9-15-1969

Re International Association of Machinists, Lodge 717, and Orenda Ltd

Innis Christie

D Wren

D G. Pyle

RE INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 717, AND ORENDA LTD.

I. Christie, D. Wren, D.G. Pyle. *September 15, 1969.*

EMPLOYEE GRIEVANCE alleging failure by the company to provide weekly indemnity for non-occupational sickness.

G. Drennan for the union.
T.A. King, Q.C., and *C. Marsden* for the company.

AWARD

The facts: On June 19, 1968, Mr. Garden, the grievor, went to Orenda's plant doctor for an examination. He was referred to his family doctor. That same day, and again on June 24th, he consulted Dr. W.K. Taylor who had been his doctor for some years. On June 25th, Dr. Taylor signed an "Attending Physician's Statement" for submission to the company in support of a claim by the grievor for weekly indemnity for non-occupational sickness. The statement noted under the heading "diagnosis" the following: "neurodermatitis both hands, duodenal ulcer symptoms". It is also noted on the statement that the patient "has been totally disabled (unable to work)" from June 19, 1968, and that he should be able to return to work on July 2, 1968. Under the heading "how long will the patient be partially disabled?" the answer given is "for the same period".

In accordance with the normal procedures at Orenda the physician's statement was sent to the company's personnel office and forwarded by them to Great West Life Assurance Co., the carrier company of the company's group insurance policy. Great West in due time sent an indemnity payment for the last week of June to the company and the company sent it to Mr. Garden.

On July 2nd, Dr. Taylor filled out an "Attending Physician's Supplementary Statement" for Mr. Garden with the diagnosis of "Abd pain – duod. ulcer (?)." Under "describe complications or new independent condition which prolonged the disability" Dr. Taylor put the word "nil". He noted on the form that the patient was "totally disabled (unable to work)", that he should be able to return to work on August 6th, and once again also noted that he "was or will be partially disabled" from June

19th to August 6th. According to the form Dr. Taylor had not instructed the patient to remain indoors. There is in evidence a letter signed by Dr. Taylor bearing the same date as the statement, as follows:

"Dear Sir:

"I have been treating Mr. Garden for abdominal problems and have had poor success. I would recommend that he be off three, four or if possible, five weeks to try recover.

Yours truly,

(signed) W.K. Taylor."

Immediately thereafter, according to Mr. Garden's evidence, he retired to seclusion in a friend's trailer at Jackson's Point. While his testimony is not corroborated in any way there was no company evidence to contradict his testimony and his credibility was not diminished in cross-examination by company counsel.

The special difficulty of this case arises from the fact that on July 5th, the employees at Orenda went on strike and stayed out until August 19th. Mr. Garden is claiming indemnity payments for the whole of that period. I have been very much aware of this fact throughout my consideration and return to the matter of the strike at the end of the decision.

On July 8th, the carrier company sent Mr. Garden a registered letter as follows:

"Dear Mr. Garden:

Re Group #4284

"From time to time we call for an independent medical examination at the expense of this company.

"We have arranged an appointment for you with Dr. E. Hanniford, 1849 Yonge Street, Toronto, at 1:30 Friday, July 12th.

"Kindly note Weekly Indemnity Benefits cannot be paid until the examination is completed.

Yours very truly,

Mrs. S. Morrison
Toronto Group Claims.

c.c. Dr. E. Hanniford
c.c. Orenda Engines."

Mr. McKay, Great West's group claims supervisor for Ontario, testified that the independent examination had been considered necessary due to the drastic increase in the estimated period of total disability in the supplementary physician's statement and because total disability was insufficiently established in that statement. To call for an independent examination in such a case was a normal procedure according to Mr. McKay. It should be noted that the letter of July 8th, did not pass through the Orenda personnel office, as did the claim forms and indemnity cheques.

Presumably the letter of July 8th, reached the grievor's residence the following day. In any case he did not get the letter or receive any word of it, according to his testimony, until his wife handed it to him upon his return from Jackson's Point on July 14th. The appointment date was then, of course, two days past. On July 17th, Mr. Garden had another appointment with his family doctor, Dr. Taylor. Dr. Taylor apparently told Mr. Garden that he, Dr. Taylor, had not heard from anyone, that Mr. Garden was under his care and that Mr. Garden need only do what he told him to do. If he actually made such statements Dr. Taylor did his patient a considerable disservice, as he did by the careless filling in of forms.

According to Mr. Garden's testimony he then called Dr. Hanniford's office only to be told that Dr. Hanniford was on holiday. Mr. Garden also testified that he called Great West and was put through eventually to Mr. McKay's office, and that Mr. McKay or someone in his office told him that benefits were suspended because he had not kept his appointment. In his testimony Mr. McKay was unable to recall any contact with the grievor and asserted that had anyone in his office had such contact there was certain to be some notification on the file, and there was none. Mr. Garden further testified that he contacted Dr. Leckey, the plant doctor, who "told me to carry on with my family doctor, to pay no more attention to this appointment [of July 12th, set out in the letter of July 8th], that he would call Mr. Larner [the Company's personnel manager] and straighten things out and to concentrate on my health". Dr. Leckey did not testify and the company at no time contradicted the grievor's testimony with regard to his conversation with Dr. Leckey.

On July 18th, Mr. McKay of Great West wrote to Mr. Larner, personnel services supervisor at Orenda, as follows:

"Dear Gordon:

Re: Roy Garden Group #4284

"On July 8th, by Registered Letter, we asked Mr. Garden to appear for a medical examination on July 12th. Mr. Garden did not appear at Dr. Hanniford's office.

"Accordingly payment of indemnity will be suspended unless Mr. Garden can show cause why he could not attend.

"Please advise your employee.

Yours very truly,

(signed) D. McKay
Supervisor Group Claims."

Following the receipt of that letter Mr. Larner did nothing whatever in relation to the grievor.

August 6th, the date projected in Dr. Taylor's first supplementary statement for the grievor's return to work, came and went. On August 9th, the grievor consulted with a specialist, Dr. J.A. Wilkinson, with regard to abdominal pain. On August 22nd, Dr. Wilkinson's bill for $20 was sent out on an "Attending Physician's Statement" and was subsequently paid, in September, by Great West. On August 19th, the strike ended. On August 21st, the grievor went to the company's personnel office bearing a letter from Dr. Taylor dated August 20th, as follows:

"Dear Sir:

"I have been investigating and treating Mr. Roy Garden for a neurodermatitis and gastric hyper-acidity. X-rays show a duodenal diverticulum but no ulcer. I believe the best treatment at present is the routine antacid-diet combination, and a return to work to see if this will help settle the problem.

Yours truly,

(signed) W.K. Taylor, M.D."

The grievor talked to Mr. Larner, the personnel services supervisor, who advised him to take the next eight days as a

vacation and gave him another blank "Attending Physicians Supplementary Statement" form. According to the grievor Mr. Larner said that "he was sure the matter would be looked after". Mr. Larner on the other hand testified that he had no recollection of any comment to the effect that Mr. Garden was entitled to indemnity payment. My conclusion is that Mr. Larner suggested to the grievor that the matter was under discussion with the carrier company but probably was careful to avoid any commitment. Mr. Larner further testified that the grievor indicated that the reason why he had not attended the July 12th, medical examination was that he had been told by his family doctor not to bother.

On that same day, August 21st, Dr. Taylor filled out a new claim form stating the diagnosis as "abdominal pain; duodenal deverticulum – tension" and under the heading "describe complications or new independent conditions which prolong the disability" he filled in "the above is the reason for the whole problem", referring to the diagnosis. He noted August 22nd, as the date the patient should be able to return to work and gave the dates of partial disability as June 19th, to August 22nd. He filled in nothing opposite the questions "to the best of your knowledge is patient now totally disabled (unable to work)?" and "if 'NO' give date the patient could have returned to work". However, under "remarks" he stated "the patient was ill and the time off was necessary". His claim form was received by Great West on August 26th. Mr. McKay, Great West's claims supervisor, stated in his testimony that the form did not indicate total disablement and, further, that his company was unhappy about the fact that two different forms of handwriting appeared on the form. I am unable to take this last point very seriously since the writing relating to the diagnosis (except for the words "abdominal pain"), the description of the condition which prolonged the disability and the "remarks" are all obviously in Dr. Taylor's handwriting as it appears throughout his statements and letters.

The rest of the documentary evidence consists of further letters from Dr. Taylor on September 12th, and November 19th, strongly supporting the grievor's claim for indemnity and letters of September 9th, 19th, 24th and October 7th, between Mr. Larner at Orenda and Great West which demonstrate the carrier company's doubts about the claim and its final decision not to pay.

The obligation of the company, Orenda Ltd., to provide the weekly indemnity payments claimed by the grievor depends, of course, on the terms of the collective agreement. There are four provisions that are relevant:

> "Article 15.05 On furnishing proof satisfactory to the Company of inability to work because of illness or injury an employee shall be granted sick leave without pay for a period not exceeding twenty-six (26) weeks. Any further extension of such sick leave shall be at the discretion of the Company. The Company may require evidence of the employee's fitness to resume his previous occupation. Seniority shall accrue during sick leave.
>
> "Article 26.01(a) The Company will provide and bear the entire cost of life insurance, accidental death and disability insurance, *weekly indemnity for non-occupational sickness and accident*, and a comprehensive insured plan of medical and surgical benefits, with payments based on the 1965 O.M.A. Schedule of Fees.
>
> "Article 26.03 The life insurance benefits, available for employees only and not for their dependents are as follows:
>
> All male employees $7,000.00
> All female employees $3,000.00
>
> "Article 26.04 The accident and sickness *benefits* available for employees and their dependents shall be those specifically *shown in the certificate of insurance which shall be issued to each employee* who is enrolled in the plan."
>
> [Italics added]

Mr. Garden was issued a certificate, the face of which bears the words:

> THE
> GREAT WEST
> Assurance Company
>
> "HEREBY CERTIFIES that the information contained herein sets forth certain terms, conditions and provisions of its GROUP POLICY 4284GH which provides benefits for employees of
>
> ORENDA LTD. ....
> (herein called the employer)

"An eligible employee is insured in respect of himself and in respect of those dependents listed in his application for the following benefits all as set forth in the said policy:

"(1) WEEKLY INDEMNITY INSURANCE FOR EMPLOYEES:

....

"All provisions of the said policy apply to the insurance referred in this individual certificate ..."

When the individual certificate is unfolded, at the top of the first page appear the words, in large letters, "TERMS AND CONDITIONS OF THE GROUP POLICY". Under that, s. I, deals with eligibility of the employee, s. II, with commencement of insurance and then comes s. III, headed "*Weekly Indemnity Insurance for Employees*":

"A. Accident – ....

"B. Illness – If mental or physical illness not hereinafter excepted, directly and independently of all other causes, shall wholly and continuously disable the employee and prevent him from performing any and every duty pertaining to his occupation or employment, and if the disability begins while the employee is insured, the Company will pay during the continuance of such disability for a period up to but not exceeding 26 weeks commencing with the third working day of such disability a Weekly Indemnity of

(i) $55 in respect of male employees, and
(ii) $45 in respect of female employees.

....

"An employee shall not be insured for and no weekly indemnity shall be payable for any disability:

(1) for which the employee is entitled to indemnity in accordance with the provisions of any workman's compensation or similar law;

(2) for any period during which the employee is not treated by a legally qualified physician;

(3) resulting from illness caused or contributed to by or resulting from war or any act incidence thereto or engaging in a riot;

(4) resulting from pregnancy, childbirth or miscarriage except as provided in sub-section C. ''

On the back of the certificate of insurance in large letters appear the words ''GENERAL PROVISIONS'' and under that heading there are 13 paragraphs. The ones that concern us are the following:

''8. The Company shall have the right and opportunity to examine the person whose injury or sickness is the basis of claim when and so often as it may reasonably require during pendency of claim hereunder, and also the right and opportunity to make an autopsy in cases of death where it is not forbidden by law.

''9. Upon request of the insured employee and subject to due proof of loss the accrued weekly indemnity or hospital confinement benefits will be paid each week during any period for which the Company is liable, and any balance remaining unpaid at the termination of such periods will be paid immediately upon proof satisfactory to the Company. All other benefits provided in this policy will be paid immediately after receipt of proof satisfactory to the Company.''

All references to ''the company'' in the certificate are, of course, to Great West, not Orenda Ltd.

The issues: In argument for the company Mr. King made four points:

1) In regard to medical evidence it is only necessary that this board inquire whether there is reasonable evidence on which the company could come to the conclusion that it did.

2) In any event the evidence of total disablement is inadequate and unsatisfactory.

3) The grievor was under duty to take a medical when requested by Great West and his failure to do so deprives him of any right, even if the medical evidence of his illness is satisfactory.

4) The only duty resting upon Orenda Ltd. is to forward claims to Great West, and not to interfere in the decision upon those claims. If it has dealt properly with the claims and the carrier company has then made a wrong decision Orenda is not responsible.

I shall deal first with Mr. King's fourth point, the relationships between the employer, Orenda Ltd., the carrier company, Great West, the union and the grievor. After that I shall consider the nature of the disability that must be proved and the proof thereof and then the effect of Mr. Garden's failure to attend the medical examination, in that order. Lastly, I shall consider the relevance of the strike.

It is, perhaps, worth mentioning that in reply at the third stage of the grievance procedure the company relied only upon the grievor's failure to attend for the medical examination arranged by the carrier company.

Decision:

In art. 26.01(a) the company has undertaken to "provide and bear the entire cost of... 'weekly indemnity for non-occupational sickness and accident'...". If the collective agreement stopped there, there would be no question at all that the company is obliged to provide such indemnity payments itself from whatever source it sees fit. In *Re Int'l Ass'n of Machinists, Lodge 171, and Fleet Mfg. Ltd.* (1967), 18 L.A.C. 311 (O'Shea, chairman) a unanimous board held that such was the obligation of a company which had agreed as follows [at p. 313]:

> "'27.05 Attached hereto and forming part of this Agreement is an Appendix with clauses I to IX.
>
> 'CLAUSE VII
>
> GROUP INSURANCE,
>
> SPECIFICATIONS FOR GROUP LIFE
>
> AND CASUALTY PLAN
>
> . . . . .
>
> '4. *Weekly Indemnity Benefit*, 1967 – 1968
>
> 'The benefit is to be $60.00 per week. It is to be payable from the first day for accidents and the sixth day for sickness upon a maximum period of 39 days.'"

The board in *Fleet Mfg.* noted that there was evidence that the union was aware, at the time the collective agreement was negotiated, that the company was dealing with a particular carrier company but there was nothing in the collective agreement to require the company to choose a particular carrier or to agree to particular terms. The fact that it was consistent with the terms of the collective agreement that the weekly indemnity

benefits be guaranteed by group insurance did "... not permit the company to unilaterally alter the benefits provided by the collective agreement by making contractural arrangements with the carrier of the insurance which are [were] inconsistent with the provisions of the collective agreement binding upon the company and the union", at p. 317.

Article 26.04 of the agreement before us provides that the "benefits available for employees... shall be those specifically shown in the certificate of insurance which shall be issued to each employee..." How does this affect the right to weekly indemnity that any employee would have if the agreement had stopped short of art. 26.04? In the first place it is clear that the only parties to the collective agreement are the union and the company and, of course, the employees are bound by its terms. It is also clear that the only parties to the insurance contract are Orenda Ltd. and the Great West Life Assurance Co. Ltd. In the absence of special statutory provision the employees and the union can make no claim directly against Great West and they cannot incur obligations to Great West under a contract to which they are not parties. Orenda Ltd. has rights against the carrier company and those rights may be conditioned upon the performance of certain acts by the union and the employees, but that does not mean that there is any contractual relationship between the employees and Great West.

Secondly, under art. 26.04 certain provisions in the certificate of insurance issued to each employee must be referred to in order to understand what has been promised by Orenda Ltd., to the union and the employees. The accident and sickness benefits promised are those set out in the certificate of insurance. The key question is: "How much of the certificate is brought into the collective agreement by the reference to the benefits shown in the certificate?" My conclusion is that the "benefits" are $55 weekly in respect of male employees and $45 weekly in respect of female employees where the employees are "wholly and continuously" disabled from performing "any and every duty" pertaining to their occupation or employment, provided the employee in question is being treated by a legally qualified physician and disability is not covered by workmen's compensation or does not result from war, riots, pregnancy, childbirth or miscarriage. Those are the "benefits" shown in the certificate and are, therefore, what Orenda Ltd. must provide.

The company will obviously object that if this much of the insurance certificate is incorporated by reference into the collective agreement so too must the "GENERAL PROVISIONS" be incorporated. The difference, however, is that what I have taken to be the statement of benefits is an impersonal one easily incorporated by reference. The "general provisions", on the other hand, set up rights between the parties to the insurance contract. General provision No. 8, which concerns us here, purports to give the carrier company the right to order a person whose injury or sickness is the basis of the claim to have a medical examination, but the contract of insurance is only with Orenda, and Orenda cannot give Great West rights against its employees in their private capacity. This is a right, therefore, only against Orenda. Nor is there any reason to conclude that in art. 26.04 of the collective agreement the union is agreeing that Great West shall have rights directly against the employees. The legal doctrine of privity of contract would preclude such a result, and, even if we were to say that a collective agreement could give "rights" to a third party, art. 26.04 would have to be much more explicit in conferring rights on the third party carrier company to achieve such a result. The only effect of general provision No. 8 is that where the carrier company is denied its opportunity to examine the injured person it may be released from its obligation to Orenda to pay under the policy. But that does not affect Orenda's obligation under the collective agreement. This, however, does not leave Orenda defenseless, as pointed out below.

I have concluded that the impersonal statement of the benefits under the weekly indemnity part of the insurance certificate is imported into the collective agreement by the reference in art. 26.04, but that the same reference cannot be interpreted as importing into the collective agreement the personal rights and duties established between the parties to the insurance contract under the "general provisions" on the back of the certificate.

Further support for result reached may be derived from the fact that in art. 26.03 the word "benefits", used in relation to life insurance, quite clearly refers only to the amounts to be paid. The parties should, therefore, be assumed to have intended a somewhat similar meaning when they used the word "benefits" in the very next part of the art. 26.04. For this

reason too, the certificate of insurance should be looked at mainly to determine how much money is payable under the weekly sickness and accident indemnity.

Article 26.01(a) requires Orenda Ltd. to provide weekly indemnity for non-occupational sickness and accident and art. 26.04, I have concluded, does not limit the company's obligation by importing the "General Provisions" on the insurance certificate. I have thus rejected the argument that company's only obligation is to buy insurance covering their employees. The question then arises: Just what is the company's obligation?

According to art. 26.04 the benefits to be provided, as shown in the insurance certificate, are $55 weekly in respect of male employees who are "wholly and continuously disabled" and prevented from performing "any and every duty" pertaining to their employment or occupation. It was suggested at the hearing that a man who was able to "go to the cottage" was not totally disabled and that "the insurance company should not pay for rest cures". Whatever may be the stand of the carrier company, from the point of view of the relationship between the employee and Orenda Ltd., a man must surely be considered to be totally disabled from performing any part of his occupation or employment when he has received uncontradicted advice from his doctor that he should not work.

Under art. 15.05 an employee will only be granted sick leave "on furnishing proof satisfactory to the Company". Thus Orenda Ltd. is given considerable control over sick leave, but where the company has accepted the employee's doctor's diagnosis and recommendation and has granted sick leave it surely cannot then say that for purposes of indemnity the man is not disabled from work. It is obvious that the purpose of weekly indemnity under art. 26.01(a) is to provide some income to one who cannot work because of sickness. In the case before us Mr. Garden was granted sick leave and as of that date must be considered to have been totally disabled from performing the duties of his occupation.

If, because of the length of the recommended period off work or for some other reason, the employer does not find the statement from the employee's doctor to be "proof satisfactory to the Company of inability to work" under art. 15.05 it may, of course, demand satisfactory proof, including medical examination by another doctor. In determining whether it has satis-

factory proof and in ordering another medical examination the employer must act reasonably. See *United Steelworkers of America, Local 4752 v. Burlington Steel Co.* (1969), 69 C.L.L.C., para. 14, 206 (Pennell, J.).

As suggested in the *Fleet Mfg. Ltd.* decision, *supra*, at p. 318, the carrier company may be considered to have the status of agent for the employer in dealing with claims for indemnity. Thus in the case at hand the registered letter of July 8th, constituted a request from the employer's agent that Mr. Garden, the grievor, supply satisfactory proof of his inability to work by submitting to a medical. It was not suggested that it was unreasonable for the company to require a medical in the circumstances of this case. Mr. McKay, Great West's claims supervisor, testified that it was usual to do so in such cases so we have grounds for concluding that the requirement was reasonable, in accordance with the *Burlington Steel Co.* decision, *supra*. In that case the learned Judge directed a board of arbitration to reconsider the reasonableness of requiring an independent medical examination, where there had been no expert evidence on the matter.

Mr. Garden's failure to attend for the medical examination entitled Orenda Ltd. to conclude that there was no proof satisfactory to the company of inability to work because of illness and, therefore, to terminate his sick leave. Once he was no longer on sick leave the grievor would not have been entitled to indemnity payments. (If the company improperly terminated his sick leave the grievor could, of course, seek to establish before a board of arbitration that the company had not acted reasonably in seeking satisfactory proof of his inability to work). But in the case before us Orenda Ltd. did not terminate the grievor's sick leave. When the personnel office was informed that he had failed to attend his medical examination nothing was done. The grievor's status could not change from "sick leave" under art. 15.05 to "leave of absence" under art. 15.01 or to "absent without reasonable explanation" under art. 12.06, or to "layoff" or "on strike", by virtue merely of his failure to attend the medical examination. His status could only change by decision of the company communicated to him. As long as the grievor, Mr. Garden, continued to be on sick leave he continued to be entitled under the collective agreement to receive weekly indemnity under art. 26.01(a). Whether the Great West Life Assurance Co. still had an obligation to

Orenda under the insurance policy to make the indemnity payments is not for us to decide.

Mr. King, for the company, argued with regard to the medical evidence of disability that it was only necessary to establish that the company had acted upon reasonable evidence. On the view that I have taken above of the company's obligation, this issue does not arise. The company must provide weekly indemnity for an employee who cannot work because he is sick. Once it is established that the employee is not working because of sickness the company must provide the indemnity. The company exercises its judgment, not in determining whether to pay indemnity in such circumstances, but rather in determining whether to grant sick leave. Here the company *has* granted sick leave for the whole period for which indemnity is claimed so no question arises of whether it refused to grant sick leave on reasonable grounds under art. 15.05 of the collective agreement.

As pointed out at the start, the difficulty underlying this whole case is that during the time in question the employees of Orenda Ltd. were on strike. Had they not been, probably when Mr. Larner, the company's personnel supervisor, was notified that the grievor had failed to attend for his medical he would have notified the grievor that his sick leave was terminated. In the confusion of the strike, or perhaps because he considered it unimportant, neither Mr. Larner nor anybody in his office notified the grievor that the company was no longer satisfied with his proof of his illness and that his status was accordingly changed. Failure to do so is understandable, but, all the same, it is the company's failure. Mr. Garden's status could not change until he was so advised by the company, and as long as he was on sick leave he was entitled to indemnity payments.

Summary: By art. 26.01(a) the company was obligated to "provide and bear the entire cost of weekly indemnity for non-occupational sickness". The benefits to be provided, according to art. 26.04, were those spelled out in the certificate of insurance issued to each employee. The collective agreement thus incorporates by reference the impersonal statement of benefits set out in the certificate; $55 weekly to be paid for non-excepted physical illness which wholly and continuously disables the employee and prevents him from performing any and every duty pertaining to his occupation or employment, provided that

the employee in question is not entitled to workman's compensation, is under the care of a legally qualified physician, and does not suffer from an illness caused or contributed to by war, riot, pregnancy, childbirth or miscarriage. On the other hand, the "general provisions" on the back of the certificate of insurance state certain rights and obligations which have been created under the contract of insurance between the parties to it. Those provisions create rights between the two parties to the life insurance contract and thus are not directly enforceable against the union or employees, who are not party to the insurance contract. Because they are framed in terms of rights between the parties to the insurance contract the general provisions are not incorporated into the collective agreement by the reference to "benefits" in art. 26.04.

My conclusion is that any employee who has received uncontradicted medical advice not to work is totally disabled within the terms of the "benefit" incorporated by reference into art. 26.04. If the company is not satisfied with the proof of disability presented by the employee it should refuse to grant him sick leave. The scheme of the collective agreement manifestly is that an employee on sick leave receives weekly indemnity unless his sickness falls within the categories excepted under the terms of the benefit. The company need only grant sick leave if it is satisfied with the proof of inability to work that has been furnished and in satisfying itself the company may, where it is reasonable, require that the employee have an independent medical examination.

Here, in spite of the grievor's failure to attend for his medical, the company never told him that his sick leave was terminated and thus he continued in that status. Whether the employee's failure to attend his medical examination released the Great West Life Assurance Co. from its obligation to make indemnity payments, and, indeed, whether he was ever sufficiently disabled to obligate the insurance company to make payment are not matters within our jurisdiction to decide. All this board can decide is that the grievor was absent from work on uncontradicted medical advice, that he was granted sick leave and that the employer at no time indicated to him that it was sufficiently dissatisfied with the proof of illness which he submitted to terminate his sick leave. The grievor must, therefore, be considered to have been continuously on sick leave until August 22nd, and to be entitled to weekly indemnity pay-

ments for that period. The grievance is allowed. The company shall compensate the grievor for the weekly indemnity payments that he should have received during the period from July 1, 1968 to August 22, 1968.

DISSENT (Pyle)

I dissent from the award of the chairman and wish to record my reasons for doing so.

The chairman has developed an extended argument as to stopping in the middle of art. 26.01(a) and also interpreting art. 26.04 in light of art. 26.03, all to arrive at the conclusion that:

> "the impersonal statement of the benefits under the weekly indemnity part of the insurance certificate is imported into the collective agreement by the reference in Article 26.04, but – the same reference cannot be interpreted as importing into the collective agreement the personal rights and duties established between the parties to the insurance contract under 'General Provisions' on the back of the certificate."

I find this conclusion remarkable, *i.e.*, that the impersonal statement of benefits under the weekly indemnity part of the certificate is imported but not the personal rights and duties set out under the "General Provisions" of the same certificate. Certainly I do not agree that we can rely upon part of a certificate but, at the same time, ignore the balance.

As noted on p. 7 of the award, the insurance carrier certified that the information contained therein set out the terms, conditions and provisions of a group policy, and which provided benefits for employees of Orenda Ltd.

Certain rules of eligibility relate strictly to weekly indemnity, and do not particularly apply to other features of the program, just as eligibility rules for some of the other features do not apply to weekly indemnity. These other features include:

– Accidental death, dismemberment and loss of sight insurance;

– Hospital expense insurance;

– Surgical and medical expense insurance;

– Nursing expense insurance;

– Drug expense insurance.

Equally obviously, some terms and conditions apply to all forms of insurance and these are set out under the heading of

"General Provisions", including paras. 8 and 9, as noted in the chairman's award. It is the latter which the chairman holds cannot be imported into the agreement, while the terms and conditions set out specifically under the heading "Weekly Indemnity Insurance for Employees" are to be imported.

I find the chairman's reasoning most difficult to follow. First, he relies upon the reasoning advanced in *Re Int'l Ass'n of Machinists, Lodge 171, and Fleet Mfg. Ltd.* (1967), 18 L.A.C. 311, which agreement made no reference whatsoever to any terms and conditions of a certificate of insurance and which award noted that it was not dealing with a situation in which an employee was asked to submit to a further medical examination by an independent doctor.

Further, the chairman purports to rely upon the wording of art. 26.03 and the use of the word "benefits" in that clause. One clause deals with life insurance benefits, while the other deals with sickness and accident benefits. The wording of the clauses are remarkably different, and if the parties had meant the same thing, I would have thought they would have used parallel language. Certainly, paras. 8 and 9 of the "General Provisions" would not have application with reference to a claim for life insurance.

Finally, the chairman purports to rely upon art. 15.05 which reads in part as follows:

> "On furnishing proof satisfactory to the Company of inability to work because of sickness or injury, an employee shall be granted sick leave without pay for a period not exceeding twenty-six (26) weeks."

He then makes a sweeping conclusion on p. 349 to the effect that:

> "As long as the grievor, Mr. Garden, continued to be on sick leave he continued to be entitled under the collective agreement to receive weekly indemnity under art. 26.01 (a)."

And later on the same p. 350:

> "Once it is established that the employee is not working because of sickness, the company must provide the indemnity".

With reference to the first quotation, the employee was well aware of his need to make application for his weekly indemnity,

even if the company had granted him sick leave *without pay*.

In any event, in both statements the chairman is, I submit, in error when he makes the sweeping conclusion he does. Elsewhere in his award (pp. 346 and 350), he very specifically states that an employee to be entitled to sick leave benefits must (a) be being treated by a legally qualified physician; (b) not be covered by Workmen's Compensation; (c) not incapacitated as a result of war, riot, pregnancy, childbirth or miscarriage.

Absence under any of these circumstances would still entitle an employee to sick leave under art. 15.05. It is not, then, a case of an employee being entitled to weekly indemnity benefits once he is on sick leave.

In conclusion, the chairman has imported into the collective agreement parts of a certificate of insurance while denying the import of others. He is quite satisfied that an employee, to qualify, must satisfy someone that he is: (a) being treated by a legally qualified physician; (b) not covered by Workmen's Compensation; (c) not incapacitated as a result of war, riot, pregnancy, childbirth or miscarriage; and I submit that that someone is the insurance carrier. Notwithstanding the above, an employee can, nevertheless, ignore with impunity or through sheer ignorance, the stipulation or condition that he submit to an independent medical examination before the insurance carrier makes further payments to him. I submit that the reasoning for the separation between the so called "impersonal statement of the benefits under the weekly indemnity part of the insurance certificate" and "the personal rights and duties... under the 'General Provisions' on the back of the certificate" at best, leaves a great deal to be desired. One can only wonder if the reference on several occasions to the "back of the certificate" is not in itself to demean the "General Provisions" inasmuch as the certificate in itself is a four-page document which, when folded, does in fact have the "General Provisions" appearing as the final page.

In conclusion, I would have dismissed the grievance. Mr. Garden was a very uncertain witness, uncertain as to where he had been, how long he had been there, and to whom he had talked with at the office of the insurance carrier. He relied upon some very poor advice from Dr. W.K. Taylor, M.D., advice in an area in which Doctor Taylor was lacking in any competence

whatsoever. Be that as it may, sympathy for the grievor is not suffice to establish that the employer violated the agreement with the union when the insurance carrier denied to the grievor the weekly indemnity benefits.