

CHAPTER 7

MEDICAL CERTIFICATES

7:000 Introduction	
7:100 Overview	Page 95
Summary of Principles	Page 98
7:200 The Right to Require a Medical Certificate	Page 101
7:300 The Need for Reasonable Grounds to Require a Medical Certificate	Page 116
7:400 Assessing the Sufficiency of a Medical Certificate	Page 133
7:500 Decisions Considering the Sufficiency of Medical Certificates.....	Page 146
7:600 Entitlement to Diagnosis and Other Specific Medical Information	Page 152
7:700 Objecting to an Employee’s Medical Certificate	Page 160
7:800 Checklist of Factors to Review	Page 163

7:000 INTRODUCTION

This chapter reviews the circumstances where, and the degree to which, an employee can be compelled to provide the employer with medical certification of illness. The chapter concludes with a Checklist of Factors to Review when considering issues relating to a demand for the provision of medical information.

7:100 OVERVIEW

Medical Certificates as Corroboration of Illness

The law regarding an employer’s right to require production of a medical certificate is confusing, and in some respects irreconcilable. The most troubling area involves medical certificates that are sought to justify an absence due to illness.

Independent corroboration of illness, either by way of medical evidence or via non-medical avenues, has been considered a critical component of establishing an employee’s claim of illness. As has often been stated, a bare assertion of illness is not sufficient.

There are, of course, exceptions to that requirement. A collective agreement or a workplace rule or practice may relieve an employee from having to provide a medical certificate in the case of a short-term illness. In other cases, an employer may adopt a more informal case-by-case approach, whereby the need for corroboration is waived in the sense that it is invoked only where the employer becomes concerned with the legitimacy or frequency of the employee’s absences. By way of further exception, corroboration would not be required where the employer knew of, and accepted, the legitimacy of the employee’s illness.

The most widely accepted form of corroboration is a medical note or certificate that confirms that the employee’s physician had been consulted and had concluded, upon examination of the employee, that the employee was, in the physician’s view, ill and unable to work on the date(s) in question.

An employer's request for medical information must be reasonable, given the particular set of facts at issue. Much of the confusion that exists in this area of the law is attributable to arbitrators having failed to reconcile the requirement for reasonableness with the general expectation that an employee must corroborate any assertion of illness.

This issue has been addressed in greater detail in Chapter 6, but it bears continuing consideration when attempting to understand the concepts addressed in this chapter.

Medical Certificates for Other Purposes

A medical certificate may be required for reasons other than corroboration or substantiation of illness. A certificate may be necessary to determine whether the employee's particular condition justifies payment of sick benefits. It may be required to substantiate an employee's fitness to continue to work or fitness to return to work following an absence due to illness. A medical certificate may be necessary to resolve questions related to accommodation or provision of modified work, and it may be a factor where there are allegations that the employee filed a fraudulent sick-leave claim or engaged in activities inconsistent with an alleged illness. The reasonableness of the employer's requirement and the scope of the medical information that can be sought are often a function of the purpose underlying the request for a medical certificate. Consequently, what is reasonable in one context may not be reasonable in another. That is a distinction often overlooked.

In cases involving a demand for medical information, arbitrators endeavour to balance the competing privacy rights of employees with the employer's legitimate business interests. In the case of an absence due to illness, the "balancing question" has centred on whether it was reasonable in the circumstances for the employer to require a medical certificate (or a more detailed medical certificate) to substantiate the employee's illness and/or entitlement to sick benefits. Unfortunately, none of the reported cases where arbitrators have embarked on either of these inquiries have satisfactorily reconciled the well-established need for corroboration with the reasonableness of the employer's demand for medical information.

Considered from another perspective, where an arbitrator upholds an employee's claim for sick benefits after having determined it was not reasonable for the employer to have requested a medical certificate for a one or two-day absence, has the arbitrator, in effect, determined that the basic need to corroborate the employee's assertion of illness did not apply in such circumstances? That would appear to be the impact, but, again, no decisions have addressed the issue in that fashion.

Additional layers of complexity arise where the question of proof has been addressed partially or fully by the terms of the collective agreement.

For instance, many collective agreements contain clauses that distinguish between longer term absences (for example, five or more days) and those of shorter duration. Clauses of this nature frequently require that an employee must provide a medical certificate to substantiate any illness that falls into the longer term category. While some clauses will stipulate that the employer retains the right to require a medical certificate in cases of shorter illnesses, most collective agreements are silent on the issue. Most often, arbitrators have reconciled that silence with the general obligation to provide corroboration of illness by holding that the employer's right to require a medical certificate for shorter periods of absence has been qualified by the terms of the collective agreement. In other words, it can be requested only where the employer reasonably requires such corroboration to address a valid concern regarding the legitimacy of the employee's absence.

In a very limited number of cases, arbitrators have found that the sick-leave provisions in the collective agreement were so comprehensive as to constitute a complete code regarding proof of illness. These provisions have been interpreted to limit the employer's entitlement to seek proof of

illness even where the circumstances provided a reasonable basis for questioning the legitimacy of the absence.

Care must be taken when considering these cases, for even when the collective agreement provisions could be said to amount to a code, that codification, with its consequent restriction on having to provide medical evidence, may be limited to one aspect of the illness equation. For example, a codification of proof of illness generally would not limit an employer's right to seek additional medical evidence for purposes such as assessing the need for accommodation, determining modified work restrictions, or determining whether an employee had recovered to the extent that she could be returned to her former position without restriction or accommodation.

Even where the employer retains the right to require proof of illness, arbitrators generally have found that it must consider individual circumstances in asserting that general right. As a consequence, arbitrators most often have concluded that directives or absenteeism attendance programs were unreasonable when they imposed a medical certificate requirement on all employees at a certain absenteeism level, particularly in cases where the employer was not questioning that the employee was actually ill. At first blush, this approach appears to be difficult to reconcile with an employer's generally accepted right to require corroborative evidence of an employee's assertion that she was ill and unable to work.

The confusion that arises by reason of different arbitral perspectives is compounded by the frequent failure of arbitrators to clarify the precise form of report being addressed when discussing the respective rights of the parties. The colloquially referenced "doctor's note" may be no more than a cryptic, one-line, printed note that purports to excuse the employee from work on one or more dates. A "medical certificate" may be more formal in nature and contain perhaps somewhat more information regarding the employee's condition or recovery. A "Physician's Statement" may be thought of as a one or two-page form that most often has been prepared by the employer for completion by the employee's physician. It generally solicits more detailed information, and has been likened to requiring the sort of particulars an insurer would solicit when considering a disability claim. Then there is a Physician's Report or a Medical Report, generally set forth by way of a letter that responds to particular questions raised by the employer. The nature of that report may, in some cases, require that the physician re-examine the patient before responding to the employer.

These various forms of "proof" (i.e., notes, certificates, statements, and reports) often are referred to interchangeably, with the term "medical certificate" frequently being an omnibus term that incorporates all such forms of proof. The distinctions, while perhaps subtle in some cases, must not be ignored in rationalizing what often appears to be differing approaches to the need to provide medical information.

For the purposes of this chapter, the term "medical certificate," unless indicated otherwise, will be used in a broad sense to refer to most types of medical information provided by an employee's physician.

Finally, any reliance that an employee could assert with respect to a conclusive "presumption" of illness will be lost where the employee has tendered medical evidence that was insufficient to corroborate her assertion of illness.¹⁵⁹

¹⁵⁹ This is consistent with the approach generally taken with respect to the admission of relevant evidence, in that all relevant evidence generally is admissible, irrespective of the manner in which it was obtained. The primary exceptions to admissibility are privileged information (including some labour-relations communications and discussions) and, in the view of some, surreptitious video surveillance evidence that fails to meet an arbitrator-mandated reasonableness test. The issue of admissibility of relevant evidence is considered in Chapter 12, Surveillance Evidence.

SUMMARY OF PRINCIPLES

The Right to Require a Medical Certificate

7:201 Even in the absence of a provision in a collective agreement, an employer may require an employee to produce a medical certificate or other medical documentation where such is reasonably necessary. The source of this entitlement usually is considered to be either an inherent right of management or an implied term of the collective agreement. [[Page 101](#)]

7:202 A collective agreement that stipulates the conditions under which a medical certificate is required may limit the employer's right to require a medical certificate in different circumstances. Nevertheless, the employer generally will retain the right to seek proof of illness where it has reason to suspect the employee may have been absent for reasons other than illness. [[Page 103](#)]

7:203 The retained right to seek proof of illness (where there is reason to suspect that an employee may have been absent for reasons other than illness) permits an employer to impose, on an individualized basis, a medical certificate requirement on each occasion of absence where the employer has reason to question, in a broad sense, the legitimacy of the employee's absenteeism. [[Page 109](#)]

7:204 A collective agreement provision regarding proof of illness may, in some circumstances, be found to constitute a complete code that effectively limits the employer's right to seek medical information that does not fall within the scope of that provision. A clause of this nature may narrow the employer's right to obtain particularized medical information that would be compellable if the agreement otherwise was silent. [[Page 112](#)]

7:205 Even where a collective agreement limits the circumstances where a medical certificate may be required to substantiate an illness or a sick-leave claim, those provisions will not necessarily limit the employer's entitlement to seek a medical certificate or other relevant medical documentation to address entirely distinct issues such as fitness, accommodation, and prognosis for regular ongoing attendance. [[Page 115](#)]

The Need for Reasonable Grounds to Require a Medical Certificate

7:301 In the absence of a contrary provision in the collective agreement, arbitrators consistently have held that an employer must have "reasonable and probable cause" or "reasonable and probable grounds" to compel the production of medical certificates or other medical documentation. [[Page 116](#)]

7:302 The expressions "reasonable and probable cause" and "reasonable and probable grounds" have not been defined except by the factual context where either was found to exist or not exist. [[Page 117](#)]

Considering the underlying circumstances, the "reasonableness requirement" can be formulated in the following terms:

- (a) In a case dealing with absence due to illness, it is reasonable to require a medical certificate or other medical documentation where the employee's absence, or pattern or frequency of absence, raises a reasonable question as to whether a particular absence was justified; whether the employee was making every reasonable effort to attend at work; or whether there was some other justifiable reason for being concerned about the employee's health or ongoing attendance. [[Page 118](#)]

(b) In a case involving fitness to work or fitness to return to work, it is reasonable to require a medical certificate or other medical documentation where the employee's circumstances or actions raise a reasonable question as to whether the employee can perform the functions of the position in a safe manner. [\[Page 119\]](#)

(c) In a case involving potential accommodation or modified duties, it is reasonable to require a medical certificate or other medical documentation to facilitate the employer's assessment of these issues. [\[Page 127\]](#)

(d) In a case involving the sufficiency of a medical certificate or other information that has been provided, it is reasonable to require that further and more detailed information be provided where the information received is deficient in one or more essential respects. [\[Page 128\]](#)

7:303 An assessment of the reasonableness of a request for a medical certificate or other related information is primarily a fact-based inquiry that will consider, among other matters, employee conduct (where relevant), the purpose underlying the request, and whether the employer has adopted an incremental approach in order to minimize unnecessary intrusions upon the employee's privacy. [\[Page 130\]](#)

7:304 Reasonableness will not necessarily be a precondition to demanding a medical certificate where the collective agreement stipulates that a medical certificate will be required at a certain point, such as after an absence of three days. The matter, however, may be different where the clause is discretionary; for example, the employer may request a medical certificate after an absence of three days. [\[Page 132\]](#)

Assessing the Sufficiency of a Medical Certificate

7:401 An employer is entitled to evaluate a medical certificate to determine if, for example, it is sufficient to establish that the employee was suffering from an illness. [\[Page 133\]](#)

7:402 An employer may be entitled to question and challenge a physician's recommendations. [\[Page 141\]](#)

7:403 A predictive medical certificate, often based upon a recovery norm (or what can be referred to as a "presumptive recovery period") may have to be supported by a supplementary medical certificate prepared after the happening of an anticipated medical event. [\[Page 145\]](#)

Decisions Considering the Sufficiency of Medical Certificates

7:500 Overview of Decisions [\[Page 146\]](#)

7:501 Cases Involving Approval of Sick Leave or Sick Pay [\[Page 147\]](#)

7:502 Cases Involving a Return to Work [\[Page 149\]](#)

7:503 Cases Involving a Failure to Return to Work [\[Page 150\]](#)

7:504 Cases Involving an Unauthorized Absence from Work [\[Page 151\]](#)

Entitlement to Diagnosis and Other Specific Medical Information

7:601 An employer has the right to compel the production of sufficient information to determine if the employee's absence was bona fide. In instances involving sick leave and sick pay, this may

7:100 Overview

include routine information as to the nature of the illness or disability (but not normally the diagnosis), the prognosis, if any, and the length of the employee's expected absence. [\[Page 152\]](#)

7:602 While an employer usually will not be entitled, in the normal course, to insist upon receipt of a diagnosis or particulars of treatment, inquiries regarding the nature of the employee's illness and the type of treatment recommended normally are seen as being less invasive, and may, therefore, be permissible. [\[Page 155\]](#)

7:603 An employer generally will be entitled to obtain more medical information relating to an employee's illness (or recovery) in cases involving prospective leaves, ability to work, and issues related to accommodation and modified work. [\[Page 158\]](#)

Objecting to an Employee's Medical Certificate

7:701 An employer who is not prepared to accept the sufficiency of an employee-tendered medical certificate must advise the employee why it is rejecting the certificate. The employee must be given timely notice so that she can consider whether to address those concerns by providing additional medical information. Where an employer fails to do so, the arbitrator is likely to conclude that the employee's medical evidence, although limited or cursory, must, in the circumstances, be found to justify the employee's position. [\[Page 160\]](#)

Factors to Review When Considering a Direction to Provide Medical Information

7:800 Checklist of Factors to Review [\[Page 163\]](#)

7:200 THE RIGHT TO REQUIRE A MEDICAL CERTIFICATE

7:201 Even in the absence of a provision in a collective agreement, an employer may require an employee to produce a medical certificate or other medical documentation where such is reasonably necessary. The source of this entitlement usually is considered to be either an inherent right of management or an implied term of the collective agreement.

Arbitrator Cross, in *Studebaker-Packard of Canada Ltd.* [1960],¹⁶⁰ summarized the law in the following terms:

I am of the opinion that under the management's rights clause [wording not reproduced in the decision], the company has the right to require as a condition of employment that its employees shall be physically fit to perform the work required of them. The company by paying a certain daily wage is entitled to a full physical performance and an employee who suffers a disability by reason of illness or other cause may at the option of the company become subject to release or transfer. Indeed at common law a company has an obligation to other employees to select reasonably fit and competent fellows with whom a servant is required to work ... Therefore, if there is reasonable and probable ground for believing that an employee has become physically impaired during the course of his employment, the company surely must have the right to require a medical opinion with respect to such condition, and to suspend employment pending a favourable report.

That decision was relied on by arbitrator Weatherill in *Firestone Tire & Rubber Co. of Canada Ltd* [1973]:¹⁶¹

There is no doubt an employer has both the entitlement and the obligation to satisfy itself as to the fitness of its employees to carry out the tasks to which they will be assigned. What is proper will depend, in each case, on the nature of the work and the circumstances to which it is to be performed. In *Re U.A.W., Local 525, and Studebaker-Packard of Canada Ltd.* (1960), 11 L.A.C. 139 (Cross), it was held that it was a paramount right of management to require that employees be physically fit to perform the work that they are required to do and to satisfy itself by medical opinion if necessary, that this is so. In *Re U.A.W., Local 89 and Reflex Corp. of Canada Ltd.* (Weatherill), referred to in *Re U.A.W., Local 27, and Eaton Automotive Canada Ltd.* (1969), 20 L.A.C. 218 at p. 220 (Palmer), the Studebaker case was approved and it was added that there must be reasonable and probable grounds for the imposition of such a requirement.

In *Halifax Infirmary Hospital* [1982],¹⁶² the Nova Scotia Court of Appeal summarized the law as follows:

It is generally recognized, however, that an employer, even without any specific management rule, or any specific clause in the collective agreement, may, under its management prerogative ask for particulars of an ailment, request a medical certificate or even require examination by a staff doctor.

¹⁶⁰ *Studebaker-Packard of Canada Ltd* (1960), 11 L.A.C. 139 (Cross). This decision is reviewed in greater detail at p. 119 of this manual.

¹⁶¹ *Firestone Tire & Rubber Co. of Canada Ltd.* (1973), 3 L.A.C. (2d) 12 (Weatherill)

¹⁶² *Halifax Infirmary Hospital* (1982), 54 N.S.R. (2d) 289 (N.S.C.A.)

7:200 The Right to Require a Medical Certificate

However, the right to require a medical certificate can be limited by the terms of a collective agreement. Moreover, unless a statute or a collective agreement provision specifically compels such production, the employer normally will be required to establish that the facts of the case provide it with reasonable grounds to compel the production of a medical certificate.

In *Nav Canada* [2000],¹⁶³ arbitrator Brault affirmed an employer's right to ascertain whether a particular absence was justifiable:

It is a matter of common understanding that, unless management rights are otherwise restricted, the Employer is entitled to adopt and implement policies aimed at directing and organizing the workplace ... In general terms, the adoption by management of a policy aimed at preventing absenteeism and setting rules to govern absences from work due to illness or injury is in keeping with this principle. To be sure, in the absence of specific language to the contrary in the collective agreement, there is nothing unreasonable in management wanting to ascertain through a formal policy the reasons for such absences to determine whether they are genuine or not. In fact, management has the right to know whether illness or something else is behind an employee's absence.

¹⁶³ *Nav Canada* (2000), 86 L.A.C. (4th) 370 (Brault)

7:202 A collective agreement that stipulates the conditions under which a medical certificate is required may limit the employer's right to require a medical certificate in different circumstances. Nevertheless, the employer generally will retain the right to seek proof of illness where it has reason to suspect the employee may have been absent for reasons other than illness.

Arbitrators consistently have found that an employer could not invoke a policy or rule stipulating that medical certificates were to be provided routinely in circumstances that differed from those set forth in the collective agreement. By way of example, if the collective agreement provided that a medical certificate may be required after an absence of three days, the employer could not adopt a policy to require a medical certificate on the fourth and subsequent occasion of absence in any 12-month period, regardless of the duration of such absence. These cases also have held that even where there was a requirement to provide a medical certificate after an absence of three days, an employer could require, on a case-by-case basis, that a medical certificate be provided for shorter absences if it had reason to believe the employee's absence was not legitimate.¹⁶⁴

In *Toronto (City)* [1984],¹⁶⁵ arbitrator Picher considered whether the employer could impose, on a given group of employees, the requirement to produce medical certificates for each and every illness, regardless of the duration of the illness, in circumstances where there was no question of the employee's claim to have been incapacitated by illness. He found that it could not. The collective agreement addressed those situations where medical certificates would be required, and, consequently, the employer could not require medical certificates automatically in other circumstances. That said, the employer retained the right to require a certificate on a case-by-case basis in the event it questioned the truth of an employee's assertion in respect of illness.

In *Metropolitan Toronto (Municipality)* [1986],¹⁶⁶ arbitrator Burkett considered an absenteeism-control program in the context of a collective agreement that required an employee who was absent for more than three consecutive working days to furnish a medical certificate from her personal physician.

The employer's absenteeism-control program required all employees who were at Stage 2 of the program¹⁶⁷ to provide a medical certificate for each absence, regardless of the duration of the absence and regardless of whether the employer had reasonable grounds to suspect the cause of the absence. Refusal to provide the required certificate could result in a denial of sick-leave benefits.

The union argued that where the parties had expressly dealt with the preconditions that must be met to qualify for payment of sick-leave benefits, and had expressly stipulated the circumstances under which an employee was required to produce a medical certificate following an absence from work, the right of the employer to otherwise require the automatic production of a medical certificate had been abridged.

In finding that the employer's requirement was improper, arbitrator Burkett stated:

The recent awards that we consider to be on point, with one exception, support the proposition that where the parties have expressly stipulated the conditions under which the production of a medical certificate may be automatically required, such a stipulation fetters

¹⁶⁴ See the comments of arbitrator McLaren in *Salvation Army Grace Hospital, Windsor* (1980), 25 L.A.C. (2d) 241 (McLaren), reproduced in Section 7:304, at p. 132 of this manual.

¹⁶⁵ *Toronto (City)* (1984), 16 L.A.C. (3d) 384 (Picher)

¹⁶⁶ *Metropolitan Toronto (Municipality)* (1986), 23 L.A.C. (3d) 271 (Burkett)

¹⁶⁷ The employer's absentee control program caused employees with unsatisfactory attendance to be elevated through a three-step program. The program contained a medical certificate requirement that was more stringent than the one imposed in the collective agreement.

7:200 The Right to Require a Medical Certificate

the employer's right to automatically require the production of medical certificates on the basis of criteria different than those set down in the collective agreement.¹⁶⁸

Here, arbitrator Burkett considered his earlier decision in *Municipality of Metropolitan Toronto* (unreported, September 15, 1979), where the absenteeism program was similar and the collective-agreement language was virtually identical. In that earlier case, he found that the employer had not violated the collective agreement when it notified some employees that henceforth they would be required to produce medical certificates when returning from absences caused by illness. In that earlier decision, arbitrator Burkett had stated:

[A requirement for] the production of a doctor's certificate in all cases where an employee is absent from work for more than three consecutive working days does not undermine the right of the corporation to seek verification of illness for absences of less than three days where there is cause to believe that the employee may have been absent for reasons other than illness. To hold otherwise would make it impossible for the corporation to monitor the sick leave plan in respect to absences of three days or less.

Arbitrator Burkett addressed his earlier decision:

There is a distinction to be drawn between the automatic requirement to produce a medical certificate and the more limited requirement to produce a medical certificate where there are reasonable grounds to question the legitimacy of an absence ... [W]here the parties specify in the collective agreement the circumstances under which automatic production is required ... and have as well expressly given the employer the authority to refuse to authorize sick pay where there are reasonable grounds to believe that an absence was not due to illness ... the proper inference to be drawn is that the parties intended to restrict the employer's authority to require the automatic production of medical certificates to those situations that have been expressly stipulated ... [T]his is a line that the parties are free to draw short of allowing an unfettered discretion and, in my view, where the parties stipulate the conditions that trigger the requirement for automatic production, it is their intention, apart from where there are reasonable grounds to question an absence, not to allow the employer to require automatic production of medical certificates in other circumstances.

Arbitrator Burkett found that the automatic requirement for production of medical certificates for each absence,

regardless of the duration of the absence and regardless of whether there are reasonable grounds to believe that the absence was not due to illness or injury, breaches the collective agreement [but] where there are reasonable grounds to suspect the bona fides of the absence, the employer is free under this agreement to request the production of a medical certificate regardless of the duration of the absence and to thereby monitor the sick leave plan.

In summary, under the provisions considered by arbitrator Burkett in both these cases, the employer could not enact a policy requiring that all employees produce a medical certificate for each absence after reaching a certain level of absenteeism, but it could impose that requirement on individual employees on a case-by-case basis where there were reasonable grounds to question their absenteeism.

¹⁶⁸ The one exception was stated to be *City of Windsor* (1985), 19 L.A.C. (3d) 1 (McLaren). Arbitrator Burkett rejected the case as being wrongly decided.

In *St. Joseph's Health Centre* [1988],¹⁶⁹ arbitrator Joyce reviewed a number of awards dealing with the production of mandatory medical certificates for three- and five-day absences. He arrived at a similar conclusion regarding the employer's right to request a medical certificate on a continuing basis where it had concerns regarding an employee's absenteeism.

In *St. Michael's Extended Care Centre* [1994],¹⁷⁰ the arbitrator found that the employer's absenteeism policy was unreasonable in several respects, one of which was that after three incidents of absenteeism in a 12-month period, any further absences in excess of three days would require a medical certificate to qualify for sick pay. This proviso did not take into account individual circumstances, and was not related to the existence of reasonable grounds to suspect that sick leave was being abused. Arbitrator Smith found that although the employer had the right under the collective agreement to require a certificate to substantiate illness, and although it may be "appropriate and reasonable for a rule to exist that requires medical certificates in circumstances in which the employer is concerned about the employee's ability to function in his position," such decisions must be made on an individual, rather than an automatic or generalized, basis.

That case also reaffirmed the principle that where the collective agreement sets forth the circumstances in which automatic production of a medical certificate is required, the employer cannot automatically require the production of such certificates on a different basis.

In *St. Joseph's Hospital (Elliot Lake)* [2008],¹⁷¹ the hospital implemented a policy requiring that an employee produce a medical certificate for every new absence once a particular threshold had been reached. The arbitrator found the requirement (in this case formulated as a policy rule) was unreasonable and unfair:

It was unreasonable to require the grievors, or any similarly situated employee, to go through the effort of attending to a physician's office to seek the production of [a] medical certificate when the Hospital was not in fact questioning the fact that [the] grievors were sick ...

It was also not a reasonable or fair exercise of the Hospital's right to enact policy to demand that employees be required to produce medical certificates for all future absences simply because the employee has crossed a certain threshold of absenteeism.

Arbitrator Sheehan distinguished this case from arbitrator Joyce's earlier decision in *St. Joseph's Health Centre* [1988].¹⁷² In that earlier case, the arbitrator had concluded it was reasonable for the employer to have required that the employee provide a medical certificate for all future claims for sick-pay benefits. Arbitrator Sheehan found, as a distinguishing factor, that the employer's direction in that case was not improper, for, by reason of the employee's "history of unacceptable attendance, the employer had reasonable grounds to be concerned over the legitimacy of the frequent absences from work." The employee's past absenteeism was such that "it raised a clear question regarding the legitimacy of any claim of illness of that employee."

In *Salvation Army Grace Hospital* [1995],¹⁷³ the employer imposed, by way of practice, a medical-certificate requirement for all instances of illness where the nurse had been absent for more than twice the hospital average of all employees. An employer witness testified that the objective was to "increase employee awareness of the absence problem and to encourage staff to seek professional help for health problems." It was acknowledged, however, that the medical certificate requirement would have an impact on an employee who had been absent for just one lengthy absence if the length

¹⁶⁹ *St. Joseph's Health Centre* (1988), 34 L.A.C. (3d) 193 (Joyce)

¹⁷⁰ *St. Michael's Extended Care Centre* (1994), 40 L.A.C. (4th) 105 (Smith)

¹⁷¹ *St. Joseph's Hospital (Elliot Lake)* (2008), 170 L.A.C. (4th) 115 (Sheehan)

¹⁷² *St. Joseph's Health Centre* (1988), 34 L.A.C. (3d) 193 (Joyce)

¹⁷³ *Salvation Army Grace Hospital* (1995), 47 L.A.C. (4th) 114 (Tettensor)

7:200 The Right to Require a Medical Certificate

of that one absence exceeded a period more than twice the hospital average. The arbitrator found that the employer's practice was not supportable, and that it would have to consider matters on a case-by-case basis:

[We] agree that this threshold should not automatically result in letters being automatically provided to employees. If an employee had a history of low absenteeism and perhaps one illness resulting in a lengthy absence, we are of the view that the employer would not be justified in being concerned about excessive absenteeism.

The union had not adduced any evidence concerning the individual employees who were the subject of the group grievances. Consequently, the arbitrator concluded that in the circumstances, he could not determine whether the letters the employer had sent to the employees (advising of the imposition of the medical certificate requirement) were justified in light of its concern regarding excessive absenteeism.

The employer in *Nav Canada* [2000]¹⁷⁴ had issued a directive requiring a medical certificate for all instances of sickness at its Toronto area control centre (but not at other locations) because of a concerted work disruption that resulted in high absenteeism on one particular weekend. The directive provided in part:

All absences due to illness must be supported by a certificate from a physician who has actually seen the ill employee. Failure to provide such a certificate on return to work will mean that sick leave will not be authorized. Even with a certificate, sick leave may not be authorized depending on the circumstances ...

The collective agreement provided that unless an employee had been advised that a medical certificate would be required, a signed statement attesting to his illness would qualify him for sick leave, provided the absence did not exceed five days and the employee had not been granted more than 10 days sick leave during the year solely on the basis of statements signed by the employee. Arbitrator Brault, in considering this particular sick-leave clause, concluded that the parties intended that the employee's statements would prevail as the primary means to establish the employee's illness, subject to the employer's option of asking for a medical certificate in accordance with the relevant provision.

In upholding the grievance, arbitrator Brault cited a 1998 decision of arbitrator Swan in another *Nav Canada* case.¹⁷⁵ There, arbitrator Swan found that the discretion conferred on the employer to require evidence to justify sick leave must be exercised reasonably. Arbitrator Brault concurred, stating that the right of the employer to require medical certification is essentially a "discretion that must be exercised reasonably," given the purpose as well as the wording of the relevant clauses. It was his view that the policy negated the application of discretion:

That such a discretion would exercise itself through the application of a policy requiring in advance the blanket medical certification of each and every short-term sick leave claim, would in our view be excessive ... What it [the blanket requirement] does in fact is eliminate any notion of discretion, i.e. one where proper consideration would be given to the actual circumstances giving rise to an individual employee's claim for sick leave.

Arbitrator Brault then considered whether the employer's application of the directive to one particular location amounted to an exercise of discretion. He found against the employer on this point:

¹⁷⁴ *Nav Canada* (2000), 86 L.A.C. (4th) 370 (Brault)

¹⁷⁵ *NAV Canada* (1998), 74 L.A.C. (4th) 163 (Swan)

Moreover, limiting the application of the policy to a given shift or location, as it here happened, would not change things. This would mean not recognizing, or denying in advance by virtue of the shift they happen to work, or where they work, rights to individuals who are granted identical rights with regard to paid sick leave under the agreement and whose attendance records and alleged illness might even be the same. This would not constitute, in our view, a reasonable exercise of discretion.

The employer was directed to withdraw its policy on mandatory certification of all sick leave.

The issue of discretion also was considered in a similar grievance in *Air Canada* [2000].¹⁷⁶ In that case, the employer denied an employee's claim for an illness that occurred on December 25. It did so based on a bulletin that had been posted five days earlier. The bulletin, which was posted with the intent of reducing absenteeism over the holiday period, stated in part:

Those employees who do not report for duty as scheduled [during the Christmas and New Year period] will be required to provide substantiation for their absence e.g. Medical Certificate, and will be so advised when they call in. These same employees may also not be paid sick leave and may, depending on the circumstances, be assessed discipline.

The grieving employee testified he had not seen the bulletin.

The collective agreement stated that sick leave would be allowed in accordance with the provisions in the company's Regulation Manual. That manual contained the following comment in respect of sick leave:

There is an honour system in reporting absence account sickness [sic], however, it is the prerogative of the Company to request an employee to provide a Doctor's Certificate if, in the opinion of his/her supervisor, there is justification for doing so.

The arbitrator considered that this provision had been incorporated by reference into the collective agreement.

Arbitrator Picher commented that the notice in this case did not amount to an absolute prohibition on payment for sick leave without a medical certificate. He also stated that the employer was within its rights to promulgate such a discretionary policy:

It should be stressed that in the Arbitrator's view the Company was entirely within its rights to promulgate the notice of December 20, 1996, a step that appears to be well justified by the historic pattern of holiday period absenteeism which had plagued the Company's operation in years prior. But neither the notice itself nor the Company's own policy are framed in terms of an absolute liability whereby an employee will automatically be deprived of sick pay for failing to produce a doctor's note. On the contrary, the language of both documents suggest that the employee is entitled to individual assessment of the merits of his or her own situation.

In the result, the grievance was allowed because no individual consideration was given to the employee's circumstances, and, as a consequence, the employer had failed to exercise its discretion. The employee had an exemplary attendance record, had not seen the notice, and the notice requirement had not been incorporated into the answering machine "greeting" that was engaged to record employee calls regarding their reporting of absence. Arbitrator Picher stated that individual consideration should have leaned in the direction of giving the employee the benefit of the doubt.

¹⁷⁶ *Air Canada* (2000), 91 L.A.C. (4th) 94 (Picher)

7:200 The Right to Require a Medical Certificate

In *Natrel (Ontario) Inc.* [2001],¹⁷⁷ the collective agreement provided that each employee was deemed to receive six days' paid sick leave at the beginning of each year, with such leave to be applied to any absence due to illness of less than four days. This was said to be coordinated with a weekly indemnity plan that addressed illnesses of four days or longer. Days not used during the year were to be paid out at the end of the year. The clause also provided "In all cases where the draw against the 'Sick Bank' has been exhausted, a doctor's note for each subsequent illness will be supplied within one calendar week to verify the illness."

The union challenged the Stage 2 requirement of the employer's attendance management program that obligated an employee who was elevated to that stage to provide a doctor's note to support any future absences during the next 12 months. It alleged that the collective agreement clause that obligated an employee to provide a doctor's note once the six days had been exhausted effectively prevented the employer from requiring such a note prior to that point.

Arbitrator Brown upheld the union's contention, saying that when the parties agreed on the clause, they agreed by implication that there would be no blanket requirement for a note relating to all absences by an employee who had credits left. He commented, however, that such a conclusion did not mean that an employer may never request a note from someone with a balance of credits. In that regard, an "employer may require a doctor's note if there are reasonable grounds to suspect that an employee took sick leave when not ill, even though the [employee had] credits outstanding." The arbitrator concluded that insofar as employees who had not exhausted their sick banks were concerned, the attendance management program requirement was inconsistent with the collective agreement requirement that implicitly waived any blanket requirement of that sort. Therefore, the employer was directed to amend the attendance management program to eliminate the requirement for employees who have credits remaining to "produce a doctor's note unless there are reasonable grounds to suspect that an absence was not caused by illness."

The employer in *Health Sciences Centre* [2003]¹⁷⁸ implemented a new policy that purported to give it the right to require that an employee produce a medical certificate on the occasion of each absence once the employee had reached a certain level on its attendance management program.

In concluding that the requirement was inappropriate, given that the parties had addressed the automatic provision of medical certificates in their collective agreement, arbitrator Spivak stated that the employer nevertheless had a right to require a medical certificate on a case-by-case basis where there were reasonable grounds to doubt the truth of an employee's claim that he was away because of his illness.

¹⁷⁷ *Natrel (Ontario) Inc.* (2001), 94 L.A.C. (4th) 325 (Brown). Other aspects of this case are discussed at p. 127 of this manual.

¹⁷⁸ *Health Sciences Centre* (2003), 114 L.A.C. (4th) 400 (Spivak)

7:203 The retained right to seek proof of illness (where there is reason to suspect that an employee may have been absent for reasons other than illness) permits an employer to impose, on an individualized basis, a medical certificate requirement on each occasion of absence where the employer has reason to question, in a broad sense, the legitimacy of the employee's absenteeism.

The imposition of such a condition frequently arises where the employee's ongoing absenteeism has given the employer cause to question whether the absenteeism was entirely justifiable. Depending on the underlying facts, arbitrators have been prepared to uphold this type of an ongoing individualized requirement, even in the face of a collective agreement stipulation that appeared to limit the circumstances where a medical certificate could be required.

Generally, arbitrators have found that an employer may impose, on a case by case basis, a medical certificate requirement for each occasion of absence where the employee's level of absenteeism can be considered excessive. Such a requirement also has been found to be reasonable where the employee's absenteeism appeared to conform to a particular pattern. However, a requirement of this nature is unlikely to be upheld where the employer is not challenging the legitimacy of the absence. Similarly, such a requirement normally will not be upheld where the employee is suffering from a recognized medical condition that usually results in an increased level of absenteeism.

Cases that support this proposition have drawn a distinction between the general imposition of a medical certificate requirement (regardless of underlying facts or medical conditions) and a requirement that is imposed on an individual basis on one or more employees because their level of absenteeism, when considered with other known factors, such as their pattern of absences, leads to a concern that the absences may not be defensible. That is the distinction that arbitrator Burkett drew between his 1986 and 1979 decisions,¹⁷⁹ and it was the approach that arbitrator Joyce adopted in *St. Joseph's Health Centre*.

In *St. Joseph's Health Centre* [1988],¹⁸⁰ the employee had been placed in the "Medical Certificate Required" category some four years earlier. The employer submitted that the employee's attendance record justified such a requirement, and that

while the requirement placed on the grievor has been reviewed periodically, his attendance has never reached a level sufficiently satisfactory to warrant relieving him of the requirement; the important thing to note is that the requirement resulted from an individual assessment; there has been no blanket requirement placed on all employees. Given the fact that the grievor had such a poor attendance record the employer could not simply accept his word; this being so it would not make any sense to wait until the grievor returned from an illness and then tell him he had to see a doctor.

On the occasion of this particular absence, the employee, being aware of the requirement, had made an initial effort to see a physician but never followed through. When his request for sick leave was denied, he obtained a medical certificate after the fact.

Arbitrator Joyce commented that, given the terms of the collective agreement, he would have had discretion to relieve an employee of having to provide a medical certificate if the employee had an acceptable reason for not visiting a doctor during the absence from work. By way of example, "there could be circumstances where an employee absent for one day did not, for legitimate reasons, see a

¹⁷⁹ This distinction was discussed by arbitrator Burkett in *Metropolitan Toronto (Municipality)* (1986), 23 L.A.C. (3d) 271 (Burkett) where he distinguished his earlier decision in *Municipality of Metropolitan Toronto*, unreported, September 15, 1979, (Burkett). The distinction is reviewed at p. 103 of this manual.

¹⁸⁰ *St. Joseph's Health Centre* (1988), 34 L.A.C. (3d) 193 (Joyce)

7:200 The Right to Require a Medical Certificate

doctor. In short, the employer is required to be reasonable in the application of this rule, just as with any rule.”

Arbitrator Joyce then referred to *Borough of Scarborough* [1974], where arbitrator Shime found that it was reasonable to require the production of a medical certificate where the employer had reasonable cause for suspicion based on a poor attendance record. There it was stated:

It seems reasonable to require some form of proof of illness where an employee is absent on six occasions during a year. In that situation the employer may be reasonably suspicious and require some form of proof. And there may be cases in which there is some “concern about absenteeism.” That might include such suspicious circumstances as an employee being absent on a number of occasions on days surrounding a weekend.

In considering whether the circumstances justified the employer’s requirement that the employee produce a medical certificate for all future absences, arbitrator Joyce concluded:

[G]iven the grievor’s history of unacceptable attendance, the employer had reasonable grounds for concern over the legitimacy of the frequent absences from work. This being so, the employer had reasonable grounds to question, in depth, the reason for each absence. This being so, the employer acted properly in its decision that the grievor must produce a medical certificate in the case of each absence due to alleged illness until such time as his absenteeism reached an acceptable level.

In *Dashwood Industries Ltd* [1998],¹⁸¹ the employer required that employees produce medical documentation when they provided an unacceptable reason for their absence or when their rate of casual absences exceeded 3%. The 3% figure was said to be an industry standard. The employee was terminated after failing to provide medical evidence to support her latest absence.

The employee had been disciplined on six prior occasions during the preceding year for similar infractions. The earlier discipline, which had not been grieved, was said to have been progressive in nature.

In finding that some discipline was warranted in the circumstances, arbitrator Rose stated:

In the final analysis, the employer’s request for medical verification is rooted in her discipline record and an absence record in excess of the employer’s 3 percent guideline. That record establishes the basis for requiring medical documentation ... In all the circumstances, it was not unreasonable for the employer to require the grievor to medically document her absences.

The union had submitted that there were very real and practical problems associated with having to provide medical documentation for each absence. It referenced the cost of a medical certificate, the availability of doctors, and the unwillingness of some doctors to provide this type of certification. Arbitrator Rose noted that while there can be difficulties in obtaining medical documentation,

these are not insurmountable barriers, especially given the situation the grievor found herself in. Considering the grievor was instructed to document her absences and her continued employment could have been at risk, what cost, inconvenience, hassle or possible embarrassment is too great to avoid the risk of being discharged? In my opinion, a prudent course of action would have been for the grievor to have developed a back-up plan to obtain a medical certificate. This might have included finding a walk-in clinic, hospital emergency room or even a new family doctor, if necessary, and lining up someone to drive her to see a

¹⁸¹ *Dashwood Industries Ltd* (1998), 73 L.A.C. (4th) 395 (Rose)

doctor in the event she was unable to do so. When weighed against the risk [of] losing her job, a job she held for 30 years, this hardly seems impractical. In the instant case, the grievor's situation required her to, at the very least, telephone her family doctor to demonstrate some effort was made to secure medical documentation.

Arbitrator Rose commented that the employee's failure to provide medical documentation caused him to conclude there was some cause for discipline but that termination was too harsh a penalty.

It is recognized that there are practical difficulties in securing medical documentation and that obtaining documentation may not be possible or prudent in each and every case of short term illness. In the situation the grievor found herself, she should have, at the very least, made an attempt to contact a doctor for the purpose of verifying her absence. Taking into account that the grievor's absence record is not that excessive and there are mitigating factors, discharge is not appropriate in the circumstances.

The arbitrator substituted a 10-day suspension followed by an unpaid leave of absence. In the circumstances, the employee suffered four and one-half months of lost wages.

In *St. Joseph's Hospital (Elliot Lake)* [2008],¹⁸² arbitrator Sheehan upheld grievances filed by two employees who had been advised, pursuant to the provisions of an attendance management program, that their absenteeism had reached the level where a medical certificate would be required for all future absences. One of the employees suffered from chronic headaches, and the other suffered a chronic problem with kidney stones. The employer did not take issue with the legitimacy of either of their absences. Given that fact, arbitrator Sheehan concluded there was no reasonable basis for the employer to require that the two employees prove they were ill.

¹⁸² *St. Joseph's Hospital (Elliot Lake)* (2008), 170 L.A.C. (4th) 115 (Sheehan)

7:200 The Right to Require a Medical Certificate

7:204 A collective agreement provision regarding proof of illness may, in some circumstances, be found to constitute a complete code that effectively limits the employer's right to seek medical information that does not fall within the scope of that provision. A clause of this nature may narrow the employer's right to obtain particularized medical information that would be compellable if the agreement otherwise was silent.

In *London (City)* [1983],¹⁸³ arbitrator Langille characterized the terms of the collective agreement as constituting a comprehensive code for monitoring sick-leave abuses.

Although the case dealt with a policy involving a home visitation program, it is instructive in that the arbitrator found that the collective agreement provisions (which included a requirement that an employee submit to an examination by the employer's physician) constituted a complete code and could not be supplemented by other requirements such as a visiting nurse program:

By setting out the degree and type of inspection which the employer will utilize in scrutinizing claims for sick leave, the parties have committed themselves to one solution of a delicate issue. They have, by implication, excluded other techniques.

Therefore, the program was found to have violated the collective agreement.

The foregoing decision was disapproved in *Windsor (City)* [1985].¹⁸⁴ In a case that also dealt with a visiting nurse program, employees who claimed sick leave were required under the collective agreement to have their entitlement to draw from their accumulated sick-leave credits validated. Arbitrator McLaren stated:

There is no necessary or logical reason to decide, as was apparently decided by arbitrator Langille, that a system of filing certificates applying for sick-leave pay is a comprehensive and complete code for the monitoring of sick-leave absences. Such a conclusion confuses the process of validating sick-leave pay from an accumulated account with the process of determining if an employee is *bona fide* ill when the employee claims to be absent for that reason. In the former case, all that occurs is denial of sick-leave pay either because of lack of credits or lack of legitimate sickness; in the latter situation the likely result is discipline for cause.

By setting up a system for validation of sick-leave pay, the employer can not be taken to have foregone its management rights to determine the legitimacy of absence for purposes of discipline.

The *Windsor (City)* case was rejected in turn, in *Metropolitan Toronto (Municipality)* [1986],¹⁸⁵ where arbitrator Burkett stated he was unable to accept the distinction "between a system for validating sick pay, on the one hand, and a system for determining if the employee is *bona fide* ill, and therefore immune from discipline, on the other. In my view, the two are one and the same ..."

The collective agreement in *Ottawa Citizen* [1996]¹⁸⁶ required that an employee on sick leave furnish a medical certificate to establish that she was "incapable of working." It also provided that the employee would be required to submit to an independent medical examination by a physician chosen by the employer where the union and the employer agreed that such action was warranted. The union submitted that the clause essentially codified the contents of a medical certificate, and, therefore, that

¹⁸³ *London (City)* (1983), 9 L.A.C. (3d) 262 (Langille)

¹⁸⁴ *Windsor (City)* (1985), 19 L.A.C. (3d) 1 (McLaren)

¹⁸⁵ *Metropolitan Toronto (Municipality)* (1986), 23 L.A.C. (3d) 271 (Burkett)

¹⁸⁶ *Ottawa Citizen* (1996), 58 L.A.C. (4th) 209 (Dumoulin)

the employer was not entitled to seek a medical certificate that went beyond merely communicating that the employee “was incapable of working.”

Arbitrator Dumoulin stated:

Having chosen a method to verify a claim to sick leave benefits, the employer is not entitled to unilaterally impose a system inconsistent with or as a modification to the collective agreement provisions ...

If the subject matter is not dealt with in the collective agreement, such as notice to the Employer in case of illness, then the agreement can't be a “complete code” on the issue and the Employer can make reasonable rules on that subject. However, when a specific matter like the content of a medical certificate is specified, an arbitrator shouldn't be allowing the addition of confidential medical information to it.

In *Hudson Bay Mining and Smelting Co. (Zochem Division)* [2001],¹⁸⁷ the employer sought a medical assessment prior to assigning the employee to a posted position. The employee alleged it had no right to seek such an examination, arguing that the collective agreement provision dealing with medical evidence set out the only circumstances where the employer could request a medical certificate from the employee's doctor. That provision read:

It is understood that the company will pay the cost of a medical examination for each employee before the employee is officially hired. In addition, after any significant absence due to illness or injury, the Company may request a medical certificate from the employee's doctor signifying fitness to return to work and the Company will reimburse the employee for the cost of the examination as well as for the time lost at regular rate of pay.

The employee's contention was rejected by arbitrator Springate on the basis that an employer has a recognized entitlement, apart from any statutory or contractual authority, to “require a medical examination if it has reasonable and probable grounds to suspect that because of a medical condition an employee is a danger to himself or others or is unfit to perform his or her job.”¹⁸⁸

Arbitrator Springate concluded the employer had reasonable and probable grounds for suspecting that by assigning the employee to the posted position, he would be in danger of suffering further back injuries. Therefore, it was entitled to ask the employee to have his doctor provide a medical assessment that addressed his ability to perform the job safely.

The codification argument was rejected in *Winnipeg Free Press* [2001],¹⁸⁹ where the union had argued that the collective agreement article dealing with sick leave was an all-encompassing code, and that the superimposition of the employer's policy dealing with the administration of sick leave was inconsistent with the sick-leave provisions.

In rejecting the union's contention, arbitrator Hamilton stated that while the agreement contemplated absences due to accident or illness (in varying circumstances), the article was silent

regarding the procedure “... when and how the employee must report that he is going to be absent.” In my view, the Company is entitled to promulgate reasonable rules and regulations on the “when” and “how” of notification. Therefore, I do not accept the Union's contention that simply because [the article] does not address such procedural requirements, the Employer is prohibited from promulgating a policy in respect of such matters.

¹⁸⁷ *Hudson Bay Mining and Smelting Co. (Zochem Division)* (2001), 93 L.A.C. (4th) 289 (Springate)

¹⁸⁸ *Relying on Brewers' Warehousing Co. Ltd.* (1982), 4 L.A.C. (3d) 257 (Knopf)

¹⁸⁹ *Winnipeg Free Press*, unreported, December 5, 2001 (Hamilton)

7:200 The Right to Require a Medical Certificate

The union, in *St. James-Assiniboia School Division No. 2* [2004],¹⁹⁰ argued that the Public Schools Act (Manitoba) and the sick-leave article in the collective agreement constituted a complete code with respect to medical information, such that the employer was entitled only to a medical certificate and not the underlying diagnosis, prognosis, and treatment plan. It submitted that only a doctor, and not the employer's staff, was entitled to receive that information. That submission was rejected by arbitrator Peltz.

In *Laurentian University* [2010],¹⁹¹ the collective agreement contained extensive provisions regarding the requirements for, and contents of, medical certificates to support an absence due to illness. The union contended that the provisions were "very detailed and specific," and that they set out "a complete procedure for dealing with sickness-related absences and with accommodation" so that the employer was not entitled to additional detailed information sought in virtually identical letters sent to a number of employees who were absent on salary continuation. The arbitrator agreed:

The collective agreement here contains a comprehensive process to deal with sick leave. This specific language cannot be sidestepped in the way the employer has attempted to do here ... The employer has violated the collective agreement by requesting additional medical information from employees beyond what is specifically set out in the collective agreement.
....

¹⁹⁰ *St. James-Assiniboia School Division No. 2* (2004), 131 L.A.C. (4th) 313 (Peltz)

¹⁹¹ *Laurentian University* (2010), 202 L.A.C. (4th) 100 (Slotnick)

7:205 Even where a collective agreement limits the circumstances where a medical certificate may be required to substantiate an illness or a sick-leave claim, those provisions will not necessarily limit the employer's entitlement to seek a medical certificate or other relevant medical documentation to address entirely distinct issues such as fitness, accommodation, and prognosis for regular ongoing attendance.

In *Natrel (Ontario) Inc* [2001],¹⁹² arbitrator Brown concluded that the employer could not impose a medical certificate requirement at Stage 2 of an attendance management program, for while the collective agreement specifically obligated an employee to provide a doctor's note once her sick-leave credits had been exhausted, it was silent as to her obligation to provide medical documentation prior to that point.

However, the arbitrator upheld a Stage 3 requirement to provide medical documentation that addressed what were referred to as the logically distinct issues of fitness, accommodation, and prognosis, for the relevant article was silent as to these issues.

¹⁹² *Natrel (Ontario) Inc.* (2001), 94 L.A.C. (4th) 325 (Brown). This case is discussed further at [pp. 108](#) and [127](#) of this manual.

7:300 THE NEED FOR REASONABLE GROUNDS TO REQUIRE A MEDICAL CERTIFICATE

7:301 In the absence of a contrary provision in the collective agreement, arbitrators consistently have held that an employer must have “reasonable and probable cause” or “reasonable and probable grounds” to compel the production of medical certificates or other medical documentation.

In considering the reasonableness of an employer’s request for medical information or documentation, arbitrators have continued to use the archaic characterization that there be reasonable and probable grounds or reasonable and probable cause to require the production of such information. None of the cases have defined those requirements.

These two expressions have their origin in the criminal law,¹⁹³ but the manner in which they have been used in the context of seeking medical information can be summarized by asking the question, “Was it reasonable in the particular circumstances for the employer to have requested the information that it was seeking?” Using that approach will facilitate defining the requirement by reference to the factual circumstances where the required reasonableness was found either to exist or not exist.

Medical certificates are sought for reasons other than the substantiation of illness. A medical certificate may be requested to establish that the employee’s condition is not affecting job performance or safety, or, as is more commonly the case, to establish that the employee has recovered and can now return safely to either her former or an alternate position. Similarly, medical certificates may be requested to deal with issues of modified work, accommodation, and other like matters.

The reasonableness of a request for medical information is, in part, a function of the purpose underlying that request. Accordingly, what is reasonable in one context may not be reasonable in another. That distinction often has been overlooked.

¹⁹³ *Black’s Law Dictionary* (8th ed.) (Thomson West) notes that the expressions “probable cause,” “reasonable cause,” “sufficient cause,” “reasonable grounds,” and “reasonable excuse” often are used interchangeably. In the context of the Fourth Amendment of the Constitution of the United States, probable cause, “which amounts to more than a bare suspicion but less than evidence that would justify a conviction, must be shown before an arrest warrant or search warrant may be issued.” *Black’s* also contains a definition in the torts context, with probable cause being defined in that context as “a reasonable belief in the existence of facts on which a claim is based and the legal validity of the claim itself.” In terms of Canadian usage, Sanagan’s *Encyclopedia of Words and Phrases Legal Maxims Canada* (5th ed.) (Carswell) references an 1878 criminal case, where the court stated that “The test for reasonable and probable grounds requires that the prosecutor have ... an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

7:302 The expressions “reasonable and probable cause” and “reasonable and probable grounds” have not been defined except by the factual context where either was found to exist or not exist.

Considering the underlying circumstances, the “reasonableness requirement” can be formulated in the following terms:

- (a) In a case dealing with absence due to illness, it is reasonable to require a medical certificate or other medical documentation where the employee’s absence, or pattern or frequency of absence, raises a reasonable question as to whether a particular absence was justified; whether the employee was making every reasonable effort to attend at work; or whether there was some other justifiable reason for being concerned about the employee’s health or ongoing attendance. [\[Page 118\]](#)
 - (b) In a case involving fitness to work or fitness to return to work, it is reasonable to require a medical certificate or other medical documentation where the employee’s circumstances or actions raise a reasonable question as to whether the employee can perform the functions of the position in a safe manner. [\[Page 119\]](#)
 - (c) In a case involving potential accommodation or modified duties, it is reasonable to require a medical certificate or other medical documentation in order to facilitate the employer’s assessment of these issues. [\[Page 127\]](#)
 - (d) In a case involving the sufficiency of a medical certificate or other information that has been provided, it is reasonable to require that further and more detailed medical information be provided where the information received is deficient in one or more essential respects. [\[Page 128\]](#)
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7:300 The Need for Reasonable Grounds to Require a Medical Certificate

7:302(a) In a case dealing with absence due to illness, it is reasonable to require a medical certificate or other medical documentation where the employee's absence, or pattern or frequency of absence, raises a reasonable question as to whether a particular absence was justified; whether the employee was making every reasonable effort to attend at work; or whether there was some other justifiable reason for being concerned about the employee's health or ongoing attendance.

A history of unacceptable attendance may provide an employer with reasonable grounds to require that an employee present a medical certificate on the occasion of each absence.¹⁹⁴ A change in medical prognosis and potential length of absence also can provide a reasonable basis for a demand for further medical evidence.¹⁹⁵ Finally, conduct inconsistent with an illness, or facts suggesting an employee was not ill, generally will constitute a reasonable basis for requesting a medical certificate.¹⁹⁶

¹⁹⁴ St. Joseph's Health Centre (1988), 34 L.A.C. (3d) 193 (Joyce) and see cases discussed in Section 7:203, commencing at [p. 109](#) of this manual.

¹⁹⁵ York Condominium Corp. #76 (2001), 102 L.A.C. (4th) 85 (Lewis), reviewed at [p. 124](#) of this manual.

¹⁹⁶ See, for instance, Section 2:400, commencing at p. 29 of this manual.

7:302(b) In a case involving fitness to work or fitness to return to work, it is reasonable to require a medical certificate or other medical documentation where the employee's circumstances or actions raise a reasonable question as to whether the employee can perform the functions of the position in a safe manner.¹⁹⁷

An employer is entitled to require that an employee provide a medical certificate when returning to work from an illness or injury that may have affected the employee's ability to perform the requirements of the position safely.

The employee in *Studebaker-Packard of Canada Ltd.* [1960]¹⁹⁸ had suffered a heart attack. Several months later, his doctor reported he was able to return to work "at a lighter job until such time as he can fit into his regular work." The employee, who had been on layoff, was bypassed when a stock-handler position became available because the employer believed the position was not "lighter work." The arbitrator agreed with the employer's view.

The employee had declined to undergo an employer-directed medical evaluation to assist in the company's assessment of his ability to return to work. In finding that the employer was entitled to require such an evaluation, arbitrator Cross stated:

If there is reasonable and probable ground for believing that an employee has become physically impaired during the course of his employment, the company surely must have the right to require a medical opinion with respect to such condition, and to suspend employment pending a favourable report.

Such a requirement may result in delays of employment for an employee pending a medical examination and clearance, but the basic right is so important to the company, and the fulfillment of the obligation so important to other employees, any necessary delays or inconvenience caused an employee thereby must be accepted with as good grace as possible.

It might be observed that an employee as well has some obligation towards his employer to ensure his own physical fitness and in the case in question here, the grievor if he did not want to clear with the company's medical department, could have seen his own doctor at once and obtained a clearance from him. If such a clearance had been presented, the company would have been obliged to employ him from the date of its presentation until some evidence to the contrary as to his fitness was obtained from its own medical advisors.^[199]

In my opinion, there was reasonable and probable ground for the company to query the physical fitness of the grievor to do the work of a stock handler and there is no evidence that management acted capriciously in requiring a medical clearance before he undertook such work. The company has the right and obligation under the circumstances to check on the physical fitness of the grievor to do the work of a stock handler. The fact that some delays occurred in his employment cannot defeat this right and this is particularly true because had the grievor co-operated at the very beginning, or had presented a medical certificate from his own doctor, he could have been returned to work at a much earlier date than was actually the case.

¹⁹⁷ The reader should review this section in conjunction with the representative decisions summarized in Section 7:502, commencing at [p. 149](#).

¹⁹⁸ *Studebaker-Packard of Canada Ltd.* (1960), 11 L.A.C. 139 (Cross)

¹⁹⁹ This excerpt suggests that an employee who suffers a disability by reason of illness may, at the option of the employer, be subject to release or transfer, and that an employer who is presented with a medical clearance from the employee's doctor must reinstate the employee in active employment from the date of presentation of the certificate until some evidence to the contrary as to the employee's fitness is obtained from the employer's medical advisors. Neither of these propositions accords with present day obligations in this area

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

The arbitrator dismissed the grievance, stating that the employee was responsible for the delay and the accompanying loss in wages.

In *Firestone Tire & Rubber Co. of Canada Ltd.* [1973],²⁰⁰ arbitrator Weatherill stated:

There is no doubt an employer has both the entitlement and the obligation to satisfy itself as to the fitness of its employees to carry out the tasks to which they will be assigned. What is proper will depend, in each case, on the nature of the work and the circumstances to which it is to be performed. In *Re U.A.W., Local 525, and Studebaker-Packard of Canada Ltd.* (1960), 11 L.A.C. 139 (Cross), it was held that it was a paramount right of management to require that employees be physically fit to perform the work that they are required to do and to satisfy itself by medical opinion if necessary, that this is so. In *Re U.A.W., Local 89 and Reflex Corp. of Canada Ltd.* (Weatherill), referred to in *Re U.A.W., Local 27, and Eaton Automotive Canada Ltd.* (1969), 20 L.A.C. 218 at p. 220 (Palmer), the Studebaker case was approved, and it was added that there must be reasonable and probable grounds for the imposition of such a requirement.

In *Canada Post Corp.* [1986],²⁰¹ the employer implemented a policy that all employees who called in sick at the beginning of their shift, but who then reported for duty on that shift, would be required to produce medical certification before being allowed to work any portion of that shift. The arbitrator found that this requirement did not conflict with a collective agreement provision that an employee may be required to produce a medical certificate to substantiate an absence due to illness in excess of five working days. He commented:

There is an important distinction between a medical certificate whose purpose is to verify that an employee cannot work due to illness and a certificate, normally required when the employee returns to work, certifying that he or she is medically fit to resume work: see *Monarch Fine Foods Co. Ltd. ...* (1978), 20 L.A.C. (2d) 419 (Picher).

The employee in *Inco Ltd.* [1988]²⁰² presented a medical certificate that authorized his return to regular duties. Although his physician had advised she was aware of the hazardous aspects of the employee's position that might affect his asthma, the employer nevertheless wanted more information in terms of a prognosis and continuing treatment. The employee was told the employer wanted to question his physician with respect to "frequency of attack, continuing medication and the prognosis following his release from hospital." Although the employee acknowledged in cross-examination that those were reasonable questions to put to the doctor, he had refused to give permission.

During the grievance discussions, the parties agreed to have the employee examined by a mutually selected physician. That physician provided a four-page report clearing the employee to return to his full range of duties. The employee agreed that this examination was much more comprehensive than the one carried out by his own doctor, and that the report answered the questions the company sought to put to his own doctor. Upon receipt of that report, the employee was returned to his full range of duties.

In dismissing the grievance, arbitrator Burkett stated that "an employer is under a positive obligation to satisfy itself as to the fitness of an employee to return to work following illness or accident." He commented:

²⁰¹ *Canada Post Corp.* (1986), 23 L.A.C. (3d) 138 (Picher)

²⁰² *Inco Ltd.* (1988), 35 L.A.C. (3d) 108 (Burkett)

The jurisprudence is best summarized in *Re Trailmobile Canada Ltd and U.A.W., Loc. 397* [unreported February 28, 1986 (Rayner)], as follows:

“It is well established that the employer has both the entitlement and the obligation to ensure the fitness of its employees to carry out the tasks that they will be assigned at work. It is also well established that the company can require a medical certificate to satisfy itself that the employee is fit to return to work. If the initial certificate is unsatisfactory, the company can reasonably require a further certificate or direct a medical examination: see *U.A.W., Loc. 525 and Studebaker-Packard of Canada Ltd* (1960), 11 L.A.C. 139 (Cross); *Re Reflex Corp. of Canada Ltd* (Weatherill, unreported); *Re U.A.W., Loc. 27 and Eaton Automotive Canada Ltd* (1969), 20 L.A.C. 218 (Palmer).”

The issue was whether it was reasonable, in the circumstances of this case, to refuse to allow the employee to perform the full range of his duties. Arbitrator Burkett stated:

In deciding this issue, we must consider the nature of the work, the medical condition of the employee precipitating the concern of the company and, finally, the medical information made available to the company in support of the employee’s request to return to the full range of his duties.

... [G]iven the nature of the duties that [the grievor] was seeking to be assigned to (which required good respiratory health), the seriousness of the respiratory illness that he had suffered ..., and the positive obligation upon the company to satisfy itself with respect to the grievor’s fitness to perform these duties on a continuing basis, the request for this additional information was reasonable.

The arbitrator found that the continued assignment to light duties was reasonable in the face of the employee’s refusal to provide the requested information. He distinguished *Keeprite* [1982],²⁰³ stating:

[T]he company in that case did not take issue with the medical certificate nor advise the grievor, as was done in this case, of what it required to satisfy itself of the grievor’s fitness to return to work. Furthermore, in that case, where the grievor worked as an assembler and had suffered a foot injury, there does not exist the same configuration of facts related to the nature of the job vis-à-vis the nature of the illness. In the case before us the assignment of an employee with a respiratory infection of the type suffered by [the grievor] to perform the full range of a reactor operator’s duties in the environment of the IPC plant could precipitate a life-threatening situation. There was no such possibility in the *Keeprite* case.

The grievance was dismissed.

In *Hudson Bay Mining and Smelting Co., Limited* [1988],²⁰⁴ the employee had been off work for nine months due to a knee injury. He then presented a back-to-work slip that simply provided for a return date. The company refused to allow the employee to return to work without further assurances. It sought to have the employee execute a waiver to allow it access to his medical records. He refused because of concerns that the “waiver” was too broad in scope. He then signed a revised waiver 18 days later.

After reviewing the arbitral authorities that had been cited, the arbitrator stated:

²⁰³ *Keeprite* (1982), 7 L.A.C. (3d) 112 (Brown)

²⁰⁴ *Hudson Bay Mining and Smelting Co., Limited*, unreported, July 11, 1988 (MacLean)

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

I accept the proposition that in the usual case a clear and unequivocal medical certificate, such as the form issued by the Company, when properly completed, provides sufficient proof of an employee's fitness to return to work. I do not consider the circumstances of the present proceedings to be the "usual case" however.

Arbitrator MacLean then noted the employer had been in possession of earlier medical reports that clearly had expressed the opinion that the employee was unable to perform his job. The form he presented when he attempted to return to work

contained no elaboration as to the change in the grievor's condition. Considering the type of operations carried out by the Company, and the type of work performed by the grievor [an underground maintenance mechanic], it is in my view best for all, the Company, the employees, and the Grievor himself, that care be taken to insure reasonable fitness to work. This diminishes the threat of damage or perhaps even serious injury. I find that the Company's request for further assurances was reasonable in the circumstances of this case, and that the request was made in good faith.

However, I am of the view that the Company failed to meet its responsibilities in one respect: it did not clearly indicate to the Grievor what further assurances of fitness to return to work it required of him.

Recognizing there would have been some delay involved even if the company's expectations had been clear, the employee was compensated for 10 of the lost 16 shifts.

The employee in *Thompson General Hospital* [1999]²⁰⁵ had presented a return-to-work slip that advised she "has responded well to medical and psychotherapy and I feel she is now fit to resume her duties." The employer considered the document to be inadequate.

In summarizing the law in this area, arbitrator Steel stated:

An employer has the right and obligation to assure itself that an employee returning to work after an illness is fit to resume her work (*Re Firestone Tire & Rubber and U.R.W.* [(1973), 3 L.A.C. (2d) 18 (Weatherill)].

This entitlement may arise from specific provisions in the collective agreement or from the general provision on management rights:

"To the extent that it falls within management's rights to ensure itself that an employee is fit and able to work in return for the pay he receives, the employer's discretion in that regard is reviewable by a board of arbitration to determine whether the employer acted arbitrarily, discriminatorily or in bad faith. This duty on the part of the employer is implied in every collective agreement whether or not said agreement contains specific provisions to that effect."

(*Re Tele-Direct (Publications) Inc. and O.P.E.I.U., Loc. 131* [(1989), 8 L.A.C. (4th) 159])

The employer has the right to satisfy itself as to the fitness of the employee through medical opinion if necessary. [*Studebaker-Packard of Canada Ltd.* (1960), 11 L.A.C. 139 (Cross)] ... In the usual case, the presentation of a valid medical certificate that does attest to fitness will satisfy the employee's initial onus of proving that she is fit to return to work.

²⁰⁵ *Thompson General Hospital* (1991), 20 L.A.C. (4th) 129 (Steel)

Where, on reasonable grounds, the employer is not satisfied with the certification offered by the employee, some arbitrators have stated that the employer may demand that the employee secure additional medical certification or undergo further medical examination by a physician designated by the employer, or that he or she waive the confidentiality of personal medical records and permit the employer to secure such information from the employee's physician (*Brown and Beatty ... Canadian Labour Arbitration ...*).

Before the employer can place additional requirements on the employee, it must, in accordance with ordinary principles of fairness, state the grounds of its objection to the medical certificate offered by the grievor and must point out to the employee what it requires before it will permit his return. "If the certificate in itself is not satisfactory, the employee must be advised of that, so that he may either protest the reasonableness of the company's rejection of it, or request a more ample certificate from his doctor. If a further medical opinion is required, then again the company must advise ... the employee of that fact (*Re Firestone Tire & Rubber Company of Canada Ltd. ...*)"

... The degree and sufficiency of medical evidence required will vary depending on a number of factors. First, the employee's work or the employer's position may require a higher standard of care than in other situations. The medical certificate should provide an indication that they can perform the particular work requested of them. For example, in the case of *Re Sunnybrook Hospital and Sunnybrook Hospital Employees* [(1980) 26 L.A.C. (2d) 86] at p. 88 the duties of a nurse were considered ... [and it was stated that]:

"The employer is not only entitled here to ensure that the grievor has the fitness to carry out her tasks but would be delinquent in its own responsibilities if it failed to do so."

(See also *Re Good People Sea & Shore*, at p. 344.)

Second, most arbitrators have recognized that the employer has a right, and according to some, a duty independent of simply receiving the medical certificate submitted, to satisfy itself that the employee is medically fit. The right is premised on the employer having reasonable and probable grounds for assuming that the employee is unfit or would present a danger to himself, his fellow employees, or to company property:

"For example, it would clearly be proper for the employer to demand additional medical certification attesting to the employee's recovery if the employee had initially presented a standard medical form which did not contain any diagnosis of the grievor's illness, prognosis for recovery, or details as to the nature of the treatment provided."

(*Brown and Beatty*, para. 8:3342.)

In summary, once an employee produces a medical certificate stating unequivocally that he is fit to return to work, the onus shifts onto the employer to establish that he is not fit to return to work.^[206] If the employer has reasonable grounds on the facts of the case to question the validity or the completeness of the opinion stated in the medical certificate, then it must explain clearly to its employee the reason the medical certificate is not acceptable and what specific information is requested so that the employee can return to [his] treating physician and obtain the proper information. If the explanation is not satisfactory the company may,

²⁰⁶ The reference to a shift in the onus merely recognizes that the presentation of a proper and adequate medical certificate will meet the employee's arbitral onus of proof unless the employer then can introduce evidence, medical or otherwise, that effectively challenges the contents of the medical certificate.

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

after consultation with the concerned employee, require that a medical examination preferably by an independent doctor, be undertaken (*Re Tele-Direct (Publications) Inc.*) ...

... The standard of proof required with respect to fitness cannot be unreasonable. An employer may not refuse to allow an employee to return to work on the mere possibility of medical problems in the future, although the precise degree of risk that the employer must bear is a matter of some debate among arbitrators and will depend upon the facts of each case.

In concluding that the request for further information was reasonable, arbitrator Steel stated that the medical report was very general and that it gave “no information as to the treatment provided the grievor ... [and] no information as to the prognosis for the future, especially considering the fact that the work situation which caused the [grievor’s] depression had not changed.” In addition, the arbitrator considered that the employer was a hospital “which has a duty and an obligation to ensure that its patients receive the best possible care and that its employees are at all times capable of providing that care, [and that the grievor was] a head nurse and ha[d] a position of considerable responsibility ... [a position which was] also quite stressful.”

In *York Condominium Corp. #76* [2001],²⁰⁷ the employee had advised the employer he was suffering from tuberculosis and would be absent for one month. Shortly thereafter, his doctor advised that the tuberculosis was not contagious and that he could resume his full duties. The employer, however, refused to permit him to return without additional medical assurances.

The union took the position that receipt of a completed medical questionnaire should have been sufficient for the employer’s purposes. Alternatively, the union contended, the employer should have “made reasonable efforts to advise the employee in a timely manner that he must provide additional medical assurances regarding his ability to return to work so that he would not lose the opportunity to work on his regular shift [on the day in question].”

The employer submitted that it was acting in a reasonable manner, and that the employee’s medical prognosis and potential length of absence kept changing right up until he presented himself as being able to return. The employer relied primarily on the summary of principles set forth in *Thompson General Hospital* [1991].²⁰⁸

In finding that the employer had acted reasonably, the arbitrator stated:

The Employer was faced with a radically changed diagnosis. It wanted reasonably to be satisfied that what appeared to be a serious illness, with potential risks to other employees, was in fact not so. It reasonably wanted to know that the grievor was fit to work and that his illness would not put himself and others at risk.

In *Hudson Bay Mining and Smelting Co. (Zochem Division)* [2001],²⁰⁹ the employee was the senior applicant for a posted position that involved heavy lifting. The employer refused to award the position to him (he had had a history of back problems) until such time as his doctor had assessed his ability to perform this aspect of the position. The collective agreement contained a provision enabling the employer to seek medical certification for employees returning to work, but it was silent regarding cases involving a change in jobs or job functions. Nevertheless, the arbitrator found that the employer’s right to seek such medical assurances was reasonable. In doing so, the arbitrator relied on arbitrator Knopf’s approach in the *Brewers’ Warehousing* case.²¹⁰ Arbitrator Springate stated:

²⁰⁷ *York Condominium Corp. #76* (2001), 102 L.A.C. (4th) 85 (Lewis)

²⁰⁸ *Thompson General Hospital* (1991), 20 L.A.C. (4th) 129 (Steel). The principles are set forth at [page 122](#) of this manual.

²⁰⁹ *Hudson Bay Mining and Smelting Co. (Zochem Division)* (2001), 93 L.A.C. (4th) 289 (Springate)

²¹⁰ *Brewers’ Warehousing Co. Ltd.* (1982), 4 L.A.C. (3d) 257 (Knopf) (discussed at p. 41 of this manual)

An employee's right to privacy and an employer's need for information reflecting the workplace can come into conflict, particularly when personal information is involved. In seeking to balance the competing interests involved arbitrators have recognized that quite apart from situations covered by statute or a collective agreement an employer can require a medical examination if it has reasonable and probable grounds to suspect that because of a medical condition an employee is a danger to himself or others or is unfit to perform his or her job.

Arbitrator Springate concluded that the employer had reasonable and probable grounds for suspecting that if the employee was assigned to the posted position, he would be in danger of suffering further back injuries. It was, therefore, entitled to ask the employee for a medical assessment from his doctor that addressed his ability to perform the job safely.

In *Winnipeg Free Press* [2001],²¹¹ arbitrator Hamilton, after considering an employee's obligation to substantiate an absence, stated:

Let me say that different considerations apply in respect of an employee who has a chronic absenteeism problem or who is seeking to return to work following a lengthy absence due to illness or injury. In the latter circumstance, arbitral jurisprudence is very clear that the Employer is entitled to satisfy itself as to the employee's capability of returning to work and, indeed, the trend of arbitral authority is that an employer has the duty to do so.

A contrary, and generally unaccepted, view regarding the medical information an employee must provide in order to return to work following an illness was set forth in a preliminary award in *Fort James Canada Inc* [2001],²¹² where arbitrator Newman characterized what she considered to be the common workplace approach:

After an extended absence from work due to illness or disability, the most common practice known is for the employee to return to work with a concise word from a family doctor, indicating fitness to return. Neither employers nor labour relations arbitrators, as a matter of course, put our busy physicians to the task of detailing history, providing the ground for diagnosis, or opining on the matter of prognosis, unless such effort is necessary. We have come to accept the hastily written doctor's note, unless more is required. In doing so, we accept *prima facie*, that the doctor is licensed to practice, that he or she knows the patient, that he or she has treated the patient and knows the relevant factual background, that the doctor has the necessary data to support the opinion, and that the opinion is reliable. To require more in the first instance, as a matter of course, is in my view, unwarranted.

Arbitrator Newman rejected the approach taken in *Firestone* and the cases that have followed it. She stated that while there may be a basis for the employer to challenge the medical certificate, it was a matter that should be dealt with at arbitration (as opposed to the employer's being able to insist upon additional information prior to assessing the validity of the employee's contention):

In some cases, of course, there are reasons for employers to doubt the note, and to require that arbitrators explore beneath the surface before accepting as truth, that which the doctor's note implies and states. Whether the employer was reasonably entitled to ask for more when the note was presented, may be a question for the arbitrator. But, there can be no doubt about the Company's right at hearing to require an opportunity to challenge the note, to seek production of additional information, or to adduce evidence which contradicts the contents of the note.

²¹¹ *Winnipeg Free Press*, unreported, December 5, 2001 (Hamilton)

²¹² *Fort James Canada Inc.* (2001), 94 L.A.C. (4th) 423 (Newman)

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

In this case, the employee had been seeking to return to work after a 20-month absence due to injury. He provided his employer “with a brief handwritten note from his family doctor, indicating that he was able to return to (regular) duties.” After a delay of approximately three months, the employer requested more information from the employee, and also requested that the employee submit to a functional abilities assessment. He did so and was declared fit to return to work.

Arbitrator Newman found that where the employee presented a medical note of this nature (i.e., a cryptic note or a bare assertion that the employee was fit to return), he had met the initial onus of proof, and it was then up to the employer to prove that the note was either insufficient or unreliable. As discussed elsewhere,²¹³ there is no reasoned arbitral support for concluding that filing a medical certificate of this nature satisfies an employee’s onus of proof.

Although the reasoning should be rejected, the result most likely was correct. Arbitrators have held that an employer will lose its right to challenge a medical certificate where it fails to give the employee timely notice of the alleged deficiencies and fails to advise of any additional information that may be required.²¹⁴ Waiting three months to request additional information certainly would have taken the matter outside the bounds of reasonableness.

²¹³ See Section 7:401, commencing at [p. 133](#).

²¹⁴ See Section 7.701, commencing at [p. 160](#).

7:302(c) In a case involving potential accommodation or modified duties, it is reasonable to require a medical certificate or other medical documentation to facilitate the employer's assessment of these issues.

In *Natrel (Ontario) Inc.* [2001],²¹⁵ the arbitrator considered a union's challenge to a recently introduced attendance improvement program. The union contended that the medical requirements that were set forth at Stages 2 and 3 of the program were inconsistent with the collective agreement. The union's contention was upheld with respect to the Stage 2 but not the Stage 3 requirement.²¹⁶

The program terms at Stage 3 stated that an employee who was elevated to that stage would receive a letter requiring that "the employee take a questionnaire to his doctor asking for confirmation that the employee is capable of performing the duties of his job and requesting information about accommodation and medical prognosis." The union contended that the collective agreement clause that obligated an employee to provide a doctor's note once her sick-leave bank had been exhausted effectively relieved her from having to comply with this requirement.

The arbitrator found that the Stage 3 provision did not offend the relevant article in the collective agreement, for the article was entirely silent "about medical proof addressed to the logically distinct issues of fitness, accommodation and prognosis." Given that silence, the arbitrator found that the article did not regulate the medical evidence relating to these issues. Consequently, the Stage 3 requirement was not inconsistent with the collective agreement, and was, by implication, a reasonable requirement in the circumstances.

The obligation to provide sufficient medical information in matters of accommodation is considered further in Section 14:603 at page 641 of this manual.

²¹⁵ *Natrel (Ontario) Inc.* (2001), 94 L.A.C. (4th) 325 (Brown)

²¹⁶ An employee who was elevated to Stage 2 of the program was obligated to provide a doctor's note to support any future absences during the following 12 months. This was found to be inconsistent with a collective agreement requirement that obligated an employee to provide a medical certificate in the case of an absence where the employee had exhausted all remaining sick-leave credits. This aspect of the decision has been reviewed at [p. 108](#) of this manual.

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

7:302(d) In a case involving the sufficiency of a medical certificate or other information that has been provided, it is reasonable to require that further and more detailed information be provided where the information received is deficient in one or more essential respects.

In *St. Joseph's Hospital* [1987],²¹⁷ the employee had been absent due to stress induced by her mother's illness. The medical certificate she tendered authorized her to take two weeks off work. The doctor had completed the date that care commenced and the date when the employee could return to work. The certificate did not describe the employee's illness, nor did it contain any additional remarks. The employer took the position that the medical certificate was of little probative value, and that a negative inference should be drawn from the union's failure to call the doctor.

The arbitrator commented that the medical certificate did not contain a "bounty of information." He concluded that while the certificate was very brief, it should be accepted because the employer had not taken any definitive steps to require the employee to provide a more informative medical certificate or to submit to an examination by another physician.

While the Board recognizes that the medical certificate does not contain a bounty of information, in order to successfully challenge its veracity, the employer must do more than merely voice suspicions. Such suspicions must be based on more concrete grounds than the employer was able to demonstrate in this case.

In arriving at that determination, arbitrator Ponak stated:

Arbitration boards have not been reluctant to carefully scrutinize medical certificates, especially in circumstances in which legitimate suspicions arise. Suspicions have been aroused in a number of ways, including where the medical certificate is backdated (i.e. the doctor sees the patient after the illness is over), where a certificate is given on the basis of a telephone conversation and no visual or physical examination takes place, or where other employees attest to the fact that the allegedly ill employee was not ill. But absent such suspicion, arbitration boards have not usually devalued medical certificates simply because the information contained therein is sketchy. If that were the case, few medical certificates would be deemed to have any value. Physicians are notorious for their brevity on notes of this kind. In this regard, the amount of information contained in the grievor's medical certificate was not unusual.

The arbitrator noted the doctor had seen the employee for 20 to 30 minutes, and had made a decision he was in a position to make.

The arbitrator also stated that the presentation of the certificate "does not automatically end the matter." The collective agreement gives the employer the right to require satisfactory proof of any illness, and

[t]his provision gives the employer some discretion in situations where it may be uncertain about the precise nature of an employee's illness and/or its expected duration. Notwithstanding that this Board has concluded that the Grievor's medical certificate was sufficient to qualify her for sick leave, there would seem to be room for honest differences of opinion in this regard. In light of [the collective agreement provision], it would not have been unreasonable for the employer to ask the Grievor either to provide a more informative certificate from [her doctor] or [to have] requested that the Grievor see another physician.

²¹⁷ *St. Joseph's Hospital* (1987), 28 L.A.C. (3d) 185 (Ponak)

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

The Board has no hesitation in suggesting that the Grievor's failure to do so would have weighed heavily against her in the ultimate disposition of this matter.

The arbitrator found, however, that the employer erred in not having requested a second opinion.

Had the employer wanted additional proof of the Grievor's condition, it should have requested such proof in clear and unequivocal terms.

In dismissing the grievance, the arbitrator stated that the case ultimately turned on this last point.

Additional cases illustrating this principle are found in sections 7:401 and 7:402, commencing at pages [133](#) and [141](#), respectively, and in sections 7:501 to 7:504, commencing at page [147](#).

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

7:303 An assessment of the reasonableness of a request for a medical certificate or other related information is primarily a fact-based inquiry that will consider, among other matters, employee conduct (where relevant), the purpose underlying the request, and whether the employer has adopted an incremental approach in order to minimize unnecessary intrusions upon the employee's privacy.

Arbitrator Burkett, in *Inco Ltd.* [1988],²¹⁸ commented that the reasonableness of an employer's request for further medical information can depend on the nature of the illness and its impact on the employee's ability to perform the full range of his duties. He distinguished between a circumstance where the employee had suffered a foot injury that allegedly affected his ability to perform the functions of an "assembler," and circumstances where, as here, the employee suffered from a respiratory illness that could have precipitated a life-threatening situation.

In *School District No. 5 (Southeast Kootenay)* [2002],²¹⁹ the employers had initiated a requirement that an application for either extended or partial medical leave (with the latter leave amounting to authorization to work a reduced workday or a reduced workweek) be supported by a comprehensive Physician's Statement.

The union had contended that the requirement offended the following clause in one of the two collective agreements:

For any absences on sick leave in excess of four (4) consecutive days, a certificate from a duly qualified medical practitioner may be required. A certificate for shorter periods of absence may be required if a pattern of consistent absences appears to be developing.

Arbitrator Korbin first commented that

the issue must be decided not only on the issue of reasonableness of the prescribed medical certificates but also in the context of the language of the collective agreement governing the parties ...

He found that the foregoing clause did not restrict the employers from requiring more extensive information in support of an application for extended or partial leave:

Cases of prospective medical leaves clearly differ from cases where employers seek to validate, after the fact, short-term periods of absence due to illness or injury.

In considering that the Physician's Statement was far more detailed (and invasive) than the usual medical notes accepted for short-term illnesses, the arbitrator opined that the scope and content of a medical certificate or statement "must be reasonable given the nature of the benefit sought by the teacher."

Arbitrator Korbin held that the use of the prescribed medical certificates in this case did not violate the collective agreements and was not legally objectionable. He also commented:

In rendering this decision, I am cognizant of arbitral comments that do not favour an employer's policy to routinely require medical certificates. (See for example [Rosewood Manor, NAV Canada and Skeena Cellulose Inc]).^[220] However, those cases do not concern

²¹⁸ *Inco Ltd.* (1988), 35 L.A.C. (3d) 108 (Burkett), reviewed at [p. 120](#) of this manual.

²¹⁹ *School District No. 5 (Southeast Kootenay)* (2002), 107 L.A.C. (4th) 224 (Korbin, J.) .

²²⁰ The distinction advanced by arbitrator Korbin is of little assistance. His decision does not reference any of these three cases (other than in the list of cases), and his use of the phrase "routinely require" is too vague to be of use. In *Rosewood Manor* (1990), 15 L.A.C. (4th) 395 (Greyell), arbitrator Greyell stated that "there is no proscription in the collective

prospective applications being made for partial medical leaves and extended medical leaves. I am satisfied that requests for partial and extended medical leave present unique circumstances which require the Employer on a routine basis to consider a broader spectrum of medical information than may be required for standard cases of sick leave.

The need to develop an incremental approach to seeking disclosure of confidential information has been discussed in Chapter 5, commencing at page 53.

agreement as to the circumstances under which proof is required. That being the case, proof of sickness may be required in the form of a doctor's note or certificate when the circumstances reasonably warrant requirement of same." Skeena Cellulose Inc. (2001), 95 L.A.C. (4th) 289 (McDonald) dealt with the termination of an employee for absenteeism pursuant to a last-chance agreement and the employer's failure to make it clear to the grievor that it expected him to provide a doctor's note on each occasion of absence. The case does not discuss the issue of routinely requiring medical certificates, and arbitrator McDonald expressed no opinion in that regard. The list of cases set forth at the outset of arbitrator Korbin's award included two Nav Canada decisions, but the award discusses neither. In Nav Canada (2000), 86 L.A.C. (4th) 370 (Brault), arbitrator Brault adopted the reasoning of arbitrator Swan in NAV Canada (1998), 74 L.A.C. (4th) 163 (Swan). Both cases considered the same collective agreement provisions, and the arbitrators in both found that a policy or practice that required medical certification of each and every short-term sick-leave claim was incompatible with a collective agreement provision that conferred a discretion on the employer to consider claims on an individual basis.

7:300 The Need for Reasonable Grounds to Require a Medical Certificate

7:304 Reasonableness will not necessarily be a pre-condition to demanding a medical certificate where the collective agreement stipulates that a medical certificate will be required at a certain point, such as after an absence of three days. The matter may however be different where the clause is discretionary; for example, the employer may request a medical certificate after an absence of three days.

Arbitrator McLaren, in *Salvation Army Grace Hospital, Windsor* [1980],²²¹ observed that a medical certificate could be required, without having to establish reasonableness, where the collective agreement specifically gave the employer an unqualified right to seek a medical certificate. In this case, the collective agreement stipulated that the employer “reserve[d] the right to demand a Doctor’s certificate of proof of illness after an employee has been absent from scheduled duty with the Hospital for a period exceeding [three shifts].” Arbitrator McLaren noted that this right permitted, but did not require, the employer to ask for proof that an absence of greater than three days’ duration was due to illness. He characterized the right as “an unfettered power to make a demand for proof when the hospital so desires.” He stated that

In absences of greater than three days’ duration this reserved power may be exercised even though there may be no grounds to think anything other than that the employee was legitimately ill.

This decision must be considered in light of decisions such as *NAV Canada* [1998],²²² where arbitrator Swan found that where a discretion exists within the context of a collective agreement to require proof of illness, then that discretion must be exercised reasonably. Arbitrator McLaren adopted that approach with respect to absences of three days or less, but did not do so with respect to longer term absences, even though the requirement to provide proof in such cases was worded in a discretionary fashion.

It is likely that the “unfettered demand” to require proof in today’s arbitral environment would be limited to clauses that state that proof is mandatory after a certain length of absence.

²²¹ *Salvation Army Grace Hospital, Windsor* (1980), 25 L.A.C. (2d) 241 (McLaren)

²²² *NAV Canada* (1998), 74 L.A.C. (4th) 163 (Swan)

7:400 ASSESSING THE SUFFICIENCY OF A MEDICAL CERTIFICATE

7:401 An employer is entitled to evaluate a medical certificate to determine if, for example, it is sufficient to establish that the employee was suffering from an illness.

Neither the employer, in the first instance, nor an arbitrator, are required to give absolute effect to the statements set forth in a medical certificate. The certificate is merely one piece of evidence to be weighed in coming to a final conclusion.

In *Consumer's Gas Co.* [1962],²²³ arbitrator Little considered a discharge grievance where the “trigger” for the termination was a 10-day absence due to alleged illness. At issue were the validity and sufficiency of the medical certificates tendered on behalf of the employee.

The employee did not attend the hearing, and no evidence was given by the doctor or any of the employee’s relatives (he was purportedly visiting his brother during his absence). The arbitrator stated that “the grievance therefore must stand or fall on the weight which the company should have given to the employee’s story that he was absent because of illness, together with a medical certificate purportedly supporting his contention.”

The arbitrator addressed what he termed the “evidentiary value of a medical or doctor’s certificate”:

It is of itself actually no more admissible as evidence than any other written statement made and signed by any other person. There are however two ways in which its contents can become evidence. One is by the person signing the certificate presenting himself as a witness to testify as to the truth of its contents and thus subject himself to cross-examination regarding same. The other is where both parties agree as to the accuracy of the certificate and agree to it being accepted as truth by a court of law or arbitration board without verifying oral testimony. The latter situation occurs quite regularly and is no doubt one of the reasons why the fiction has arisen among laymen that doctors’ certificates in themselves must be accepted at their face value whether presented by a union to a company or vice versa to an arbitration board.

Arbitrator Little found there were ample legal and factual grounds for refusing to accept the employee’s medical certificate. It did not appear to have been written by a doctor (but, at best, by a nurse who signed the doctor’s name and added her initials), the word “pleurisy” was added in another’s handwriting, and the date of the certificate was problematic in the context of the dates the employee was absent.

The arbitrator also stated:

Surely when an employee is absent from work without leave there must be an onus on him to explain his absence satisfactorily or be subject to discipline. He is the only one who can furnish the explanation ...

The termination was upheld.

In *Ford Motor Co. of Canada Ltd.* [1975]²²⁴ the employee suffered from diabetes and angina. As a result, the employer placed him in a light-duty job.

²²³ *Consumer's Gas Co.* (1962), 13 L.A.C. 116 (Little)

²²⁴ *Ford Motor Co. of Canada Ltd.* (1975), 8 L.A.C. (2d) 149 (Palmer)

7:400 Assessing the Sufficiency of a Medical Certificate

The employee was then involved in a motorcycle accident where he injured his elbow and thigh. His absence continued for two months. During that time, his doctor filled out a number of accident and sickness benefit forms showing that he was “totally disabled,” and that he would not be returning to work until a date approximately two months after his accident.

During the second month of his absence, the company discovered that he had been working as a driver instructor. He had done this before the accident. The employer contacted his doctor, who said he had been unaware of this fact. The doctor apparently had told the employee to stay home and rest. The employee then was terminated.

On at least two occasions subsequent to the termination, the employee insisted he had not been working after his accident.

The union’s position was that it was irrelevant whether the employee had been working while absent. It contended that the issue in dispute was whether the absence had been approved by the employee’s doctor. The union stated that at all times during the period of absence, the employee had been covered by his doctor’s approval, and that such approval was good and sufficient reason for his absence from employment.

The grievance was dismissed. Arbitrator Palmer stated:

In coming to this conclusion, I would first note that I cannot accept the bare position of the union that certification by a doctor is sufficient reason for an employee to absent himself from work. Clearly, such decisions can be in error, either as a result of error on the part of the doctor, the patient or both. Without dilating on the matter, it seems abundantly clear that were an employee to intentionally mislead a doctor concerning the state of his health to the end that that doctor would be willing to state that the employee involved was unable to work, such certification would not provide a suitable reason to explain an absence. In the present case, the facts seemed to be analogous to this situation. Thus, the evidence appears manifest that the grievor did not inform [his doctor] at any time that he was engaged in working at a driving school. Consequently, this concealment could affect the doctor’s diagnosis of the extent of his injuries. In my opinion, it does not lie in the mouth of [the grievor] to argue that such a failure is one of a harmless nature. Clearly it is unreasonable to do so and the whole of the grievor’s conduct in attempting to keep this fact from the company is consistent with such a position.

In *St Jean de Brebeuf Hospital* [1977],²²⁵ arbitrator Swan stated:

The grievor advances her own testimony that she was ill, and a certificate from her doctor. The probative value of medical certificates in arbitration proceedings has been dealt with in a number of awards, and the arbitral jurisprudence is quite clear. First, they are admissible as an exception to the hearsay rule, and the usual statutory rule as to notice. ... On the other hand, no arbitrator is required to give absolute effect to the statements set out in such a certificate, and the certificate must be treated as merely another piece of evidence to be weighed in coming to a final conclusion. In the words of one arbitration award, *Re Steel Co. of Canada Ltd. and U.S.W., Local 1005* (1975), 8 L.A.C. (2d) 298 (Beatty) at p. 302:

“We should also add that in admitting such evidence, boards of arbitration must be circumspect in ensuring such reports are of probative value. Where as here the first report is merely a standard form of some three lines without any diagnosis or explanation of the nature of the illness and where on the evidence of the grievor

²²⁵ *St. Jean de Brebeuf Hospital* (1977), 16 L.A.C. (2d) 199 (Swan)

himself [the doctor] never examined him nor questioned him as to his health other than to ask, 'How are you today?', little, if any weight can be attached to them ..."

Arbitrator Swan found that the probative value of the medical certificate before him was negligible. The employee saw her doctor on February 23 and then spoke to him on March 4, when she called to request a medical certificate, but it was, in the words of the arbitrator, "simply meaningless to describe the relationship during the period as one in which the employee had been under the care of her physician." He stated:

The probative value of this certificate is clearly negligible. Given the circumstances under which it was obtained, it is clearly no evidence that the grievor was actually ill on any of the days in question.

In finding that the employee could not rely on the cursory certificate she had presented, arbitrator Swan also commented that the physician's certificate fell

outside of the bounds of reasonableness as well. It might well have been useful, after a two day illness, to certify that he had seen the grievor, was satisfied as to her symptoms, and was prepared to lend his support to her complaint of illness. After a much longer period, his certificate is of much less value. Nevertheless, the blame for putting him in a situation where he had to choose between issuing a useless certificate and refusing to certify an illness about which he had, however haphazardly, been consulted, must lie upon the grievor. Her own conduct was not only unreasonable; it also obscured the only valid medical evidence available to her.

The grievance was dismissed.

Despite ultimately dismissing the grievance, arbitrator Swan commented that a medical certificate that might be deficient can still be of some value:

A medical certificate obtained following a cursory examination, or even after a telephone consultation, will not always be valueless to an employee. Depending upon the nature of the complaint, the medical history of the employee, the likely value of a detailed examination for a better diagnosis or for prescribing a cure, it may be quite reasonable for a physician to simply record the fact of a reported illness and leave the matter at that. Without a certain amount of reasonableness on the part of employees, employers, medical practitioners and arbitrators, sick pay schemes would collapse in a morass of red tape.

In *Fishery Products (Marystown) Ltd.* [1979],²²⁶ the employees missed work after having been denied permission to attend a rock concert. Both presented medical notes for similar but different complaints. The medical notes were based solely on the employees' complaints to their doctor.

The physician who testified stated he was satisfied the employees had told him the truth, and he would not have altered his assessment of the employees' cases if he had known (as the evidence established) that they had stated they would take the night off and, if necessary, obtain a doctor's certificate to indicate they were sick. It was the employer's position that the employees had done exactly as they said they would, "and in the absence of some reasonable explanation, [the employer had] established a *prima facie* case for not accepting the medical certificates."

Arbitrator Hattenhauer adopted the approach taken in *Ford Motor Co. of Canada Ltd.* [1975].²²⁷ He stated:

²²⁶ *Fishery Products (Marystown) Ltd.* (1979), 22 L.A.C. (2d) 439 (Hattenhauer)

7:400 Assessing the Sufficiency of a Medical Certificate

Like Palmer, at p. 152 “... I cannot accept the bare position of the union that certification by a doctor is sufficient reason for an employee to absent himself from work.” [The doctor here] readily admitted that, on August 17th, his opinion of the grievors’ ability to work was based entirely on the specific complaints which they mentioned to him at the time and that his diagnoses – based on those complaints – were not confirmed by examination and might not have been confirmed by another examiner. In cross-examination he also agreed that it is quite possible that someone can get a medical certificate from him for some ulterior purpose, if the person is intent on misleading him. To put it bluntly, medical certificates of illness are not Holy Writ, and that simply because of the fact that their authors are fallible and can be misled. Surely, to argue otherwise is tantamount to suggesting that professional competence in the health sciences field – or in any other field for that matter – ipso facto vests the individual with such divine qualities as omniscience or infallibility ... I agree that under certain circumstances a medical certificate of illness may be questioned and disregarded when evaluating just cause for an employee’s absence from work.

The arbitrator also noted that the employees had failed to testify. He stated their failure to appear and to testify under oath led to the inference that the evidence they could have given, if truthful, would have been damaging to their cause. The grievance was dismissed.

In upholding an employer’s policy that required employees to disclose the nature of their illness, arbitrator Bruce, in *Eastern Provincial Airways (1963) Ltd.* [1981],²²⁸ commented:

It is my opinion that the company has a right to evaluate a medical certificate and that in the exercise of that right the company is not making a medical judgment. The company may, for example, be assessing a situation in which the doctor did not see or hear from the patient until after the illness had concluded, but was nevertheless persuaded to issue a medical certificate. In such circumstances, the doctor has relied on the patient’s word. If the patient has a medical history of a recurring problem, greater weight will attach to such a certificate than if the doctor has no particular reason to know whether or not the employee had the complaint which he claimed to have had.

In *Wetaskiwin General and Auxillary Hospital and Nursing Home, District No. 81* [1984],²²⁹ arbitrator Beattie stated:

A medical certificate, in most circumstances, is “satisfactory proof” [of illness] but a medical certificate does not unequivocally authorize sick leave; such a certificate has to be viewed in the context of conflicting evidence particularly an employee’s improved condition, whether acknowledged or apparent. It may also be of some relevance to take into account whether a medical certificate has been prescribed by a doctor on his own volition or has resulted from a request of his patient. It is abundantly clear from arbitral jurisprudence that medical certificates are not to be accepted in situations where there is clear evidence refuting the certificate or undermining the basis upon which the certificate was given.

In addressing the probative value of a medical certificate in *St. Joseph’s Health Centre* [1988],²³⁰ arbitrator Joyce stated that, depending on when the employee was seen by his doctor, a certificate may be satisfactory for one purpose but not another. Where, as here, the employee was seen by his

²²⁷ Ford Motor Co. of Canada Ltd. (1975), 8 L.A.C. (2d) 149 (Palmer)

²²⁸ Eastern Provincial Airways (1963) Ltd. (1981), 29 L.A.C. (2d) 306 (Bruce)

²²⁹ Wetaskiwin General and Auxillary Hospital and Nursing Home, District No. 81, unreported, December 21, 1984 (Beattie), cited in Strathcona County (2000), 92 L.A.C. (4th) 1 (Sims)

²³⁰ St. Joseph’s Health Centre (1988), 34 L.A.C. (3d) 193 (Joyce)

doctor the day following his illness, “the certificate may have had some value in determining that the employee was fit to return to work” on the day that he was examined, but it was of “no assistance” in determining if he was ill the preceding day. He stated:

The fact that an employer is entitled to obtain a certificate and the fact that the onus is upon the grievor to prove to the employer that he was indeed ill leads to the inescapable conclusion that the employer is entitled to evaluate the information found in the certificate. This is discussed in *Re Eastern Provincial Airways (1963) Ltd. and I.A.M., Lodge 1763* (1981), 29 L.A.C. (2d) 306 (Bruce) at p. 313:

“No arbitration awards known to me accept the view that a mere assertion by the person claiming to have been sick is satisfactory. That, of course, is why the collective agreement gives the company the right to require a doctor’s certificate. But on the subject of doctor’s certificates I concur with the arbitrator in *Re Ford Motor Co. of Canada Ltd. and U.A.W., Local 1520* (1975), 8 L.A.C. (2d) 149 (Palmer) at p. 152 [supra] ...

For this reason and other similar reasons, it is my opinion that the company has a right to evaluate a medical certificate and that in the exercise of that right the company is not making a medical judgment ...”

The employee in *Steels Industrial Products* [1991]²³¹ had been observed doing construction work while absent on sick leave. The union argued that the employee’s activity should be viewed in the context of a “recovery curve” and, given that he returned to work the following day, his conduct was not surprising or out of order. It contended that whether an employee could return to work on a particular day was a decision to be made by the employee’s physician rather than the employer, the employee or the arbitrator. The arbitrator rejected this argument:

It is precisely the arbitrator’s task to determine a grievor’s physical fitness on a day in question. Otherwise, he abdicates his jurisdiction. Understandably, when exercising his jurisdiction, the arbitrator may place considerable weight on the physician’s medical opinion.

In the result, the termination was upheld.

Once a medical certificate has been introduced into evidence,²³² the evidentiary burden then shifts to the employer to lead evidence to establish the certificate is inadequate. A mere suspicion normally will not be sufficient to discharge that shifting evidentiary burden. For instance, in *Queen Elizabeth II Hospital* [1998],²³³ arbitrator Moreau commented:

The most common and most accepted evidence of an absence from the workplace due to illness are medical certificates provided by an employee’s physician. That is exactly what was provided in this case. Normally a doctor’s note, such as those obtained by the grievors here, would be accepted as sufficient proof that the employee was absent for a valid medical reason. In cases where the employer wishes to contest the illness claim, it falls on the

²³¹ *Steels Industrial Products* (1991), 24 L.A.C. (4th) 259 (Blasina)

²³² Where a medical certificate is introduced through someone other than the author, the parties need to consider the basis on which it is being tendered. For instance, if it is being tendered through the grievor, then the employer, if it is concerned with the validity of the certificate, normally will agree to such admission only if the union undertakes to call the author as a witness. Similarly, consideration also might be given to stipulating that the certificate is being entered into evidence for a limited purpose, such as establishing that it was a document that had been provided to the employer rather than for the purpose of establishing the sufficiency or truth of its contents. The issue of admission of medical certificates is addressed in Chapter 11.

²³³ *Queen Elizabeth II Hospital* (1998), 77 L.A.C. (4th) 170 (Moreau)

7:400 Assessing the Sufficiency of a Medical Certificate

employer to prove that the medical certificate is invalid.^[234] As Arbitrator Larson stated in reference to what the employer argued was a sketchy medical certificate in the *Parkridge Care Home* decision [(1991), 23 C.L.A.S. 146] at p. 16:

“But what must be realized is that a qualified physician is an expert and is entitled to give his opinion to an arbitration board on matters within his competence. He is entitled to say, as Dr. Wong did in the certificate of August 22, 1990, that the grievor was not emotionally fit to work. That opinion is valid unless it is proved to be wrong and the onus is on the employer to do it. That is to say that under Article XI Section 3(b) the primary onus is on the employee to prove illness but that is precisely what the grievor did in this case by tendering the various medical certificates. The onus then shifts to the employer to prove that the medical opinion is wrong and while the employer cannot require the employee to be examined by a physician of its choice, it can conduct an investigation into the activities of the employee and, at the very least, call the employee’s physician as witness to require him to justify his opinion.”

The above reference is also consistent with the comments of the Ponak board in the *Re St. Josephs Hospital* decision at p. 15 [reported 28 L.A.C. (3d) 185 at p. 195]:

“Accordingly, it is the Board’s conclusion that the medical certificate, on its face, is sufficient to support the Grievor’s assertion that she was ill and required until December 30th to recover. While the Board recognizes that the medical certificate does not contain a bounty of information, in order to successfully challenge its veracity, the employer must do more than merely voice suspicions. Such suspicions must be based on more concrete grounds than the employer was able to demonstrate in this case.”

Arbitrator Moreau commented that without more evidence, the grievance would have succeeded because the only evidence would have been the medical notes that stated the employees were sick. However, the doctor testified that the employees, who were suffering from fatigue, did not display any symptoms of illness, nor were they ever diagnosed by him as being sick (despite the clear indication to the contrary in the medical certificates). On that basis, the grievances were denied.

From a practical point of view, employers should ensure that non-specific medical certificates are met with a request for further and better medical information. In addition, employer counsel should not agree to the admission of such reports unless union counsel undertakes to call the author of the report.

In *Sault Area Hospitals* [2001],²³⁵ arbitrator Whitaker concluded that the first and second medical note the employee’s physician had provided were insufficient to support her claim that she was unable to work due to stress. The first note read that the employee “will not be able to work due to family stress,” and the second stated that she “will be unable to work due to personal stress until further notice.” The arbitrator found, however, that a third letter from her doctor provided “probative information sufficient to establish that the grievor was disabled by stress.” That third letter, which was six paragraphs in length, stated that the employee was suffering from “a situational depression and anxiety state,” and it explained why the employee could not have worked during the period of her absence.

The employee in *Kawneer Company Canada Ltd.* [2001]²³⁶ provided a physician’s statement that diagnosed her condition as “anxiety/depression, gastric upset.” The employer’s insurer refused to pay

²³⁴ This is not an accurate statement of the law. See Section 6:300, commencing at p. 69.

²³⁵ *Sault Area Hospitals* (2001), 94 L.A.C. (4th) 230 (Whitaker). This decision is reviewed in greater detail at p. 23 of this manual.

²³⁶ *Kawneer Company Canada Ltd.* (2001), 100 L.A.C. (4th) 129 (Luborsky)

her weekly indemnity benefit claim without additional medical proof that “might include the physician’s clinical notes, a specialist’s narrative consultation report, or any tests regarding her condition ...”

In dismissing the grievance, arbitrator Luborsky stated:

In the absence of language to the contrary, the primary onus is on the employee to establish an entitlement to the benefit claimed, which may require the employee to submit more complete medical information in appropriate circumstances. The above excerpt from the *Grace Hospital* case²³⁷ also illustrates the caution that arbitrators must exercise when dealing with medical certificates from physicians that may be curt, unclear or bereft of information. It is difficult to accept that, in the absence of specific language in a collective agreement to the contrary, the parties would have intended such potentially inadequate medical certificates to form the entire basis for establishing an initial entitlement to the negotiated benefits.

... The fact that an employee may be ill or injured as a matter of medical opinion, does not necessarily convey an entitlement to benefits as a contractual matter, under the terms of the weekly disability benefits plan as negotiated between the parties. There was no evidence that [the grievor’s physician] knew what the contractual terms, exceptions or limitations were, or had even read the Group Insurance Plan. In such circumstances, it is not reasonable to conclude that the parties intended the medical opinion of the employee’s attending physician alone, to be determinative of the initial entitlement of benefits to the employee under the governing contractual terms. Rather, considered in context with the other terms of the Group Insurance Plan, the attending physician’s medical opinion must be viewed as one factor in the Administrator’s assessment of the employee’s eligibility for benefits which [according to the terms of the benefit booklet] may be supplemented by further examination of relevant records and/or medical examinations by physicians of the insurer’s choice.

In the *Grace Hospital* case, the union had argued that the doctor’s certification of a need for continuing absence from work to breastfeed the employee’s newborn child was sufficient proof of the employee’s entitlement for a further leave of absence with benefits. The collective agreement in that case provided that an employee, absent for reasons related to the birth of her child or the termination of her pregnancy, would be entitled to a further leave of absence with benefits if she was certified by a medical practitioner as unable to return to work. The arbitrator, in dismissing the grievance, commented that the physician’s certification that the employee would be absent for medical reasons did not satisfy the criterion that she was “unable to work.” As a consequence, she was not entitled to benefits for the extended period of leave.

The employee in *Kohler Ltd.* [2007]²³⁸ had been denied three days’ leave. He claimed that this denial, along with other stressors, caused him to visit his doctor to address anxiety-related symptoms. His doctor authorized three days’ medical leave for the same three days he had been denied the leave. This event was followed by a further instance of alleged fraudulent sick leave during the following week, both of which resulted in the termination of the employee’s employment.

In upholding the termination, the arbitrator concluded that the employee was not credible, and that he had “tried to spin a web of deceit to cover his actions during the two weeks in question.”

In considering the validity of the medical certificate, arbitrator Coleman stated:

It is not necessarily impossible or even unreasonable for significant stress and anxiety, where supported by proper and sufficient medical proof, to excuse a person from work, even in

²³⁷ *Grace Hospital* (1984), 16 L.A.C. (3d) 263 (MacIntyre)

²³⁸ *Kohler Ltd.* (2007), 168 L.A.C. (4th) 167 (Coleman)

suspicious circumstances such as prevail here. But, at the same time, medical notes and other information submitted in otherwise suspicious circumstances will be scrutinized very carefully by both employers in the first instance, and where it proceeds to the next step, by arbitrators. The fact of a medical certificate cannot be ignored nor its contents put aside lightly (see *Johnson Matthey Ltd.*, supra), but at the same time, medical certificates and even detailed medical opinions need not necessarily be accepted as correct. They have weight, even considerable weight, at least on their face, but they are not unassailable. The usual means of attack are contrary medical opinions or proof of behaviour inconsistent with illness or injury ... But it is also possible to impeach an otherwise credible medical certificate or opinion by undercutting the foundation upon which it is based.

In support of the foregoing, arbitrator Coleman referenced *Ford Motor Co. of Canada Ltd.* [1975],²³⁹ *Johnson Matthey Ltd.* [2004],²⁴⁰ *Teck Cominco Metals Ltd.* [2005],²⁴¹ *Canada Post Corp.* [1990]²⁴² and *PSERC* [2003].²⁴³ In each of these five cases, the employees had failed to inform their doctor of underlying relevant circumstances (i.e., working elsewhere on a part-time basis or having had their leave of absence or vacation request denied). In all five cases, the terminations were upheld. Arbitrator Coleman stated:

These awards reflect common sense. Restating a line from *Johnson Matthey Ltd.*, supra, “arbitrators ought to be reluctant to second-guess medical professionals”, but where those medical professionals have been misled and misinformed, their opinions will cease to offer the protection that they may otherwise afford. Two relevant factors to be take[n] into account are the coincidence of a failed leave request not communicated to the treating physician, and a significant reliance by the treating physician on the subjective symptoms described by their patients.

Arbitrator Coleman commented that on the employee’s second visit to his doctor, he underwent a physical examination, for he had been complaining of experiencing a rapid heartbeat, feeling shaky, and having an upset stomach. In considering whether those symptoms were enough to prove incapacity, the arbitrator commented:

In isolation from other events, it may well have been possible to accept the view of the physician that the grievor was properly excused from work for medical reasons. The note may have been able to stand on its own. However, in the circumstances which actually prevailed at the time, I find it difficult to conclude that the worker was in fact too ill to go to work. The doctor’s opinion at the time is devalued considerably by the fact that he was not made aware of the events going on at the time, including the unsuccessful leave request or the grievor’s failure to come to work on July 31 ... I am also influenced by the evidence concerning the trip to Alberta. I accept the evidence of [the doctor] that a valid, non-pharmaceutical treatment for a diagnosis of stress and anxiety is to separate the patient from the main source of distress. Undoubtedly the grievor was less stressed away from work. But this trip to Alberta remains very suspicious, and inconsistent with his claimed ailments. If the chief symptom at the time was an upset stomach and nausea, I find it difficult to accept that a legitimately sick individual would undertake two twelve hour car rides.

²³⁹ *Ford Motor Co. of Canada Ltd.* (1975), 8 L.A.C. (2d) 149 (Palmer)

²⁴⁰ *Johnson Matthey Ltd.* (2004), 131 L.A.C. (4th) 249 (Slotnick)

²⁴¹ *Teck Cominco Metals Ltd.* (2005), 141 L.A.C. (4th) 97 (Sullivan)

²⁴² *Canada Post Corp.* (1990), 17 L.A.C. (4th) 67 (Blasina)

²⁴³ *Public Service Employee Relations Commission (B.C.)*, [2003] B.C.C.A.A.A. No. 161 (Q.L.) (McConchie)

7:402 An employer may be entitled to question and challenge a physician's recommendations.

In *DuPont Canada Inc.* [1994],²⁴⁴ the employer sought to have the employee continue to perform light-duty work. Her doctor, however, had advised her she should take 30 days off work. The employee elected to follow the advice of her doctor. Arbitrator Starkman found that the employee, despite suffering continuing pain, was capable of working. The employer was entitled to have her return to modified duties, and the employee's failure to do so gave the employer cause for disciplinary action. The arbitrator stated:

It is clear that the employer in this case has the right to insist that employees present themselves for work unless they have a *bona fide* reason for being absent. The employer retains the prerogative to initially determine the appropriateness of the reason for the absence, and the employee has a right to file a grievance if they are not satisfied with the employer's decision. Medical restrictions can be *bona fide* reasons for absence from work, although the employer is not required to necessarily accept the recommendation of an examining physician and is entitled to challenge the appropriateness of the physician's recommendation.

In this regard, I adopt the observations at pp. 29-30 of the decision in *Re Globe and Mail and Southern Ontario Newspaper Guild (Milne)*, unreported, March 12, 1990 [summarized 18 C.L.A.S. 11] (O'Shea), that:

"... It is not a doctor's function to grant a leave of absence from work since that is the prerogative of management. It is trite to say that a medical leave of absence cannot be unreasonably denied. However, an employer has a right to determine on the basis of evidence presented whether the medical leave of absence is justified, subject of course to the right to grieve if the leave is refused. Article 10.01 of the collective agreement clearly contemplates that it is the employer's right to "grant" sick leave. In my view, a doctor should be very circumspect when issuing medical certificates which he knows will be used as justification for absences from work. While many doctors seem to take the position that their sole responsibility is to their patients, I am of the view that they are also responsible to the employer who will act on the medical certificates that the doctor provides ..."

Arbitrator Starkman framed the issue as a question of whether the employee had acted reasonably in accepting her doctor's recommendation to take time off work. In finding she had not, he stated:

Based on its observations of the worker, the paucity of the information offered for the absence from work in the notes of [the grievor's doctor], and the opinions of [the company's on-site doctor] and the other on site medical practitioners, I am satisfied that the employer had valid reasons for rejecting [the grievor's doctor's] recommendation. Put another way, it was not reasonable for the grievor, who had or ought to have had knowledge that the employer was committed to accommodating her work restrictions, to rely on the recommendation of [her doctor] and refuse to present herself for work.

Although *Strathcona County* [2000]²⁴⁵ was decided in favour of the employee on the basis that the employee met the contractual standard of proof set forth in the collective agreement, arbitrator Sims was critical of the employer's having questioned the doctor's judgment. He stated:

²⁴⁴ *DuPont Canada Inc.* (1994), 42 L.A.C. (4th) 22 (Starkman)

²⁴⁵ *Strathcona County* (2000), 92 L.A.C. (4th) 1 (Sims). The background circumstances in this case are reviewed more fully at p. 31 of this manual.

The Employer's difficulty with [the doctor's] letter is not, in essence, the validity of the information on which [the doctor] based his opinion, diagnosis and prescription for time off, but the validity of that opinion, diagnosis and prescription itself. It appears to have been the Employer's view that [the grievor's] work-related stress, if it existed, was self-induced in the sense that he had failed to make alternative holiday arrangements despite his need and an adequate opportunity to do so. Similarly to the extent that he was stressed out [by other matters at work], this was caused by his own attitude at work. However, as discussed by Arbitrator Ponak in the *St. Joseph's Hospital* decision (supra), there is a distinction that must be drawn between the cause of the illness and the impact on the health of the individual in question. "One cannot base illness on causes rather than symptoms" [p.193]. One might fault [the doctor] for too readily identifying the Employer's conduct as the cause of [the grievor's] symptoms of depression. However, [the doctor] clearly says that [the grievor] was suffering from symptoms that led him to diagnose anxiety and depression.

Similarly, the Employer clearly questions the appropriateness (on medical grounds as well as employment law grounds) of a physician essentially prescribing a vacation or a walk in the woods as a solution to a depressed state. However, [the doctor's] letter discloses he gave [the grievor] the certificate in part to give him time to regain his composure and, implicitly, to alleviate his anxiety and depression.

The Employer asks us to discount [the doctor's] letter in part because it shows that [the grievor] asked for the medical leave. Had the letter gone on to indicate that [the doctor] granted the request without applying professional judgment to the situation, and the suitability of such an absence given the grievor's condition, that might be a persuasive factor. However, it appears from the letter itself, as well as from [the grievor's] evidence that [the doctor] was telling him to get away from work for a while to relieve his symptoms. Such advice is not inherently suspect. If one accepts that [the grievor] had reached a state of significant anxiety and depression due in part at least to his situation at work (even if caused by his own attitude) then perhaps the physical challenge of the West Coast Trail could be beneficial in restoring his sense of proportion and mental well-being. That is not for us to prescribe. We only note that it is not inherently implausible.

The arbitrator held that the employee had been dismissed without cause. The employer, if not prepared to accept the medical certificate, should have sought further medical input from the employee's physician or from an employer-appointed physician. Stated somewhat differently, arbitrator Sims found that there was a reasonable basis for the employer to have requested further and better medical information, including possibly a medical examination by an employer-designated physician. The employer's failure to have done so left the arbitrator with a medical certificate that, in his view, should have been given some weight by the terms of the collective agreement. Arbitrator Sims also accepted that the onus of proof in a disciplinary case such as this was that of the employer (as opposed to proof of eligibility for sick leave or proof of fitness to return to work, where the onus in both circumstances falls upon the employee).

In *Sault Area Hospitals* [2001],²⁴⁶ in a case involving employee stress, arbitrator Whitaker stated that the employer was not required to accept, as proof of illness, a statement from the employee's physician that she was unable to work due to personal stress. The arbitrator ultimately found that the doctor's third letter provided "probative information sufficient to establish that the grievor was disabled by stress." That third letter, which was six paragraphs in length, stated that the employee was suffering from a "situational depression and anxiety state." Moreover, it explained why the doctor was of the view that the employee could not have worked during that period.

²⁴⁶ *Sault Area Hospitals* (2001), 94 L.A.C. (4th) 230 (Whitaker). This decision is also reviewed at p. 23 of this manual.

The employee in *Brampton (City)* [2008],²⁴⁷ claimed he had a psychological disability that prevented him from driving a “Smart Car,” and he insisted, as a matter of accommodation, that the employer provide him with a different vehicle to use in the performance of his duties.

The employee’s physician advised that the employee had “problems with panic/anxiety” in a Smart Car. His doctor referred him to a psychologist. The doctor and the psychologist both acknowledged at the hearing that they had accepted what the employee told them at face value, Arbitrator MacDowell commented that the diagnosis was, in some respects, a self-diagnosis. Neither had probed the employee in any way. The doctor testified that he did not undertake the kind of critical evaluation that he would have done had he known he might be called as a witness. The psychologist testified he saw his role as attempting to achieve the employee’s preferred outcome (i.e., provision of a different vehicle).

The employer sought to have the employee gradually transition into the use of a Smart Car. The employee refused. The employer then suggested that the employee submit to an Independent Medical Examination. Once again, the employee refused. Arbitrator MacDowell commented that the employee’s “view seemed to be that his doctor’s note was a ‘trump card’ and having played it, nothing further was required.”

The arbitrator commented that the doctor’s ultimate conclusion, as recorded in his notes, was that the employee had “normal” anxiety. The arbitrator commented that this is not a mental illness, and that:

In my opinion, [the doctor’s testimony] is insufficient to reliably establish a genuine medical problem – let alone a permanent disability which can not be remedied (not that this was ever considered). It amounts to no more than the doctor granting the request of his patient: providing the patient with the paperwork to confirm that the patient is ill, because the patient says he is. It is a medical veneer for the Grievor’s self report ...

The arbitrator stated:

To be clear: it is understandable that a busy general practitioner might not be inclined to question a condition that was reported to him by his patient; and in a given case, what the patient describes may be all that is necessary for the doctor to transform a layman’s observation into a reliable medical judgment and diagnosis of illness. However, where the evidence of illness consists of nothing more than the self report of a single and singular incident, by someone who has a motive and inclination to fabricate or exaggerate, and when the reason for visiting the doctor is to procure a document excusing him from doing something that he has always been opposed to doing for many other reasons, then I think that some skepticism is called for.

... From fairly early on the Employer wanted objectively reliable medical information because it suspected – not unreasonably as it turned out – that it should not rely upon what the Grievor’s own caregivers were saying, when it was based exclusively on what he was saying to them; and in my view, there was nothing wrong with the Employer’s quest for reliable and objective and independent medical information and the right to communicate with those doctors. Indeed this is a textbook case of why Employers are sometimes right not to blindly rely upon what an employee’s family doctor has to say.

This is not to suggest that the statement from an employee’s physician is inherently unreliable, but only that doctors are as open to manipulation as anyone else, and that in a “rights based world” employees have come to learn the value of these “medical trump cards”. And paradoxically, the more physicians are inclined to unquestionably support such claims,

²⁴⁷ *Brampton (City)* (2008), 174 L.A.C. (4th) 140 (MacDowell)

7:400 Assessing the Sufficiency of a Medical Certificate

the more difficult it may be for workplace parties (and adjudicators) to sort out these kinds of questions. It leads to cynicism, not solutions. And it leads to litigation.

Moreover, the trust relationship that doctors understandably seek to foster with their patients, may actually inhibit their ability (or inclination) to get to the truth, and thus to an accurate medical picture – particularly if it involves pressing and probing what the patient has said (something which a busy doctor may not have the time or inclination to do).

The arbitrator found it was not unreasonable to ask for an Independent Medical Examination in this case.

The question for the Employer is different from that of the physician: it is not just whether the Grievor has some kind of “medical problem”, but also what that means for his job and his work responsibilities. An accurate assessment of an employee’s illness is only part of the answer to that workplace question.

7:403 A predictive medical certificate, often based upon a recovery norm (or what can be referred to as a “presumptive recovery period”) may need to be supported by a supplementary medical certificate prepared after the happening of an anticipated medical event.

In *Peel Board of Education* [2000],²⁴⁸ the arbitrator concluded that the medical evidence he heard established “that six weeks of recovery following an uncomplicated childbirth is the currently accepted normative standard of medical care.” Although arbitrator Kaplan recognized that not all women will require that length of recovery, he stated that the presumption of six weeks made it unnecessary for a woman to visit her doctor during the first six weeks following childbirth, and that evidence of inability to return prior to that date could be presumed.

However, in *St. James-Assiniboia School Division No. 2* [2004],²⁴⁹ arbitrator Peltz discussed the notion of “presumptive recovery periods” used by physicians to predict the length of an employee’s recovery from various types of medical conditions. He noted that a Physician’s Statement (in the case of anticipated childbirth) with a projected date of confinement and a request for six weeks’ sick leave was not sufficient in itself, and that the employer was entitled to receive a medical assessment that had been conducted after delivery, based on known facts and medical requirements.

The grievors conceded under cross examination that this was a reasonable position for the Division to take and the board agrees. While “predictive” medical certificates will continue to be needed at the time of application for maternity leave and also for purposes of filing a sick leave application, the Division is entitled to have a supplementary certificate prepared after delivery. This should not be an onerous requirement for the physician or patient, but it will satisfy the Division’s legitimate need for a “real” certification of condition, treatment and prognosis.

The certificate is not conclusive for the duration of the six weeks or whatever period the physician prescribes. Where the Division has a genuine concern about the validity of the sick leave duration or has other *bona fide* concerns, it may require additional information as canvassed above ... However, the Employer would bear a stringent onus in seeking such additional disclosure.

²⁴⁸ Peel Board of Education (2000), 92 L.A.C. (4th) 289 (Kaplan)

²⁴⁹ St. James-Assiniboia School Division No. 2 (2004), 131 L.A.C. (4th) 313 (Peltz)

7:500 DECISIONS CONSIDERING THE SUFFICIENCY OF MEDICAL CERTIFICATES

OVERVIEW

A medical certificate tendered to substantiate an illness or to support a recovery and subsequent return to work must be sufficient to meet its intended objective.

There has been somewhat of a divergence in the arbitral law. Several cases have concluded that a doctor's certificate that merely stated the employee "was ill" on the relevant dates was sufficient to establish the employee's claim of illness. The majority of cases, however, have held that an employer is entitled to a sufficient level of detail such as would satisfy an objective person that the physician had made a proper evaluation of the employee's condition.

In assessing this divergence, one must keep in mind that different levels of detail may be required for different purposes and in different circumstances. The question of an employee's fitness to return to work generally will require more in the way of detail, while a certification with respect to a very short-term illness may require somewhat less detail. Similarly, arbitrators have found that a medical certificate sufficient to substantiate a one-or two-day absence due to illness may not be sufficient to support an absence of one week or more. In the result, some arbitrators have been prepared to accept, as corroborative and determinative, a "one-sentence" medical certification for a one-or two-day absence, while at the same time requiring a more expansive medical certificate in circumstances where the illness was longer²⁵⁰ or other factors were present.

In addition, arbitrators have found that a medical certificate that normally would be considered insufficient to justify an absence due to illness may be sufficient for that purpose where the employer failed to advise the employee of the nature of the insufficiency, such that the employee was not given the opportunity to attempt to obtain additional medical evidence to justify the absence. The result may prove to be the same as where the employer "overshoots" its entitlement to medical information by seeking additional medical information that is, at that stage, overly intrusive.²⁵¹

²⁵⁰ See for example the comments in *St. Jean de Brebeuf Hospital* (1977), 16 L.A.C. (2d) 199 (Swan), at p. 23 of this manual.

²⁵¹ Chapter 5 addresses the requirement for an employer to use an incremental approach when seeking additional medical information.

7:501 Cases Involving Approval of Sick Leave or Sick Pay

A cryptic medical certificate frequently (but not always) has been found insufficient to support a claim for sick leave.

An arbitrator rejected as insufficient several medical certificates obtained by different employees, in advance of childbirth, that were provided in support of sick-leave applications, on the basis that such certificates either were cryptic or insufficiently informative; that they simply stated the patient could not work for a specified two-month period “due to medical reasons”; or that they amounted to a bare assertion that the employee could not work or needed to be confined for a specified period of time.²⁵²

Medical notes stating only that the employees were sick on the shift in question would have been sufficient, in the absence of any contradictory evidence, to establish entitlement to sick-leave benefits.²⁵³ The physician who had issued the certificates, however, was called as a witness, and he testified that “the grievors, who claimed to be too tired to work their shift, had not displayed any symptoms of illness nor were they ever diagnosed by him as being sick despite the clear indication otherwise in the medical certificates.” The grievances, therefore, were dismissed.

Medical certificates that simply stated the employee could not work due to stress were considered insufficient to support such a claim. That inadequacy subsequently was overcome by a physician’s letter that set forth his diagnosis and an explanation as to why the employee could not have worked during the period of her absence.²⁵⁴

A medical certificate stating that the employee was “under the doctor’s care at present” and unable to return to work did not support a mandatory requirement for proof of illness for days absent beyond the date of the certificate.²⁵⁵ The arbitrator adopted with approval an earlier decision requiring that a proof of illness be related to a particular period of absence. A certificate tendered after the first week of absence (but which did not refer to a subsequent period) did not substantiate a continuing absence because it did not relate the illness to the period of absence.

An arbitrator found that an employee had not met the requirement to “furnish evidence of an injury or illness to the company appointed doctor” when he provided a certificate that merely stated he had been under care and would be ready to return. The arbitrator stated that the certificate furnished no evidence whatever of illness.²⁵⁶ Similarly, a medical certificate, obtained after the fact, and which simply confirmed that the employee had been off work on the day in question, did not amount to a verification that the employee had been ill.²⁵⁷ In another case, a medical certificate stating that the employee had been absent for medical reasons for a three-day period was held to be insufficient to establish illness.²⁵⁸

A medical certificate that is sufficient for a one-or two-day illness may be insufficient for a longer term illness.²⁵⁹

A medical certificate described as not having contained “a bounty of information” was held to be sufficient to establish illness where the employer failed either to demand a more informative certificate or to request the employee be examined by another physician.²⁶⁰

²⁵² St. James-Assiniboia School Division No. 2 (2004), 131 L.A.C. (4th) 313 (Peltz), reviewed at [p. 145](#) of this manual.

²⁵³ Queen Elizabeth II Hospital (1998), 77 L.A.C. (4th) 170 (Moreau), reviewed at [p. 137](#) of this manual.

²⁵⁴ Sault Area Hospitals (2001), 94 L.A.C. (4th) 230 (Whitaker), reviewed at p. 23 of this manual.

²⁵⁵ Alberta (1990), 15 L.A.C. (4th) 164 (Moreau)

²⁵⁶ Atlantic Packaging Products Ltd. (1988), 33 L.A.C. (3d) 122 (Joliffe), reviewed at p. 198 of this manual.

²⁵⁷ Pyrotenax of Canada Ltd. (1984), 16 L.A.C. (3d) 257 (Knopf), reviewed at p. 77 of this manual.

²⁵⁸ Providence Care, Mental Health Services (2011), 204 L.A.C. (4th) 345 (Surdykowski), reviewed in further detail at [p. 153](#) of this manual.

²⁵⁹ St. Jean de Brebeuf Hospital (1977), 16 L.A.C. (2d) 199 (Swan), reviewed at [p. 134](#) of this manual.

7:500 Decisions Considering the Sufficiency of a Medical Certificate

The foregoing cases should be considered in conjunction with Sections 7:601-7:603, “Entitlement to Diagnosis and Other Specific Information”, for the law has developed in a manner to reflect that an employer generally will be entitled to sufficient information by way of a medical certificate to satisfy it that the employee was unable to work due to illness.

²⁶⁰ St. Joseph’s Hospital (1987), 28 L.A.C. (3d) 185 (Ponak), reviewed at [p. 128](#) of this manual.

7:502 Cases Involving a Return to Work

Medical certificates that merely state the employee is now fit to resume his duties usually are not sufficient to satisfy the employee's obligation to establish fitness to return to work.

A medical report that was general in nature and gave no information as to treatment or prognosis was considered insufficient to support a return to work after a lengthy absence for depression.²⁶¹ In arriving at that determination, the arbitrator considered that the employee, being a nurse, would be returning to a stressful situation in which she would be expected to ensure that the patients received the best possible care.

Similarly, a doctor's slip that simply stated the duration of the employee's absence and the reason for such absence, but which failed to refer to the employee's being medically fit to return to work, was found to be insufficient to support the employee's return.²⁶²

A certificate from the employee's doctor, and a second from a specialist in psychiatric medicine, were not sufficient to support an employee's return to work after a six-month absence for a psychosocial disorder. The information in the certificates was limited to a reference to the nature of the disorder, the period of care and hospitalization, and a date for the employee's clearance to return to work.²⁶³

Medical certificates advising that the employee's fitness to return to work was conditional on his being transferred out of his work area and out of his job were not sufficient to justify the employee's return.²⁶⁴

In another instance,²⁶⁵ the arbitrator found that an employee's medical clearance to return to work with significant medical limitations was not sufficient to compel the employer to return the employee to the workplace.

Similarly, a medical certificate that contained qualifications regarding the employee's return to work was considered ambiguous and inadequate to support a return to work.²⁶⁶ That concern was overcome by a second certificate that amounted to a reissuance of the first without the qualifications. The reissued certificate was considered sufficient to support the employee's return to work because the employer failed to take steps to call the reissued certificate into question.

An arbitrator held, however, that a cryptic medical note was sufficient to justify an employee's return to work after an absence of 20 months due to injury.²⁶⁷ In an interim decision that was surely wrongfully articulated, the arbitrator concluded that an employee who was returning to work following a lengthy absence need only present "a hastily written doctor's note" containing "a concise word from a family doctor, indicating fitness to return." The arbitrator held that if the employer had some basis to challenge that assertion, then it should leave the question to be determined at an arbitration where the employer could seek production of additional information or adduce evidence that contradicted the contents of the note.

²⁶¹ Thompson General Hospital (1991), 20 L.A.C. (4th) 129 (Steel), reviewed at [p. 122](#) of this manual.

²⁶² Good People Sea & Shore Services Ltd. (1988), 1 L.A.C. (4th) 342 (MacDonald).

²⁶³ International Nickel Co. (1974), 6 L.A.C. (2d) 443 (Johnston), reviewed at [p. 161](#) of this manual.

²⁶⁴ British Columbia (Public Service Employees Relations Commission) (1998), 72 L.A.C. (4th) 309 (Jackson), reviewed at [p. 57](#) of this manual.

²⁶⁵ Alberta (1989), 5 L.A.C. (4th) 205 (Johanson)

²⁶⁶ Firestone Tire & Rubber Co. of Canada Ltd. (1973), 3 L.A.C. (2d) 12 (Weatherill), reviewed at [p. 85](#) of this manual.

²⁶⁷ Fort James Canada Inc. (2001), 94 L.A.C. (4th) 423 (Newman), reviewed at [p. 125](#) of this manual.

7:500 Decisions Considering the Sufficiency of a Medical Certificate

7:503 Cases Involving a Failure to Return to Work

A medical certificate that did not reveal all the medical professionals who had been consulted, and that did not provide a sufficient reason or explanation for the employee's inability to return to work, was held to be inadequate to support the employee's continued absence.²⁶⁸ Here, the employee had provided her employer with several cryptic medical certificates over a four-month period. The employer, being of the view that the medical "notes" appeared to create inconsistencies, requested that she submit to an Independent Medical Examination. She agreed, but, on the advice of her union, she refused to consent to release the results of the examination to her employer. Her employment was terminated. In considering the sufficiency of the medical certificates, the arbitrator stated that with the exception of the initial medical certificate,²⁶⁹ the medical notes submitted by the employee were "entirely inadequate for the purpose. They do not provide sufficient information in the circumstances. More specifically, they are incomplete insofar as they fail to reveal all of the medical professionals apparently consulted by the grievor and even collectively do not provide a sufficient reason or explanation for the grievor's inability to return to work or for the continuously extended return to work dates."

²⁶⁸ S.E.I.U., Loc. 1 Canada (2008), 174 L.A.C. (4th) 210 (Surdykowski), reviewed at p. 55 of this manual.

²⁶⁹ The initial medical certificate stated that "[The grievor] is under medical care for Crohn's disease. Her prognosis should improve following surgery." The subsequent medical certificates merely stated that the grievor would be off work "for medical reasons" for a further defined period of time.

7:504 Cases Involving an Unauthorized Absence from Work

A doctor's certificate was not sufficient to establish proof of illness where it was not dated when completed, contained no diagnosis or explanation of the nature of the illness, was not produced during the grievance process, and was obtained with respect to an incident where the employee was suspected to have left work for a reason other than illness.²⁷⁰

A doctor's certificates, supported by the doctor's testimony, were not sufficient to establish the employees' illness in circumstances where the employees attended a concert after having been denied leave for that purpose.²⁷¹ The doctor's opinion of the employees' inability to work had been based entirely on what they told him. The certificates were considered to be of no value.

A medical certificate stating the employee would be absent for medical reasons was not sufficient to establish that the employee was unable to work.²⁷²

²⁷⁰ Gilbarco Canada Ltd. (1973), 5 L.A.C. (2d) 205 (O'Shea)

²⁷¹ Fishery Products (Marystown) Ltd. (1979), 22 L.A.C. (2d) 439 (Hattenhauer), reviewed at [p. 135](#) of this manual.

²⁷² Grace Hospital (1984), 16 L.A.C. (3d) 263 (MacIntyre), reviewed at [p.139](#) of this manual.

7:600 ENTITLEMENT TO DIAGNOSIS AND OTHER SPECIFIC MEDICAL INFORMATION

7:601 An employer has the right to compel the production of sufficient information to determine if the employee's absence was bona fide. In instances involving sick leave and sick pay, this may include routine information as to the nature of the illness or disability (but not normally the diagnosis), the prognosis, if any, and the length of the employee's expected absence.

Where an employee has been absent due to illness, the employer generally is entitled to receive sufficient medical particulars to permit it to determine whether the absence was bona fide. While employers generally are not entitled (at least in the initial stage of their inquiries)²⁷³ to obtain a diagnosis or information regarding the treatment being provided, they are entitled at a minimum to receive information regarding the nature of the illness, the prognosis, if any, and the expected date of return if reasonably determinable. They also are generally entitled to know when the doctor was consulted in relation to this period of absence and whether the employee could be said to have been under the doctor's care throughout the period of absence. It is generally appropriate to request that the doctor advise whether the medical assessment has been based primarily on the employee's anecdotal comments or confirmed by the doctor's observation or other objective evidence. While the doctor's opinion regarding the employee's inability to work during the period of the absence is not always determinative of the matter, a medical certificate generally will be considered inadequate where the doctor does not at least state that the employee had been unable to work due to illness during the entire period of absence.

The classic statement of the employer's entitlement is set forth in *Rosewood Manor* [1990],²⁷⁴ wherein arbitrator Greyell adopted the following comments of arbitrator Hope in the *Victoria Times Colonist* case:²⁷⁵

In the context of the benefits of sick leave and sick pay, an employer is entitled to require the employee to provide sufficient information to permit it to satisfy itself that a particular absence was for a *bona fide* sickness or disability. How searching that inquiry can become is a function of the particular facts. The inquiry must be reasonable. Where sick leave and sick pay are addressed in the collective agreement, the inquiry must be in accordance with the provisions of the agreement.

... This employer is entitled to require all employees to provide particulars of each absence attributed to illness or disability. Whether the information which is provided is sufficient will depend on the particular facts. Certainly there can be no objection to routine information as to the nature of the illness or disability, the prognosis, if any, and the expected date of return of the employee. Generally the employer is entitled to require all the information necessary to equip management to determine whether the illness or disability is *bona fide* and what impact it will have on the attendance of the employee.

²⁷³ This issue should be considered in conjunction with Chapter 5, "Adopting an Incremental Approach to Seeking Disclosure". The scope of information that can be sought at a particular point generally will be limited to that which is reasonably required, having regard to balancing the employee's privacy concerns with the employer's rights and obligations. Consequently, a request for a diagnosis, while most often considered unreasonable at an early stage, may be appropriate after the employer has exhausted other, less intrusive, options in an effort to obtain particulars that are reasonably required. As discussed in Chapter 5, at p. 59, the employer's requests for medical information should be accompanied by a statement that the information will be evaluated, with the employer reserving the right to seek other medical information should it consider such to be necessary.

²⁷⁴ *Rosewood Manor* (1990), 15 L.A.C. (4th) 395 (Greyell)

²⁷⁵ *Victoria Times Colonist*, unreported, February 12, 1986 (Hope)

7:600 Entitlement to Diagnosis and Other Specific Medical Information

The comments of arbitrator Hope have been accepted by other arbitrators as a proper statement of the law.²⁷⁶ The situation may be otherwise, however, where a term of the collective agreement limits the scope of the information the employer can seek.²⁷⁷

In terms of recent decisions, arbitrator Surdykowski, in *S.E.I.U., Loc. 1 Canada* [2008],²⁷⁸ found:

It is not inordinately invasive, [in the context of justifying absences and claims for sick benefits] to ask for a medical certificate [which] includes the reason for incapacity, which would appropriately consist of a general statement of the nature of the disabling illness or injury, without diagnosis or symptoms. It is not unreasonable for an employer to require an employee to provide the reason for her absence or claim for sick benefits, and the mere fact that providing that reason (i.e. the nature of her illness or injury) will reveal otherwise confidential medical information does not excuse the employee from providing the reason in order to satisfy the onus on her to justify her absence and claim for benefits even in the first instance.

Arbitrator Surdykowski dealt with that same issue in *Hamilton Health Sciences* [2007]²⁷⁹ and then again in *Providence Care, Mental Health Services* [2011].²⁸⁰ In the latter case, the union asked that he revisit his earlier decision in *Hamilton Health Sciences*. In the course of addressing that request, the arbitrator stated “The applicable principles are settled and there is nothing in any of the cases cited (or that I am otherwise aware of) that reveals any emerging departure from these principles. As far as I am aware, the [Hamilton Health Sciences decision] is being followed in the community and by other arbitrators in this jurisdiction.”

Arbitrator Surdykowski summarized that decision, and, for the purposes of this section, the relevant portions of his summary read as follows:

Employees are obliged to attend work as scheduled and to provide notice of and a legitimate excuse for any absence from work in accordance with the collective agreement. Sick leave benefits are available only to the extent that a collective agreement so provides and an employee who seeks such benefits is obliged to produce objectively satisfactory proof of entitlement in that respect ...

... The nature of confidential information is such that a conservative approach to disclosure is appropriate ... and that as a general matter in the absence of specific collective agreement or other contractual requirements a certificate from a qualified medical doctor which specifies that an employee is absent from work because he is unable to work due to illness and injury for a specified period constitutes *prima facie* proof which satisfies an employee’s first instance reporting obligations, and that in order to obtain additional confidential medical

²⁷⁶ See, for example, *Salvation Army Grace Hospital* (1995), 47 L.A.C. (4th) 114 (Tettensor); *Kitimat (District)* (1998), 74 L.A.C. (4th) 351 (Kinzie); *Winnipeg Free Press*, unreported, December 5, 2001 (Hamilton); *School District No. 5 (Southeast Kootenay)* (2002), 107 L.A.C. (4th) 224 (Korbin); and *St. James-Assiniboia School Division No. 2* (2004), 131 L.A.C. (4th) 313 (Peltz).

²⁷⁷ See, for example, *Ottawa Citizen* (1996), 58 L.A.C. (4th) 209 (Dumoulin), where the collective agreement required that an employee who was seeking sick leave was required to furnish a medical certificate establishing that the employee had been “incapable of working.” The employee’s obligation was met when she provided a medical certificate containing that statement. Accordingly, in a case involving qualifying for paid sick leave (but not necessarily one establishing fitness to work, accommodation or modification of duties), the employer was prevented contractually from seeking particulars of the illness.

²⁷⁸ *S.E.I.U., Loc. 1 Canada* (2008), 174 L.A.C. (4th) 210 (Surdykowski). This case is reviewed in greater detail commencing at p. 55 of this manual.

²⁷⁹ *Hamilton Health Sciences* (2007), 167 L.A.C. (4th) 122 (Surdykowski)

²⁸⁰ *Providence Care, Mental Health Services* (2011), 204 L.A.C. (4th) 345 (Surdykowski)

7:600 Entitlement to Diagnosis and Other Specific Medical Information

information, the employer must demonstrate a legitimate need for specific information on an individual case-by-case basis ...

However, I also concluded that it is not inordinately invasive for an employer to ask that such a medical certificate include the reason for the incapacity, consisting of a general statement of the nature of the disabling illness or injury, without diagnosis or symptoms. I concluded that it is not unreasonable for an employer to require an employee to provide the reason for her absence or claim for STD benefits as a matter of general principle and because of the “reality check” considerations in paragraphs 40-46.

I agreed with the distinction drawn in modern jurisprudence between diagnosis and nature of illness information, but emphasized that the terms are neither congruent [nor] mutually exclusive. I concluded that the mere fact that providing the nature of illness or injury may suggest a diagnosis does not excuse the employee from providing the reason in order to satisfy the onus on the employee to justify her absence and claim for benefits even in the first instance ...

In this case, the employee’s medical note, written on a prescription slip, dated January 8, stated “The above patient was absent from work for medical reasons (Jan 7-9).” The arbitrator stated that “although most employers generally accept a simple ‘certificate’ like the one submitted by the grievor in this case, they are not obliged to do so.” He found that the medical slip was patently deficient. The employer “was entitled to require the grievor to provide a medical note which confirmed he was seen by a physician on January 8, 2009 and which described the nature of the illness or injury for the purposes of assessing the grievor’s claim for collective agreement sick leave benefits for his absence from work on January 7, 8 and 9, 2009.”

The declaration the arbitrator issued as part of his reasons for decision stated the employer was entitled to a description of “the general nature of the illness or injury, without technical medical details, diagnosis or symptoms ...”

In *Greater Sudbury (City)* [2010],²⁸¹ arbitrator Kaplan referred to the *Hamilton Health Sciences* case as the leading case on this issue. He summarized the arbitral law in the following terms:

In accordance with the authorities, the employer is entitled to information appropriately identifying the employee and indicating when he or she was seen by the doctor in relation to the particular illness for which the benefits are being claimed. The employer is not, again in accordance with the authorities, entitled to a diagnosis in order to qualify for benefits unless the collective agreement or an applicable statute otherwise provides. The employer is only entitled to information about the specific absence for which benefits are being claimed and that information is to be provided by the doctor who examined the employee and who is substantiating the legitimacy of the illness. The employer is entitled to know when the employee is expected to return to work and what, if any, restrictions apply upon his or her return.

... In some situations, determined by an objective and reasonable assessment of individual cases, the employer may be entitled to further information. Follow-up requests for further medical information is not prohibited; indeed, in some cases, it will be necessary and entirely justified. Quite clearly, there is a continuum of appropriate medical information in which the obligation to provide more detailed medical information will increase, for example, as absences increase.

²⁸¹ *Greater Sudbury (City)* (2010), 197 L.A.C. (4th) 123 (Kaplan)

7:600 Entitlement to Diagnosis and Other Specific Medical Information

7:602 While an employer usually will not be entitled, in the normal course, to insist upon receipt of a diagnosis or particulars of treatment, inquiries regarding the nature of the employee's illness and the type of treatment recommended normally are seen as being less invasive, and may, therefore, be permissible.

Arbitrators have distinguished between situations where an employer is seeking a diagnosis and those where the employer is seeking information regarding the nature of the illness or disability.

For instance, in *Eastern Provincial Airways (1963) Ltd.* [1981],²⁸² arbitrator Bruce, in upholding an employer's absenteeism policy, commented:

There are, therefore, cases in which the medical state of an individual is a matter clearly within the sole knowledge of that individual, and if the individual wishes to avail himself of sick-leave with pay he must expect to have to share his knowledge with his employer, firstly because an obligation rests on the employee to prove that he is sick; secondly because the examples of the specific information required which are cited in the absenteeism policy ("boil on left foot; sinus headache; fell off ladder and broke arm") are so reasonable in terms of what an employer has a right to know when sick-leave credits are being used; and thirdly, because under the collective agreement the company has the right to go further and, in effect, refuse to accept an employee's word and demand a doctor's certificate. In sum, the requirement that an employee state the specific reason for absence due to sickness or injury is in my opinion a lesser requirement than to present a doctor's certificate, to which the company is entitled [under the collective agreement].

In *York County Hospital* [1992],²⁸³ arbitrator Fisher found it was not necessary for the employer to require a medical diagnosis or particulars of treatment to determine whether the employee was legitimately ill. He commented that even where such information might be required, the employer first must have taken other available steps to investigate the circumstances of the illness, and, further, must have taken steps to ensure the information would be treated confidentially.

This award does not stand for the proposition that the employer is never entitled to the medical diagnosis and treatment of an employee ... [I]n order to determine whether or not the employer could legitimately request such information from an employee; however ... the employer must show:

(a) The information is reasonably required in order to determine the validity of the claim. Before this could be established the employer should show that it has exhausted other avenues of trying to investigate the claim ...

(b) If it is determined that it is reasonably necessary to obtain information regarding the diagnosis and treatment of an employee, then the employer must take appropriate precautions to insure that access to this information is limited on a need-to-know basis... [S]ome system must be developed by this employer to control access to this type of information so that the situation does not occur where front-line supervisors sit around and chat about an employee's diagnosis as if they were discussing yesterday's baseball scores.

Similarly, in *Halton (Regional Municipality)* [1993],²⁸⁴ arbitrator Swan found that the employer was not entitled to ask, as a condition of granting sick-leave pay, for the routine disclosure of the nature of

²⁸² *Eastern Provincial Airways (1963) Ltd.* (1981), 29 L.A.C. (2d) 306 (Bruce)

²⁸³ *York County Hospital* (1992), 25 L.A.C. (4th) 189 (Fisher)

²⁸⁴ *Halton (Regional Municipality)* (1993), 32 L.A.C. (4th) 137 (Swan)

7:600 Entitlement to Diagnosis and Other Specific Medical Information

the employee's disability, "if that expression mean[t] the precise medical diagnosis of the employee's illness or injury."

That is not to say, as the cases on which we rely point out, that there may not be specific circumstances in which the corporation is entitled to such information, subject to its undertaking to maintain the confidentiality of that information and its restriction to those members of the corporation's staff who reasonably require to have access to it. It may be that such reasons as ensuring that sick-leave pay is not misused or that its employees and clients are protected against communicable disease would qualify.

In *Salvation Army Grace Hospital* [1995],²⁸⁵ arbitrator Tettensor concluded that the section of the employer's certificate of illness that asked for the "Nature of Illness" should be qualified to make it clear that a detailed diagnosis was not required. He suggested that the form be revised by adding, after the phrase "Nature of Illness," the expression "(not Detailed Diagnosis)." He also commented that the request for disclosure of "Type of Treatment Recommended" was appropriate, for it was less invasive than a requirement to disclose "Treatment Recommended."

Where an employer is seeking information regarding diagnosis or treatment specifics, it must do so on an individual, rather than an automatic, basis. In finding that certain aspects of an employer's absenteeism awareness program were unreasonable, arbitrator Smith, in *St. Michael's Extended Care Centre* [1994],²⁸⁶ stated that the medical certificate referenced in the policy was "repugnant," given its automatic nature, in that it required the attending physician to provide a diagnosis, a treatment prescription, and a prognosis:

Those kinds of requirements are not an appropriate demand to place on an employee in the automatic fashion contemplated by this policy ... Without consideration of the individual circumstances, more information appears to be required by this certificate than necessarily dictated by the mere number of absences of the employee.

Arbitrator Dumoulin, in *Ottawa Citizen* [1996],²⁸⁷ held that a collective agreement clause that required an employee on sick leave to furnish a medical certificate "establishing that the employee [was] incapable of working" by implication disentitled the employer from requesting a "diagnosis" to verify the employee's claim to sick benefits.

The arbitrator noted that the collective agreement provision specifying the "content" of the medical certificate did not require that a medical diagnosis be provided:

In my judgment, if the parties had intended to have such a confidential medical fact as a diagnosis given to the Employer whenever it requested it, they would presumably have specified that in the one sentence of the collective agreement that deals with the contents of a sick leave medical certificate. For this board to order that the Employer has the power to obtain, whenever it considers it appropriate, a medical diagnosis regarding an employee, whether he or she wishes to provide it or not, clear language to that effect would have to be present. Such an order would be adding language to the provision that specifies what medical information the Employer is entitled to.

Arbitrator Dumoulin distinguished the situation from one where the collective agreement was silent regarding the employer's entitlement to medical information:

²⁸⁵ *Salvation Army Grace Hospital* (1995), 47 L.A.C. (4th) 114 (Tettensor)

²⁸⁶ *St. Michael's Extended Care Centre* (1994), 40 L.A.C. (4th) 105 (Smith)

²⁸⁷ *Ottawa Citizen* (1996), 58 L.A.C. (4th) 209 (Dumoulin)

7:600 Entitlement to Diagnosis and Other Specific Medical Information

If the subject matter is not dealt with in the collective agreement, such as notice to the Employer in case of illness, then the agreement can't be a "complete code" on the issue and the Employer can make reasonable rules on that subject. However, when a specific matter like the content of a medical certificate is specified, an arbitrator shouldn't be allowing the addition of confidential medical information to it.

The arbitrator also commented that the portion of the employer's form that requested the reasons for the absence (using options such as illness, injury, etc.) did not constitute a request for a diagnosis, and was, therefore, acceptable.

The case of *Kitimat (District)* [1998]²⁸⁸ illustrates a practical resolution to concerns regarding issues related to diagnosis and treatment. Prior to the hearing, the parties agreed to resolve aspects of the grievance by adopting the following changes to the employer's medical form:

"Diagnosis – including complications; subjective symptoms; objective findings, including results of x-rays and tests" [revised] to "nature of current illness/disability"

"treatment, including medication and operative procedures and dates" [revised] to "nature of medical treatment or intervention; have you recommended a treatment program yes or no and is the treatment program being followed yes or no."

Consequently, the only issue left to be addressed by the arbitrator was the propriety of the employer's medical authorization.

In *Hydro Agri Canada* [2001],²⁸⁹ arbitrator Whitaker summarized the employer's right to obtain medical information:

The employer is entitled in the usual circumstances to information regarding the timing of return to work, restrictions, accommodations, and prognosis, but not diagnosis. The authorities routinely draw these distinctions in an effort to balance what is reasonably required by the employer and the employee's privacy. There may be unusual circumstances where in the administration of a claim for sick leave or in a disciplinary investigation, an employee may be obliged to disclose a diagnosis, however the general application of the policy should not require this in the usual course. Even as in this case where the employer is self-insured, this balancing of interests should apply.

Where an employer is seeking information regarding diagnosis or treatment specifics, it will normally have to substantiate its need for that type of information. This may require that the employer first take other available steps to investigate the circumstances underlying what it views as a questionable illness. The information must be reasonably required, it must be requested on an individual rather than a pre-determined basis, and appropriate pre-cautions must be taken to guarantee confidentiality of the information once received.

²⁸⁸ *Kitimat (District)* (1998), 74 L.A.C. (4th) 351 (Kinzie)

²⁸⁹ *Hydro Agri Canada* (2001), 95 L.A.C. (4th) 99 (Whitaker)

7:600 Entitlement to Diagnosis and Other Specific Medical Information

7:603 An employer generally will be entitled to obtain more medical information relating to an employee's illness (or recovery) in cases involving prospective leaves, ability to work, and issues related to accommodation and modified work.

In *School District No. 5 (Southeast Kootenay)* [2002],²⁹⁰ arbitrator Korbin considered the form of medical certificate that an employee's physician was required to complete in support of the employee's application for an extended or partial medical leave of absence (with the latter category amounting to an ongoing reduction in the employee's regular hours of work). He concluded that the nature of the leave entitled the employer to seek more information than it might be entitled normally to receive in cases involving approval of a short-term medical absence:

Cases of prospective medical leave clearly differ from cases where the Employer seeks to validate, after the fact, short-term periods of absence due to illness or injury... Requests for partial and extended medical leaves present unique circumstances which require the Employer on a routine basis to consider a broader spectrum of medical information than may be required for standard cases of sick leave.

The employer's form of medical certificate required that the physician address the following questions regarding the employee's treatment: (i) Was the employee prescribed a course of treatment that rendered him unable to work his full assignment? (ii) If no course of treatment was prescribed, had a course of treatment been recommended that would render the employee unable to work his full assignment? and (iii) If a course of treatment had been prescribed or recommended, had the employee followed the prescribed or recommended course of treatment?

Arbitrator Korbin found that these questions were permissible.

The first thing to note about these queries is that they do not actually elicit a description of the treatment. Rather, they limit requested information to whether treatment has been prescribed or recommended and whether that treatment, whatever it is, is being followed. The questions elicit information in two possible ways – whether treatment is a part of the illness giving rise to the request for leave or whether the treatment itself is the reason for the requested leave. These questions are not about the nature of the treatment and are therefore not unreasonably probing of the [employee's] medical condition. In this regard, the Employer seeks only the information that may assist it, together with the other information provided, in making the necessary determination about the requested leave. Therefore, I find that [these queries] are reasonable.

In certain cases, an application for a medical leave will be supported by a physician's recommendation that is, at least in part, based on a presumptive recovery period commonly accepted by the medical profession. In *St. James-Assiniboia School Division No. 2* [2004],²⁹¹ arbitrator Peltz found that the production of a physician's statement (in the case of anticipated childbirth) with a projected date of confinement and a request for six weeks' sick leave was not sufficient in itself, and that the employer also was entitled to receive a medical assessment that had been conducted after delivery, based on known facts and medical requirements.

Issues related to fitness to work or to continue to work, modification of duties, and accommodation generally entitle an employer to make inquiries that are more searching in nature than would otherwise be the case, and, as such, may enable the employer to insist upon the provision of

²⁹⁰ *School District No. 5 (Southeast Kootenay)* (2002), 107 L.A.C. (4th) 224 (Korbin)

²⁹¹ *St. James-Assiniboia School Division No. 2* (2004), 131 L.A.C. (4th) 313 (Peltz), discussed further in Section 7:403 at [p.145](#).

7:600 Entitlement to Diagnosis and Other Specific Medical Information

particulars that would, in other circumstances, be considered as amounting to an overly invasive inquiry.

7:700 OBJECTING TO AN EMPLOYEE'S MEDICAL CERTIFICATE

7:701 An employer who is not prepared to accept the sufficiency of an employee-tendered medical certificate must advise the employee why it is rejecting the certificate. The employee must be given timely notice so that she can consider whether to address those concerns by providing additional medical information. Where an employer fails to do so, the arbitrator is likely to conclude that the employee's medical evidence, although limited or cursory, must, in the circumstances, be found to justify the employee's position.

In *Firestone Tire & Rubber Co. of Canada Ltd* [1973],²⁹² arbitrator Weatherill relied on his earlier decision in *Reflex Corp. of Canada Ltd.* [1968],²⁹³ wherein he had stated:

Clearly, when an employee returns from an absence due to illness, the occasion is proper for the company to require some certification of fitness. Where the certificate is not satisfactory, the company could properly require a further certificate, or could direct its own medical examination. Such a procedure, however, must be carried out in accordance with ordinary principles of fairness. If, as in the instant case, the company is to reject the medical certificate offered by the returning employee, it must state the grounds for such objection, and must point out to the employee what it requires before it will permit his return. If the certificate in itself is not satisfactory, the employee must be advised of that, so that he may either protest the reasonableness of the company's rejection of it, or request a more ample certificate from his doctor. If a further medical opinion is required, then again the company must advise the employee of that fact.

Arbitrator Weatherill found in the *Firestone* case that the employer had not given any reasons for its outright rejection of the employee's medical certificate. In upholding the grievance, he concluded:

While as we have indicated, the company was entitled to its doubts as to the grievor's fitness and would have been entitled to require a medical examination, preferably by an independent doctor, there is, in support of the certificate on which the grievor relied, the evidence of a specialist in dermatology and of the grievor's own doctor. The doubts in the case, proper though they may have been, must be said to be met by the specialist evidence. There is no evidence to the contrary and the company took no steps once the clear certificate was offered to it, to call that certificate in[to] question. It simply refused to permit the grievor to return. Having in mind the principles set out in the cases referred to above, it must be concluded that in the instant case the company has not shown that it acted properly in refusing to accept the doctor's certificate [last offered].

In *Martindale Sash and Door Ltd.* [1972],²⁹⁴ the employee presented himself as being able to return to work after an absence of 10 months. He advised the employer that his doctor had told him he could return, but that his "back could go out at any time." The employee did not present any written documentation, and the employer did not make any inquiries of the employee or his doctor regarding his condition and fitness to return to work. The arbitrator found that the employer had reasonable grounds to demand a medical certificate, and that the employer, if it wanted further proof, was

²⁹² *Firestone Tire & Rubber Co. of Canada Ltd.* (1973), 3 L.A.C. (2d) 12 (Weatherill)

²⁹³ *Reflex Corp. of Canada Ltd.*, unreported, July 17, 1968 (Weatherill); referred to in *Eaton Automotive Canada Ltd.* (1969), 20 L.A.C. 218 (Palmer)

²⁹⁴ *Martindale Sash and Door Ltd.* (1972), 1 L.A.C. (2d) 324 (Fox)

obligated to request such a certificate. It did not, and, as a consequence, the grievance was granted. Arbitrator Fox stated:

The board is of the opinion that the employer, after the employee had provided him with reasonable and probable grounds for suspecting that he was unfit to work, and having the undoubted right to demand that he produce a medical certificate of fitness, failed to discharge the onus that was on him. In short, he did not go far enough in his inquiry to see if the employee was able to work. Accordingly, the board finds that the grievor was unjustly discharged [when the employer refused to permit him to return to work].

The employee in *International Nickel Co.* [1974]²⁹⁵ presented medical forms that authorized his return to work. He was advised he would not be permitted to return until the company physician certified he was fit to do so. As part of that process, the company physician requested information from the employee's physician. Despite repeated follow-ups by the company's physician, the information was not received from the employee's physician for one month. The company physician then cleared the employee to return the following day. Arbitrator Johnston found that while the request for the additional information was reasonable, the employer nevertheless had to bear the cost of lost wages during this period:

We conclude that if the company intended to require a further report from [the specialist] about the completeness of his ... certificate, then it should have explained these requirements fully to the grievor so that he could pursue the necessary information from [the specialist] on the basis of the patient-doctor relationship with his own sense of personal urgency ... we believe this would have produced the desired information much more quickly. If the company chose not to put the matter within the grievor's power in this way, then it should bear the burden of delay – and not the grievor – when its investigation one month later showed the return to work medical certificates to be fully substantiated. In failing to inform the grievor as suggested, or to compensate him for the delay, we conclude that the company's conduct fell below the standard of fairness and reasonableness expected of it in these circumstances.

Similarly, in *Hudson Bay Mining and Smelting Co., Limited* [1988],²⁹⁶ arbitrator MacLean found that while the employer acted reasonably in seeking further medical information prior to permitting the employee's return, it "failed to meet its responsibilities in one respect: it did not clearly indicate to the Grievor what further assurances of fitness to return to work it required of him." Recognizing there would have been some delay involved even if the employer's expectations had been clear, the employee was compensated for approximately one-half of the missed shifts.

The *Firestone Tire & Rubber Co. of Canada Ltd.* case was accepted as an accurate statement of the law in the context of arbitrator Steel's summary of principles in *Thompson General Hospital* [1991],²⁹⁷ wherein she stated:

Before the employer can place additional requirements on the employee, it must, in accordance with ordinary principles of fairness, state the grounds of its objection to the medical certificate offered by the grievor and must point out to the employee what it requires before it will permit his return. If the certificate in itself is not satisfactory, the employee must be advised of that, so that he may either protest the reasonableness of the company's rejection of it, or request a more ample certificate from his doctor. If a further medical opinion is required, then again the company must advise the employee of that fact.

²⁹⁵ *International Nickel Co.* (1974), 6 L.A.C. (2d) 443 (Johnston)

²⁹⁶ *Hudson Bay Mining and Smelting Co., Limited*, unreported, July 11, 1988 (MacLean)

²⁹⁷ *Thompson General Hospital* (1991), 20 L.A.C. (4th) 129 (Steel)

7:700 Objecting to an Employee's Medical Certificate

In *Nelsons Laundries Ltd.* [1997],²⁹⁸ arbitrator Somjen held that the employer's failure to take timely issue with the employee's medical certificate was sufficient to uphold the employee's claim for lost wages. He stated that "the onus is on the employer to clearly indicate to the employee if a medical certificate is unsatisfactory and exactly what is required from the employee in a further certificate."

It is certainly reasonable and would be reasonable in other instances for the employer to require more detail than a brief handwritten report, in light of [the grievor's] medical history and repeated absences due to back problems. Requiring a detailed report was reasonable and if the employee refused to provide the appropriate detail with sufficient notice, refusing to allow the employee to work would also have been reasonable. However, in the present circumstances, because the grievor provided a report indicating that he was fit to work, and the employer did not question that report until he showed up for work a month later, I find that the employer should not have refused to allow the grievor to work [on the two days in question]. Therefore, I uphold the grievance.

²⁹⁸ *Nelsons Laundries Ltd.* (1997), 64 L.A.C. (4th) 120 (Somjen)

7.800 FACTORS TO REVIEW WHEN CONSIDERING A DIRECTION TO PROVIDE MEDICAL INFORMATION

This checklist will assist in assessing the facts that may or may not justify a demand for an employee to provide medical documentation. It also will assist a union in exploring relevant aspects of the issue with a grieving member.

A. Are There Limitations Governing the Employer's Right to Seek Medical Documentation?

- Is the employer's right to request medical documentation partly governed by either a statutory provision or the terms of a collective agreement? If so, do the circumstances fall neatly within the terms of either? Is there any possibility that the provision may be circumscribed by other factors, including other clauses in the collective agreement? (See Section 7:202, commencing at [page 103](#).)
- If the collective agreement provides the employer with discretion to require medical documentation, has the employer undertaken a proper exercise of that discretion? (See, for example, Section 7:304, commencing at [page 132](#).)
- Are there any medical documentation provisions in the collective agreement that could be said to constitute a complete code dealing with certain aspects of proof of illness? (See Section 7:204, commencing at [page 112](#).) If so, do the provisions govern the specific circumstances that give rise to the employer's request? (Recall that a provision that limits the requirement to provide medical documentation to justify an absence will not necessarily relieve an employee of having to provide medical documentation to address issues such as the employee's ability to work safely, the need for accommodation, and the likelihood or prognosis for regular future attendance in cases involving excessive but innocent absenteeism.) (See Section 7:205, commencing at [page 115](#).)
- If there are conditions stipulating when a medical certificate may be required, does their inclusion limit the employer's right to require a medical certificate in the specific circumstances under consideration? (See Section 7:202, commencing at [p. 103](#).)
- If there are collective agreement provisions governing the matter, are they subject to an express or an implied term of reasonableness?²⁹⁹
- Is the matter addressed by a policy governing the requirement for production of medical documentation? Is the employer's policy defensible? If not, are the circumstances such that the employer may, nevertheless, be entitled to require the requested documentation, based on the arbitral principles that would apply in the absence of a policy's having been adopted?

²⁹⁹ Reasonableness generally will not be a precondition where the collective agreement stipulates that a medical certificate will be required at a certain point, such as after an absence of three days. The matter may be different however, where the clause is discretionary, as, for example, the employer may request a medical certificate after an absence of three days. An express or statutorily implied provision that requires the employer to act reasonably also may have an impact on such determination. (See Section 7:304, commencing at [p. 132](#).)

- Is there a workplace practice that governs when medical information is required? Is there a defensible rationale for departing from that practice? Is this a case where advance notice should have been given so that the employee could consult with the physician at the time of illness rather than after receiving the employer's request following conclusion of the illness? (See Section 7:203, commencing at [page 109](#).)
- Regardless of any limitations imposed by the collective agreement, is there a reasonable basis for suspecting that the employee's absenteeism was not legitimate, thereby possibly entitling the employer to insist on the provision of medical documentation in the particular circumstances? (See Section 7:202, commencing at [page 103](#).)

B. Do Reasonable Grounds Exist to Require Production of Medical Documentation?

(i) In a case dealing with absence due to illness, does the employee's absence or the employee's pattern or frequency of absence raise a reasonable question as to whether (a) a particular absence was justified; (b) the employee was making every reasonable effort to attend at work; or (c) there was some other justifiable reason for being concerned about the employee's health or ongoing attendance? (See sections 7:302(a) and 7:203 commencing at [pages 118](#) and [109](#) respectively.)

- Where medical documentation is being requested to corroborate an absence, did the employee know or should the employee have known that medical corroboration would likely have been requested given the circumstances of the matter? If not, would some form of corroboration, whether medical or otherwise, have been available when the employee was advised of the need to produce corroboration? Even where the employee was aware that medical corroboration was required, are the circumstances such that an arbitrator might relieve the employee from having failed to fulfill that expectation? (See sections 6:302 and 6:303 commencing at pages 75 and 77 respectively.)

(ii) In a case involving fitness to work or fitness to return to work, do the employee's circumstances or actions raise a reasonable question as to whether the employee can safely perform the functions of the position in question? (See section 7:302(b) commencing at page [119](#).)

- Included in the considerations will be the nature of the injury and its impact on safety. (See Section 7:302(b) commencing at page [119](#).) The length of absence also may be a factor, in that an employer may not be entitled to seize upon a short absence to justify medical proof of fitness where the employee had been performing at a somewhat reduced capacity for some time prior to the most recent absence.
- Related to these issues is whether the employer's expectations regarding fitness are reasonable and defensible. Could steps be taken to accommodate the employee's return, either through a short-term "work hardening" process or by way of longer term accommodative measures?
- An employer will not generally be entitled to refuse to return an employee to the workplace on the basis of a concern that there is a high probability that the injury or medical condition is likely to reoccur (See Section 6:403 commencing at page 89.)

(iii) In a case involving potential accommodation or modified duties, is the medical documentation reasonably required to facilitate the employer's assessment of these issues? (See Section 7:302(c) commencing at [page 127](#).)

(iv) In a case involving the sufficiency of a medical certificate or other information that has been provided, is the information deficient in one or more essential respects? (See Section 7:302(d), commencing at [page 128](#), along with Section E of this checklist.)

C. Is the Documentation Being Sought Proper or Reasonable in the Circumstances?

- Has the employer adopted an incremental approach to minimize unnecessary intrusions upon the employee's privacy? (See Chapter 5, commencing at page 53.)
- Has the employer adopted appropriate precautions to ensure that the medical information is handled in a confidential manner? (See Section 7:602, commencing at [page 155](#).)
- Has the employer reviewed its present form of medical certificate, if one exists, to ascertain whether any of the information sought on that document is inappropriate, and, as such, might justify the employee's refusal to have the physician respond to the queries that are properly addressed on that form?
- Is the information that is being sought reasonably necessary in the circumstances of the case? (See sections 7:301 to 7:304 commencing at [page 116](#).) Consider the specific points that can be advanced to justify such a contention.
- If the employer is seeking to have the employee provide medical documentation from a specialist (for example, a report from a psychiatrist), are the circumstances such that a requirement of this nature would be considered to be justified at this stage? (See Chapter 5 regarding the need to adopt an incremental approach.)
- Do the circumstances underlying the request for medical documentation raise the potential for imposition of discipline? Medical information may not be compellable solely to attempt to substantiate that an employee had lied about the reason for absence, or to consider whether the employee's conduct was affected by health considerations, in circumstances where the employee had not raised health issues to explain what might be disciplinable conduct. (See, for example, the discussion of arbitrator Christie in the *Canada Post* case referenced at page 221 of section 8:300.)
- Is the employer asking that the employee provide either a diagnosis or particulars of treatment? If so, is that requirement defensible in the circumstances? (See Section 7:602 commencing at [page 155](#).) Are there any factors (such as a medical issue of an extremely sensitive or embarrassing nature) that might tilt the balance against the employer's being able to seek generally accepted, routine, information, such as the nature of the illness or disability (as opposed to the diagnosis), the prognosis, if any, and the length of the employee's expected absence? (See Section 7:601, commencing at [page 152](#).)

D. Is the Medical Consent or Release Limited to Information that Is Reasonably Required?

- Is the consent that has been prepared by the employer limited to releasing information that is responsive to those questions that were properly advanced in the employer's request for medical information? Does the consent extend to authorizing the physician to provide additional information at some future point without the employee's further authorization or knowledge? (See Section 4:201, commencing at page 40.)
- Where an employee refuses to execute a proper consent or withdraws a consent that had been executed previously, the employer must consider a non-disciplinary response. In such instances, consider whether the employee has been advised of the consequences likely to flow as a result of a refusal or withdrawal of consent. (See Section 4:203, commencing at page 49.)

E. Is the Employer Seeking Additional Information to Supplement or Clarify Medical Information that Has Been Provided by the Employee?

In considering whether such a request is justifiable:

(i) Can the employer substantiate that there are reasonable concerns raised on the face of the document?

- Does the medical certification cover the entire period of the absence? Is there a legitimate concern that the physician did not see the employee until some time after the absence commenced? Does the certification reasonably attest to the employee's being under the physician's care for the entire period of the absence? Is the certificate subject to question on the basis that the physician did not schedule a timely follow-up when such might be expected in the circumstances?
- Does the certificate disclose that the physician's certification was based on objective evidence (for example, a physical examination and possibly test results), or was the opinion based on subjective information (i.e., primarily a recitation by the employee as to the nature of her complaints)?
- Does the certificate appear to have been altered in any way? Is it all in one person's handwriting? Is it signed by the physician? Is it an original, or a photocopy? Where there is a concern regarding the legitimacy of the certificate (for example, the possibility of a suspected forgery), is it possible to compare the certificate with any earlier certificates provided by the same physician?

(ii) Is there reason to question the probative value of the medical certificate on the basis of answers to questions put to the employee when, or shortly after, the certificate was provided? Where appropriate, these questions might include the following:

- When did the employee visit the physician in relation to the onset of the illness? Did the physician physically examine the employee or did the physician rely primarily on the symptoms the employee had communicated to the physician? Were any tests ordered or medication prescribed, as opposed to the particular type ordered or prescribed? If medication was prescribed, did the employee fill the prescription in a timely manner, and has the medication been taken as prescribed? Was the employee

referred to a specialist for a further consultation? Was the employee advised to schedule a subsequent appointment, and, if so, how long after the initial appointment? Did the employee attend the subsequent appointment? If not, why not?

- If the absence followed upon a workplace conflict (either with management or fellow employees), what exactly did the employee communicate to the physician in that regard? If the employee was known to have participated in recreational or other physical activities during the period of his certified absence, what exactly did he tell the physician, if anything, about his intended activity, and what, if anything, did the physician say in return?
- Was the physician the employee's regular physician, and had the physician been treating the employee for the condition prior to this particular absence?
- If the employee's absence extended beyond a few days, could the employee have been accommodated by provision of alternate duties, on a short term basis? Would the employee have known that alternate duties might be made available, and did the employee advise the physician of that possibility?
- What input did the employee have in determining the length of the absence recommended by the physician? Did the employee request that the physician authorize a period of absence? Did the employee do anything, other than convalesce at home, during the period of the absence?

(iii) If the employer is to be requesting further medical information, has it advised the employee, in a timely manner, why the medical information received is inadequate or subject to question, as well as advising what further information is required? Has the employer prepared a letter to the employee, as well as to the employee's physician (with a copy to the union where appropriate), setting forth additional information that should be provided to the physician, and requesting that the physician address its concerns as enumerated in the letter? Does the letter advise that the employer reserves the right to request further information (including possibly an employer-initiated medical examination) in the event it is not satisfied with the additional information received?