IN THE MATTER OF AN ARBITRATION

(Under the *Labour Relations Act, 1995*)

BETWEEN:

WINDSOR REGIONAL HOSPITAL

(the "Hospital")

and

ONTARIO NURSES ASSOCIATION

(the "ONA")

AND IN THE MATTER OF an arbitration of the grievance #202311214 dated October 20, 2023 of DC, one of 19 Individual, Group and Union Grievances under ONA Consolidated Grievance #202406923 concerning medical evidence issues under the collective agreement between the parties.

BEFORE: George T. Surdykowski – Sole Arbitrator

APPEARANCES:

For the Hospital: Jodi Gallagher Healy, Counsel (Hicks Morley LLP);
Andrew Schjerning, Counsel (Hicks Morley LLP);
Francine Herlehy, Director, Labour Relations and Human Resources
Kelly Dorie, HR Business Partner, Labour Relations
Krista Miller, Employee Health Coordinator, Employee Health
Michael Broderick, Manager, Employee Health, Safety & Security

For the ONA: Philip Abbink, Counsel (Cavalluzzo LLP);
David McQuillan, Counsel (Cavalluzzo LLP)
Carol Leclair (Bargaining Unit President)
Caroline Cohen (Grievance Chair)
Kimberley Evans (Labour Relations Officer)

Zoom hearing held on April 29, 2026.

AWARD

THE GRIEVANCE

1. The grievance herein was filed on October 20, 2023. It read as follows:

> I am grieving that the Employer has violated the Collective Agreement, Articles 3, 6, 7, B, J and any other relevant provisions including the Human Rights Code, the Occupational Health and Safety Act, and any other statute and Employer policy including but not limited to failing to provide me with a harassment free work environment, attempting to return me to work when I cannot maintain my College of Nurses standards, the unreasonableness of the Employer for failing to accept my medical information from my physician as adequate.

2. The parties filed and Agreed Statement of Facts. Notwithstanding the wording of the grievance, the Agreed Statement of Facts describes the parties' agreement that the issues to be determined as follows:

> "(a) ONA's allegation that the Hospital engages in a practice of pressuring employees to return to work prematurely. In particular, ONA alleges that the Hospital pressured the Grievor to return to work on October 17, 2023, roughly 3 weeks before the return to work date recommended by her physician, to perform Responsible Person duties, which included patient care duties. ONA further alleges that the Grievor expressed concern about returning to work earlier than recommended, and although the Grievor was told that she would not be assigned duties outside of her restrictions, there was no guarantee that this would be the case because the Grievor, as an RN, has professional obligations to respond to unpredictable patient care needs as they arise. ONA alleges that on October 19, 2023, the Grievor was assigned additional duties because another nurse called in sick, and then experienced an aggravation to her injury while performing patient care duties. The Grievor visited a walk-in clinic and was given further restrictions, including no patient care for 2 weeks. ONA alleges that the Hospital then pressured the Grievor to return to work early again, suggesting that she could perform sedentary duties and resume Responsible Person duties.
>
> (b) ONA's allegation that the Hospital engages in a practice of refusing to accept personal health information provided by employees as sufficient. Specifically, ONA alleges that the Hospital refused to accept the recommendation from the Grievor's physician in the APS provided on October 2, 2023 that the Grievor should remain off work until November 10, 2023 by pressuring the Grievor to return to work early on modified duties. ONA further alleges that the Hospital then refused to accept the APS completed for the Grievor by a physician at the walk-in clinic on October 19, 2023, which recommended no patient care, by pressuring the Grievor to return to work on modified duties, including RP duties.

(c) ONA's allegation that the Hospital engages in a practice of making excessive inquiries of employees' physician. Specifically, ONA alleges that the Hospital asked the Grievor to have a FAF completed by her physician despite the Grievor already having submitted two (2) APS forms and a medical note indicating the Grievor was totally disabled and unfit to work due to her physical restrictions for a period lasting until early November 2023."

3. ONA seeks only declaratory relief, without prejudice to seek further relief if it considers appropriate after digesting the Award.

4. The Hospital denies ONA's allegations. The Hospital's position is that it did not breach the collective agreement, or any applicable legislation or Hospital policy.

IDENTITY ANONYMIZATION

5. Because this grievance concerns the grievor's confidential personal health information I accepted the parties' agreement to anonymize the identities of the grievor and medical health professionals involved in order to protect the grievor's privacy rights to the greatest extent possible.

THE AGREED STATEMENT OF FACTS (Anonymized)

6. The parties filed an Agreed Statement of Fact with the documents referenced it attached as "Tabs". The Agreed Statement of Facts is a matter of record, and the anonymized version is attached as an Appendix to this Award. Instead of beginning with a summary of the agreed facts, I will summarize the parties' submissions, and refer to the facts agreed to by the parties in my determination of the grievance as I consider appropriate.

SUBMISSIONS (Summarized)

ONA

7. Mr. McQuillan notes that the Grievor was absent for just over 1 month due to a fractured rib, during which time the Hospital required 3 return to work meetings and multiple medical certificates. He submits this was inappropriate in the circumstances, and that the Hospital inappropriately rejected the medical clinical assessments the Grievor obtained and applied undue pressure on the Grievor to return to work prematurely.

8. Mr. McQuillan submits that the October 2, 2023 Attending Physician/Practitioner's Statement ("APS") completed by the Grievor's physician complied with the first instance

disclosure requirements established by the jurisprudence and the 1980 HOODPIP, and provided sufficient reliable information for the purposes of assessing the legitimacy of the Grievor's absence from work and their entitlement to 1980 HOODIP sick leave benefits while maintaining the primacy of the Grievor's privacy.

9. Mr. McQuillan points out that the October 2, 2023 APS specified that the Grievor was unfit for any work, including with accommodation. He argues that the Hospital effectively rejected physician's opinion and the Grievor's stated concerns by pursuing a strategy to return them to work in a modified work position.

10. Mr. McQuillan argues that if the Hospital had any concerns about the sufficiency of the contents of the October 2, 2023 APS it could and should have sought clarification from the physician before moving forward with a return to work plan. Instead he submits, the Hospital unduly pressured to the Grievor to return to work prematurely to assigned duties beyond their restrictions, which aggravated the Grievor's injury, necessitating further medical attention and producing an October 19 medical note and second APS. Mr. McQuillan argues that the re-injury and second APS should have caused the Hospital to treat the Grievor as totally disabled from performing any work for the 14 days specified in these second certifications.

11. Mr. McQuillan argues that there was no legitimate basis for the Hospital's rejection of the October 19 medical certification, or for the Hospital's assertion of a conflict in the medical documentation. He submits there was no basis for the Hospital's request that the Grievor disclose further private medical information in a FAF. He argues that even if the Hospital might reasonably have sought clarification of the October 19 note and APS, a functional abilities assessment was not necessary or appropriate in the circumstances, and was beyond what was required by the "least amount of medical information required for a legitimate purpose" test established by the jurisprudence.

12. Mr. McQuillan submits that having received the completed FAF it was inappropriate for the Hospital to then offer the Grievor sedentary work and to once again pressure the Grievor to return to work prematurely contrary to medical advice.

13. Mr. McQuillan argues that because of the unpredictability of the demands a nurse may encounter in a hospital environment, it was particularly egregious for the Hospital to continue to pursue the Grievor's return to work after the Grievor suffered re-injury during their first return to work after their initial absence. He submits that the grievance should therefore be allowed and the appropriate declarations issued.

14. Mr. McQuillan cited the *Hamilton Health Sciences v. Ontario Nurses' Association*, 2007 CanLII 73923 (ON LA – Surdykowski) – "*Hamilton Health Sciences #1*"; *Hamilton Health*

Sciences v. Ontario Public Service Employees Union, 2021 Can LII 13253 (ON LA – Steinberg) – "*Hamilton Health Sciences #2*"; and *Unilever Canada Inc. v. United Food and Commercial Workers Union, Locals 174 and 633,* 2022 CanLII 6822 (ON LA – C. Johnston) arbitration decisions aid of ONA's submissions.

The Hospital

15. Ms. Gallagher Healy submits that the Hospital and its agent Acclaim acted reasonably and appropriately throughout, and followed an appropriate return to work process at every step on the basis of the information available at the time. She submits that the grievance should therefore be dismissed

16. Ms. Gallagher Healy argues that the Grievor's October 2, 2023 APS, particularly Section D, must be read in the way a doctor would understand it, which she says effectively begs the question "why" the physician checked the box indicating their opinion that the "Employee is unfit to work", particularly when the Grievor's assertions of their restrictions was different.

17. The Hospital submits that the Grievor's obligation as a regulated health professional was to perform their designated nursing duties and responsibilities, which in this case reasonably included the modified work program the Grievor and ONA agreed to at the October 5, 2023 tripartite return to work meeting held for the purpose. Ms. Gallagher Healy submits that the modified work offered the Grievor was consistent with the treatment plan outlined in the October 2 APS (which she acknowledges was over and above what had to be disclosed), and with the Hospital's obligation to safely return the Grievor to work as soon as possible. She denies that the Hospital pressured the Grievor to return to work. Ms. Gallagher Healy submits this return to work meeting was appropriate and *Human Rights Code* and *OHSA* compliant. She argues that if the Grievor or ONA had an issue with the Grievor's ability to return to work on the modified basis offered they should have raised it at the return to work meeting.

18. Ms. Gallagher Healy notes that the Hospital gave the Grievor some further time [11 days] to recover from their injury before holding a second return to work meeting on October 16 and returning the Grievor to work on October 17.

19. Ms. Gallagher Healy denies that the Hospital rejected the Grievor's concerns at the subsequent October 16 return to work meeting. She submits that on the contrary, the Hospital discussed these concerns with the Grievor and assured the Grievor that their restrictions would be respected, all in ONA's presence.

20. Ms. Gallagher Healy points out that ONA is a sophisticated union, and that the Grievor was supported and represented by ONA, at all the return to work meetings and accepted the

offers modified return to work offers in the various positions they were placed on a short-term accommodation basis without any objection from ONA. She submits that contrary to ONA's submissions, the Hospital fully and properly considered the Grievor's functional limitations and re-injury concerns, and assured the Grievor that assistance would be available if required. Ms. Gallagher Healy reiterates that if the Grievor or ONA genuinely believed that the Grievor would be unable to comply with the Grievor's professional obligations as a regulated health professional they could and should have said so at the several return to work meetings, but that notwithstanding the Grievor's expressions of concern the Grievor and ONA accepted that the Hospital's various offers of accommodated work.

21. Ms. Gallagher Healy denies that the Hospital was reckless and overbearing, or that the Grievor's October 19 re-injury was reasonably foreseeable. She argues that the Hospital and its agent Acclaim acted reasonably and in good faith throughout having regard to the information available at the time. Ms. Gallagher Healy argues that the Hospital's or Acclaim's actions cannot be viewed in hindsight, and that the Grievor was in any event performing work within their restrictions when they were re-injured.

22. Ms. Gallagher Healy argues that the October 19 medical note and APS did not comply with the 1980 HOODIP requirements, and that there was a conflict between the contents of the medical documentation provided by the Grievor. She submits this reasonably led to the request for the more intrusive but reasonably necessary for the purpose FAF, in what she submits was by that time no longer a first instance situation.

23. Ms. Gallagher Healy points out that the Grievor's short-term disability claim was in any event supported through November 1, 2023, that the Grievor accepted the Hospital's offer of modified RP work beginning November 2, 2023.

24. Ms. Gallagher Healy submits that the situation viewed in context as a whole is an example of a productive return to work dialogue between all concerned consistent with duty to accommodate requirements. She acknowledges that the Grievor may have felt pressured, but reiterates that the Grievor is a professional who had the benefit of ONA's assistance throughout. She submits the Hospital properly considered the available medical evidence in an open dialogue with the Grievor and ONA in an appropriate attempt to address the Grievor's restrictions and concerns in a reasonable attempt to safely return the Grievor to work.

25. Ms. Gallagher Healy also referred to the *Hamilton Health Sciences #1*; and also to *Complex Services Inc. v. OPSEU, Local 278*, 2012 CanLII 8645 (ON LA – Surdykowski); and *Unilever Canada Inc. v. United Food and Commercial Workers Union, Locals 174 and 633,* 2022 CanLII 6822 (ON LA – C. Johnston) arbitration decisions in support of the Hospital's submissions.

ONA Reply

26. ONA does not dispute the Hospital's tripartite return to work process, and does not suggest that the Hospital cannot accommodate a nurse in a position notwithstanding that they cannot perform all the nursing duties and responsibilities associated with it. He clarified that ONA's assertion is that the Grievor should not have been returned to work in any active nursing capacity because of the nature of their injury and the inherent unpredictability of the demands of nursing positions in a hospital environment.

27. Mr. McQuillan submits that the Acclaim was wrong to request an FAF immediately after the Grievor re-injured themselves and provided a new doctor's note and APS which made it very clear that the Grievor was unfit to return to work.

28. Mr. McQuillan submits that the Hospital's return to work approach put the Grievor in the untenable position of either accepting the Hospital's offers of modified duties and responsibilities which the Grievor was concerned would require them to perform tasks beyond their functional limitations, or declining to return to work and losing sick pay benefits as a consequence.

DECISION

The Principles of Required Private Medical Information Disclosure for Leave of Absence and Sick Leave Benefits Purposes

29. The parties agree on the generally applicable principles developed in the arbitral jurisprudence, as they should because these are well established. As usual in such cases, the focus of the parties' disagreement is on the application of those principles.

30. Although the focus of much of the caselaw is on "first instance" absence from work situations, it includes commentary on non-first instance situations. The principles are so well established that quoting great swatches of quotes from the caselaw would serve no useful purpose. It is sufficient to summarize the established principles as follows:

- The plain and ordinary meaning of "first instance" in the context of absence from work situations is "at the beginning of an absence from work". How long "first instance" extends depends on the facts of the particular case.

- The confidentiality of personal medical information and the medical health professional-patient relationship is such a significant individual privacy right that it is paramount.

- The limitations on the bargaining unit employee right to keep personal medical information private are not absolute. Whether and the extent to which confidential private medical information must be disclosed depends on the circumstances, including the applicability of legislation that speaks to such privacy issues, the provisions of the collective agreement, and most importantly as a general matter, the legitimate purposes for which an intrusion into a bargaining unit employee's protected privacy.

- In every case, whether in the first instance or not, a conservative approach to the disclosure of private medical information is appropriate. Whether and extent to which an employee can be required to disclose confidential medical information is assessed by applying a "least extent necessary for the legitimate purpose" objective test which balances the employee's privacy interest with the employer's legitimate workplace management interests, with the employee's privacy paramount in the event of doubt.

- A bargaining unit employee is obliged to provide appropriate notice of and a legitimate excuse for an absence from work in accordance with the collective agreement or legitimate workplace rules. In order to receive collective agreement sick leave benefits an employee must establish entitlement by providing objectively satisfactory proof of entitlement.

- In every case, whether in the first instance or not, the employer must obtain the employee's informed consent to the disclosure of confidential medical information by the employee's treating medical health professional. A separate informed consent is required for every contact with or disclosure by an employee's treating medical health professional. An employer may not require an employee to consent to without further notice forward-looking or multiple contacts with their medical health professional(s) for the purpose of either clarification or obtaining additional private medical information.

- Informed consent means that an employee is entitled to identification of the medical health professional the employer is seeking to contact for the purpose of obtaining their confidential medical information; the specific medical information being sought; and why the employer is seeking access to that information. The employee must be kept fully in the communications loop with respect to all requests for the release of their private medical information to their employer.

- In every case, first instance or otherwise, the employer must have an objectively reasonable basis for seeking an employee's confidential medical information, or for clarification or additional such information. On the other hand, a bargaining unit employee who refuses to consent to an objectively reasonable request for their confidential medical information for absence from work justification or sick leave

benefits purposes, whether or not in the first instance, may be subject to discipline for cause or denied sick leave benefits.

- In the absence of a collective agreement provision that requires more, or reasonable cause to doubt its *bona fides*, a document signed by an appropriate medical health professional which certifies that an employee is unable to work due to a generally described illness or injury (i.e. the nature of the illness or injury), is under the medical health professional's care (continuous if necessary) and is complying with an appropriate treatment plan, and estimates the expected duration of the absence, satisfies the employee's first instance medical information disclosure obligations. Such a "certificate" constitutes *prima facie* first instance proof sufficient to justify the absence and qualify the employee for available sick leave benefits.

- An employer has no first instance right to a bargaining unit employee's diagnosis, symptoms, details of a treatment plan or medications, or prognosis other than the expected date that the employee will be able to return to work with or without specified restrictions, or to a list of medical appointments. If the document that certifies the absence does not provide it, the employer may ask for the date the medical health professional first saw the employee for the illness or injury. The employer may not require disclosure of subsequent or scheduled medical appointments unless there is a legitimate need for such information.

- Subsequent to the first instance the employer may ask an employee to disclose additional medical information as reasonably required for a legitimate purpose, including to justify a continued longer than originally estimated absence, or for return to work accommodation purposes (generally not a first instance issue), for example. The longer the absence, the more disclosure of medical information may be required in what some of the cases refer to as the disclosure continuum. But the conservative least intrusive for the legitimate purpose test for disclosure remains the same.

The Principles Applied

31. Although the Ontario *Human Rights Code* and *Occupational Health and Safety Act* were referenced in the grievance as filed and in the Hospital's submissions, ONA did not refer to either statute in its submissions, and the parties' definition of the issues in their Agreed Statement of Facts makes no mention of either. This leads me to conclude that ONA chose not to pursue any such allegation (rightly on the basis of what was put before me).

32. There is no dispute that the Grievor received all of the sick leave benefits they were entitled to. There is no sick leave benefits claim before me.

33. The Grievor's regular position at all material times was full-time Registered Nurse ("RN") on the Renal Chemotherapy/Dialysis Unit at the Hospital's OUE campus.

34. The 1980 HOODIP forms part of the collective agreement between the parties and applies to the Grievor. The 1980 HOODIP requires OUE employees to provide a completed APS for absences from work of more than 3 consecutive shifts, and as otherwise required in order to obtain sick pay benefits. The Plan brochure more defines proof of disability for sick leave benefits purposes as being:

> Proof of disability satisfactory to your employer such as a doctor's certificate is required for absences of three days' duration or over, and is subject to a periodic review thereafter. However, such proof may be required at any time in order for you to qualify for benefits.

35. The Grievor left work after they felt unable to continue their shift on September 27, 2023. The Hospital provided them with a blank APS in case one was required.

36. September 28, 2023 was the Grievor's first missed shift.

37. The Hospital has contracted out is absence and sick leave management duties and responsibilities to Acclaim Ability Management. The Hospital referred the Grievor to Acclaim to manage the Grievor's absence from work on September 29, 2023. Although the Hospital had already provided the Grievor with one, Acclaim immediately sent the Grievor an APS form and advised them to have it completed by their physician and returned by October 13.

38. The Grievor returned the completed APS to Acclaim on October 2, 2023, the same day it was signed by the Grievor, and completed and signed by their physician. The APS identified the nature of the Grievor's illness/injury as being a non-workplace "fracture of rib #7 (left)" sustained on September 24, 2023. The APS specified that the Grievor was "unfit to work" as a result and identified the Grievor's restrictions as being not lifting patients or pushing 50 lbs. or more, "e.g. mechanical lift", and estimated November 13, 2023 as the Grievor's return to work date. The APS also detailed the Grievor's treatment plan (to an extent beyond what the Hospital acknowledges was required in the first instance) as being convalescence, avoiding painful activities, Tylenol, a prescription for 400 mg Ibuprofen, and a bone density scan.

39. Despite the anticipated return to work date identified in the APS, the Grievor advised the Hospital on October 3, 2023 they would be off work until November 9, and would return to work on November 10. Acclaim apparently had no issue with this because it advised the Grievor that their absence from work was supported for the period September 27-November 9, 2023, pending the Hospital's response concerning possible available accommodation.

40. The Hospital indicated an ability to accommodate the Grievor's restrictions and scheduled a return to work meeting for October 5. The Grievor attended this return to work meeting with an ONA Return to Work Representative. Upon being advised by the Hospital that the restrictions noted in the October 2 APS could be accommodated, the Grievor expressed concerns about returning to work before the return to work date recommended by their physician (even though the Grievor had themselves indicated a slightly earlier date), including their ability to complete patient care tasks such as CPR, placing patients in chairs, and rolling over patients if they vomit. The Hospital responded that the Grievor would be assigned to the Bell Building where patients age generally (i.e. not always) ambulatory and independent, and that the Grievor would be able to work within their restrictions, with co-worker assistance available if needed. The Hospital advised that Charge Nurse duties were also available and suggested a further meeting on October 16 review a modified work plan, and to give the Grievor further recovery time.

41. The Hospital effectively disagrees with ONA's submission that the October 2, 2023 APS the Grievor provided to the Hospital was sufficient to justify the Grievor's absence from work due to injury, and entitlement to 1980 HOODIP sick pay benefits.

42. I observed in *Hamilton Health Sciences #1* (paragraph 58) that all that the 1980 HOODIP requires of an employee in order to establish "total disability" for sick pay benefits purposes is proof "satisfactory to your employer such as a doctor's certificate", but that "satisfactory to your employer" does not imply either an employer subjective test or broad employer discretion with respect to the quality of proof required. The test for "satisfactory" is objective reasonableness. Further, the modifier "such as a doctor's certificate" must be interpreted in light of the significant privacy protections assigned to confidential personal medical information. The 1980 HOODIP offers a doctor's certificate as an example of what is deemed to be objectively reasonable proof for sick pay benefits purposes: namely, certification in some form by a medical health professional. This requires no more than a document from a medical health professional qualified to make the medical assessment attested to that is objectively sufficient to certify that the employee is unfit to return to work due to illness or injury. This is not subject to the employer's subjective satisfaction. In the first instance under the 1980 HOODIP, the employer is not entitled to more than certification by a qualified medical health professional that assesses the employee as being incapable working at her occupation due to illness or injury for a specified period, the general nature of the illness or injury, that the employee is undergoing treatment (without specifying what it is), and the anticipated return to work date. The employer can only obtain additional confidential medical information if it has objectively reasonable grounds to doubt the accuracy, truth or adequacy of the certificate.

43. I am satisfied that that October 2, 2023 APS satisfied the 1980 HOODIP first instance medical information requirements for 1980 HOODIP purposes.

44. Indeed, the Hospital must in fact have been satisfied that the October 2, 2023 APS was in fact sufficient for not only absence justification and 1980 HOODIP sick pay benefits purposes, but also return to work accommodation purposes because the Hospital held what was apparently a normal (for these parties) return to work meeting on October 5 at which it offered the Grievor what the Hospital considered an appropriate modified work assignment consistent with the October 2 APS. The Hospital responded to the Grievor's concerns about re-injury by assuring the Grievor that they would be able to work within their restrictions and that help would be available if required.

45. Further to the October 5 return to work meeting, the Hospital scheduled another return to work meeting for October 16, 2023, this one by conference call. Exactly what position at its Bell Building the Hospital had in mind on October 5 is not clear. In any case, neither that, nor the Charge Nurse position possibility the Hospital had suggested, was actually offered to the Grievor on October 16. Instead the Hospital offered the Grievor a modified duties Responsible Person ("RP") with 2 days' training return to work position beginning the next day. The parties agree that notwithstanding that the intention was to return the Grievor to work in a position modified to accommodate the Grievor's restrictions (as set out in the October 2 APS), placement in the modified RP assist position nevertheless meant that the Grievor could be called to perform bedside nursing duties for short periods during breaks or sick calls. Even for short period bedside nursing duties were outside the Grievor's identified restrictions. The Grievor and ONA apparently accepted the Hospital's assurance that the Grievor would not be required to work outside their restrictions, because they accepted the Hospital's offer of a RP assist modified return to work assignment.

46. The Hospital denies ONA's claim argues that it was reckless and overbearing at the October 16 return to work meeting, that it rejected the Grievor's concerns, or that having regard to the information available to it at the time that it was reasonably foreseeable that the Grievor would re-injure themselves in the offered RP assist position. It argues that the Grievor's concerns were discussed and that the Grievor were assured their restrictions would be respected. I agree that the Hospital told the Grievor and ONA that it recognized and accepted the restrictions set out in the October 2 APS, and assured them that these would be respected and that assistance would be available if required.

47. But with respect, the RP assist return to work assignment does not reflect recognition of the nature of the Grievor's injury or acceptance of their restrictions. The restrictions noted in the October 2 APS do not demonstrate an understanding of the requirements of the Grievor's regular job and would have given the Hospital reasonable cause to ask for clarification. However, the Hospital 's actions do not demonstrate any concern about the extent or quality of the physician's assessment of the Grievor's fitness for work even with accommodation. The Hospital could have

sought clarification in that respect. It did not. If as the Hospital suggests the APS read as a whole begged the question "why was the Grievor unfit to work", why didn't the Hospital ask the Grievor's physician for that clarification? Nor is there any evidence that the Hospital or Acclaim had obtained an opinion from an appropriate qualified medical health professional about the October 2 APS assessment or the suitability of the modified RP position offered to the Grievor, having regard to the nature of their injury. Instead the Hospital substituted its own opinion for that of the Grievor's treating physician. It appears that the Hospital did so without considering the nature of the Grievor's injury adequately or perhaps at all.

48. The October 2 APS assessed the nature of the Grievor's injury as a fracture of their left side 7th rib. There is no suggestion much less evidence that the Hospital questioned this assessment. There any suggestion that it would have been possible for the Grievor to perform all of the duties and responsibilities of their regular full-time RN on the Renal Chemotherapy/Dialysis Unit at the Hospital's OUE campus, which the parties agree was physically undemanding), on either an as usual or an accommodated basis until they fully recovered from that injury.

49. I find it troubling that there is no evidence that the Hospital considered the effect of the Grievor's injury on their ability to return to work in any position, or on the appropriateness of the October 16 return to work offer. The nature and effect of a rib injury on an employee's ability to perform work is something that persons responsible for absence and safe return to work management should be alert to, particularly in a hospital workplace.

50. A rib fracture is a break in one or more of the ribs in the human ribcage caused by some sort of traumatic event. It is or should be common knowledge for people whose job it is to manage employee workplace absences and returns to work that rib fracture symptoms typically include chest pain that worsens with deep breathing, coughing, or movement. The impact on a person who suffers such an injury depends on the degree of fracture and the individual's health and physiology. But with proper care most such fractures heal well on their own within 6-12 weeks. Treatment typically focuses on rest, pain management by common over-the-counter pain medications, and perhaps breathing exercises to maintain respiratory mechanics and reduce the risk of pneumonia. Although similar to other rib fractures, the location of the 7th rib fracture makes it more prone to complications such as bleeding into the chest cavity or organ damage, compared to fractures of ribs higher or lower in the rib cage.

51. There is a spectrum of patient response to rib fracture damage. The extent to which someone who fractures a 7th rib without any associated organ damage will have to miss work will depend on their physical makeup and general condition, the nature of their work, (particularly the physicality of their regular job), and availability of accommodation in their regular or another job. Although it is generally recommended that a person who has suffered a

rib fracture stay as active as possible, movement of the upper body, can be difficult to manage and must be kept within prescribed medical restrictions.

52. In any case, the Hospital did not accept that the Grievor was totally disabled and unfit for any work. Whether or not it actually accepted the restrictions specified in the October 2, 2023 APS, by seeking for clarification and offering the Grievor the modified RP assist return to work position the Hospital signaled its acceptance of those restrictions for 1980 HOODIP and accommodated return to work purposes. It is not open to the Hospital to argue otherwise now, regardless of subsequent events.

53. Although ostensibly modified in recognition of the Grievor's restrictions, the October 16 return to work assignment specifically contemplated that the Grievor could be called on to perform bedside nursing duties for short periods during breaks or sick calls, something clearly outside the Grievor's identified restrictions. In the absence of evidence that the Hospital was not experiencing the same staffing issues endemic in Ontario I consider it likely and reasonably foreseeable that either an atypical dialysis or other patient care situation where the promised assistance was not available would arise, or that in a break or sick call situation the Grievor would otherwise be faced with the untenable choice of either providing necessary patient care outside of their restrictions, or denying a patient necessary care. The reality is that as a responsible professional RN the Grievor would undoubtedly feel compelled to risk re-injury by stretching themselves beyond their functional limitations in the exercise of what the Grievor would reasonably perceive as their professional duty of care. I am satisfied that it was reasonably foreseeable that the Grievor would as likely as not suffer a re-injury in the performance of the modified RP job as assigned. This is not hindsight. It is my assessment of the situation before The Grievor was returned to work on October 17.

54. I agree with ONA that by offering what I am satisfied was the problematic modified RP assist return to work assignment the Hospital effectively rejected the Grievor's physician's assessment that the Grievor was unfit for work and was expected to be unable to return to work until November 10. The description of the functional limitations described in the October 2, 2023 APS that in the Grievor's physician's opinion made them unfit for work could reasonably be understood to suggest that the doctor was not familiar with the requirements of the Grievor's job. But there is no evidence that anyone sought clarification of the October 2 APS for accommodated return to work purposes purposes.

55. However, it is also a fact that despite some misgivings the Grievor, with an ONA representative available to support and advise them, accepted the modified work assignment, and

that ONA voiced no objection or even concern. And so the Grievor returned to work in the offered modified RP assist position.[1]

56. The Grievor returned to work on October 17 to the modified RP assist position as agreed. The Grievor's assigned duties included providing ambulatory outpatients with dialysis, and performing RP functions such as assigning work duties and monitoring patient flow, which do not generally (i.e. not never) require pushing 50 lbs. or more, or lifting patients. The Grievor worked full shifts as assigned on October 17 and 18.

57. On October 19, 2023 the Grievor was partnered with another nurse to continue RP training. However, a shift RPN called in sick. This resulted in the Grievor being assigned to cover several additional necessary patient assignments, something well outside the Grievor's restrictions. The Grievor's partner assured the Grievor they would be able to assist if the Grievor needed help. Though undoubtedly necessary for patient care purposes, it was inappropriate for the Hospital (albeit through a Hospital representative "on the ground") to add patient care duties and responsibilities much more likely than not outside the Grievor's restrictions in circumstances where it was even less likely that short-staffed co-worker assistance would be available if required, all of which made it even more likely that the Grievor would be pushed beyond her functional limitations to a re-injury result.

58. There is no evidence that assistance was either required or available when at approximately 8:15 a.m. on October 19, 2023 the Grievor reported to their manager that they had aggravated their injury while engaging in patient care on the Dialysis Unit. What that patient care was is not specified, but the Grievor reported experiencing chest pain immediately after putting a patient on a dialysis machine, and that they could no longer perform their assigned duties because of the pain. An October 19 "Employee Event Summary" records the Grievor saying that she was:

> "… required to come into work on modified work charge work duties, and RPN did not report for duty … pt.'s were accessed and put on within the unit and my

[1] Perhaps Ms. Gallagher Healy misspoke (or I misheard), or she was referring to the "Employee Event Summary" referenced in referenced in paragraph 17 of the Agreed Statement of Facts, but I heard her say that the Grievor was offered Charge Nurse responsibilities and told that help would be available if required. Although the October 19 "Employee Event Summary" that is part of the Agreed Statement of Facts records the Grievor saying that she was on a Charge Nurse assignment when she was reinjured, the fact specifically agreed to by the parties is that the Grievor was offered a modified RP trainee or assist return to work position at the October 16 return to work meeting and which the Grievor accepted and was duly assigned to, and that the Grievor was working in that position when they were re-injured (paragraphs 16-17 of the Agreed Statement of Facts). This raises a question about the reliability of either the Grievor's reporting, or the "Employee Event Summary". But I need not try to resolve for purposes of this Award. The Charge Nurse option was also raised by Acclaim after the Grievor reinjured themselves on October 19, but there is no evidence that the Grievor was in fact assigned a Charge Nurse position, modified or not during the period of their absence.

> trainer researched meds and delivered those needs. After putting a pt. on in spot #13 while walking to another pt. felt left wall chest pain. …"

This was not further explained. The parties agree that putting a patient on dialysis does not typically (i.e. not ever) require pushing 50 lbs. or more, or lifting a patient. There is nothing in the Agreed Statement of Facts about upper body twisting or stretching movements when engaged in such a task – movements which could aggravate a 7th rib injury.

59. In addition to denying ONA's complaints about its conduct during the October 16 return to work meeting, and denying the foreseeability of Grievor re-injury in the offered RP assist position, the Hospital submits that the Grievor was in any event performing work within their restrictions when she was re-injured. With respect, it is not clear on the facts agreed to that the Grievor was working within their restrictions when she was re-injured. But even if that is so, the delicacy of a healing 7th rib fracture injury is such that it seems obvious that there is a real danger that a nurse who has not fully recovered from such an injury may suffer re-injury if they are returned to work in a fluid hospital work environment in a position that may require upper body activity.

60. In fact, the parties agree that the Hospital recorded that the Grievor reported doing additional tasks because a nurse did not show up for their shift, although the Grievor could not identify a particular movement that caused the sudden pain they reported. This suggests the Grievor may not have been working within their restrictions. If the Grievor was working within restrictions when they re-injured themselves, this *prima facie* demonstrates the inappropriateness of the RP return to work assignment. If the Grievor was working outside of their restrictions, their cooperative conduct throughout suggests that circumstances compelled them to do so.

61. In any case, the Hospital advised the Grievor to see their physician to review their restrictions, something that should probably have been done before the Grievor was returned to work on October 17 – 12 days after the first (October 5) return to work meeting.

62. The Grievor left work but apparently did not attempt to see their physician. Instead the Grievor immediately went to an Urgent Care walk-in clinic where they obtained a medical note and a completed APS (both dated October 19, 2023, and from the same doctor) which they faxed to Acclaim the same day. The grievor also informed the Hospital. The medical note stated that the Grievor was "unfit to work" and that they were totally disabled and off work for 14 days, at which time they should be reassessed. The APS restated the Grievor's injury as being a fractured rib, reiterated that the Grievor was "unfit to work" and identified the Grievor's functional limitations as being: "No patient care" (emphasis supplied) for 2 weeks.

63. That same day, Acclaim advised the Hospital of the Grievor's "no patient care for 2 weeks" functional limitation update and asked if there were any strictly sedentary duties

available for the Grievor to perform. Acclaim also advised that the Grievor had said that when they left work on October 19 they weren't doing anything heavy or particularly physical, and that they "just twisted and felt some severe pain and knew it wasn't going to get better" (Emphasis added.).

64. On October 20, 2023 the Hospital advised Acclaim that the Grievor could assist in documenting upcoming Covid vaccinations. An Occupational Health Nurse responded that a return to work meeting with the Grievor and ONA had to be scheduled for the purpose. That is, the Hospital effectively rejected the second medical assessment that the Grievor was unfit to return to work, and again failed to consider the effect of the nature of the Grievor's injury on their ability to return to work in any position at the risk of aggravating their injury.

65. ONA filed the grievance herein the same day; that is, before the next return to work meeting.

66. Despite the grievance and before another return to work meeting, on October 23, 2023 Acclaim spoke to the Grievor about returning to work. The Grievor responded that they had a medical note placing them off work for 2 weeks and a "no patient care" functional limitation, and that they didn't understand how they could return to work. Notwithstanding this, Acclaim advised the Grievor that the "no patient care" limitation could be accommodated. The Grievor responded that they were worried about re-injury because they they had previously been returned to work with a no physical work limitation but ended up having to do such work and re-injuring themselves. Apparently unhappy with the Grievor's response, Acclaim told the Grievor that their restrictions required clarification because there were conflicts in the medical documentation – despite there not being any previous suggestion of any such conflict or that clarification was required, including when the Hospital assigned the Grievor to the accommodated return to work RP position. Further, despite this purported need for clarification Acclaim also advised the Grievor that the Hospital was able to accommodate as an extra Charge Nurse which should not involve physical work. There is no evidence that Acclaim suggested the Grievor would be assigned to documenting Covid vaccinations.

67. In any event, the Grievor acquiesced to Acclaim's suggestion that they have a Functional Abilities Form ("FAF") completed for the purpose of obtaining a more specific statement of restrictions and limitations. There is no evidence that Acclaim involved ONA in these discussions, or that ONA agreed that a functional abilities assessment was necessary or appropriate.

68. The Hospital asserts that the October 19 medical note and APS did not comply with the 1980 HOODIP requirements, reiterates Acclaim's claim of a conflict between the contents of the medical documentation provided by the Grievor. The Hospital submits that this was no longer a

first instance situation, and that the conflict in the documentation justified the request for completion of a more intrusive but reasonably necessary for the purpose FAF.

69. I understand the focus of the Hospital's assertion of conflict in the medical documentation submissions to be on the October 19 medical note and APS. As indicated above (paragraph 62), the medical note stated that the Grievor was total disabled and "unfit to work", and that they were to be off work for 14 days at which time the Grievor should be reassessed. The APS restated the Grievor's injury as being a fractured rib and identified the Grievor's functional limitations as being: "No patient care" (emphasis supplied) for 2 weeks. I am unable to discern any conflict between the two documents. Further, although the October 19 APS was more optimistic with respect to the Grievor's possible return to work date, its assessment that the Grievor was "unfit to work" and identification of "No patient care" for weeks restriction are sufficiently consistent with the original October 2 APS assessment (paragraph 38, above) for the purpose.

70. I agree that this was no longer a first instance situation. But the test for reasonably necessary disclosure of confidential medical information is the same. The Hospital does not even now specify how the October 19 medical note and APS did not comply with 1980 HOODIP requirements, and I am unable to discern any substantive shortcomings in that respect.

71. Nor did either Acclaim at the time or the Hospital in its submissions identify the alleged conflicts in the medical documentation presented by the Grievor. I am equally unable to discern any substantive conflict in the medical documentation. I am not satisfied that there is any conflict in the Grievor's medical documentation as alleged, or that there was anything in either that documentation or otherwise that justified the request by the Hospital's agent Acclaim for a functional abilities report for the Grievor. That this request was apparently made without notice to or consultation with ONA, despite the grievance having already been filed, is particularly troubling.

72. That said, the Grievor had been supported and assisted by ONA throughout. The Grievor was therefore aware that ONA was available or would be available to further assist. There is no evidence that Acclaim prevented the Grievor from seeking ONA's assistance or advice with respect to the FAF request, or that the Grievor was troubled by ONA's noninvolvement or sought ONA's assistance or advice in that respect, again notwithstanding that the grievance herein had already been filed. In any case, the Grievor did agree to have the FAF completed. There is no suggestion that the Grievor did not do so voluntarily.

73. I am satisfied that even in the October 2, 2023 APS was not good enough for the Hospital (even though its conduct indicates it was), the substantially the same for the purpose October 19 doctor's note and APS should have been sufficient for the Hospital to accept that the Grievor was

totally disabled and unable to perform any non-sedentary work. Indeed, the Hospital's suggestion that the Grievor could be assigned to documenting Covid vaccinations demonstrates that it in fact finally accepted that was the case.

74. I am satisfied that Acclaim's demand for a functional abilities assessment of the Grievor was neither necessary nor appropriate.

75. However, the Grievor did have the FAF completed on October 24, 2023 (the day after Acclaim asked for it), albeit by their physiotherapist not her physician. The FAF identified the Grievor's even more stringent restrictions as being:

- walking less than 15 minutes
- standing 15-30 minutes
- sitting 15-30 minutes
- no squatting or kneeling
- no lifting, pushing, pulling or carrying any weight
- no sedentary duties for more than 15-30 minutes
- no lifting, bending forward, twisting, turning
- "needs 15 minutes breaks twice for ice application"

76. The FAF included an assessment of immediate risk to health if the Grievor participated in accommodation work duties as per the noted restrictions. The physiotherapist noted that the healing of the Grievor's rib injury could be compromised if the restrictions were not followed, and that the Grievor was waiting for clearance from their family doctor's clearance with whom the Grievor had a November 9, 2023 appointment. The FAF also noted a further physiotherapy appointment on October 31 and a checkmark beside "Return to modified duties/hours".

77. Upon receiving the completed FAF the Hospital held a return to work meeting with the Grievor and ONA to discuss modified duties within the Grievor's restrictions on October 25, 2023. The Hospital presented a new modified return to work plan which adopted the above FAF restrictions (paragraph 75) beginning November 2, 2023, with November 9 the next review date. The Offer of Modified Work document referenced in paragraph 31 of the Agreed Statement of Facts in that respect described the modified duties position as another "assist [with] RP duties" position. It did not identify an expected return to full regular duties and responsibilities date.

78. It is apparent from the parties' agreement that the Hospital sent Acclaim a copy of the Offer of Modified Work document on November 3 that the Grievor, and I infer ONA, accepted the Hospital's offer because the Grievor in fact returned to work on November 2, 2023 in accordance with that work plan. Acclaim responded by confirming that the Grievor's entire absence from work until November 1, 2023 was "supported" (i.e. approved), that the modified

return to work plan started on November 2, and that the grievor was to be reassessed on November 9. There was no mention of the Grievor's October 31 physiotherapy appointment.

79. To complete the factual picture, the Grievor presumably worked as a RP assist until the Grievor's physician cleared them to return to work "full hours/duties" (presumably to the Grievor's regular Renal Chemotherapy/Dialysis Unit position) as of November 10, 2023. There is no suggestion that is not the case. In the result, the Grievor's full September 25-November 2, 2023 absence (i.e. excluding the 2.25 days they worked during that period) was approved for sick leave benefits.

80. I agree with the Hospital that ONA is a sophisticated union, that ONA supported and represented the Grievor throughout, and that the Grievor and ONA accepted the various modified return to work offers as aforesaid without objection (but with expressed concerns). I agree that the Grievor provided the October 19 medical note and APS on their own initiative, and that the Grievor agreed to provide the FAF requested by Aclaim. Indeed, the Grievor was fully cooperative throughout.

81. The Hospital submits that if the Grievor or ONA genuinely believed that the Grievor would be unable to comply with the Grievor's professional obligations as a regulated health professional in the accommodated return to work positions they could and should have said so, but that neither of them did, despite the Grievor's expressed concerns. Although the Hospital acknowledges that the Grievor may have felt pressured, the pressure was not undue having regard to the fact that the Grievor is a professional who had the benefit of ONA's assistance throughout. The Hospital submits that it properly considered the available medical evidence in an open dialogue with the Grievor and ONA in a reasonable and appropriate attempt to safely return the Grievor to work with due regard to their restrictions and concerns.

82. The inference suggested by the Hospital's submissions is that the Grievor and ONA are responsible for anything that went wrong, or that at the very at least they share that responsibility with the Hospital, just as they shared tripartite responsibility for facilitating the Grievor's safe return to work with required reasonably available accommodation.

83. There is merit to these Hospital submissions. But they do not get the Hospital off the responsibility hook.

84. As a matter of law, the employer, the employee and the union n a unionized workplace share tripartite responsibility for facilitating an ill or injured employee's as soon as possible safe return to work. The process requires the active participation of all three, and must be individualized to accommodate the employee's situation, the employer's legitimate workplace interests, and and union concerns. The first step is to identity the employee's disability, and

functional limitations and reasonable accommodation requirements. The second step is to find the most appropriate reasonably available accommodation for the employee that does not cause the employer undue hardship, or unnecessarily disrupt the integrity of the collective agreement. The focus of the process must be on the interplay between the nature of the employee's illness or injury and their reasonable accommodation needs, and the nature and reasonable requirements of the workplace.

85. So it is true that responsibility for safely returning an ill or injured employee to work as soon as reasonably possible is a shared one. But this responsibility is not equally shared.

86. An ill or injured employee is responsible for reporting their illness or injury as soon as possible, for obtaining appropriate medical attention and allowing the employer access to otherwise confidential medical information that is reasonably necessary for the purpose of facilitating their as soon as possible safe return to work, for cooperating with and actively participating in the return to work process, and for accepting their employer's reasonable return to work offer with reasonably necessary accommodation – even if the offer is not ideal for the employee's perspective. A union is responsible for cooperating and actively participating in the return to work process, and supporting and advising an ill or injured employee during that process, and for not raising unduly technical collective agreement roadblocks to the employee's safe return to work.

87. In other words, an ill or injured employee's role in the return to work process is to facilitate the return to work process by reporting and providing access to objectively necessary safe return to work information, and not resisting the employer's reasonable attempts to safely return them to work. A union's role is to facilitate the employee's safe return to work by supporting and advising the employee, and not raising objections to safe return to work suggestions that do not really damage the integrity of the collective agreement; in other words, to not "get in the way" of the employee's safe return to work. That is, the employee's and union's cooperative and active participation roles are largely reactive, and require a level of trust in the employer, including that employer assurances are not empty.

88. The employer's role is more than facilitative. The employer has the primary proactive responsibility to safely return an ill or injured employee as soon as possible to reasonably available work with objectively necessary available duties and responsibilities or hours of work accommodation (to the point of undue hardship). The employer is the party that manages the workplace and typically knows it best. It is the employer that knows what work can reasonably be made available with necessary modification to accommodate the employee's identified functional limitations. And only the employer is in the position to actually make an offer of safe return to work, and determines what to offer the employee to return them to work. In short, the employer that is in the control position. The employer determines the safe return to work options

available, and makes the offer it considers appropriate. The union can object that a return to work offer is unsuitable or otherwise inappropriate. But if the employer persists the union's only alternative is to file a grievance. And sure, the employee can decline a return to work offer as unsuitable, but doing so opens the employee, a person in already in a vulnerable position, to discipline or a denial of sick leave benefits, again leaving a grievance or possibly a *Human Rights Code* complaint, as options for redress. But as the length of the grievance to decision journey in this case demonstrates, today's grievance processes are not expeditious. (And neither is the *Human Rights Code* complaint process, as the Ontario Human Rights Tribunal's statistics similarly demonstrate.) In the result, the employee, who is the subject and should be the primary focus of the process, tends to be under greater return to work pressure than the employer or the union.

89. The Hospital recognizes this when it acknowledges that the Grievor may have felt pressured, albeit while reiterating that it properly considered the available medical evidence in an open dialogue with the Grievor and ONA in an appropriate attempt to address the Grievor's restrictions and concerns in a reasonable attempt to safely return the Grievor to work.

90. Of course there will be pressure. There always is. And the process expects the employer in a safe return to work process to aggressively search for the best safe return to work option. But when is the employer's approach too aggressive such that it places undue pressure on the already anxious employee whose union representation may be soft to please the employer and accept assurances (promises in this context) that may be empty? The question can easily become "best" for who? The "best" option for the employee is not always perceived as best by the employer, and vice versa. Avoiding self-interest in what is supposed to be an objective process can be a challenge. Indeed, the self-interest of all concerned tends to be a natural part of the return to work process, so that the reality is that what the employer perceives to be its "best" option will prevail so long as it is one that should be acceptable for the employee.

91. I am satisfied that in this case the Hospital's approach to was overly aggressive, and led it to offer the Grievor return to work options that should have been foreseeably unsafe, with assurances that were predictably empty, which led to the Grievor's re-injury on October 17, 2023 and probably delayed the Grievor's return to work in their regular position.

<u>Summary of Significant Findings</u>

92. In summary:

- The evidence in this singular case is insufficient to establish a practice. One case does not a practice make.

- I am satisfied that the October 2, 2023 APS constituted and should have been accepted by the Hospital as sufficient first instance certification of the Grievor's unfitness for work due to injury for absence from work justification and 1980 HOODIP sick leave benefits purposes.

- I find that although the Hospital wrongly rejected the medical assessment of the Grievor in the October 2, 2023 APS that the Grievor was unfit to return to work and inappropriately returned the Grievor to work in a modified but not restrictions compliant RP position that did not take the nature of the Grievor's injury properly into account. I find that it was foreseeable that the Hospital's assurances that the Grievor would not be required to work outside their restrictions and that assistance would be available if required were unrealistic.

- I find it reasonably foreseeable that returning the Grievor in the modified RP position as assigned on October 17, 2023 would at some point result Grievor re-injury.

- I find that the Grievor was inappropriately assigned additional patient care duties and responsibilities outside the Grievor's restrictions on October 19, 2023, in circumstances when the promised assistance was unlikely to be available, and that it was foreseeable that the Grievor would be pushed beyond their functional limitations and with re-injury the result.

- I find that the in light of what had transpired up to that point the October 19, 2023 doctor's note and APS were sufficiently 1980 HOODIP compliant, and sufficient for further return to work assessment purposes and should have been accepted as such. I find that the Hospital/Acclaim did not properly consider the October 19 medical certifications in light of the October 2 APS and the Grievor's re-injury on October 19, and wrongly rejected out-of-hand the physician's assessment that the Grievor was unfit to return to work.

- I find that there was no conflict in the medical documentation presented as alleged by the Hospital, or at all.

- I find that Acclaim's request for a completed FAF for the Grievor was unnecessary and inappropriate in the circumstances. I find that Acclaim wrongly excluded ONA from the discussion in that respect.

- I find that the Hospital's approach to the Grievor's safe return to work was overly aggressive, and that it led the Hospital to fail to properly consider the nature of the Grievor's injury and medical assessments of their ability to return to work, and to

discount the Grievor's concerns. I find that this resulted in the Grievor being presented a with return to work position that was foreseeably unsafe and with [predictably empty assurances, with Grievor's re-injury on October 19, 2023 the reasonably foreseeable result.

Result

93. All of these findings include violations of the collective agreement. Therefore:

(a) **I DECLARE THAT** the October 2, 2023 APS produced by the Grievor constituted sufficient first instance certification of the Grievor's unfitness for work due to injury for absence from work justification and 1980 HOODIP sick leave benefits purposes.

(b) **I DECLARE THAT** without seeking clarification the Hospital wrongly rejected the physician's October 2, 2023 assessment that the Grievor was unfit to return to work and inappropriately returned the Grievor to work in a modified but not restrictions compliant RP position that did not take the nature of the Grievor's injury into account.

(c) **I DECLARE THAT** it was reasonably foreseeable that returning the Grievor to work in the modified RP position as assigned would result Grievor re-injury.

(d) **I DECLARE THAT** the Hospital inappropriately assigned the Grievor additional patient care duties and responsibilities outside the Grievor's restrictions on October 19, 2023, in circumstances when the promised assistance was unlikely to be available, and that it was foreseeable that this would lead to the Grievor being pushed beyond their functional limitations and result in re-injury.

(e) **I DECLARE THAT** notwithstanding that it was no longer a first instance situation, in all the circumstances the October 19, 2023 doctor's note and APS were sufficiently 1980 HOODIP compliant, and sufficient for return to work assessment purposes.

(f) **I DECLARE THAT** that the Hospital/Acclaim did not properly consider the October 19 medical certifications in light of the October 2 APS and the Grievor's re-injury on October 19, and without seeking clarification wrongly rejected out-of-hand the physician's assessment that the Grievor was unfit to return to work.

(g) **I DECLARE THAT** Acclaim's request for a completed FAF for the Grievor was unnecessary and inappropriate in the circumstances.

(h) **I DECLARE THAT** that Acclaim wrongly failed to include ONA in the discussion about the FAF.

(i) **I DECLARE THAT** the Hospital's approach to the Grievor's safe return to work was overly aggressive in the circumstances, and that this led the Hospital's failure to properly consider the medical assessments of the Grievor's ability to return to work having regard to the nature of the Grievor's injury.

(j) **I DECLARE THAT** the Grievor's October 19, 2023 re-injury was a reasonably foreseeable result of returning the Grievor to work in the RP position with modified duties and responsibilities which included non-restrictions compliant assigned patient care duties and responsibilities, in circumstances where the promised assistance would not be available.

94. As noted in paragraph 3, above, ONA does not seek other than declaratory relief at this time. I shall remain seized with this matter for a reasonable time for the purposes of rectification and to deal with any remedial issues, subject to my being available to do so.

95. I note the Grievor and ONA agreed with the Hospital at every step and accepted the Hospital's return to work offers despite the Grievor's concerns, and that the facts before me suggest that the Grievor has not suffered any harm that requires non-declaratory remediation. Accordingly, subject to further evidence or argument, it appears to me that no further relief is necessary.

ISSUED IN BAYFIELD, ONTARIO THIS 6th DAY OF JUNE 2026.

George T. Surdykowski

George T. Surdykowski, Arbitrator

APPENDIX

AGREED STATEMENT OF FACTS

The Grievance

1. [The Grievor] is a full-time employee of the Hospital on the Renal Chemotherapy/Dialysis Unit at the OUE campus, and a member of a bargaining unit of Registered Nurses employed by the Employer and represented by ONA.

2. The Grievor was hired in 1993, meaning that the 1980 HOODIP brochure's requirements apply to [their] sick leave entitlements. (Tab 1)

3. To claim HOODIP sick pay benefits, OUE employees are required to provide a completed APS for absences from work of more than 3 consecutive shifts (and otherwise as required, in accordance with the HOODIP).

4. The Grievor left sick during [their] scheduled shift on September 27, 2023. [Their] manager, Brent Vicary ("Mr. Vicary"), Director of the Renal Program, provided the Grievor with a blank APS form in case [they] needed it.

5. On September 29, 2023, Judy Szarka ("Ms. Szarka"), an Employee Health Nurse working for the Employer, sent an email to Acclaim, attaching an Employee Referral Form ("ERF") for the Grievor's absence, with the first full missed shift on September 28, 2023. (Tab 2)

6. The ERF is a multi-purpose form, including to refer the management of an employee's sick leave claim to Acclaim.

7. On September 29, 2023, Sammi Chu, an Ability Management Intern at Acclaim, sent the Grievor an APS form, advising [them] that the APS form needed to be completed by the Grievor's physician and returned to Acclaim by October 13, 2023. (Tab 3)

8. On or around October 2, 2023, the Grievor's physician provided Acclaim with a completed APS indicating a RTW date of November 10, 2023 and that the Grievor's functional limitations were not lifting patients or pushing 50 pounds or more e.g. mechanical lift, for 6 weeks. (Tab 4)

9. On October 3, 2023, the Grievor's manager, Mr. Vicary, sent an email to Ms. Szarka and Colleen Landry, an Ability Management Consultant at Acclaim, advising them that the Grievor contacted the Renal Program to say that she would be off work until November 9, 2023 with a return to work ("RTW") on November 10, 2023. (Tab 5)

10. On October 3, 2023, Ms. Landry sent an email to Ms. Szarka and Mr. Vicary, advising them that the Grievor's physician had provided medical documentation and that the Grievor's medical restrictions prevented [them] from lifting patients or pushing more than 50 pounds, and indicated a RTW date of November 10, 2023. Ms. Landry stated that unless the Employer was able to accommodate these restrictions, the Grievor's medical leave of absence was supported from September 28, 2023, until November 9, 2023 with the Grievor to be reassessed on November 9, 2023. (Tab 6)

11. On October 3, 2023, Acclaim advised the Grievor that pending the Hospital's response regarding its ability to accommodate, the Grievor's absence was supported from September 27, 2023, to November 9, 2023. (Tab 7)

12. On October 3, 2023, Mr. Vicary responded stating "Thank you for providing – this is not what the employee had indicated to me. If these are [their] restrictions, the unit would be able to accommodate them". The Employer sent out a meeting request to review the restrictions with the Grievor and the Union. (Tab 8)

13. On October 5, 2023, a RTW meeting was held amongst the Grievor, Mr. Vicary, ONA's RTW Representative Tina Marie Davies, and Krista Miller ("Ms. Miller"), Employee Health Coordinator. At the meeting, Ms. Miller reviewed the Grievor's restrictions and advised that the Grievor could be accommodated within those restrictions. During the meeting, the Grievor advised [they were] concerned about returning to work before the RTW date recommended by [their] physician and was concerned about [their] ability to safely complete tasks related to patient care such as performing CPR, putting patients down in chairs, and rolling patients over if they vomit, as this would be over 150 pounds. Mr. Vicary stated that the Grievor would be able to work within [their] restrictions by asking for help when needed. (Tab 9)

14. Mr. Vicary advised that the Grievor would be assigned to the Bell Building (where patients are generally ambulatory and independent). He further advised that if any issues occurred [they] could call a co-worker to assist. Mr. Vicary advised that charge nurse duties were also available. The Hospital suggested that the parties meet again on October 16, 2023, in order to allow the Grievor some time to recover and review a modified plan again. (Tab 9)

15. Another RTW meeting amongst the Grievor, Mr. Vicary, Ms. Miller, and Ms. Davies occurred on October 16, 2023. The Hospital offered the Grievor "Responsible Person" ("RP") duties and training in the RP duties for two days, beginning on October 17, 2023. The Grievor would be called to bedside duties when breaks or sick calls occurred, however, this would be for short periods of time and [they were] told that [they] would not be required to work outside her restrictions. The Grievor asked what would happen if a nurse scheduled on the unit called in sick. Mr. Vicary stated that if it was a last minute sick call, the RP would need to take a patient assignment until someone else could cover the shift. The Grievor accepted the Hospital's offer of modified duties starting the next day. (Tab 9)

16. The Grievor returned to work on October 17, 2023. She was assigned duties such as providing ambulatory outpatients with dialysis, performing "RP" functions assigning work duties, and monitoring patient flow, which generally do not require pushing 50 lbs or more or lifting patients. The Grievor worked [their] full shift on October 17, 2023, and [their] full shift the next day on October 18, 2023.

17. During [their] shift on October 19, 2023 (that started at 0700), the Grievor was partnered with a nurse named Vanessa, to continue training as an RP. An RPN scheduled on the unit called in sick. The Grievor was assigned to cover the necessary patient assignments, which included several additional patient assignments. Vanessa advised the Grievor that if [they] needed help, [they] would assist [them]. At approximately 0815, the Grievor reported to [their] manager Mr. Vicary, that the patient care [they] had engaged in on the dialysis unit had "aggravated" [their] injury. Immediately after putting a patient on a dialysis machine and while walking to another patient area, the Grievor reported chest pain resulting from [their] aggravated injury. Putting a patient on dialysis typically does not require pushing 50 lbs or more or lifting patients. The Grievor reported that, because of this chest pain, [they] could no longer perform [their] assigned duties. Mr. Vicary advised the Grievor to see [their] physician to review [their] restrictions. Ms. Soulliere later recorded a note on the Grievor's chart stating that, the Grievor had reported that because another nurse "did not show up for shift," the Grievor was "doing some additional tasks." The Grievor also advised Ms. Soulliere that [they] could not identify any one particular movement that caused [their] the sudden pain. (Tab 9 & 10)

18. The Grievor left work to visit a walk-in clinic, where [they were] given a medical note and a completed APS indicating that [they were] unfit to work due to "total disability" and should be off work for two (2) weeks, at which point [they] should be reassessed. (Tabs 11 & 12) The completed APS form stated that the Grievor was unfit to work and [their] functional limitations were "no patient care" for two (2) weeks. (Tab 12) The completed APS form was faxed to Acclaim on October 19, 2023.

19. The Grievor notified Mr. Vicary that [they] had received a new medical note from the physician at the walk-in clinic stating that [they were] unfit for work for two (2) weeks and that [they] should not do any patient care during that time. Mr. Vicary told the Grievor to call Acclaim. (Tab 13)

20. On October 19, 2023, Ms. Landry sent an email to Mr. Vicary, Ms. Szarka, Ms. Miller, and Sheri McLeod ("Ms. McLeod"), Attendance Management Coordinator at the Hospital, advising that the Grievor's medical form indicated "no patient care" for two (2) weeks and asking whether there were any strictly sedentary duties on the unit that the Grievor could perform. Ms. Landry further advised that the Grievor "explained to me that [before [they] left work on October 19, 2023] [they weren't] doing anything heavy or particularly physical, [they] just twisted and felt some severe pain and knew that it wasn't going to get better". Tab 13

21. On October 20, 2023, Mr. Vicary advised Ms. Landry that the Grievor could assist with the RP role and with "documentation with upcoming Covid vaccinations." Shannon Soulliere, Occupational Health Nurse at the Hospital, responded to Mr. Vicary, advising him that a RTW meeting would need to be scheduled with the Grievor and the Union. (Tab 14)

22. On October 23, 2023, Ms. Landry spoke to the Grievor regarding her RTW. The Grievor advised that [they] had a medical note placing her off work for two weeks, and did not understand how [they] could RTW. Ms. Landry advised that the October 19, 2023 APS form stated that the Grievor had functional limitations that included no patient care for two (2) weeks. Ms. Landry advised that the Hospital was able to accommodate this functional limitation. The Grievor advised that [they were] worried about reinjuring [themselves] because "last time [they were] unable to do any physical work but ended up having to do it and that is what caused [their] reinjure." The Grievor asked to call [their] Union and Ms. Landry agreed. Ms. Landry advised that because she had two conflicting medical documents completed on the same day, that she would need clarification regarding the Grievor's restrictions and limitations. Ms. Landry informed the Grievor that the Hospital is able to have [them] back to work as an extra Charge Nurse, therefore there should not be any reason for [them] to do any physical work. It was agreed that Ms. Landry would send the Grievor a Functional Abilities Form ("FAF"), to obtain more specifics on the Grievor's restrictions and limitations, so that everyone was on the same page. (Tab 15)

23. On October 23, 2023, Ms. Landry sent a FAF to the Grievor, asking the Grievor to have it completed by [their] physician. (Tab 16)

24. On October 24, 2023, the Grievor's physiotherapist completed the FAF, indicating that the Grievor's medical restrictions included not walking more than 15 minutes, not standing or sitting for more than 15-30 minutes, no squatting or kneeling, and no lifting,

pushing, pulling, or carrying any weight. The Grievor was also restricted from performing sedentary duties for more than 15-30 minutes and from lifting, bending, twisting, or turning at all. In addition, the Grievor needed fifteen minute breaks twice for ice application. (Tab 17)

25. In response to a question on the FAF which stated: "Please indicate the immediate medical risk to your patient's health if they were to participate in [accommodated] work duties as per the above restrictions at this time", the physiotherapist stated: "the rib [fracture] healing can compromise if the patient is not following the above restrictions (waiting for the clearance from the family Dr. for the [fracture] healing". (Tab 17)

26. In response to a question on the FAF which stated: "Please specify how long the accommodated work would be required for, before the patient could return to their full duties" the physiotherapist responded: "waiting for family Dr's clearance (Appointment on 9-Nov-'23)." (Tab 17)

27. Following these paragraphs, the physiotherapist put a checkmark beside "return to modified duties/hours". (Tab 17)

28. During a RTW meeting on October 25, 2023, the Grievor met with the Employer (Ms. Miller and Mr. Vicary) and the Union (Ms. Davies) to discuss modified duties within the Grievor's restrictions. The Employer prepared a modified RTW plan for the Grievor to perform less than 15 minutes of walking, 15-30 minutes of standing / sitting, no squatting / lifting, no lifting / pushing / pulling / carrying, no bending forward / twisting / turning, and two fifteen minute breaks for ice application, with a return to work date of November 2, 2023. (Tab 18)

29. On October 30, 2023, Ms. Landry sent a facsimile to Ms. Szarka advising her of the Grievor's medical restrictions, which included not walking for more than 15 minutes, not standing or sitting more than 15-30 minutes, no squatting or kneeling, no lifting, pushing, pulling, or carrying any weight, not performing sedentary duties for more than 15-30 minutes, and not lifting, bending, twisting, or turning at all. (Tab 19)

30. The Grievor returned to work on November 2, 2023, pursuant to the modified work plan.

31. On November 3, 2023, Ms. Szarka sent a facsimile of a modified RTW plan, that had been accepted by the Grievor, to Ms. Landry. (Tab 20)

32. On November 3, 2023, Ms. Landry sent an email to Mr. Vicary, Ms. Miller, Ms. Szarka, and Ms. McLeod advising them that the Grievor's complete absence was supported until November 1, 2023, and that [their] modified RTW plan started on November 2, 2023 with a reassessment scheduled for November 9, 2023. Ms. Landry attached a support letter for payment of STD benefits and setting out the Grievor's modified RTW plan. (Tab 21)

33. The Grievor's physician advised that the Grievor was cleared to perform full hours and duties as of November 10, 2023. (Tab 22)

34. The Grievor's full period of absence between September 27 and November 2, 2023 (*i.e.* not including the 2.25 days she was at work) was approved for sick leave benefits.

35. On October 20, 2023, the Union filed a grievance on behalf of the Grievor (202311214). In the grievance the Union stated that: (Tab 23)

> *I am grieving that the Employer has violated the Collective Agreement, Articles 3, 6, 7, B, J and any other relevant provisions including the Human Rights Code, the Occupational Health and Safety Act, and any other statute and Employer policy including but not limited to failing to provide me with a harassment free work environment, attempting to return me to work when I cannot maintain my College of Nurses standards, the unreasonableness of the Employer for failing to accept my medical information from my physician as adequate.*

36. This grievance raises the following issues:

(a) ONA's allegation that the Hospital engages in a practice of pressuring employees to return to work prematurely In particular, ONA alleges that the Hospital pressured the Grievor to return to work on October 17, 2023, roughly 3 weeks before the return to work date recommended by her physician, to perform Responsible Person duties, which included patient care duties. ONA further alleges that the Grievor expressed concern about returning to work earlier than recommended, and although the Grievor was told that she would not be assigned duties outside of her restrictions, there was no guarantee that this would be the case because the Grievor, as an RN, has professional obligations to respond to unpredictable patient care needs as they arise. ONA alleges that on October 19, 2023, the Grievor was assigned additional duties because another nurse called in sick, and then experienced an aggravation to her injury while performing patient care duties. The Grievor visited a walk-in clinic and was given further restrictions, including no patient care for 2 weeks. ONA alleges that the Hospital then pressured the Grievor to return to work early again, suggesting that she could perform sedentary duties and resume Responsible Person duties.

(b) ONA's allegation that the Hospital engages in a practice of refusing to accept personal health information provided by employees as sufficient. Specifically, ONA alleges that the Hospital refused to accept the recommendation from the Grievor's physician in the APS provided on October 2, 2023 that the Greivor should remain off work until November 10, 2023 by pressuring the Grievor to return to work early on modified duties. ONA further alleges that the Hospital then refused to accept the APS completed for the Grievor by a physician at the walk-in clinic on October 19, 2023, which recommended no patient care, by pressuring the Grievor to return to work on modified duties, including RP duties.

(c) ONA's allegation that the Hospital engages in a practice of making excessive inquiries of employees' physician. Specifically, ONA alleges that the Hospital asked the Grievor to have a FAF completed by her physician despite the Grievor already having submitted two (2) APS forms and a medical note indicating the Grievor was totally disabled and unfit to work due to her physical restrictions for a period lasting until early November 2023.

37. It is the Hospital's position that it did not breach the Collective Agreement, the *Human Rights Code,* the *Occupational Health and Safety Act,* or any other relevant statute and Employer policy, as alleged. The Hospital further denies the characterization of ONA's allegations.