

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal from an April 25, 2006 Hearing Officer decision. The Hearing Officer found that the Worker had sustained a workplace injury over time, commencing on or about May 22, 2005. However, the Hearing Officer also found that the Worker was not entitled to temporary earnings replacement benefits ["TERB"] beyond July 13, 2005, the date on which the Worker laid off work.

I will set out only those portions of the claim history and appeal proceedings which are most relevant to my reasoning and conclusion.

The Worker was employed in a position with the Employer (a security firm), wherein she processed currency - including cash and coin - for client businesses.

On March 1, 2004, the Worker suffered an injury when she tripped over a bucket. The Worker received TERB up until approximately May 3, 2004, at which point she returned to work on modified duties. She returned to full pre-injury duties on or about June 28, 2004.

The Worker filed a Report of Accident dated November 6, 2005, in which she indicated she suffered a workplace injury over a period of time, commencing on May 22, 2005 when her employment duties were altered. The Worker had previously laid off work on July 13, 2005.

A February 16, 2006 Case Manager decision found that the Worker had suffered a compensable injury flowing from the change in her employment duties. The Case Manager also found that the Worker was entitled to medical aid ["MA"] with respect to the compensable injury. However, the Case Manager determined that the Worker was not entitled to TERB beyond July 13, 2005. First, the Case Manager noted that the Employer had provided an open invitation to the Worker, to accommodate any areas of concern encountered by the Worker while performing the Cash Processing position duties. Second, the Case Manager found that the position in the Envelope Room had been offered to the Worker, but that the Worker had refused the position for reasons unrelated to the compensable injury. In particular, the Worker believed she could not reconcile her schedule concerning child care duties and her husband's work hours, with the work hours of the Envelope Room position.

The Worker appealed the Case Manager decision by means of a February 20, 2006 Notice of Appeal to Hearing Officer. The Worker appealed the denial of TERB, and sought all benefits to which she was entitled. The Employer also appealed the Case Manager decision, and in particular challenged the Case Manager's recognition finding. Those appeals led to the April 25, 2006 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced by the Worker's filing of a June 12, 2006 Notice of Appeal with the Workers' Compensation Appeals Tribunal [the "Tribunal"]. The Employer did not appeal the Hearing Officer decision.

This appeal proceeded by way of oral hearing, held at Halifax, Nova Scotia, on February 21, 2007. The Worker attended at the oral hearing, and provided sworn testimony. In addition, the Workers' Representative provided submissions. No one attended on behalf of the Employer to provide testimony. However, the Employer Representative - a partner in a workplace injury consultant firm based in London, Ontario - participated by means of teleconference, and provided submissions. The Board did not take part in the hearing.

ISSUES AND OUTCOMES:

At issue is whether the Worker is entitled to TERB beyond July 13, 2005.

The Worker's appeal is denied. The Worker is not entitled to TERB for the period beyond July 13, 2005.

ANALYSIS:

I have reviewed all the materials in the Board and Tribunal files, as well as the recording of the oral hearing. I will set out only those portions of the evidence and submissions most relevant to my reasoning and conclusion.

Worker's Testimony

The Worker testified concerning her education and employment history.

The Worker commenced employment with a different security firm on or about October 23, 2000, which involved "prepping" cheques. She was involved in a motor vehicle accident in 2001, and missed approximately four months of work. She returned to work with the previous employer on modified hours, and modified duties. The Worker left her previous employment in November 2003 because she was receiving only four hours of work per week.

The Worker commenced employment with the Employer on or about November 23, 2003. The Worker was employed on a casual basis when she started with the Employer.

The Worker understood that she was hired in a data entry position. However, she did not realize that she would have to stand for approximately 12 hours "prepping" the work. The general procedure at that time in the Cash Processing department was that the employees

would “prep” the work, and then “process” it. The Worker left her position with the Employer within two hours of starting work, because she could not stand for a long period of time while prepping the work.

The next day, the Worker spoke with a manager, and explained her situation. The Employer agreed that the Worker could restrict her activities to “processing” work, as opposed to “prepping” it. The Worker was the only person in the department whose activities consisted solely of processing work, as opposed to both prepping and processing it.

The Worker originally testified that she worked five 12 to 14-hour shifts per week. However, after further questioning by both representatives and the Tribunal, it appeared that the Worker would start at approximately 10:00 p.m. on Sunday night, and at either midnight or 1:00 a.m. on the other work nights. Further, the Worker’s departure time would vary in accordance with her husband’s work schedule. On those days when her husband worked (every second work day), the Worker was permitted to leave so that she could be home by 7:00 a.m. On other days, the Worker would work until 10:00 a.m. The Employer accommodated the Worker’s desire to be home with her children on those mornings when her husband would work. The Worker testified that she eventually became a full-time employee, but she was uncertain as to the number of hours per week she worked.

The Worker testified that she suffered her first workplace injury in March 2004, when she fell at work. The Worker believed she was off work for approximately four months, and she then returned to her processing position. (Both compensable injuries were to the same area of the back injured in the motor vehicle accident).

The Worker testified that her employment duties were changed in May 2005. The Cash Processors were now expected to prep the work at their stations, prior to processing it. The Worker testified that the new duties were more physically demanding than her former duties, which just involved processing. Later in the hearing, there was discussion and testimony concerning the Employer’s willingness to provide the Worker with modified duties in the Cash Processor position. The Worker indicated that the attitude of her co-workers constituted a major problem for her. The co-workers would make snide remarks concerning the Worker’s modified duties - for example, that the Worker could not even count her bags of coin and currency. Generally, the Worker was unhappy with the attitude of her co-workers, and felt deterred from asking them for help. In addition, the Worker indicated that sometimes co-workers were not available to provide her with assistance.

The Worker raised the possibility of working in the Envelope Room with B, who was the lead hand in the Cash Processing department. The Worker believed she could perform the duties of the Envelope position, because it involved processing deposits to ATM machines and did not involve coins. The Worker then had a lengthy discussion with F, who was the supervisor of both the Cash Processing department and the Envelope department. The Worker felt that F was discouraging her from moving to the Envelope department, because

F stated that the Worker would not be able to modify her hours (to accommodate her child care obligations in the light of her husband's work schedule), in the same manner as in the Cash Processing position. The Worker indicated that F advised her of the difficulties with the work hours in a "sarcastic" manner.

The Worker testified to her belief that this was not a genuine offer of a position in the Envelope Room. The Worker had sometimes worked in the Envelope position during her first two months of employment, while she was a casual employee. At that time, the Worker was permitted to leave work early, to be home prior to her husband's departure for work. The Worker does not understand why the work hours in the Envelope Room would now be rigid, or why the same accommodations made for her in the Cash Processing position could not be made in the Envelope position. The Worker believes that the Employer did not want her in the Envelope position. On another occasion, the owner of the Employer made a hand gesture during a conversation with the Worker; the Worker interpreted the gesture to mean that she would be fired if her doctor did not set out certain functional capacities in a report.

The Worker testified that she collected EI sick benefits after she laid off work in July 2005. Moreover, she was employed as a school monitor from January 2006 to June 2006, and earned approximately \$50 per week in that position. The Worker chose to discontinue employment with the Employer, because she felt the Employer was lying to her and treating her unfairly. The Worker believes she was denied an employment position with a different security firm in August 2006 because of a poor reference from the Employer. Eventually, the Worker returned to employment in February 2007 with the employer with whom she worked from 2000 to 2003. In this position, the Worker must work with coin, and she is not performing modified duties. However, the Worker stated that the clients served by her current employer do not deal with the same amount of coin as did the Employer's clients. Consequently, her work with the current employer is not as physically demanding.

Worker's Submissions

The Workers' Representative argued that the Employer provided no explanation for the refusal to accommodate the Worker's child care obligations in the Envelope position, when the Employer was willing to accommodate these obligations in the Cash Processing position. In this connection, the Workers' Representative noted that the Worker attended at the hearing, and provided sworn testimony. However, no one from the Employer attended to provide sworn testimony. In short, the Worker argued that there was no genuine willingness to provide the Worker with modified duties in the Envelope position.

With respect to the Cash Processing position, the Workers' Representative argued that Dr. Kinnear - the Worker's family physician - indicated the Worker could only work in the Envelope position. There is no medical evidence indicating the Worker could have continued working in the Cash Processing position. Moreover, the Worker's co-workers were not always available to assist the Worker in that position.

Employer's Submissions

The Employer Representative argued that the Employer demonstrated a willingness to go above and beyond in accommodating the Worker. The Employer accommodated the limitations flowing from the non-compensable motor vehicle accident, the Worker's non-compensable child care obligations, and the limitations flowing from the compensable injuries. At some point, it is the Worker's obligation to accommodate the standard work hours of the modified position offered by the Employer. The Employer had offered the Worker her requested modified position in the Envelope Room, but the Worker then refused to accept it for reasons unrelated to the compensable injury. Therefore, the Worker should not be awarded earnings loss benefits.

The Employer Representative also argued that the Employer expressed a willingness to modify the Cash Processing position in any manner necessary to accommodate the Worker. Even if the Worker perceived difficulties with the co-workers, the Employer was willing to modify the Worker's duties in the manner necessary.

Finally, the Employer Representative indicated that the Tribunal may rely upon the file materials; there is no need for testimony from the Employer's employees.

Reasoning

In addition to the oral testimony and submissions, I also reviewed all the materials in the Board and Tribunal files. In particular, I note the Employer's October 18, 2005 correspondence and the Worker's handwritten notations thereon. I also note the Employer's submissions of March 31, 2006 and April 6, 2006. Further, the Worker provided handwritten submissions with the February 20, 2006 Notice of Appeal to Hearing Officer. I also note that the Case Manager's Summary Report and Decision forms dated December 29, 2005, January 10, 2006, June 14, 2006 and September 16, 2005 are of particular significance.

I find that the Worker is not entitled to TERB beyond July 13, 2005, substantially for the reasons set out by the Case Manager and the Hearing Officer.

First, I find that the Employer was willing to modify the Cash Processing position, to address concerns raised by the Worker. For example, the October 18, 2005 correspondence from the Employer describes the Worker's employment duties after May 22, 2005, and some of the Employer's efforts to accommodate her concerns. The file materials suggest that the Worker did not raise certain matters with the Employer because of the reaction of co-workers to her modified duties. However, given the Employer's past willingness to accommodate the Worker, I find that the Employer would in all likelihood have addressed the Worker's concerns with respect to the Cash Processing position, if these matters had been brought to the Employer's attention. I find it is more likely than not that the Cash Processing position could have been modified to accord with any functional

limitations experienced by the Worker.

I acknowledge the Workers' Representative's argument concerning the limited medical evidence relating to the Worker's ability to perform the Cash Processing position. However, I do not accord great weight to Dr. Kinnear's medical opinion concerning the Worker's employment capacities. First, as the Employer argued in previous submissions to the Board, Dr. Kinnear opined that the Worker should be assigned to the Envelope position without seeing any job description. Moreover, in her December 8, 2005 correspondence, Dr. Kinnear indicated she was previously unaware of some of the employment information, and was unaware that the Worker had been offered a position which she had refused. In the December 8, 2005 correspondence, Dr. Kinnear also suggested that the Worker would not be able to perform the duties of any position. Yet, within a month, the Worker was employed as a school monitor. I note in passing that Dr. Kinnear described the Worker as suffering from a two-month history of worsening back pain as of June 22, 2005; this suggests that the Worker's worsening back pain commenced prior to the change in the Worker's employment duties. The assertion of a two-month history of worsening back pain does not accord with the Worker's own testimony, and generally undermines the weight which can be accorded to Dr. Kinnear's opinion.

As a matter of common sense, the Worker was able to continue working in the Cash Processing position for close to two months after May 22, 2005. If she had advised the Employer of all the duties which caused her difficulty, I am satisfied that the Employer would have modified those duties to enable her to continue in that position.

For the sake of completeness, I note that the Hearing Officer did not consider the Cash Processing position in her denial of TERB. However, this factor was considered by the Case Manager, and was raised by the Employer Representative at the oral hearing.

Second, with respect to the Envelope position, I agree with the Board decision-makers that the Employer had indeed offered this position to the Worker. Given the Employer's past efforts at accommodation, I am not willing to infer that the Employer's insistence on standard work hours was actuated by bad faith. (In this connection, I note the Worker's testimony that she did not ask F why modified hours were not available in the Envelope position, and in fact had not asked F whether modified hours were available). The Employer immediately agreed to the Worker's request for a position in the Envelope Room. The Worker's refusal to accept that offer was not reasonable, given all the circumstances. Presumably, the Worker would have been able to make alternate child care arrangements, if she were determined to continue in her employment. In fact, by the time of the January 10, 2006 meeting at the Employer's premises, the Worker had arranged child care which would have allowed her to accept the Envelope position. In short, the Worker's loss of earnings was due to her refusal to accept the Envelope position, for reasons unrelated to the compensable injury. Therefore, the Worker's earnings loss beyond July 13, 2005 was not due to the compensable injury. As a result, the Worker is not entitled to TERB for that period.

Medical Aid

The Case Manager found that the Worker was entitled to MA with respect to the compensable injury. That finding was not varied by the Hearing Officer, and the issue of MA is not before me. For the sake of completeness, I note the Worker's testimony that she subsequently benefitted from additional chiropractic treatment in that she is now "90 to 95 percent of normal", whereas she was only "75 to 80 percent" prior to the additional chiropractic treatment. I note simply that it is open to the Worker to seek MA from the Board for the additional chiropractic treatment, in the event she has not already received such MA. I express no opinion whether such MA should be granted.

CONCLUSION:

The Worker's appeal is denied, for the reasons above. The Worker is not entitled to TERB for the period beyond July 13, 2005.