IN THE MATTER OF A HEARING PURSUANT TO SS. 62(1) AND 66.2 OF *THE LABOUR STANDARDS ACT*, R.S.S. 1978, c. L-1 (AS AMENDED) AND SS. 2-75 & 4-2 OF *THE SASKATCHEWAN EMPLOYMENT ACT*, S.S. 2013, c. S-15.1 (AS AMENDED)

LRB FILE No. 092-14

BETWEEN:

DOEPKER INDUSTRIES LTD., DAVID DOEPKER, LIONEL DOEPKER, RANDALL DOEPKER and GREG YUEL,

APPELLANTS,

AND:

DMB

RESPONDENT (COMPLAINANT)

AND:

UNITED STEELWORKERS, LOCAL 1-184,

INTERVENOR

ADJUDICATOR'S DECISION
July 29, 2015

T. F. (TED) KOSKIE, B.Sc., J.D.

Representatives: Marilyn Penner, WMCZ Lawyers, for the Appellants, Doepker Industries Ltd., David Doepker, Lionel Doepker, Randall Doepker & Greg Yuel

Annemarie Chernesky, Labour Standards Officer, for the Director of Labour Standards

DMB Respondent (Complainant), for herself

Sonny Rioux, Staff Representative, United Steelworkers, District 3, for the Intervenor, United Steelworkers, Local Union 1-184

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I. INTRODUCTION

[1] Pursuant to section 60 of *The Labour Standards Act,*[1] as amended (the "*LSA*"), the Director of Labour Standards (the "Director") issued Wage Assessment No. 5882[2] (the "Assessment").

[2] The Assessment directed Doepker Industries Ltd. ("Doepker") and David Doepker, Lionel Doepker, Randall Doepker and Greg Yuel (the "Doepker Directors") to pay four thousand six hundred and seventy-four dollars and thirty-two cents ($4,674.32) to DMB.

[3] Doepker and the Doepker Directors appealed[3] (the "Appeal") the Assessment.

[4] The Minister of Labour Relations and Workplace Safety selected me to hear and determine the Appeal.

II. FACTS

[5] Doepker is an equipment manufacturer with three plants and several hundred employees in Saskatchewan–Annaheim, Moose Jaw and Saskatoon. Each plant is divided into nine or ten departments. Employees work one of two shifts, rotating every two weeks–6:00 a.m. to 2:30 p.m. and 2:30 p.m. to 1:00 a.m.

[6] The Annaheim plant is the largest of the three (3). It principally manufactures grain bulkers, a unique trailer. That involves every aspect of the process, such as the making, assembly and painting of all components.

[7] The Saskatchewan Labour Relations Board certified the United Steelworkers,

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[1] R.S.S. 1978, c. L-1

[2] Exhibit G-1, Wage Assessment No. 5882

[3] Exhibit G-2, Notice of Appeal

Local 1-184 (the "Union") as the exclusive bargaining agent for all employees of Doepker employed at Annaheim, Saskatchewan, save certain exclusions (the "Bargaining Unit").[4] The Union and Doepker have concluded a collective bargaining agreement ("CBA").[5]

[8] At all times material to this appeal, Doepker employed DMB as a Level Three Painter in its Paint Kitchen at its Annaheim plant. DMB falls within the scope of the Certification Order and CBA.

[9] DMB described her duties as "painting anything that comes out of production." She said:

a) the paint is applied, wet, using an atomizing air system and then baked in an oven;

b) solvents, thinner and urethane are used in the process;

c) the urethane contains isocyanates–a catalyst for hardening and drying;

d) there is no particular problem with exposure to isocyanates when "in the pail," but, when atomized, they can be harmful, causing problems such as skin irritation, rashes and asthma;

e) the use of isocyanates is regulated–controls must be used to reduce the hazards (for example, ventilation and personal protective equipment); and

f) individuals that inhale isocyanates are instructed to go to a clean air source, drink plenty of milk and water and seek medical attention.

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[4] Certification Order dated April 11, 2000 (LRB File No. 016-00)

[5] Exhibits E-1 & G-3, CBAs (2009 - 2012 & 2012 - 2015)

[10] In June 2006, DMB became pregnant with her first child. Her doctor was concerned with the potential harmful effect of chemical exposure to her and her unborn child. She also had some issues with her blood pressure and being dizzy. DMB doctor directed that she not:

a) work in the Paint Kitchen;

b) lift more than ten pounds in weight;

c) stand, crouch or sit for a long time; and

d) climb ladders.

In response, Doepker moved DMB to work in Finishing. DMB signed a "Change of Status" form. Her wage stayed the same–$18.25 per hour.

[11] After that, DMB suffered gestational hypertension (an increase in blood pressure due to her pregnancy). As a result, she went on disability leave on December 26, 2006. She received disability payments from Blue Cross until she started her maternity leave on January 27, 2007 (the day her baby was born).

[12] Following her maternity leave, she returned to work at Doepker as a Level Three Painter. Her pay was $18.95 per hour.

[13] In November 2011, DMB learned she was pregnant with her second child. The expected due date was June 26, 2012.[6] DMB's doctor had the same concerns as with her first pregnancy.[7] DMB advised Doepker of the pregnancy and her doctor's concerns. In response, Doepker moved DMB to work in Finishing on

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[6] Exhibit E-2, Doctor's note dated November 8, 2011

[7] DMB's doctor followed up with a Medical Restriction Form dated November 23, 2011–see Exhibit E-4

November 9, 2011. DMB says she did not sign a "Change of Status" form. Her wage stayed the same–$21.94 per hour.

[14] DMB encountered difficulties with her pregnancy. Varicose veins were developing in her legs. As well, she was suffering gestational hypertension.

[15] On April 9, 2012, DMB spoke with Kristen Kunz ("Kunz"), Doepker's Human Resources Advisor, and asked for a Blue Cross disability application form. At that time, Kunz suggested DMB ask her doctor if she would be able to office work instead of going on disability leave.

[16] DMB spoke with her doctor. He provided a Medical Restriction Form saying DMB could do "office work only."[8] In response, Doepker moved DMB to the office on April 9, 2012. Her wage at the time was $21.94 per hour. She received an additional $1.00 per hour if working the night shift.

[17] Kunz testified that the office work was not in scope and that there were no jobs in production that would meet the requirements of the doctor's note. She further stated that combining different tasks in production would not be sufficient to create a position that the Complainant could do.

[18] On April 12, 2012, Kunz advised DMB Doepker would reduce her wage to $12.50 per hour. Kunz told DMB this was because:

a) Article 5.05 of the CBA provided she was to be paid the rate of her original position for seventeen weeks and then the wage would be adjusted to the rate for the work she was doing;

b) she had already been accommodated for more than seventeen weeks at her regular rate;

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[8] Exhibit E-4, Medical Restriction Form dated April 9, 2012

c) she should be paid at the rate applicable to the work she was performing– $12.50 per hour.

[19] DMB testified she refused to sign a "Change of Status" form. She said she did not agree with the form saying she was changing "due to medical reasons." Her view was pregnancy was not a medical reason.

[20] DMB saw her doctor on April 12, 2012. She had her blood pressure checked and it was high. The doctor did not want any further stress on the baby. He gave her blood pressure medicine and advised her to go off work and apply to Blue Cross for disability. The she gave her doctor the Blue Cross package to complete and begin the application process.

[21] On April 13, 2012, DMB spoke with her union representative, Mike Bold ("Bold") and informed him of her wage reduction. On April 16, 2012, DMB spoke with her union unit chair, Chris Thiemann ("Thiemann") about the same subject. Both Bold and Thiemann advised the union had tried dealing with this issue previously, but did not have successful results. They were of the opinion a grievance of the issue was not likely to succeed and suggested she raise the matter with Labour Standards. The union did not file a grievance on DMB's behalf.

[22] On April 16, 2012, Doepker increased DMB's office duties. Doepker increased her wage $15.60 per hour.

[23] On April 17, 2012, DMB submitted her complaint to Labour Standards.

[24] By letter dated April 18, 2012, Labour Standards advised Doepker that DMB had lodged a complaint.[9] Labour Standards gave no details of same.

[25] On April 24, 2012, DMB advised Kunz that it was her last day of work before

[9] Exhibit E-8, Letter dated April 18, 2012, from Labour Standards to Doepker

going on disability leave. Kunz testified she was not aware of any changes in DMB's medical condition at that time. Neither DMB, nor her doctor gave Doepker any subsequent documentation concerning her ability to work.

[26] On April 25, 2012, Kunz completed Doepker's Employer Statement to support DMB's claim for disability benefits.[10]

[27] On April 25, 2012, Labour Standards advised Doepker that Annemarie Chernesky ("Chernesky") would be visiting the Annaheim plant on April 30, 2014.

[28] On April 30, 2012, Kunz met with Chernesky. Kunz testified Chernesky wanted DMB returned to work at her original wage. Kunz said she advised Doepker would require a doctor's confirmation DMB could come back to work. No such medical documentation was provided.

[29] DMB began receiving group insurance benefits (disability benefits) effective May 2, 2012.

[30] On May 14, 2012, Labour Standards wrote to Doepker outlining its position.[9] In essence, Labour Standards said that Doepker owed $4,674.32 to DMB, comprising the following:

a) the difference of $6.34 per hour for the period she worked at a lower rate from April 10 to 24, 2012;

b) her fully salary for the period that she was denied the opportunity to work at her old rate from April 25 to May 23, 2012;

c) public holiday pay for May 21, 2012; and

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[10] Exhibit E-12, Employers Statement dated April 25, 2012

[9] Exhibit E-11, Letter dated May 14, 2012, from Labour Standards to Doepker

d) annual holiday pay on lost wages.

[31] DMB received group insurance benefits (disability benefits) until June 24, 2012.

[32] DMB's child was born on June 25, 2012.

[33] Doepker did not:

a) tell DMB to commence maternity leave early; or

b) besides seeking a doctor's confirmation, refuse to allow DMB to come to work.

[34] DMB returned to work on June 13, 2013, and continued to work in the Paint Kitchen.

III. DISPUTE

[35] The issues herein are as follows:

a) Should the Union have intervenor status and, if so, what should be the nature of same?

b) Do I have jurisdiction to hear and determine this Appeal?

c) Does Article 5.05 of the CBA offend sections 72(3) and/or 75(1) of the *LSA* and therefore have no force or effect with respect to DMB?

d) If Article 5.05 of the CBA does not offend sections 72(3) and 75(1) of the *LSA*, Is there a breach of the *LSA*, and, if so, did the Director err in his calculation of the Assessment?

IV. DECISION

[36] I grant the Union intervenor status. I rule the Union is entitled to participate fully in the Appeal, including calling evidence and questioning the witnesses called by other parties.

[37] I rule I have jurisdiction to hear and determine this Appeal.

[38] I rule:

a) section 25(1) of the *LSA* required Doepker to maintain the pre-accommodation wages and benefits of DMB while she was being accommodated in another job because of her pregnancy;

b) Doepker failed to do so contrary to the *LSA*; and

c) Article 5.05 of the CBA has no application in the instant case to the extent that it was inconsistent with the requirements of the *LSA*.

[39] I allow the Appeal and vary the amount claimed in the Assessment to $600.84.

[40] I decline to order the Appellants to pay interest on the sum owing.

V. REASONS

A. LEGISLATIVE AND CONTRACTUAL PROVISIONS

1. *THE LABOUR STANDARDS ACT*

[41] The relevant provisions of the *LSA* are as follows:

PART IV

Maternity Leave For Female Employees

Conditions for applications, etc.

23(1) Every employee who:

(a) is currently employed and has been in the employment of her employer for a total of at least 20 weeks in the 52 weeks immediately preceding the day on which the requested leave is to commence.

(b) submits to her employer an application in writing for leave under this section at least four weeks before the day specified by her in the application as the day on which she intends to commence the leave; and

(c) provides her employer with a certificate of a qualified medical practitioner certifying that she is pregnant and specifying the estimated date of birth;

shall be granted by her employer maternity leave from her employment with the employer in accordance with subsection (3).

(2) Notwithstanding subsection (1), an employer shall grant to an employee maternity leave from her employment with the employer in accordance with subsection (3) if the employee meets the requirements of clause (1)(a) and provides her employer with a certificate of a duly qualified medical practitioner:

(a) certifying that the employee is pregnant, specifying the estimated date of birth and certifying that there are bona fide medical reasons that require the employee to cease work immediately; or

(b) certifying that the employee was pregnant and that her pregnancy terminated on a specified date, not more than 14 days prior to the date of the certificate, due to a miscarriage or a stillbirth.

(3) The maternity leave to which an employee is entitled pursuant to subsections (1) and (2) shall consist of a period not exceeding 18 weeks commencing at any time during the period of 12 weeks immediately preceding the estimated date of birth.

(4) Where:

(a) an employee has failed to comply with clause (1)(b) but is otherwise entitled to maternity leave pursuant to subsection (1); and

(b) the employee has not provided her employer with a certificate of a duly qualified medical practitioner certifying that there are bona fide medical reasons that require the employee to cease work immediately;

the employee shall be granted by her employer maternity leave from her employment with the employer in accordance with subsection (5).

(5) The maternity leave to which an employee is entitled pursuant to subsection (4) shall consist of a period not exceeding 14 weeks commencing at any time during the period of eight weeks immediately preceding the estimated date of birth.

(6) Notwithstanding subsections (3) and (5), where the actual date of birth is later than the estimated date of birth, the employee is entitled to not less than six weeks' leave after the actual date of birth.

(7) Where an employee to whom maternity leave has been granted in accordance with this section and her employer agree that the portion of the leave that follows the actual

date of birth should be a period of less than six weeks, the employer may permit the employee to resume her employment at the expiration of a period agreed to by them.

Further period of leave
24 Where an employee who has been granted maternity leave by her employer pursuant to section 23:

(a) is unable, for bona fide medical reasons, to return to her employment after the expiration of the maternity leave; and

(b) provides her employer with a certificate of a qualified medical practitioner stating that, for bona fide medical reasons, she is not able to return to her employment at that time;

the employer shall grant to her any further period of leave, not exceeding six weeks, that is requested by her.

Employer may require commencement of maternity leave
25(1) Where the pregnancy of an employee would unreasonably interfere with the performance of the employee's duties, her employer may, if no opportunity exists to modify her duties or reassign her to another job with no loss of wages or benefits, require her to commence maternity leave not more than 13 weeks prior to the estimated date of birth.

(2) Where an employer requires an employee to commence maternity leave pursuant to subsection (1), the provisions of this Part apply mutatis mutandis to that maternity leave.

(3) In any prosecution alleging a violation of subsection (1) the onus shall be upon the employer to prove that the pregnancy of the employee would unreasonably interfere with her duties and that no opportunity exists to modify the employee's duties or to reassign the employee to another job.

Reinstatement after maternity leave
26(1) An employer who has granted maternity leave to an employee pursuant to this Part shall, at the expiration of the leave, reinstate the employee in the position occupied by the employee at the time the leave commenced, or in a comparable position, with no loss of accrued seniority or benefits or reduction in wages.

(2) For the purposes of seniority and rights of recall, being on maternity leave does not constitute a break in service, and seniority and rights of recall continue to accrue while an employee is taking maternity leave.

(3) Subject to subsection (4), an employee is entitled to continue participating in any benefit plan that is prescribed in the regulations for the purposes of this subsection while taking maternity leave if the employee pays contributions required by the plan.

(4) A benefit plan that does not permit the participation of employees in accordance with subsection (3) must be amended to permit that participation not later than three years after the day on which this section comes into force.

Employer not to dismiss pregnant employee; magistrate may order employer to comply
27(1) No employer shall dismiss, lay off, suspend or otherwise discriminate against an employee by reason of the fact that she:

(a) is pregnant;

(b) is temporarily disabled because of pregnancy; or

(c) has applied for maternity leave in accordance with this Part.

(2) In any prosecution alleging a violation of subsection (1) the onus shall be upon the employer to prove that the employee was dismissed, laid off, suspended or otherwise discriminated against for good and sufficient cause.

(3) Where an employer is convicted of failure to comply with any provision of this Part, the convicting judge may, in addition to any other penalty imposed for the offence, order the employer to allow forthwith the employee such maternity leave as the employer ought to have granted to the employee or, if the conviction is for failing to reinstate an employee in her former employment after the employee has, pursuant to this Part, been granted leave, the convicting judge may order the employer to reinstate the employee in her employment under the same terms and conditions in which she was formerly employed and may further order the employer to pay to the employee her wages retroactive to such date as the convicting judge deems that the employee ought to have been reinstated in her former employment under the terms of this Part.

Notice to employer of intention to resume employment
28(1) An employee to whom maternity leave has been granted pursuant to this Part and who intends to resume her employment with her employer after the date of birth shall, at least four weeks prior to the day on which she intends to resume her employment, notify her employer of her intention to do so.

(2) No employer is required to allow an employee to whom maternity leave has been granted pursuant to this Part to resume her employment until after the employee has complied with subsection (1).

. . .

Annual holiday to which employee is entitled
30(1) Every employee to whom this Act applies is entitled:

(a) subject to clause (b), to an annual holiday of three weeks after each year of employment with any one employer;

(b) to an annual holiday of four weeks after the completion of ten years of employment with one employer and after the completion of each subsequent year of employment with that employer.

. . .

Remuneration payable to employee in respect of annual holiday
33(1) An employee is entitled to receive annual holiday pay in the following amounts:

(a) if the employee is entitled to an annual holiday pursuant to clause 30(1)(a), three fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday;

(b) if the employee is entitled to an annual holiday pursuant to clause 30(1)(b), four fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday.

(1.1) With respect to an employee who is entitled to an annual holiday pursuant to section 30 but who does not take that annual holiday, the employer shall pay to the employee the employee's annual holiday pay not later than 11 months after the day on

which the employee becomes entitled to the annual holiday.

(2) Where an employee takes his holiday in one continuous period, the annual holiday pay payable to the employee shall be paid to the employee by his employer during the period of fourteen days immediately preceding the commencement of the holiday period.

(3) Where an employee has given his employer notice under clause (c) of subsection (1) of section 31 that he desires to take his annual holiday in a manner other than in one continuous period, the annual holiday pay payable to the employee in respect of each of the several portions in which the employee desires to take his holidays shall be paid to the employee by his employer during the period of fourteen days immediately preceding the commencement of each portion of the holiday respectively.

(4) Where an employee has scheduled a period as an annual holiday at a time agreed to by the employer and the employer does not permit the employee to take the annual holiday as scheduled, the employer shall reimburse the employee for any monetary loss suffered by the employee as a result of the cancellation or postponement of the annual holiday.

. . .

Wage assessment
60 . . .

(2) The director may issue a wage assessment:

(a) against an employer where the director has knowledge or has reason to believe or suspects that an employer has failed or is likely to fail to pay wages as required by this Act;

. . .

Hearing by adjudicator
62.1(1) An adjudicator who is selected pursuant to subsection 62(5) shall conduct a hearing of the appeal.

(2) Subject to any regulations made pursuant to section 84, the adjudicator may determine the procedures by which the hearing is to be conducted.

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may adjourn the hearing of an appeal from time to time and for any period that the adjudicator considers necessary.

(5) Notwithstanding that a person who is directly affected by a hearing is neither present nor represented at the hearing, where notice of the hearing has been given to the person pursuant to subsection 62(5), the adjudicator may proceed with the hearing and make any decision as though that person were present.

(6) The Arbitration Act, 1992 does not apply to adjudications conducted pursuant to this Act.

. . .

Power of minister's representative to determine amount of wages payable

68(1) Where a duly authorized representative of the minister finds that an employer has failed to pay to an employee any wages payable under this Act or under a contract of service, the representative may determine the amount of the wages that the employer has failed to pay to the employee and, if the amount is agreed to in writing by the employer and the employee, the employer shall within seven days pay that sum to the director who shall pay it to the employee.

(2) An employer who makes payment in accordance with subsection (1) is not liable to prosecution for failure to pay those wages to the employee.

. . .

Effect of Act on other Acts, agreements, contracts and customs
72(1) Nothing in this Act or in any order or regulation made under this Act affects any provision in any Act, agreement or contract of service or any custom insofar as it ensures to any employee more favourable conditions, more favourable hours of work or a more favourable rate of wages than the conditions, the hours of work or the rate of wages provided for by this Act or by any such order or regulation.

(2) Where any provision in this Act or in any order or regulation made under this Act requires the payment of wages at the rate of time and one-half, no provision in any Act, agreement or contract of service, and no custom, shall be deemed to be more favourable than the provision in this Act or in the order or regulation if it provides for the payment of wages at a rate less than the rate of time and one-half.

(3) Any provision in any Act, agreement or contract of service or any custom that is less favourable to an employee than the provision of this Act or any order or regulation made under this Act is superseded by this Act or any order or regulation made under this Act insofar as it affects that employee.

. . .

Agreements not to deprive employees of benefits of Act
75(1) No agreement, whether heretofore or hereafter entered into, has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Act.

(2) This Act applies to agreements made in or out of Saskatchewan with respect to service or labour performed in Saskatchewan.

2. *THE TRADE UNION ACT*

[42] The relevant provisions of *The Trade Union Act*, (the "*TUA*") are as follows:

Powers of arbitration board, binding effect of findings of, etc.
25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.

3. COLLECTIVE BARGAINING AGREEMENT

[43] The relevant provisions of the CBA are as follows:

5.05 An Employee on a graduated return to work program or light duty (i.e. modified work/training) will be paid their regular rate of pay for up to seventeen (17) weeks.

After seventeen (17) weeks the Employee will be paid the rate applicable to the work they are medically fit to perform. If applicable, the balance of an Employee's rate, up to the amount paid by the WCB or Group Insurance Company rate structure will be paid by Workers' Compensation or the Group Insurance Company.

Upon medical release to full duties, the Employee will return to their previous classification and rate.

. . .

ARTICLE 15

GRIEVANCE PROCEDURE

15.01 Definition and Recognition of a Grievance

a. Any complaint, disagreement or difference of opinion between the Parties respecting the interpretation, application, operation or alleged violation of the Collective Agreement, including any dispute with regard to discipline or discharge, shall be considered to be a grievance.

b. Any such complaint, disagreement or difference of opinion will be recognized as a grievance by following the grievance procedure.

15.02 Grievance Procedure

a. Informal Step:

As an informal step, the Employee is encouraged to make an earnest and constructive effort to resolve the grievance directly with the Supervisor to whom he reports. If the Employee so chooses, he can be accompanied by a Shop Steward of their choice.

b. Step One:

At this step, notice in writing of the grievance must be filed with the Employee's Supervisor, within fifteen (15) calendar days after the occurrence of the alleged grievance, or of the date on which the Employee first has knowledge of it.

The notice in writing shall briefly but clearly describe the nature of the incident or occurrence which gave rise to the grievance and it shall clearly state the provision of the Agreement which has been violated. To assist the Employee and the process, the Employee shall use the standard from provided for this purpose.

Any meeting between the Parties at this step must involve the Employee, Shop Steward and Supervisor.

The Supervisor will make an earnest and constructive effort to answer the grievance in writing within ten (10) calendar days.

c. Step Two:

In the event that a resolution of the grievance, satisfactory to the Union and the Company, does not result at Step One, the Shop Steward and the Union Staff Representative shall agree to meet with Management to discuss the grievance within ten (10) calendar days from the date the grievance was referred to Step Two.

All answers to Step Two of the grievance procedure shall be in writing, and given within ten (10) calendar days of the Step Two meeting. If the grievance is not resolved, then, at the request of either Party, the grievance may be referred to arbitration.

d. Step Three - Mediation

Within fifteen (15) calendar days following the Step Two answer, by mutual agreement, the Parties may choose Grievance Mediation as the next step to resolve the dispute. The Mediator will be arranged through the Department of Labour.

e. Step Four - Arbitration:

Within fifteen (15) calendar days following the Step Two answer, or within seven (7) calendar days following an unsatisfactory result in Step Three, the Parties will jointly notify one Arbitrator selected from the following list:

1. Ken Norman
2. Bill Campbell

Selection of an Arbitrator for the first arbitration shall be in alphabetical order until an Arbitrator is found. Subsequent arbitration will be done on a rotating basis. If none of the Arbitrators listed above are available, then an appointment shall be made by the Minister of Labour in the Province of SK.

The Arbitrators referred to in this Article do not have the authority to amend, modify, alter or in any way change this Collective Agreement.

Once an Arbitrator has been selected or appointed, the Arbitrator shall convene a hearing, consider the submission of the Parties, and render his decision which shall be final and binding upon the Parties.

Each Party shall bear the costs of their representatives, and half the cost of the Arbitrator and any off-site facilities, if required.

f. Time Limits:

Saturdays, Sundays and Statutory Holidays shall be excluded in determining the time within which any step is to be taken under the foregoing provisions of this Article.

Any and all time limits fixed by this Article may be extended by mutual agreement between the Company and Union.

If a grievance is not advanced through the Steps of the Grievance Procedure within the specified time limits, the grievance shall be deemed to be abandoned and all rights of recourse to the Grievance Procedure shall be at an end. The abandonment of a grievance under this Article shall not prejudice future cases of a similar nature.

15.03 Union and Company Policy or Group Grievance

The Union or the Company may file a policy or group grievance.

B. PRELIMINARY ISSUES

1. INTERVENTION

[44] During the opening submissions and before hearing any evidence, the Appellants and Respondent brought to my attention that:

a) the Appellants took the position the matters leading to the Assessment and this Appeal are governed by the CBA and ought to be dealt with through the grievance/arbitration procedures contained therein;

b) the Director and DMB intended to ask that I decide Article 5.05 of the CBA and its application to the matter at bar to be null and void; and

c) neither the Appellants, Respondent, nor Director gave the Union notice of this Appeal or its scheduled hearing.

[45] I directed that the parties give notice of this Appeal to the Union. In the event the Union sought intervenor status, I advised the parties I was prepared to hear submissions concerning that issue. I then adjourned the hearing.

[46] Upon receiving notice, the Union advised me that it wished to seek status to intervene in this matter. I therefore scheduled a hearing of this application.

[47] In essence, the Union's position is as follows:

a) it is the exclusive bargaining agent for the Doepker Bargaining Unit;

b) it and Doepker are parties to a CBA;

c) DMB is an employee in the Bargaining Unit represented by the Union;

d) the issues in the Appeal involve not only the interpretation of section 25(1) of the *LSA*, but the application of Article 5.50 of the CBA, including the Director's position that the said Article is null and void; and

e) it therefore has a direct interest in this matter and should be granted intervenor status.

[48] Doepker did not object to my granting the Union intervenor status.

[49] The Director objected to the Union's application. The Director submitted that the legislative framework that governs appeals does not contemplate, either expressly or by implication, the granting of intervenor status. The Director did say, however, that he would not object to the Union making submissions on the issue of my jurisdiction.

[50] I disagree with the Director's position. Section 62.1 of the *LSA* provides that I have conduct of the hearing, may determine the procedures by which same is to be conducted and may accept any evidence I consider appropriate. In my view, this is sufficient authority to grant intervenor status. I am also mindful of the decision of L. Ted Priel in *SEIU* v *Saskatoon Regional Health Authority et al.*[10] Though dealing with an arbitration board, the learned arbitrator reviews and sets out what I consider to be guiding principles that also apply to this Appeal. He says:

> 34. A labour arbitration board, so long as it complies with the principles of fairness and natural justice, is the master of its own procedure.
>
> . . .
>
> 35. Individual employees in the bargaining unit are entitled to receive notice of an arbitration proceeding that may directly affect them, and to participate as a party to the proceedings, if that is their desire, particularly in a situation where the bargaining agent for the employee takes a position in the hearing contrary to the interests of the intervening employee and provided the interest of the employee was something that was being dealt with by the Arbitration Board.

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[10] (2007) CanLII 81324 (SK LA)

Hoogendoorn v. Greening Metal Products and Screening Equipment Co. (supra)

Bradley v. Ottawa Professional Fire Fighters Association (supra)

36. In my opinion, the notice and standing issues dealt with in the Hoogendoorn and Bradley decisions are, in reality, an explanation of the obligations an Arbitration Board has to observe its duty of fairness and the rules of natural justice. In a decision in a case between United Food and Commercial Workers, Local 1400 and Westfair Foods Ltd., with respect to all Real Canadian Superstores and all Real Canadian Wholesale Clubs in the Province of Saskatchewan, dated August 19, 2002, a three-person board, comprised of Stan Grimley, Albert Tholl and Ted Priel, made the following comment at page 9 of its decision:

> "In both the Hoogendoorn and Bradley decisions, the statutory bargaining agent for the employee took a position contrary to the employee's interests and those interests were clearly the focus of the proceedings. It is apparent that the Supreme Court of Canada, in the Hoogendoorn decision, distinguishes between two situations. The first situation is where employees may be generally affected by an interpretation of the Collective Agreement which is binding upon all members of the bargaining unit. In that kind of a situation, some of the employees may be positively affected and others may be negatively affected. In that kind of a situation, no notice need be given. In the second circumstance, where the focus of the hearing is the rights of certain employees but it is clear that those employees? interests will not be represented by the statutory bargaining agent of the employees and the outcome of the hearing will be binding upon those employees, obviously, notice should be given to the employees and they should be afforded standing at the hearing. In our opinion, not to give notice to those employees would be to deny them the basic fairness and natural justice to which they are entitled. Put another way, where the focus of the hearing is the rights of the replacement workers employed by the Employer after the strike, and those employees may be adversely affected (terminated) by the result of the grievance arbitration in which the employees' certified collective bargaining agent actively opposes the employee's interests, natural justice demands that notice be given to the employees and that the employees be granted standing at the hearing."

37. The participation in a grievance arbitration by someone other than the union and the employer was further considered in the case of Mississauga Hospital and Practical Nurses Federation of Ontario (1998), 70 L.A.C. (4th) 366, where, at page 371, the learned Arbitrator stated as follows:

> "Arbitration is essentially a private process, involving an employer and the union as the designated bargaining agent for the employees in the bargaining unit. Nonetheless, it has been recognized for some decades that others may be or are entitled to be granted the right to participate in arbitration proceedings. A third party must demonstrate that its rights would be adversely affected by, or it has a substantial interest in, the proceedings. A grant of legal standing depends upon showing more than some interest in the outcome or some indirect impact. A third party granted standing is entitled to participate fully, including calling evidence and questioning the witnesses called by other parties."

38. In the Mississauga case, an outside union, CUPE, Local 3546, sought intervenor status in a case involving Mississauga Hospital and the Practical Nurses Federation of Ontario. The employer and PNFO did not oppose the application provided CUPE was

bound by the results. The learned Arbitrator concluded that there was no authority to force a third party to participate as an Intervenor and, as an Arbitrator, he had authority under one Collective Bargaining Agreement but no authority to assume jurisdiction to determine the rights and obligations under a different Collective Bargaining Agreement between the Intervenor and the Intervenor's employers.

39. In the case of Canadian Union of Public Employees v. Canadian Broadcasting Corporation (1992), 1992 CanLII 108 (SCC), 2 S.C.R. 7, the Supreme Court of Canada upheld a decision of the Ontario Court of Appeal that an Arbitrator in a work jurisdiction dispute had erred by failing to provide notice of the hearing to two third party unions asserting claims to the work in question. The Supreme Court was critical of what it saw as a suggestion by the Ontario Court of Appeal that an Arbitrator could take jurisdiction over an intervening party without any statutory jurisdictional base or without the consent of the parties. At paragraph 4 of its decision, the Court made the following comment:

> "The important issue resolved by this appeal is that those to be significantly affected by the arbitration should receive notice of the proceedings. Fairness and natural justice require no less."

[51] In this Appeal, I am asked, *inter alia*, to:

a) consider and interpret provisions of the *LSA* as they apply to a member of the Union's Bargaining Unit; and

b) determine that a provision of the CBA–to which the Union is a party–is null and void.

[52] My view is that:

a) this Appeal involves issues that will directly affect the Union;

b) the Union's interests will not be represented by Doepker, DMB and the Director;

c) the outcome of this Appeal may well create binding consequences for and of significance to the Union; and

d) not to give notice to the Union would be to deny it the basic fairness and natural justice to which it is entitled.

[53] I therefore grant the Union intervenor status. I rule the Union is entitled to participate fully in the Appeal, including calling evidence and questioning the witnesses called by other parties.

2. DEFERENCE

[54] Doepker says that I do not have jurisdiction to decide this Appeal. In brief, it says it says this because the essential nature of the complaint involves the interpretation and application of the CBA.

[55] Doepker first refers me to section 25 of the *TUA*. Doepker says this provision mandates settlement of all differences between Doepker and the Union through the grievance/arbitration procedures set out in the CBA.

[56] Doepker then referred me to various decisions.[11] Doepker relies upon same to submit that:

> . . . [T]he jurisdiction of the adjudicator depends of what legislation or document must be interpreted in order to determine the matter at issue. In determining jurisdiction, the adjudicator must determine first, what the essential nature of the dispute is. Then, what document must be interpreted to determine the issue. If the matter involves an interpretation of the collective bargaining agreement, then the arbitrator under section 25 of the TUA will have jurisdiction. If the matter involves an interpretation of the LSA, then the adjudicator under the LSA will have concurrent jurisdiction with the arbitrator.

[57] Doepker then referred me to *Regina Police Assn. Inc.* v *Regina (City) Board of Commissioners*[12] for the proposition that in determining the essential nature of the dispute, I must proceed based on the facts surrounding the dispute between the parties, and not based on how we may frame the legal issues. In this regard, Doepker maintains:

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[11] *Dominion Bridge* v *Routledge*, (1999) 177 Sask R 114, [1999] SJ No 215 (QL) (Sask CA); *Loblaws Inc. (c.o.b. Real Canadian Superstore)* v *Saskatchewan (Labour Standards, Director)*, 2012 SKQB 124, [2012] SJ No. 199; *Brown* v *Westfair Foods Ltd.*, 2002 SKQB, 218 Sask R 196

[12] [2000] 1 SCR 360, 2000 SCR 14

> The dispute at issue in this case is one regarding the wage rate that an employee is entitled to be paid when she is unable to perform the duties of her regular position due to pregnancy and requires accommodation.

[58] Doepker says I must then examine the governing provisions of the CBA. Doepker then points me to Article 5.05 that provides:

> An Employee on a graduated return to work program or light duty (i.e. modified work/training) will be paid their regular rate of pay for up to seventeen (17) weeks.
>
> After seventeen (17) weeks the Employee will be paid the rate applicable to the work they are medically fit to perform. If applicable, the balance of an Employee's rate, up to the amount paid by the WCB or Group Insurance Company rate structure will be paid by Workers' Compensation or the Group Insurance Company.
>
> Upon medical release to full duties, the Employee will return to their previous classification and rate.

Doepker maintains DMB was on light duty and therefore this Article should determine her wage. Doepker goes on to argue that if there is a complaint, disagreement, or difference of opinion about same, it should be dealt with through the grievance/arbitrations procedure set forth with Article 15 of the CBA.

[59] Doepker says that while the *LSA* contains various maternity provisions, none deal with the wage to be paid to a pregnant employee when accommodated. Since that wage rate is the "essential nature of the dispute in this matter," Doepker submits

> Labour Standards had no basis to issue a wage assessment and the adjudicator lacks the jurisdiction to address the wage assessment appeal. The Complainant ought to have followed the grievance procedure, as outlined in the CBA, and ultimately have the matter of wages to be paid during her accommodation determined by an arbitrator, pursuant to section 25 of the TUA.

[60] On the other hand, the Director maintains:

> . . .[T]he dispute in this case involves standards that are fundamental to the Act and the Division's administration of the Act. At stake is the policy objective of ensuring that a pregnant woman's salary is maintained. As this policy objective has been enshrined in the Act, any disputes involving this matter should be governed and adjudicated under the Act. The Act provides greater protection in this matter than the Collective Bargaining Agreement. We rely on section 75 of the Act which prohibits any agreement from depriving an employee from any right or benefit of the Act.

[61] The Director referred me to *Loblaws Inc.* v *The Director of Labour Standards.*[13] There, Rothery, J. reviewed the law regarding jurisdiction of a Labour Standards adjudicator for an employee whose employment is subject to a CBA that provides for arbitration to resolve disputes. In that case, the wage assessment was issued to address pay in lieu of notice. Both the *LSA* and the CBA there had provisions regarding pay in lieu of notice.

[62] The Director says, as a result, it was possible the adjudicator and the arbitrator to have concurrent jurisdiction. He submitted the test of jurisdiction hinges on the essential element of the dispute and referred me to the decision of Vancise, J.A. in *Dominion Bridge* v.*Routledge.*[13] Therein, he said:

> [26] When one employs the modern theory of interpretation described by Driedger and considers the statute as a whole the legislature in my opinion intended that workplace disputes involving minimum labour standards, even in the collective bargaining context, are primarily disputes about legislatively enshrined standards and negotiated employment terms.
>
> [27] Fundamentally, the essential nature of this complaint is a labour standards violation and not a dispute arising out of the collective agreement dealing with the interpretation, application or violation of the collective agreement as contemplated by s. 25. While it arose in the context of the workplace and in a unionized setting governed by a collective bargaining agreement, the issue fundamentally involves the interpretation of The Labour Standards Act.

[63] The Director concludes that since my interpretation of subsection 25(1), with the applicability of subsection 27(1), could conclude the *LSA* provides greater benefit than Article 5.05 of the CBA, I should have jurisdiction.

[64] Doepker does not disagree that it is possible for me to have concurrent jurisdiction. However, it says that can only happen if the essential nature of the dispute involves a breach of the *LSA*. Saying the matter depends on the facts of the case, Doepker submits this matter "aligns" more with *Loblaws* than *Dominion Bridge* and

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[13] 2012 SKQB 124

[13] (1999) 177 Sask. R. 114 (CA)

argues:

> The Court in *Loblaws* found that the CBA provided greater protection than the *LSA* and accordingly there was no breach of the *LSA*. As discussed above, section 25 does not deal with wage rates to be applied to accommodated pregnant employees. Accordingly, there can be no breach of the *LSA* and accordingly, the adjudicator lacks jurisdiction.

[65] The Union submits that I have jurisdiction to hear this Appeal. It argues:

> . . . [W]e agree with the Director's position that the nub of the issue before the Adjudicator is the interpretation of section 25(1) of the LSA, not the interpretation or application of Article 5.05. The question is whether section 25(1) places a positive obligation on the employer to pay a pregnant employee reassigned to another job their pre-reassignment rate of pay, as asserted by the Director.
>
> In addition, the Director and Employer are at odds over the interpretation of section 25(1). Generally, we adopt and agree with the submissions of the Director on that issue.
>
> We submit, however, that the Officer's decision is overbroad in so far as it purports to declare Article 5.05 of the Collective Agreement null and void.

[66] While I have little difficulty with the manner in which Doepker suggests I ought to analyze the jurisdiction issue, I cannot agree with its conclusions. I prefer those of the Director and the Union.

[67] I will first deal with the essential nature of the dispute. I do not agree it is simply wages. It is also a question of my interpretation of and determination whether subsection 25(1), with the applicability of subsection 27(1), could conclude the *LSA* provides greater benefit than Article 5.05 of the CBA.

[68] Second, I will address the CBA. I do not agree the complaint simply falls within Article 5.05 of the CBA. The uncontroverted evidence shows:

a) Doepker met or exceed the requirements of Article 5.05; and

b) the Union was of the view a grievance would not be successful.

[69] Third, I will address the *LSA*. I cannot accept that no argument exists that the

LSA contains provisions that deal with the wage to be paid to a pregnant employee. This will depend a good deal on my interpretation of the words "if no opportunity exists to modify her duties or reassign her to another job with no loss of wages or benefits" in section 25(1).

[70] I therefore rule I have jurisdiction to hear and determine this Appeal.

C. CONCLUDING ANALYSIS

1. *LSA* AND CBA

[71] Doepker submits that, to decide what section 25(1) of the *LSA* means, its words are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the LSA and the intention of the Legislature. I accept this as the proper rule of statutory interpretation. For sake of ease, I break this test into two components–reading the words and scheme, object and intention.

[72] Doepker first addresses the second component–scheme, object and intention. It says:

> . . . [T]he Legislature intended to provide minimum standards by which employers are bound, to ensure fair and equitable working conditions that balance the competing needs of employees and employers.

It then references several authorities[14] that discuss the "idea of minimum standards." I note these authorities speak of the *LSA* ensuring employees have minimum benefits and an expedited means of enforcing same. However, they do not speak of the broader context of balancing those rights with the needs of employers. I am not aware of any authority that supports that broader context and do not accept it with this

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[14] *Kolodziejski* v *Auto Electric Service Ltd.* (1999), 177 Sask.R. 197, para 27; *Dominion Bridge*, *supra*, footnote 11, para 24;

component of the test.

[73] At the outset, Doepker speaks of minimum standards only in general terms. The Director focuses more on the issue in this Appeal. It says:

> We are of the opinion that the dispute in this case involves standards that are fundamental to the Act and the Division's administration of the Act. At stake is the policy objective of ensuring that a pregnant woman's salary is maintained.

I agree with this characterization.

[74] I will now address the first component of the test–reading the words. It is helpful again to set them out. Section 25(1) of the *LSA* reads:

> 25(1) Where the pregnancy of an employee would unreasonably interfere with the performance of the employee's duties, her employer may, if no opportunity exists to modify her duties or reassign her to another job with no loss of wages or benefits, require her to commence maternity leave not more than 13 weeks prior to the estimated date of birth.

[75] Doepker submits section 25(1) of the *LSA*, read in its grammatical and ordinary sense, is an enabling provision to an employer. It says it allows the employer to require a pregnant woman to commence maternity leave early, if:

a) her pregnancy would unreasonably interfere with the performance of her duties; and

b) there is no opportunity to accommodate her to another job with no loss of wage or benefits.

Doepker submits the section gives the employer a power. It does not define a right of the employee.

[76] Doepker submits that section 25(3) of the *LSA* supports its position. It reads:

> 25(3) In any prosecution alleging a violation of subsection (1) the onus shall be upon the employer to prove that the pregnancy of the employee would unreasonably interfere with her duties and that no opportunity exists to modify the employee's duties or to reassign the employee to another job.

It says:

> The only way to logically apply section 25(3) is if the employer used its discretionary power without the conditions precedent present. If section 25(1) imposed the positive obligation that Labour Standards claims and that certain accommodations are violations of section 25(1), there would be no way to apply section 25(3). If the accommodation itself is the "violation" referred to in section 25(3), then employer would never be able to prove that "no opportunity exists to modify the employee's duties or to reassign the employee to another job" and there would be no need for section 25(3). The legislature included section 25(3) as the due diligence clause, that if an employer is going to require a pregnancy employee to commence maternity early, it must be able to prove the conditions precedent existed.

[77] Doepker references several authorities[15] to support its position that its argument simply restates well established common law principles. I am not persuaded these authorities are helpful to Doepker. I say this principally because they refer to the broad notion of the duty to accommodate. They neither relate specifically to a statute such as the *LSA*, nor to issues such as gender and pregnancy.

[78] On the other hand, the Director made the following submission concerning the first component of the test:

> It hinges on the requirement of "with no loss of wages or benefits" applying to all pregnant employees who have their duties modified or are reassigned because of pregnancy. Section 25(1) would permit an employer to require an employee to commence maternity leave only if there was no other option. If a pregnant employee could be accommodated in a lower paying position, it would be an absurd interpretation of subsection 25(1) that the employer could opt to require the employee to commence maternity leave rather than be reassigned to a lower paying position. Arguably, subsection 25(1) presumes that an accommodation of a pregnant employee will be with no loss of wages or benefits. This interpretation is supported by the overall purpose and intent of the Act which is to protect employees.

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[15] Barbara G. Humphrey's *Human Resources Guide to the Duty to Accommodate* (Aurora: Canada Law Book Inc., 2002); Kevin D. MacNeill's *The Duty to Accommodate in Employment* (Aurora: Canada Law Book Inc, 2003); *Advance Engineered Products Ltd.* v. *Advance Employees' Assn.*, [2007] S.L.A.A. No. 14, 160 L.A.C. (4th) 289

[79] The Director submits section 27(1) of the *LSA* supports his position. It reads:

> 27(1) No employer shall dismiss, layoff, suspend or otherwise discriminate against an employee by reason of the fact that she:
>
> (a) is pregnant;
>
> (b) is temporarily disabled because of pregnancy, or
>
> (c) Has applied for maternity leave on accordance with this Part.

He says:

> As well, it may be arguable that subsection 27(1) can be relied upon to require an employer to maintain a pregnant employee's wages or benefits if she is reassigned to another job because of her pregnancy.
>
> . . .
>
> The prohibition in that subsection is not limited to specific circumstances given the words "or otherwise discriminate against". Arguably the intent of those words is broad enough to cover any circumstance that results in discrimination.

[80] Doepker disagrees with the Director's section 27(1) argument. In essence, it says:

> Article 5.05 has been found by the SHRC to not discriminate against pregnant employees, as it treats pregnant employees in the same manner as it treats all other employees. There is no basis to claim that discrimination in this case and as a result, section 27 has no applicability.

[81] The Director submits its position is further supported by the Supreme Court of Canada decision in *Machtinger and Lefebre* v. *HOJ Industries Ltd.*,[16] where the Court said:

> [A]n interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not.

and section 10 of *The Interpretation Act, 1995*, which states:

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[16] (1992), 91 D.L.R. (4th) 491 (S.C.C.)

> Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.

[82] The Union adopted and agreed with the Director's submissions concerning the meaning of section 25(1) of the *LSA*.

[83] I have difficulty with Doepker's argument concerning the first component of the test. In my view, the flaw in its argument stems from its view of the second component of the test. Section 25(1) is not a balancing provision. It is not one of giving discretion and/or power to the employer. The object of the *LSA* is to provide minimum standards by which employers are bound. The object of section 25(1) is to ensure a pregnant woman's salary is maintained. Read in that light, the Director's submission appeals to me and I accept it.

[84] I do not see Doepker's argument concerning section 27(1) to be helpful to it. No argument is being made that Article 5.05 is discriminatory. It is arguable that subsection 27(1) can be relied upon to require an employer to maintain a pregnant employee's wages or benefits. However, I do not believe it is necessary for me to so rule.

[85] The Director argues:

> The Act provides greater protection in this matter than the Collective Bargaining Agreement. We rely on section 75 of the Act which prohibits any agreement from depriving an employee from any right or benefit of the Act.

[86] On this point, the Union submits:

> We submit . . . [it] is overbroad . . . to declare Article 5.05 of the Collective Agreement null and void. Article 5.05 is not a restrictive provision. It exists to provide a benefit to all employees who need job accommodation in a lower-paying position. It delays any reduction in their wages for 17 weeks. Article 5.05, therefore, is a form of accommodation and is meant to provide employees with greater benefits than those to which they would be entitled under human rights law, as the duty to accommodate does not require an employer to provide an employee receiving job accommodation with higher pay and benefits than those of an employee who is doing the same work but not

being accommodated.

> . . . [S]uch a declaration [is not] necessary for the purposes of rendering a decision in favour of the complainant. It is sufficient . . . to determine that 1) section 25(1) required the Employer to maintain the pre-accommodation wages and benefits of the complainant while she was being accommodated in another job as a result of her pregnancy 2) the Employer failed to do so contrary to the Act and 3) Article 5.05 had no application in the instant case to the extent that it was inconsistent with the requirements of the Act.

[87] I agree with the Union. I therefore rule:

a) section 25(1) of the *LSA* required Doepker to maintain the pre-accommodation wages and benefits of DMB while she was being accommodated in another job because of her pregnancy;

b) Doepker failed to do so contrary to the *LSA*; and

c) Article 5.05 of the CBA has no application in the instant case to the extent that it was inconsistent with the requirements of the *LSA*.

[88] I note Doepker additionally argued the only sections in the *LSA* dealing with wage rates are those dealing with minimum wage rate, which it says are not at issue here, as Doepker pays greater than minimum wage rates. It therefore submits there was no breach of section 25(1) and accordingly, there should be no wage assessment.

[89] I do not accept this argument. In my view, it would render the words "with no loss of wages or benefits" to be meaningless. That is not consistent with the interpretation I have found.

2. CALCULATION OF ASSESSMENT

[90] Doepker summarizes the time line as follows:

a) November 23, 2011 - this is the date from which the 17 week period where they paid DMB her regular wage began to elapse;

b) April 10, 2012 - DMB goes to office duty only;

c) April 16, 2012 - DMB's office duties were increased and they increased her wage to $15.60 per hour;

d) April 24, 2012 - DMB's last day of work before going on disability leave due to her gestational hypertension diagnosis;

e) May 2, 2012 - After the seven day waiting period mandated by the disability insurance provider, DMB begins receiving disability payments (effective as of this date) and based on her pre-accommodation rate of pay–the benefits were paid from May 2 to June 24, 2014.

[91] The Assessment for $4,674.32, broken down as follows:

a) regular wages for the hours worked at the reduced rate from April 10 to April 24: 88 hours x $6.34 = $557.92;

b) regular wages for the hours could have worked from April 25 to May 23 had Doepker allowed the Complainant to return to work: 168 hours x $21.94 = $3,685.92;

c) public holiday pay for Victoria Day: $175.52;

d) annual holiday pay of the lost wages outlined above: 3/52 x $4,419.36 = $254.96.

[92] Doepker argues:

a) the Assessment should only apply to the period DMB could work and correspondingly actually worked;

b) the Director can only issue an assessment against an employer where the employer has failed to pay wages, as required by the *LSA* (s.60(1);

c) there is nothing in the *LSA* that requires an employer to pay the wages of an employee who is put on disability leave by her doctor;

d) the medical evidence provided to Blue Cross supports the conclusion that as April 24, Binsfeld's gestational hypertension was severe enough that she be off work and begin to receive disability benefits;

e) at no point did DMB provide any documentation that she was fit to return to work after April 25; and

f) at no point did DMB advise Doepker or the Union that she could return to work.

[93] The Director argues:

> . . . [T]here is the authority to quantify the lost wages and there is no error. In particular, is the employer's position that the employee abandoned her position by "refusing to work". The Division accepts the employee's position that the entire matter had a negative impact on Dawn- Marie Binsfeld and her family. The health of her baby were compromised due to the insensitive manner that this dispute was handled by the employer. In no way should it be construed that the employee abandoned her position and refused to work.
>
> It should also be pointed out the only issue to be determined is whether there has been a breach of the Labour Standards Act - no other grievance or issue, should be considered in this forum for resolution; adjudication. If such issues arise, the appropriate remedy to gather information to support such issues should be handled through the appropriate forum only and not blur the narrow issue as outlined in the Wage Assessment.

[94] Doepker argues:

> . . . [T]he Officer erred in her calculation of the wage assessment, by including a period of time when the Complainant was not actually working, but rather on disability leave and receiving disability benefits. The Director only has the authority to issue a wage assessment for wages required to be paid by the LSA. There is nothing in the LSA that requires an employer to pay wages to an employee who is on disability leave and

receiving disability benefits. The Complainant provided no medical evidence that she was permitted to return to work. Without medical evidence, Doepker would not be able to return the Complainant to work. Further, only a judge has the authority to order an employer to pay retroactive wages. The Director and the Officer lacked the authority to include retroactive wages in their wage assessment. The wage assessment should not include the period from April 25th to May 23rd, 2012, when the Complainant was not working. As a result of the improperly included time, the Officer also miscalculated the Annual Holiday Pay. Therefore, if it is found that there was a breach of the LSA, the wage assessment ought to be reduced to $600.84.

[95] In Doepker's submission:

a) the period from April 25 to May 23, should be removed from the wage assessment;

b) the maximum amount that could be owning because of the wage reduction is $557.92, which accounts for the difference in wages that would have been paid, had DMB's wages been maintained at her paint kitchen wage for the period she was accommodated at lesser paying work;

c) the Director erred in his inclusion of Public Holiday Pay in the wage assessment, as DMB was on disability leave and receiving benefits when the Public Holiday occurred; and

d) DMB's annual holiday pay payable on the lost wages is $42.92.

[96] Doepker submits the correct wage assessment should be $600.84, broken down as follows:

a) regular wages for the hours worked at the reduced rate from April 10 to April 24: 88 hours x $6.34 = $557.92; and

b) annual holiday pay of the lost wages outlined above: 4/52 x $557.92 = $42.92.

[97] I am persuaded Doepker's argument on calculation is correct. DMB did testify that Doepker's position caused her stress. However, the evidence is clear that

she applied for disability leave because of gestational hypertension. This was consistent with her disability leave when first pregnant. I find as a fact that DMB did not work as and from April 25 because of her disability resulting from gestational hypertension, not the manner that the employer handled this dispute.

[98] I therefore allow the Appeal and vary the amount claimed in the Assessment to $600.84.

[99] I decline to order the Appellants to pay interest on the sums owing.

Dated at Saskatoon, Saskatchewan, on July 29, 2015.

T. F. (TED) KOSKIE, B.Sc., J.D.,
ADJUDICATOR

VI. NOTICE

The parties are hereby notified of their right to appeal this decision pursuant to section 4-8 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (as amended), which reads as follows:

> 4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.
>
> (2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.
>
> (3) A person who intends to appeal pursuant to this section shall:
>
> (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
>
> (b) serve the notice of appeal on all persons mentioned in clause 4 4(1)(b) who received the notice setting the appeal or hearing.
>
> (4) The record of an appeal is to consist of the following:
>
> (a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;
>
> (b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;
>
> (c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;
>
> (d) any exhibits filed before the adjudicator;
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> (e) the written decision of the adjudicator;
>
> (f) the notice of appeal to the board;
>
> (g) any other material that the board may require to properly consider the appeal.
>
> (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.
>
> (6) The board may:
>
> (a) affirm, amend or cancel the decision or order of the adjudicator; or
>
> (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.