IN THE MATTER OF AN EXPEDITED ARBITRATION
PURSUANT TO SECTION 50 OF *THE LABOUR RELATIONS ACT, 1995*
AND A COLLECTIVE AGREEMENT

BETWEEN

INDEPENDENT ELECTRICITY SYSTEM OPERATOR

(the "IESO")

and

THE SOCIETY OF UNITED PROFESSIONALS

(the "Society")

GRIEVANCES RE: BENEFIT ENTITLEMENTS

MEDIATOR/ARBITRATOR: John Stout

APPEARANCES:

For the IESO:
Richard J. Charney – Norton Rose Fulbright Canada LLP
Josh Hoffman- Norton Rose Fulbright Canada LLP

For the Society:
Alex St. John - Wright Henry LLP

HEARINGS HELD BY VIDEOCONFERENCE ON OCTOBER 11, 2022 AND WRITTEN SUBMISSIONS RECEIVED UP TO OCTOBER 22, 2022

AWARD

Introduction

[1] The parties appointed me to hear and determine three grievances dealing with disputes regarding benefit entitlements under the Collective Agreement.

[2] The parties agreed to an expedited mediation/arbitration process pursuant to s. 50 of the *Labour Relations Act, 1995* (the "Act"), whereby they filed extensive written briefs. It was agreed that that if I found it necessary to decide the case based on any expert evidence or disputed evidence, then the parties would have an opportunity to file comprehensive expert reports and cross-examine.

[3] The first grievance was filed by the Society on December 3, 2021, in response to the IESO's refusal to provide coverage for Continuous Glucose Monitoring (CGM) devices, which they claim are blood glucose meters (BGMS). It is the Society's position that CGMs are explicitly covered by the language in the *Health & Dental Benefits Members of the Society of Energy Professionals and Eligible Dependents and Pensioners* brochure dated January 1, 2010 (the "Benefits Brochure"), which is the Benefits Plan (the "Benefits Plan') incorporated by reference into the Collective Agreement. The Society submits in the alternative that CGMs are covered as falling under the reference in the Benefits Brochure to "most diabetic supplies."

[4] The IESO asserts that CGMs are not referenced or covered under the Benefits Brochure. The IESO submits that CGMs are not a BGM, which is covered under the Benefits Brochure, nor are CGMs included in the list of most diabetic supplies that is referenced in the Benefits Brochure. Therefore, CGMs are not eligible for reimbursement under the IESO Benefits Plan.

[5] The second grievance was filed on November 30, 2021 and concerns the IESO's refusal to provide coverage for tele-orthodontics, such as Smile Direct Club (SDC). The Society takes the position that there is no language in the Collective

Agreement or the Benefits Brochure that excludes this type of service from coverage.

[6] The IESO submits that tele-orthodontics, are not covered by the Benefits Plan because the Benefits Brochure explicitly or implicitly requires in-office or in-person orthodontic treatment. In addition, tele-orthodontics are excluded pursuant to the "reasonable and customary limits" provision found in the Benefits Brochure.

[7] The third grievance was filed January 25, 2022 and it relates to the IESO's refusal to provide the Society with information about the drugs that have been excluded from coverage under the IESO's drug formulary despite being approved for use in Canada. The Society asserts that Addendum 10 to the Collective Agreement entitles them to such information and the IESO's refusal has interfered with the Society's ability to administer the Collective Agreement and represent their members.

[8] At the hearing, the third grievance was withdrawn on the basis of the following representation by the IESO:

> To the best of the IESO's knowledge, up to this point in time, no approved drug for use in Canada, other than those drugs approved for in hospital use only, have been excluded from the benefits formulary.

[9] After carefully considering the parties' submissions, and for reasons provided as follows, I agree with the IESO that CGMs and tele-orthodontics are not covered under the Benefit Brochure. Therefore denial of coverage by the IESO does not violate the Collective Agreement and the two remaining grievances must be dismissed.

Background Facts

[10] The relevant background facts are not in dispute, and they are fully laid out in the briefs. I have summarized these facts below to provide context for my decision.

[11] The IESO is a non-profit corporate entity established under the *Electricity Act, 1998*. It is the Ontario Hydro legacy entity responsible for controlling Ontario's bulk electricity system and operating the competitive wholesale market. Its work involves, amoung other things, collecting offers from suppliers, and bids from purchasers to schedule and dispatch resources and determine real time market price for electricity.

[12] The IESO employs over 900 employees, most of whom (70%) are represented by the Society.

[13] The IESO and the Society are parties to a Collective Agreement that expires on December 31, 2022.

[14] Part VI of the Collective Agreement addresses health and dental benefits, and it provides as follows:

> The IESO, through its claims services provider, shall provide extended health benefits and dental coverage as outlined in the pamphlet entitled "Health & Dental Benefits for Employees Represented by the Society of Energy Professionals, Eligible Dependents and Pensioners" [the Benefits Brochure], dated January 1, 2010 (or any subsequent and mutually agreed upon revision) and in accordance with the existing insurance carrier contract for Society-represented staff…
>
> The Corporation shall publish the reasonable and customary rates once a year but for informational purposes only. Published rates will indicate that they are subject to change without notice and that employees are responsible for calling the benefits administrator to confirm the current rates

[15] There is no dispute that Benefits Brochure is incorporated by reference into the Collective Agreement.

[16] Article 56 of the Collective Agreement also addresses dental benefits, and it provides as follows:

> Effective January 1st of each year of the Collective Agreement, the dentist fees will be paid up to the amounts shown in the current Ontario Dental Association (ODA) Fee Guide.

[17] The IESO has retained Canada Life (formerly the Great-West Life Assurance Company) as administrator (also referred to as the "carrier") of their benefits plans pursuant to an Administrative Services Only ("ASO") agreement.

[18] The Benefits Brochure refers to "comprehensive medical services" but also indicates that there are "limitations" and "reasonable and customary limits" that will be applied by the carrier. The Benefits Brochure provides additional information relating to reasonable and customary limits as follows:

> To be considered reasonably necessary, the medical services or products must be ordered by a physician and must be commonly and customarily recognized throughout the physician's profession as appropriate in the treatment of the patient's diagnosed sickness, injury or condition. These plans will pay the excess over the deductible portion of the reasonable and customary charges and time limitations for the services and supplies set out in this brochure, when necessary for the care and treatment of injury or illness and when ordered or prescribed by a licensed medical practitioner.
>
> The reasonable and customary charge of any service or supply is the usual charge of a similar provider in the area. A similar service is one of the same nature and duration, requires the same skill, and is performed by a provider of similar training and experience. Area means the town or city in which the service or supply is actually provided.

[19] In terms of diabetic supplies, the Benefits Brochure indicates:

> Most diabetic supplies are covered, including needles and syringes, dextrosticks, glucosticks, autolets, autoclicks, lancets, Preci-jet guns, insulin pumps, and necessary hardware and blood glucose meter (e.g. glucometer).
>
> NOTE: A patient does not need to be insulin dependent to be eligible for a blood glucose meter.

> Replacement of a blood glucose meter, Preci-jet gun, insulin pump and necessary hardware is eligible once every three calendar years.

[20] It is noteworthy that the Benefits Brochure had its genesis in the predecessor employer Ontario Hydro's benefits plan. The 1991 Ontario Hydro Health & Dental Benefits Brochure (the "1991 Benefits Brochure") also addressed diabetic supplies and it provided as follows:

> Note - a patient does not need to be insulin dependent to be eligible for a blood glucose meter.
>
> Most diabetic supplies are covered; including dextrosticks, glucosticks, autolets, autoclicks, lancets, Preci-jet gun, insulin pumps and necessary hardware.
>
> Replacement of blood glucose meter, Preci-jet gun, insulin pump and necessary hardware are eligible once every three calendar years.

The December 3, 2021 CGM Grievance

[21] A Society member had some of her claims for a Continuous Glucose Monitor (CGM) paid during the period from February 1, 2019 to January 11, 2020. However, many of the member's claims were denied without any explanation.

[22] Subsequently, the administrator provided an email indicating that "under the terms of the policy coverage is not available for CONTINUOUS GLUCOSE MONITORING (CGM) SYSTEM and FLASH GLUCOSE MONITORING (FGM) SYSTEM."

[23] The Society members treating endocrinologist has prescribed the Dexcom CGM system and she strongly recommends that the member remain on the system long-term.

[24] The Society member pays a monthly subscription for the CGM of $299 per month, which is $3,588.00 per year. The Member has incurred $12,600 for the subscription to date. The cost of a traditional BGM such as a glucometer and

associated test strips and lancets is approximately $2,977.92. The Society maintains that other costs associated with using a traditional glucometer would be approximately $3,613.33.

[25] A CGM can be a replacement for a glucometer, although diabetic patients may use both. The Society member uses a glucometer to calibrate her CGM once every ten days, "as a preference."

[26] The Society filed a grievance on December 3, 2021, on behalf of their member, claiming that the IESO violated the Collective Agreement by failing to honour the members claims for the CGM.

[27] In or around March 7, 2022, the Province of Ontario announced that coverage for CGM's would be provided through the Province of Ontario's Assistive Devices Program (the "ADP").

The November 30, 2021 SDC grievance

[28] The Benefits Brochure provides as follows with respect to orthodontic coverage:

> **Orthodontic services are covered as shown below:**
>
> | Dental Service | Benefit |
> |---|---|
> | **Orthodontic Services: Services to prevent and correct irregularities of the teeth (e.g., braces)** | • **75% of the cost up to a lifetime maximum benefit of $5,000 per person** |
>
> **The following orthodontic services are eligible:**
>
> - Consultations
> - Pretreatment Diagnostic Services
>   - […]
> - Preventive Interceptive Orthodontics (including Appliances and maintenance)
>   - […]

- Corrective Orthodontics
  - Removable and Fixed Appliance Therapy
  - Retention

Predetermination

Prior to the commencement of orthodontic treatments, the dentist should submit an Orthodontic Treatment Plan to Great West Life which:

- Provides a classification of the malocclusion or malposition,
- Recommends and describes necessary treatment by orthodontic procedures,
- Estimates the duration over which the treatment will be completed,
- Estimates the total charge for such treatment, and
- Is accompanied by cephalometric x-rays, study models and such other supporting evidence as Great-West Life may reasonably require.

Great-West Life will inform you of the amount eligible for reimbursement under the Plan.

[29] According to information provided by the Society, tele-dentistry and tele-orthodontics, such as SDC, have recently become more popular, in part due to the COIVD-19 pandemic. The Society provided clinical literature in support of the use of tele-orthodontics.

[30] The Society notes that historically the IESO has provided coverage for more expensive Invisalign clear aligners, which provide a treatment similar to SDC and other tele-orthodontics.

[31] The Society sought information from Canada Life regarding coverage for SDC. Canada Life indicated that the IESO's Benefit Plan only covers orthodontic treatment provided in office by a dentist or orthodontist, therefore SDC is not covered.

[32] The Society filed a grievance on November 30, 2021, claiming that the IESO violated the Collective Agreement by not providing coverage for tele-orthodontic services.

[33] The IESO has denied the grievance, indicating that tele-orthodontic services are not covered under their Benefits Plan. The IESO submits that only orthodontic services rendered in-person or in-office are covered under the Benefits Brochure. The IESO notes that Invisalign is prescribed by a dentist or physician who has seen the patient and monitors progress.

[34] In the alternative, the IESO takes the position that tele-orthodontics are not covered pursuant to the "reasonable and customary limitations" provision in the Benefits Brochure. The IESO has provided literature that contradicts the Society's literature, indicating that tele-orthodontics are "not commonly and customarily recognized" as an appropriate treatment.

Decision

[35] The issue to be resolved is whether the IESO has violated the Collective Agreement by denying coverage for CGMs and tele-orthodontics such as SDC. The resolution of the grievance is a matter of collective agreement interpretation, and the relevant evidence is not in dispute. The IESO's obligations are found in the terms of the Collective Agreement and the Benefits Brochure, which has been incorporated by reference. I do not require any expert evidence to assist me in resolving the grievances.

[36] The principles applied by labour arbitrators when interpreting a collective agreement are set out by Arbitrator Surdykowski in *Ontario Power Generation and Society of Energy Professionals (Travel Payment)* 2015 CanLII 56079 (ON LA) as follows:

> 3. Discerning mutual intent is not the objective of the collective agreement interpretation exercise. What Professor Sullivan has described as the intentionalist approach to contract interpretation has been overtaken in this jurisdiction by what she refers to as the textualist approach (see: Ruth Sullivan, "Contract Interpretation in Practice and Theory" (2000) 13 S.C.L.R. (2d) 369, particularly pp. 375-86, 392). That is, the contractual intent of the parties must be determined by an objective contextualized approach to the words they used in the contract document (see, *Dumbrell v. The Regional Group of Companies*

Inc., 2007 ONCA 59 (CanLII), 85 OR (3d) 616; 279 DLR (4th) 201; per Doherty J.A. at paragraphs 47-56).

4. Although the *Dumbrell* analysis and objective contextualized approach is generally applicable to the interpretation of collective agreements, it is important to remember (as Arbitrator Lynk observed in *PSAC v. Alliance Employees' Union*, (2002) 2002 CanLII 79138 (ON LA), 111 L.A.C. (4th) 402, at paragraph 57), that a collective agreement is different from a commercial or other non-collective agreement contract. The significance of labour relations context cannot be overstated. Collective agreement language must be given its plain and ordinary purposive labour relations interpretation. This means that a literal, dictionary, or corporate commercial approach to interpretation is not necessarily appropriate. However, although the overall labour relations context (including the applicable legislative framework) in which a collective agreement is bargained is important, the most important contextual consideration is that of the particular provision(s) in issue within the broader context of the particular collective agreement.

5. It has been posited that there is a general guiding "principle" which requires that the language used must be interpreted in a manner which best preserves the spirit and intent of the collective agreement. However, the Ontario Court of Appeal's decision in *Dumbrell* makes it clear that this "principle" must take a back seat to the words used to describe the agreement. The parties to a collective agreement are presumed to say what they mean and mean what they say. Unless rectification is obviously necessary, the presumption is that the parties to a collective agreement have selected the wording used intentionally. Although much has been written about collective agreement purpose, fairness, internal anomalies, or cost or administrative difficulty, such considerations only come into play when the grievance arbitrator must choose between equally plausible interpretations of the collective agreement language in issue.

6. A grievance arbitrator cannot rewrite the parties' agreement. In the absence of extrinsic evidence sufficient to establish an asserted ambiguity (a doctrine which applies to interpretation), or waiver or estoppel (which doctrines both apply to application), a grievance arbitrator must interpret and apply the collective agreement as written. The arbitrator cannot amend or imply conditions into the collective agreement because he considers it fair or otherwise appropriate to do so, or because of his view (expert or not) of what the parties (or either of them) must have (or could never have) intended. The grievance arbitrator is tasked with determining what the collective agreement provides or requires, not what he thinks it should say, regardless of any perceived unfairness of the effect of the actual wording on either party or on bargaining unit employees. The employer, the union, and bargaining unit employees are entitled to no more or less than the benefit of the bargain described by the words contained in their collective agreement. Clear collective agreement wording trumps all considerations other than legislation. If the parties or either of them are dissatisfied with the consequences of their collective agreement bargain as determined by a grievance arbitrator it is up to them to seek a collective bargaining solution. It is no part of a grievance arbitrator's job to save the parties or either of them from the consequences of the agreement as written.

> 7. The fundamental rules of collective agreement interpretation can therefore be summarized as follows:
>
> > (i) the words used must be given their objective plain and ordinary contextual labour relations meaning;
> >
> > (ii) all words must be given meaning, and different words are presumed to have different meanings unless this would lead to a result that is illegal, absurd or inconsistent with the overall scheme and structure of the collective agreement.
> >
> > (iii) words or phrases cannot be inferred unless they is essential to the purposive operation of the collective agreement, or to make the collective agreement consistent with mandatory legislation which constitutes the statutory labour relations framework in the jurisdiction.

[37] The Society argues that a CGM is a BGM and therefore explicitly covered according to the Benefits Brochure. The IESO disagrees, maintaining that CGM's measure glucose levels in the interstitial fluid, while BGM measures glucose in your blood.

[38] I agree with the IESO that a CGM system is not a BGM, like a glucometer. A BGM and a CGM are not the same. There is no dispute that both a BGM and CGM system measure blood sugar levels. In this respect they both measure glucose levels to assist in managing diabetes, but they measure the levels in different ways. A BGM, such as a glucometer, measures blood glucose levels by extracting blood from the finger onto a test strip that is inserted into the device. A CGM system does not measure blood glucose levels in the same way. A CGM measures glucose levels in interstitial fluid. A BGM and CGM are two different devices or systems that are used for a similar purpose, but they are not the same.

[39] I note that the 1991 Benefits Brochure also refers to coverage for a BGM. There is no dispute that CGM systems were not commonly prescribed at that time. Therefore, the original reference in the 1991 Benefits Brochure is to a certain type of device for measuring blood glucose levels and the example given is a glucometer as well as the supplies required to use that device.

[40] CGMs do not appear to have been contemplated in 1991 and the failure to specifically reference them in current Benefits Brochure leads me to find that they are not explicitly covered under the current Benefits Plan.

[41] The Society also argues that CGMs are covered by the reference "most diabetic supplies." The Society submits that CGMs are similar to the items included and listed in the Benefits Brochure. The Society argues that the list is open ended and must by necessary implication include supplies prescribed by a physician for measuring blood glucose levels.

[42] The IESO submits that CGMs are not similar to the diabetic supplies listed and they are distinctly different. The IESO argues that adding coverage for CGMs would be adding a monetary benefit that is not explicitly provided for in the Collective Agreement, see *Allmix Concrete Inc. v. Teamsters Local Union 230*, 2021 CanLII 85019 (Luborsky).

[43] I have sympathy for the Society's argument that a CGM is somewhat similar to the supplies listed in the Benefits Brochure, to the extent that it is a system for measuring blood glucose levels. The Society member's treating physician has prescribed the CGM and strongly recommends the long-term use of the Dexcom CGM. However, I cannot be swayed by sympathy. My decision must be based on the language found in the Collective Agreement.

[44] The language in my view is somewhat ambiguous as it may be interpreted as being an open ended list. However, it is clear that not all diabetic supplies are covered. There may well be some diabetic supplies that have been covered since 1991 that are not listed, although no one provided any evidence on this point. There may also be diabetic supplies that have not been covered since 1991, but I was not provided with any evidence on this point either.

[45] The language does not provide that "all diabetic supplies are covered" or "the following and similar diabetic supplies are covered." Nor does the language

provide that “any diabetic supplies prescribed by a physician are covered” or “most diabetic supplies are covered, including or not limited to the following.”

[46] I agree with the IESO that CGMs are not expressly included in the list and the language does not clearly provide coverage for CGMs. I also agree that implying coverage for CGMs in this case would essentially be providing the Society with an additional monetary benefit in the absence of clear language, contrary to the “clear language for economic benefit” principle, see *Canadian General-Tower Limited and USW, Local 862*, 2011 CanLII 73194 (ON LA). Moreover, I am of the view that the IESO (or the predecessor Ontario Hydro for that matter) would not have agreed to an open ended list that could possibly include costly diabetic supplies that may be developed in the future. In my view, much clearer language would be necessary to find that a CGM is covered.

[47] As an aside, I would note that the Province’s decision to include coverage of CGMs under the ADP and the savings that would entail with reduced usage of a blood glucose meter may very well reduce the cost of providing coverage for CGM systems. However, this is an issue the parties must address in collective bargaining.

[48] I now turn to address the tele-orthodontics grievance.

[49] I agree with the Society that the Benefits Brochure does not explicitly exclude tele-orthodontics nor does it explicitly state that orthodontic services must be provided in-person or in-office. At the same time, the Benefits Brochure does not explicitly include coverage for tele-orthodontics, including SDC. The fact that a benefit is not explicitly excluded from coverage, does not necessarily mean that it must be included in the Benefits Plan. In my view, the “clear language for economic benefit” principle applies and tele-orthodontics such as SDC are not included in the Benefits Plan, see *Canadian General-Tower Limited and USW, Local 862*, *supra.*

[50] I also agree with the IESO that reading the language in the Benefits Brochure as a whole, the language contemplates that "Orthodontic Services" will be provided by a dentist or orthodontist in a traditional way (in-person/in-office) and there is a requirement to provide a "Orthodontic Treatment Plan," for "Predetermination." It does not appear to me, based on the evidence submitted, that SDC and other tele-orthodontic providers could fulfill the requirement to provide such a Orthodontic Treatment Plan.

[51] Accordingly, for all the reasons stated above, I find that the IESO's failure to provide coverage for CGMs and tele-orthodontics does not violate the Collective Agreement. Therefore, those two grievances must be dismissed.

[52] I remain seized to address any issue fairly raised but not addressed in this award.

Dated at Toronto, Ontario this 25th day of October 2022.

John Stout- Mediator/Arbitrator