IN THE MATTER OF THE HOSPITAL LABOUR DISPUTES ARBITRATION ACT

AND IN THE MATTER OF AN INTEREST ARBITRATION FOR A RENEWAL COLLECTIVE AGREEMENT

B E T W E E N :

DONWAY PLACE/DON MILLS SENIORSAPARTMENT

("the employer")

- and -

SEVICE EMPLOYEES' INTERNATIONAL UNION
LOCAL 1 CANADA

("the union")

BEFORE: John McNamee, Chair
Wassim Garzouzi (Union nominee)
Irv Kleiner (Employer nominee)

APPEARANCES: For the Employer:

Ryan Wood (Spokesperson – Bass Associates)
Robert Lamoureux (Revera)

For the Union:

Sukhmani Virdi (Counsel, Caley Wray LLP)
Tom Fraser (Research Associate)
Petra Niebergall (Union Representative)
Leela Ibrahim and Begum Barran (Bargaining Committee)

A hearing was held via Zoom, on August 18, 2023, following which the parties filed additional materials and submissions. The arbitration board met in executive session on November 6, 2023, and the parties continued to make submissions thereafter. The nominees also continued their discussions after November 6, 2023.

A W A R D

The parties were unable to resolve all of the issues with respect to the contents of a collective agreement to replace the agreement which expired on December 31, 2021, and therefore referred to this board the outstanding disputes.

There was no disagreement as to our jurisdiction to decide these issues. The parties did not agree upon a term for the new agreement, and, accordingly, pursuant to the provisions of s. 10(11) of the *Hospital Labour Disputes Arbitration Act*, the term of the new agreement shall be from January 1, 2022 until December 31, 2023.

By way of background, the employer is a 371 suite retirement complex located in the Don Mills neighbourhood of Toronto, which encompasses both independent and assisted living. At the time of the hearing, it was owned by a joint venture between Welltower REIT and Revera.

Welltower REIT is an American real estate investment trust which invests in healthcare infrastructure. It has a market cap of $43 billion, and is Canada's largest publicly traded long-term care company.

Revera is one of the largest retirement and long-term care companies in Canada. It is privately owned by the Public Service Pension Investment Board, who acquired the publicly traded Retirement Residences REIT in 2006.

Service Employees International Union (SEIU) is the largest health care union in North America with 2 million members in Canada, the United States, and Puerto Rico. The Canadian membership totals approximately 110,000 members - 60,000 of whom are in Ontario and represented by SEIU, Local 1 Canada.

At this location, the union represents approximately 118 full time, part time and casual employees of the employer. These employees work, amongst other classifications, as Healthcare, Housekeeping, Dietary and Laundry Aides; Cooks, Dishwashers: Receptionists and Registered Practical Nurses. At the hearing, the employer agreed that Health Care Aides were the equivalent of Personal Support Workers.

The union gave notice to bargain on October 4, 2021, and the parties met in negotiations on February 24 & 28, and on March 24, 2022. They met again in conciliation on June 13, 2022, and the "no-board" report issued on June 20, 2022.

THE CRITERIA

The *Hospital Labour Disputes Arbitration Act* requires an interest board of arbitration to consider all factors it considers relevant, including the following five required criteria:

a) The employer's ability to pay in light of its fiscal situation;

b) The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased;

c) The economic situation in Ontario and in the municipality where the hospital is located;

d) A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment, and the nature of the work performed; and

e) The employer's ability to attract and retain qualified employees.

The employer did not suggest that it was unable to afford a reasonable settlement. The union argued that the employer was unable to attract and retain employees in light of the current terms and conditions of employment. It also argued that the recent strong uptick in the inflation rate, and the increases in the provincial minimum wage were important factors for the board to consider. It submitted that a Board of Interest Arbitration cannot fulfill its legislated mandate by looking only at the settlements/awards. They must consider the specific terms and conditions of comparators as found in the collective agreements; and make a comparison with the collective agreement before it. To ignore this task, it said, would be an error of jurisdiction.

The parties also argued that the replication principle should apply, and that we should consider comparability to other employers and bargaining units, as well as total cost. To that end, they provided the Board with a variety of economic data, including summaries, and in some cases the

text, of memoranda of agreement and arbitration awards from within, and without, the retirement home sector. We have considered all of the statutory criteria, the economic data, the precedents, and the arguments placed before us.

ANALYSIS

In its brief, the union sought a substantial number of improvements to the collective agreement, including:

a) special wage adjustments for all classifications except RPN, as well as general wage increases of 4% retroactive to the commencement of each contract year;
b) a substantial increase in shift premiums and a first ever weekend premium;
c) substantial increases in employer paid life insurance and employer contributions to the cost of the dental plan;
d) substantial increases in paid sick leave;
e) an increase in minimum reporting pay; and
f) an agreement that the employer will provide a computer and a printer in order for employees to access pay stubs and tax forms in hard copy form.

The union also sought an award which substituted coverage under the *Workplace Safety and Insurance Act* ("WSIA") for the private, occupational health and safety coverage which now pertains at the home. (The present law of this province does not require private retirement homes to maintain WSIA coverage for employees. Part II of Schedule 1 attached to the WSIA reads, in part, as follows:

Part II
Excluded Industries

Class N — Non-Hospital Health Care and Social Assistance
3. Residential care facilities operated by a private employer.

Part X of the WSIA does permit employees who are not insured under the act to sue their employer(s) for damages in the event of workplace injury under certain circumstances, and it may well be that pursuant to the decision in Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, the union may be able to pursue such a claim through the grievance procedure.

The union's nominee took the view that the change to WSIA coverage was the union's most important proposal, and suggested that this award should, above all else, grant that proposal, even if it meant that all of the union's other proposals, except wages, were not awarded. He pointed to the cost of the proposal, which was provided by the employer as follows:

Site	**Type**	**Insurer**	**Premium Cost**	**WSIB Cost**	**Difference**	**% Change**	**Increase of total comp.**
The Donway	Monthly	CHUBB	1,058.00	3996.54	2,938.54	378%	1.090%

and suggested that an annual increase in total compensation of 1.09% was both reasonable and affordable if the board were not to accede to any of the other union proposals except wages.

He also pointed out that the provisions of the WSIA were substantially more beneficial to employees, both from a procedural and substantive viewpoint, than the present private regime, and that, especially in light of the Covid 19 pandemic, which is not yet over, and given the likelihood of future pandemics, better occupational health and safety coverage than the present private insurance plan was essential.

He further said that, even absent a pandemic, the WSIA statistics as cited in the union's brief strongly indicated that the number of claims filed by employees who were covered by WSIA in "Assisting Occupations In Support Of Health Services" during 2021 and 2022 far exceeded the number filed in many, if not all, other occupations, including police officers and firefighters; longshore workers and material handlers; and labourers in processing, manufacturing and utilities.

He quoted from the union's brief to the effect that "The average Revera retirement home (as represented by the Revera homes at which WSIA coverage exists) has had 31 WSIB claims from workplace injuries. Given that retirement homes are not large workplaces, this is a striking amount."

In answer to the suggestion that the award of WSIA coverage would constitute a breakthrough which should be bargained and not awarded in a conservative process such as interest arbitration, he pointed out that at least 20 Revera retirement homes (approximately one-half), and many other retirement homes in the sector, already maintain WSIA coverage for their employees.

Given these considerations it ought to be a simple decision to substitute WSIA coverage for private occupational health coverage when the difference in cost is barely in excess of 1% of total compensation. Yet it is not easy in light of the history of this issue.

The employer asserts that the trend is away from WSIA and toward private insurance. This statement requires some examination, but it is true that there are no arbitration examples cited to me, or of which I am aware, in which an arbitrator has required an employer which maintained private occupational health insurance to replace that insurance with WSIA coverage. It is also true that a large number of privately owned retirement homes, seemingly the great majority (including 74 of 85 Chartwell homes), maintain private occupational health insurance in preference to WSIA coverage. In all of these cases of which I am aware or was advised, the private insurance was in place prior to the home being certified, and has remained in place, or (in a few cases) the change from WSIA to private insurance was voluntarily agreed to by the union.

The only exception to the generality of the last sentence, as referred to by the parties, occurred in 2012, when a group of five homes represented by CLAC merged into a single bargaining unit. These homes, which apparently did have WSIA coverage, agreed to adopt private occupational health and safety insurance on the condition that the parties would meet annually to review the provisions of the private insurance as opposed to that provided the WSIB, and to recommend changes to the private coverage, and on the further condition that, if the parties could not agree on the amendments to be implemented, the union would have the right to require reversion to what is now WSIP insurance. The union recently exercised that option.

There are only a few arbitration examples of adjudication of the issue. These are:

a) On December 14, 2016, Arbitrator Albertyn issued five essentially identical awards involving SEIU, Local 1 and Chartwell Park Place Retirement Residence; Chartwell Centennial Retirement Residence; Chartwell Parkway Retirement Residence; Chartwell Constantia Retirement Residence; and Chartwell Scarlett Heights Retirement Residence. In each of these awards he awarded language which permitted the employer(s) to purchase private occupational health insurance, subject to a number of conditions, including the union's ability to grieve and arbitrate benefit denials.

   Unfortunately, the awards do not indicate

   i) whether or not the prior agreements contained provisions for private insurance or WSIB coverage, or whether the agreement was silent on the issue. If the latter, the awards do not indicate whether or not which insurance, if any, existed in the terms of the previous agreements;

   ii) If the prior agreements did have WSIA coverage, there is no indication what position the union took on the change to private insurance. It could be that the union opposed it, or that the union agreed to the concept, but the parties could not agree on the language surrounding the private insurance. The award does not say; and

iii) There is no indication in the awards that the arbitrator was in possession of the costs involved, or a listing of the benefits to be provided under the private insurer, and there is no analysis or reasoning as to why the arbitrator chose to make the award that he did.

b) In Re Oaks Retirement Village Inc. and CLAC Local 303, April, 2020 (unreported), Arbitrator Randall, in dealing with a first agreement, said:

> The Employer will introduce insurance coverage which it warrants is equivalent to WSIB insurance. The issue of equivalence is properly a grievable matter;

c) In Re Chartwell Penbrooke Heritage Retirement Residence and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, May 25, 2021 (unreported), Arbitrator Steinberg dismissed, without comment, a union proposal to replace the existing private insurance with WSIA coverage. The decision does not indicate whether or not the arbitrator was provided with the costs of the union's proposal; and

d) In Lynwood Park and Christian Labour Association of Canada, July 21, 2021 (unreported) I discussed some of the relative merits of private insurance versus WSIA coverage and rejected the union's request for the introduction of WSIA in place of the private scheme which then existed. Instead, I ordered the employer to secure additional insurance for occupational disease to the extent that the employer could do so within a maximum cost of ten cents per hour paid. I did not have any information as to the costs of the union's proposal.

There were only two other cases which were brought to my attention in which an arbitration board, even remotely, dealt with the issue. Those cases were The Teddington and Service Employees' International Union, Local 1, Canada, November 17, 2017 (unreported) and The Millwood and Service Employees' International Union, Local 1, Canada, November 17, 2017 (unreported). These were both my cases, and the union agreed to the employer's proposal to substitute private occupation health insurance WSIA coverage prior to the start of the hearing, so that the issue was never adjudicated.

I was not made aware of any other case in which an arbitration board dealt with the issue. Nor was I advised of any other case in which a union voluntarily agreed to substitute private occupational health insurance for WSIA coverage, or, on the contrary, seriously attempted to bargain a proposal to substitute WSIA coverage for private insurance.

Given these few examples, it is difficult to say that there is a trend in any direction with respect to this issue.

However, the employer said that an award in favour of the union on this issue would constitute a breakthrough, and that arbitration is a conservative process, whereby an arbitration board should not break new ground except in cases of demonstrated need. It denied that there is any demonstrated need in this instance, and said (and I have no reason to disbelieve) that the great majority of retirement homes maintain, and have maintained for many years, private occupational health insurance. A decision in favour of the union, it submitted, would create an aberration and an unjustified intrusion into collective bargaining in the sector. It submitted that the proper place for the issue to be resolved is in negotiation between the parties. In that regard, it said that unions generally, and this union in particular, have shown little interest in the issue for many years.

The employer nominee's comments were particularly trenchant and, rather that summarize them, I have set them out verbatim:

1. The Union's proposal to substitute WSIB for the existing private CHUBB insurance is without precedent. This is uncontested.

2. You have seen the number of Homes in the Chartwell group of Homes that have private insurance versus the number of homes in that group which WSIB which the Union states has been in place for some 15 years. For the Union Nominee or anyone else to suggest that it has been that way for a very long time and that the Union has not challenged it over that period, only serves to affirm just how widespread private insurance is in the retirement home sector.

3. If you apply traditional replication principles in determining this "ask", you should summarily reject the proposal. This is a significant proposal that must be dealt with in collective bargaining and it can't be simply brought to this Board with a supporting argument that is in effect based upon……"*wouldn't this be a nice alternative benefit plan to have*".

4. You must consider the magnitude of the proposal and consider the significant changes that would result from any decision to change the current private insurance to WSIB and I will set them out below. In some respect, I will be correcting misinformation that was given to you by the Union Nominee in earlier submissions.

The Imposition of New Statutory Obligations which currently do not exist.

5. Obligation to re-employ. Under Section 54 (sic, the obligation to re-employ after one year's service is actually contained in s. 41(1) of the WSIA, an employee who has been employed for at least a year by the employer must be offered re-employment with the Employer, or must offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date.

6. Currently, the Employer's only requirement is to comply with the *Ontario Human Rights Code* which requires an employer to accommodation to the point of undue hardship. This WSIA statutory regime goes well beyond this and would constitute a significant departure from what is in place currently. For an interest board to bind an employer to a statutory regime such as that in the WSIA would indeed be remarkable without there being significant trade offs and discussion at the bargaining table which in this instance has not occurred.

7. Under the WSIA, the obligation to re-employ is two years from the date of the injury or one year after the date that the Board notifies the employer that the worker is medically able to perform the essential duties of the workers preinjury employment or the date the worker turns 65, whichever is the earlier.

8. Under the WSIA, an employer who terminated a re-employed worker within 6 months of becoming re-employed is presumed to not have filled the obligation to re-employ. Pursuant to the WSIA, an employer can be subjected to penalties and levies under the Act and the Board an order payments to a worker for up to one year.

9. The bottom line here is that it would be quite extraordinary and anomalous for a HLDAA Board to subject an employer to a statutory regime that has no application to the Employer without the Employer voluntarily becoming a participant. On this basis alone you should deny the proposal.

Additional Impact of the proposal to change private coverage to WSIB

10. Non mandatory businesses such as these retirement homes, can request coverage but also have the right to end coverage. If this Board were to award the Union's proposal, the Board would also be removing the Employer's right to opt out of WSIB insurance if there was a need to do so. This constitutes a remarkable encroachment on the Employer's management rights and more particularly, its ability to control expenses which it currently has in the course of insuring employees in the workplace. **No employer would relinquish that right in a right to strike/lockout environment.**

11. Any thought of changing the current private insurance to WSIB coverage would also **permanently** eliminate the Employer's ability to shop the workplace insurance coverage with other carriers. You know that there are indeed other insurance companies that compete with one another to provide the coverage including, ACE, UNUM, and RBC-Dexia. The Employer would lost the ability to go to market and secure the best prices/services. **No employer would relinquish that right in a right to strike/lockout environment.**

12. WSIB has annual indexing of benefits but also the maximum earnings limit of insurance has been going up every year and this has resulted in increases to the employer's business costs. For example, in 2023, the maximum per person was $100,422.00 and 2024 it is $110,000.00……a 9.5% increase to the business.

13. The classification is N2 for these businesses. The base rate has been increasing every year. In 2022 it was $1.98, in 2023 it was $2.01, and in 2024 it will be $2.13. These are base rates. All employers are also subject to experience based rating on a "grid" system under the 2020 Rate Framework. Under model that came into effect in 2020, a two step process is used to set and adjust rates under the WSIB regime. Step one involves setting an average rate for each industry class that is based on their risk profile and share of responsibility to maintain the insurance fund. The second step, involves looking at how an individual claim history compares to the rest of the businesses in the class. This means that the Employer's overall rate under this model would reflect individual claims experience and risk. The WSIB uses insurable earnings, claims costs, and the number of allowed claims over a six year period to set premium rates. For new businesses with less than a year of experience, the premium rate would be the class rate but again, the employer would have no way of controlling those cost increases in the future as they currently do with private insurance. **The loss of the ability to go to market is a significant proposal that should not be awarded based upon what you have before you.**

14. Regardless of that has been indicated previously, this is NOT a "public benefit" as described by the Union Nominee earlier in the day. It could be if the public were paying for it but that is not the case. It is only the Employer who pays into this system- this is a cross Canada mandatory Workers Compensation coverage for certain industries and it is governed by provincial law and is administered by public entities.

15. The Union Nominee's statement: "*also consider that the cost for this benefit continues to go down"* is wrong!! The cost of WSIB coverage is NOT GOING DOWN. The last three premium rates in the N2 classification (which these Homes would fall into) prove that. And……that is **before** experience rating is applied to the base rate **which makes the annual spend entirely unpredictable and there is no recourse to correcting that if the ability to go and shop the market is taken away.** To coin a phrase from my friend's often used arguments, "*In what universe would any employer agree to this kind of arrangement?"*. Again, to characterize this proposal as something that would be achieved by the Union in free collective bargaining is fictitious and wishful thinking at best. **No Employer would ever go along with this in a right to**

strike /lockout environment and the Chartwell data that was provided to you would support that conclusion.

16. Recent announcements in the provincial government agenda would indicate that there are also more increases to employer costs that are likely coming, which include annual indexing formulas (and which would have retroactive effect) and the introduction of "**super indexing**" (an add on any year as many times as the government would like, and would be on both current and future years).

17. On November 14, 2023, the Ontario Government introduced Bill 149 (Working for *Workers Four Act, 2023.* This Bill is a matter of public record. When this legislation is enacted, it would amend several statutes including the *WSIA.* Bill 149 would amend he WSIA to enable super indexing increases to the Workplace Safety and Insurance benefits. This would be achieved through the creation of a new regulation making power to create regulations setting out indexing increases to a rate that is above the annual rate of inflation. Who is going to pay for this? Employers of course.

18. There could not be a worse time for any employer to opt in to WSIB and with this knowledge you should not award this extraordinary proposal to change private coverage to WSIB which is not supported by any evidence nor precedent and is entirely based upon "*wouldn't this be a good thing to have instead of the private insurance".*

19. To simply rely upon "costing" as a basis for obtaining this unprecedented change would also entirely ignore the effect of such a change going forward.

20. Once again, I place this item in the same category of proposals as the EI carveout proposal that some Employers in the CUPE world have pursued over a number of years wherein those employers have been told time and time again by interest boards……..*this is significant……..and must be bargained.* For you to, for one moment entertain this proposal that is lacking in precedent, and is entirely unsupported by the evidence provided to this Board would just be wrong. This Employer would not agree to this proposal in a right to strike and lockout environment without there being meaningful collective bargaining when both parties are provided with a fulsome opportunity to consider their respective positions with respect to what each of them is prepared to trade.

I do not disagree with most of the employer's factual submissions in that regard (which were not denied by the union), but I do disagree that a decision in favour of the union would constitute a breakthrough. It would, of course, be ideal if the parties could resolve the issue themselves in negotiations, but, although the majority of retirement homes currently maintain private coverage, there are a number of homes at which WSIA coverage is already in place, including almost half

of the Revera homes. An award which duplicates a term of collective agreements which already exist in the retirement home sector can hardly be classified as a breakthrough.

Notwithstanding my view that an award in favour of the union would not constitute a breakthrough, it is fair to say that it would constitute a precedent in light of the paucity of arbitral and (to the best of my knowledge and information) the lack of attention which, it would seem that unions have paid to the issue in the past. I am also fully aware that the home at issue here is but one home out of a constellation of hundreds of homes and, while I cannot control the positions that other parties may take with respect to this award, I do emphasize that the decision herein is based upon the particular facts, especially the costs quoted by the employer, and the evidence before me.

I have thoroughly reviewed the union's request for the substitution of WSIA coverage for the present private occupational health and safety policy, and it has much to recommend it. In particular, the provisions of the private policy are substantially inferior to WSIA coverage in a number of respects. For example, although loss of earnings benefits are similar at 85% of net weekly earnings, but they are subject to a maximum of 260 weeks under the private plan versus the WSIA which can provide benefits until the worker reaches age 65 (with an exception of a two years maximum for an accident occurring after the employee's 65th birthday). The private policy makes no provision for chronic pain, occupational disease (including Covid 19 contracted at work), future economic loss, or for chronic and traumatic mental stress, while the WSIA provides benefits in all of these cases.

The foregoing are but a few of the many advantages to employees who have WSIA coverage over the employer's private insurance policy.

I also note that the appeal procedures under the WSIA provide employees with the better access than accrue to an employee who is aggrieved by a negative decision of a private insurer. This was a factor mentioned by union counsel in her oral submission in that, she said, but without any specifics, that many claims had been rejected by the present private insurer. While the appeal process under the WSIA can often by slower than the ideal, it provides a faster and cheaper method of decision review than would a court or, assuming it is possible, the grievance and arbitration procedure in the collective agreement. For employees of retirement homes, who, at

least for the most part, live pay cheque to pay cheque, and for whom the loss of a few days pay is a serious matter, the prospect of a lawsuit against either their employer or the insurer, or even waiting for the outcome of an arbitration, can spell financial disaster, and, in cases of short-term absence, is virtually impractical except in the most extreme cases.

In so saying I have no idea what possible policy considerations underlay the decision of the Ontario government to exempt employees of private retirement homes from WSIA coverage, while mandating it for employees of Homes for the Aged, charitable homes. and other similar, public institutions. I can only say that the exemption makes no sense to me, and deprives a very substantial number of essential workers of rights that their colleagues in other retirement homes, nursing homes and hospitals have. This is particularly so in light of the work that they perform in caring for older persons who are more susceptible to disease, and who often have mobility issues which require the retirement home staff, most of whom are women, to physically exert themselves to assist the residents, including residents who have fallen or need help to get out of bed, shower or go to the bathroom; and some of whom have memory issues, dementia or other similar conditions which sometimes lead to violent outbursts.

The employer says that there is no demonstrated need for this change, and that it should be bargained, not awarded. I do not agree. The health and safety of employees at work is of high, if not paramount, importance, and, although WSIA coverage would not mitigate those risks, it would at least mitigate the results to employees when the work that they do results in foreseeable consequences. Nor can I ignore the union's allegation, not denied by the employer, that 22 residents of this home died during the earlier years of the pandemic, although the union did not indicate that all of those deaths were due to Covid.

We need only to think back to the tragic consequences of Covid in 2020 and 2021, where many retirement home residents and staff, died or became seriously ill. It is not an exaggeration to suggest that these employees were among the most at risk from Covid throughout the entire population, and Covid was not the first pandemic to strike Ontario (eg. SARS and Swine Flu), and it is unlikely that we have seen the last of such pandemics. It may well be that these concerns have contributed to the systemic shortage of employees in medical facilities (including retirement homes) which have so plagued our hospitals, nursing homes and retirement homes for some considerable time.

In respect of these shortages as they affect hospitals, see Arbitrator Kaplan's decisions in Participating Hospitals v OPSEU, 2023 CanLII 75478; The Participating Hospitals (Represented by the Ontario Hospital Association) v ONA, 2023 CanLII 65431 and Participating Hospitals v CUPE/OCHU & SEIU, 2023 CanLII 50888. Arbitrator Kaplan's decisions as cited relate to employee shortages in hospitals, and while hospitals (and for that matter nursing homes) are not good comparators for retirement homes in terms of wages and other terms and conditions of employment, the union is correct that hospitals, nursing homes and retirement homes draw upon much of the same talent pool for many of the occupations involved, and employees share many of the same employment risks. Both hospitals and nursing homes, by requirement of the statute, maintain WSIA coverage for their employees, and those employees are substantially better compensated, and better protected in cases of workplace injury and occupational disease, than retirement home staff.

The employer says that an award in favour of the union would:

a) create new, reinstatement obligations which go above and beyond the accommodation provisions of the *Ontario Human Rights Code*. In this regard, it may be correct, but these are obligations which apply to most employers in Ontario, and to those retirement homers which already subscribe to coverage under the WSIA. This section has been contained in the statute since 1997, and is conditional upon the injured employee being able to perform the essential duties of his or her pre-injury job, or, if unable to do so, the availability of other suitable employment. At any event, the re-employment obligations under the WSIA are not so very different from the obligation to accommodate under the *Ontario Human Rights Code*; especially when combined with the arbitral case law regarding discharge when an employer asserts that it has no suitable accommodated work available for an injured employee; and with Article 39.07 of the collective agreement reads:

> 39.07 Where an employee requires a permanent accommodation due to an injury resulting from an occupational accident, the Employer will consider the employee for suitable vacancies. The Employer will consider the qualifications, experience and ability of the applicants. Where qualifications, experience and ability are equal, the disabled employee shall fill the vacancy;

b) prevent the employer from cancelling the insurance, and/or seeking to shop the coverage to other insurers for less money. This is only true in part. Article 39 of the collective agreement obliges the employer to carry occupational accident insurance, and sets out a number of criteria which that insurance must meet. In order to cancel the insurance, or to amend the criteria, the employer would be required to negotiate a change to the collective agreement in much the same way as it would be required to negotiate a change if the union's proposal were awarded and the employer wished to revert to private insurance. It is true, however, that under the current collective agreement, the employer could, in all likelihood, replace the present private insurer with a policy from another insurer, but the new insurance would still have to meet the criteria set in the collective agreement, and, in light of the fact that such insurance policies are usually experience adjusted, it is unlikely that the employer could realize dramatic savings; and

c) the parties should be required to bargain the issue, and such a change could not be accomplished at the bargaining table without considerable trade offs. It would, of course, be ideal if the parties could have bargained this change, but what else is arbitration for if not to resolve the differences between the parties when they fail to agree at the negotiation table? The arbitral principles which govern an interest board's determinations are well known, and do not require repetition here. Suffice it to say that we must consider, amongst other concerns, demonstrated need, cost, comparability, and replication.

Finally, the employer also points to the fact that the majority of retirement homes have private insurance, as opposed to a minority who use coverage under the WSIA. It says that such an issue should be resolved at the bargaining table, and not at arbitration. But surely that, in and of itself,

is not a conclusive argument either for replication, comparability or even the principle, which I endorse, that arbitration is a conservative process. Even if we were not considering the matter of demonstrated need, the fact that there are homes which maintain coverage under the WSIA is solid evidence that an award in favour of the union is not a breakthrough, and the acceptability of a proposal cannot be evaluated on the basis of a numerical count of the number of homes which have the benefit concerned as opposed to those who do not. Other factors, including cost and demonstrated need, subject matter and purpose must play a part.

In the result, I have decided to award the greater part of the union's proposal with respect to this issue. However, I have taken note of the employer's argument in terms of cost. This collective agreement would not be eligible for catch up, and accordingly, if it were not for the cost of the WSIA issue, I would normally have awarded at three percent general increase in the first year, and a 3.5% increase in the second year, together with improvements on some of the union's other issues, although those other improvements would not have totaled as much as one percent. In this case, however, and in order to partially defray the cost of the award of WSIA coverage, I will (with one exception) not be awarding any of the union's other proposals, and I will be reducing my normal award by one-half percent in the second year.

AWARD

In light of all of the circumstances, and in consideration of the positions advanced by the parties, the Board makes the following award. The parties are therefore directed to enter into a collective agreement which consists of all of the terms of the previous agreement, including any letters of intent or agreement attached thereto, except as modified by the following:

1) Term – January 1, 2022, to December 31, 2023;

2) Provide for across-the-board wage increases:

   Retroactive to January 1, 2022 - 3%

   Retroactive to January 1, 2023 – 3%

3) The retroactivity amounts referred to in paragraph 2 above are to be paid by separate check or bank transfer to current employees in accordance with Article 44.01 of the collective agreement. Persons who worked in the bargaining unit after January 1, 2022, but who have since terminated their employment will also be entitled to retroactivity on the following basis. The employer is directed to send notice of the availability of retroactivity to the last known address of such ex-employees, who, in order to receive retroactivity, must claim it within 60 days following the mailing of the notice;

4) Effective December 31, 2023, the unions proposal regarding WSIA coverage, as set out as revised Articles 39.01, 39.04 and 39.07 on pages 69 and 70 of its arbitration brief. For purposes of clarity, the union's proposed Article 39.08 as set out on page 71 of its arbitration brief is not awarded; and

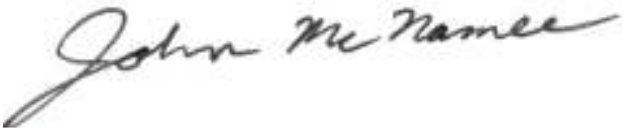
5) The union asserted that the present health and welfare benefits provided include paramedical coverage, although reference to that coverage is not included in the collective agreement. The employer did not deny that assertion. Accordingly, and effective as of the date of this award, the union's proposed Article 41.02(d) as set out on page 88 of the union's arbitration brief is awarded.

The agreement will also include any item(s) mutually agreed between the parties prior to the hearing. The effective date of those items shall be the date of this award except as otherwise specified in writing by the parties.

Any proposal not specifically included herein is rejected.

The board retains jurisdiction over this award until a new collective agreement is executed.

DATED at Toronto, this 24th day of November, 2023.



John McNamee, Chair

I dissent as attached

”Irv Kleiner”
Irv Kleiner, Employer Nominee

I concur in part as attached

”Wassim Garzouzi”
Wassim Garzouzi, Union Nominee

Employer Nominee's Dissent

The Chairman was appointed by the Minister of Labour to chair this Board with the objective pf replicating a collective agreement outcome that would have been negotiated by these parties in a right to strike/lockout environment.

I must vehemently disagree with the Chairman's decision to award WSIA coverage in place of the longstanding private insurance that has been in place in this Home for many years, and in renewal after renewal agreement.

The negotiated settlements and awards that were presented to this Board did not support the awarded change and I would maintain that in the context of "replication, this is not a change that would have ever been achieved in collective bargaining without there being meaningful discussions between the parties which had not occurred in this instance. The Union simply labelled the WSIA coverage proposal as being "a priority" because it would present improved coverage for employees. That does not in and of itself convert an overly ambitious and exaggerated proposal into one that is realistically achievable in interest arbitration. I would suggest that simply wanting an outcome, or continuing to table an exaggerated proposal does not make the proposal a legitimate bargaining objective.

I rely on the comments that I submitted to the Chairman as reproduced in his Award beginning at page 9 and as such I will not reiterate those comments and observations in this Dissent. The Chairman did not disagree with most of the submissions that I made to him. As such and with all due respect, the decision to convert private insurance to WSIA coverage does indeed constitute a departure from what has been normative for the retirement home sector in relation to retirement homes that have provided private workplace insurance instead of WSIA coverage for a considerable number of years.

The Chairman acknowledged that "there are no arbitration examples" that were cited to him in which an arbitrator had required an employer that had maintained private occupational health insurance to replace that insurance with WSIA coverage.

The Chairman acknowledged that there has been a paucity of arbitral authority and a "lack of attention" from the unions in this sector (including this union) to this issue in the past. That in and of itself is revealing in that it only serves to confirm just how unrealistic this proposal was to begin with. Unions have simply been accepting of private insurance in the retirement home sector and have even gone so far as to agree to convert WSIA coverage to private insurance.

The Chairman also acknowledged that there was a large number of privately owned retirement homes which maintain private occupational health insurance as opposed to WSIA insurance (including 74 out of 85 Chartwell Retirement Homes).

There was also an acknowledgment that there had been instances in which this Union has voluntarily agreed to change WSIA coverage to private insurance.

In his Award, the Chairman has articulated criticism of the Ontario Government's decision to exempt employees in retirement homes from WSIA coverage while making it mandatory for

employees who work in long term care. That was not a reason to award the change to the longstanding private coverage that has been provided to the employees in this retirement home facility. An interest Board's mandate is to interpret collective bargaining trends in a sector and to not sit in judgement of those trends as has often been said by other interest boards. While the Chair may disagree and be critical of the Government's decision to fashion the statute as it has, the fact of the matter is that a significant number of retirement home operators have a statutory right and an entitlement to insure workers through private insurance and that is what a significant number of them have done. It is not this Board's role to make value judgments such as those now indicated in this Award in support of awarding the change that is indicated.

As Arbitrator Stanley stated:

> "The arbitration process should not be viewed as an opportunity to make changes in a collective agreement based on philosophical preferences. In this way, it should closely resemble the collective bargaining process which in our experience tends to very quickly focus on settling real practical problems and setting aside those proposals that stem from both parties simply seeking what would be, from their point of view, a better agreement." (Arbitrator Stanley in Ten Participating Nursing Homes and SEIU (1987)).

By legitimizing this exaggerated proposal, this Board will only have exacerbated the narcotic effect that is often associated with the interest arbitration process. Many critics of the interest arbitration process have asserted that because arbitration is an available option under the HLDAA, good faith bargaining will inevitably yield to the temptation of parties of having an arbitrator resolve their differences and, that there will be a greater tendency for parties to refrain from engaging in meaningful bargaining so as to be able to submit exaggerated proposals with the hope that one day one of those exaggerated proposals may actually be achieved.

An anomalous award such as this one (for all the reasons that I have already articulated above and in my written submissions to the Chairman as reproduced in the Award) only serves to perpetuate the assertion that compulsory arbitration induces a "narcotic effect" so that parties tend to rely upon the process instead of their own bargaining efforts and therefore become addicted to the process.

I would characterize this awarded WSIA workplace coverage conversion as anomalous in that it simply represents a "point of view" of one arbitrator- a point of view that is not reflective of bargaining realities that have emerged in the retirement home industry with respect to this workplace insurance issue.

For all of the foregoing reasons, I must completely disassociate myself from this Award which I am certain will be regarded as an outlier in the sector.

All of which is submitted this 24th day of November, 2013.

"Irv Kleiner"

Irv Kleiner, Employer Nominee

PARTIAL CONCURRENCE OF UNION NOMINEE

The Chair's primary determination in this case is unassailable.

This partial concurrence discusses two areas briefly addressed in the award.

First, the Employer Nominee centered his submission (reproduced above) on the "imposition of new statutory obligations", namely, the *WSIA* requirement for employers to re-employ injured workers.

The examples provided include:

> *an employee who has been employed for at least a year by the employer must be offered re-employment with the Employer, or must offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date.*
>
> […]
>
> *Under the WSIA, the obligation to re-employ is two years from the date of the injury or one year after the date that the Board notifies the employer that the worker is medically able to perform the essential duties of the workers preinjury employment or the date the worker turns 65, whichever is the earlier.*
>
> […]
>
> *Under the WSIA, an employer who terminated a re-employed worker within 6 months of becoming re-employed is presumed to not have filled the obligation to re-employ. Pursuant to the WSIA, an employer can be subjected to penalties and levies under the Act and the Board an order payments to a worker for up to one year.*
>
> [*sic*, throughout]

These basic protections for injured workers are, quite astonishingly, decried by the Employer Nominee. There is nothing "remarkable", "extraordinary" or "anomalous" about providing injured workers with minimum statutory rights, including the right to re-employment after suffering serious injuries at the workplace.

If nothing else, the Employer Nominee's submission brings attention to the inadequacies of private insurance and further justifies the Chair's decision to provide workers in this sector with statutory protections under the *WSIA*.

Second, there was no reason to limit improvements elsewhere in the award, especially in view of the demonstrated need recognized by the Chair in granting the Union's proposal on WSIB.

For those reasons, I partially concur.

Dated in Ottawa, November 24, 2023.

WASSIM GARZOUZI