IN THE MATTER OF AN ARBITRATION
PURSUANT TO A COLLECTIVE AGREEMENT

BETWEEN:

GUELPH GENERAL HOSPITAL

(the Employer)

-and-

ONTARIO NURSES' ASSOCIATION

(the Union)

AWARD

Sole Arbitrator	**Christopher White**
For the Employer	**Glenn Christie** **Hicks Morley Hamilton Stewart Storie LLP**
For the Union	**Nicholas Baxter** **Legal Counsel**

INTRODUCTION

1. I was appointed as sole arbitrator of a Grievance dated March 20, 2023 on behalf of a Grievor who the parties have agreed shall be anonymized in this Award. The parties further agreed that the hearing would take place by way of an Agreed Statement of Facts (the ASF) and the exchange of written argument.

THE GRIEVANCE

2. The Grievance was filed following the Employer's denial of sick pay benefits (sometimes referred to as short term disability (STD) benefits by the parties) to the Grievor for a scheduled shift for which she was absent due to a scheduled colonoscopy. The Employer offered the Grievor the option of using a vacation day for this absence, which she then accepted. The Union seeks that she be made whole including the reinstatement of the vacation day that was used.

THE BENEFIT PLAN

3. The Grievor's employment predates January 1, 2006 and, as such, she is qualified for coverage under the 1980 Hospitals of Ontario Disability Income Plan (HOODIP) as set out in a brochure that details the various entitlements, both sick pay benefits and long term disability benefits, available to employees as well as their eligibility to receive those benefits. The brochure includes the following statement referenced by the parties in the ASF:

> *The Hospitals of Ontario Disability Income Plan consists of two periods of benefits, the Sick Pay Benefit and the Long Term Disability Benefit. These cover the periods before and after the payment of disability benefits by the Unemployment Insurance Commission.*
>
> *For the purposes of the Sick Pay Benefit and the Long Term Disability Benefit, "total disability" and "totally disabled" mean, during the first 104 weeks you are absent from work, that you are unable to perform the regular duties pertaining to your occupation due to injury or illness and that you are not engaged in any gainful occupation. After 104 weeks, you must be prevented, by injury or illness, from engaging in any gainful occupation for which you are or may become fitted by training, education or experience.*

4. The HOODIP brochure also sets out a summary of the exclusions to an employee's entitlement benefits as follows:

> *<u>Exclusions</u>*
>
> *All total disabilities are covered provided that you are under the care of a medical doctor, except injury or illness resulting from commission by you of a criminal offence, engagement in an illegal occupation, wilfully self-inflicted injury, or war.*

THE ISSUE

5. The issue in this case is whether the Grievor's scheduled colonoscopy resulted in her being "…unable to perform the regular duties pertaining to [her] occupation <u>due to injury or illness</u>…" (emphasis added) such that she would qualify for STD benefits under 1980 HOODIP.

THE FACTS

6. In addition to the ASF, the Union provided a Will-Say statement by the Grievor. The Employer elected not to cross-examine the Grievor on that statement. While the statement is quite detailed, the following summarizes the relevant facts from the Grievor's Will-Say:

- The Grievor worked as a registered nurse in the family birthing unit.
- The colonoscopy was scheduled to take place on a day that the Grievor was scheduled to work a 12-hour tour from 7:15 a.m. to 7:15 p.m.
- The colonoscopy was ordered by a gastroenterologist to whom the Grievor had been referred as she had been experiencing a bloody stool for a few months.
- The Grievor has a family history of colon issues (cancer or advanced polyps).
- Prior to the colonoscopy, the Grievor had to observe certain dietary restrictions.
- On the day prior to the colonoscopy (a date on which the Grievor was not scheduled to work), the Grievor was restricted to the consumption of clear liquids and started the process of taking laxatives to clear her bowels. The final administration of laxative took place at 3 a.m. on the morning of the colonoscopy.
- Following the consumption of laxatives on the day prior to the colonoscopy, the Grievor experienced ongoing bouts of diarrhea that left her nauseous, light-headed and cramped.
- The Grievor attended the hospital at 6 a.m. for her colonoscopy as instructed, at which time she was still dealing with the diarrhea and its effects.
- The colonoscopy procedure was scheduled to take place at 8 a.m.
- The colonoscopy procedure required the administration of benzodiazepine and fentanyl for pain management that left the Grievor believing that she moved in and out of consciousness.
- The Grievor had five polyps removed during the procedure. Three of the polyps were pre-cancerous, resulting in a recommendation that she have a follow-up colonoscopy in 2026.
- The Grievor was sent home at the end of the procedure with instructions that included a prohibition for 24 hours on driving, operation of machinery or the making of important or legal decisions. She arrived home at approximately 11 a.m.
- She remained home for the balance of the day where she experienced extreme fatigue and exhaustion leading to her napping for three hours during the late morning and early afternoon.

7. Attached to the Grievor's Will-Say were a number of documents. One of these was a set of instructions from the gastroenterologist that included the following section:

> *Post Procedure Information*
>
> *For the first 30-60 minutes after your procedure do not eat or drink anything hot as you have had sedation- this may also make you groggy for the next 24 hours.*
> - *Avoid straining during bowel movements, especially if a polyp was removed.*
> - *Gas cramps are common on the day of or after the procedure. If you develop different abdominal pain, particularly after the first day, please contact our office.*
> - *If you experience any abdominal pain, new shortness of breath, fever, or rectal bleeding – please contact our office.*
>
> *If you have had a polyp removed*
> - *avoid heavy lifting or straining for 1 week.*

8. It was the Grievor's evidence that she was unable to perform the duties and requirements of her role as a registered nurse in the family birthing unit on the day of her colonoscopy. As stated in her Will-Say:

> *As a labouring nurse, we have a number of duties that require important attention to detail such as monitoring vital signs, checking dilations, assisting patients with pushing, help with breast feeding. If a C-section is required, we will scrub in with the doctor and assist with the operation. Following the operation, we are required to clean the operating room.*

The Grievor's evidence was that "The laxatives during the preparation made me sick and I was too sedated following the procedure.". She stated that she would have been unable to meet the practice standards of the Employer or the Ontario College of Nurses and that to have worked on the day the colonoscopy took place would have represented a health and safety risk for both her and any patients with whom she might have dealings.

UNION SUBMISSION

9. It is the Union's position that:

> *…the preparation for the colonoscopy procedure starting on March 19, 2023, and her condition following the procedure resulted in [the Grievor] being totally disabled from work on March 20, 2023. The prescribed medications leading up to, and administered during, the colonoscopy procedure resulted in an illness that prevented [the Grievor] from performing her regular duties of a registered nurse.*

9. The Union argues that it has met its onus of establishing that the Grievor had an illness that resulted in a total disability as defined in 1980 HOODIP. Accordingly, the onus then shifts to the Employer to identify an applicable exclusion under HOODIP that might nullify the Grievor's entitlement to sick pay benefits for the day on which the colonoscopy was conducted. It was submitted that in interpreting insurance contracts, language granting entitlements are to be read broadly while language setting out exclusions are to be read narrowly.

10. In support of its argument, the Union tendered the following decisions:

- *Paul Revere Life Insurance co. v. Sucharov*, [1983] 2. S.c.r. 541, 1983 CanLII 168 (SCC)
- *South Bruce Grey Health Centre and ONA(2009003245), Re*, 2011 CarswellOnt 16474 (Swan)
- *Windsor Regional Hospital v. Ontario Nurses' Assn. (Disability Claims Grievance)*, [2015] O.L.A.A. No. 132, 2025 CarswellOnt 5012 (Swan)
- *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 S.C.R. 246 (SCC)
- *Bawden v. Wawanesa Mutual Insurance Co.*, [2013 O.J. Nol 2647, 2013 CarswellOnt 7822 (Ont.SC)
- *Bawden v. Wawanesa Mutual Insurance Co.*, [2013] O.J. No. 5385, 2013 CarswellOnt 15960 (Ont.CA)
- *Rouge Valley Health System and ONA (Jossul), Re*, 2007 CarswellOnt 11594 (Davie)
- *Hamilton Health Sciences Corp. v. O.N.A.*, 2007 CarswellOnt 9197 (Surdykowski)
- *Bell Canada v. Communications Workers of Canada*, (unreported) October 12, 1979 (Burkett)
- *Baycrest Centre for Geriatric Care and OPSEU (Phillips), Re*, 2002 CarswellOnt 9195, 70 C.L.A.S. 189 (Howe)
- *Toronto (Metropolitan) v. C.U.P.E., Local 79*, 1989 CarswellOnt 5013 (Davis)
- *Hamilton Health Sciences and ONA (J.(R.M.)), Re*, 2016 CarswellOnt 7789 (Steinberg)
- *Humber River Hospital v. Ontario Nurses' Association*, 2021 CanLII 119793 (ON LA (Jesin)
- *Sault Area Hospital v. Ontario Nurses' Assn. (Sick Leave Greivance)*, [2006] O.L.A.A. No. 309, 86 C.L.A.S. 91 (Herlich)
- *North Bay General Hospital v. Ontario Nurses' Association (Nesbit)*, (unreported) January 15, 2009 (Stephens)

- *Lever Pond's, a Division of UL Canada Ltd. v. International Brotherhood of Teamsters, Chauffeurs, Warehosemen and Helpers of America, Local 132 (Chemical, Energy and Allied Workers) (Courts Grievance)*, [1988] O.L.A.A. No. 491, 74 L.A.C. (4th) 81 (Briggs)
- *B.C. Cancer Agency and B.C.N.U. (Edwards) (Re*), 65 L.A.C. (4th) 380, 1997 CanLII 24988 (BC LA) (Larson)
- *Ontario (Ministry of Housing) v. Canadian Union of Public Employees, Local 767 (Phillips Grievance)* [1994] O.L.A.A. No. 19, 39 L.A.C. (4th) 1 (Stewart)
- *Re Great Atlantic & Pacific Co. of Canada Ltd. and United Food & Commercial Workers, Local 175 & 633*, [1986] O.L.A.A. No. 60, 25 L.A.C. (3d) 189 (Hinnegan)
- *MIC's Group of Health Services and ONA (Mayer), Re*, 2015 CarswellOnt 15665 (Marcotte)

11. In advancing its position, the Union submitted that an earlier arbitral decision between it and another public hospital holding that a scheduled colonoscopy did not constitute an "illness" was wrongly decided. That decision, *Thunder Bay Regional Health Sciences Centre v. Ontario Nurses' Association*, 2020 CanLII 107996 (ON LA) (Randazzo) (hereafter "*TBRHSC and ONA*") involved material facts that are on all fours with this matter. It was argued by the Union that this decision represents:

> *...the first and only case to expressly exclude coverage under HOODIP for diagnostic procedures (including the pre- and post-surgical condition of the grievor), in the face of direct evidence that the grievors' medical conditions were totally disabling. ONA submits the finding in [TBRHSC and ONA] is an incorrect and dangerous precedent...*

That decision will be reviewed in greater detail below.

12. It was argued that the terms "illness" and "injury" in the 1980 HOODIP brochure must be given a broad and liberal construction and can refer to many conditions and symptoms that need not be limited to definitions of specific illnesses or diagnoses. The Union referenced the decision in *Rouge Valley Health System* (supra) in which Arbitrator Davie wrote:

> ..."due to illness" in HOODIP is unambiguous and refers to an employee who is "unable to work" by reason of sickness or ill health. Put slightly differently, the employee is prevented from working because he/she is not in a state of being well.

Here, the Grievor's state of "ill health" constituted an illness that prevented her from attending work and performing her regular duties and responsibilities. It was submitted

that this state of ill health commenced when the Grievor began her preparations for the colostomy and continued until her recovery from the procedure.

13. The Union sought to distinguish this case from those decisions in which employees asked for sick leave in connection with medical appointments for disability-related conditions on days when they would have otherwise been fit to attend work.

14. It was argued that the Union is not required to demonstrate that the Grievor was physically unable to perform her duties and responsibilities due to an underlying medical condition. As stated in the Union's written submission:

> *...there does not need to be an underlying condition that prevented [the Grievor] from working her shift. ONA submits that if the parties had intended to include a requirement for an underlying condition or, more specifically in this case, to exclude diagnostic procedures, that would need to be outlined clearly within the policy itself. There is no reference to underlying conditions or diagnostic procedures in HOODIP.*

15. In this regard, it was submitted that the decision in *MIC's Group of Health Services* (supra) was wrongly decided. In that case, a grievor was denied paid sick leave for the day on which a colonoscopy was performed. In dismissing the grievance, Arbitrator Marcotte wrote, "...there is no evidence to establish or suggest the medical procedure caused injury to her or caused her to be ill". While the Union argues that award was wrongly decided as the parties had agreed that the grievor was disabled from performing her work on the day of the procedure, it was submitted that there was no evidence as to the nature of her physical condition. Here, the Union submits, there is the Grievor's unchallenged evidence that she was unable to perform her job duties as a result of the laxatives (and consequent diarrhea) as well as the restrictions on her ability to function following the anaesthetic.

16. In the result, the Union asks that the Grievance be allowed and that she be made whole through the provision of sick pay for the day of the colostomy and the restoration of the vacation day that was utilized for that purpose.

EMPLOYER SUBMISSION

17. The Employer's position is simply that the Grievor in this case did not suffer an injury or illness and, accordingly was not eligible for sick pay. As stated by the Employer in its written submission:

> *The fundamental flaw with the grievor's claim is that she equates "symptoms" with "illness". Further, the Union errs by equating the articulation of various "symptoms" with satisfying the sick leave plan's requirement that one must be "absent from work, that you are unable to perform the regular duties pertaining to your occupation due to injury or illness". One does not automatically equal the other.*

18. The Employer notes, with approval, the decision in *TBRHSC and ONA* (supra) and argues that its rationale is similarly applicable in this case. While it was agreed that I am not bound by the decision, substantial deference is owed when the same material facts and contractual language are at issue in order to provide parties with clarity and certainty as they order their affairs. In that regard, the Employer cites two decisions:

- *Phillips Cables Ltd. v. United Electrical, Radio and Machine Workers, Local 510,* 1997 CanLII 2967 (ON LA) (Swan)
- *Ross Memorial Hospital v. CUPE Local 1909,* 2017 CanLII 20431 (ON LA) (Gedalof)

The second of these decisions deals with the specific circumstance of parties who are involved in a central bargaining process such as that which governs the Union and the Employer here. Addressing the concept of "substantial deference", Arbitrator Gedalof wrote:

> *"21. Thus, we find that the Albertyn, Kaplan and Herman awards cannot be meaningfully distinguished, and in order to find in favour of the Hospital, we would need to conclude that those decisions were wrongly decided. Before examining those decisions more closely and in light of the arguments put forward by the responding party, there are several points that we wish to emphasise.*
>
> *22. It is clear that the Albertyn, Kaplan and Herman awards are not binding upon us. If we were to conclude that the interpretation of the collective agreement reached in those decisions is wrong, we would not hesitate to reject that interpretation and substitute our own. However, it bears emphasising that these decisions are nonetheless entitled to a substantial degree of deference, especially in the circumstances of this case. The provisions in issue in this case are central language applicable to numerous hospitals across the province. They are the subject of central hospital bargaining, the results of which are likewise binding on numerous hospitals across the province. It is indisputable that in this context conflicting interpretations of the same language can be highly disruptive to the central bargaining process.*

23. Further, there have been two subsequent rounds of bargaining since the Albertyn Award in 2007, over which the language has remained unchanged. In 2014, seven years after the Albertyn Award, Arbitrator Kaplan makes the following observation at page 9 of his Award:

> *We find implausible the suggestion that the parties negotiating the current collective agreement would have assumed or intended that the identical collective agreement provisions would now be given a meaning exactly opposite to the interpretation found in the Albertyn award that was issued in 2007.*

That observation, with which we fully agree, is of equal force in the current case.

19. Here, it was submitted, the Grievor's entitlement to sick pay under 1980 HOODIP requires that she be disabled from performing her regular duties and that the reason for the disablement must be illness or injury. In this case, the Grievor's symptoms were not the product of an "illness" but, rather, were the consequences of her preparation for a diagnostic procedure. That she was disabled from performing her regular duties as a result does not satisfy the branch of the test that the disability must be due to illness or injury.

20. The Employer argues that this case is on all fours with the decisions in *TBRHSC and ONA* (supra) and *MIC's Group of Health Services and ONA (Mayer), Re*, and the analyses found in the following cases (each of which was also cited by the Union):

- *Bell Canada v. Communications Workers of Canada*, (unreported) October 12, 1979 (Burkett)
- *Baycrest Centre for Geriatric Care and OPSEU (Phillips), Re*, 2002 CarswellOnt 9195, 70 C.L.A.S. 189 (Howe)
- *Toronto (Metropolitan) v. C.U.P.E., Local 79*, 1989 CarswellOnt 5013 (Davis)

It was stated that there are no contrary decisions to be found involving similar facts and contractual language.

21. In the result the Employer seeks the dismissal of the Grievance.

UNION REPLY SUBMISSIONS

22. The Union submitted that the arbitral authorities stand for the proposition that where symptoms, however caused, prevent an individual from performing their regular duties they meet the test for sick leave under policies such as 1980 HOODIP. Again, it is

unnecessary for the Union to prove a "unifying diagnosis or underlying condition". It is enough that the Grievor had an illness, in this case, caused by taking prescribed medications.

23. With respect to the Employer's argument that *TBRHSC and ONA* (supra) is entitled to substantial deference, the Union replies in essence, that each case must be determined on its own unique facts. Further, it was submitted that "…the reasoning in *Thunder Bay Regional Hospita*l is novel and a departure from previous case law on the definition of illness found in other arbitral decisions.". The Union submitted that the entirety of the tendered caselaw must be carefully considered in assessing *TBRHSC and ONA* (supra) and that such a review will lead to a different conclusion.

24. The Union sought to distinguish the decision in *Phillips Cables Ltd*. (supra) and *Ross Memorial Hospital v. CUPE Local 1909* (supra). The first of these involved a preliminary motion by a party that sought to rely on a previous award involving the same contract language but in a prior collective agreement. The latter decision involved a case in which there had been three prior decisions in which the outcome and reasoning were consistent. Here, it was submitted, *TBRHSC and ONA* (supra), misapplies prior arbitral awards dealing with the definition of illness and stands as an "outlier" in the jurisprudence. Accordingly, it is wrongly decided and should not be given substantial, or any, deference.

25. Finally, the Union submitted that the award in *TBRHSC and ONA* (supra) effectively introduces a new exclusion into the 1980 HOODIP plan for those cases where an employee's illness occurs as the consequence of a diagnostic procedure. In this case, there was no dispute that the Grievor was disabled from performing her regular duties. As such, this situation is distinguishable from the other decisions relied on by the Employer set out at paragraph 20, above, in which there was no evidence that the grieving employee was unable to work due to illness on the day for which they claimed sick pay.

26. The Union renewed its request that the Grievance be allowed.

DECISION

27. The issue in this case, as stated by the parties in the ASF, is whether the Collective Agreement entitles the Grievor to short-term disability (i.e. the Sick Pay Benefit) for her shift on March 20, 2024. On that date, the Grievor underwent a colonoscopy procedure and did not attend work for her scheduled shift in the Family Birthing Unit. That issue requires a determination as to the meaning of the term "illness" as it is used in the 1980

HOODIP brochure. Again, for ease of reference, the operative language of the brochure reads:

> ...*"total disability" and "totally disabled" mean, during the first 104 weeks you are absent from work, that you are unable to perform the regular duties pertaining to your occupation due to injury or illness*...

28. The Grievor provided a Will-Say statement on which she was not cross-examined. In the Will-Say she described the preparation for the colonoscopy that involved purging her bowels on the day prior to, and on, the date of the procedure as well as the effect of the anesthetic drugs required. The Grievor stated, and I accept, that on March 20, 2024 she was unable to perform the regular duties pertaining to her occupation.

29. That leaves outstanding the question as to whether that inability to perform her regular duties was "...due to illness...".

30. The Union argues that the symptoms the Grievor experienced because of the laxative-related purging and the anesthetic are self-evidently "an illness". There is no basis for arbitrator to look behind the symptoms for their cause. Once the symptoms are demonstrated and it is found that they render the Grievor unable to perform her regular duties, entitlement to sick pay is proven.

31. The Employer argues that it is not enough to find symptoms existed that rendered the Grievor unable to perform her regular duties. It is necessary for the Union to prove that the symptoms were actually caused <u>by</u> an illness. Here, the fundamental reason for the Grievor's absence from the workplace was so that she might undergo a diagnostic procedure. The Grievor was required to take medications to facilitate that diagnostic procedure but the symptoms resulting from those medications cannot be said to constitute "an illness".

32. The parties have each referenced the two "colonoscopy cases" that may be relevant to my determination. The first is *MIC's Group of Health Services and ONA (Mayer), Re* (supra). As here, the parties in that case were governed by the 1980 HOODIP brochure. The grievor underwent a colonoscopy that entailed the same preparations and procedure as did the Grievor in this case and, in an Agreed Statement of Facts, the parties stated that, for the purpose of the hearing, it would be assumed that the Grievor was "totally disabled" for day on which the colonoscopy took place. Again, as here, the issue was described by Arbitrator Marcotte in the following terms:

> *...there is no dispute, for purposes of this award, the grievor was totally disabled. Rather, the issue between the parties is whether or not the grievor's total disability entitles her to sick pay benefits under the 1980 HOODIP. More specifically, the issue requires determination of the cause or source of the grievor's total disability. The Union position is the grievor's total disability is "clearly related" to the medical procedure on June 9, 2015. The Employer position is that the medical procedure does not meet the definition in the 1980 HOODIP of total disability "due to injury or illness."*

33. In considering the caselaw, the learned arbitrator drew a distinction between the case before him and those cases in which sick pay benefits were claimed for the period following an elective procedure (as opposed to the day on which the procedure took place) or those cases in which the elective procedure was the only means of treating a disease. In dismissing the grievance, Arbitrator Marcotte wrote:

> *The grievor underwent a colonoscopy on June 9, 2015. There is no evidence to establish or suggest she was ill or injured prior to the procedure. There is no evidence to establish or suggest the medical procedure caused injury to her or caused her to be ill. Entitlement to short-term disability benefits under 1980 HOODIP arises when an employee covered by it is "totally disabled as a result of injury or illness." While the Union argued the grievor's total disability was "clearly related" to the medical procedure, that is not the test; the test is whether or not illness or injury caused the total disability. Since the grievor's total disability was not caused by injury or illness, I cannot find the grievor was totally disabled for purposes of eligibility to receive sick pay benefits under the 1980 HOODIP.*

34. I note that in the case before Arbitrator Marcotte, while the parties agreed that the grievor was totally disabled on the day of the colonoscopy, there did not appear to be direct evidence from her respecting the symptoms she experienced in the preparation for, and aftermath of, the colonoscopy. That was not the case in the second decision, *TBRHSC and ONA*, supra, in which the Union led direct evidence from the grievor who underwent a colonoscopy respecting the preparation and procedure as well as the symptoms experienced and the impact on her ability to do her job as a registered nurse. It was that grievor's testimony that she was incapable of performing her regular duties. Further, the Union called evidence from the physician who performed the colonoscopy that the grievor was not capable of working as a registered nurse on the day of the procedure due to a lack of food, lack of sleep and the required consumption of a final litre of laxative on that day.

35. in *TBRHSC and ONA,* supra, Arbitrator Randazzo considered most, if not all, the same authorities as were tendered to me. I note that the Union, before Arbitrator

Randazzo, argued that *MIC's Group of Health Services and ONA (Mayer), Re* (supra) was distinguishable on the bases that:

> *Arbitrator Marcotte based his decision on an Agreed Statement of Facts which did not include evidence of the Grievors' state of health on the date of the procedure. Further, the Agreed Statement of Facts did not include evidence that the Grievors' ill health was due to the preparations for the procedure and side effects from the medications administered during the procedure.*

However, in the cases before both Arbitrator Marcotte and Arbitrator Randazzo, the employer hospitals agreed that the grievors were totally disabled on the days on which the colostomies were performed. Similarly in this case, while the Employer did not explicitly agree that the Grievor was disabled on the day of her colostomy procedure, it did not cross-examine her on her Will-Say statement in which she stated that she was unable to perform her regular duties on that date and I have found that she was totally disabled within the meaning of the 1980 HOODIP brochure. Here, too, the only question that remains is whether that disability is due to illness.

36. Before me, the arguments advanced by the Union reflected in their material respects, the arguments that were put by it to Arbitrator Randazzo. In rejecting those arguments, the learned arbitrator found that colonoscopy procedures such as that performed on the Grievor were "…medical diagnostic appointments for the monitoring of health concerns". Accordingly, such an absence was not due to illness. Arbitrator Randazzo further stated:

> *53. In Baycrest Centre, supra, which also adopts the reasoning of Arbitrator Burkett in Bell Canada, supra, an employee was not entitled to sick pay where work was missed due to a follow-up medical appointment and x-ray notwithstanding that the appointment was necessitated by an injury to the employee's elbow that required a lengthy absence from work. The Board of Arbitration, at paragraph 18 of the decision found that,*
>
> > *…As indicated in paragraph 21 of the Agreed Statement of Facts, it is common ground between the parties that had the grievor not had the medical appointment with Dr. Boynton on July 5, 2001, she would have been able to work her regular hours of work between 9:00 a.m. and 5:00 p.m.*
>
> *54. I consider this to be analogous to matter before me. Although the dietary preparations and medications caused impairment, these impairments cannot be considered in isolation from the procedure as they are a fundamental and necessary part of the diagnostic procedure. Further, but for the diagnostic*

procedure, the Grievors would have been capable of working on the day of the procedure.

37. In dismissing the grievance before him in *TBRHSC and ONA,* supra, Arbitrator Randazzo considered that:

> *…the dietary preparations and medications administered are not to be viewed in isolation and should be considered as part of the colonoscopy … procedure. As such, [the grievor's] total disability on the day of the procedure was due to the procedure and not due to an illness or injury.*

In so finding, Arbitrator Randazzo carefully analyzed the evidence before Arbitrator Marcotte in *MIC's Group of Health Services and ONA (Mayer), Re* (supra), and found that the facts before him were "…satisfactorily similar to the facts before me [and] are sufficient to conclude that the total disability was due to the procedure and not due to an illness or injury.".

38. In deciding this matter, I would observe that neither the 1980 HOODIP brochure nor the Collective Agreement between the parties sets out a definition of "illness" that might assist in interpreting its use in the case before me. Similarly, those documents are silent with respect to the relationship between diagnostic procedures and entitlement to the Sick Pay Benefit. Each of the parties has advanced an interpretation of language that is, on its face, rational. Counsel for the Union has argued forcefully and persuasively in favour of its interpretation. But, in preferring that offered by the Employer I must conclude that the interpretation found in both *MIC's Group of Health Services and ONA (Mayer), Re* (supra) and *TBRHSC and ONA,* supra is correct and that the Grievor's colonoscopy for diagnostic purposes, together with the symptoms experienced in connection with that process, do not constitute "an illness" for the purposes of the 1980 HOODIP brochure.

39. In these circumstances, I agree with the reasoning of Arbitrator Gedalof in *Ross Memorial Hospital v. CUPE Local 1909*, supra, as set out in paragraph 18, above. This, too, is a case in which the awards of Arbitrators Marcotte and Randazzo cannot be "meaningfully distinguished" from the matter before me. To rule in the Union's favour, I would have to conclude that those decisions were wrong, something that I am unable to do. I accept the Union's position that I am not bound by those decisions but, as submitted by the Employer, substantial deference is owed them. As in the *Ross Memorial Hospital* decision, the parties here are participants in a central bargaining process. There are two consistent decisions by experienced and respected arbitrators. There have been collective agreements negotiated by the parties subsequent to the issuance of those

decisions. Labour relations are best served when parties are able to make decisions and order their affairs secure in the knowledge that contractual language will be interpreted and enforced in a clear and consistent fashion by arbitrators.

40. For all the foregoing reasons, the Grievance is dismissed.

DATED this 20th day of May, 2025.

Christopher White