ILLNESS AND ABSENTEEISM
CONTENTS

PART III DEALING WITH ABSENTEEISM

USING THIS MANUAL

This manual is intended for use by employers, unions, and other human resource personnel. It has been written so that it can function on one level as a "how-to" manual, and, on another, as a comprehensive resource that can be used to render advice and prepare for arbitral presentations and submissions.

The manual distils the relevant principles and summarizes the cases from which those principles have been drawn. The principles serve as a starting point, with their application to a particular set of circumstances depending on the underlying facts and, to a certain extent, on an assessment of the competing interests of the parties. The case extracts illustrate the reasoning arbitrators have employed when addressing various interrelated issues. A particular case extract, therefore, may appear in more than one section of this publication.

For ease of reference, an arbitral award, whether issued by a sole arbitrator or a three person panel, has been referred to as the award of the arbitrator who chaired the matter.

The manual is not limited to the prescriptive. The expectation is that by considering the reasoning underlying the various principles, the reader will be able to understand better the approach an arbitrator might take in any particular case.

Every effort has been made to adopt a balanced approach. While the interests of unions and employers often differ, operating from a recognized set of principles minimizes disputes and unnecessary arbitral expenses. It may also minimize the anguish that employees suffer when the parties are litigating issues that might have been avoided or resolved had all the parties had a better understanding of the applicable arbitral principles.

The detail contained in this manual might be seen by some as daunting. Recognizing that possibility, every effort has been made to organize the contents in a manner that will allow the manual to be used in a progressive fashion. All the principles addressed in a particular chapter are set forth at the outset of that chapter. A reader wanting to explore a topic can readily move from the Table of Contents to the appropriate chapter, and then from the Summary of Principles set forth at the outset of that chapter to the specific pages where the principle is discussed.

Many of the principles are interrelated, so that it often will prove beneficial for the reader to begin by reading the entire chapter in which the relevant principle is found. A matter that may appear simple may require further analysis once the balance of the related material has been considered.

The chapter formats are not identical. It was feasible to weave the case summaries into most chapters, but the topics in chapters 8 and 9 (Medical Examinations at the Direction of the Employer and Medical Examinations Ordered by an Arbitrator) were better addressed by summarizing the relevant cases, in chronological order, at the end of each of those chapters. This chronological approach also illustrates the manner in which these two challenging areas of the law have developed.

It is intended that the contents of this manual will be replaced as required. During the intervening period, supplements will be provided to subscribers on the manual's website and by email. Subscriber input is welcomed, particularly as it relates to website content, suggestions for additional materials, or commentary on any aspect of this manual.

The website can be accessed at www.illnessandabsenteeism.com. Access to the subscriber's portion of the website will require entry of the subscriber's current subscription number as set forth below, along with the password that the subscriber has associated with that subscription.

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CHAPTER 1

BALANCING PRIVACY AND WORKPLACE INTERESTS

1:000 INTRODUCTION

This chapter provides a brief introduction to the issue of employee privacy and the manner in which that interest has been balanced against the employer's workplace interests. These issues are dealt with in greater depth in Chapter 12 in the context of considering the admissibility of evidence compiled during the course of a surreptitious surveillance.

1:100 OVERVIEW

Arbitrators generally have accepted that employees have a right to privacy.[1] They also have accepted that an employer's workplace interests provide the employer with the right to inquire into matters related to workplace absenteeism and qualification for sick leave or other wage-replacement benefits. These competing interests are reconciled by requiring that employer incursions into an employee's privacy be reasonable in the circumstances.[2] This is accomplished partially by requiring that employers adopt a staged or incremental approach to seeking medical information, with a right to resort to a more intrusive approach in cases where the employer's reasonable need for information was not satisfied by a less intrusive inquiry.[3]

An employee's right to privacy may be further affected by the need to balance the interests of the parties during the arbitral process. The concept of natural justice (i.e., the right to a fair hearing) empowers or obligates an arbitrator in appropriate circumstances to order that an employee undergo a medical examination by an independent medical examiner, or, again where appropriate, to undergo a medical examination by a physician who has been retained by the employer to assist in the preparation and presentation of its case.[4]

Except in limited circumstances, an employee's refusal to provide information that is reasonably required is not a disciplinable matter. An employee's maintenance of a privacy right in these circumstances, however, can have other arbitrally countenanced consequences. These include non-payment of sick benefits or a refusal to permit the absent employee to return to work until satisfactory medical information has been provided.[5]

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[1] The source of this right is discussed extensively in Chapter 12.

[2] The issue of reasonableness is considered in Chapter 7 (Medical Certificates) and Chapter 8 (Medical Examinations at the Direction of the Employer). A two-step reasonableness test, as it relates to the introduction of surveillance evidence, is canvassed in Chapter 12 (Surveillance Evidence).

[3] This requirement is discussed in Chapter 5 (Adopting an Incremental Approach to Seeking Disclosure).

[4] See Chapter 8 (Medical Examinations at the Direction of the Employer), Chapter 9 (Medical Examinations Ordered by an Arbitrator) and Chapter 12 (Surveillance Evidence).

[5] The consequences of an employee's refusal to consent to provide necessary medical information or to undergo a medical examination is considered in Chapter 4 (Consent to the Release of Medical Information) and in Chapter 8 (Medical Examinations at the Direction of the Employer).

Where an employee submits to a medical examination or provides medical information that could not reasonably be required, that evidence is admissible nevertheless. In the case of surreptitious surveillance evidence, the emerging view is that even where the surveillance offended the employee's right to privacy, the surveillance evidence must be admitted in order to ensure that the principles of natural justice are met.

SUMMARY OF PRINCIPLES

1:101 The right to privacy has been characterized as a "fundamental right of employment law." That right, however, is not paramount, but must be balanced against the employer's rights and obligations. [Page 11]

1:102 An employer can intrude upon an employee's privacy only if it has a legitimate business purpose for doing so. [Page 11]

1:103 Any such intrusion on an employee's privacy must be reasonable, having regard to all the circumstances. [Page 12]

DISCUSSION OF PRINCIPLES

1:101 The right to privacy has been characterized by one arbitrator as a "fundamental right of employment law."[6] That right, however, is not paramount, but must be balanced against the employer's rights and obligations.

> 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.[7]

And, as stated elsewhere:

> The privacy right that attaches to medical information is not absolute. There is a tension between an employer's right to or legitimate need for information in order to properly manage its business and the workplace, and to meet its statutory and collective agreement obligations, and an employee's right to personal privacy.[8]

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[6] Rosewood Manor (1990), 15 L.A.C. (4th) 395 (Greyell). Statements such as these must be considered in the context of the legislation of the governing jurisdiction. For instance, this observation was made in the context of a broadly recognized privacy right set forth in the British Columbia Privacy Act. That legislation is discussed in Section 12:502 of this manual.

[7] Hudson Bay Mining and Smelting Co. (Zochem Division) (2001), 93 L.A.C. (4th) 289 (Springate); relying on Brewers' Warehousing Co. Ltd. (1982), 4 L.A.C. (3d) 257 (Knopf)

[8] S.E.I.U., Loc. 1 Canada (2008), 174 L.A.C. (4th) 210 (Surdykowski)

1:102 An employer can intrude upon an employee's privacy only if it has a legitimate business purpose for doing so.

> There is no question that an employer has a continuing right to inquire into any absence from work and that an employee has a continuing obligation to account for any absence, including an absence alleged to be due to sickness … But in that context it is important to recognize that there is nothing inherent in the employer-employee relationship which vests in an employer a discretionary right to compel employees to compromise their right of privacy through the disclosure of personal medical information. In particular, that is not a discretion which falls within the retained rights concept which vests in an employer those rights coincidental with the management and direction of the enterprise and the work force which have not been bargained away. An employer can only intrude upon the privacy of an employee if it has a legitimate business purpose tied to the employer-employee relationship.[9]

From a business perspective, absenteeism can be costly. Under the majority of collective agreements, the employer is required to assume the cost of wage-replacement benefits. Efficiencies are lost, and employee morale can be affected by excessive absenteeism. Arbitrator Picher has commented on the impact of workplace absenteeism:

> The seriousness of innocent absenteeism in the workplace cannot be minimized. It is an obvious irritant when services or production are disrupted or delayed because of the intermittent absence of employees caused by unpredictable illnesses, however brief. Often the cost in terms of disruption is compounded by the very real cost of sick-pay benefits incurred by the employer. The economic toll of innocent absenteeism can be enormous … It is not surprising, therefore, to find a number of means by which employers have sought to reduce the instances of innocent absenteeism among their employees … Accepting that in the spectrum of illness there is a grey area in which the willingness of an employee to attend at work will depend to some extent on a degree of tolerance to a minor discomfort, absent communicable disease, there may be situations in which an employer has a legitimate interest in seeking to deter employees from the decision to stay home. The object is to encourage that employee who would have a medical justification for not coming to work, but who could, with a minimum of discomfort nevertheless put in a productive day. [10]

[9] Rosewood Manor (1990), 15 L.A.C. (4th) 395 (Greyell), quoting from Victoria Times Colonist, unreported, February 12, 1986 (Hope)

[10] Toronto (City) (1984), 16 L.A.C. (3d) 384 (Picher). This case considered an employer's policy requiring that employees provide a doctor's certificate once their level of absenteeism has exceeded a stated threshold.

1:103 Any such intrusion on an employee's privacy must be reasonable, having regard to all the circumstances.

> 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.[11]

Similarly, it has been determined that:

> Whether a medical certificate ought to be required in the circumstances of a particular case remains a matter within management's discretion to be exercised reasonably and in good faith …[12]

Among the circumstances that must be considered of course are the provisions of the collective agreement:

> 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 …[13]

Finally, the arbitrator's role in addressing such competing interests

> … is to endeavour to balance the legitimate interests of the employee and the employer. The employee has an interest in his/her personal privacy, free of unreasonable and excessive intrusion. The employer has an interest in protecting the safety of all its employees including the employee in question, and protecting the safety of the public, and the safety of its property.[14]

[11] Rosewood Manor (1990), 15 L.A.C. (4th) 395 (Greyell) , quoting from Victoria Times Colonist, unreported, October 11, 1985 (Hope)
[12] St. Lawrence Lodge (1985), 21 L.A.C. (3d) 65 (Emrich)
[13] School District No. 5 (Southeast Kootenay) (2002), 107 L.A.C. (4th) 224 (Korbin)
[14] Ocean Construction Supplies Ltd. (2005), 140 L.A.C. (4th) 257 (Blasina)

CHAPTER 2
DEFINING ILLNESS

2:000 INTRODUCTION

This chapter considers the approach that arbitrators have taken when determining whether an illness or other medical condition justified an employee's absence from work.

2:100 OVERVIEW

Not all medical conditions or illnesses justify an employee's absence from work. In order to establish a justifiable illness, the employee must advance objective evidence that establishes a physical or emotional inability to perform work. The employee does not have to demonstrate total incapacity; it is enough to show that, because of illness-produced discomfort, weakness, or pain, it would be unreasonable to expect the employee to perform the available work.

Several types of conditions have merited specific consideration by arbitrators.

Jet lag and fatigue or tiredness by themselves do not amount to an illness. A hangover has been considered by some, but not others, to constitute an illness. While stress may amount to an illness, it may be difficult to measure or gauge. Continuing physical pain may, at a certain point, cease to qualify as an illness justifying absence from work. A condition that might amount to an illness can cease to qualify as an illness where the employee engages in conduct inconsistent with a continuing illness.

Arbitrators have, at times, drawn a distinction between illness (as, for instance, debilitating stress) and underlying workplace issues that were considered to be the real or primary cause for the employee's absence.

Normally, an arbitrator will not arrive at a medical determination in the absence of supportive medical evidence. Where an employer considers that a medical certificate is inadequate, it falls upon the employer to seek additional information. A simple rejection of the certificate will not be sufficient. It is only where additional information had been reasonably requested, and the employee had then failed to provide that information, that the employee's failure would weigh against the employee in the ultimate disposition of the matter.

SUMMARY OF PRINCIPLES

2:201 In order to justify an absence from work on the basis of a particular illness, the employee normally must establish that the discomfort, weakness, or pain attributable to the illness were such that it would be unreasonable to expect the employee to perform the available work.

2:301 An employee's obligation to establish an illness sufficient to render the employee unable to work normally is met by the introduction of expert medical evidence.

2:401 An employee who engages in conduct inconsistent with an alleged illness or a subsequently prescribed convalescence, particularly if the conduct is not disclosed to her doctor, may be subject to discipline. The employee also may also be disentitled from having her condition qualify as an illness within the context of the collective agreement provisions dealing with paid benefits.

2:200 DEFINITION OF ILLNESS

2:201 In order to justify an absence from work on the basis of a particular illness, the employee normally must establish that the discomfort, weakness, or pain attributable to the illness were such that it would be unreasonable to expect the employee to perform the available work.

An illness that would justify an absence was defined by one arbitrator in relatively narrow terms:

> The only legitimate reason for an absence under the sick leave plan is an illness of such severity that the employee is simply unable to perform the work he or she is required to do.[15]

In that case, the arbitrator was addressing a fairly trivial medical complaint, where the employee was seeking sick benefits for a one-month absence due to a series of nosebleeds.

A better and more workable definition of an illness constituting a justifiable absence was set forth in *St. Jean de Brebeuf Hospital* [1977]:[16]

> Quite clearly, an employee does not have to demonstrate total physical incapacity to work, it is enough to show that, because of illness produced discomfort, weakness or pain, it would be unreasonable to expect the employee to perform the work of the job.

The question of whether a condition will constitute an illness is to be determined on the facts of each case.

In *Queen Elizabeth II Hospital* [1998],[17] arbitrator Moreau stated:

> Given the nature of the claim for illness leave, one cannot say categorically which circumstances will give rise to a claim and which will not. In that regard, we agree with the following comments [of arbitrator Stewart] from the *Ontario (Ministry of Housing)*[18] decision at p. 6:
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> > "The more appropriate test, and the one we adopt, is that illness and hence entitlement to sick leave is established where the objective evidence establishes a physical (or possibly emotional) inability to perform work."

Putting aside the issue of a self-induced illness,[19] melding the comments of arbitrators Swan and Stewart provides the basis for a definition of illness that is fair and reasonable, and makes eminent good sense:

> Illness is established where the objective evidence demonstrates a physical or emotional inability to perform work. The employee does not have to suffer total incapacity; it is enough to show that, because of illness-produced discomfort, weakness or pain, it would be unreasonable to expect the employee to perform the available work.

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[15] University of Windsor, unreported, October 15, 1976 (Stewart), as set forth in St. Jean de Brebeuf Hospital (1977), 16 L.A.C. (2d) 199 (Swan)
[16] St. Jean de Brebeuf Hospital (1977), 16 L.A.C. (2d) 199 (Swan)
[17] Queen Elizabeth II Hospital (1998), 77 L.A.C. (4th) 170 (Moreau)
[18] Ontario (Ministry of Housing) (1994), 39 L.A.C. (4th) 1 (Stewart)
[19] Arbitrator Stewart found that a self-induced hangover constituted an illness for the purposes of paid sick leave. Others have disagreed. That question should be dealt with by adopting a purposive approach to interpreting a sick-leave clause rather than attempting to adopt a definition of illness that addresses the circumstances in a particular case. Note that a purposive approach was adopted in Kenroc Tools Corp. (1990), 17 L.A.C. (4th) 416 (Picher) (see p. 31 of this manual).

The foregoing definition of illness may, however, be modified by the terms of the collective agreement. Such a modification usually would be found within the clause that identifies the type of absence that would qualify for payment of sick leave. For instance, a sick-leave provision could either modify the definition of illness (for example, excluding self-induced illness or establishing a higher threshold for qualifying an absence as being compensable), or could exclude payment for enumerated circumstances such as where the employee was not under a doctor's continuous care and/or was not following a prescribed treatment regime.

2:300 ARBITRAL TREATMENT OF SPECIFIC CONDITIONS

2:301 An employee's obligation to establish an illness sufficient to render the employee unable to work normally is met by the introduction of expert medical evidence.

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An employee who asserts that his absence was justified due to illness bears the onus of adducing sufficient evidence to support that contention. That obligation, however, must be understood within the context of the overriding arbitral principle that requires an employer to provide the employee with timely notice of its concerns regarding the sufficiency of the employee's medical evidence. An employer's failure to provide this notice likely will result in the arbitrator's concluding that the employee's medical evidence, although limited or cursory, must, in the circumstances, be found to justify the employee's absence. These matters are considered further in Chapter 6.

Arbitral Treatment of Various Conditions

Several types of conditions have merited specific consideration by arbitrators.

In rejecting the contention that a case of **jet lag** constituted an illness, arbitrator Ladner, in *British Columbia* [1990],[20] addressed the **need for expert medical opinion** to establish that certain types of symptoms constitute an illness:

> Anyone who has suffered from any extreme form of jet lag has felt sick and out of health. It is necessary, however, to determine whether one is in fact sick and out of health rather than simply feeling that way. Distinguishing between a disease and the symptoms of a disease is not a judgment that can always be made by a layman; in some circumstances it may require an expert opinion. I am not suggesting that it was necessary for the Grievor to attend upon a doctor on March 5th or 6th, but rather that where there is a difference of opinion as to whether the symptoms described by a claimant are evidence of an illness, an expert opinion, such as from a doctor, may be required before a reasoned conclusion can be reached about the issue. Clearly, an employee who is tired because he or she did not get to bed early enough the night before is not ill. On the other hand, the employee who feels exactly the same way because that person has mononucleosis is just as clearly ill. An observer of those two employees may notice no difference whatever between them; indeed the employee himself or herself may notice no difference. But clearly one is ill and the other is not. The difference between them can only be perceived by an expert.

Arbitrator Ladner concluded that in the absence of an expert's opinion that the employee's symptoms amounted to an illness, the union had failed to discharge the necessary onus.

Similarly, in *TRW* [2005],[21] the arbitrator rejected the employee's claim of illness (**debilitating stress**) on the basis that the evidence fell "far short of explaining the nature and extent of the employee's mental or emotional impairment and the reason it rendered him unable to work."

The "notes" that had been provided by both the Employee Assistance Program (EAP) counsellor and the employee's physician in that case were found to be insufficient to establish the employee's claim of illness. The notes of the EAP counsellor were discounted by arbitrator Hinnegan:

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[20] British Columbia (1990), 18 L.A.C. (4th) 187 (Ladner)
[21] TRW Linkage & Suspension Division (2005), 144 L.A.C. (4th) 215 (Hinnegan)

> The counselor in question is not a medical practitioner so that her observations as to the grievor's demeanor and emotional condition during her visits with him are only that and do not in any way constitute a medical diagnosis of a mental disability preventing the grievor from working during the period in question. It is not my function to make a medical diagnosis based on the EAP counselor's, or any one else's, observations of the grievor's demeanor or behaviour. Any medical diagnosis of a totally disabling mental impairment preventing the grievor from working must be solely that of a qualified medical practitioner. There was no indication at the hearing that the EAP counselor's notes were provided to the grievor's personal physician to assist him in making a diagnosis.

In considering the medical information that had been tendered, arbitrator Hinnegan stated:

> The only medical information provided on which to make a determination as to whether the grievor has established by probative and cogent medical evidence that he was absent from work due to a total disability as a result of a mental condition caused by stress in his workplace situation were the written notes and comments provided by the grievor's family physician … [He] was not called at the hearing to explain his notes so that I am left with his handwritten notes in the various certificates and forms in order to make any determination of the issue before me.

Arbitrator Hinnegan concluded he was dealing with a **workplace issue** rather than a case of debilitating stress.[22]

An arbitrator normally will not arrive at a medical determination in the absence of **supportive medical evidence**. For instance, in *Greater Toronto Airports Authority* [2007],[23] the arbitrator found it was beyond an arbitrator's expertise to draw medical conclusions based on a surveillance videotape that the employer had introduced. In *Canada (Attorney General)* [2008],[24] the employee had refused to comply with a new uniform code that had been sanctioned by the union. The employee became tearful and was diagnosed as suffering from an "**adjustment crisis.**" His health then declined to the point that he was diagnosed as suffering from "**severe major depression.**" In addressing the facts underlying her decision, the arbitrator opined that the employee was suffering, on one or two occasions, from a state of psychological distress. There was no direct medical evidence to support that finding. In setting aside the arbitrator's decision in favour of the employee, the Federal Court stated:

> The adjudicator's field of expertise is in labour relations and, unless she refers to the opinion of either a physician or a psychologist in determining that a certain event caused psychological distress to [the grievor], she is clearly exceeding her powers.

The court also commented that the arbitrator's decision was unreasonable, and it noted that the employee was responsible for his own predicament.

Arbitrator Stewart rejected the necessity of a medical diagnosis in *Ontario (Ministry of Housing)* [1994].[25] In what surely must be the high-water mark in attempting to define the concept of illness, she found that an employee's **premeditated and self-inflicted hangover** constituted an illness that entitled him to paid sick leave. She made that determination despite the fact that the employee had telephoned the employer's support clerk on Friday to report he would be ill on the following Monday. When asked how he could predict he would be ill, the employee replied that he was attending a wedding (on the Sunday) and would have a hangover the following day. The arbitrator rejected the

[22] This case is discussed further at p. 25 of this manual.
[23] Greater Toronto Airports Authority (2007), 167 L.A.C. (4th) 81 (Bendel)
[24] Canada (Attorney General) (2008), 180 L.A.C. (4th) 97 (F.C.)
[25] Ontario (Ministry of Housing) (1994), 39 L.A.C. (4th) 1 (Stewart)

need for medical evidence, stating that all that was required was that the employee have established his physical incapacity to perform his work in order to qualify for sick pay. She also found it was irrelevant that the "illness" had been self-inflicted. She stated that to reject the claim on that basis would be potentially to require rejection of a sick-leave claim from a smoker who was suffering from lung cancer, or from an obese employee who was suffering from an illness associated with obesity. In her view, the appropriate response would have been for the employer to have paid the sick-leave claim and to have considered whether the employee's conduct should be met with a disciplinary response.

In *North Bay General Hospital* [2009],[26] the employee had been denied sick pay on the basis that the cosmetic surgery she had undergone for removal of excess skin had fallen within the **"willfully self-inflicted" exclusion** set forth in the collective agreement. Arbitrator Stephens concluded that the exclusionary provision did not extend to the circumstances of this case:

> The employer argues that the exclusion of "willfully self-inflicted injury" operates to deny coverage to the grievor. The employer submits that "willfully" means making a decision of one's own free will. That may well be one aspect, but it does not adequately convey the sense of word. In my view, the word "willfully" goes beyond free will, and describes an action that is in some manner contrary to good sense or good advice, where the individual is being deliberately obstinate for example, such as the willfulness of a misbehaving child.
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> The employer also says the grievor's injury, in order to constitute a "self-inflicted injury", need not be at her own hand, and the phrase is broad enough to capture injury by another person at the invitation of an employee. While this is arguably true, I also find that the phrase "self-inflicted injury" conveys the sense of an action that is illegitimate and harmful. One speaks of an individual "inflicting" pain or injury on another in a violent confrontation, but not of the surgeon "inflicting" an injury on a patient during surgery, unless the surgery goes wrong. Similarly, a "self-inflicted" injury, in the typical use of the term, is an injury that is caused either by reckless, destructive behaviour or by a suicide attempt.

In arriving at his decision, arbitrator Stephens referenced a 1986 award of arbitrator Hinnegan in *A & P* [1986],[27] in which arbitrator Hinnegan found that an accidental sunburn did not constitute a "self-inflicted" injury; and an earlier award of arbitrator Burkett, again in *A & P* [1984],[28] where arbitrator Burkett found that injuries suffered in self-defence did not fall into an "engaging in fisticuffs" benefit exclusion. He stated:

> The finding [in the sunburn instance] tends to support a narrower application of the concept of self-inflicted injury, in that the arbitrator held that the manner in which the injury was sustained was understandable, and that this barred the application of the exclusion, even in the face of an established employer practice. In my view, this approach is even clearer in the 1984 *Re A. & P.* decision by arbitrator Burkett. The collective agreement contained an exclusion for injury caused as a result of "engaging in fisticuffs." This is as neutral a phrase as one could use to describe a fight, and the phrase "engaging in" would appear to capture any participant in the "fisticuffs", regardless of how the fighting came about. Yet Arbitrator Burkett held that the exclusion did not apply where the employee was defending himself. Thus, arbitrators have found that "self-inflicted" exclusions do not apply where the employee's actions could be seen as reasonable or understandable.

[26] North Bay General Hospital (2009), 181 L.A.C. (4th) 179 (Stephens)
[27] Great Atlantic & Pacific Co. of Canada Ltd. (1986), 25 L.A.C. (3d) 189 (Hinnegan)
[28] Great Atlantic & Pacific Co. of Canada Ltd. (1984), 18 L.A.C. (3d) 44 (Burkett)

Arbitrator Ladner's decision in *British Columbia* [1990][29] (regarding the need for an expert's opinion), was followed in *Alcan Smelters* [1997].[30] In that latter case, arbitrator Hope rejected the employee's claim to have been unable to work following a short period of **heavy drinking** that ultimately resulted in the employee's being **maced by police**. The stated reason for the employee's inability to work was that he had a bad headache. He denied he was suffering from a hangover. Arbitrator Hope stated that "In any event, a hangover would not be an acceptable reason for being absent." He summarized the employee's position as one where "… he was unable to account for the headache he experienced or to establish that it prevented him from attending at work." He stated:

> Accepting the fact that being "maced" would not disable the grievor for any significant period of time, the grievor's **self-diagnosis** of his condition would require the support of an opinion from a qualified expert, such as a medical doctor, that the circumstances would be likely to disable him from performing his duties.

In *Metropolitan Authority (Metro Transit Division)* [1989],[31] the employee had been suspended for having failed to call in prior to both her scheduled shift and a second shift that had been scheduled for her later that day. She claimed to have overslept and missed both shifts for medical reasons. She had been seen in the vicinity of a tavern earlier that day but claimed she had not gone into the tavern. She provided no information regarding her underlying medical condition. At the arbitration hearing, the employee's treating physician testified that the employee was being treated for **premenstrual syndrome (PMS).** It was the physician's evidence that a woman suffering from PMS might experience, among other signs, depression, insomnia, and stress-related symptoms. When the physician examined the employee approximately two weeks after the missed shifts, the employee reported to her that she had suffered from a night of insomnia, and that she was disoriented on that particular day. The employee's physician testified that the employee could have been suffering from PMS on that date. After hearing evidence from the employee and her boyfriend, the arbitrator concluded that the employee was suffering from PMS symptoms on the day in question. He described her failure to advise the employer of her condition as understandable, if erroneous:

> One can surely take judicial notice of a number of uncouth expressions and vulgar metaphors used in common parlance to describe women suffering from symptoms of P.M.S. It is unfortunate, but perhaps not surprising, that the grievor might not wish to be fully forthright with the employer's management personnel, even under the best of circumstances, about her medical condition.

Despite the employee's failure to disclose the nature of her "medical excuse", the arbitrator set aside the suspension, and directed she be compensated for the four and one-half days of lost wages.

Although the employee's claim was rejected, based on insufficient medical evidence, arbitrator Swan commented on **influenza or flu** as an illness in *St. Jean de Brebeuf Hospital* [1977]:[32]

> Here the grievor says she had "flu", a word which I did not consider to be an exhaustive medical diagnosis, but a common lay person's expression to describe a set of symptoms which all but the heartiest individuals know only too well. In this case, the grievor specifically mentioned sore muscles and a sore throat.
>
> The fact that a disease is a common one, that its symptoms are difficult to verify, that it cannot be effectively treated except by rest and a degree of self-indulgence, and that it is quite

[29] British Columbia (1990), 18 L.A.C. (4th) 187 (Ladner)
[30] Alcan Smelters and Chemicals Ltd. (1997), 62 L.A.C. (4th) 371 (Hope)
[31] Metropolitan Authority (Metro Transit Division) (1989), 6 L.A.C. (4th) 371 (Archibald)
[32] St. Jean de Brebeuf Hospital (1977), 16 L.A.C. (2d) 199 (Swan)

> properly of little professional interest to the medical profession does not mean that it cannot qualify as an illness.

Although arbitrator Swan recognized that flu-like symptoms can qualify as an illness, it is generally an illness of very short duration, so that symptoms that are said by the employee to persist beyond a reasonable period of time may dictate a closer examination to determine whether the employee met the onus of establishing such illness. He stated:

> The grievor's failure to seek further medical advice when a minor, if unpleasant illness failed to subside after five days of rest casts doubt upon her entire story, and weakens considerably the value of her own evidence.
>
> … The physician's certificate fell outside 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.

Arbitrator Moreau, in *Queen Elizabeth II Hospital* [1998],[33] dismissed a grievance from two nurses who claimed sick pay on the basis that they were suffering from **fatigue,** and consequently, unable to work their operating room shift. The grievance was rejected. The doctor who had provided the employees with medical notes stating they were sick, acknowledged at the hearing that he had based his opinion on what they had told him rather than on any observed or diagnosed signs of illness. In rejecting the grievances, arbitrator Moreau stated:

> I agree with the employer and the awards which distinguish between being tired and being sick. The Alcan Smelters award, for example, refers at p. 377 to the *Demiris Arbitration* "…where the conclusion was that an employee who suffered fatigue as a result of family problems could not rely on that fact to excuse a failure to attend at work." The *Hydro Electric Commission of the City of North York* award dealt with circumstances like those in this case where illness leave was claimed on the basis of a lack of sleep. The arbitration board had the following comments to make on the difference between being tired and being ill at p. 6:
>
> > "We are not dealing here with a situation where an employee by reason of experiencing a prolonged problem becomes so exhausted that he was verging on a physical and/or mental breakdown. We are, rather, dealing with a person who was legitimately tired because he had perhaps only three hours' sleep between Sunday a.m. and Monday noon. He may well have been too tired to report for work on Monday noon but that does not mean that that the reason for the absence falls within any reasonable definition of illness; to so find would be to say that any employee who was legitimately too tired to work would be eligible for sick pay. It is clear that if the parties had intended to have a provision as part of the negotiated working conditions, clear language would have been included in the collective agreement."

In *Sault Area Hospitals* [2001],[34] arbitrator Whitaker considered a grievance where the employee had been denied sick leave on the basis of the insufficiency of a medical note advising that she would not be able to work due to **family stress**. The employee's spouse, who had been injured in a snowmobile accident, had been transferred to a major medical centre some distance from their community. The employee, who claimed (and subsequently testified) that the circumstances caused her to suffer from depression, anxiety, and intestinal disorders, had made it known to the employer that she had left their

[33] Queen Elizabeth II Hospital (1998), 77 L.A.C. (4th) 170 (Moreau)
[34] Sault Area Hospitals (2001), 94 L.A.C. (4th) 230 (Whitaker)

community to be at her husband's bedside. Arbitrator Whitaker commented that the first and a second similar certification of illness ("The above patient will be unable to work due to personal stress until further notice") would not, in his view, have been sufficient to substantiate the claim. The employee, however had presented additional medical information following the filing of the grievance, that being a six-paragraph letter stating she was suffering from a "situational depression and anxiety state," and explaining in some detail the doctor's opinion as to why she could not have worked during the period of her absence. In upholding the grievance, the arbitrator stated:

> In our view, it was entirely reasonable for the employer to conclude, based on their observations of the grievor and a review [of the first two letters], that the information provided [at that point] did not establish that the grievor was disabled by stress and that further information was required in order to prove the claim.
>
> The circumstances of this type of claim are particularly difficult for a number of reasons. Firstly, it is understandable that the grievor would want to be off of work to deal with the terrible tragedy being faced by her family. This means that there was already in existence to the employer's knowledge, a significant causal factor (other than disability) which would prevent her from working. The second point is that "stress" as a disability is difficult to measure or gauge. There is no doubt stress can be disabling. On the other hand, most people live with some degree of stress and so it can be reasonably assumed that stress is not in the normal course, a disabling condition. Finally, as union counsel suggests, this grievance is not intended to open the "floodgates" so that any type [of] stress becomes grounds for absence from work.

The employee, in *St. Joseph's Hospital* [1987],[35] had been absent due to stress she suffered as a result of her mother's serious illness. She testified she was "emotionally depressed, unable to sleep, [and] unable to cope." It was her evidence that she could not cope with simple household tasks, and she was concerned she would not be able to function properly in her nursing position. She attended with her physician. After having spoken with her for 20 to 30 minutes, her physician completed a "Return to School or Work Certificate." It stated that the employee had been under his care, commencing that date, and that she should be able to return to school/work two weeks later. The form did not provide any other information. The employee, however, testified that when the form had been completed, she noticed that the doctor had written "**acute anxiety state**" on her out-patient chart. Her physician was not called to testify.

The employer refused to pay sick pay for the entire two-week period, claiming that the employee was upset or distressed rather than actually ill, and further that she had been authorized by her physician to take two weeks off when, according to the employer's belief, the employee had asked the doctor only to be relieved of two shifts. The employee was immediately advised that she would be paid only two days' sick leave and that any other time required would be without pay.

The arbitrator concluded that the employee was suffering from an illness:

> It is a truism that people respond differently to different situations. Faced with a crisis, some individuals soldier on and indeed find in their work a certain relief from the ongoing crisis itself. Others react as did the Grievor, with great anxiety and "an inability to cope". In the Board's view, this in no way diminishes the fact that the Grievor may have suffered an illness. One can not base illness on causes rather than symptoms. The Grievor's reaction to the illness of her mother was to become emotionally depressed and in her own words she "totally fell apart". In the Board's opinion, such a situation could fall within the definition of "illness".

[35] St. Joseph's Hospital (1987), 28 L.A.C. (3d) 185 (Ponak)

In dealing with the employer's contention that the medical certificate was inadequate to establish that the employee had been ill, the arbitrator commented that it would have been reasonable in the circumstances for the employer to have sought a more informative certificate or to have required that the employee see another physician. A simple rejection of the certificate, however, was not appropriate. If the employer wanted additional information, it should have "requested such proof in clear and unequivocal terms." The arbitrator also commented that if such information had been requested, and the employee then had failed to provide that information, her failure "would have weighed heavily against her in the ultimate disposition of [the] matter."

In *Strathcona County* [2000],[36] the employee's physician authorized a two-week absence from the workplace, for medical reasons, for the same period that the employee had been denied vacation leave. The employee was terminated following the employer's discovery that he had used this period to undertake the very same travel he had intended to undertake on his vacation. A subsequent medical report from the employee's physician advised that the underlying reason for the leave was the **workplace stress** the employee had been experiencing, with the major stressor being that his vacation had been denied. The decision set aside the employee's termination for cause, but did not discuss whether stress of this nature properly could be considered to amount to an illness.

A **diagnosis of stress** can be made by a general practitioner.[37] However, it is a disabling condition that can be difficult to assess.

In *TRW* [2005],[38] arbitrator Hinnegan discounted the notes made by both the employee's physician and his EAP counsellor.[39] Although the physician's notes stated that the employee was suffering from "**acute work-related situational stress,**" arbitrator Hinnegan found they fell "far short of explaining the nature and extent of the grievor's mental or emotional impairment and the reason it rendered him unable to work."

In arriving at his decision, arbitrator Hinnegan commented on the difficulty in assessing stress as a debilitating condition:

> "Stress" as a disability is difficult to measure or gauge. Undoubtedly, stress can be disabling, but, it is perhaps trite to say that most people live with some degree of stress on a daily basis so that the reasonable assumption is that stress is not, in the normal course, a totally disabling condition. See *Re Sault Area Hospitals and S.E.I.U., Loc. 268 ("X")* (2001), 94 L.A.C. (4th) 230 (Whitaker). Following on from that, it seems an equally reasonable assumption that establishing that stress resulting in mental impairment to the point of total disability surely requires probative, persuasive medical information provided by a medical professional qualified to make such an assessment.
>
> Also, in the *Sault Area Hospitals* case, arbitrator Whitaker observed that the typical "notepad" notes of a family physician are generally deemed by arbitrators to be inadequate as a medical diagnosis of mental impairment due to stress to the point of total disability preventing an employee from working at his job for a period of time. See also *Re St. Jean de Brebeuf Hospital and C.U.P.E., Loc. 1101* (1977), 16 L.A.C. (2d) 199 (Swan). In the latter case, the arbitrator noted that the obligation of establishing total disability from working due to stress entitling an employee to sick pay benefits under the collective agreement is on the employee. He also noted that cursory medical notes are of negligible probative value in meeting that onus, particularly in the case of a claimed serious illness.

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[36] Strathcona County (2000), 92 L.A.C. (4th) 1 (Sims). See also p. 31 of this manual
[37] Refer to Brinks Canada Ltd. (1994), 41 L.A.C. (4th) 422 (Stewart) discussed at p. 56 of this manual.
[38] TRW Linkage & Suspension Division (2005), 144 L.A.C. (4th) 215 (Hinnegan)
[39] This aspect of the case is considered at p. 19 of this manual.

> In *Sault Area Hospitals*, the grievor's family physician satisfied that onus by following up his "notepad" certificates with a typewritten six-paragraph letter explaining his diagnosis of a "situational depression and anxiety state" and, further, attended the hearing as a witness to fully explain his diagnosis of the grievor's illness and his opinion that the grievor could not have worked during the period of her absence.
>
> [In this case, a] review of the "diagnostic" comments offered by [the grievor's physician] in his various medical notes shows them to be at the opposite end of the spectrum. His comments are as cursory as cursory gets. His diagnosis of the grievor's illness was "acute work-related situational stress", or some variation of that general phrase. That rather nebulous observation of the grievor's situation falls far short of explaining the nature and extent of the grievor's mental or emotional impairment and the reason it rendered him unable to work.

Arbitrator Hinnegan concluded that he was dealing with a **workplace issue** rather than a case of debilitating stress:

> If any further confirmation is required that this was a workplace issue, albeit a stressful one for the grievor, and not a medically supported total disability, it lies in the simple fact that this whole matter was resolved through a meeting between the grievor and the Plant Manager to clear the air about what had been going on on the floor with respect to the grievor for some period of time. This was a standard labour relations approach to a workplace problem and was in no way a medical intervention or medical treatment of a mental or emotional condition.
>
> Here, the grievor was simply an employee who was having an issue with his supervisor and rightly or wrongly, saw himself as being picked on and harassed and was upset and angry about being disciplined. The situation was no more complicated than that and was a typical workplace situation encountered regularly in any number of workplaces. As [the grievor's doctor] quite accurately described it, the grievor was alleging harassment and was experiencing work-related situational stress or anxiety as a result, which is a far cry from mental impairment due to illness totally disabling him from performing his regular occupation.
>
> There being no medical diagnosis by any qualified medical professional approaching that here, that ends this matter.

The case of *Consumer Glass* [1998][40] illustrates the significant difficulties an employer can encounter when dealing with **psychiatric-related conditions**. The employee, who was found to be suffering from a psychiatric condition, was obsessed and delusional. He believed that his foreman had denied him a promotion, that the foreman was following and spying on him, and that the foreman wanted to have sex with him. He was described as continually confronting the foreman and blaming him for all that was wrong in his life.

Despite several ongoing incidents of a psychiatric nature, the psychiatrist who was jointly chosen to examine the employee recommended, after a relatively short examination also attended by the employee's wife, that the employee return to work. He opined that "although the [employee] was somewhat delusional, he was in control of his behaviour … [and] had undertaken that he would go through proper procedures in handling any difficulties he might have with [his foreman]." The employer rejected that recommendation, and the matter proceeded to arbitration.

[40] Consumer Glass (1998), 70 L.A.C. (4th) 140 (Albertyn)

While it had been apparent to those associated with the employee that he had been experiencing episodes of a psychotic nature, it was not until well into the arbitration that the psychiatrist reconsidered his diagnosis and recommendation.

In his testimony, the psychiatrist, who had been present from the outset of the hearing, testified that he now had revised his earlier opinion. He stated that after having observed the employee at the outset of the hearing and after considering the additional incident that resulted in the termination, it was now his conclusion "that the grievor has been showing symptoms of a **delusional disorder** (which he explained used to be referred to as a paranoid disorder) associated specifically with his job and extended to all persons associated with the workplace … [The psychiatrist] explained that his considered conclusions were that the grievor was not psychiatrically well enough to return to his job; and the grievor could pose a danger to himself and others."

In *Brampton (City)* [2008],[41] the employee claimed he was suffering from a psychological disability that prevented him from driving an employer-provided "Smart Car". In dismissing the grievance, arbitrator MacDowell stated:

> This board of arbitration has no problem concluding that an "**anxiety disorder**", if properly established, would constitute a "disability"; and that if such condition interferes with the … employee's ability to do his/her job, then an Employer may be obliged to engage in a process of accommodation. And if accommodation is required, then there may have to be adjustments on both sides: modification of the employee's duties or equipment on the one hand, and (perhaps) efforts to ameliorate the underlying medical condition on the other. Because disabilities may be transient or permanent, total or partial, treatable or not; and as WSIB practice demonstrates: "work hardening" and steps to promote adjustment or recovery may also be part of the equation. Accommodation is a tripartite, cooperative problem solving exercise, that was aptly described by Sopinka J. in *Board of School Trustees District No. 23 (Central Okanagan) et al v. Renaud et al* (1992), 95 D.L.R. (4th) 577 (S.C.C.).
>
> However the pivotal first step, which triggers these legal obligations, is the presentation of reliable evidence (not just an *assertion*), that the employee actually suffers from a disability – and if he does, that it prevents him from performing his normal tasks. And it is here that the evidentiary foundation is lacking in this case.

The arbitrator commented that the doctor's ultimate conclusion, as recorded in his notes, "was **"normal" anxiety** – which is not a mental illness."

The arbitrator found that "to the extent that the grievor experienced any anxiety with the Smart Car, it was more probable than not that it was related to normal anxiety. "It [normal anxiety] is not a mental illness or disability, let alone a permanent or immutable one. Moreover, even if there were some component of irrational fear, there should at least have been some consideration of whether that could be addressed, therapeutically, and at least some consideration of what that 'treatment' might entail."

Stress may exacerbate an employee's **fibromyalgia.** In *Ottawa (City)* [2009],[42] the employer failed to carry out its duty to accommodate the employee where it failed to implement a medical recommendation to transfer her to a less stressful position.

In *Treasury Board (Department of Human Resources and Skills Development)* [2011],[43] the employee suffered from **environmental hypersensitivity.** Her request to telework was granted, first on a part-time, and then, on a full-time, basis. However, the employer's attitude changed with the appointment

[41] Brampton (City) (2008), 174 L.A.C. (4th) 140 (MacDowell)
[42] Ottawa (City) (2009), 185 L.A.C. (4th) 227 (Picher)
[43] Treasury Board (Department of Human Resources and Skills Development) (2011), 207 L.A.C. (4th) 31 (PSLRB:Paquet)

of a new supervisor who "questioned the eisting accommodations simply because of her own organizational preferences, without attempting to understand [the employee's] limitations." The employee's tasks were changed and her telework arrangement was terminated without consultation with the employee. Damages were awarded for the employer's "reckless conduct."

Continuing pain associated with an illness may cease to qualify, at least at a certain point, as an illness justifying an absence from work. In *DuPont Canada Inc* [1994],[44] the employee had injured her back. That injury caused pain and suffering, and resulted in a restriction of movement. The employee was immediately assigned light clerical duties, and performed such work, for two to six hours per shift, for a period of two and one-half months. The employee continued to experience pain, with little apparent improvement in her condition. Her doctor then recommended she stay off work for 30 days. The employer took issue with that recommendation. It was of the view that the employee was not serious in returning to her regular duties; that her doctor's recommendation was made without full knowledge of the light duties she was offered; and, further, that the doctor's recommendation was inappropriate and medically unsupportable. Arbitrator Starkman agreed. He found that despite suffering continuing pain, the employee was not disabled to the point where she could not present herself at work. He also found that it was unreasonable for the employee to have followed her doctor's advice, given that the employer had made light work available to facilitate her condition.

[44] DuPont Canada Inc. (1994), 42 L.A.C. (4th) 22 (Starkman)

2:400 CONDUCT INCONSISTENT WITH AN ILLNESS

2:401 An employee who engages in conduct inconsistent with an alleged illness or a subsequently prescribed convalescence, particularly if the conduct is not disclosed to her doctor, may be subject to discipline. The employee also may also be disentitled from having her condition qualify as an illness within the context of the collective agreement provisions dealing with paid benefits.

Conduct that is inconsistent with an illness has been considered both here and in section 17:202. This type of conduct is generally considered to be less culpable than conduct which involves flagrant dishonesty on the part of the employee.

In *Hussman Store Equipment Ltd.* [1990],[45] the employee had suffered a pulled thigh muscle while playing baseball. He had been off work on weekly indemnity benefits for almost eight weeks when he was observed playing baseball. He was terminated on the basis that he was off work on false pretences.

The arbitrator stated there was no dispute that the employee had suffered a valid injury and had the right to claim and receive weekly indemnity benefits under the collective agreement. The issue was not whether the employee had been injured, but rather whether he was in receipt of benefits during a period when he could reasonably have been expected to be at work.

Arbitrator Brown commented that it was essential that benefit plans not be abused:

> There can be no doubt that an employer, whether administering a self-insured benefit plan or a fully insured plan, is vitally concerned in the proper application of the benefits for its employees. It is a costly benefit to an employer and one of the most significant benefits for the protection of employees who become ill or injured other than for compensable injuries. It is therefore to the benefit of both parties to ensure that such a plan which must for the most part be maintained on an honour system, not be abused. Where an employee takes improper advantage of that type of benefit there is cause for disciplinary action under the collective agreement by which the benefit is obtained.

In characterizing the employee's behaviour, the arbitrator stated:

> The grievor was in receipt of weekly indemnity benefits and he knew or ought to have known that it was his responsibility to return to work as soon as possible upon recovery from his disability. What he did wrong was not to contact his employer to advise him of his status during June in light of his decision to play baseball. It must be obvious to anyone … that if he could undertake that activity, he could perform his work as an assembler where he was not involved in running or the other movements required of the body including his leg as he did while playing baseball. The grievor claimed, however, that he had his doctor's permission as a matter of therapy to play baseball. However that may be, the incongruity of that situation with his absence from work and receiving benefits should have triggered his report to the company who could then have had a further examination by [the doctor] and a specific medical report as to the grievor's ability to return to work either for full or modified duties. The grievor did not consider his employer in that regard or his responsibilities as a receiver of its benefits.
>
> On the face of these facts it must be concluded that the grievor was careless in the performance of his obligations as an employee to return to work as soon as he could

[45] Hussman Store Equipment Ltd. (1990), 16 L.A.C. (4th) 19 (Brown)

> reasonably have done and to keep his employer informed as to his ability to return to work. The grievor did not do so in circumstances where his injury was recovered to the extent at least that he could take on activities which were patently inconsistent with his remaining off work without further explanation. While therefore the grievor did have a valid claim initially for weekly indemnity benefits, I find that he remained off work while in receipt of those benefits in circumstances when it is clear that he should have made efforts to advise the company of his physical condition and to have arranged a definite time to return to work. The doctor's certificate of an indefinite return to work which had originally been given is not consistent with the grievor's physical activities in the last week of June and the requirements of his job. In contemplation therefore of playing baseball, it would have been reasonable for him to provide the company with an explanation that he had permission from his doctor to engage in that activity and to advise the company of his intended return to work date. Either the grievor did not think clearly about his employment status or he was uncaring whether anyone might learn of his baseball activities and in either event must be considered to have intentionally abused his benefit privileges by failing to return to work at his earliest possible time which was his responsibility to assume. The company must rely on an employee's honesty in making a determination of when he is fit to return to work as the employer cannot be expected to know on a daily basis, what the employee's medical condition and suitability for a return to work may be.

The arbitrator also commented on the employee's failure to be truthful when first confronted with the fact that he had been playing baseball. By not advising that he had his doctor's permission to play baseball (which might have been valid), "it discloses a guilty mind concerning his physical condition and his fitness to work at his regular job at that time."

Arbitrator Brown referenced an unreported award in *Re Canadian National Railway Co. and International Brotherhood of Boilermakers,* unreported, September 20, 1989 (Picher). In that case, arbitrator Picher upheld the termination after considering a similar factual situation.

> With the greatest respect to counsel for the union, the issue in the instant case is not whether the grievor's sporting activities aggravated his condition or hindered his convalescence. It is whether he has deliberately sought to mislead his employer in matters pertinent to its interests, including his availability to resume working. In the arbitrator's view the conclusion is inescapable that he had, and that he has done so knowingly and without colourable excuse …

Arbitrator Brown in *Hussman* also commented that while it was inadvisable, it was at least somewhat understandable that the employee would have lied when informed he had been terminated. The employee said that he did so because he was scared and nervous. "That conduct though unacceptable did not establish that he falsely asserted his claim for benefits but is a factor to be taken into account in the relief claimed in the grievance."

In reinstating the employee without any retroactive compensation, arbitrator Brown stated:

> Had the grievor maintained his initial position which he knew to be false through to the hearing and had not given the company the correct information, then there would be little, if any, basis for consideration of the mitigation of the penalty in his favour. In these circumstances where there was not a fraudulent claim for benefits but negligence in the exercise of the grievor's responsibility to return to work at the earliest possible time and untruthfulness with his employer, while cause for discipline, the penalty of discharge is, in my opinion, too severe and is not consistent with the ratio of the cases referred to above in

> which fraudulent claims for benefits have been found and terminations of employment have been upheld.
>
> One of the important factors in the consideration of disciplinary penalties is not only to correct the employee's future behaviour but deterrence of similar misconduct. As I have stated, the administration of a benefit plan is successful when employees are forthright with their employer and where abuses of such a plan have occurred, it must be brought forcibly to the attention of the defaulter as well as others who may obtain benefits under the plan that such conduct is not acceptable and that penalties up to discharge will be applied. It is my view that the grievor did not reach the point in the particular circumstances of this case, where the company was justified in imposing the maximum penalty. I find, however, that the company would have been justified in imposing a substantial suspension from work without pay.

In substituting a suspension for the termination, the arbitrator considered the employee's 15 years of service; the absence of any similar offences in his past employment history; the difficult economic circumstances in the province; the fact that the employee had not intended to take undue advantage of the company but had done so by his negligent conduct; the fact that the employee had not entered into a deliberate scheme to defraud the company, but failed to meet his responsibilities in his employment relationship, which caused the company to take the action it did against him; and the fact that the employee was now sincere in his remorse, and that corrective discipline would be effective in his future employment with the company.

In *Kenroc Tools Corp.* [1990],[46] arbitrator Picher accepted for the purpose of his decision that the employee was suffering from a physical ailment for which he had sought treatment. The doctor had prescribed pain medication and antibiotics, and had advised the employee to stay off work for two weeks to rest. During that period, the employee, unbeknownst to his doctor, spent five days at a hunting camp. Upon discovery of that information, the employer's insurer denied the sick-leave benefit claim, and the employer imposed a five-week suspension. Arbitrator Picher upheld the suspension, and denied the claim to be indemnified for lost benefits:

> In the arbitrator's view the parties to the collective agreement did not intend that an employee who receives the benefits of the medical indemnity plan could, at least without some authorization from his physician and his employer, engage in an away-from-home vacation trip during the course of a medical leave. As a person receiving indemnity benefits at the company's expense, the grievor was under a minimal obligation to follow a faithful programme of treatment and convalescence, and to clear in advance both with his physician and his employer any contemplated activities which might be unusual in the circumstances. This [the grievor] failed to do, and in so doing, departed from the intention of the sick leave indemnity plan and the related duty of care and disclosure which he owes to the company.

The foregoing cases can be contrasted with the decision of arbitrator Sims in *Strathcona County* [2000].[47] There, the employee, after having been denied an earlier vacation request, sought and received a medical leave for that same two-week period. He left a medical note at the workplace immediately prior to leaving. It simply stated that he would be absent for the two-week period on medical grounds. The employee was evasive when he was questioned on his return. In response to questions prepared by the employer, the employee subsequently provided a letter from his doctor that stated in part:

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[46] Kenroc Tools Corp. (1990), 17 L.A.C. (4th) 416 (Picher)
[47] Strathcona County (2000), 92 L.A.C. (4th) 1 (Sims)

> He requested from me a medical leave of absence from work regarding the stress he was experiencing. This would have the dual purpose of facilitating absence from work to help him gather his composure and he would also be able to avail of some summertime vacation during this period of disability. In this regard he was given a medical leave of absence from me [for the two-week period].

The doctor was not called to testify. The employee, however, testified that his doctor did not suggest he see either a psychologist or a psychiatrist for his stress, nor did he prescribe any medication or other treatment.

As previously planned, the employee and his companions hiked the West Coast Trail during this period. Although the employee testified he mentioned the hike to his doctor, his doctor had not suggested the trip. He summarized his doctor's advice as being to "get away from the place."

The employee, who had been terminated for cause, was reinstated without penalty. In upholding the grievance, the arbitrator appeared to ignore the fact that no disclosure had been made to the employer. He minimized the fact that the employee had requested that his doctor authorize him to be off work for the same period that he had been denied vacation leave, and he accepted without question the doctor's letter of explanation that the employee later provided to the employer. He did so despite the employer's objection that the letter was "hearsay" in nature, and should not be accepted into evidence without the doctor having been called and made available for cross-examination.

The *Strathcona County* decision [2000][48] and the earlier reasoning of arbitrator Stewart in the premeditated and self-inflicted hangover case of *Ontario (Ministry of Housing)* [1994],[49] are in stark contrast to arbitrator Picher's well-reasoned decision in the *Kenroc Tools* [1990][50] case.

Greater Toronto Airports Authority [2007][51] stands as a reminder that an employer who is alleging inconsistent conduct generally will be expected to call medical evidence to satisfy the arbitrator that employee conduct as captured on video surveillance was medically inconsistent with the employee's stated medical condition.

With the exception of *Strathcona County,* the cases reviewed in this section generally replicate the approach taken in the culpable absenteeism decisions that are set forth in Chapter 17, and in particular, those addressed in section 17:203, commencing at page 828 of this manual.

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[48]The arbitrator's decision in Strathcona County (Strathcona County (2000), 92 L.A.C. (4th) 1 (Sims)) can be said to have been predicated on the view that the parties, in the collective agreement, had "addressed themselves specifically to what happens "where it can be shown that reasonable doubt exists in respect to the purpose of an absence claimed to be due to illness." The agreement stated that:

"an employee may be required to provide proof of illness upon return to work, where it can be shown that reasonable doubt exists in respect to the purpose of an absence claimed to be due to illness. Such proof may take the form of a medical certificate or a sworn statutory declaration. The employer may also require the employee to submit proof of attendance at a medical, dental or optical appointment when time off from work is granted to attend such appointments."

The arbitrator acknowledged that the facts of the case "clearly raised what would be a reasonable doubt in the mind of any Employer about the bona fides of [the grievor's] illness." While acknowledging that a medical certificate is not "irrefutable proof," the arbitrator characterized this as a matter to be determined based on the specifics of the contractual terms. He stated, "This contractual stipulation for the form of proof to be used in the specific event of a doubt over the purpose of an absence makes it impossible for us to accept the proposition that the resulting medical certificate is of no weight in deciding the validity of the absence." The arbitrator also noted that the facts in this case were distinguishable from some other cases in that the doctor here was not misled, and, consequently, there was no clear evidence refuting the certificate or undermining the basis on which it was given.

[49]Ontario (Ministry of Housing) (1994), 39 L.A.C. (4th) 1 (Stewart); see also the discussion at p. 20 of this manual.

[50] Kenroc Tools Corp. (1990), 17 L.A.C. (4th) 416 (Picher)

[51] Greater Toronto Airports Authority (2007), 167 L.A.C. (4th) 81 (Bendel)

CHAPTER 3
OBTAINING CREDIBLE MEDICAL INFORMATION

3:000 INTRODUCTION

This chapter considers the difficulties in both obtaining and then relying on medical certificates.

3:100 PRACTICALITY OF REQUIRING A MEDICAL ASSESSMENT

For the most part, arbitrators have attempted to find a suitable balance between the employer's need for appropriate disclosure of an employee's medical condition (with the concomitant employee privacy concerns),[52] the practical need to give effect to medical certificates, and the reality that medical certificates often are issued primarily or solely on the basis of the employee's stated symptoms (without an appropriate medical examination), and at times without full (or any) employee disclosure of relevant medical or employment-related factors.

Although arbitrators consistently have found that an employee must do more than merely assert she was ill in order to justify her absence on that basis, the requirement to produce a corroborative or explanatory medical certificate can be problematic:[53]

> It is not uncommon for a collective agreement to require the production of a medical certificate for all but the shortest illnesses. This practice poses, in my view, the danger of a gross abuse of the medical services which are provided as a part of the social legislation of this Province. It would appear inevitable that medical practitioners will be deluged with requests from employees, not for medical services but for proof of illness. Many short-term illnesses, as any mortal human being knows well, are not amenable to medical treatment. Were the requirements of many collective agreements enforced to the letter, employees with common colds who ought to be home in bed with a warm drink would be forced to attend at their doctors' offices, and physicians who ought to be meeting the treatable medical needs of their patients would, to satisfy some employer, be certifying the existence of cold symptoms which can be best cured by the body's own defences.

However, problems associated with obtaining medical certificates do not obviate the need for, or relieve employees from, having to obtain such certificates. Obstacles to obtaining a medical certificate are not insurmountable, and an employee who fails to obtain one when required does so at her own risk.[54]

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[52] The issue of balancing the employee's desire to limit disclosure of private medical information and the employer's legitimate need to obtain information about an employee's health or medical condition has been canvassed in Chapter 1.
[53] St. Jean de Brebeuf Hospital (1977), 16 L.A.C. (2d) 199 (Swan)
[54] See the excerpt from Dashwood Industries Ltd (1998), 73 L.A.C. (4th) 395 (Rose), referenced at p. 110 of this manual.

3:200 ISSUES REGARDING THE ADEQUACY OF MEDICAL ASSESSMENTS

Employers and unions look to physicians to provide accurate and objective medical information. The failure of some physicians to meet that standard is central to much of the grievance-related litigation common to this area.

The failure of some physicians to provide a proper medical certificate may be attributable to one or more of the following factors:

> (i) Physicians are busy professionals. Medical conclusions rendered with respect to minor or medically insignificant issues often are based solely on subjective information provided by the employee. The physician's failure to stipulate whether she is relying primarily on an oral history rather than clinical signs of illness may lead to questions regarding the validity or usefulness of such certificates.
>
> (ii) There is always the possibility that a particular employer, union, or employee will attempt to massage information to achieve a specific outcome or a preferred resolution of a workplace issue. While most physicians do not have the time or inclination to probe the truth or accuracy of information that has been provided, they should, where possible, disclose the essential facts on which they have based their medical opinion. Failure to do so may justify an employer's or a union's efforts to seek clarification or additional information.
>
> (iii) Physicians may adopt an inappropriate advocacy role on behalf of their patients and thereby unwittingly contribute to, or, in fact, create litigious issues in the workplace.
>
> (iv) Physicians may contribute further to workplace litigation by making recommendations based on inadequate knowledge of either the employee's position or alternate work that might be provided to the employee as part of a return-to-work arrangement. While some of the responsibility for this can be attributed to inadequate or untruthful information provided by a particular employee, the ultimate responsibility must be borne, at least partly, by the employer. Employers need to ensure that the physician has the required information before making her recommendation. Where it is suspected that a recommendation was made without a full understanding of the workplace situation, then the employer should provide the physician with the necessary information along with a request for a supplementary certificate or report.
>
> (v) Physicians generally have no knowledge of the terms of the collective agreement or any associated benefit plan. A mere statement that an employee was "absent due to illness" must be considered in that context.

Arbitrators have acknowledged that patients can be manipulative when seeking a medical certificate to serve a particular end:[55]

> Theoretically, a patient will be truthful, non-manipulative, and sincerely interested in as quick a genuine recovery as reasonably possible. Such a recovery would enable a return to work without an excessive absence or an overreaching claim for WI or Workers' Compensation benefits. However, theory and reality may diverge. One employee may be motivated to overextend his/her absence; another may be motivated to return to work before really being ready. There is no obligation upon the physician to accept that the patient is being truthful; and there is no absolute obligation upon an employer to accept a doctor's note at face value.

[55] Ocean Construction Supplies Ltd. (2005), 140 L.A.C. (4th) 257 (Blasina); see also the comments of arbitrator MacDowell in Brampton (City) (2008), 174 L.A.C. (4th) 140 (MacDowell), discussed on p. 143 of this manual.

Arbitrators also have recognized that a physician may not be completely objective, or may not be competent, or have the necessary knowledge, to make an informed decision to certify the employee as being unable to work.

> The real world is not an ideal one. In the ideal world doctors would have perfect knowledge of the relevant medical matters, their patients and their patients' workplaces, and would be completely objective. If that were so, a doctor's simple statement certifying that an employee was ill and unable to work for some specified period of time, and specifying restrictions for return to work and accommodation purposes when and as appropriate, would be good enough for all purposes and nothing further, including any diagnoses or even a statement of the nature of the illness or injury would be required. But that is not the real world, or at least not the one I am familiar with. Medical health professionals are also human beings. The fact is they are not always entirely objective. It is quite appropriate for medical health professionals to act as advocates[56] for their patients in medical matters within their competence, but not when the advocacy extends beyond their medical expertise or matters of which they have direct knowledge, such as when they have little or no knowledge of the workplace or their patient's job or employment situation other than what their patient decides to tell them.[57]

In accepting the opinion of the employer's expert witness over that of the employee's treating psychiatrist, arbitrator Smith, in *Canada Safeway Ltd.* [2000],[58] stated:

> First, it must be noted that while I have no doubts about the sincerity of [the treating psychiatrist's] views, he is the treating psychiatrist who must have as his primary focus the successful treatment of the Grievor and not the truth or accuracy of her recitation of the events. From his perspective the needs of the patient and her requirements are paramount and not the needs of the Employer. To that extent, some of his responses during cross-examination revealed that he was acting more as an advocate than an objective observer. Such detracts from the strength of his evidence. A similar conclusion was reached by Arbitrator Tettensor in the Mauro grievance case [Canada Safeway Ltd. (1996), 42 C.L.A.S. 264]. That [the treating psychiatrist] omitted from his report a material and significant fact, namely the Grievor's previous conviction for theft underscores this point …"

In *Brampton (City)* [2008],[59] arbitrator MacDowell commented on the difficulty an employer can encounter in having to evaluate the validity of information provided by health-care professionals:

> In the "real world", a busy family physician may not be fully informed about the employment context and may not probe the truth or completeness of what s/he is being told by the patient; nor may s/he be inclined to express an opinion that is contrary to that patient's wishes. Accordingly, [the witness's] job includes sifting through the material that doctors provide, in order to see whether it fairly illuminates the worker's medical situation and fairly supports the employee's preferred resolution of a workplace issue. From her perspective, it is a problem solving exercise that requires accurate and objective medical information; because

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[56] An example of the physician as advocate can be found in DuPont Canada Inc. (1994), 42 L.A.C. (4th) 22 (Starkman), where the physician acknowledged that, with no material change in the employee's condition, he had altered his opinion because he thought that to do otherwise might have an impact on the employee's claim to Workers' Compensation benefits. See, also, Peel Regional Police Services Board (2011), 204 L.A.C. (4th) 65 (Trachuk), where the physician's advocacy on behalf of the employee was a critical factor in the arbitrator directing the employee to submit to an independent medical examination.

[57] S.E.I.U., Loc. 1 Canada (2008), 174 L.A.C. (4th) 210 (Surdykowski)

[58] Canada Safeway Ltd. (2000), 94 L.A.C. (4th) 86 (Smith)

[59] Brampton (City) (2008), 174 L.A.C. (4th) 140 (MacDowell). This case is reviewed further, commencing at p. 143 of this manual.

> what the employee wants or thinks s/he is "entitled to" may not be appropriate to the work setting; and the medical evidence tendered by the employee may not be sufficient or complete. In [the witness's] experience, these cases call for a careful assessment of what the information means for the workplace problem under review – a process that is influenced, but not always governed, by what the employee wants or what his/her doctor has recommended. For as Arbitrator Surdykowski has noted, the doctor may be neither objective nor fully informed.

Physicians generally have no knowledge of the terms of either the collective agreement or any associated benefit plan. A mere statement that an employee was "absent due to illness" must be considered in that context.[60]

In *Providence Care, Mental Health Services* [2011],[61] arbitrator Surdykowski commented extensively on issues related to medical assessments and mis-use of sick leave. Not all people are "objective, honest, ethical, candid and truthful." Many physicians have taken on an inappropriate advocacy role in the unionized workplace. He stated:

> [While advocacy within the health care system may be appropriate], such advocacy may be misplaced when it enters the employment or legal world. Particularly in the unionized work world there is a very limited place for medical health professionals as advocates. There the role of the medical health professional is to provide the necessary medical facts and expert opinions as required, and to leave advocacy in the collective agreement benefits administration process, or the grievance arbitration process, to the union which is charged with the duty and responsibility of representing employee interests in that respect.

The need for objectivity in providing medical information is a matter that has been dealt with by some of the provincial colleges of physicians and surgeons. For instance, the following portion of the Medical Certificates section of the Policy Manual published by the British Columbia College of Physicians and Surgeons was referenced in *Ocean Construction Supplies Ltd.* [2005]:[62]

> A physician may be pressured by the employee to provide information to the employer which meets the employee's objectives. However, physicians must recognize that employers and their insurers will be relying on the information provided to them by the physician in making a number of decisions concerning questions such as those raised above. A physician may be required to testify in proceedings involving a dispute between an employer and an employee. These proceedings could be before courts, boards of arbitration under collective agreements, boards of inquiry in human rights disputes, the Workers' Compensation Appeals Tribunal or a Workers' Compensation Board Reinstatement Officer. In such proceedings, the physician may be subpoenaed as a witness, required to produce clinical notes and examined and cross-examined under oath about the information already provided by the physician to the employer or the employer's insurer. Employers and insurers do indeed rely on representations made by physicians concerning the matters referred to above and in so doing they may incur financial liability for sick leave or disability pay. As well, the employer will be relying on representations that the employee is fit to return to work. Physicians should recognize that if they provide misinformation or erroneous or unfounded opinions concerning such matters employers and insurers who have relied on such representations may have claims for damages against the physician.

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[60] See Grace Hospital (1984), 16 L.A.C. (3d) 263 (MacIntyre) and Kawneer Company Canada Ltd. (2001), 100 L.A.C. (4th) 129 (Luborsky), discussed on p.138 and 139 of this manual.
[61] Providence Care, Mental Health Services (2011), 204 L.A.C. (4th) 345 (Surdykowski)
[62] Ocean Construction Supplies Ltd. (2005), 140 L.A.C. (4th) 257 (Blasina)

Similarly, a Statement issued by the College of Physicians and Surgeons of Manitoba was considered by arbitrator Peltz in *St. James-Assiniboia School Division No. 2* [2004].[63] An excerpt from that statement follows:

> Unlike Guidelines which are also published by the College as general clinical advice for the profession, Statements are formal requirements which doctors must follow … The intent of Statement 139 on Sickness Certificates is to allow employers enough information so they can assess the basis for the medical opinion being given, while at the same time not divulging so much personal information that patient privacy is being undermined. In a background comment, the College notes that employers and insurers rely upon physician certificates and may incur financial liabilities for sick leave and disability coverage.

The operative text of that Statement (college website version) states:

> Obligations
>
> When providing a certification, a physician must:
>
> Ensure there is consent from the patient to provide information to a third party.
>
> Limit the information provided to that covered by the patient's consent.
>
> Limit information to that specifically required by the third party within the scope of the patient's consent.
>
> Ensure that all statements made are accurate and based upon current clinical information about the patient.
>
> Limit the statements to the time period with respect to which the physician has personal knowledge. A physician must not state that the patient has been under the physician's care for a particular time period unless that is a fact.
>
> When providing a sickness certificate, avoid diagnostic terms. Information provided may indicate:
>
> -Prognosis relative to the work situation
>
> -Activity limits and ability limits
>
> -Risk factors (to the patient and others)
>
> When providing a sickness certificate on the basis of a history provided by telephone or following an office visit where clinical evidence of the illness does not continue to be evident, specifically say so in the sickness certificate.
>
> A physician must not imply that the physician has evidence of an actual diagnosis if the information is restricted to history or examination that is non-contributory.
>
> When providing a sickness certificate, have accurate information about the requirements of the patient's job before giving an opinion on fitness to work.
>
> A physician who gives a certification containing a statement which the physician knows or ought to know is untrue, misleading or otherwise improper, commits an act of professional misconduct.

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

3:200 Issues Regarding the Adequacy of Medical Assessments

Concerns related to the adequacy and sufficiency of medical certificates are discussed in Chapter 7, Medical Certificates.

CHAPTER 4
CONSENTING TO THE RELEASE OF MEDICAL INFORMATION

4:000 INTRODUCTION

This chapter reviews the issue of compelling a consent or release of medical information.

4:100 OVERVIEW

An employer's entitlement to compel an employee to consent to the disclosure of medical information is limited to the information that the employer can properly require. An employee's refusal to provide a consent that is too broadly drawn will effectively insulate the employee from the consequences of failing to provide the requested information.

Generally, an employee who refuses to provide a properly drawn consent cannot be disciplined for such refusal. Similarly, an employee can not be disciplined for withdrawing a previously executed consent. Such refusal or withdrawal, however, can have an adverse financial or non-monetary impact on the employee. This might include loss of income-protection benefits or a justifiable refusal to permit the employee to continue at, or return to, work following an injury.

SUMMARY OF PRINCIPLES

4:201 A valid consent cannot compel a general disclosure of medical information. The disclosure must be limited to those questions that are properly posed in the employer's inquiry. Moreover, a proper consent cannot require an employee to authorize direct communications between the employer and the employee's physician. [Page 40]

4:202 In the absence of a prohibition in the collective agreement, an employer may seek information or clarification directly from an employee's physician in circumstances where a consent has not been provided. [Page 47]

4:203 Except in limited circumstances, an employee's refusal to provide a proper consent will not attract discipline. However, it may attract a non-disciplinary response that can have an adverse financial or non-monetary impact on the employee. [Page 49]

4:204 An employee may be entitled to withdraw a previously delivered consent without being subject to discipline. [Page 50]

4:205 An employer has the right to require employees to sign an authorization for the release of medical information to an entity it has chosen to assist with the administration of an income-replacement benefit. [Page 51]

4:200 DISCUSSION OF PRINCIPLES

4:201 A valid consent cannot compel a general disclosure of medical information. The disclosure must be limited to those questions that are properly posed in the employer's inquiry. Moreover, a proper consent cannot require an employee to authorize direct communications between the employer and the employee's physician.

A consent or authorization to release medical information will be problematic if it transcends the specific matters at issue. Rather than being general in nature, the consent must be confined to those questions identified in the employer's request for additional medical information. Similarly, if the consent can be interpreted as authorizing subsequent communication with the physician, that aspect of the consent or release will be seen to be inappropriate and unreasonable. In either case, the employee may be entitled to refuse to execute the consent, and any wage or benefit loss attributable to any resultant delay in obtaining the medical information will be the responsibility of the employer.

In *Pacific Press Ltd* [1977],[64] the union challenged the following portion of a medical claim-form authorization:

> This is also my authorization to [the Employer] and/or Canada Life Assurance Company to contact my medical practitioners for further information regarding the illness or injury for which this claim is being made. I understand that a false statement may constitute grounds for claim refused (sic) and/or disciplinary action.

The arbitrator distinguished the authorization from a medical certificate:

> The [authorization] complained of differs from a certificate in that it gives a third party (either the employer or the carrier) the right to solicit information from a physician and involves communication between the physician and a third party without any involvement or knowledge of the patient.

The arbitrator held that it would be improper to require an authorization that would enable the employer to clarify matters directly with the physician. After referring to an unreported decision where a company official reportedly cross-examined the employee's physician as to the employee's alleged illness, arbitrator Thompson stated:

> This incident seems fairly typical of possible management action where there is doubt about the veracity of an employee's claim. A lay person would solicit information from a physician to amplify or contradict statements on a medical certificate. If the lay person then doubts the claim, then what follows? Might not the patient, assuming he or she learns of the inquiry, then request yet another statement by the physician? Might not a physician decline to respond to a third-party inquiry? In short, such inquiries are unlikely to produce information pertinent and germane to processing the claim. If management regards medical evidence as inadequate, it could require a more complete medical certificate or specify the information a certificate should contain. If doubts about the legitimacy of medical evidence persist, they probably will have to be resolved in an open proceeding, not through private inquiry.
>
> Underlying this decision is a concern for the integrity of the doctor-patient relationship … This relationship is one of the most private in our society, and any breach of it should be made only with the assent, individual or collective, of the patient.

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[64] Pacific Press Ltd. (1977), 15 L.A.C. (2d) 113 (Thompson)

The arbitrator held that the authorization, being open-ended in nature, was not defensible.

In terms of the sentence in the authorization dealing with a "false statement" as constituting grounds for rejection of the claim and/or discipline, the arbitrator stated that the sentence was not improper because it simply constituted a reminder to claimants of conditions already prevailing:

> While the reminder may be annoying to the conscientious employee, it may also discourage abuses of the sick leave plan. It is certainly within management's powers to remind employees of their obligations when claims are filed.

In *Brewers' Warehousing Co. Ltd.*. [1982],[65] an employee's refusal to comply with a directive to deliver a "Physician's Report to Supervisor" form to his physician, although not treated as such, was essentially a refusal to consent to the release of medical information to the employer. The warnings that had been imposed were set aside. The arbitrator commented that while the employer was entitled to require the employee to provide the information that it solicited, it "failed to establish any specific grounds or justification for receiving the information from a physician …"

The outcome in this case was correct (in that discipline normally will not be appropriate where an employee refuses to consent to a disclosure of medical information), but the reasoning was problematic. Given the facts, the appropriate rationale would have been to state that while an employer can request the information, and the employee may suffer the consequences of failing to provide the information (for example, a refusal to permit the employee's return to work), the employer, absent a statutory or express contractual requirement, cannot discipline the employee for refusing to consent to the release of that information.

The Medical Assessment form in *Windsor (City)* [1995][66] authorized the physician to "forward a full release of information" to the employer. Arbitrator Brent held that the reference to a "full release of information" was too broad in that it could be seen as authorizing release of information that might result in the employer's "learning about personal, sensitive matters which have not affected the employee's attendance and which are not at all related to any current ability to perform a particular job." The employer was directed to amend the authorization to limit the information provided "to the specific medical reasons for the employee's past absences" and to "the reasons for the triggering absence or pattern of absences which gave rise to the request."

The issue in *Kitimat (District)* [1998][67] was the propriety of a medical authorization or consent that read:

> I hereby authorize my physician to release to the District of Kitimat, Personnel Department, any information they request of this disability.

The arbitrator interpreted the foregoing consent to amount to an authorization to the physician to disclose not only the medical information contained in the form but also any information requested by the employer in the future concerning that disability. He concurred with the employer's view that the consent, as drafted, would authorize the employer to approach the employee's physician after the

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[65] Brewers' Warehousing Co. Ltd. (1982), 4 L.A.C. (3d) 257 (Knopf). Here, arbitrator Knopf found that the employer's request for medical information from an employee who was on Workers' Compensation benefits was reasonable, but (i) given that there was no statutory or contractual requirement to provide such information; (ii) given that there was no reason to suspect that the employee would not be able to perform his regular duties when he presented himself for work, and (iii) given further that the matter was one of individual direction rather than a rule that had been consistently enforced in the past, the employer could not discipline the employee for having refused to deliver a "Physician's Report to Supervisor" form to his physician for completion.

[66] Windsor (City) (1995), 51 L.A.C. (4th) 61 (Brent)

[67] Kitimat (District) (1998), 74 L.A.C. (4th) 351 (Kinzie)

form had been signed, and seek additional information from the physician without going through the employee and without the employee's even being aware of the employer's request.

Arbitrator Kinzie commented that the collective agreement set forth a procedure consistent with the arbitral jurisprudence. He stated:

> That procedure involves a request by the Employer of the employee to furnish "proof to its satisfaction" of the employee's disability. [However, in] the Employer's direct and unilateral approach to the employee's physician, the employee is neither "requested" to provide information, nor does he "furnish" it. Instead, he is altogether excluded from the process. The accounting has been changed from an open process where all three participants are involved, i.e., the employee, his physician and the Employer, to a private investigation. In my view, such an approach is not consistent with the provisions of [the collective agreement].

After citing with approval an extensive passage from *Pacific Press Ltd.* [1977],[68] arbitrator Kinzie stated that the second reason for concluding that the consent or authorization as drafted contravened the provisions of the collective agreement was that it amounted to

> an unreasonable exercise of the Employer's discretion to require the employee to account for his absence from work. Such a "private inquiry", may be efficient but because it may often result in the disclosure of confidential information about his medical condition without his knowledge, it does not, in my view, sufficiently respect the confidentiality of the physician-patient relationship. Further, the employee is not authorizing such a "private inquiry" voluntarily. He is required by the Employer to do so, i.e., sign [the consent] as a condition to his receiving sick leave payments.

The arbitrator noted:

> The Employer has other means of requiring an employee to account further for his absence where it is not satisfied with the information supplied to that point in time. It may request that a further Physician's Report form be completed by the employee's physician. It may particularize its concerns in a letter to the employee and ask him to have his physician address them in a reply letter. The evidence establishes the Employer has used both of these alternatives. Further, should the employee refuse to provide the information requested or fail to do so, the Employer may then take the additional step of stopping the payment of sick leave benefits to the employee.

Arbitrator Kinzie concluded that a consent or authorization

> is a legitimate requirement insofar as it authorizes the employee's physician to release the medical information contained in the form to the Employer. However, to the extent that the Employer relies on it to initiate direct and unilateral contact with an employee's physician to obtain further information concerning the employee's medical condition, I am of the view that its use for that purpose is inconsistent with the provisions of the collective agreement. I am of the view that the Employer is not entitled to initiate such contacts based on the [current] authorization.
>
> Therefore, by way of clarification to bring the patient's authorization into line with the provisions of the collective agreement, I direct that [the authorization] be amended to read as follows:

[68] Pacific Press Ltd. (1977), 15 L.A.C. (2d) 113 (Thompson)

> "I hereby authorize my physician to release to the District of Kitimat, Personnel Department, the above mentioned information concerning my disability."
>
> I am of the view that employees must sign this amended [authorization] in order that their physicians are authorized to release the enclosed confidential information to the Employer.
>
> If the Employer requires further medical information from an employee's physician, the proper course contemplated by the collective agreement and the Employer's own policy is to require the employee to make a further visit to his physician to obtain it by the issuance of a further Physician's Report form or a letter to the Employer addressing the particular concerns it has raised.

In *Purolator Courier Ltd.* [2000],[69] the Attendance Management Program stipulated that at a particular step of a multi-step process, the employee would be

> requested to provide the Employer with a medical release form to permit the Employer to communicate directly with the employee's doctor as "This will allow the Company to determine the likelihood of satisfactory future attendance."

Arbitrator Greyell stated that the medical release that employees were required to sign was

> unlimited as to the nature and scope of the information to be obtained. While an employer is generally entitled to such medical information as to allow it to make an informed decision as to an employee's fitness to return to work or as to future prognosis to be able to attend work on a reasonably regular basis, the broad nature of the information which may be accessed under the form of release required to be signed is unreasonable as it is offensive to the privacy rights of the employee concerned. Accordingly, I find this aspect of the Program invalid.

A compulsory referral to a treatment program in *Fleet Industries Ltd.* [2000][70] was found to "breach the grievor's privacy or integrity and vitiate his consent." In that case, the employer had imposed a disciplinary suspension, coupled with mandatory participation in an Employee Assistance Program for suspected alcohol abuse.

The arbitrator stated that the real issue was whether the employer had the right to impose a one-month suspension to force the employee to seek treatment for what the employer perceived to be a problem with alcohol dependency. He found that it did not. He stated:

> There is nothing inappropriate in offering an employee the option of participating in a treatment program as a condition of avoiding discipline. This is the basis of many "last chance" agreements, including ones which these parties have apparently entered. Obviously, the option need not be offered only at the "last-chance" stage. The offer could be made at any earlier stage in the disciplinary process, when, for instance, an employee was facing a suspension. Or, and this it seems to me, is the meaning to be given the 'referral' language in the EAP before me, a counseling or treatment program can be offered as an alternative to facing possible escalating discipline in the future. As [the union witness's] evidence made clear, this is the basis of the Employer's leverage with an employee. Take the option offered or face present or possible future discipline, if the problem persists. While there is obviously an element of compulsion in these options, the employee nonetheless has one and he is not

[69] Purolator Courier Ltd. (2000), 89 L.A.C. (4th) 129 (Greyell)
[70] Fleet Industries Ltd. (2000), 89 L.A.C. (4th) 423 (Randall)

> subject to additional discipline simply by choosing to take his or her chances with the disciplinary stream.

Although recognizing that the facts differed considerably from those in *Nav Canada* [1998],[71] arbitrator Randall stated:

> Mr. Swan's remarks [in that case] capture the state of both the arbitral and general law respecting the protection of an employee's privacy rights. At pages 182-83, Mr. Swan writes:
>
> > "However, while it is my view that [the management's rights article] of the collective agreement is broad enough to allow the employer to refuse to allow an employee to work unless it is satisfied of the employee's fitness, it is not broad enough to permit the Employer to compel release of medical information to or medical examination by a third party. The Employer may request that an employee consent to do so, and if the request is reasonable in all of the circumstances, an employee who does not consent may well suffer the consequences of not demonstrating his or her fitness for duty. But beyond that the Employer cannot go."

The two employers in *School District No. 5 (Southeast Kootenay)* [2002][72] introduced a policy requiring that applicants for extended medical leave have their doctor complete a prescribed medical certificate. Each of the two included an authorization for release of medical information. In one but not the other, the authorization or consent authorized the employee's physician "to release the necessary information of [the employee's] current illness or injury" to the employer, and then further authorized the physician to complete the physician's statement that was part of that same document. Arbitrator Korbin relied on a recent unreported decision of arbitrator Munroe,[73] wherein he, after considering a similar authorization, held that the employer could not require employees to sign an authorization that permitted direct contact with the employee's doctor. Arbitrator Korbin directed that the authorization be revised to make it clear that all that was being authorized was the completion of the Physician's Statement.

The employer in *Hamilton Health Services* [2008][74] had retained a third party to adjudicate sick-leave claims, and to carry out medical case management. The employee had completed the disability application form, which included an authorization to disclose information. She claimed that she had been told by the employer that the form, which was to be forwarded to the third-party case adjudicator, would constitute "satisfactory proof of disability." The employee also had advised the employer, on her own volition, that her husband was dying of cancer, that she was having difficulty coping, and that she was taking medication to help her cope. The employer relayed this information to the third-party adjudicator.

Arbitrator Devlin found that the information that was relayed fell outside that contained in the application form forwarded to the third-party adjudicator, and that it had, therefore, been forwarded without the employee's consent.

> Accordingly, she did not realize that the information she relayed to [the Hospital], which did not appear on that form, would be considered in the adjudication process. Given the confidentiality of personal medical information, care must be taken to ensure that an employee is aware of the information that will be considered in adjudicating his or her claim and consents to the use of that information. In this case, the disclosure of the information

[71] Nav Canada (1998), 74 L.A.C. (4th) 163 (Swan)
[72] School District No. 5 (Southeast Kootenay) (2002), 107 L.A.C. (4th) 224 (Korbin)
[73] School District No. 36 (Surrey), unreported, June 6, 2000 (Munroe)
[74] Hamilton Health Services (2008), 169 L.A.C. (4th) 293 (Devlin)

> takes on significance because of the role the information played in [the contract provider's] recommendation to deny the Grievor's claim …

In arriving at her decision, arbitrator Devlin relied heavily on a recent decision of arbitrator Surdykowski, wherein he had, in a case involving the same parties and the same application form,[75] concluded that the consent to release medical information was overly broad. The consent before both arbitrators had authorized any party involved in the employee's treatment to provide the third-party adjudicator "with all information and documentation requested regarding her medical condition as it related to her claim."

Arbitrator Surdykowski had found that the contract provider stood in the same position as the employer, and could not require information to which the employer was not entitled. Arbitrator Devlin summarized arbitrator Surdykowski's findings on the consent issue:

> With regard to the release of personal information, Arbitrator Surdykowski found that the consent on the medical certificate of disability form was overly broad. He suggested, among other matters, that the consent ought to be limited to the treating physician and that if there was more than one medical professional involved, a separate consent was required for each. He also found that an employee could not be required to consent to the disclosure of information beyond that to which the Hospital was entitled and that direct communication between the Hospital or [the contract provider] and the employee's care givers without the consent of the employee was prohibited. He concluded as well that the Hospital [or the third party adjudicator] could ask an employee to voluntarily disclose additional information but that such a request had to be made on a separate form or on a separate page so that it would be clear to the employee that he or she was not required to make the disclosure and that a separate consent was required for each type of confidential information.

These companion decisions clearly are distinguishable from the others that have been considered, in that they impose additional constraints on the consent issue that have no foundation at law. If the third-party adjudicator stands in the footsteps of the employer, then there is no reason for it not to be able to consider relevant information that has come to the attention of the employer. If the information was incorrect or irrelevant to the consideration, and it was relied on, then that may be one thing. But consider a situation where an employee walks off the job after having received a minor rebuke from the employer, and then follows that up with a note from her doctor excusing her from work for medical reasons. To suggest that the employer cannot, without the consent of the employee, communicate this fact to the insurer or claims adjudicator so that additional questions might be posed (or, in fact, consider the matter itself if it is adjudicating the claim in-house), is surely incorrect and is not supported by the common law or other arbitral authorities.

In *S.E.I.U., Loc. 1 Canada* [2008],[76] the employee's continuing absence, coupled with her provision of several medical notes that were said "to create inconsistencies," led to an employer request that the employee submit to an Independent Medical Examination (IME). The employee reluctantly agreed to undergo such an examination, but advised the employer that on the advice of her union, she would not agree to sign a medical release. After having concluded that the medical notes that had been submitted were inadequate for the purpose of establishing the propriety of the employee's continuing absence, arbitrator Surdykowski stated:

> I am satisfied the grievor was wrong to refuse to agree to a release of the medical information that would have been disclosed by the IME requested by the Employer. Agreeing to an

[75] Hamilton Health Sciences (2007), 167 L.A.C. (4th) 122 (Surdykowski)
[76] S.E.I.U., Loc. 1 Canada (2008), 174 L.A.C. (4th) 210 (Surdykowski)

> examination without a release of information defeats the purpose of an IME and is no agreement at all.

The arbitrator ordered that the employee undergo an Independent Medical Examination. He stated that if the employee failed, without good cause, to attend or failed to execute the necessary consent to a release of medical information flowing from that examination, then he would dismiss the grievance.

4:202 In the absence of a prohibition in the collective agreement, an employer may seek information or clarification directly from an employee's physician in circumstances where a consent has not been provided.

Several of the cases reviewed in this chapter have held that it would be improper to require an employee to consent to employer-initiated communications with the employee's physician (except, of course, where the specifics of the communication have been expressly and properly authorized by the consent). None of these cases however, have gone so far as to find there is a general prohibition against an employer's seeking information or clarification from an employee's physician.[77] That may be because it is the physician, and not the employer, who is responsible for maintaining the confidentiality of the doctor-patient relationship and determining the boundaries of that confidentiality.

A physician who releases information that falls outside the scope of an employer's authorization does not necessarily offend the confidentiality inherent in the physician-patient relationship. A response to a further employer inquiry may be appropriate, from the physician's perspective, even in the absence of an employer-prepared authorization, for the communication may amount to a clarification of information already disclosed as opposed to the disclosure of additional confidential information. Alternatively, such further disclosure may be justified by either the scope of a physician-prepared release or an oral consent the patient has given to the physician.

In *Bowater Mersey Paper Co* [1998],[78] arbitrator Outhouse concluded there was no express or implied prohibition that prevented an employer from seeking information or clarification directly from an employee's physician. He stated:

> The collective agreement does not contain any provision which prohibits the Employer, either expressly or by necessary implication, from communicating with an employee's physician. Neither does such a blanket prohibition arise, in my view, by virtue of the confidential relationship which exists between patient and doctor. It is the doctor who is responsible for maintaining medical confidentiality. If an employer contacts a doctor to make inquiries about an employee's fitness for work, then it is up to the doctor to decide whether or not to answer the employer's inquiries. The doctor could refuse to provide any information without first getting the employee's consent. Alternatively, the doctor could choose to answer the employer's questions if they did not call for disclosure of what the doctor considered to be confidential medical information. In either event, it is difficult to see any violation of the collective agreement on the part of the Employer, unless of course the agreement prohibited communication with an employee's doctor which is not the case here.
>
> To put the matter a slightly different way, medical confidentiality is not affirmatively enshrined in the present collective agreement. Consequently, even if the Employer were to obtain confidential medical information about an employee without that employee's consent, it would not constitute a violation of the agreement as such. There are undoubtedly circumstances, and these have arisen in a number of reported cases, where employers have disciplined employees for refusing to provide confidential medical information. In such circumstances, arbitrators have set aside the discipline on the grounds that it was not imposed

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[77] In Kitimat (District) (1998), 74 L.A.C. (4th) 351 (Kinzie), the issue was whether the consent that had been adopted by the employer was overly broad, in that it could be interpreted to authorize a response to not only the medical issues that were addressed in the inquiry but future inquiries that might be made without going through the employee and without the employee's even being aware of such further inquiries. The arbitrator held that there was nothing in the collective agreement that would authorize or require this form of a broad consent to be provided by the employee.

[78] Bowater Mersey Paper Co. (1998), 76 L.A.C. (4th) 411 (Outhouse)

for just cause. That is an entirely different situation, of course. The employee is entitled to resist production of confidential medical information and the employer cannot extract same upon pain of discipline. However, it does not follow that an employer somehow breaches its contractual obligations by merely asking for medical information about an employee or, as in the case at hand, by making inquiries about the employee's fitness for work.

4:203 Except in limited circumstances, an employee's refusal to provide a proper consent will not attract discipline. However, it may attract a non-disciplinary response that can have an adverse financial or non-monetary impact on the employee.

An employee who improperly refuses to consent to a release of medical information potentially faces the same consequences as one who improperly refuses to submit to a medical examination by a physician not of his own choosing.[79] Progressive discipline may be imposed in either case, provided the employee's obligation arises pursuant to either a statutory provision or an express contractual term of the collective agreement. Employers however must bear in mind that a termination imposed on the basis of a single refusal most likely will be set aside on the grounds that the discipline is neither progressive nor reasonable in the circumstances.

However, where, as is more frequently the case, the requirement to provide medical information has been found by an arbitrator to be implied in the collective agreement, the employer cannot discipline an employee for refusing to consent to the release of such information. However, there may be "administrative consequences" for such refusal.[80]

In *Fleet Industries Ltd.* [2000],[81] arbitrator Randall adopted the following comments of arbitrator Swan in *Nav Canada* [1998][82] as representing the current state of the arbitral law:

> … It is difficult to imagine circumstances in which an employee could be disciplined for not granting consent. The very notion of consent would, indeed, be undermined by any such conclusion. There may be administrative consequences of refusal of consent, including being placed on leave, paid or unpaid depending upon the circumstances, but I am unable to envision circumstances in which discipline for, for example, insubordination could ever be justified by a refusal to provide information or to undergo an examination which has no statutory or collective agreement authorization, and which would amount to a serious invasion of personal privacy or integrity.
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> … I cannot imagine that it would ever be justified for the Employer to use threats of disciplinary action to compel an employee to consent to disclosure of medical information or to a medical examination.

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[79] See the discussion in Chapter 8 regarding implied requirements to undergo an employer-directed medical examination and the consequences for refusal to do so.
[80] See the discussion in Section 8:204, commencing at p. 179 of this manual, regarding the various "administrative consequences" that might arise where the refusal relates to a reasonable request to provide medical information not mandated by a statutory provision or an express term of the collective agreement.
[81] Fleet Industries Ltd. (2000), 89 L.A.C. (4th) 423 (Randall)
[82] NAV Canada (1998), 74 L.A.C. (4th) 163 (Swan)

4:204 An employee may be entitled to withdraw a previously delivered consent without being subject to discipline.

The employee in *Masterfeeds* [2000][83] had been on a lengthy medical leave of absence so he could seek treatment for substance abuse. He was returned to modified work on the conditions that he undergo a further assessment and that he receive a negative result on a drug and alcohol assessment. He concurred. When the employee attended with the Independent Medical Assessor to discuss the results of the assessment, he revoked his consent to provide a copy of the assessment report to the employer. The report, however, by then had been mailed to the employer. It disclosed that the employee had continued to drink and use marijuana on a recreational basis, and that he had declined to provide a urine specimen for testing. The employee's employment was terminated.

Arbitrator Kinzie found that while the employee's consent had been given freely, its withdrawal "did not give the Employer just and reasonable cause to impose any form of discipline upon the employee because there [was] no obligation on the employee to provide such consent." This reasoning is difficult to follow. For instance, there is no obligation on an employee or a union to enter into a "Last Chance" agreement, but once one has been entered into, neither the employee nor the union can resile from the terms of that agreement on the basis that they were not obligated to enter into it. An agreement to reinstate, with its conditional assessment requirement, should be treated in a similar fashion.

Nevertheless, the termination was set aside, and the employer was ordered to reinstate the employee on its disability plan as of the date of termination. There was no consequence imposed, as there would have been (as, for example, a cessation of wage-continuation benefits) in circumstances where the employee improperly had withheld a consent to release information to the employer. Despite having received wage-replacement benefits for the 10-month medical leave, despite acknowledging that he continued to drink regularly and use marijuana occasionally, and despite the fact that neither the employee nor his physicians were called to give evidence, the arbitrator concluded, based on medical reports that had been filed, that some progress in recovery had been made and that the employee's accommodation should continue.

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[83] Masterfeeds, Division of AGP Inc. (2000), 92 L.A.C. (4th) 341 (Kinzie)

4:205 An employer has the right to require employees to sign an authorization for the release of medical information to an entity it has chosen to assist with the administration of an income-replacement benefit.

In *Sanofi Pasteur* [2010],[84] the employer's self-insured sick-leave plan was administered by a third-party insurer. While the union recognized that its members must submit medical verification and documentation to the employer in support of their short-term sick-leave claims, it took issue with the employer's right to require employees to sign a consent authorizing the release of their medical information to the insurer.

Arbitrator Knopf stated:

> The simple fact of engaging a third party with expertise and efficiencies to assist with contract administration has been widely recognized as a valid exercise of management rights.
>
> … Since it has also been recognized that this Employer has the right to expect employees to establish their entitlement to Short Term Sick Leave,[85] it follows that the Employer has the right to expect employees to sign [an] authorization for the release of their medical information to the entity that the Employer has chosen to assist with the administration of that benefit.

In arriving at her decision, arbitrator Knopf commented that there was no evidence or suggestion that there was any demonstrable reason to be concerned about employee privacy or confidentiality. In the circumstances, the employer was entitled to withhold sick benefits until a proper consent had been given.

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[84] Sanofi Pasteur (2010), 202 L.A.C. (4th) 322 (Knopf)

[85] Arbitrator Knopf's reasoning specifically referred to this employer's right to expect employees to establish their entitlement to a particular benefit. The right to require consent to disclose medical information to a third-party insurer will not be operable where the collective agreement requires payment of the benefit without the presentation of satisfactory medical evidence.

CHAPTER 5
ADOPTING AN INCREMENTAL APPROACH TO SEEKING DISCLOSURE

5:000 INTRODUCTION

This chapter discusses the requirement for an employer to seek additional medical information in an incremental or staged fashion. The employer's failure to adopt this approach may result in a finding that a more intrusive demand for medical information was unreasonable. As a consequence, the employee may be relieved of the obligation to provide additional medical information that otherwise ultimately would have been compellable.

5:100 OVERVIEW

The incremental approach seeks to balance employee privacy rights against an employer's business interests.

Employers who are seeking additional medical information must make their inquiries in an incremental or staged manner. The expectation is that an employer must raise its concerns regarding the sufficiency of medical information first with the employee's physician. Only when this avenue has been exhausted can the employer pursue a more intrusive inquiry.

There is a downside to this approach from an employee's perspective, for it can involve a futile intermediate inquiry with consequent delay in addressing the employee's benefit claim or employment status. That possibility must be discussed where a union or employee seeks to limit the scope of the employer's initial inquiries. In the same vein, an employer must give serious consideration to a union proposal to meet its requirements in a less intrusive manner. An employer who insists on an overreaching requirement risks an arbitrator's conclusion that its demands were unreasonable. In that event, the employee likely would be indemnified for any lost wages. On the other hand, if the employee refused to comply with a less invasive inquiry, any wage loss most likely would have been borne her.

Employees may believe that an employer is limited to only one inquiry, and that it must then live with the information it receives in response. Potential misunderstandings can be avoided by advising the employee, preferably in writing, that despite the fact that the employer has requested and will consider the information being sought, it reserves the right to require further and better medical information should it consider that to be necessary.

SUMMARY OF PRINCIPLES

5:201 An employer normally will be required to adopt the least intrusive approach to seeking medical information, even if that approach is unlikely to provide the required medical information.

5:202 The least intrusive approach usually will require that concerns be addressed (or, if necessary, clarified) with the employee's own physician. The scope of the information sought at any particular stage must be limited to what is reasonably required. It is only after these efforts have been exhausted that the employer can reasonably seek an examination by, or a medical certificate from, someone other than the employee's physician.

5:203 An employer may have to accept an employee's suggestion for a less intrusive process for satisfying the employer's reasonable concerns.

5:200 DISCUSSION OF PRINCIPLES

In seeking medical information, an employer should strive to adopt the least intrusive non-punitive approach that balances its business interests with the privacy interests of the employee. That is achieved using a layered or incremental approach to compelling the production of medical documentation. That approach recognizes there are layers of legitimate employee and employer interests that ought to be explored in a sequential manner to minimize unnecessary intrusions into an employee's privacy.

As a starting point, an employer should begin its inquiry by seeking medical information from the employee's own physician. The scope of the information sought must be limited to the information an employer normally would be entitled to receive when dealing with the particular factual situation. If the information received is insufficient or raises new concerns, the employer then should seek additional information or clarification from the employee's physician. It is only after these efforts have been exhausted that an employer can reasonably seek an examination or report from a physician designated by the employer.

An employer who subsequently rejects an otherwise reasonable alternate approach advanced by the employee places itself at risk. For instance, if the employee proposes an examination be conducted by an independently chosen physician rather than one designated by the employer, or that, in the first instance, the examination be conducted by an independent physician rather than a psychiatrist, then the employer must consider the possibility that its legitimate concerns might be addressed in that fashion.

In formulating its approach, the employer should recognize that an initial inquiry designed to obtain the best and most definitive answers to its concerns may well be found to be overly intrusive. When adopting a "staged" or "incremental" approach, the employer should advise the employee, preferably in writing, that despite the fact it has requested and will consider the information being sought, it reserves the right to require further and better medical information, should it consider such to be necessary.

In *S.E.I.U., Loc. 1 Canada* [2008],[86] arbitrator Surdykowski reviewed the competing interests of both employers and employees, and concluded that, in terms of compelling disclosure of confidential medical information, the appropriate and least intrusive approach would be to consider the issue of disclosure in a layered or incremental fashion:

> As a matter of general principle in that latter respect, what is required is sufficient reliable information to satisfy a reasonable objective employer that the employee was in fact absent from work due to illness or injury, and to any benefits claimed (see, Arbitrator Swan's comments in *Re St. Jean de Brebeuf Hospital and C.U.P.E., Loc. 1101* (1977), 16 L.A.C. (2d) 199 at pp. 204-206). As a general matter, the least intrusive non-punitive approach that balances the legitimate business interests of the employer and the privacy interests of the employee is appropriate.
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> The several layers of legitimate employer interests suggest that there is more than one stage to the process that is engaged when an employee is absent from work. An employer's desire for more information, or its genuine concern for an employee's well-being or desire to assist the employee, do not trump the employee's privacy rights. Nor do questions of expediency or efficiency. In the absence of a collective agreement provision or legislation that provides otherwise the employer is entitled to know only that the employee is unable to work because she is ill or injured, the nature of the illness or injury, the expected return to work date, and

[86] S.E.I.U., Loc. 1 Canada (2008), 174 L.A.C. (4th) 210 (Surdykowski)

> what work the employee can or cannot do. A document in which a qualified doctor certifies that an employee is away from and unable to work for a specified period due to illness or injury is *prima facie* proof to justify the absence, and to qualify the employee for any applicable sick benefits for that period. To require more invites an unnecessary invasion of the employee's privacy. In order to obtain additional confidential medical information, the employer must demonstrate a legitimate need for specific information on an individual case-by-case basis. That is, initially an employer has no *prima facie* right to an employee's general medical history, a diagnosis, a treatment plan, or a prognosis other than the expected date that the employee will be able to return to work with or without restrictions.
>
> But employees are obliged to justify absences and claims for sick benefits. It is not inordinately invasive for an employer 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.
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> Where an absence from work has been lengthy and return to work dates are repeatedly extended, or the employer has reasonable cause to suspect the genuineness, accuracy or quality of the information provided to substantiate an absence the employer is entitled to additional information, and perhaps to an IME [Independent Medical Exam]. For example, if the employer has an objective reason to doubt that the doctor who signed a medical certificate actually saw or made any professional evaluation of the employee or that the doctor was qualified to provide the assessment in the certificate, or suspects that the employee has gone "doctor shopping", or has information that casts doubt on the *bona fides* of the alleged illness or injury that the employer is entitled to seek additional information that is specific to and reasonably necessary to address its concerns (see for example, *Re York County Hospital Corp. and S.E.I.U., Loc. 204* (1992), 25 L.A.C. (4th) 189 (Fisher, Chair) at page 193). [87]

An incremental approach had been commended in the earlier case of *Brinks Canada Ltd.* [1994].[88] After noting that no steps had been taken to obtain further information or clarification from the employee's physician, and noting further that the company had not pursued the employee's offer to be examined by another physician designated by the employer, arbitrator Stewart stated:

> While it is possible that these avenues of obtaining information may ultimately not have provided the employer with the assurance it reasonably required, it is quite possible that such an assurance could have been provided. In my view, in the circumstances of this case, it was unreasonable for the employer to insist on the significantly more intrusive approach of requiring a psychiatric examination without first exploring the less intrusive options …
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> There may be some situations where it is immediately apparent, either from the nature of the medical information that is conveyed or the actions of the employee that a psychiatric assessment is appropriate. However, such circumstances do not exist here … The evidence before me relating to [the grievor's] actions simply do not support the conclusion that the employer was reasonably compelled to immediately seek a psychiatric assessment. I am unable to accept the validity of the employer's position that stress or emotional problems are necessarily, and in all circumstances, beyond the competence of a general practitioner to

[87] The examples set forth here should not be seen as limiting.
[88] Brinks Canada Ltd. (1994), 41 L.A.C. (4th) 422 (Stewart)

> assess, treat and provide a valid opinion upon in relation to the ability of the employee to resume employment and that, therefore, there would be no value in obtaining this information. If the employer has a reasonable basis for the view that the information/opinion available from this source is inadequate then the matter could appropriately be pursued further and other avenues, such as a psychiatric evaluation, could be explored.

Arbitrator Jackson relied on the *Brinks Canada* case in *British Columbia (Public Service Employees Relations Commission)* [1998].[89] The employee's physicians had recommended that he return to work, but all their recommendations were conditional on the employee's being transferred to a different area of the workplace. A psychiatric examination was scheduled but not conducted because the employee refused to sign the required consent.

The arbitrator noted that the employer had a reasonable basis to believe the employee's problems may have extended beyond his workplace, and concluded that the employer had been entitled to seek further information prior to returning the employee to any other position as a matter of accommodation. The question then became whether this concern could have been satisfied by something other than a requirement for a psychiatric examination. In addressing this issue, the arbitrator noted that the employer had failed to advise the employee's doctor that he had difficulties with a number of other supervisors and it had failed to inquire if such additional facts would change his opinion. Arbitrator Jackson stated, "To paraphrase arbitrator Stewart in the *Brinks* case, that avenue of inquiry may not have provided the Employer with the assurance it sought but it is quite possible it would have."

Arbitrator Jackson concluded that the employer's concerns

> were not pursued in the manner that they should have been to reflect the proper balancing of the Employer's legitimate interests against the Grievor's privacy rights … The difficulty here, as in the *Brinks* case, is that if the Employer made the inquiries of [the grievor's doctor] I have mentioned and, on reasonable grounds, remained unsatisfied, it might then have been justified in requiring a psychiatric assessment. This might have delayed the Grievor's return to work for a number of months. However, I can only deal with the situation that existed at the relevant time. Once I have found the Employer's requirement of a psychiatric assessment to have been unreasonable without further inquiry, I am left with [the grievor's doctor's] opinion that the Grievor could return to work and the Employer's duty to accommodate the Grievor's mental problems … In the circumstances, the Employer's insistence on a psychiatric evaluation, in the absence of making further inquiries through other less intrusive avenues, was unreasonable.

Arbitrator Kinzie, in *Masterfeeds* [2000],[90] dealt with the termination of an employee who had revoked his consent to release an independent medical assessment to his employer. After concluding that the employer could not discipline the employee for revoking a consent that had been given freely, arbitrator Kinzie noted, without using that expression, that an incremental approach should have been employed:

> Having reasonable and probable grounds to question the grievor's fitness to return to work, as of February 1, 2000, what options were open to the Employer? First of all, the Employer could have held the grievor out of service until its doubts regarding his fitness to return to work were satisfied. It could then have expressed its doubts in writing to [his doctor] and requested his response to them. Given the nature of the grievor's illness, i.e., substance abuse,

[89] British Columbia (Public Service Employees Relations Commission) (1998), 72 L.A.C. (4th) 309 (Jackson)
[90] Masterfeeds, Division of AGP Inc. (2000), 92 L.A.C. (4th) 341 (Kinzie)

> it could also have reasonably, in my view, requested that its doubts and concerns be answered by an addiction specialist. If the grievor failed to respond to these requests, the Employer could have, in my view, continued to hold the grievor out of service, he not having established his fitness to return to work.

In *Molson Breweries* [2005],[91] the employer insisted that an employee, who was said to have threatened acts of violence in the workplace, be examined by a psychiatrist it had selected. The employee resisted, and the union subsequently suggested the employee's physician should select an independent psychiatrist who could conduct the examination. The employer remained adamant that it should be entitled to designate a psychiatrist who would conduct the examination.

The union submitted that the cases established a hierarchy in terms of seeking medical information:

> First, the employee provides medical information from his own doctor upon a return to work. If that evidence is not accepted by the employer, the Company, upon reasonable grounds, may ask for additional proof of fitness and may ultimately seek an opinion of a doctor of its choice.

The arbitrator stated:

> I agree with this analysis. I believe that first seeking medical information through the grievor's own doctor or specialist and then seeking an independent assessment if the initial medical information is not sufficient is a much less intrusive approach than demanding that the grievor undergo a medical assessment by a specialist of the Company's choosing from the very beginning. As many of the cases already referred to remind us, an employee still retains his privacy rights and those rights, while clearly not absolute, need to be infringed as little as possible. If any authority is needed to conclude that there is a balancing between the interest of the employer and employee and that the employer's interest must be achieved in an effective manner that least intrudes on the privacy rights of the employee I refer to *Re British Columbia (Public Service Employee Relations Commission) and B.C.G.E.U. (Teixeira)* (1998), 72 L.A.C. (4th) 309 (Jackson).

The incremental approach reflected in the foregoing cases is one that should be adopted when seeking sensitive medical information. If prudently implemented, such an approach can avoid the type of overreaching that may occur when an employer initially insists on the employee's producing what it would consider to be the best and most definitive answer regarding that employee's medical condition.

An incremental approach may reduce the possibility of an award for lost wages. For instance, requiring a diagnosis (rather than a description of the nature of the employee's illness or injury) in the first instance may result in an arbitrator's finding that the employer's demands were unreasonable. In that event, the employee likely would be indemnified for lost wages. On the other hand, if the employee refused to comply with a less invasive inquiry, any wage loss likely would be borne by the employee.

Further, if the employee complied with the less invasive request, the medical information received, along with non-medical information received from elsewhere, may justify a further or more invasive inquiry into matters relating to issues such as a diagnosis or treatment plan.

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[91] Molson Breweries (2005), 142 L.A.C. (4th) 84 (Rayner)

Many employees believe that an employer who is seeking medical information regarding an employee's condition will be "bound" by the information provided. It would be prudent for an employer to correct any potential misunderstanding at the outset of the process. An employer should advise the employee (preferably in writing), at the time that information is sought, that (despite the fact that it has requested and will consider the information it has sought), it reserves the right to require further and better medical information, including, should the employer consider it necessary, a medical examination by either an independent or employer-designated physician.

The adoption of an incremental approach will not guarantee the employer can seek more intrusive information in the face of continuing concerns regarding the validity of the employee's claim. For instance, in *Braemore Home* [1988],[92] the initial physician's letter "recommended" that the employee be granted time off for "medical reasons." The lack of specifics (coupled with the fact that the employee had been serving a one-day suspension on the day the physician's letter was written) caused the employer to request that the employee's physician complete the employer's Physician's Statement. The statement was completed by one of the physician's colleagues. It stated the employee was suffering from "back pain and mental stress, muscle spasm, insomnia, anxiety." The employee, who was neither confined to home nor displaying any apparent signs of disability, subsequently advised the employer that he had not been prescribed medication and was not undergoing any treatment for his back.

The employer was suspicious. The employee had been a good employee, and his attendance record was said to have been exceptional. However, matters had changed significantly in the months leading up to this particular absence. The employee's work performance had deteriorated. He then was refused a personal leave of absence. In addition, his illness claim appeared to commence on the date he was serving a one-day suspension. The employer, not being satisfied with the claim's legitimacy, decided it needed a specialist's opinion. Given that all the concerns appeared to be stress-related, it decided to seek an opinion from a psychiatrist. The employer, therefore, informed the employee it would not pay sick benefits without such a report. The employee refused to submit to a psychiatric examination. He did, however, consult with his physician, and his physician then wrote to the employer to advise that treatment details were "none of the employer's business," and that there was no reason for the employee to undergo a psychiatric consultation at this time.

The collective agreement merely provided that:

> An employee may be required to produce a certificate from a medical practitioner for any illness certifying that he was unable to carry out his duties due to illness.

Arbitrator Outhouse stated he shared the employer's skepticism regarding the employee's alleged illness:

> However, that issue was not pursued at the hearing and the grievor's claim that he was ill, as well as the doctors' letters and notes in support of that claim, are essentially unchallenged. That being the case, I am compelled to find on the evidence before me, scant as it may be, that the grievor was legitimately ill during the period in question. Consequently the case falls to be decided solely on the issue of whether the employer was entitled to deny the grievor sick leave benefits because he refused to comply with its request that he provide it with a psychiatric opinion in support of his claim.

He concluded that the employer did not have that right:

[92] Braemore Home (1988), 34 L.A.C. (3d) 271 (Outhouse)

> The parties have clearly turned their minds to what constitutes proof of illness and both sides are bound by that agreement. This is not to say that the employer must accept at face value every medical certificate which is tendered to it. Obviously, if it has good reason to doubt the accuracy of a certificate or if a certificate is incomplete, then the employer can put the grievor to the test of proving through the grievance and arbitration procedure that he or she was unable to work due to illness. In such circumstances, the onus will be on the employee to prove such inability. What the employer cannot do, however, is require an employee who has already produced a medical certificate to submit to a further medical examination by another doctor for the purpose of providing the employer with a second opinion …
>
> The employer could, perhaps, have successfully denied the grievor's claim for sick-leave benefits on the basis that the medical certificates provided by him were not satisfactory, but it chose not to take that route. Instead, it opted to insist on getting a second opinion from a specialist. In so doing, it exceeded its lawful authority by purporting to establish a standard of proof in relation to sick-leave entitlement which far exceeds that found in the collective agreement …

This case might be explained as having been decided by reason of the manner in which it was conducted and argued. The employer clearly did not accept that the employee was ill. Nevertheless, the medical certificates were tendered as evidence without any apparent objection by the employer's counsel. The physicians who authored the certificates were not called to testify. Consequently, the arbitrator was left with unchallenged medical evidence in the form of the doctors' certificates. He stated that he was compelled, on the basis of that scant evidence, to find that the employee was legitimately ill.

It makes little sense, from either a labour relations or arbitral point of view, for the arbitrator to have suggested that the employer erred when it failed to reject the employee's sick-leave claim. In reality, that is what it did. Moreover, the employer essentially had advised that the claim would be reconsidered if the employee would undergo a medical examination by a psychiatrist selected by the employee. The arbitrator failed to consider that an employer can, in an appropriate case, legitimately request that an employee undergo such an examination (see Chapter 8).