collective agreement or Terms of Reference and who should decide that admissibility issue, a grievance arbitrator under the collective agreement or a CRC panel. At least, the latter issue is currently before an arbitration panel chaired by Arbitrator Emily M. Burke under the collective agreement between the Health Employers Association of British Columbia and the Hospital Employees' Union. Nothing which is said or determined in this decision or the Original Decision should be taken to in any way impinge on that arbitration panel's jurisdiction and role in interpreting that collective agreement and the Terms of Reference the parties have agreed to in respect of the CRC structure and process.
>
> (at p. 12)

180 Both parties have utilized the provisions of the *Labour Code* to argue a denial of a

fair hearing before a CRC on various bases including the issuance of a CRC decision prior to it considering the Union's written submission (*Peace Arch District Hospital and HEU, Local 180* (Marshall) August 14, 1986; application for reconsideration B149/87); or whether a reasoned analysis has been provided (*HLRA (Kelowna General Hospital), supra*). Indeed the Board has found certain of those requirements to be consistent with a fair hearing but drawn the line in *HEABC, supra,* in not allowing an adversarial process of cross-examination to test the accuracy of information provided to the CRC panel.

181 The CRC however does not derive its jurisdiction from the conclusion it is an arbitration board under the *Labour Relations Code.* It derives its jurisdiction from the language of the collective agreement. The question of whether a CRC can determine whether to review video-surveillance tapes in this policy grievance is not a question of process but a question of the jurisdiction agreed between the parties in establishing CRCs under the collective agreement. Without that agreement between the parties the CRC has no jurisdiction or mandate. The question ultimately for this panel is taking into account the context as expressed above by the Labour Relations Board and the language in the Collective Agreement, does the collective agreement limit the authority of a CRC to consider video surveillance evidence.

182 The Employer argues the language in the Collective Agreement, in particular the LTD Addendum does not limit what is submitted to the CRC or its authority to consider the submissions of the parties on the admissibility of evidence. It argues the Union's argument seeks to undermine the clear intent of the parties by having a third-party circumscribe the evidence available to a CRC. It maintains the language has no limitations on a CRC's authority to receive evidence or make decisions on the admissibility of evidence. Indeed, it maintains there is nothing inherent in the role of CRC under the Collective Agreement preventing it from considering videotaped observations. Rather, it maintains the context of the whole of the LTD Plan makes clear the CRC was designed to be the exclusive body to review and determine the evidence in relation to disputed claim of disability.

183 In support of its argument, the Employer relies upon principles of collective agreement interpretation, in particular that is necessary to consider the nature of the benefit claimed and the inherent probability or not that the parties would have agreed on the provision of such a benefit (*School District No. 39 (Vancouver*) (1996) 53 LAC (4th) 33 (Hope)). It notes it is a fundamental tenet of collective agreement interpretation that significant benefits and obligations are likely to be clearly and unequivocally expressed in the language used by the parties (*Health Employers Association of B.C. v. Hospital Employees' Union,* [2002] BCCAAA No. 130 (QL)). The Employer says the assertion the Collective Agreement contains a provision stripping a CRC of statutory authority to consider video surveillance evidence cannot be construed as anything but significant. Only the clearest of language could establish such a proposition. Accordingly, the Employer maintains if the parties had intended to restrict the authority of CRCs this would have been clearly expressed and it is highly improbable that any employer would agree to prevent the CRC from considering relevant information. It also argues past practice is consistent with this view.

184 The Employer maintains the wording in Section 11 establishes the purpose of the

CRC is to review the adjudication of the claim by GWL which must include the information used to make its decision. The meaning of Section 11 must be considered in the context of what the parties intended to achieve under the LTD Addendum; that is to establish a process for third party adjudication of the LTD claims by a claims-paying agent; to authorize the claims-paying agent to make decisions on a claimant's entitlement to LTD benefits; and to provide for a process of review of disputed claims by a committee of three physicians. This, the Employer argues was the clear intention of the parties based upon the language of Article 11 of the LTD plan.

185 In contrast, the Union submits the plain language of Section 11 of the LTD Addendum establishes the claim of the employee for disability benefits is to be reviewed by their CRC composed of three medical doctors. It is not the decision of the claims-paying agent as to be reviewed. The narrowly circumscribed jurisdiction of the CRC which is limited by the plain wording of Section 11 of the LTD Addendum to reviewing claims for disability benefits only, is to be contrasted with the broad general jurisdiction conferred on a regular arbitration panel in Articles 9.05 and 11.01 of the Collective Agreement. In making its argument the Union relies upon *HEABC,* BCLRB No. B39/2009 where the Board noted "the parties have agreed that medical and vocational issues arising in the claim to LTD benefits will be decided by a CRC; and that issues arising from the interpretation of the collective agreement will be decided by conventional arbitration. This bifurcation of decision-making logically allows medical issues to be decided by doctors and legal issues to be decided by arbitrators (at par. 25).

186 The Employer notes "adjudicate" refers to what the claims-paying agent does and the grievance does not challenge what GWL is permitted or not permitted to do in the adjudication of LTD claims. It does go on however to cite case law that it maintains confirms video surveillance is an appropriate adjudicative tool. (See *Ditomaso v. Manufactures Life Insurance,* 2002 BCSC 502); *PSEC v. BCGEU (Stadnyk), supra).* It points out the "decision" referred to in Section 11 is the decision of the claims-paying agent (GWL) resulting from its adjudication of the claim which leads to a CRC's review of the claim. Once GWL makes a decision "regarding a claims for benefit" which a claimant "disputes", he or she may invoke the CRC review process.

187 The Employer points out Section 11 provides if a claimant disputes the decision of the claims-paying agent, the claimant may arrange to have her/his claim "reviewed" by a CRC. In other words, what is being reviewed is the "claim"; not simply the "decision". Any assessment of the meaning of "review" must include an assessment of what constitutes the claim, which by necessity, requires the CRC to have before it all of the information relied on by the claims-paying agent in coming to its decision as to whether the claimant was "totally disabled" under the LTD Plan.

188 The Employer relies upon *HLRA, on behalf of St. Paul's Hospital v. HEU, Local 180, supra,* and *Lions Gate Hospital and BCNU*, BCLRB No. 112/87 to maintain a review must involve a review of <u>all</u> the materials before the claims-paying agent on which it based its decision. It must be taken in its broadest sense (see *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)*, [1992] SJ No. 3 (C.A.).) The Employer also says where video surveillance forms part of the basis of the decision of the claims-paying agent, it would be contrary to

the principles of a fair hearing to prevent such information from being provided to the CRC for consideration. (*See Re British Columbia,* BCLRB No. B202/2005 and *Peace Arch Hospital and HEU, Local 180 (Marshall), supra*).

189 In considering the Employer points on the interpretation of the words "adjudicate"; "decision" and "review" in the Collective Agreement, we note the latter is most pertinent to the matter here. As noted by the Employer, the Union by this grievance does not challenge what GWL is permitted to do. Essentially, the Employer seeks a broad interpretation of the words "review" which requires the CRC to have the benefit of all the information relied upon by the claims-paying agent in coming to its decision as to whether the claimant was "totally disabled" under the LTD Plan.

190 This argument is consistent with the theme of the Employer that because the CRC is considered an arbitration board under the Code, it is empowered to develop its own procedures and make determinations as to what evidence it must consider. Ultimately however, it does not take adequately into account the many arbitral awards and decisions of the Labour Board that reference the specific design between the parties of a dispute resolution system agreed to as per the collective agreement that bifurcates medical/vocational issues arising in a claim for LTD benefits. The clear tenor and statements throughout those decisions is to acknowledge a system that is more inquisitorial than adversarial and seeks to preserve those elements initially agreed between the parties.

191 The evidence in this matter makes clear the parties agreed in the Collective Agreement to a bifurcation between medical/vocational issues arising in a claim for LTD benefits and issues arising from the interpretation of the Collective Agreement. This has been consistently expressed in decisions referred to earlier and specifically noted in *HEABC*, BCLRB No. 27/2007. The language of the collective agreement establishes the parties designed a dispute resolution process to resolve disputed LTD benefit claims as to whether or not the applicant is disabled in accordance with the definition of disability in the Collective Agreement. The Terms of Reference, as per paragraph 7 of that document, specify a medical procedure. Three medical doctors are appointed to deal with this issue. As noted in *HEABC, supra*, the doctors are not identified as arbitrators or adjudicators; rather the Terms of Reference contemplate these doctors will conduct their CRC duties in a manner that "harmonizes with the way they routinely carry out the duties of their profession". This reality leads to the conclusion it is the claim of the employee for disability benefits that is being reviewed and not the decision of the claims-paying agent to deny benefits. The CRC is not reviewing the fairness, reasonableness or correctness of the claims-paying agent decision. Rather, three medical doctors are reviewing the issue of the claim of the employee for disability benefits, in particular the question of whether or not the applicant employee has been disabled in accordance with the definition of disability.

192 While as noted by the Employer, the CRC may have an ability to make incidental interpretive decisions (see *HEABC (on behalf of VIHA (Victoria General Hospital) and Hospital Employees' Union (Lyserg CRC)*, BCLRB No. B303/2005,) this does not weaken the fundamental premise stated throughout that the mandate of the CRC -- three medical doctors - is to deal with medical/vocational issues when it reviews a claim of

denial of disability benefits. Moreover, to accept the Employer's argument would contradict the comments made in *HEABC, supra,* "that this is not in the nature of an appeal in the usual sense of that term" and "the contractual terms that establish the CRC process do not contemplate that a party can challenge the truth or accuracy of the information provided by the employee in the interview process." (at par. 43) While we agree with the Employer that "form" does not dictate jurisdiction as noted earlier, the form here is dictated by the jurisdiction established by the parties' agreement that a CRC deals with medical/vocational issues where applicable. That circumscribed jurisdiction dictates the form and whether the admissibility of video evidence is properly before a CRC. The jurisdiction of a CRC is based in Section 11 of the LTD Addendum.

193 The Employer has however relied upon past practice to argue the practice informs the intent and meaning of the Collective Agreement provisions at issue and/or establishes estoppel in this instance. In ascertaining the intent of the parties the Union maintains past practice is not helpful as an aid to interpretation unless it discloses a mutual agreement between the parties.

194 The history of this matter is relevant in the sense it sets out the context of the use of the CRC. While I agree with the Union, the principles in *John Bertram and Sons, supra,* must be satisfied in order to rely upon past practice, in particular knowledge by responsible Union officials, the Employer has argued the pervasiveness of the practice should impute knowledge to responsible Union officials.

195 In our view, of note is not just the practice of the parties but rather the history of the attempts by the parties to develop procedures for CRCs over the years. In May 1983, the Union sent a letter to the HLRA Health and Benefit Plan and proposed a list of ten written procedures for the CRC dealing with Ms. B. Haills. That letter was forwarded by the trust to HLRA to deal with. The response of HLRA ultimately in August, 1983 was that the CRCs should be at liberty to determine their own procedures. In a letter of August 23, 1983 the Employer pointed out:

> The Association considers that claims review committees should be at liberty to determine their own procedure. These committees were intended to provide an independent assessment of an employee's medical condition. The role of the committees is to determine a medical diagnosis. The committee members are medical doctors who have been chosen by the parties because of their medical expertise. It is therefore appropriate that the committees be able to make their assessment in whatever manner and by whatever means they consider appropriate.

196 On September 2, 1983, in response, the Union noted there was no disagreement with the contention that the committee was intended to provide an independent assessment of an employee's medical condition and that they should be able to determine their own procedure in order to make that decision. The Union noted however that this did not absolve the parties from the responsibility of providing some parameters within which the committee works in order to ensure the intent of the Agreement is realized.

197 In her testimony, Lee Whyte said there was no issue between the parties that they

were talking about medical evidence and medical procedures. In her view, the parties understood a CRC to be a panel of medical doctors looking at medical evidence in the form of medical reports. In April 1984, HLRA and the Union agreed to procedures for a CRC established to hear the appeal of Ms. B. Haills. The Employer maintains this was agreed for the purpose of this one case only. In any event, by December 31, 1984, "Procedures for Claims Review Committee" had been renamed Terms of Reference and were generally applicable to all CRCs.

198 In April 1987, HBT prepared and distributed revised procedures for the CRCs. These were entitled Claims Review Committee Procedures and contained more detail regarding the materials to be provided to the CRC, including the Terms of Reference, Expense Guidelines, an overview of the LTD Plan and arbitrations, and information regarding the claimant's case including personal information "medical reports, vocational reports and/or job description and correspondence from Mutual Life re denial/termination benefits."

199 In February 1988, the Union made further proposals regarding the CRC procedures. The Union sought the right of the claimant for a full hearing before the committee including calling witnesses, cross examination and oral argument by counsel. The Employer replied in a letter dated March 10, 1988 that the CRC's mandate was not limited to dealing with medical questions, but had a mandate to review medical and vocational issues. The Employer also replied the CRC process was to be non-adversarial such that a CRC could not provide the forum for the kind of hearing suggested by the Union. The Union pointed out as part of this process HLRA did not raise any issues regarding the admissibility and use of video surveillance evidence by CRCs.

200 The Union has argued the Terms of Reference emphasize the "inquisitorial" rather than adversarial nature of a CRC meeting. Consistent with Section 11 of the LTD Addendum the Terms of Reference make clear the CRC mandate is confined to medical and not legal matters.

201 The Employer argues however the Terms of Reference were not agreed to by the parties to the Collective Agreement, but were unilaterally imposed by HBT. This is distinguishable from the case of *Bonita Mae Jennings*, where the Terms of Reference were agreed. As a result, the Employer argues they do not affect the CRC's jurisdiction. The Employer says in any event the evidence of Ward is that HBT utilizes the same procedures for the operation of CRCs for all of the unions covered by HBT and, specifically, with respect to the material provided to CRCs by HBT. The Terms of Reference were never interpreted in the narrow manner claimed by the Union. The evidence of Ward and Sulpher is that CRCs have always been provided with all of the information used to adjudicate the claim -- which included video surveillance reports and tapes when they came to be used by the claims-paying agent and submission when they were made by the parties. The Employer says the Terms of Reference were intended to guide the CRCs in terms of ensuring that it had pertinent medical and vocational information, however, read as a whole and in light of the long standing practice it is clear that they do not restrict CRCs from reviewing relevant information related to a claim of disability.

202 The history of the early exchanges attempting to develop procedures for CRCs indicates there was a consensus between the parties the CRC was to deal with the medical issues. That ultimately expanded to vocational issues. There were differences between the parties as to the procedures to be used by a CRC. Indeed, while the Union argues today for the limited jurisdiction of a CRC, at one point it was looking for the option of a full hearing before the committee including witnesses' cross-examination and oral argument. Fundamentally, however these exchanges confirm the intent these matters were bifurcated between medical/vocational issues and interpretation issues under the Collective Agreement. Issues of a fair hearing of the CRC were to be dealt with by the Labour Relations Board. There was also recognition the CRC was an inquisitorial, non-adversarial process along with an understanding ultimately that some parameters needed to surround the process. While HBT can ultimately be said to have imposed the Terms of Reference, early correspondence makes clear discussion on proposals concerning the Terms of Reference was referred by HBT to HLRA when the Union raised questions or proposals regarding procedures the Union suggested should be adopted by CRCs.

203 Extensive evidence was also led by the Employer to demonstrate it was the consistent practice of HBT to forward all information considered by GWL, including video-surveillance tapes, to the CRC and that Union officials were aware of this. This practice it maintained informs the mutual intent of the parties with respect to the Collective Agreement provisions at issue.

204 Two things are immediately evident. The number of CRCs are significant. The evidence established thousands of LTD claims have been processed since the LTD Addendum came into effect. The majority are resolved without reference to a CRC. The Employer has brought evidence of approximately 10-12 files in which video-tape surveillance was provided to a CRC and used in coming to its decision. Of those, two were at or within the time frame HEU raised the issue concerning the admissibility and use of video tape surveillance evidence. In most of these cases the Union points out, the only HEU persons who were aware of this were staff representatives with no authority to amend the Collective Agreement. While the Employer argues these were paid representatives who existed in every union office in the Province, it was also clear through Jessome's testimony that these may well have been isolated instances, not enough to develop a pattern sufficient to impute knowledge to responsible Union officials.

205 In our view, this is unlike *Coast Hotels, supra,* where the union performed a full audit and no issue was raised about the manner in which the employer was calculating annual vacation pay increases. In the present case, there are sporadic instances that arose among a large number of cases, such that knowledge of a consistent practice by responsible Union officials cannot be definitively established. It would be a different matter if the historical discussions between the parties on the CRC procedures or Terms of Reference included such information. Those discussions were between responsible Union and Employer officials and reflected certain common understandings as part of this process. In further contrast, the collective bargaining in 1998 where senior Union officers were aware of the use of video surveillance goes only so far as knowledge of the use by GWL of video surveillance. It does not establish knowledge of use of video surveillance tapes by or in the CRC meetings.

206 Ultimately, the number of cases the Employer was able to establish in which video surveillance was sent to CRCs was low on a comparative basis. As a result, it is not possible to draw a significant conclusion from that amount.

207 This matter is further complicated by the fact HBT who is not a party to the Collective Agreement, was sending the information; not HEABC/HLRA. Accordingly, it is difficult to apply the principles in *John Bertram, supra,* to this situation. With respect to the alternative estoppel argument of the Employer, that estoppel would as the Union argues have come to an end on March 31, 2001 because the HEU indicated it would rely on its interpretation in April, 2006.

208 Ultimately, where does that leave the Panel in considering whether the intent of the parties was to allow or limit the consideration of video surveillance evidence by CRCs. What is evident is that the CRC was to be a largely inquisitorial process dealing with medical issues. That is made clear by the testimony concerning the formation of CRCs, subsequent arbitrations and decisions that delineated the bifurcation of the process under the Collective Agreement. Many of the disputes between the parties that have gone to the Labour Relations Board can be characterized as process issues. The Union argues dealing with video surveillance evidence broadens the jurisdiction of the CRC as doctors would be required to make legal decisions about whether video surveillance evidence is admissible before a CRC. It maintains it was not the intent of the parties to have CRCs undertake this analysis.

209 While CRCs were to be given flexibility with respect to the medical issues they were to determine as doctors, we do not find this includes legal decisions associated with the admissibility of video surveillance evidence. In our view, this would contradict the nature of the inquiry which is medical/vocational and inquisitorial. The underlying issue in this case has been commented upon to a certain extent in *HEABC,* BCLRB No. 27/2007 where the Labour Relations Board noted CRCs do not deal with evidence in the sense that evidence is called in a grievance arbitration. Rather, they deal with relevant medical and vocational information without cross-examination in a meeting with the claimant. There is no process to challenge the admissibility of any evidence or information or to present any legal argument. In our view similar to the Board's comments in *HLRA (Kelowna Hospital), supra,* that what constitutes a fair hearing varies with the circumstances of the case, the question of what the CRC may appropriately deal with varies but must be consistent with its medical/vocational jurisdiction.

210 The Employer's argument in effect would mean cross-examination to test the veracity of information could/would be allowed when clearly the Labour Relations Board has ruled against that in *HEABC, supra.* In effect, the Employer is arguing the ability of a CRC panel to develop its own procedures means it can decide legal issues associated with the admissibility of video-surveillance tapes. The CRC is not charged with that mandate. We note further this injects an adversarial element into what is largely an inquisitorial process. In our view, it would be inconsistent with the purpose of a Claims Review Committee, the LTD Addendum and the Collective Agreement to require a panel of three doctors to conduct adversarial legal proceedings to determine a question of law. As we have concluded, the jurisdiction of a CRC is limited to decisions within its proper

jurisdiction as a specialized tribunal limited to medical/vocational decisions as reflected by the agreement of the parties in the Collective Agreement and discussions about the nature of the process.

211 The jurisdiction of the CRC is derived from the agreement of the parties as reflected by the Collective Agreement. That jurisdiction as agreed between the parties is confined to the medical "track" as referred to in early decisions such as *Royal Jubilee, supra. HEABC, supra,* concluded a CRC is a "review" that has been determined through arbitration to be a "court of last resort" on all medical matters (at p. 5). It has a "special character" and a limited jurisdiction to review long-term disability appeals (see *HLRA (Kelowna), supra,* at p. 4). It can be referred to as "a new or different method for the resolution of a particular class of dispute" as noted in *Pullman Trainmobile Car Ltd., supra.* Ultimately, it is inherent in the role of the CRC that there are limitations on its jurisdiction which translate into limitations on its ability to deal with matters which must be part of its medical/vocational jurisdiction. The decision of the Labour Relations Board that a CRC is an arbitration board does not expand its jurisdiction. That jurisdiction is determined by the agreement of the parties.

212 The Employer says the Union is arguing the "form" of the CRC, i.e., its medical inquisitorial nature cannot or does not impact on the jurisdiction of the CRC. The Employer however says an arbitration panel under the *Labour Code* is entitled to determine its own procedure as noted by Munroe in *G.R. Baker, supra,* including review of video surveillance and determination of admissibility. We agree as the Employer argues and as sanctioned by the Labour Relations Board that a CRC is able to develop its own procedures as any arbitration board. This however must conform to the fair hearing requirements and legal issues as commented by the Labour Board in the cases set out above. We reiterate this must also be consistent with its mandate dealing with medical/vocational issues as reflected in the words of the Collective Agreement agreed between the parties.

213 What is evident from all the above is that while we agree a CRC can develop its procedures as articulated in *G.R. Baker Memorial, supra,* this is circumscribed by the medical/vocational jurisdiction agreed to by the parties in establishing CRCs under the Collective Agreement. The consistent theme in both the arbitration and Labour Board cases is that the jurisdiction of the CRC is circumscribed. It is not a process that follows the full adjudication model and clearly was not intended to function as one as evidenced by both the language of the collective agreement, the discussion between the parties on procedures over the years and the appointment of three medical doctors. That medical expertise infuses the specialized process, along with the expectation the doctors will carry out their "duties in a manner harmonizes with the way they routinely carry out the duties of the profession".

214 While the Employer argues the test for admissibility of video surveillance evidence is relevance and cites court authority for this proposition, the reality as expressed above is this as a unique dispute resolution system designed by the parties to focus on the medical/vocational question that arises when undertaking a review of whether the decision to decline a benefit is correct. The claim of the employee is then reviewed by a CRC. The concept of "adjudicate" referenced in the wording of the Collective Agreement,

while it connotes a "judicial" process for the claims review process as set out by Arbitrator Munro in *G.R. Baker* it does not reflect an agreement by the partiers that this is a full fledged formal adversarial process.

215 In that sense, the Employer's argument that a CRC cannot have its ability to consider video surveillance evidence circumscribed is not consistent with these tenets. While there are both medical and vocational aspects to whether a claimant is "totally disabled", that judgment arises in a medical context as reflected in decisions in this area. The Employer's argument seeks to utilize the concept that a CRC is an arbitration board under Section 89 of the *Labour Relations Code* without adequately taking into account the limitations set out by the parties in the Collective Agreement when designing this system. These limitations have been reiterated over the years in discussions between the parties as to the process or framework to be utilized by a CRC.

216 Ultimately however, this does not mean a CRC cannot ever consider video surveillance evidence. Rather, where the consideration of video surveillance is consistent with its mandate dealing with medical/vocational issues as reflected in the system designed by the parties through their collective agreement, it may well be appropriate. In our view this has limited application to when observations from surveillance can be considered "medical information" or akin to a functional evaluation. If indeed it can be characterized as a tool for a functional evaluation or another such tool that would be consistent with the medical/vocational jurisdiction, it could well be utilized as part of the CRC process. This would be part of the vocational/medical jurisdiction of a CRC.

217 As noted in *Royal Jubilee Hospital, supra,* the claims-paying agent has a duty to articulate its reasons for declining claims in a manner which separates medical issues from interpretive issues. Once a clear statement for declining a claim and the evidence relied upon is delivered, the claimant has the option of a medical review or invoking the grievance procedure, as in *G.R. Baker, supra.* If there are legal issues associated with a video surveillance tape utilized in the claims-paying agent decision, this matter can be grieved under the grievance/arbitration procedures of the Collective Agreement. Ultimately, this intent is reflected by the agreement as set out in our analysis above.

218 Section 13 of the Addendum reinforces this conclusion as it provides the terms of the Plan shall not prejudice the application or interpretation of the Master Collective Agreement. A claimant would otherwise not be able to properly raise legal interpretive issues associated with its medical claim that it can otherwise ordinarily raise under the Collective Agreement. Legal issues such as the applicability of the appropriate test and/or privacy issues should be available to a claimant to grieve under the grievance and arbitration procedures in Articles IV and V of the Master Agreement.

219 In view of all the above, the Union's grievance is successful in part. While we have concluded under the Collective Agreement that CRCs do not have the jurisdiction to make legal rulings on the admissibility and use of video tape surveillance evidence, we have not concluded as a broad automatic rule that video surveillance would be precluded in every case. Indeed, where it is consistent with the medical/vocational mandate of a CRC, it could be appropriately considered as part of the CRC process.

220 The Panel remains seized of this matter to resolve any outstanding issues.

Dated at Vancouver, British Columbia this 9th day of July, 2010.

EMILY M. BURKE
CHAIR

RUTH HERMAN
MEMBER

CHRIS GRANT
MEMBER
(Dissents)
Written Dissent to Follow

qp/e/qlspi/qllxr