IN THE MATTER OF AN ARBITRATION BETWEEN:

Unifor Local 41-O

("the Union")

and

Nestle Purina

(the "Employer")

Re: Benefits Grievance, 001-2016

Before: Matthew R. Wilson - Arbitrator

For the Employer:

Michael Smyth – Counsel
Carl Jafrabad – Director, Compensation, Benefits & Pension
Krupa Lalloo – HR Manager

For the Union:

Micheil Russell – Counsel
Joe Say – President
Gus Carreiro – Vice President
Liz Mazari – National Representative

A hearing was held in Toronto, Ontario on October 17, 2017.

AWARD

1. I was appointed by the parties under the collective agreement to hear a grievance challenging three changes to the benefit plan that were implemented by Nestle on January 1, 2016.

2. Nestle engages Sun Life Financial Canada to provide administrative services for the health and dental plan negotiated between the parties under the collective agreement.

3. The changes can be briefly described as follows:

   (i) Dispensing frequency – previously, employees could visit a pharmacist to fill a prescription without limitation. The change limits visits to the pharmacy for specified maintenance drugs to five prescriptions per year.

   (ii) Pre-authorization – for specific drugs identified by Sun Life, the employee must have his or her physician complete a medical information questionnaire so that Sun Life can determine whether other drugs are more appropriate. If the employee refuses to use the drug recommended by Sun Life, coverage for the prescribed drug is refused. Previously, there was no pre-authorization process.

   (iii) Co-ordination of benefits – previously, the plan covered a spouse's excess expense for the submitted amount through a coordination of benefits. The change limits the coverage to the reasonable and customary amount usually charged for that particular benefit.

4. The issue before me is whether Nestle can unilaterally make these changes to the benefit plan.

Collective Agreement

5. The relevant provisions of the collective agreement are as follows:

   > 23.01 The Company will not make any changes in its present employee benefit plans which affect the employees in the bargaining unit without agreement with the Union. Employees will continue to be covered under the following plans:
   >
   > . . .

> 23.02 It is understood and agreed that controversies about the administration of these plans shall not be subject to the Arbitration Procedure of this Agreement.

FACTS

6. There was no dispute about the facts. The parties made submissions on the basis of stipulated facts and agreed to documents.

7. Prior to implementing the changes, the company sent a memo to all employees announcing that there would be changes to "the administration of benefits" effective January 1, 2016. There was no discussion with the union prior to this announcement.

8. After some inquiries about the benefit changes, the union filed a grievance challenging the changes to the benefit plan. Since the grievance, the company issued further information about the changes including various question and answer documents.

(i) Dispensing frequency

9. The change to the dispensing frequency sets a limit on the number of times per year – to a maximum of five - that specified maintenance drugs can be filled. Maintenance drugs are described as drugs that are commonly prescribed for long-term illnesses. Once an employee reaches the limit, the employee must pay the dispensing fee. Previously, there was no limit on the number of times an employee could fill the prescription.

(ii) Pre-authorization

10. The change requires employees to have their physician complete a medical questionnaire if specified drugs are prescribed. Sun Life has determined a list of drugs that it describes as *preferred* drugs. Even if the drug recommended by the employee's physician is prescribed and has a drug identification number – two common requirements in the benefit plan – the cost of the drug still might not be covered under the plan if Sun Life stipulates that a different drug is more appropriate. The pre-authorization form, the process, and the prospect of being denied for not accepting Sunlife's *preferred* drug is a new change.

11. I was advised that no employee has been refused coverage based on this change. The question and answer sheet distributed to employees states that the cost of completing the medical form is not covered by the insurance plan. However, during the course of the hearing, Nestle stated that the cost of completing the form would be covered based on its practice of covering the costs of medical forms.

(iii) Benefit co-ordination

12. This change affects expenses for extended health care, drug and dental coverage. It means that the amount not covered by any spousal plan is adjudicated based on the eligible amount of the expense, instead of the submitted amount. Previously, an employee's submitted amount was covered.

13. An example from Nestle's letter to employees illustrates the change:

    A plan member has a dental expense for $240, but the provincial dental association "reasonable and customary" current fee guide indicates $235 for this expense/provider type.

    - the first group benefits plan pays 80% of $235 = $188
    - the second-payer plan pays $47 (the difference between $235 and $188)
    - the plan member is then responsible for $5, the amount billed above the current fee guide ($240-$235)
    - Prior to the change, in this example, the plan member (e.g. the employee) paid nothing.

14. Counsel for the union points out that this small amount is magnified if the cost involves an expensive dental procedure.

THE PARTIES' POSITIONS

15. Unifor argued that each of the three changes outlined above are more than administrative changes as that phrase is used in Article 23.02. Rather, these are substantive changes to the benefit plan that cannot be unilaterally imposed. It argued that Nestle breached Article 23.01 by making the changes. In the alternative, it argued that Nestle is estopped from making the changes.

16. Unifor relied on *Canadian Broadcasting Corp*. (1993), 38 L.A.C. (4th) 215 (Burkett); *McKesson Canada Corporation*, 2011 CanLii 99377 (Gee); and *Expertech Network Installation* (2006), 87 C.L.A.S. 358 (Surdykowski).

17. Nestle argued that the collective agreement allows administrative changes to be made without the agreement of the union. It relied on existing text of the benefit plan to argue that the changes to the dispensing frequency and the coordination of benefits are permitted. While the plan was changed to describe the pre-authorization process, Nestle asserted that this is an administrative change to how the insurer approves eligible drugs.

18. Nestle relied on *Air Canada*, 2012 CanLii 92037 (Knopf); *Hamilton Health Sciences Corp*., [2012] O.L.A.A. No. 371 (Rose); *London Health Sciences Centre*, (2013), 240

L.A.C. (4th) 405 (Roland); and *Corporation of the City of Peterborough*, 2016 CanLii 53072 (Stout).

ANALYSIS

19. It is a trite principle that a party cannot unilaterally change a provision of the collective agreement. As the awards referred to me make clear, when the parties make a bargain, they are expected to stick to it until the next opportunity for negotiations. Changes implemented by an insurance company that is contracted by one of the parties (usually the employer) cannot alter the benefit plan in a way that is inconsistent with the provisions of the collective agreement.

20. The analysis starts with the collective agreement. Article 23.01 states that the company will not make any changes in its present employee benefit plans that affect the employees in the bargaining unit without the agreement of the union. It also states, in Article 23.02, that controversies about the administration of these plans are not subject to the arbitration procedures of the collective agreement

21. There is no dispute that the collective agreement permits Nestle to make administrative changes to the benefit plan. The issue before me is whether the three changes implemented by Nestle are administrative.

(i) Dispensing Frequency

22. This change discourages an employee from making multiple visits to the pharmacy to obtain the same maintenance prescription by limiting the payment of the dispensing fee to five times per benefit period. Unifor quite properly acknowledged that the change is not significant and that the employee could avoid additional costs by increasing the volume of the prescription and reducing the frequency of pharmacy visits. However, it argued that an employee should not be required to change their practice of filling prescriptions without the union's consent.

23. In my view, this is a change to the way the benefits are administered in that it targets the frequency and method of reimbursement and not the actual benefit entitlement. The level of coverage for the dispensing fee has not changed, nor has the level of coverage for the prescription drugs. Rather, the only change for the employee is that she receives a larger quantum of prescribed medication in fewer visits. This is an administrative change as contemplated by Article 23.02 and permitted under the collective agreement.

(ii) Pre-authorization form

24. The issue is not so much about the cost that a physician may charge for completion of the form – a cost the company said would be covered under the collective agreement – or the nature of the questions on the form, but rather it is about the added criteria that the employee must try the medications recommended by Sun Life in order to be eligible for coverage. The benefit plan stipulates certain

conditions that must be satisfied for a claim for prescribed medication to be covered, such as requiring a prescription and a drug identification number. The pre-authorization form is effectively a new condition.

25. Nestle argues that this change is an administrative process that employees must undergo in order to obtain the desired prescription drug.

26. Several obvious questions arise from the pre-authorization process. Who decides what medications are recommended and what is the basis for the recommendation? What happens if there is a dispute between the physician who prescribed the medication and the insurance company? Will the list of drugs subject to the pre-authorization process increase over time and if so, on what basis? These questions all impact the substantive benefit entitlement because the end result could be the denial of benefit coverage that was previously available before the change was implemented. In effect, a new criterion has been imposed on the approval of the benefit claim.

27. The cases relied upon by the employer are distinguishable primarily because the conclusions are rooted in the "reasonable and customary" language. In *Air Canada*, *supra*, a cap on orthopedic shoes was allowed because "…that number is to be determined on the basis of what is 'reasonable and customary'". The arbitrator explained:

> The arbitral authorities recognize that where benefit coverage is not specified in a Plan or a Collective Agreement, changes in administration on the basis of what is "reasonable and customary" coverage or standards do not amount to violations of the Collective Agreement, see *Hotel-Dieu Grace Hospital and ONA,* and *Duke Energy Gas Transmissions and C.E.P.U., supra.* The evidence in this case leads to the conclusion that while there has been a change in the application of standards of adjudication, there has not been a change in the provision of benefits promised in the Benefits Plan.

28. Similarly, in *Hamilton Health Sciences*, *supra*, Arbitrator Samuels allowed a dispensing fee cap because the collective agreement only required the hospital to contribute to a premium coverage of the insurance plan that was subject to their terms and conditions including any enrolment requirements. The arbitrator found that the plan allowed for reasonable and customary limits and the dispensing fee fell within such limits.

29. In *London Health Sciences*, *supra*, the arbitrator allowed a per visit cap on massage therapy because it fell within the reasonable and customary limits as provided for in the benefit plan. The arbitrator explained:

> In the present state of jurisprudence, a finding that a "reasonable and customary" price is within a range within the industry and which is not

destructive to the benefit is sufficient to show that the collective agreement has not been violated should the amount be in the acceptable range.

30. The award in *City of Peterborough*, *supra*, dealt with whether specific benefit changes imposed by the employer were allowed under the collective agreement. The arbitrator found that the benefit entitlement for compression stockings (which was not specifically mentioned in the collective agreement) was subject to insurance industry standards and therefore only reimbursement of only the reasonable and customary costs was required. However, with respect to masseur services (which had a specific yearly limit in the collective agreement) the employer could not impose a limitation that was different from the collective agreement.

31. The reasonable and customary limits commonly found in benefit plans do not apply to the newly implemented pre-authorization process. Thus, the decisions referred to me do not persuade me that reasonable and customary limits found in the benefit plan allow for a pre-authorization process that requires employees to use medications other than those prescribed by their physician in order to obtain coverage. This is not what the parties bargained for when they negotiated the benefit provisions. It is more than an administrative change because it substantively affects the employee's entitlement to the prescription medication coverage by imposing a significant criterion on the entitlement.

(iii) Coordination of Benefits

32. This change affects how the benefit is calculated for the portion of the spousal claim that was not covered by the spousal plan. The employer argues that the language of the benefit plan sufficiently covers how the new calculation is applied. It argues that employees were only ever entitled to coverage for spouses up to a reasonable and customary limit.

33. While it may be true that the benefit language contemplates spousal coverage in the way that the employer has argued, this is not how it has been historically applied. Up until the change was made, the submitted claim for the spousal portion was covered up to the stipulated benefit limit. It was not reassessed to determine whether it fell within the reasonable and customary level. So, the portion of the spousal claim that would have been covered prior to the change will no longer be covered. This is more than an administrative change. This is a reduction in the benefit.

34. In this respect, the reasons why Arbitrator Stout denied the employer's change on masseur services in *City of Peterborough*, *supra*, is applicable:

> [53] In my opinion, it is not appropriate to permit the City to rely on such a limitation when it has not been clearly communicated to the Union at the time when the language was agreed upon. I find that the City left the Union with the impression that the only limitations with respect to masseur services was the yearly limit amount and that benefits would only be payable

after the maximum allowance under the provincial health plan has been paid. In these circumstances, I find that the City cannot rely on any additional limitation unless they obtain the Union's agreement.

[54] I acknowledge that the City sought clarification of the language in the most recent round of bargaining. However, I do not find such a proposal during bargaining to be at all relevant. It is not unusual for either party to a collective agreement to seek clarification in language to avoid litigation or settle an outstanding grievance. The parties agreed to the *status quo* and thus my decision must be based on the context at the time of the grievances and the language found in the Collective Agreement before me.

35. I find that the employer's change to the coordination of benefits is a substantive change that materially affects the employee's benefit entitlement. It follows that it is not a change that can be unilaterally implemented.

SUMMARY

36. For the foregoing reasons, I conclude that the changes made to the dispensing frequency do not violate the collective agreement as they are administrative as that term is understood in Article 23.02. The changes made to the pre-authorization of stipulated medications and the coordination of benefits are not permitted pursuant to Article 23.01 of the collective agreement as they are a change to the benefit plan that is not administrative.

37. I remain seized to deal with the implementation of this award.

Dated this 3rd day of November, 2017 in Whitby, Ontario.

Matthew R. Wilson