

IN THE MATTER OF THE ARBITRATION BETWEEN

MOWER COUNTY

“EMPLOYER”

And

**UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 9**

“UNION”

)
)
) **BMS NO.08-PA-0157**
)
)
) **DECISION AND AWARD**
)
) **RICHARD R. ANDERSON**
) **ARBITRATOR**
)
) **JANUARY 24, 2007**
)
)

APPEARANCES

For the Employer:

Ann Goering, Attorney
Allan Cordes, Human Resource Director
Doug Groh, Auditor-Treasurer
Craig Oscarson, County Coordinator
Dr. Rosemary Linderman, Psy.D.L.P., ABPP

For the Union:

Brendan Cummins, Attorney
Nicole Blissenbach, Attorney
Nancy Clingman, Grievant
Richard Morgan, President Local 9
Dr. Keith Kleis, DO
Amy Zahn, Masters Level Certified Clinical Social Worker
Kathy Lientz, Steward Local 9

JURISDICTION

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement, herein after the Agreement that was effective from January 1, 2007 through December 31, 2009.¹ The language in Article III [GRIEVANCE AND ARBITRATION] provides for the filing, processing and arbitration of grievances. Section E of this Article defines the jurisdiction and sole decision-making authority of the arbitrator. The parties stipulated that there were no procedural issues involved herein, and the matter was properly before the undersigned Arbitrator for final and binding decision.

BACKGROUND

Mower County, hereinafter the Employer, is located in south central Minnesota. UFCW Local 9, hereinafter the Union, represents inter alia certain clerical employees including those in the Auditor-Treasurer's office. The bargaining unit, which consists of approximately 38 employees, is set forth in Article 1 [PREAMBLE–UNIT DEFINITION-TERM] of the Agreement. The parties have a history of collective bargaining in excess of 20 years.

Human Resource Director Allan Cordes in a letter dated June 6th to the Grievant, Nancy Clingman, denied her request for Short Term Disability (STD) benefits.² Thereafter on June 20th, The Union filed a grievance challenging the right of the Employer to deny the Grievant STD benefits.³ County Coordinator Craig Oscarson denied the grievance in a letter dated June 27th to Union President Richard Morgan.⁴ In a letter dated July 6th, Union Business Agent Rod

¹ Union Exhibit No. 1.

² Union Exhibit No. 18.

³ Union Exhibit No. 2.

⁴ Union Exhibit No. 3.

Mc Dermott notified Oscarson that the Union intended to proceed to arbitration.⁵ Co-Counsels for the Union, Brendan Cummins and Nicole Bllissenbach notified the undersigned Arbitrator by letter dated September 10th of my selection as the neutral arbitrator in this matter.

A hearing was then conducted on December 7, 2007⁶ in Austin, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on December 7th. Post-Hearing Briefs were simultaneously mailed on January 4, 2008 and received on January 5, 2008. The record was then closed and the matter was taken under advisement.

THE ISSUE

The parties stipulated that the issue was, "Whether the Employer denied Short Term Disability leave benefits to the Grievant, Nancy Clingman, in violation of Article IX Section E of the collective bargaining agreement and the Employer's Short Term Disability Leave Policy, and if not, what is an appropriate remedy?"

RELEVANT CONTRACT PROVISIONS

ARTICLE III - GRIEVANCE PROCEDURE

Section A. *A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.*

Section D. *A grievance procedure is hereby established for the purpose of resolving any difference between the Employer and the Union as to the meaning and application of the provisions of this Agreement. Such differences shall be handled in accordance with the following procedure:*

- 1. Within ten (10) working days of a potential alleged grievance or within ten (10) working days of when the union was aware of the grievance there will be a pre-grievance*

⁵ Union Exhibit No. 4.

⁶ Unless otherwise indicated herein, all dates are in the year 2007.

meeting. This meeting will involve the aggrieved employee, the steward, supervisor and/or department head and the Human Resource Director. The Human Resource Director shall provide a written response to the “pre-grievance” to all parties involved in the meeting within ten (10) working days of the meeting.

2. In the event the problem cannot be solved as outlined in (1) above, the Business Agent or their representative will reduce the grievance to writing and indicate the specific provisions of the contract involved, the remedy sought and present it to the County Coordinator or his/her representative within ten (10) working days. The parties will attempt to resolve the written grievance at a meeting including but not limited to the steward, the Business Agent and the County Coordinator or his/her designee. The County shall give a written answer to the grievance within ten (10) working days of the close of the meeting.

3. In the event the grievance is not resolved to the satisfaction of the Union in any of the preceding steps, they’ shall have ten (10) working days from the receipt of the County’s reply letter to accept the answer to the written appeal, or to refer the matter to arbitration.

Section E. Arbitrators Authority

I. An arbitrator acting on matters relating to this agreement shall be subject to provisions of MS. 1 79A.16, Subd. 5, 6 and 7. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.

ARTICLE IX - PAID TIME OFF (PTO)

Section E. Mower County will provide a short-term disability policy for employees who choose the PTO option and for all employees hired after January 1, 2001 at no cost to the employee. Employees will receive a full paycheck after 24 hours of PTO usage for an illness, injury, etc. up to 491 hours. The leave shall be used within one year from the occurrence of the disability. Part-time employees will be required to use PTO for hours they are normally scheduled to work during the first three days of illness, injury, etc. If the employee does not have three days PTO or comp time available, the first three days will be unpaid. In no case will the employee be allowed to take an unpaid leave if PTO is available.

A doctor’s note will be required after five (5) working days off leave due to an illness or injury.

Intermittent leaves for the same purpose shall be cumulative. There will be a ninety-calendar day per occurrence limit for short-term disability.

RELEVANT POLICIES

MOWER COUNTY PERSONNEL POLICY (Relevant Provisions)

SECTION D116 SHORT TERM DISABILITY

WHAT IS SHORT TERM DISABILITY (STD)?

Mower County provides STD for its employees when they are unable to work due to injury or illness that occurred outside the work site.

ELIGIBILITY:

Mower County will provide a short-term disability policy for employees on Paid Time Off (OTC) who work a minimum of 14 hours per week. This includes all non-union employees hired after July 27, 1999, union employees hired after January 1, 2001, and all employees who chose the OTC option based on Union contracts or Section D115, Paid Time Off of the Mower County Personnel Policies. Temporary employees are not eligible for Short Term Disability.

Short Term Disability is for employees only and may not be used for the illness or injury of a family member.

Eligibility begins on the date of occurrence. For purposes, of this policy, date of occurrence does not include preventative treatment leading up to the occurrence. Time used that involves preventative treatment and maintenance treatment will not be eligible for STD leave.

EXAMPLES:

1. *An employee is on medication and has regular physician appointments that involve cardiovascular disease such as high blood pressure. The employee suffers a heart attack and recovers. After being released back to work the employee has his/her medication changed and is then on a preventative treatment program again. The eligible STD leave only involves the heart attack and recovery time.*

2. *An employee is diagnosed with cancer. The employee has treatment that involves further diagnosis, surgery and/or chemotherapy and follow up physician visits. All time involved is eligible as the employee had an occurrence (diagnosed with cancer) and all time incurred involved the treatment of the occurrence.*

Short Term Disability will cover only once per occurrence of a diagnoses.

PROCEDURE:

Employees who have an illness or injury that lasts more than 3 workdays and choose to use the Short Term Disability benefit are required to fill out a Short Term Disability Claim Statement Sections 1 and 2 if the illness or injury lasts over five workdays the employee is required to have Section 3 completed by a physician. The Short Term Disability Claim Statement should be turned into the Human Resource Office by the end of the pay period. In

no case will Short Term Disability over 5 workdays be approved without a physician's statement.

FOLLOW UP CLAIMS:

In the event that an employee returns to work after a Short Term Disability Leave and is later taken off work for the original diagnosis, the employee's physician must complete a Short Term Disability Follow-up Claim Statement. The Short Term Disability Follow-up Claim Statement should be turned into the Human Resource Office by the end of the pay period.

PHYSICAL EXAM:

Mower County may require an employee to be examined at any time and as often as the County deems necessary. Mower County will pay for any required exam.

NOT COVERED:

The following is not covered under Short Term Disability:

- 1. Illness contracted or injury sustained in the course of any outside employment for wage or profit.*
- 2. Illness or injury for which the employee is eligible in whole or in part, under the provisions of any Workers' Compensation Act or Employer Liability Law.*
- 3. Cosmetic or elective surgery.*
- 4. Illness contracted or injury sustained while on an unpaid personal leave other than jury duty, a family leave as defined under Federal Family and Medical Leave Act or comparable state law.*
- 5. Disability caused by:
 - a. War or act of war, whether declared or not, or any hostile act of foreign power;*
 - b. Attempted suicide or intentionally self-inflicted injury, while sane or insane; or*
 - c. Taking part in or the result of taking part in committing a felony.**
- 6. Disability while confined to any facility because employee was convicted of a crime or public offense.*

MOWER COUNTY WILL NOT PAY BENEFITS IF:

- 1. There is an unreasonable failure on the employee's part to undergo a scheduled examination for a second medical opinion or specialty consultation
OR once you have an appropriate medical plan, you fail to comply with this plan without good cause. "Good cause" means a medical reason preventing implementation of the plan.*
- 2. Your employer, the policyholder, or an associated company has offered you the opportunity to return to limited work while you are disabled;
You are functionally capable of performing the limited work which is offered; and
You do not return to work when and as scheduled.*

TERMINATION OF THE BENEFIT:

The STD Benefit will automatically terminate under the policy on the earliest of the following:

1. *The date You cease to be Disabled Or Partially Disabled as defined in the policy;*
2. *The date You are no longer under the Regular Care and Treatment of a Physician for the disabling condition;*
3. *The date You die;*
4. *The date the Benefit Period ends according to the Policy Schedule;*
5. *The date You fail to provide adequate proof of Disability or Partial Disability or fail to agree to a physical and or vocational examination as scheduled by Mower County;*
6. *The date You are determined not to be Disabled or Partially Disabled based on objective medical findings;*
7. *The date You fail to cooperate in Rehabilitation;*
8. *The date Work Earnings equal or exceed 100% of Pre-Disability Earnings;*
9. *The date You begin working for an employer other than Your own employer or become self-employed unless You are participating in a rehabilitation program approved by Mower County;*
10. *The date the policy terminates or You retire;*
11. *The date You cease to meet the policy's requirements for eligibility;*
12. *The day preceding the date a leave of absence begins, except if You are Disabled as defined in the policy or on family leave as defined in the Federal Family and Medical Leave Act or comparable state law; or*
13. *The day preceding the date a layoff or work stoppage begins.*

LIMITATIONS:

1. *Benefits for a disability due to mental illness, alcoholism and/or chemical/drug abuse will be provided only when the employee is actively participating in an approved medical treatment program or drug/alcohol treatment program.*
2. *STD benefits will not be paid for any illness or injury caused or contributed to by a pre-existing condition unless the date of disability occurs after 24 continuous months of coverage under this policy. A pre-existing condition is a mental or physical condition for which the employee has consulted a physician; received medical treatment; or taken prescription drugs during the twelve months prior to the effective date.*

AUTHORITY:

Mower County has the sole discretionary authority to determine eligibility for participation or benefits and to interpret the terms of this policy. All determinations and interpretations made by Mower County are conclusive and binding on all parties.

DEFINITIONS:

Benefit Period: Full time employees: 491 hours (figured on calendar days) for up to one year from date of occurrence.

Part time employees: Hours prorated to normal scheduled work hours for a 90 calendar day work period for up to one year from date of occurrence.

Injury: Bodily harm resulting directly from an accident and independently of all other causes.

Illness: the structure and/or the systems of the human body to cause deviation from a normal healthy state.

Occurrence: Date an injury or illness takes place or the date the illness is first diagnosed by a physician. Preventative or maintenance treatment leading up to an illness or injury is not considered the date of occurrence (see examples under Eligibility.)

Physician: A person who is: Operating within the scope of a doctor's license; and either licensed to practice medicine and prescribe and administer drugs or to perform surgery; or Legally qualified as a medical practitioner and required to be recognized under the policy for insurance purposes, according to the insurance statutes or the insurance regulations of the state of issue.

DSM-IV (Diagnostic Criteria)

309.81 Post-Traumatic Stress Disorder

A. *The person has been exposed to a traumatic event in which both of the following were present:*

(1) *the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened (death or serious injury, or a threat to the physical integrity of self or others).*

(2) *the person's response involved intense fear, helplessness, or horror. **Note:** In children, this may be expressed instead by disorganized or agitated behavior.*

B. *The traumatic event is persistently reexperienced in one (or more) of the following ways:*

(1) *recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.*

(2) *recurrent distressing dreams of the event. **Note:** In children, there may be frightening dreams without recognizable content.*

(3) *acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated).*

Note: *In young children, trauma-specific reenactment may occur.*

(4) *intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.*

(5) *physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.*

C. *Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:*

(1) *efforts to avoid thoughts, feelings, or conversations associated with the trauma*

(2) *efforts to avoid activities, places, or people that arouse recollections of the trauma*

(3) *inability to recall an important aspect of the trauma*

(4) *markedly diminished interest or participation in significant activities*

(5) *feeling of detachment or estrangement from others*

(6) *restricted range of affect (e.g., unable to have loving feelings)*

(7) *sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).*

D. *Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:*

- (1) *difficulty falling or staying asleep*
- (2) *irritability or outbursts of anger*
- (3) *difficulty concentrating*
- (4) *hypervigilance*
- (5) *exaggerated startle response*

E. *Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.*

F. *The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.*

Specify if:

Acute: *if duration of symptoms is less than 3 months*

Chronic: *if duration of symptoms is 3 months or more*

Specify if:

With Delayed Onset: *if onset of symptoms is at least 6 months after the stressor*

308.3 Acute Stress Disorder

A. *The person has been exposed to a traumatic event in which both of the following were present:*

- (1) *the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.*
- (2) *the person's response involved intense fear, helplessness, or horror.*

B. *Either while experiencing or after experiencing the distressing event, the individual has three (or more) of the following dissociative symptoms:*

- (1) *a subjective sense of numbing, detachment, or absence of emotional responsiveness*
- (2) *a reduction in awareness of his or her surroundings (e.g., "being in a daze")*
- (3) *derealization*
- (4) *depersonalization*
- (5) *dissociative amnesia (i.e., inability to recall an important aspect of the trauma)*

C. *The traumatic event is persistently reexperienced in at least one of the following ways: recurrent images, thoughts, dreams, illusions, flashback episodes, or a sense of reliving the experience; or distress on exposure to reminders of the traumatic event.*

D Marked avoidance of stimuli that arouse recollections of the trauma (e.g., thoughts, feelings, conversations, activities, places and people).

E. Marked symptoms of anxiety or increased arousal (e.g., difficulty sleeping, irritability, poor concentration, hypervigilance, exaggerated startle response, motor restlessness).

V62-82 Bereavement

This category can be used when the focus of clinical attention is a reaction to the death of a loved one. As part of their reaction to the loss, some grieving individuals present with symptoms characteristic of a Major Depressive Episode (e.g., feelings of sadness and associated symptoms such as insomnia, poor appetite, and weight loss). The bereaved individual typically regards the depressed mood as “normal,” although the person may seek professional help for relief of associated symptoms such as insomnia or anorexia. The duration and expression of “normal” bereavement vary considerably among different cultural groups. The diagnosis of Major Depressive Disorder is generally not given unless the symptoms are still present 2 months after the loss. However, the presence of certain symptoms that are not characteristic of a “normal” grief reaction may be helpful in differentiating bereavement from a Major Depressive Episode. These include 1) guilt about things other than actions taken or not taken by the survivor at the time of the death; 2) thoughts of death other than the survivor feeling that he or she would be better off dead or should have died with the deceased person; 3) morbid preoccupation with worthlessness 4) marked psychomotor retardation; 5) prolonged and marked functional impairment; and 6) hallucinatory experiences other than thinking that he or she hears the voice of, or transiently sees the image of, the deceased person.

FACTS

The Grievant is a long-term employee with approximately 19 years of service in various clerical positions. At all times material herein, she was employed as an office support specialist in the Auditor-Treasure Office under the supervision of County Auditor-Treasurer Doug Groh.

The Grievant has had a history of suffering from depression and anxiety for which she has been under the care of a physician. In early 2003, the Grievant suffered from depression, anxiety and stress resulting from a confrontation with a co-worker. She was unable to work and sought medical treatment with Dr. Barbara Chamberlain of the Mayo Clinic in Rochester, Minnesota on February 21, 2003.

Thereafter on March 11, 2003, the Grievant filed for STD benefits, citing anxiety and depression as the basis for her being unable to work.⁷ The Grievant's STD claim form signed by Doctor Chamberlain indicated that the Grievant was experiencing symptoms involving "↓mood, ↓energy, insomnia, panic episodes, racing thoughts and ideas of reference" with a diagnosis of "major depression recurrent with possible psychotic symptoms".⁸ STD benefits were subsequently approved.⁹

In August 2006, the Grievant's mother had a reoccurrence of cancer that had been in remission for three years. Part of her lung was removed and she started chemotherapy under a Mayo Clinic experimental program. While being treated the Grievant's mother suffered an allergic reaction to the medication and was unable to eat resulting in a weight loss from 150 to 120 pounds. According to the Grievant she was very close to her mother, who was her best friend. Every day at suppertime she would go to her mother's house to help her eat, having at times to almost force-feed her. She would also leave work during her lunch hour to do the same. Her mother subsequently died on March 7th after a fall and being placed in a nursing home and hospice. The Grievant stayed with her mother the night she passed away after experiencing a difficult night.

According to the Grievant, she made the funeral arrangements because her father was not in the best of health and took his wife's death really hard since they were very close.¹⁰ The night after her mother's funeral she did not sleep well because she was sick and vomiting, and was worried about her dad. She called him early in the morning (approximately 9:00 a.m.), but he

⁷ STD Claim Form Union Exhibit No. 19.

⁸ STD Claim Form Union Exhibit No. 19.

⁹ Exact date and period of disability unknown.

¹⁰ He almost died in 2006 after suffering a heart attack.

did not answer. She then kept calling, but still no answer. She assumed he was out of the house doing errands. After taking a brief nap because she was tired and not feeling well, she called him again at approximately 2:00 p.m. Again, there was no answer. After calling again later and getting no answer, she finally went to his house around 6:30 p.m. When she arrived at his house, she discovered the mail and newspaper had not been taken in. After she entered the house, she found him lying in his bed with one leg on a table and in obvious pain and distress. The hand held phone was on the floor. Apparently, he tried to answer when she called. He must have been lying in the bed a long time because the bed was soiled.

She called her husband who then called 911 in spite of her protesting dad. He was then taken to the local hospital. She stayed with him that night and slept in a bed next to him. According to the Grievant, she stayed with him most of the next day and night and watched him slowly die. She stated that she felt guilty for not recognizing how hard her dad took her mother's death and for not going to the house sooner when he did not answer her calls.

According to the Grievant, she called Oscarson either the night of her dad's admittance to the hospital or the next morning because she had no PTO (Paid Time Off) or other leave available and needed to be with her dad. Her dad subsequently died on March 14th and his funeral was on March 16th. On that day she received a letter from Cordes expressing sympathy for the death of her parents.¹¹ The letter also outlined her leave options pursuant to her request of Oscarson. Also, accompanying the letter were various leave forms including STD claim forms.

The Grievant returned to work on Monday, March 19th and worked the entire week as well as the following Monday, March 26th.¹² On March 23rd an article appeared in the local newspaper

¹¹ Union Exhibit No. 6.

¹² Employer Exhibit No. 2.

that cited the Grievant regarding her proposal that property tax payments be allowed monthly rather than biannually, which the article indicated that the Grievant was already doing.¹³ The article also cited the Grievant as being invited to testify at a legislative hearing on taxes. Her testimony was scheduled for March 20th; but due to her parent's recent deaths, she was unable to find the time to do so. On Monday, March 26th the Grievant was at work and in Groh's office at approximately 9:00 a.m. Groh, while talking on the phone to Oscarson, asked her who gave her permission to pay her taxes monthly. According to the Grievant, she responded to Groh by saying "leave me alone" and proceeded to walk into the vault area because she was anxious and thought she was going to have an anxiety attack. While in the vault she saw the plaque with her father's picture on it and broke down crying.¹⁴ She then called her doctor's office and made an appointment for that day and then left work after informing Groh of her doctor's appointment.

Groh's version of this scenario is that Oscarson called him early that morning inquiring about the article that quoted the Grievant. Oscarson was asking questions about the article that he directed to the Grievant for a response, which he then relayed back to Oscarson. During the questioning the Grievant became agitated, stood up and said, "If they don't stop picking on me you are going to be down to three deputies".¹⁵ At approximately 11:00 a.m., the Grievant informed him that she was going to her doctor's office and possibly would not be back.

Dr. Kleis, who is a D.O. (Doctor of Osteopathy) and has been practicing in general family practice since 2000, examined the Grievant. The Grievant testified that during the examination she informed Dr. Kleis of the deaths of her parents. She also informed him of her feelings of helplessness resulting from her actions in not doing more for her dad. As a result, she felt guilty

¹³ Employer Exhibit No. 11.

¹⁴ Her dad had been the County Auditor-Treasurer for many years.

¹⁵ There were five deputies in the office. One was out on leave. If the Grievant left, there would be three.

and responsibility for his death, feelings that she kept reliving over and over again. She also told him of being agitated at work and of her fears of going back to work since she felt there was no support system for her there. Dr. Kleis, who has been treating the Grievant since December 2006 for anxiety and depression, initially diagnosed her as having depression and anxiety. Dr. Kleis then increased her medication for depression. He also gave her a new prescription for anxiety and referred her to a psychotherapist.

The Grievant initially saw psychotherapist Amy Zahn on April 2nd and informed her of the same problems that she had informed Dr. Kleis of. Therapist Zahn is a Licensed Social Worker-Masters Social Worker who has been a licensed clinical social worker for five years. She had previously obtained her Masters Degree in social work in 2000. Therapist Zahn testified that she has worked with patients with depression for 10 years as well as with battered women and with residents of domestic violence shelters. Therapist Zahn testified that she regularly diagnoses patients as a part of her general clinical duties and estimated that during her career she has diagnosed between 15 and 20 individuals with Post-Traumatic Stress Disorder (PTSD), those primarily in battered women's shelters. She also testified that she diagnosed the Grievant with PTSD based upon the criteria set forth in the American Psychiatric Association Desk Reference to the Diagnostic Criteria from DSM-IV-TR.¹⁶ Therapist Zahn testified that she did not personally review the criteria, but rather relied on a software program.

Therapist Zahn also testified that she diagnosed the Grievant with PTSD because the Grievant had suffered a lot of trauma due to the recent deaths of her parents and because of her belief that she did not do as much as she could have done for her dad, which she believed

¹⁶ The recognized authority for diagnosing certain mental illnesses. Employer Exhibit No. 10.

contributed to his death. Therapist Zahn further testified that she does not do any client testing, or did she do any testing of the Grievant.

Therapist Zahn assisted the Grievant in filling out an STD claim form during the session and set up weekly therapy sessions for the Grievant. Initially there were gaps of more than a week because of Therapist Zahn's scheduling conflicts; however, the Grievant did see Therapist Zahn 11 times between April 2nd and June 27th according to the Grievant's contact visit sheet maintained by Therapist Zahn.¹⁷

The Grievant submitted the STD claim form to the Employer on April 2nd signed by Therapist Zahn who diagnosed the Grievant as having "PTSD" and exhibiting subjective symptoms of "*depression, anxiety, not sleeping, emotional, not able to concentrate and not able to focus*".¹⁸ Under psychiatric symptoms, Therapist Zahn listed "*grief, stress, anxiety*" and "*panic attacks*". Cordes sent a reply letter to the Grievant dated April 3rd, wherein he noted that the Grievant was on STD leave in February 2003, that this recent claim had the same diagnosis as the 2003 claim; therefore, the claim was being denied.¹⁹ Cordes further stated that if her doctor (Therapist Zahn) felt the two diagnoses were different, she would have to review the Grievant's claim form from 2003 and distinguish the differences.

On April 5th, Cordes sent Therapist Zahn a letter accompanied by the Grievant's 2003 STD claim form and a copy of the Employer's STD Policy. In the letter Cordes requested that Therapist Zahn review the 2003 application form and the current one, and if she believed the claims were different, to list the differences.²⁰

¹⁷ Union Exhibit No. 21.

¹⁸ Union Exhibit No. 7.

¹⁹ Union Exhibit No. 8.

²⁰ Union Exhibit No. 9.

Therapist Zahn responded by letter on April 19th. In her letter she stated,²¹

I have reviewed the information that you mailed to me regarding the two claim statements for short term disability for Nancy Clingman. I feel that there is a difference between the 2003 claim and the present 2007 claim. I diagnosed Nancy with Post Traumatic Stress Disorder, due to her losing both of her parents in such a short time. Nancy is suffering from extreme emotional stress experienced from this trauma. Nancy is feeling depressed, anxious, and extremely overwhelmed. Nancy is unable to function appropriately in both her personal and her professional life. I am requesting that Nancy take a leave of absence from her job for the next month. Nancy is coming to see me on a weekly basis to work on these issues in a counseling environment. If you have any more questions or concerns please contact me anytime.

By letter dated April 27th, Cordes denied the Grievant STD benefits citing three reasons:²²

(1) The application for benefits you submitted was not completed by a physician as required; (2) You are not participating in an approved treatment program as required; and (3) The condition for which you are claiming the disability appears to be the same condition for which you applied for benefits in 2003.

On April 30th, the Grievant came to Cordes' office. According to Cordes, she was in an extremely agitated state and was swearing, screaming and belligerent. During this encounter, the Grievant asked Cordes if he wanted her to come to work "like this". She also called him and the County administrators "assholes", adding that if her leave was being denied, she would be at work tomorrow. Oscarson, who witnessed the incident, testified that the Grievant was in an agitated state, that she was angry and upset over Cordes' involvement in denying her STD leave, and at one point began to shake uncontrollably and went to her knees.

According to the testimony of Groh the Grievant, after having a confrontation with Cordes, came into his office to get another STD claim form since the initial form was not filled out by an approved medical professional. She said a number of things that gave Groh concern over her

²¹ Union Exhibit No. 10.

²² Union Exhibit No. 11.

well being.²³ She was extremely angry and was yelling, swearing and crying at times. She was very upset over Cordes denying her STD benefits and was going to file a grievance. Apparently Cordes had informed her that she needed to go to an "in house" therapy program versus the one-day-a-week session that she was currently attending. According to Groh, the Grievant stated, "there was no way in hell that she would do that and would be at work the next day". She then went into a tirade about the administration and about the dictatorial actions of Cordes in denying her STD benefits; adding that FMLA leave wasn't any help because it did not provide the necessary money to pay her costs for continued Employer benefits and also she wasn't getting credit for retirement benefits under PERA (Public Employees Retirement Act).

According to Groh, the Grievant stated during this conversation that she could understand why people go bezerk or go "postal" and "take actions like what happened at Virginia Tech". She also suggested that the administration was driving her crazy referencing a local situation where a schoolteacher was allegedly driven crazy by her administration resulting in her suicide. Groh testified that he was so concerned about the Grievant's safety and well being that he asked her if he should call her husband to come get her, but she rejected that because she was afraid of what her husband would do since he was also upset over the STD benefit denial. Alternatively, he asked her to call him when she got home, which she did.

Immediately following the aforementioned incident, Cordes sent the Grievant another letter clarifying the requirements for STD benefits.²⁴ In the letter Cordes informed the Grievant that the STD claim form had to be completed by a physician; that she must have a physician diagnose her condition, and have the physician develop a treatment program listing treatment goals that

²³ Groh wrote down the substance of his conversation with the Grievant in a memorandum. Employer Exhibit No. 4.

²⁴ Union Exhibit No. 12.

directly address his specific diagnosis; that the program must be administered or directly supervised by a physician; and that the treatment plan must be forwarded to the County for approval. The letter also had a requirement that her physician must explain how the condition for which she was currently claiming STD benefits differed from the condition present in her 2003 STD benefit claim.

The Grievant then submitted another STD application form on May 9th that was signed by both Therapist Zahn and Dr. Kleis.²⁵ In the diagnoses section heading of the form under diagnoses it lists "309.81 Posttraumatic Stress".²⁶ There is no comment under the sub-headings "Subjective symptoms" or "Objective findings".

After receiving the new STD application, Cordes sent the Grievant another letter on May 15th.²⁷ Cordes informed the Grievant that she again failed to complete that portion of the first page of the form where she was supposed to list the symptoms of her illness or diagnosis and that her physician failed to list on his portion of the form the required subjective symptoms and his objective findings.

Cordes also explained that the treatment program did not meet the requirements set forth in his April 30th letter wherein the program must directly address her specific diagnosis, list treatment goals and be approved by the County. In addition, Cordes stated that the information listed on the May 9th form does not list the frequency of the counseling sessions, the type of medication or how the sessions relate to her specific diagnosis. Cordes also explained that the County was prepared to tentatively approve her claim subject to additional information from her physician; however, after carefully reviewing the claim statement, it was noted that her most

²⁵ Union Exhibit No. 13.

²⁶ The code for PTSD under DSM-IV-TR criteria is 309.81.

²⁷ Union Exhibit No. 14.

recent visit was on April 11th, which was an unacceptable course of treatment. Finally, Cordes informed the Grievant that she also failed to provide information from a physician explaining how her current condition differed from her 2003 condition.

Cordes also sent Dr. Kleis a letter on May 15th, which he copied the Grievant, that reiterated the deficiencies in the Grievant claim as set forth in his letter to her.²⁸

Dr. Kleis responded to Cordes' letter on May 22nd.²⁹ The letter stated,

In regards to #1, diagnosis section subjective symptoms, the patient is having severe depression and anxiety making it very difficult for her to be in any type of situation around other people. She becomes very tearful in talking to people and cannot handle any type of stress at this time. There are no objective findings with the post-traumatic stress disorder, unfortunately there is not any type of lab or x-ray we can do to prove emotional distress, which is the reason we do have her seeing a psychologist to continue to evaluate this and continue with her treatment.

In correspondence to your #2, the treatment program set out for her specific treatment plan, is to be meeting with a psychotherapist on a regular basis which she is doing. Appointments are every 1 to 2 weeks as the provider is able to fit her in. Treatment goals obviously are to help Ms. Clingman achieve emotional stability. In addition to the counseling sessions, Ms. Clingman has been prescribed prescription medication by myself for post-traumatic stress disorder. The type of medication is a selective serotonin reuptake inhibitor.

In response to your #3 regarding Ms. Clingman's visit on April 11, 2007, this was with her psychotherapist discussing her post-traumatic stress disorder, which is the main problem here. I find that very relevant to her treatment program in that her therapy is going to be probably the most beneficial thing to her to get her through this difficult time.

In reply to your #4 relating how the condition now is different from what she went through in 2003, the post-traumatic stress from this is related to her parents death, both dying within very close proximity to each other. She was very close to her parents and she has a lot of guilt in finding her father and feeling she could have done more to help save him. I do not feel that in 2003 she was confronted with this type of post-traumatic stress. She may have been dealing with some depression and anxiety at that time and I do not doubt depression and anxiety are playing a role here, however, the unfortunate stresses she has had in such close proximity to each

²⁸ Union Exhibit No.15.

²⁹ Union Exhibit No. 16.

other is definitely different than what happened in 2003.

Finally, in response your #5 anticipated date of return to work, unfortunately I cannot give you an anticipated date of return to work. Under these circumstances everybody does recover at different rates. I wish I could tell you that within so many treatments she would be back to herself, unfortunately it does not work that way when dealing with post-traumatic stress disorder. I can assure you that we will do our best to help her to recover her emotional health. I will be happy to supply you with a letter indicating her ability to perform her essential functions when I do feel she has achieved that goal. If you do have further questions, please feel free to contact me.

After receiving Dr. Kleis' response letter, Cordes then sent a claim denial letter to the Grievant. The June 6th letter stated,³⁰

The County has received a letter from Dr. Kleis dated May 22, 2007 stating that your treatment plan consists of medication and appointments with a psychotherapist every one to two weeks "as the provider is able to fit" you in. Although Dr. Kleis states that your therapy is the most beneficial part of your treatment, your May 9, 2007 application for benefits signed by Dr. Kleis and his most recent letter show that your therapy sessions are infrequent.

Short Term Disability benefits are only provided when an employee is actively participating in an approved medical treatment program. The sporadic nature of the treatment you are obtaining does not meet the requirements of the County's Short Term Disability policy. Given the fact that Dr. Kleis has stated that you are unable to work, with no prognosis regarding your expected return date, and that you "cannot handle any type of stress" the County has determined that your current course of treatment is inappropriate and therefore will not approve it.

Further, the County has reviewed all of the information regarding your current condition and your 2003 use of Short Term Disability. The County has determined that the underlying condition is the same, even though the triggering event may be different.

Therefore, your request for Short Term Disability is denied.

The Grievant testified that during the time her claim was pending, which continues to date, her medical treatment consisted of doing daily "journaling" of her activities, seeing Therapist Zahn once a week, taking medications prescribed by Dr. Kleis and avoiding situations that would

³⁰ Union Exhibit No. 18.

give rise to anxiety or panic attacks. In addition, she recently began to attend a group therapy program.

After the Union filed its grievance, the Employer continued to request medical records from the Grievant to evaluate her claim³¹, but they have never been furnished. The Employer subsequently retained Dr. Rosemary Linderman as a mental health consultant. Dr. Linderman, who is the proprietor of Psychological Services of Southern Minnesota based in Austin, Minnesota, is a clinical and forensic psychologist in private practice. She has extensive experience in diagnosing psychological disorders including employee disability issues. She received a Masters Degree from Winona State University in the late 1980's in community mental health counseling, and a Doctorial Degree in clinical psychology in 1992 from the Minnesota School of Professional Psychology. She has been frequently called upon to testify as an expert witness and has completed 2,600 diagnostic evaluations related to the commitment of people as mentally ill, chemically dependent or mentally retarded. She has also reviewed hundreds of Social Security Disability claims involving mental health issues during a six-year period.

On September 13th, Dr. Linderman sent Therapist Zahn a letter asking a series of questions regarding her diagnosis of the Grievant's PTSD.³² Among other things Dr. Linderman asked Therapist Zahn how the Grievant met the criteria for PTSD based on the diagnostic criteria for PTSD in DMS-IV-TR, and why Bereavement under DMS-IV-TR would not have been a more appropriate diagnosis. She also inquired about the Grievant's current condition and whether she could return to work. Dr. Linderman also asked Therapist Zahn in the letter to identify the Grievant's compliance with treatment and her specific treatment goals as well as what treatment

³¹ Letters dated July 9th and August 16th from Employer counsel Ann Goering to Union representative Rod McDermott. Employer Exhibit Nos. 12 and 13.

³² Employer Exhibit No. 5.

goals the Grievant had accomplished, and whether she was in group therapy. Finally, she asked Therapist Zahn to have the Grievant complete a MIMPI-2 to objectively assess her current level of depression and anxiety and either mail or fax the raw data of this profile to her even if it is determined to be invalid.

On October 19th, Therapist Zahn replied to Dr. Linderman's letter. The letter which was faxed that day stated,³³

Here is the information that you are requesting in regards to Nancy Clingman:

A. Unfortunately Nancy Clingman is not able to return back to her full time employment responsibilities at this time. At this time I am not suggesting part time employment responsibilities either. I do not believe that Nancy is able to return back to work at this time and be able to function and maintain the workload that is expected of her.

B Responses to why Nancy is not able to return back to work at this time:

1. I diagnosed Nancy back in April 2007 with Post Traumatic Stress Disorder due to patient losing both her mother and her father in less than two weeks. Not only did patient lose her parents there were also traumatic circumstances that were involved with the death of her father. Nancy was not only extremely close to her parents but they were one of her main sources of support. The traumatic circumstances that I referred to earlier involved the condition that Nancy found her father in at his home right before he passed away. Nancy had been trying to get a hold of her dad for approximately twelve hours but was unable to reach him. Nancy decided to go over to her parent's home to check on him, however, when she got there she noticed that her father had not brought in the newspaper for a few days. Nancy knew that something was terribly wrong and rushed in the house to check on her father. Nancy stated that she found her father in his bed and he was extremely disoriented and confused. Nancy stated that her father had soiled himself and it looked like he had been laying like this for a long time, Nancy stated that her father could barely talk and or move to get out of bed. Nancy immediately called her husband and then called 911 in which her father was transported to AMC emergency department. Nancy's father was admitted to AMC and unfortunately died just a few days later in the hospital.

Nancy is still having trouble functioning in every day life events and situations. Nancy has trouble sleeping and when she does sleep she suffers from nightmares and does not feel rested when she wakes up in the morning. Nancy is

³³ Employer Exhibit No. 1.

also still extremely emotional and at times cries for long periods of time. Nancy continues to feel depressed and anxious on a daily basis. Nancy feels very overwhelmed and stressed a lot of the time and at times has trouble functioning even doing every day tasks. Nancy gets very anxious easily and does not seem to be able to do more than one thing at a time.

I do not believe that Nancy has been able to properly grieve for the death of her parents, partly due to all of the paperwork that she has had to do for applying for short and long term disability. Nancy did not have enough time to grieve for the loss of her mother, before she had to then grieve for the loss of her father. Nancy has also been dealing with her parent's estate and finances, so this also has put a lot of pressure on herself. Nancy has not been able to work since March 2007, so this also has put a huge financial burden and stress on her family.

2. Nancy has been very diligent about attending her individual therapy sessions with this writer. Nancy has been coming to weekly individual therapy, since April 2007. There have only been a few times, that patient did not meet with me for therapy and on those occasions this writer had to reschedule due to being ill or personal reasons. Nancy has been very open and honest with this writer and has followed thru with any suggestion that I have suggested to help her deal with her grief issues. This writer and Nancy have discussed different techniques to help her when she is having a tough time and these include journaling, CDT therapy techniques, talking to her family and friends, being open about her feelings, and taking things one day at a time.

3. The criteria in which Nancy fits into the diagnosis of PTSD which stated in the DMS-IV-TR is as follows:

A. Nancy experienced and witnessed events that were traumatic. Nancy's response involved intense fear, helplessness, and horror. (Losing her mother and than seeing her father in his condition and than losing her father.)

B. The traumatic event is persistently reexperienced in one or more of these ways:

(1) Recurrent and intrusive distressing recollections of event through images and thoughts.

(2) Recurrent distressing dreams and nightmares of the event.

(3) Intense psychological distress at exposure to internal and external cues symbolize an aspect of the event. (Going to her parent's home. Going out in public and having people ask patient how she is doing.)

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness, as indicated by three of the following:

(1) Efforts to avoid thoughts, feelings, or conversations about the loss of her parents.

- (2) *Efforts to avoid activities, places, or people that remind patient of the trauma. Patient avoids going to public places such as grocery store and restaurants. It is also hard for patient to go to her parent's home.*
- (3) *Markedly diminished interest or participation in significant activities.*
- (4) *Feeling of detachment from her family, friends, and coworkers.*
- (5) *Sense of foreshortened future, patient is worried about her career and finances.*

D. Persistent symptoms of increased arousal, as indicated by two of following:

- (1) *difficulty falling or staying asleep*
- (2) *irritability and moodiness*
- (3) *difficulty concentrating; not able to do more than one thing at a time.*

E. Duration of the symptoms have been persistent for approximately the Past six months from April 2007 to present.

F. The disturbance has caused clinically significant distress or impairment in patient's social and occupational areas of functioning.

4. Nancy has started Grief Group Therapy at AMC Hospice. Patient is going to attend this six week group therapy on a weekly basis every Tuesday. This group is only offered in the spring and the fall, patient was not emotionally ready to attend this group in the spring due to its timing.

On October 9th, Dr. Linderman sent Cordes a letter wherein she reviewed the Grievant's case.³⁴ In the review she noted,

1. Ms. Clingman has not had an approved treatment provider in the form of a psychiatrist or doctoral level clinical psychologist being her direct treatment provider. The absence of such a provider was evident in the fact that no objective personality assessment had been accomplished in the beginning of her treatment, or later to attenuate the subjectivity associated with diagnosing a patient with a certain disorder. When an MMPI-2 was requested her social worker indicated Ms .Clingman was being treated successfully without the aid of information available from this instrument. When her diagnosis was noted as Post Traumatic Stress Disorder there was no evidence that a CAPS (Clinician Administered PTSD Scale) assessment was completed, even though it was known by her treatment provider that she was taking time off work and clear support of her treatment issues was likely.

2. There is insufficient evidence to support Ms. Clingman meeting the DSM-IV-TR criteria for Post Traumatic Stress Disorder. There is no information that an

³⁴ Employer Exhibit No. 7.

attempt was made to differentiate this diagnosis with that of Bereavement which specifically notes the focus of clinical attention being the reaction to the death of a loved one, or loved ones with accompanying symptoms of sadness, depression, anxiety, guilt related to actions taken or not taken at the time of the death, marked psychomotor retardation and possible prolonged and marked functional impairment.

While losing one's parents can be a traumatic experience, there is insufficient evidence based on information in Ms. Clingman's records that she met or meets the definition of a traumatic event inclusive to PTSD. For her to meet this kind of traumatic event she herself would have to "experience, witness or be confronted with an event or events that involved actual or threatened death, or serious injury or a threat to the physical integrity of self or others," as noted in the DSM-IV-TR. Instead, her records indicate that after spending twelve hours calling her father without reaching him she went to his home, found him in need of emergency services which were accessed resulting in his being transported to AMC where he died several days later.

Her current treatment provider reports that after many months of previous treatment Ms. Clingman has only recently been directed to participate in a grief group.

3. *Despite "weekly individual cognitive behavioral therapy since March/April of 2007 as well as journaling, talking to her family and friends, being open about her feelings and taking things one day at a time," as noted by her social worker Ms. Clingman is still identified as unable to return to work on a part or full time basis, becoming easily anxious, and "does not seem to be able to do more than one thing at a time." In subsequent statements however, she is noted as "dealing with her parents' estate and finances".*

Ms. Clingman is further noted as "very overwhelmed, stressed a lot of the time, has trouble functioning even doing everyday tasks," which appears to clearly describe an individual too fragile to return to work.

The Grievant subsequently completed the MMPI-2 test on October 19th, which was evaluated by Dr. Linderman. The results of the evaluation are contained in Dr. Linderman's letter to Cordes dated October 29th wherein she stated,³⁵

Nancy Clingman's MIMPI-2 profile completed on October 19, 2007 is interpreted as that of an individual exaggerating symptoms in the direction of what is termed a "fake bad" profile. This is also a "blind" interpretation in that I did not interview her directly for a comparison between the profile and her personal presentation.

The extreme elevations of her scales in the clinical profile would speak to someone who was delusional, thought disordered and experiencing bizarre bodily and somatic

³⁵ Employer Exhibit No. 9.

delusions. Possible hypotheses for such a profile include a person being uncooperative and resistive to the testing process, having marginal reading abilities, failing to understand the meaning of the items, responding randomly because of confusion and delusional beliefs, consciously distorting symptoms for secondary gain or to draw attention to their distress. This type of profile is one that raises questions related to the person's motive for such extreme exaggeration which can be any of the above hypothesized reasons.

In particular this profile had an extremely elevated score on the Fake Bad Scale (FBS) with empirical research establishing the utility of this scale in identifying potentially exaggerated claims of disability. Her score on this scale was 29 with scores above 28 raising very significant concern about the validity of self reported symptoms particularly in individuals for whom relevant physical injury has been ruled out.

Dr. Linderman testified that, although she had not interviewed the Grievant directly, she concluded that the Grievant was not suffering from PTSD as Therapist Zahn had diagnosed and Dr. Kleis concurred. Therapist Zahn failed to consider the Bereavement criteria under the DSM-IV-TR, and did not conduct a Clinician Administered PTSD Scale (CAPS) test on the Grievant, which according to the testimony of Dr. Linderman, is considered to be the "gold standard" in the psychological community for determining whether a patient shows the signs of PTSD.

During his testimony Dr. Kleis stated that he did not do an independent psychological examination of the Grievant. He also stated that he was unfamiliar with the CAPS test, nor did he independently review the criteria under DSM-IV-TR, nor did he consider the DSM-IV-TR criteria for Bereavement.³⁶ Rather, he relied on Therapist Zahn's opinion that the Grievant was suffering from PTSD.

Finally, the Grievant was referred to a psychologist, Dr. Benitis, in late October or early November and had one visit with him. According to the testimony of Dr. Kleis corroborated by the Grievant, Dr. Benitis questioned the Grievant's PTSD diagnosis.

³⁶ In his testimony Kleis acknowledged that PTSD and Bereavement have similar criteria.

Union President Richard Morgan testified that during the last contract negotiations the Union agreed to be covered under the Employer's STD Policy, which was incorporated by reference into Article IX Section E of the Agreement. Morgan further testified that the Union had no input into formulating the Policy and did not attempt to negotiate changes in it, and that its provisions were applicable so long as they did not conflict with the Agreement.

POSITION OF THE UNION

It is the Union's position that the Employer did not have a basis to deny the Grievant STD benefits and, therefore, the grievance must be sustained. The Union argues that:

- The language in Article IX Section E of the Agreement requires a doctor's note as the method for determining eligibility. The Employer argues that it has sole discretion—regardless of the doctor's medical opinion—to determine eligibility for STD benefits. If the Employer does have sole discretion to determine eligibility, regardless of what a doctor says, then the language of Article IX Section E is irrelevant. The STD Policy must be interpreted consistent with the Agreement. If the Policy is different from the Agreement, then the relevant language of the Agreement takes precedent under contract interpretation arbitration standards. Herein, the doctor's note is spelled out in the Agreement as the specific method to determine eligibility.
- As a matter of past practice, a doctor's opinion is the appropriate method to determine STD benefit eligibility. Oscarson and Cordes both testified that they regularly rely on doctors' opinions in determining eligibility. This past practice is further evidenced by the Employer's repeated requests for a doctor's opinion in this matter and the requirement of a doctor's findings on the STD application form itself. Here, the Employer chose to ignore its past practice and contravene the Agreement language in deciding to overrule the doctor's opinion with no rational basis.
- The Employer also violated the terms of the STD Policy. The Policy states, "*Mower County provides STD for its employees when they are unable to work due to injury or illness that occurred outside the work site*". In denying benefits, the Employer did not dispute that

the Grievant was unable to work due to an illness. Both the Grievant's doctor and therapist informed the Employer that her condition of PTSD was different than the previous diagnosis of depression in 2003. The Employer then independently concluded without seeking a second opinion, which they have a right to do under the Policy, that her current condition was the same as diagnosed in 2003. The Employer also concluded that the Grievant's treatment plan was inadequate. This is unfounded since the Grievant's records show that she was regularly seeing a therapist and taking doctor prescribed medication. Accordingly, the exceptions cited by the Employer did not apply and the Grievant is entitled to benefits.

- The doctor's note and testimony from Dr. Kleis and Therapist Zahn confirm that PTSD is a different condition from depression and have different diagnostic codes. The Employer's STD Policy states, "*Short Term Disability will cover only once per occurrence*". Both Dr. Kleis and Therapist Zahn examined the Employer's STD Policy as well as the Grievant's 2003 STD claim form. They also responded in detail by letter why they believed the two conditions were different. The only evidence that the Employer introduced to contradict the opinions of trained professionals was that the Grievant's conditions in 2003 and 2007 were the same since the onset of both illnesses occurred at work, and that she was experiencing similar symptoms. Both Dr. Kleis and Therapist Zahn testified that there are similar symptoms in illnesses related to depression and PTSD, but each has a different diagnoses.

- The Grievant was and continues to be actively participating in an approved treatment plan. The Employer's STD Policy states, "*Benefits for a disability due to mental illness, alcoholism and/or chemical/drug abuse will be provided only when the employee is actively participating in an approved medical treatment program or drug/alcohol treatment program.*" When viewed in light of the Agreement, it means that a doctor must approve the

treatment program. The Grievant's treatment program was approved by Dr. Kleis, which consisted of medication and weekly therapy sessions. Dr. Kleis and Therapist Zahn explained the treatment plan to the Employer in letters. During their testimony, they reiterated the appropriateness of the Grievant's prescribed treatment plan. The Employer, however, chose to ignore and/or reject the treatment plan and second-guess Dr. Kleis and Therapist Zahn without getting a second opinion.

- Past practice demonstrated that in 2003, with the same STD Policy in effect, STD benefits were approved for the Grievant despite her treatment plan that only included medication. Thus, under the Agreement, past practice and the STD Policy, the opinions provided by the doctor and therapist were sufficient to satisfy the requirements of the Policy, and the treatment plan was appropriate.

- The Employer's STD Policy states that: "*Mower County may require an employee to be examined at any time and as often as the County deems necessary. Mower County will pay for any required exam.*" Prior to denying the Grievant STD benefits, the Employer did not seek a second opinion despite the Employer's ability to require a second examination. Even the mental health consultant, Rosemary Linderman, testified that she was not asked to provide a second opinion, and that she has never talked to the Grievant. Therefore, the opinions provided by Dr. Kleis and Therapist Zahn are uncontradicted and are controlling under the Policy, past practice, and the contract.

- The Employer's actions after the final denial of STD benefits for the Grievant were undertaken solely in preparation for arbitration and are irrelevant. Instead of presenting evidence that the treatment plan was inadequate or that the Grievant's medical condition was the same in both 2003 and 2007, the Employer chose to attack the PTSD diagnosis of Dr.

Kleis and Therapist Zahn. The Employer's evidence was based on an evaluation seven months after-the-fact without an interview or examination of the Grievant. The Employer also attempted to present evidence that the Grievant was suffering from bereavement rather than from the diagnosed PTSD. This evidence is completely irrelevant and should be disregarded.

POSITION OF THE EMPLOYER

The Employer's position is that it was justified in denying the Grievant STD benefits and, therefore, the grievance must be denied. The Employer argues that:

- Contrary to the Union's argument, the Agreement does not provide a greater benefit than the STD Policy. The Union's claim rests solely on the language in Article IX Section E wherein it states; *"A doctor's note will be required after five (5) working days of leave due to an illness or injury."* According to the Union, the Employer cannot question a doctor's note and must accept it at face value and grant STD benefits. The Union's interpretation runs contrary to the STD Policy wherein it specifically allows the Employer to make benefit determinations and also contains a provision for second opinions. The STD Policy is also consistent with Article IX Section E wherein it requires, *"If the illness or injury lasts over five (5) workdays, the employee is required to have Section 3 (of the form) completed by a physician... . In no case will Short-Term Disability over five (5) workdays be approved without a physician's statement"*.
- The determination of the Grievant's benefit eligibility as set forth in the STD Policy is *"conclusive and binding on the parties"*. The Union has never sought to negotiate changes in

this language or in any provision in the Policy. Thus, the language in the Policy clearly vests the ultimate coverage determination decision with the Employer.

- The Employer appropriately denied the Grievant's STD claim since her 2007 diagnosed illness was a reoccurrence of a 2003 diagnosis. The STD Policy clearly states, "*Short-term disability will only cover one occurrence of a diagnoses*". The Grievant failed to establish that her current illness is a different illness from the one she suffered when she was granted STD benefits in 2003. The two illnesses are similar. Both involved panic attacks and depression. In 2003, the Grievant was absent from work after a confrontation at work for which she was treated for anxiety and depression. In 2007, she also left work 12 days after the death of her father after being at work for over a week because of a panic attack resulting from a work place confrontation. Dr. Kleis initially diagnosed her as having depression and anxiety, something for which she had already been receiving treatment for by Dr. Kleis. He later changed his diagnosis to PTSD after talking to Therapist Zahn. He never conducted any tests to affirm his PTSD diagnosis but rather relied on the diagnosis of Therapist Zahn. In fact, Dr. Kleis had only a couple of PTSD patients in his career, was unfamiliar with the CAPS test, and did not consult the DSM-IV-TR or ever consider a MMPI.

- Therapist Zahn diagnosed the Grievant with PTSD and did not consider Bereavement under DSM-IV-TR, which have similar symptoms. She made the PTSD diagnosis after one visit and a week after the Grievant had her panic attack. Under the DSM-IV-TR criteria, the symptoms for PTSD must continue for a month before a diagnosis can be made. This demonstrates that Therapist Zahn made her diagnosis without carefully reviewing the DSM-IV-TR PTSD or Bereavement criteria; and in fact relied on computer software to make her diagnosis.

- Dr. Linderman testified that a PTSD diagnosis was not appropriate for the Grievant. Linderman further testified that PTSD is appropriate when a person is personally threatened with death or witnesses acts of war and similar traumatic events in which the person is actually threatened. Finally, Linderman testified that Therapist Zahn's diagnosis was inconsistent with the psychiatric community's agreement with how the DSM-IV-TR PTSD criteria are to be applied. Witnessing a parent dying of natural causes is not a PTSD event, even if that parent was recently preceded in death by another parent.
- STD leave was denied to the Grievant because she failed to enter an approved treatment program. The STD Policy provides that *"Benefits for a disability due to mental illness, alcoholism and/or chemical/drug abuse will be provided only when the employee is actively participating in an approved medical treatment program or alcohol/drug program"*. The Grievant, whether by her own choice or through the advice of health care personnel, has failed to seek and enter into an approved treatment program. She only saw her social worker on a weekly basis at a time when she was described as being so severely disabled that she was and still is unable to work at all. Dr. Linderman testified that the Grievant should have been in grief therapy within a month of her parents' deaths, and should have been in individual therapy several times per week. Linderman also testified that when the Grievant did not improve after a month, she should have been hospitalized.
- Cordes, who was in regular contact with the Employer, testified that he informed the Grievant that the treatment she was receiving was inadequate to receive benefits under the STD Policy. Under the clear terms of the Policy, the Employer must approve the treatment program. Thus, the Employer's determination that she was ineligible for STD benefits is reasonable and consistent with the language and intent of the Policy.

OPINION

The issue before the undersigned is whether the Employer denied the Grievant STD benefits in violation of Article IX Section E of the Agreement and the Employer's STD Policy. Based upon all the evidence adduced, the Employer was justified in its denial. The Policy gives the Employer final determination whether benefits will be paid. This right was in the Policy when the Union agreed to incorporate it into the Agreement and the Union never sought to change it.

This ultimate determination, however, is not per se absolute and can be challenged if a denial is based on arbitrary, capricious, or discriminatory reasons or conflicts with provisions in the Agreement. There is no evidence of a discriminatory motive. The Employer's decision to deny the Grievant STD benefits is also not arbitrary or capricious.

Benefits can be denied if the illness constitutes the same circumstances (occurrence) as a previous occurrence for which benefits were paid.³⁷ The Employer with good reason believed the illness in 2007 was the same illness diagnosed in 2003. Both illnesses resulted after a workplace confrontation. Dr. Kleis initially diagnosed the 2007 illness as anxiety and depression, which are the same doctor's diagnoses in 2003.

It was only after Dr. Kleis consulted with Therapist Zahn, who had limited exposure to PTSD and did not consider bereavement, that he changed his diagnoses. Neither conducted established psychological testing necessary to diagnose PTSD. Further, although after the fact, Dr. Linderman, who is an expert in PTSD diagnoses, testified that the symptoms the Grievant was exhibiting did not rise to the level of PTSD according the diagnostic criteria for PTSD in DMS-IV-TR; rather they were more akin to the DMS-IV-TR; criteria for Bereavement. No expert testimony was presented by the Union to rebut Dr. Linderman's diagnosis.

³⁷ The Union is not contesting the right of the Employer to deny benefits for the same occurrence.

The Employer also questioned the Grievant's treatment plan. By letter dated April 27th, Cordes informed the Grievant that she was not in an approved treatment plan. He reiterated this in a conversation with the Grievant on April 30th, wherein the Grievant according to Groh, completely rejected the group therapy treatment suggested by Cordes. Cordes renewed his request in an April 30th letter to the Grievant that she have an approved treatment plan wherein he stated, "*You must have a physician diagnose your condition and develop a treatment program. The treatment program must directly address your specific diagnosis and list treatment goals. The program must be administered or directly supervised by a physician. The treatment plan must be forwarded to the County for approval*". Cordes also informed the Grievant in a May 14th letter that her treatment program was deficient. In the end, no treatment plan was ever approved by the Employer.

The Union argues that the STD Policy only mandates an "approved treatment plan" and this was satisfied when Dr. Kleis prescribed medication and therapy treatment. This argument is contrary to the above STD Policy provision that states, "*The treatment plan must be forwarded to the County for approval.*" Moreover the Policy states, "*Mower County has the sole discretionary authority to determine eligibility for participation or benefits and to interpret the terms of this policy. All determinations and interpretations made by Mower County are conclusive and binding on all parties.*" While past practice seems to support the Union that the Employer previously approved the Grievant's STD benefits in 2003, wherein the Grievant was treated for anxiety and depression through prescribed medication, this action, in and of itself, does not mean that the Employer cannot reject a treatment plan. In that situation a treatment plan was not in issue as it is here.

Finally, the Union argues that the language in Article IX Section E (*A doctor's note will be required after five (5) working days of leave due to an illness or injury.*) only requires a doctor's note as the method for determining eligibility. This argument is a stretch of interpretation and I see no nexus between this language and STD benefit eligibility. The language merely reiterates an eligibility requirement contained in the STD Policy wherein it states that, *"Employees that have an illness or injury that lasts more than 3 workdays and choose to use the Short Term Disability benefit are required to fill out a Short Term Disability Claim Statement Sections 1 and 2".* However, *"if the illness or injury lasts over five workdays the employee is required to have Section 3 completed by a physician. ... In no case will Short Term Disability over 5 workdays be approved without a physician's statement".*

In view of the foregoing, I conclude that the Employer had a reasonable basis consistent with the language and intent of the Policy to deny the Grievant STD benefits. Therefore, the grievance does not have merit and it will be dismissed.

AWARD

IT IS HEREBY ORDERED that the grievance in the above entitled matter be and is hereby dismissed for the reasons set forth in this Decision.

Dated: January 24, 2007

Richard R. Anderson, Arbitrator