AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

FRENCHTOWN TOWNSHIP FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 3233

Union,

-and

FRENCHTOWN CHARTER TOWNSHIP,

Employer, Township.

Grievance No. 13-001
AAA Case No. 54-20-1400-0010
_____/

OPINION AND AWARD

APPEARANCES:

ARBITRATOR:	Mario Chiesa
FOR THE TOWNSHIP:	KIRK, HUTH, LANGE & BADALAMENTI, PLC By: Craig W. Lange, Attorney for Charter Township of Frenchtown 19500 Hall Road, Suite 100 Clinton Township, MI 48038
ALSO PRESENT:	Rhonda S. Sommers, Treasurer Larry Clever, Account Mgr. Burnham & Flower Mark Schmidt, Provident Agency, Inc. Via Telephone
FOR THE UNION:	Alison L. Paton, P.C. By: Alison L. Paton, Attorney for the Union Suite 700, Ford Building 615 Griswold Street Detroit, MI 48226
ALSO PRESENT:	Carson Poupard, Union Vice President Rich Knolas, Union President Ron Hoskins, Union Secretary

THE CASE

The grievance in this matter was filed on November 2, 2013. It reads as follows:

FRENCHTOWN FIRE DEPARTMENT
FRENCHTOWN CHARTER TOWNSHIP
6940 North Monroe Street, Monroe, MI 48162
(734) 241-8853

Grievance Number: 13-001
Date Filed: 02 Nov 13
Date of Grievance: 04 Nov 13 and continued

Nature of Grievance: See attached.

Remedy Desired by Grievant: See attached.

Fire Chief's Signature:_____ Date: 11/18/13

Fire Chief's Decision: See step 2.

Decision to Grievant: 11-18-13 Time: 12:00

Signature of Grievant:_____

On November 4, 2013 the Union received for the first time a copy of the Provident Life & Accident Policy (Policy #ESO-7788277)for the period 2013-2014. The Union has discovered that the Township has unilaterally changed the benefits for our members in a very significant way, as reflected in the two-page "Career Personnel Rider":

1) The rider reduces Para III.A.i disability benefit for covered injuries to a maximum of 104 weeks, whereas the benefit was previously paid for up to Lifetime of the member.

2) The rider reduces the Para III.A.i disability benefit for covered illnesses to a maximum of 104 weeks, whereas the benefit was previously paid for up to the later of age 67 or five years.

3) The rider reduces the Para III.B partial disability benefit to a maximum of 104, whereas the benefit was previously paid for up to the later of age 67 or five years.

4) The rider adds language terminating benefits upon retirement, and precluding coverage from being in lieu of worker's compensation, which language was not contained in the previous policy.

This is a flagrant violation of Article XXII of the contract, which guarantees that our members will be provided with a life and accident policy which is equal to or better in the aggregate than the prior Continental Casualty Company policy number SR83021071. A prior 2004 arbitration award between the Township and the Union established that The Provident Policy *previously in place*, preceding this newest 2013-2014 policy, was equal or better in the aggregate than the earlier Continental Casualty policy. By now reducing the Provident Policy benefits in such a substantial way for all our full-time members, the Township is no longer in compliance with Article XXII of the contract.

Furthermore, on a moral level it is outrageous that the Township would reduce these disability benefits for our full-time members, while keeping the prior benefit levels in place for paid-on-call/part-time members of the Fire Department. In addition, had the Union not recently requested a copy of this policy, we would not have even discovered this egregious violation by the Township until one of our members incurred a disability falling under this new policy.

Remedy Requested: Immediately obtain a new policy in compliance with the contract; make whole relief, together with interest, for all members who suffer a loss of any kind as a result of the Township's violation; reimburse the Union its costs and attorney fees in view of the flagrant nature of the violation; and any other relief that the Union may request.

The third step answer from the Township Board reads as follows:

The Township does not agree that the Provident Life and Accident Policy renewal is a flagrant violation of Article XXII of the contract which guarantees members with a life and accident policy which is equal to or better as stated in Grievance #13-001.

The Township was not offered a choice from Provident Insurance. When the renewal came for 2014 it was the current revised policy or nothing. The Township was given very short notice by Provident to pay and renew this policy, and reiterate this was the only offering Provident provided. In addition to the Policy Change, the renewal premium changed significantly. The premium fee for 2013 was $19,098.00 compared to the renewal premium for 2014 in the amount of $74,862.00 for a difference of $57,764.00. The Township immediately followed up with Burnham and Flowers in an effort to discuss the changes and why the changes were made. Burnham and Flowers did contact

> Provident and confirmed that the Township will be offered the 2014 as it was presented. Again, it was that policy or nothing. After much discussion the Township felt that it was paramount to at minimum to provide the revised Provident Policy than not to offer any policy, in particular since the Township had very little time to look for other policies that were comparable or better than as per contract language. We were also informed that the increase was based on the usage history of the Department even as current as 2011. Provident Insurance paid during the 90 day period the Township paid fire fighters their regular check as outlined in the Master Agreement; therefore there were instances where fire fighters were getting two checks (one from the Township and one from Provident). This practice then ended in June/July of 2011 when Provident realized fire fighters were being paid double pay. Fortunately, Provident still offered the Township renewal for 2012-2013 and 2014.
>
> Since the time of the 2014 renewal of what the Township was offered; the Township has been investigating and will continue to pursue other policies that may be equal to or better than the 2013 Provident Policy while still maintain coverage for employees.
>
> I reiterate, Grievance is denied at Step 3.

A portion of the language contained in Article XXII-Insurance of the Collective Bargaining Agreement relevant to this dispute reads as follows:

> **ARTICLE XXII-INSURANCE**
>
> * * *
>
> In addition, during the term of this Agreement, the Township will pay the premiums for the Michigan Township Association Life and Accident Benefit Insurance policy through Continental Casualty Company, policy number SR83021071 or provide life and accident insurance benefits which are equal to or better in the aggregate, than the benefits currently provided under Policy No. SR83021071.
>
> Additionally, the life insurance benefit for full-time employees shall be increased to $40,000, with double indemnity for accidental death or dismemberment.

The Continental Casualty Company policy, which is also referred to as CNA, had an effective date of July 1, 2002.

Apparently CNA made the determination to stop issuing life and disability insurance policies. This led the Township to seek another insurance company and ultimately it secured life and disability insurance through Provident Life & Accident Insurance Company. Policy number DCC-5854693 became effective on July 1, 2003. At that time, the parties' 1998-2000 Collective Bargaining Agreement was in effect. It, as well as all subsequent agreements, contained the same language I have referenced above.

Apparently, the Union was given notice in September 2003 that the Township had changed insurance providers. It filed a grievance. That grievance was litigated at a July 7, 2004 arbitration which was conducted by Arbitrator Benjamin A. Kerner. In a very thoughtful and thorough analysis of the record before him, Arbitrator Kerner issued an October 20, 2004 Opinion & Award which denied the Union's grievance.

For about ten years the Township continued with Provident policies which were renewed on an annual basis. During the term of the Provident policies and prior to the 2013 term which is the subject of this grievance, Provident instituted a number of changes which could fairly be characterized as enhancements. Certainly on their face the enhancements seemed to improve the life and disability benefits. Without getting into each one specifically, it is noted that the improvements include an

impairment modification benefit; health insurance premium benefit; covered illness disability benefit; partial disability benefit; critical care benefit, felonious assault benefit; plastic surgery benefit; cost of living adjustment; and HIV positive benefit.

The Provident policy as outlined above continued through July 1, 2013.

Larry Clever, account manager from Burnham & Flower, testified that he and his former assistant had contacted Provident, perhaps sometime in April 2013, to secure an application and the renewal information for the Provident policy. He related that on June 6 2013 he finally received a response. Provident indicated that the rate would increase from the prior year's $19,098 to $74,862. The information he received showed that from 2007 to 2012 the loss history was 1,688%. For various reasons, and after haggling with Provident, the Township chose to stay with Provident and paid the premium for the year 2013-2014.

The Township did not give the Union notice of any insurance issues or when it secured the 2013-2014 Provident contract. According to the grievance, it wasn't until November 4, 2013 that the Union received a copy of the Provident policy for 2013-2014.

Once the grievance was filed, it was processed through the grievance procedure and presented to me for resolution. It should be understood that the foregoing is a mere summary of the record and additional aspects will be displayed and analyzed as appropriate.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties given every opportunity to present any evidence they thought was necessary. In addition to the testimony offered by the witnesses, there were literally hundreds of pages of documents placed in the record. As expected, the parties filed extensive post-hearing briefs. It should be understood that everything was considered, although it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

ARTICLE II-RECOGNITION

> The Township recognizes the Union as the sole and exclusive bargaining agent for all full-time employees of the Frenchtown Charter Township Fire Department (the "Department"), excluding the Fire Chief, the Deputy Fire Chief and paid-on-call employees. In this Agreement, "Employees" shall mean all full-time employees of the Department except the Fire Chief, the Deputy Fire Chief and will not mean paid-on-call employees.
>
> The Township shall not enter into any agreements with the Employees, individually or collectively, or both which conflicts with the provisions of this Agreement.
>
> * * *

ARTICLE XIII-GRIEVANCE PROCEDURE

A grievance shall be defined as a violation, misinterpretation, or misapplication of a specific and express term of this agreement.

* * *

Step 4: If the grievance is not settled at Step 3, the grievance may be submitted to arbitration by either of the parties upon notice to the other party. No grievance shall be submitted to arbitration more than thirty (30) calendar days after the receipt of the answer in Step 3 or the date upon which the answer should have been due.

An impartial arbitrator shall be selected from a panel supplied by the American Arbitration Service (AAA) or the Federal Mediation and Conciliation Service (FMCS), upon the request of either party. The parties shall, within ten (10) calendar days of receipt of the panel, make a selection of an arbitrator. The selected arbitration agency shall render a decision within thirty (30) calendar days after the case has been heard, or as soon thereafter as possible.

The arbitrator's expenses and compensation shall be borne equally by both parties. The decision of the arbitrator will be final and binding upon both parties. The authority of the arbitrator shall be limited, as follows:

1. The arbitrator shall have no power to add to, subtract from, or otherwise modify any of the explicit terms and conditions of this agreement, nor shall the arbitrator have the authority to substitute his judgment for that of the employer relative to those matters in which this agreement allows the employer the discretion to decide.

2. The arbitrator shall have the authority to swear witnesses and to command the appearance of witnesses to the extent that the law permits. Further, the arbitrator shall not be required to adhere to the strict legal rules of evidence, but shall limit evidence to that which is competent and material to the proceedings.

3. The arbitrator shall rule on all objections as they are presented except as to the issues, which relate to the arbitrability of the issue presented for determination. Issues relative to arbitrability shall be bifurcated at the request of either party.

4. Grievances shall not be consolidated for consideration by the arbitrator except by the mutual consent of the parties and with the arbitrator's approval.

5. The decision of the arbitrator shall be in writing and supported by competent, material and substantial

> evidence. The decision shall set forth finding of fact, the reasoning and the conclusion reached on the issues submitted for determination.
>
> The party submitting the grievance to arbitration shall have the burden to prove by clear and convincing evidence that a violation of this Agreement has occurred.

Even though it is quoted above, it would be appropriate to reiterate the following provision:

> **ARTICLE XXII-INSURANCE**
>
> * * *
>
> In addition, during the term of this Agreement, the Township will pay the premiums for the Michigan Township Association Life and Accident Benefit Insurance policy through Continental Casualty Company, policy number SR83021071 or provide life and accident insurance benefits which are equal to or better in the aggregate, than the benefits currently provided under Policy No. SR83021071.
>
> Additionally, the life insurance benefit for full-time employees shall be increased to $40,000, with double indemnity for accidental death or dismemberment.

The Union argues that the importance of life and accident policy benefits for these members cannot be overstated. It submits that these fire fighters do not have a defined benefit pension plan which typically includes a generous duty disability pension benefit, but instead has a defined contribution plan. The Union goes on to argue that the Township violated the Article II-Recognition clause because it failed to provide the Union notice of the Provident plan problem. It submits that not only did the Township fail to give the Union notice of the problem, but it never notified the Union that the Provident plan benefits had changed for its members. The Union only discovered

the change by requesting a copy of the current plan during the course of negotiations in November 2013. It argues that contrary to the Township's assertion, there is no defense based on impossibility or lack of any alternative. The Union goes on to contend that if it was involved in the process, in all likelihood the matter would have been resolved and thus the difficulties currently being experienced would have been avoided. It maintains that for this reason alone, the grievance should be granted. The Union argues that the 2013-2014 Provident plan is not "equal to or better in the aggregate" and clearly the Township violated the contract by unilaterally implementing the plan. The Union goes on to argue that the appropriate comparison for purposes of applying Article XXII is to compare the new 2013-2014 Provident plan benefits against the 2003 Provident plan which an independent arbitrator last determined to be compliant with Article XXII. It argues that the language contained in Article XXII refers to benefits currently provided which conveys the meaning that in order for a comparison to exist, the CNA policy must be in existence in order to be used as the standard of comparison. It maintains that since the policy no longer exists, the standard for comparison must be the 2003 Provident policy. When the 2013-2014 Provident plan is compared to the 2003 Provident plan, which was upheld by Arbitrator Kerner, it cannot be reasonably

concluded that the benefits under the new plan for full-time career fire fighters are "equal to or better in the aggregate" than under the 2003 Provident plan. Further, the Union maintains that even if the benefits of the 2013-2014 Provident plan are compared to the old CNA plan, those benefits still cannot be deemed "equal to or better in the aggregate." The Union maintains the grievance must be granted along with an appropriate remedy.

The Township argues that the Union bears the burden to prove by "clear and convincing" evidence that the Employer violated the Collective Bargaining Agreement. It maintains that the life and disability insurance benefits provided to Union members under the revised Provident policy remain equal to or better in the aggregate than the benefits provided under the CNA policy. It points out that the prior Kerner arbitration award found that the Provident policy provided broader coverage and was at least equal to the CNA policy, if not better. The Township submits that it is important to understand that the comparison must be made "in the aggregate." In comparing the revised Provident policy with the CNA policy, the Township points out that the Provident policy is written to cover "all risks" while the CNA policy was written to cover "named perils." Building on Arbitrator Kerner's analysis and engaging in comparisons between a number of different aspects between the

CNA policy and the revised Provident policy, the Township maintains that in the aggregate, the 2013-2014 Provident revision is superior to the old CNA policy. The Township goes on to argue that Provident improved its policy since 2003 and such items must be thrown into the mix when the policies are compared. It submits that once the fine print is considered, many of the promises under the CNA policy are illusionary. For instance, it points out that many common injuries and illnesses are classified as "specified conditions" and are covered for 26 weeks, not to age 75. Thus, it concludes that the 104 weeks provided by the Provident policy exceeds the benefits under the CNA plan. It points out a number of areas in the CNA policy which it suggests establish that it is inferior to the 2013-2014 Provident plan. The Township argues that the duration of income protection has been reduced by Provident, but nevertheless, income protection benefits for certain injuries and illnesses were and remain superior under the 2013-2014 Provident plan. The Township suggests there is no "clear and convincing" evidence supporting the Union's proposition that the revised Provident plan is no longer equal to or better than what was provided in 2002 under CNA. The Township argues that if there is any remedy, it should be crafted keeping in mind the restrictions contained in the CNA policy and the coordination of workers compensation. It argues that if the Union's grievance

is granted, the Township should be able to return to the definition of total disability in the CNA contract. Nevertheless, it maintains the grievance must be denied.

In disputes of this nature, it's the arbitrator's, and hence my, responsibility to carefully analyze the record, interpret the parties' agreement and apply that agreement to the factual scenario. Parties often spend considerable time and energy negotiating contract provisions and they have every expectation that they will receive the benefit of their bargains.

Initially, I note that the Employer brought attention to the language in the Collective Bargaining Agreement which establishes the parties' mutual intent that the party submitting the grievance to arbitration will have the burden to prove by "clear and convincing" evidence that a violation of the agreement has occurred. Since the Union brought the grievance to arbitration, it would have the burden of coming forward and the burden of persuasion. Whether this is in keeping with generally accepted labor arbitration principles really doesn't matter because clear contract language prevails. Additionally, while there is often conflict regarding the quantum of proof necessary to carry the burden, the parties have mutually agreed that the level of proof is "clear and convincing" evidence.

To better understand the burden outlined in the contract, it is generally accepted that most civil litigation utilizes a burden of proof known as a preponderance of the evidence or, as it is sometimes referred to, a mere preponderance of the evidence. Essentially, this means that the party whose evidence ever so slightly tips the scale in its favor shall prevail. There is no doubt that disputes involving substantial sums of money, often millions of dollars, are decided by this standard of proof. At the other end of the continuum our judicial system recognizes proof beyond a reasonable doubt or, as it is sometimes referred to, proof beyond a moral certainty. This standard of proof is generally utilized in cases involving alleged criminal activity when a defendant's liberty may be at stake. It has been utilized in arbitration settings, but generally only when the parties have so agreed or, as some arbitrators suggest, the misconduct so parallels criminal activity and moral turpitude that the burden of proof should be that utilized in criminal litigation. In my view, between the two ends of the continuum is the burden outlined in this Collective Bargaining Agreement, being clear and convincing evidence. The burden is defined by its title and it means that in order to prevail, the party carrying the burden must establish its position by evidence which is clear and convincing.

The clear and convincing standard is higher than a mere preponderance, but lower than proof beyond a reasonable doubt.

The Union has argued that since the Township never gave it notice of the change from the prior Provident policy to the revised Provident policy, the grievance should be automatically granted. The facts do establish that even though the 2013-2014 Provident policy, the revised policy, became effective on July 1, 2013, the Union did not become aware of the change until it requested a copy of the policy in November 2013. It's not clear why the Employer did not involve the Union when confronting the issue when it first arose during the spring of 2013. Perhaps working in concert, the parties could have resolved the matter before it ended up becoming such an intense issue and being presented to an arbitrator for resolution.

Notwithstanding the above, I have not discovered any language in the Collective Bargaining Agreement which deals precisely with the duty to bargain over change in the policy in question. I recognize the Union has referenced the recognition clause and within it the parties' mutual intent to recognize the Union as the exclusive bargaining agent for this bargaining unit. However, there must first be a duty to bargain before the recognition clause comes into play. I am unaware of any charge case pending in another forum, but as I indicated above, while I

believe it would have been advantageous for both parties to deal with this issue as early as possible, the Township's failure to involve the Union did not violate the Collective Bargaining Agreement.

The Township has presented its arguments in a manner which suggests that it had no alternative but to adopt the revised Provident policy. The facts surrounding this event have been displayed in the record and, in my view, do not establish that the Township had no alternatives. The record does not establish that it was impossible to meet the standards outlined in the Collective Bargaining Agreement. It appears the Township acted alone and decided to stay with Provident. The evidence suggests other avenues may have been available, but clearly they were not pursued.

The Township has presented its case based on the assumption that CNA policy number SR83021071 is the standard by which the revised Provident policy should be compared to. It is the Union's position that for comparison purposes the new revised Provident plan should be compared to the prior Provident plan. In a nutshell, the Union maintains that the language in Article XXII implies that the CNA policy would be providing benefits at the time it was used as the measurement standard. It also maintains that the plain language and the use of the word "currently" recognizes that the Township could be paying

premiums for a plan other than the old CNA plan. Thus, it reasons that since Arbitrator Kerner determined that the 2003 Provident policy was "equal to or better in the aggregate," those plan benefits became, in effect albeit not literally, the benefits now to be viewed as being provided under policy number SR83021071, being the prior CNA policy.

There is no doubt that the provision contained under Article XXII specifically references the CNA policy. The fact that it no longer exists doesn't mean that its provisions could not be the comparison standard. By the same token, the language assumes, as indicated by the Union, that the policy could change, as indeed it has. Of course, this issue could easily have been avoided if the parties had revisited the contract language and made the appropriate revisions. I believe, however, that regardless of whether the prior Provident policy is used as the comparison standard or the original CNA policy is the comparison standard, the findings and conclusions I have reached herein are valid. In my view it doesn't matter which policy is considered the standard for comparison.

The language in Article XXII contains, *inter alia,* the phrase "equal to or better in the aggregate." As Arbitrator Kerner points out, and I agree, the term "in the aggregate" means "gathering into, or considered as a whole, total." However, that doesn't mean that certain parts of the policy are

not more important than others. In determining whether one policy is equal to or better in the aggregate to the other, there must be a comparison of not only the written language, but considerations regarding the environment in which the employment and the policy provisions will exist. For instance, one policy may provide $1,000,000 coverage for an event which, in the employment environment, would never happen, or at least be so unlikely to take place that it would be a non-consideration. Additionally, as I indicated, the environment in which the policy exists may very well dictate the weight that certain provisions of the policy should carry when comparisons are made. In this case, we are dealing with professional fire fighters. Given the testimony, it is clear that fire fighters experience their share of injuries. It can be a very hazardous profession. Furthermore, as pointed out by the Union, members of this bargaining unit do not have the benefit of being able to retire on disability and collect benefits from a defined benefit pension plan.

The Township has presented its case on the basis that the CNA policy contained in the Collective Bargaining Agreement is the standard by which the revised Provident policy should be judged. Certainly there is an abundance of evidence in the record dealing with this form of analysis. In its brief, the

Employer has presented a comprehensive analysis and also attached Appendix A, which lists a detailed comparison of the revised Provident plan versus the CNA plan.

When analyzing the record, it must be remembered that Arbitrator Kerner found that the prior Provident plan was equal to or better than the CNA plan. In his Opinion, he outlined several of the comparisons he had observed. However, as pointed out by the Union, Arbitrator Kerner reached his conclusions by comparing a Provident plan wherein the duration of the benefit, the weekly disability benefit, was for the maximum of a lifetime for injuries and five years for illnesses. The differences related to injuries was pointed out on page 109 of the transcript of the arbitration presided over by Arbitrator Kerner.

We shouldn't, and frankly I haven't, ignored the evidence presented by the Township regarding the 2009 enhancements Provident provided to its policy. As suggested by the Township, these improvements and enhancements were not part of Arbitrator Kerner's analysis. Nevertheless, given the type of injury which the record establishes fire fighters are most susceptible to incurring, it is doubtful whether the enhancements can offset the tremendous reduction of the availability of disability benefits from the max of 75 years under the CNA policy and a max of lifetime for injury and five years for illness under the

prior Provident policy. Even when thrown into the mix and judging the various policies in the aggregate, it is impossible to conclude that the enhancements outweigh the reduction of the amount of time disability benefits are available to professional firefighters.

As pointed out by the record, including the transcript of the prior arbitration hearing, most disability injuries fall within the short-term classification. Nevertheless, clearly the possibility of a disability being long term, or perhaps permanent, was in everybody's mind, including the insurance companies, when the CNA policy and the Provident policies, prior to the revised one, were created. While a long-term disability may have been a long shot, the effects would have been devastating to the injured fire fighter.

The Union's view is that the standard for comparison is the prior Provident policy. In other words, the basic policy that Arbitrator Kerner indicated was equal to or better than the CNA policy in the aggregate. If that is the case, as the Union suggests, there is no question but that the revised Provident policy is not equal to and, in fact, is inferior to the Provident policy it replaced. In examining the evidence, I note that the changes to the policy were accomplished by attaching what is titled a Career Personnel Rider. The rider introduced

several amendments to the basic Provident policy. Portions of the rider read as follows:

The definition of **Insured Person** is changed to read:

> **Insured Person** means any person who is a member of the organization. All classes of membership may be included, as well as any other party designated by the policyholder including Volunteer Member, **Career Personnel**, Part-time Personnel, **Emergency Volunteer, Auxiliary Person, Community Member**, Board Members, Trustees, Administrative Personnel, Junior Members, Members in Training or Probationary Members.

The following definition is added to the policy:

> Career **Personnel** or Part-time Personnel are employees or members of the organization that received **Weekly Earned Income** for regularly working at least 30 cumulative hours per week as an emergency service provider for one or more organization(s) identified as Named Insured of the policy holder.

For **Career Personnel** as defined in this rider, Section III.A. Maximum Weekly Total Disability Benefits is changed to read:

III.A. **MAXIMUM WEEKLY TOTAL DISABLILITY BENEFITS FOR CAREER PERSONNEL**

III.A.i. Minimum Weekly Total Disability Benefit

We will pay the **Minimum Weekly Total Disability Benefit** shown on the Policy Schedule page if an **Insured Person** is **Totally Disabled** as a result of a **Covered Injury** for a period up to 104 weeks.

We will pay the **Minimum Weekly Total Disability Benefit** shown on the Policy Schedule page if an **Insured Person** is **Totally Disabled** as a result of a **Covered Illness** for a period up to 104 weeks.

III.A.ii. Earned Income Replacement Benefit

If an **Insured Person** is **Totally Disabled,** and the **Minimum Weekly Total Disability Benefit** is payable pursuant to Section III.A.i., we will pay, a weekly **Earned Income Replacement Benefit,** up to the amount listed on the Policy Schedule page while the **Insured Person** is **Totally Disabled** and the **Minimum Weekly Total Disability Benefit** is payable.

The amount payable under this Section III.A.ii, shall be computed by determining the **Insured Person's Weekly**

Earned Income and by subtracting there from the combination of:

1) the **Minimum Weekly Total Disability Benefit**; and
2) The **Loss of Earnings Coverage** as defined on Page 6.

For **Career Personnel** as defined in this rider, **Section III.B. Partial Disability Benefit** is changed to read:

III.B. **PARTIAL DISABILITY BENEFIT FOR CAREER PERSONNEL**

If a **Covered Injury** or **Covered Illness** permits the **Insured Person** to return to any **Reasonable Occupation**, but at a lower rate of **Weekly Earned Income**, or if the **Insured Person** is receiving any **Weekly Earned Income** from any source, we will pay, such weekly benefit, but not to exceed the **Maximum Weekly Total Disability Benefit**, which had been, or would have been, had the **Insured Person** been **Totally Disabled**. The **Partial Disability Benefit** is payable for as long as the **Insured Person** is **Partially Disabled** up to a maximum of 104 weeks.

If an **Insured Person** is approved for disability retirement by the Public Employee Retirement Administration Commissioner, or otherwise retires following a **Covered Injury** or **Covered Illness** for which benefits have been paid, all eligibility for Benefits under Section III - Income Protection terminates on the effective date of such retirement.

In no event will coverage provided to **Career Personnel** by this rider be in lieu of any workers' compensation act or similar law.

This rider will end on the date the policy to which it is attached terminates.

This rider is subject to all of the terms, provisions and limitations of the policy to which it is attached. In the event of conflict between the policy and this rider the terms of this rider will prevail.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

SUSAN N. ROTH
Corporate Secretary

It is interesting to note that the rider applies only to career personnel, which arguably means that those fire fighters working the most in their career get the least amount of coverage. The changes are outlined in the rider and clearly

reduce the time which a totally disabled fire fighter can receive benefits to 104 weeks. This compares to the lifetime benefit under the prior Provident policy and the 75 year age limitation in the CNA policy. The covered illness term was reduced from five years in the prior Provident policy to 104 weeks. The total disability benefit as a result of covered injury is characterized as the most important aspect of coverage applying to a fire fighter. If that is the case, the reductions stated above are more than just significant. As I said, the revised Provident life and accident policy is not equal to or better in the aggregate to the prior Provident life and accident policy. I also find that the revised Provident life and accident policy is not equal to or better in the aggregate than the original CNA policy referenced in Article XXII of the Collective Bargaining Agreement.

It could also be argued, although I'm not basing my findings on these points, that the Township's actions in attempting to maintain the prior Provident policy and attempting to secure an extension, etc., support the conclusion that everyone realized that there would be a problem adopting the revised Provident policy. Further, some may argue that the Employer's answer to the grievance recognizes the comparison should be to the prior Provident policy, and the revised policy falls short.

I am convinced the clear and convincing evidence establishes that the grievance must be granted. The Union has met its burden of proof.

One of the most difficult aspects of this dispute is framing a remedy that will adequately address what I have found to be a clear breach of the Collective Bargaining Agreement. Certainly the intent of any remedy is not to punish the Township, but to place the Union and affected bargaining unit members in a position they would have occupied had the provision in Article XXII of the Collective Bargaining Agreement been adhered to. In this regard, the Union points out that the only open claim under the revised Provident plan, the 2013-2014 plan, was filed by Joe Abbott, who, according to the evidence, if unable to return to work before May 2016, will lose all disability benefits. The Union suggests there may be others, but at this point, none have been identified. However, this remedy applies to all members of the unit who may have valid claims which arise under the provisions of the revised Provident policy. As pointed out by the Union, I don't have the authority to order any insurance company to provide retroactive coverage. It does maintain that I do have the authority to order that Abbott receive those benefits that he would have received had not the prior Provident policy been amended. To state it in

another fashion, the Union suggests that I order that the prior Provident policy without the latest rider be implemented as the remedy.

Arbitrators are given a wide latitude when in comes to formulating remedies. In regard to remedy and while the Employer maintains that the grievance should not be granted, it suggests that if it is, it should be able to return to the definition of total disability contained in the original CNA policy. Portions of that policy read as follows:

> *"Total Disability" or "Totally Disabled"* means that during the first 60 months following the date of the Accident, the insured, because of a covered injury is:
>
> 1) Continuously unable to perform the Material and Substantial Duties of the Insured's Regular Occupation; and
>
> 2) Under the Regular Care and Attendance of a Doctor.
>
> After the applicable Total Disability weekly indemnity benefit has been paid for 60 months, "Total Disability" and "Totally Disabled" means, the Insured, because of a covered injury is:
>
> 3) Continuously unable to perform the Material and Substantial Duties of any occupation for which the Insured is or become qualified by reason of education, training or experience and not performing any Gainful Occupation;
>
> 4) Under the Regular Care and Attendance of a Doctor.
>
> * * *
>
> *"Gainful Occupation"* means the performance of any occupation or employment for wages, remuneration or profit, for which the insured is reasonably qualified by education, training or experience. Such occupation can be on a full-time or part-time basis.

The parallel provisions in the prior Provident policy read as follows:

Reasonable Occupation means any occupation for which the **Insured Person** is reasonably fitted based on education, training or experience and the **Insured Person** could expect to generate the lesser of $75,000 or at least 70% of **Weekly Earned Income.**

Review Date means each anniversary of the start of a disability.

Total Disability or **Totally Disabled** means that for the first five years from the date of a **Covered Injury** or **Covered Illness**, the **Insured Person:**

1) is not able to perform the substantial and material duties of his or her occupation; and
2) is receiving care by a physician, which is appropriate for the condition causing the disability.

After five years from the date of a **Covered Injury** or **Covered Illness, Total Disability** or **Totally Disabled** means that, due to a **Covered Injury** or **Covered Illness**, the **Insured Person:**

1) is not able to engage in any **Reasonable Occupation;** and
2) is not working at any other occupation; and
3) is receiving care by a physician, which is appropriate for the condition causing the disability.

After carefully considering the arguments regarding which provision applies, I find that the provisions in the prior Provident life and accident policy should be utilized. It was the one the Township chose when it adopted the Provident life and accident policies. Furthermore, the data supplied by the parties including from the Township's comparison chart, suggests, that returning to the old CNA policy would increase the maximum weekly benefit from $1000.00 to $1800.00. Given that Arbitrator Kerner found that the Provident policy which replaced the CNA policy met the contractual standard, I find that for the

purpose of formulating a remedy the provisions contained in the prior Provident policy shall be implemented.

AWARD

The grievance is granted. The Township violated the Collective Bargaining Agreement when it adopted the revised Provident policy. The Township is ordered to pay the individual whose claim is outstanding, wage loss and all other benefits that most likely would have been paid under the prior Provident plan to the extent the wage loss and benefits were not already paid under the 2013-2014 Provident policy. The Provident definitions listed above shall apply. Given the complexity of the dispute and remedy, I will retain jurisdiction for 120 days to resolve any issues that may arise regarding the meaning and the effect of the award. I suggest that if any issues arise, the parties make every effort to resolve them before utilizing my retained jurisdiction.

Dated: March 28, 2016

MARIO CHIESA, Arbitrator