IN THE MATTER OF AN ARBITRATION

B E T W E E N:

CBI HOME HEALTH HAMILTON
(Hereinafter referred to as "the Employer"),

- and -

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA
(Hereinafter referred to as "the Union"),

AND IN THE MATTER OF A UNION GRIEVANCE REGARDING "TRANSPORTATION ALLOWANCE".

2015 CanLII 35855 (ON LA)

SOLE ARBITRATOR: Gordon F. Luborsky

APPEARANCES

For the Union: Meg Atkinson, Counsel
Jennifer Biro, SEIU, Local 1 Union Representative
Maureen Shipperley, SEIU Local 1 Union Representative
Sandra Douglas, Chief Steward

For the Employer: Ryan Wood, Counsel
Raymond Chong, Payroll Administrator
Gerald Monczka, Controller

HEARD: June 8, 2015
Hamilton, Ontario

DECISION: June 22, 2015

A W A R D

[1] The parties agree I have jurisdiction to determine a Union policy grievance dated July 10, 2014 alleging the Employer is not paying the negotiated "Transportation Allowance" to employees for each "visit" with a client. The resolution of the dispute turns on the meaning of article 18.01 of the collective agreement, which states as follows:

ARTICLE 18.01 – TRANSPORTATION ALLOWANCE

18.01 The Employer agrees to pay transportation allowance of $1.03 per visit effective July 22, 2011.

The Employer agrees to pay transportation allowance of $1.06 per visit effective March 31, 2012.

2015 CanLII 35855 (ON LA)

[2] Both parties submit this language is clear and unambiguous supporting each of their differing interpretations of the words, "per visit" in the article. The Union claims these words describe the interaction with a single client, wherever that client lives; while the Employer maintains they refer to the employee's attendance at a discrete street location, whether in a multi-residential building or within a single residence where several clients may reside.

[3] For immediate purposes, the parties have agreed I will hear their submissions on the meaning of article 18.01 in proper context. If I determine the language is clear and unambiguous, I shall issue an appropriate declaration on meaning. If the result is to support the Employer's interpretation and application of the language, the Union's grievance will be dismissed. But if the Union's interpretation prevails, the grievance will be allowed with the issue of remedy remitted back to the parties for resolution or final adjudication before me if necessary.

[4] However, if I find the language is patently or latently ambiguous authorizing the admission of extrinsic evidence related to negotiating history of the provision and/or "past practice" under its terms, the parties have agreed to reserve their respective rights to submit such evidence and further argument on the matter, in which event they have directed that I reconvene the hearing for that purpose.

General Background

2015 CanLII 35855 (ON LA)

[5] By way of background on the initial interpretative question, and relying upon both parties' assertion the disputed contractual language is "clear and unambiguous", Union counsel stipulated the following facts that were accepted by the Employer.

[6] The Employer provides personal service workers ("PSWs") to assist elderly and infirmed individuals (referred to as "clients") residing throughout the Greater Hamilton Area ("GHA") with everyday living requirements. This includes help with dressing, bathing, general hygiene, medications and the like. Clients are referred to the Employer through the public Community Care Access Centre ("CCAC") or from private sources. Their assignments occur at all hours of the day and night depending on the client's needs; hence there are no fixed hours of work for the PSW who is compensated on an hourly basis beginning at the commencement of the first assignment of the day.

[7] The GHA is divided into four service zones with each PSW typically (but not always) assigned to clients within a particular zone. The PSW travels at his or her own expense to the client's location that is usually a residence or independent unit inside a retirement home or apartment building. They do not receive reimbursement for the actual cost of using of their own vehicles or for bus fare when they travel by public transit. Employees are usually (but not always) scheduled to work within a single geographic zone with different assignments in close proximity to each other. An employee may ask to be removed from an assignment to a particular client for any number of unstated reasons (which may include travel distance between assignments and personal difficulties with the client), with the Employer obliged to "endeavour to remove the employee as soon as possible".

[8] The collective agreement between the parties arises out of the amalgamation of three different employer organizations through proceedings before the Ontario Labour Relations Board (each predecessor employer having potentially separate practices on the matter in dispute) that the parties took two years to negotiate. After those negotiations the Union realized it had a difference of opinion with the Employer on the proper meaning of article 18.01, resulting in the present grievance.

According to the Union, effective March 31, 2012 the PSW is entitled to receive $1.06 for each visit with an individual client, wherever that client may be situated.

2015 CanLII 35855 (ON LA)

[9] There is no dispute that if two clients live next door to each other, at two different street addresses, the PSW receives the $1.06 transportation allowance for each client visit, even though the distance travelled between the clients is minimal. However where two clients live in the same residential unit as in the case of an elderly husband and wife who receive services from the same PSW; or where several different clients live within the same retirement home or apartment complex having the same street address but within discrete residences, the Employer interprets the PSW's attendance at the building as one "visit" for purposes of paying the transportation allowance. Such locations with multiple clients are referred to as "cluster sites", which is an undefined term appearing only once in article 15.13 of the collective agreement.

[10] Under the Employer's interpretation of article 18.01, a PSW who provides services at a "cluster site" to more than one client is entitled to only one transportation allowance for attending the location, regardless of the number of individual clients served at that location over any number of necessary hours. The words "per visit" in the article are claimed to refer to a specific location which is understood to be a street address. Consequently, as a strategy to minimize costs the Employer typically assigns single PSWs to cluster sites, for which it pays only one transportation allowance of $1.06 along with the negotiated hourly rate for the employee's time.

[11] Thus the narrow question before me in the present grievance concerns the meaning of the words "per visit" in the context of article 18.01 and the collective agreement as a whole. Do these words connote the PSW's attendance with a single client on a single instance to perform an authorized service or services, in which case the current transportation allowance of $1.06 is payable for each client serviced at the client's own premises as advocated by the Union; or does it take its reference only from the discrete street address, where the PSW may provide different assistance to several clients (some

even living together), which according to the Employer attracts only a single payment of the transportation allowance of $1.06 as of March 31, 2012?

2015 CanLII 35855 (ON LA)

The Parties' Arguments

[12] Although the parties agree the words "per visit" in article 18.01 are not expressly qualified by either the terms, "client" or "location", both contend their mutual contractual intention is clear and unambiguous when the words used in that article are considered in proper context.

[13] On behalf of the Union, Ms. Atkinson submits wherever a "visit" is referred to elsewhere in the collective agreement, it is in sufficient conjunction with the word "client" or associated with the notion of an attendance with an individual person that when used alone in article 18.01 the parties could only have been referring to an attendance with an individual client instead of a location as satisfying the requisite for payment of the transportation allowance. The receipt of $1.06 for the employee taking his or her own vehicle or public transit could not be regarded as reimbursement for the actual transportation costs that an employee would reasonably incur to a single location, according to the Union. Rather, since there are no set hours of work for PSWs, the payment of such a relatively small sum must be seen as a form of additional compensation for employees who, in the Union's estimation, are already underpaid. Thus, by leaving the words "per visit" unqualified in article 18.01, the parties must have intended to provide the $1.06 allowance whenever the PSW attended to an individual client at the client's residence, notwithstanding there might be any number of additional clients at the same street address or even in the same residential or apartment unit. In support of its representations the Union also referred to the well-known canons of contractual interpretation reviewed in *Re Agropur Division Natrel and Milk and Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647,* 2013 CarswellOnt 12612, 116 C.L.A.S. 109 (Surdykowski).

[14] While accepting the principles described in *Natrel, supra,* Mr. Wood, counsel for the Employer, submitted the application of those principles supported the Employer's interpretation of

2015 CanLII 35855 (ON LA)

article 18.01 in the present case. Since the words "per visit" occurs in the context of an article referring to payment of a "transportation allowance", the Employer argued it only made sense for the parties to be referring to a specific street location when they used those words. Noting that "transportation" is defined in the *Merriam-Webster Dictionary* (online ed.) as, "a means of conveyance or travel from one place to another" and that "allowance" implies a "make whole" payment that is defined in the same dictionary as, "a sum granted as reimbursement or bounty or for expenses", the Employer reasoned that in the context of an allowance for transportation purposes the clear intention of the parties must have been to provide at least partial reimbursement to defray some of the employee's costs of transit from one location to another. In such context the Employer argues the parties could not have intended to pay the employee an additional allowance where, in fact, the employee was not required to move from one location to another, which is the situation where the employee provides services to more than one client at the same residence, or within different living units in the same retirement home or apartment building. The fact the parties had not qualified the "visit" referred to in article 18.01 with the word "client", as it had in other provisions of the collective agreement, further supported the interpretation of what the Employer submitted was a common sense notion of reimbursement for the movement of the worker from one street location to another. To hold otherwise would effectively require that I read in the qualifying word, "client" when interpreting the word "visit" in article 18.01, which was prohibited by article 9.01(e) of the collective agreement that states the arbitrator "shall have no power to alter, add to, subtract from, modify or amend" the contract, according to the Employer.

[15] In support of their respective submissions, both parties also referred to some or all of the following provisions of the collective agreement in aid of their respective interpretations of the words "per visit" in article 18.01:

> ARTICLE 12 – LEAVES OF ABSENCE.
> …
>
> 12.05 Union Leave
>
> The Employer shall approve requests for leaves of absence without the loss of seniority to employees to attend Union Conventions, Seminars, Education Classes, or other

Union Business provided the employee's ***scheduled client visits*** can be rescheduled or otherwise distributed.

…

12.07 Bereavement Leave

Upon the death of a member of an employee's immediate family she shall be granted three (3) consecutive calendar days leave without the loss of pay ***for scheduled visits*** missed during such leave, one of which shall include the day of the funeral. Immediate family includes spouse, child, parent, sibling, common-law and same sex relationships.

Leave with pay ***for scheduled visits*** lost will be granted as a result of an employee's attendance at the funeral of her grandparent, grandchild, and her brother-in-law, sister-in-law, mother-in-law or father-in-law.

In the event of a Spring Interment, or another formal service associated with the funeral one (1) of the above days or entitlement may be reserved by the employee to attend the service without the loss of pay ***for scheduled visits*** missed provided the employee makes a request to the Employer in writing at the time of the initial leave is taken. The employee will provide at least two (2) weeks' notice in writing of the date for the alternative service.

12.08 Appointments

Employees shall use their best efforts to schedule appointments with physicians and dentists at such time as not to interfere ***with scheduled client visits***. Where this is not possible, the employee should advise her supervisor immediately so that ***scheduled visit(s)*** can be rescheduled or reassigned.

ARTICLE 15 – HOURS OF WORK & WORK ASSIGNMENTS

15.01 Work assignments ***within a geographical location*** shall be based on the skills, qualifications, ability, the employee's location relative to the client(s) and availability of employees. Where these factors are relatively equal, seniority hours shall govern provided the client does not specifically refuse to receive services from that employee.

15.02 The Employer will use its best efforts to provide employees with the maximum number of hours that are requested by employees in accordance with the employees stated availability and geographical area. The number of hours that are actually assigned to an employee in a day or in a week is fully dependent on:

…

2015 CanLII 35855 (ON LA)

2015 CanLII 35855 (ON LA)

15.05 The Employer will endeavour to arrange work assignments for employees within one (1) hour from the employee's place of residence.

…

15.10 ***A "work assignment" refers to the provision of service to a single client.*** The parties agree that the duration and intensity of a work assignment for a client may change during the course of that work assignment. Where such a change increases the hours of service for that client, the additional hours will first be offered to the employee who has accepted the client provided that any offer of such additional hours to such employee does not result in an employee working more than eighty-four hours (84) biweekly. Where the assignment will result in overtime, the assignment will be made at the Employer's discretion.

…

15.13 The Employer will endeavour to schedule employees for a minimum of one (1) hour in ***cluster sites.***

15.14 After reviewing and granting of employee requests to be removed ***from a particular client***, the Employer will endeavour to remove the employee as soon as is reasonably possible. The employee understands that the replacement of such time lost will be scheduled in accordance with Article 15.02.

15.15 All qualified employees who have submitted their availability forms and have accepted clients on the schedule, that later refuse or cancel ***the client assignment*** without permission from the Employer and have had four (4) such refusals/cancellations in a twelve (12) month period, the employee will be deemed to have been terminated (as per 10.05).

ARTICLE 16 – WORKPLACE SAFETY AND INSURANCE

…

16.02 The Employer agrees to provide employees with ***the client information*** received from the CCAC and any other information based on the Nursing Supervisors assessment of the client. Employees will likewise inform the Nursing Supervisor of any relevant information ***identified during regular visits.***

…

ARTICLE 19 – UNIFORM ***ALLOWANCE***

19.01 Scrubs of any colour may be worn.

[Emphasis added]

Analysis and Decision

[16] The same *Merriam-Webster* online dictionary relied upon by the Employer defines "visit" as: "to go somewhere to spend time with (someone, such as a friend or relative); to go somewhere to see and talk to (someone) in an official way or as part of your job; to go to see (a doctor, dentist, etc.)." Likewise, the *New Shorter Oxford English Dictionary* (Toronto: Oxford University Press, 1993) conveys both the notion of a meeting between people and the attendance at a place or location in describing "visit" as: "a call on or temporary stay with a person for social, friendly, business, or other purposes. Also, an excursion to or temporary residence at a place."

[17] The fact the word, "visit" may refer to both a meeting of people (as in the phrase, "I will visit Mary") and an excursion to a place or location (as in the sentence, "I need to visit the hospital") does not make that word patently or latently ambiguous as used in article 18.01 when considered in the context of the collective agreement read as a whole. Rather, even when more than one meaning is possible from the same words, the parties' intention may be clarified from the context of the words, both within the clause itself and its use elsewhere in the collective agreement. This was noted by Arbitrator Sudykowski in *Natrel, supra,* who along with stating the rule of collective agreement interpretation at para. 82, "that the words used must be given their plain and ordinary meaning" observed at para. 83: "The context in which statements are made or actions are taken can affect their meaning or inferences that can be drawn from them." The author Geoff R. Hall in *Canadian Contractual Interpretation Law,* 2nd ed. (Markham: LexisNexis Canada Inc., 2012), describes the search for contractual meaning as the balancing of, "a consideration and reconciliation of both the words used and the context of their use" at p.9 with the following illustrative commentary:

> Words and their context, therefore, are the primary theme of the law of interpretation of contracts, and set the parameters for the interpretative exercise. An interpretation which strays too far from the words selected by the parties is not legitimate because it fails to give effect to the very means the parties invoked to define their legal obligations. An interpretation which strays too far from the context in which the parties used those words risks inaccuracy; even if an interpretation is literally

2015 CanLII 35855 (ON LA)

> correct, if the words are taken out of context, the meaning does not accurately correspond to what the parties were attempting to do. ***Interpretation therefore involves a search for meaning within the constraints of the words and their context. An ideal interpretation is one which accords with both.***
>
> [Emphasis added]

2015 CanLII 35855 (ON LA)

[18] The authorities have also noted the meaning of specific words or clauses in a contract cannot be assessed in isolation, but rather presumes that in the absence of clear language to the contrary the parties would have likely intended there to be internal harmony or consistency throughout their collective agreement, with the same words having the same or similar meaning; and the avoidance of any interpretation that would give rise to an absurdity from a business efficacy standpoint. See Brown, Donald J. M. and David M. Beatty, *Canada Labour Arbitration,* 4th ed., online, at paras. 4:2100, 4:2110, 4:2120 and 4:2150.

[19] Adopting the foregoing principles to the present interpretative task, it is my opinion that the context in which the words "per visit" appears makes the parties' mutual intent reasonably clear and unambiguous; and thus I accept both parties' submission that extrinsic evidence is not admissible for purposes of determining the meaning of those words in article 18.01. On my reading of the language, I conclude the context in which the words "per visit" appear supports the Union's interpretation for the following reasons.

[20] In article 15.10 the parties have expressly defined the basic "work assignment" as "the provision of service to a single client". This idea of the relationship between the PSW and the single client as a unit of work is a theme setting the foundation of the scheduling parameters throughout their contract. The parties have used the word "visit(s)" on six occasions outside of article 18.01. Wherever the singular or plural of that word appears elsewhere in the collective agreement it is apparent from the express words and context that the parties are speaking of a meeting or attendance of the PSW with a single client, which is in harmony with their negotiated definition of a "work assignment".

2015 CanLII 35855 (ON LA)

[21] Thus, in articles 12.05 (Union leave), 12.07 (bereavement leave) and 12.08 (leaves for medical appointments), the parties have agreed to attempt to limit disruption to "scheduled client visits", in the case of both Union leave and for employee medical appointments, or without loss of pay "for scheduled visits" where the employee must be absent because of a bereavement, all of which conveys the notion of the employee's attendance with an individual client corresponding to the many separate work assignments that might occur during the employee's scheduled hours.

[22] Under article 16.02, an employee is expected to "inform the Nursing Supervisor of any relevant information (about a client) identified during regular visits", which likewise conveys the idea of an attendance by the employee with an individual client consistent with the contractual definition of a "work assignment" under article 15.10 referring "to the provision of service to a single client".

[23] The very next appearance of the word, "visit" after article 16.02 is in article 18.01 recording the Employer's agreement "to pay transportation allowance of $1.06 per visit". The word "visit" is unqualified. Thus as a matter of contextual construction in a way that is most in harmony with article 15.10 defining "work assignment" and the other uses of the word "visit", it is my opinion that the parties' intention in using the word "visit" is an unequivocal reference to the attendance between the PSW and his or her "single client" in accordance with the employee's scheduled work assignment. The words, "per visit" in the article must refer to each attendance with a living person, not at a place.

[24] To accept the Employer's interpretation that the words "per visit" are limited to the physical place or street location, as opposed to the single client that is the subject of the work assignment, would have required the parties to place language within article 18.01 to limit its scope in that manner, in order to convey some meaning other than the clear inference from the consistent use of the word "visit" elsewhere in the collective agreement. Having failed to so limit its application in any manner, the parties must be presumed to mean the same thing through their usage of the same word in the collective agreement, which in the case of the word "visit" (or its plural form), is unquestionably to refer to direct

contact between the employee and the single client in the course of a "work assignment" at the client's premises, wherever that client lives.

[25] No other language in the collective agreement detracts from that conclusion. The only reference to "cluster sites" is in article 15.13, which is undefined, and where there is no indication from that or any other contractual provision that a work assignment being tied to the provision of service to a single client is in any sense altered or combined by the close proximity of each client to one another. The dictionary definition of "transportation" referred to by the Employer is not inconsistent with multiple payments for compensating the employee when required to move from one client to another in the course of a single day of work; nor is the dictionary reference to an "allowance" as a sum granted to offset expenses inconsistent with the payment of the relatively small sum of $1.06 whenever the employee is required to move between client residences to perform services, or even to provide services to different clients within the same residential unit.

[26] Had the parties intended to provide a sum reflective of the employee's actual transportation costs, they could have done so but have not; instead settling upon a set amount per client attendance that they have referred to as an "allowance", which is unconnected to any sense of an actual expenditure. In such circumstances it cannot be said there is any "absurdity" by interpreting the contractual obligation in a manner that pays the employee an allowance for each attendance with an individual client at the client's residence, where the Employer may still receive the benefit of a very modest overall cost of transporting its employees to different locations when compared with the actual transportation expense, even where the PSW services multiple clients at the same street address. The only other reference to an "allowance" in the collective agreement is the title of article 19.01, "Uniform Allowance" which has no definitional value.

[27] The scheduling parameters referred to elsewhere in the collective agreement are also consistent with the idea of a "visit" consisting of a meeting of a PSW and an individual client than that of PSW with an apartment building or retirement residence at a single street address. Article 15.01 obliges the

2015 CanLII 35855 (ON LA)

Employer to make "[w]ork assignments within a geographical location …based on the skills, qualifications, ability, ***the employee's location relative to the client(s)*** and availability of employees" (emphasis added). Article 15.02 requires the Employer to make "best efforts" to provide the maximum number of hours requested by the employee "in accordance with the employees stated availability and geographical area." Article 15.05 also obliges the Employer to "endeavour to make work assignments for employees within one (1) hour from the employee's place of residence." Articles 15.14 and 15.15 permit an employee to refuse, cancel or request to be removed from a particular client assignment for any number of unstated reasons, which the Employer must endeavour to grant.

2015 CanLII 35855 (ON LA)

[28] The effect of these parameters is to "endeavour" to provide the employee with the maximum available work assignments within a single geographic zone in order to minimize the employee's travel time and expense while at the same time maximizing the employee's potential earnings. The parties have even identified the employee's "location relative to the client(s)" as a factor in scheduling the employee under article 15.01. But even though clearly sensitive to the "location" of client(s), they have chosen not to limit the payment of a transportation allowance by the relative location of different clients from each other. Instead, the parties agree the employee may receive multiple transportation allowances of $1.06 for each client work assignment whether required to travel across town or across the street to fulfil the assignment, making it clear there is no or little relationship between the employee's actual costs of travelling from one physical location to another and the quantum of the negotiated transportation allowance between work assignments.

[29] Why is it any different where the employee is required to travel from one unit in an apartment building or retirement residence to another? Indeed, the distance between a first floor and a 10th floor apartment unit may be greater than two standalone residences side-by-side on the same street. If the parties had intended such differences to impact the amount or entitlement of what they have called a "transportation allowance" they would have done so with clear language to that effect in their collective agreement; perhaps with express language limiting the payment to the client's "location" in the same way they refer to the relative location of the employee's residence to the client in article 15.01 as a

consideration in scheduling. Their failure to have done so must lead to the conclusion that they did not intend to distinguish between clients who are closer or farther from each other in dispensing the transportation allowance.

2015 CanLII 35855 (ON LA)

[30] Rather, the inference from all of the scheduling parameters in the context of the collective agreement read as a whole with the consistent use and meaning of the word "visit" prior to the appearance of that word in article 18.01, supports the Union's interpretation that the transportation allowance is a negotiated benefit payable whenever the employee is required to attend at the client's premises, which is in harmony with the definition of "work assignment" in article 15.10 that is ***client*** specific as opposed to ***location*** specific.

[31] Viewed in that context and having regard to the harmonious application of all scheduling parameters in the collective agreement, I am drawn to the conclusion that the words "per visit" in article 18.01 can only be referring to a direct meeting with a person in the one-on-one services rendered by the bargaining unit employee "to a single client" as defined by article 15.10, in contrast to attending at a street location.

[32] Consequently it follows I must accept the Union's interpretation of article 18.01 that requires the separate payment of $1.06 for each client attendance whenever: (a) the employee provides services to more than one client in the same residential unit; and (b) when the PSW provides services to multiple clients in the same apartment or retirement complex that the parties refer to as "cluster sites". Therefore to the extent the Employer has only paid a single transportation allowance for the employee's services provided to multiple clients at a "cluster site" or even within the same residential unit at the same street address, I must also conclude the Employer has violated the collective agreement.

Disposition

[33] The Union's grievance is accordingly allowed.

[34] For the foregoing reasons I declare the words "per visit" in article 18.01 of the collective agreement require the payment of a transportation allowance for every attendance by the employee to perform each "work assignment" for a single client at the client's residence, notwithstanding there may be more than one client at a particular street address or even within the same residential unit, giving rise to multiple work assignments and consequently payment of a transportation allowance for each one.

[35] As requested at the outset of these proceedings, the quantum of any monetary or other remedies that may be available in the circumstances of this case is remitted to the parties for settlement, failing which I remain seized to resolve the matter.

DATED AT MARKHAM, ONTARIO THIS 22ND DAY OF JUNE, 2015.

Gordon F. Luborsky,
Sole Arbitrator

2015 CanLII 35855 (ON LA)