IN THE MATTER OF AN ARBITRATION

BETWEEN:

United Steelworkers Local 2894

and

Tenneco Canada

Date of Hearing: April 8, 2014

Date of Decision: May 13, 2014

Regarding the grievance of William Johnson

Appearances

For the Union:

Mary Simms, Tony Koski, Gary Kennedy, Gary North, Pat Duggan

For the Company:

Jamie Knight and John Lacosta

Hearing held in Cambridge, Ontario

In this grievance the union claims that the grievor should have been placed in a modified position suitable to his medical restrictions on his return to work from medical leave. The facts which underlie the grievance are not in dispute.

The employer produces car parts and employs approximately 400 bargaining unit employees. It is a three shift operation, but not a continental shift.

The grievor is 50+ years old and has 23 years seniority with the company. On March 13, 2013 he had surgery on his right hand for a non-work related condition.

On April 9, 2013 he asked to return to work on modified duties. The employer required him to have his doctor complete a functional abilities form (FAF) before it would permit him to return to work. He did so and provided it to the employer on April 12, 2013. The FAF indicated that the applicant could not use his right hand at work until he was reassessed by the doctor two to three weeks later.

Before resuming the narrative it is helpful to describe the company and union's modified work program. Under Appendix J (Letter of Understanding Modified Work Policy) of the collective agreement the parties have established a joint modified work committee. The committee considers and determines whether employees can return to work and if so what work the employee is able to perform, with or without accommodation. The parties are justifiably very proud of the committee and the work that it does. The LOU states in relevant part:

Appendix J- Letter of Understanding- Modified Work Policy

The Company and the Union are committed to developing and maintaining a safe and healthy return-to-work policy. In keeping with this goal, the parties will cooperate in the return to work and rehabilitation of temporarily and permanently disabled workers, whenever and as soon as possible. The parties agree to a policy that includes the following features:

1. There will be a modified work committee that will discharge its functions in respect of affected employees on an as requested basis. Either party or an affected employee may request a meeting of the committee. Affected employees are those who have returned to work or who are seeking to return to work on a light duty basis, whether disabilities are a result of a workplace injury, or are unrelated or only partially related to the workplace.

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3. The mandate of the committee will be to consider what work, including overtime work, if any, affected employees are able to perform.

4. In discharging its mandate the committee will consider a number of factors:

    a. medical reports supplied by the employee indicating ability to perform work, and any restrictions on the performance of that work;

    b. any other medical or related information that may be available such as, functional abilities evaluations, physical demands analyses and ergonomic reports etc.;

    c. the operational needs of the Company;

    d. the wishes of the employee; and

    e. any other factor that may be relevant to the discharge of the committee's mandate.

5 The parties recognize that the proper functioning of the committee requires the parties to co-operate with each other and to disclose relevant information to each other. The committee will meet in a timely manner and discharge its functions as expeditiously as possible.

6. The parties recognize that a timely return to work and effective rehabilitation of affected employees may require accommodation or alternative work.

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12. The parties are committed to an effective return-to-work policy as the best way to support employees who are adversely affected by injury or illness.

There was a meeting of the committee on April 10, 2013. At the meeting Brendan Ryan, a Company human resources generalist, mentioned that he had been in contact with the grievor and anticipated that he would be seeking a job requiring only the use of one hand. On April 10 or April 12, 2013, or perhaps on both dates, (the union's evidence on this point was unclear) the union members of the committee suggested a few jobs which had been occupied in the past by employees who had no use of one hand. After the grievor delivered the FAF on April 12, the employer took no apparent steps to return the grievor to the workplace.

There was another meeting of the committee on April 17, 2013. The union members raised the grievor's circumstances again. The employer advised it would get back to the union. It, however, did not do so. This grievance was filed April 23, 2013 and stated: "I have a grievance under the collective agreement because the company will not accommodate me with a job within my medical restrictions for which there is jobs I can do".

At the next meeting of the committee held on April 24, 2013 the parties considered the jobs suggested by the union and some other jobs as potentially suitable for the grievor. The committee went to the plant floor and looked at the potential jobs. The company's human resources department was informed that the grievor could return to work in one of the suggested jobs. However, before the grievor started working in the accommodated position, he was, on April 26, 2013, declared fit to return to his regular job and did so on April 29, 2013.

While the grievor was off work he was paid weekly indemnity (W.I.) of 65% of his regular wage by a third party insurer. The difference between his regular pay and the amount he received as W.I. was $317.66 per week.

There is no dispute that the parties have a practice of returning employees to work on Mondays as it is easier to schedule that way.

Positions of the Parties

The union asserts that the grievor should have been returned to work at least two weeks earlier than he was. It claims that he is owed $635.32 (the difference between his regular wages and the amount he received as weekly indemnity over two weeks) as a result.

The Company argues that the earliest the grievor could have been returned to work was Monday April 22, 2013. It comes to this conclusion because the FAF was presented on Friday April 12, the next meeting of the committee was Wednesday April 17, 2013 and therefore the next Monday was April 22, 2013, one week before the grievor actually returned to work.

The Company notes that the company's human resource department is a busy place and there are many employees working on medical restrictions in modified or accommodated positions. It argues that in all of these circumstances, and although the employee could have been returned to work more quickly, the date at which he was returned to work was reasonable. The law does not require perfection but only that an employer act reasonably. A one week delay should not be the basis of review by an arbitrator.

The company relies on three cases which generally stand for the proposition that an employer need not be perfect in the speed in which it complies with an accommodation requirement but only need be reasonable.

In *Ontario Public Service Employees Union (Alviani), Union and The Crown in Right of Ontario (Ministry of Revenue), (Dissanayake) [2011] CarswellOnt 16397, 104 C.L.A.S. 321* the grievor was off work for a number of months with injuries she attributed to the ergonomic unsuitability of her work station. The union grieved that the employer took too long to consider the grievor's accommodation

request and return to work. Arbitrator Dissanayake, acting as Grievance Settlement Board, discussed the issue as follows:

> 34 The union presented a number of arbitration awards where it had been held that the employer was in breach by failing to accommodate the grievor in a timely fashion. Union counsel referred to the length of delay in those cases which led to the finding of breach. However, whether the time period taken to accommodate an employee is unreasonable must necessarily depend on the particular facts of each case. In this regard, the nature of the employee's disability, the duties and responsibilities of the position held by the employee, the nature and the timing of the medical information as to the restrictions resulting from the disability provided to the employer, whether suitable accommodation is readily available having regard to the nature of the employer's operation, the level of cooperation and participation on the part of the employee and his or her trade union in the accommodation effort, and the sophistication and experience of the employer in accommodation issues, are all relevant considerations.
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> 49 In all of the circumstances of this case, I do not find in the first place that a time period taken to return the grievor to work from the time medical information was first received suggesting that the grievor's problems may be related to her work station, was excessive. Moreover, only a small portion of the total delay is attributable to the employer. The evidence indicates that if the employer had done everything perfectly, the grievor would likely have returned to work three weeks earlier than she did. However, the duty to accommodate does not obligate the employer to be perfect. It is required only to be reasonable. In all of the circumstances I do not find that the employer acted unreasonably so as to justify a finding that it failed to comply with its duty to accommodate the grievor in a timely manner.

The same panel of the Grievance Settlement Board considered this issue again in *Ontario Public Service Employees Union (Fenech) v Ministry of Labour,* [2012] OGSBA No 126 (Dissanayake). In that case, the union argued that the employer had failed to act in a timely fashion in order to accommodate the grievor's requests for assistive devices. The total delay was a period of over two and a half years. The Board cited its earlier decision in *Alviani*, supra, for the proposition that the reasonableness of the time taken to accommodate cannot be judged solely by the length of time. The Board found that while the employer had been responsible for

some of the delay, overall, the delay had not been unreasonable. The Board made the following findings:

> [247] The Board finds that the employer could have at times acted more expeditiously. For example, while it was reasonable for it to initially explore the possibility of using the services of a MOL ergonomist for purposes of the accommodation, it soon became evident that the MOL ergonomist was not an option. The ergonomist herself clearly stated that she did not have the expertise or the time required to undertake an accommodation as complex as Ms. Fenech's. Yet, the employer continued to pursue that possibility, rather than focusing on obtaining the necessary services from an alternate source.
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> [249] The law does not expect employers to be perfect in accommodating employees. The requirement is one of reasonableness. Considering the complexity of the accommodation, the difficulties that arose in finding resolutions to the numerous obstacles that arose along the way, the Board concludes that the employer did not discriminate against Ms. Fenech by unreasonably delaying her accommodation. The overall time period taken, although regrettable, was not unreasonable in all of the circumstances the employer was faced with.
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> [emphasis added]

The arbitrator's decision in *Canadian Blood Services v Ontario Public Service Employees Union (Stevens Grievance)*, [2007] OLAA No 432 (Stewart), suggests that an employer will be found to have breached its duty to accommodate where its inaction results in unreasonable delays in implementing accommodations or providing modified work. In that case, the grievor suffered from bilateral carpal tunnel syndrome. The collective agreement specifically stated that the employer would make "every effort" to accommodate employees injured at work (para 11). Arbitrator Stewart described the facts as follows:

> The manager responsible for the grievor's accommodation, Mr. Stephenson, received a letter from the WSIB dated March 26, 2002, which described the grievor's restrictions. However, the grievor continued to perform work that she considered to be unsuitable. The grievor scheduled a meeting with the Centre Director on May 10, 2002 to discuss her

> concerns. On May 11, Mr. Stephenson was directed to ensure that a permanently modified position was put in place for the grievor. A meeting was then scheduled for late June or early July to discuss permanent accommodation. However, Mr. Stephenson then told the grievor that the meeting had to be rescheduled because Ms. Johnstone, an employee responsible for staff development, was unable to attend. The grievor later learned that Ms. Johnstone had never been invited to the meeting. At the end of July, the grievor asked the WSIB to investigate because a modified job had not been implemented and there was no indication that her concerns would be addressed. The manager of human resources, Mr. Burwash, then became aware that Mr. Stephenson had failed to implement the modified job for the grievor. Permanent modified duties were implemented for the grievor shortly thereafter.

The arbitrator found that the employer had failed to respond appropriately to the grievor's requests for permanently modified work. The arbitrator noted the following at paragraph 16:

> […] While, as Ms. Gallop emphasized, the Employer did provide permanently modified work soon after the grievances were filed, its response to the WSIB and Ms. Stevens in this matter was leisurely and somewhat cavalier, as evidenced by the failure to invite Ms. Johnstone to a meeting in July and, as noted in the WSIB correspondence, by the apparent failure to consult in a timely manner with the person responsible for training.
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> While I agree with Ms. Gallop that matters such as the development of modified duties may take some time and that an unrealistic standard should not be imposed, the evidence before me here suggests that the Employer simply did not take the necessary steps to involve the appropriate people in moving the matter forward in a reasonable manner. Fortunately Mr. Burwash became involved and ensured that the matter was dealt with in an appropriate matter, however the fact remains that a representative of the Employer who was charged with the responsibility of dealing with a significant interest of Ms. Stevens failed to fulfil the commitment provided for in Article 23.04 i) of the Collective Agreement, resulting in a breach of that provision.

Although the employer's violation of the collective agreement did not result in any direct financial loss, the arbitrator awarded damages of $1,000.00 and declared that the collective agreement had been breached.

Decision

In my view the company acted reasonably in some respects and not in others.

I am satisfied the company acted completely properly in requiring the grievor to have an FAF completed by his doctor. It also acted appropriately in deferring consideration of the FAF form to the modified work committee. While not every return to work to modified duties following an injury requires consideration by the committee, there is generally merit in involving it and in this case the committee's involvement was warranted.

I also agree with the authorities cited by the company that in accommodation cases the issue is whether the employer has acted reasonably in dealing with an accommodation request including the speed at which the request is dealt with. However, I do note that the circumstances in the cases cited were vastly more complicated than the ones before me. In those circumstances, relatively lengthy delays were acceptable because of the complexity of the circumstances surrounding the return to work. It does not follow however, that similar delays are necessarily acceptable in other factual circumstances. In other words, the cases do not establish a test or even a rule of thumb that a three week delay (or some other time period) is acceptable or reasonable.

In my view the language in the collective agreement is also important in deciding what length of delay, if any, is reasonable or appropriate. In the opening paragraph of the LOU the parties agree that: " In keeping with this goal, the parties will cooperate in the return to work and rehabilitation of temporarily and permanently disabled workers, **whenever and as soon as possible**" . In paragraph 5 of the LOU the parties agree: "The committee will meet in a timely manner and **discharge its functions as expeditiously as possible**". Similarly paragraph 6 states: "The parties recognize that **a timely return to work**…". The parties' intention appears to be that the committee meet and determine if an employee can return to work at the first opportunity. If there is any delay, beyond the time required for the committee to do its work and for the employer to come to a decision, in my view, the parties' agreement makes it clear such delay should be limited.

I must now apply these considerations to the facts before me.

As noted, I am satisfied that it was appropriate for the employer to require the grievor to provide an FAF. The grievor did so on April 12, 2013. It was also appropriate that the matter be placed before the committee. While the union members had suggested jobs the grievor could do prior to the committee meeting, it seems these suggestions were not made in the context of the FAF, but in the context of what the members believed the grievor's restrictions would be. It was appropriate for the committee to revisit the issue at the next committee meeting following receipt of the FAF. That was done at the April 17th meeting.

In my view it was required for the employer to return the grievor to work on Monday April 22, 2013. There is no real explanation for its failure to do so other than some general statements about how busy the human resources department was. In the absence of a more concrete and justifiable explanation for the delay, I see no reason why the grievor could not have been returned to work immediately. He was absent from work for only a month. The likely date of his return to work was known in advance and his work restrictions were easily anticipated and in any event raised by the union at the earliest opportunity. The Company had in the past accommodated employees in particular jobs who did not have the use of one hand. Overall, his accommodation circumstances were not especially complicated.

This conclusion is reinforced by the fact that the company did agree to reinstate the grievor to the accommodated position following the next committee meeting (but only after the grievance had been filed). There is no real suggestion that anything had changed in the meantime or that the company was in receipt of new information that was not available previously.

Accordingly, I find that the employer, acting reasonably and in accordance with the collective agreement, would have reinstated the grievor to the accommodated position on April 22, 2013 and that it was unreasonable for the employer not to have done so on that date. The grievor is entitled to be compensated for the employer's failure to reemploy him in a timely fashion. The period where compensation is owing is April 22, 2013 to April 29, 2013 and I direct the employer to make the grievor whole for that period.

I remain seized should there be any difficulty implementing this award.

Brian McLean

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Brian McLean

Toronto, Ontario