

DECISION RENDERED ON JANUARY 19, 1982
T.D. 2/82

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, C.-33 as amended

And in the Matter of a Hearing Before a Human
Rights Tribunal Appointed Under Section 39 of
the Canadian Human Rights Act

BETWEEN:

Michael Ward,
Complainant

- and -

Canadian National Express
Respondent

HEARD BEFORE: Susan Mackasey Ashley
Tribunal

Appearances:

Mr. Russell Juriansz Counsel for the Complainant and the
Canadian Human Rights Commission

Mr. Lawrence Band Counsel for the Respondent
>Introduction

This case involves a complaint by Michael Ward that he was
discriminated
against by CN Express contrary to the provisions of the Canadian Human
Rights
Act, in that he was refused employment because of physical handicap.
The
Complaint form signed by Mr. Ward and dated July 30, 1980* gives the
particulars of the complaint as follows:

While undergoing a medical examination for the position of
warehouseman,
I was informed by the doctor that as a warehouseman, I could lose my
other hand and could endanger a fellow employee. He suggested I apply
for office work. I believe I can perform the duties of the position,
and
that I was not hired by CN Express because I lack fingers and a thumb
on
my right hand. I believe this to be contrary to sections 7 and 10 of
the
Canadian Human Rights Act." (Exhibit C-2)

As stated in the complaint form, the sections of the Canadian Human
Rights Act which are relevant to this case are section 7 and 10, as
well as
section 14(a). Section 7(a) of the Act states that:

It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual...on a

prohibited ground of discrimination.

Section 10 provides further that:

It is a discriminatory practice for an employer or an employee organization

(a) to establish or pursue a policy or practice or

* It should be noted that an initial complaint form was signed in July of 1979, which neglected to give a description of the alleged discrimination. An amended form was then completed. (Transcript page 446)

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(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Section 3 provides that physical handicap is a prohibited ground of discrimination with regard to employment. The definition of physical handicap is contained in section 20 of the Act, as follows:

"physical handicap" means a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a seeing eye dog or on a wheelchair or other remedial appliance or device.

It is clear that Mr. Ward's particular physical problem, i.e. a congenital lack of fingers on his right hand, fits within the definition of "physical handicap" under section 20 of the Act.

If the complainant has made out a prima facie case of discrimination on the basis of physical handicap under the provisions of the Act, the Tribunal must then decide whether the employer was justified in discriminating because of a "bona fide occupational requirement" within the meaning of section 14(a) of the Act, which states, in part, as follows:

It is not a discriminatory practice if
(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is

established by an employer to be based on a 'bona fide' occupational requirement;...

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The Respondent's argument, which will be discussed in detail below, is that Mr. Ward was not refused employment because of discrimination, but was

excluded because of the unacceptable safety risk to himself and to other employees. (Transcript page 727) . The Respondent has submitted that if discrimination is found by the Tribunal to have been proven, section 14(a) will be available to the employer. The employer alleges that the requirement that warehousemen at CN Express possess a "functional hand", that is, one with at least two fingers, is a bona fide occupational requirement. The question arises whether the employer has a right to set minimum safety requirements within the workplace for the benefit of all employees, even though the standards may exclude persons with certain physical handicaps or disabilities.

The evidence shows that there was no dispute that Mr. Ward could perform the job function of warehouseman; however, the employer has attempted to show that he could not perform these functions as safely as could a non-handicapped employee, and as a result, the possibility of danger to himself and to other employees was increased.

The Evidence

The complainant, Michael Ward, was born in 1959, is five feet eleven inches tall, and weighs 165 pounds. His build could be described as being sturdy or athletic. He gives no impression of being "handicapped" or in any way "disabled". He testified

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he made application for a summer job as warehouseman at the London, Ontario terminal of CN Express, the application form being dated April 11, 1979 (Exhibit R-9). He saw Mr. Brodie, supervisor at the London terminal, who had authority to hire and who was willing to hire Mr. Ward, subject to a medical examination being performed by the CN doctor in Toronto. All applicants for employment at CN Express go through this process of screening,

i.e. personal interview and a medical examination. Mr. Ward filled in certain forms, among them a standard medical form (Exhibit R-6), one page being filled in and signed by Mr. Ward himself, the second page being completed and signed by Dr. McGeough, the CN doctor, after having completed a physical examination of Mr. Ward. This medical examination form was dated and signed by Dr. McGeough on May 30, 1979. On this form, Mr. Ward gave information on his general health, and indicated by checking the appropriate boxes that he had once received bone and joint injuries, in particular that he had suffered a broken wrist. In response to the question "are you now or ever have been restricted in employment", he checked the box "no". In examination and cross-examination, Mr. Ward testified that he had broken his right wrist in 1974 in a bicycle accident. He hit a pothole, the bike swerved sideways and he suffered the wrist injury. This is the only evidence of an injury to his hand or wrist ever having occurred, and it does not appear to be related to the absence of fingers on his right hand.

He described the medical examination given by CN as follows:
(Transcript page 448)

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- 5 Mr.

Ward: Yes, she asked me if I would come with her. We went down a hallway a little way and I went in to see Dr. Murray or Dr. McGeough, I'm sorry, and he asked me what had happened. He was looking at my hand

and I knew what he meant. I told him it was a birth defect and he said that was I aware that CN had a policy such that I would not be able to work with them, like they had a policy right down to the number of digits that I could be missing and still work for CN, and that because of this I would not be suitable and that perhaps I should seek employment maybe in a smaller warehouse where this restriction was not on me, or perhaps in the CN clerical practice.

I told him that really I had never had a problem with anything. I had always -- never had to hold myself back and, like, I'm sure I could do the job. But he didn't deny the fact that I could probably do the job but he did say that there was a policy that restricted me from working in a warehouse for CN.

Q. Keep telling us about the conversation.

A. Well, I offered to pick up his desk and he said, "Oh, no." He kind

of chuckled and said, you know, he knew I could probably pick it up and he asked me to do a couple of other things. He looked at my hand briefly and I don't know, I can't remember. I think I held a pen for him, or something, and he tried to pull it out.

Q. Was he able to pull it out?

A. I don't really recall. I don't think so. No. I don't think he was actually trying to pull it out, just trying to see the resistance. The conversation was quite brief, actually, like probably lasted five minutes, and he signed a thing. I looked at it and it said "unfit" for my medical. I asked him if he would put the reason down and he said no, that he felt that was between me and my employer. So that was pretty much the end of the conversation and I left."

The form on which Dr. McGeough indicated Mr. Ward "unfit" was page 2 of the medical form (Exhibit R-6). Besides indicating that Mr. Ward was unfit for employment as a warehouseman, Dr. McGeough made the following written comments:

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"-congenital defect rt. hand. All fingers and thumb have no phalanges and have only soft "buds" tissue. Surprisingly he can oppose the 1st metacarpal across the hand in a good grasping action. Pull wrist, elbow function.

-would definitely consider as a very suitable candidate in any clerical capacity."

In examination by Mr. Juriansz, Mr. Ward indicated that he spent not more than five minutes with Dr. McGeough, and that the only tests made of the functioning ability of his hand involved grasping a pencil, and the doctor's observation of Mr. Ward squeezing his right hand. No tests of grasping, carrying or using machinery similar to that used in the warehouse were made. The doctor did not make inquiries about Mr. Ward's previous employment, or any drawbacks that may have existed in prior employment in relation to his right hand.

Dr. McGeough, as regional medical officer for CNR, Air Canada, and VIA,

testified that he was knowledgeable of the job requirements of warehouseman with CN Express. He referred to a letter to Dr. J. G. Hunter, Regional Medical Officer, CN Clinic, dated May 9, 1979 (unsigned) which appears as Exhibit C-5, setting out the duties of an Express Warehouseman:

The duties of an Express Warehouseman that the Clinic should be aware of are:

(a) Loading and unloading traffic, the major portion of an 8 hour shift.

This is a job that requires repeated lifting, bending and carrying of traffic which in many instances are heavy or awkward to handle...

(b) When required, operate power equipment, i.e. shed tractor, forklift, and mechanical sweeper...

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- 7 Attachment

'A' to this document is entitled "General Description of Duties and Responsibilities of the Classification of Express Warehouseman", and lists the following functions

-As required, supervises (i.e. lead hand function) the proper loading and unloading of traffic, accuracy of weights, number of packages, addresses and marks.

-Coopers damaged traffic and maintains the necessary records.

-Seals cars and/or trailers and records seals.

-Observes general condition of traffic and its loading, noting exceptions and making reports on appropriate forms.

-Weighs outgoing traffic and ensures the proper weight is recorded along with the proper address.

-Verifies weights, addresses, number of packages and marks waybills and documents.

-When required, operates power equipment.

-Sorts traffic and waybills, codes carts, sorts waybills.

-Ensures the proper handling of dangerous commodities in accordance with instructions and regulations.

-Properly handles, loads and unloads traffic.

-Inputs and extracts information from KSR or CRT equipment, as required.

-Performs related work outside.

-Performs such other related duties as required.

It should be noted that, despite the fact that it looks as though a very small part of the above description involved loading and unloading, Dr. McGeough was of the opinion that roughly 80% of the warehouseman's function involved loading and unloading. (Transcript page 352). He stated in his testimony that he receives daily printouts of all injuries in his region SO that when he examines an individual for a job, his knowledge not only of the nature and requirements of the job but also of the record of accidents is brought into play, The medical department examines every new applicant. With regards the type of accidents occurring

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CN Express, Dr. McGeough testified that injuries to the back are the most frequent, with hand injuries being second most frequent. He described the major function of a warehouseman at CN Express, based on the job descriptions and visits to the London and other warehouses as follows:

A. Well, he is almost continuously involved with lifting, carrying, loading, unloading, so that we have individuals in a truck or trailer who would be moving equipment of almost any size of variable weights, various textures, various sizes and shapes all day long, really. (Transcript page 358)

Mr. Band questioned Dr. McGeough on CN's minimum acceptable physical requirement for a person in a warehouseman position. The testimony is set out as follows: (Transcript page 361)

"Q. What I would like to know is, what is the position of the company? I understand the medical department deals with the application of any principle, policy or rule in respect of fitness or unfitness for employment. What is the position of the medical department of the railroad, the CN Express, as to the minimum requirements for employment as a warehouseman in respect to hand conditions?

A. Here again we are trying to establish minimums but we are finding it a very difficult thing to do. We do find that there is agreement at the lower end; no problem. There are many grey areas where we do have problems.

Q. What I am asking is, what is the minimum that you require of an individual with respect to hand injuries?

A. For an express person?

Q. Yes.

A. I would feel that this should have what I would term a functional hand.

Q. What does that mean in practical terms?

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A. A functional hand is a hand that will be capable of opposing digits; in other words we have a thumb to a finger. That is opposition.

Q. So he must have a thumb and a finger.

A. I would call that a minimum, yes.

And further, at page 362, in attempting to establish that the minimum standard was job-related:

Q. What factors of employment are involved in the warehouseman's job that leads you to the conclusion that he must have opposing digits? What work does he have to do? First of all, is it job related?

A. Yes.

Q. Your standard is job related. All right.

A. Just the simple handling of objects as was demonstrated this morning, involves, if there is one person lifting -- if it is a box

he ordinarily will take this and use the principle of grasping in his favour, 50 that if he has his digits present he can adjust, he can fan out the fingers, the hand, the thumb and use that as the counter-balancing force, if you like, and a stabilizing force, to maintain that load.

Q. You referred to counter-balancing and stabilization as a factor in the employment. That leads you to the conclusion that he should have opposition?

A. Yes...

It should be pointed out that the minimum requirement of a 'functional hand' referred to by Dr. McGeough assumes that the other hand is intact.

(Transcript page 648). Dr. McGeough then referred to the types of grip which

can be manoeuvred by an intact hand - the power grip, precision grip, hook

grip, pincer grip, and combinations of these. He was of the opinion that all

of these grips were necessary to the warehouseman's job, in

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degrees. Of particular importance were the power grip, which can be described as the fingers flexed around an object, with counter pressure from

the thumb, which is positioned to bring either its pad or its medial border

firmly against the object held (Exhibit R-5). In reply to the question as to

the use of the power grip by a warehouseman at CN Express, Dr. McGeough testified:

(Transcript page 367)

"A. Well, in carrying or holding, even though you don't complete the circle of the power grip, you are still attempting to, and by doing so, you maintain that article into position so that you can -- if it is a heavy object or an awkward object you can fan out the fingers accordingly and manoeuvre them around corners to give it a sense of balance, a sense of coordination, and still use the basic gripping for holding the article in place.

Q. You mentioned a sense of balance and a sense of stability earlier. Are you differentiating between the two or are they both necessary?

A. I think both are necessary. If you lose balance you lose stability, naturally. Again stability enters into it. If you have a thumb and finger alone, naturally if you have a heavy object you will not be able to maintain as nice a balance with that as you would if you applied another digit and counter-balanced at another point, so that the more points of counter-balance you have, the better the stability.

Q. I suppose, doctor, if someone came to you with the apposition and only had one finger and thumb, if he had that apposition and applied for a warehouseman's job, would he meet the minimum standard or would you have to examine him individually to see whether or not he has proper functioning for the job?

A. I would examine him individually.

Q. Why is that, instead of the minimum?

A. Different people have a different function, even in a normal hand.

Q. Are you saying the finger could be a weak finger?

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A. Absolutely.

Dr. McGeough added that the power grip was used in the following tasks performed by a warehouseman at CN Express: handling a dock plate, driving a fork lift truck, and operating a two-handed dolly. (Transcript page 368). He

felt that the hook grip is used in carrying articles that may be on the floor, and that must be lifted up by the hands or some other means. The pincer and precision grips are not used to the same degree in the warehouseman's job. (Transcript page 371). The medical witnesses agreed that

Mr. Ward could perform a pinch-type grip using his first and second metacarpals, on objects probably not more than one inch in diameter; he can

grip larger objects using his palm, his chest, or another surface for support. Dr. Koyle felt that this reduced grip strength in his right hand on

larger objects would not be a disadvantage in a warehouseman's job, since he

would have normal function in his left hand. In other words, he would have

about the same capacity as a left-handed person.

At the end of his examination, Dr. McGeough concluded that Mr. Ward was unfit to perform the job of warehouseman, because he felt that there was a

substantial risk from the safety point of view. With regards the safety risk

to his 'good' hand, Dr. McGeough felt that it would be unfair to place an

employee in a position where he would put himself in danger. In his words:

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"...to me it would be wrong to place a man in a position where I know he would get hurt. As a physician, I would rather call him unfit and have him go and select something after having discussed the situation, why I feel this way, and then let him, allow him to choose something in which I know the risk is far less and the capabilities of advancement are more or equal." (Transcript page 381)

In cross-examination by Mr. Juriansz, Dr. McGeough noted that the minimum physical requirement of a 'functional hand' for a warehouseman is not a written policy, but one that has evolved through years of dealing with job applicants. This is not a policy that has been set by the management of CN, but is his individual assessment of the requirements for the particular job. However, it appears that this standard was generally applied as the absolute minimum standard in relation to hands.

Mr. Cordon Brodie, Operations Supervisor at the London terminal of CN Express, gave evidence that the average weight of parcels handled at this terminal in 1979 was 50-75 pounds, and there were no restrictions regarding the use of equipment by left-handed people. He said that people generally worked together unloading trucks in groups of six. When he interviewed Michael Ward, he didn't know of the disability; if he had known, he probably would have steered him towards clerical work. He stated that 5-10% of the items in the London terminal would be handled by more than one employee.

Mr. Brett Badington, a friend of Mr. Ward's who was employed as a summer warehouseman at the London terminal, testified that large items were usually handled by 2 or 3 people. On the basis

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his knowledge of the job and of Mr. Ward, Mr. Badington felt that Mr. Ward could perform the warehouseman's job, and probably better than himself, since Mr. Ward was physically stronger. (Transcript page 100). From his experience there, he felt most of the items handled at the London terminal were

light in
weight.

Medical evidence was also given by Mr. Ward's family doctor, Dr. Ronald Garfat. Dr. Garfat has been treating Mr. Ward for 11 years. His testimony corroborated that of the other medical witnesses to the extent that he agreed that Mr. Ward can execute a pinch-type grip with his right hand, which allows him to handle small objects; he does not have nearly as good a grasp with his right hand as with his left. Dr. Garfat had read the job description for warehouseman at CN Express, and had worked in a warehouse himself as a student; on the basis of these experiences and his knowledge of Michael Ward's physical health and ability, he felt that Mr. Ward could perform the functions required at CN Express. He felt that the fact that digits were missing did not mean that only small objects could be grasped, since Mr. Ward had good flexion in the palm and the wrist.

There was some discussion about the function of the fingers in sensitivity, and the use of this sensitivity in the warehouseman's job. Despite the fact that the palm is less sensitive than the fingers, Dr. Garfat speculated that:

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if he has been used to all his life using the part of the hand (the palm) for his sensitivity reactions, then he probably has more acutely developed awareness than you or I for sensation in that part of the hand. (Transcript page 47)

In preparation for the hearing before the Canadian Human Rights Tribunal, Mr. Ward saw Dr. James Murray, apparently at the request of CN, for a further examination of his hand. Dr. Murray is a medical doctor engaged in plastic, reconstructive and hand surgery. As well as being involved in many other professional activities, Dr. Murray is the hand consultant to the Ontario Workmen's Compensation Board. The examination with Dr. Murray took place in Toronto on March 4, 1981. It entailed - tests on an instrument called a Jamar manometer, which measures gripping strength; Dr. Murray also conducted a personal interview with Mr. Ward. According to Mr. Ward, the entire meeting took thirty-five or forty minutes. The report submitted by Dr. Murray to CN, dated May 25, 1981 appears as Exhibit R-3. Aside from certain

general comments adduced from his conversation with Mr. Ward, which was admittedly brief, the report contains the results of Dr. Murray's tests on Mr. Ward's hand, which will be set out in part:

"...My physical examination was restricted to the upper limbs. The left upper limb and hand is entirely normal in every respect. His right upper limb has normal strength and movement of the shoulder, elbow and wrist. The obvious abnormality is the absence of his thumb and all the fingers.

The absence of these digits accounts for the fact that the girth of his right forearm is an estimated forty percent less than his left. This is simply because the muscles that move and supply the bulk of power in the digits are located in the forearm and, of course, are therefore absent

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in this young man. He has a normal wrist joint with a normal range of movement. He has all the metacarpals in the hand. These are the long tubular bones that form the foundation for the palm of the hand. The thumb metacarpal in the normal hand is separated from those of the fingers and is mobile. This applied in this young man 50 that he has a small cleft between the metacarpals of the thumb and that of the index finger.

After referring to a tracing of Mr. Ward's hand, he continues:
...You will note the cleft between the thumb metacarpal and the metacarpal of his index finger. In this small cleft he can hold objects up to a maximum of one inch in diameter with reasonably good force but without the stability that can be provided when the fingers are present to hold the object against the palm.

...Grip strengths were recorded with the Jamar manometer. The instrument was set in five positions. Position 1 has the handle 2.50 centimeters apart. The distance between the handles is gradually increased so that at Position 5 they are eight centimeters apart. In the left hand, the readings reported in the five positions were - 17, 40, 41, 40 and 36 kilograms. This is a very good grip strength. In the right hand the readings were 9, 10, 13, 5 and 4 kilograms. This indicates that for small objects the grip strength in the right hand is about fifty percent of normal but in the wider positions, it is only ten percent of normal. These (figures) deal with only one factor of gripping. They completely ignore the stability of grip, In his normal left hand, he held the instrument simply with his left hand and he could hold it firmly and rotate his wrist in all directions while doing the tests. In his right hand, he had to hold the instrument with the left hand while he was performing the tests even though the test instrument is less than two pounds in weight. This decreased stability of grip in his right hand is due to three factors - there are no digits that can be used for

support,
no digits to supply power and no digits to give important three
dimensional sensory perception of the object that is being grasped.

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...He has a very useful flipper. It is useful, first of all, for
holding
objects firmly on a table while he works on it with his normal left

objects with any significant degree of stability and there are many
activities that they may be able to perform but perform less
efficiently
than a person with two normal hands.

Dr. Murray refers further to his visit to the CN Express Warehouse in
London, where he viewed the normal working operations at the terminal.
In
conclusion, he states that:

(through) sheer determination, I think it is likely that Michael Ward
would be able to perform most if not all of the activities required at
the CN warehouse. I definitely feel that he would not be able to
perform
as efficiently but, much more important, I think his handicap would
render him much more liable to injury or cause injury to one of his
fellow workers. An injury to his normal left hand would incapacitate
him
to the extent that he would be unable to look after his own personal
hygiene...It is my considered opinion that, from the point of view of
Michael Ward's safety and for the safety of his co-workers, he should
not be employed to work as a warehouseman in the CN terminal...

Dr. Murray felt that the minimum standard from a safety point of view
to
do the warehouseman 's job at CN Express was:

A thumb with a good digit to oppose to that can create a power between
those two digits with an intact palm, that they can have a palm to
provide stability. Two digits will

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provide power. The palm with two digits will give you stability.
Without
any digits you don't have any stability. (Transcript page 301)

He stated in cross-examination (at page 317) that Michael Ward would
probably
do the job for a summer without injury, "but if you took every person
in that
warehouse with Michael's deformity, could I ask you, do they think they
would
do it with the same safety?"

Mr. Ward gave evidence as to the type of experience he had had in previous employment, including his ability to operate a motorcycle with both hand throttle and brake on the right side, to be manipulated with his right hand. He is licensed to drive both motorcycle and automobile, and in fact, drives a standard car with gear shifts on the floor. He stated that he has operated much of the equipment in use in the London terminal in his prior employment. While working as a maintenance boy at Woolco, he operated a two-handed dolly and an hydraulic forklift, apparently with no difficulty.

(Transcript page 469). This was corroborated by Mr. Jacob Tarnowski, a division manager of the London Woolco store. Mr. Tarnowski is head of the hard-goods department, and testified that Mr. Ward worked under his direction as a maintenance boy. His duties included making sure that the floors were dean, that garbage was cleared away, hauling freight, unloading trucks and moving large boxes and goods downstairs to the stock rooms. This involved loading the items onto flat trucks, hauling them down the corridor to the elevator, and removing them from the elevator to the floor.

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- 18 The maintenance boy would also have to operate a manual hydraulically

operated fork lift. The type of items to be hauled and lifted ranged from boxed goods of up to 60 pounds weight, to furniture of various shapes and sizes. He had to lift these items by himself as well as with other people.

The maintenance boy was also responsible occasionally for assembling furniture. Mr. Ward was familiar with the operation of the dock plate, which

is placed between trucks and the receiving dock. Mr. Tarnowski testified that

Mr. Ward performed his duties "very satisfactorily", and that the company was pleased with his performance to the extent that he was promoted to a sales

job. (Transcript page 55). Mr. Tarnowski felt that parts of the job functions performed by Mr. Ward at Woolco were similar to a warehouseman's

job. He testified further, that, as president of a condominium corporation, he employed Mr. Ward as a painter. Mr. Ward was then employed with College

Pro Painters. The painters, including Mr. Ward, did exterior painting on the buildings with the aid of ladders; they also had to remove and replace old-fashioned storm windows. Mr. Tarnowski felt that on the basis of his personal experience as a warehouseman and his knowledge of Michael Ward, that Mr. Ward could perform the function of a warehouseman at CN Express, suffering no disadvantage because of his missing digits.

While Mr. Ward had no experience driving a motorized forklift such as is used by CN, he had driven a tractor with a mower attached for clearing heavy bush. This tractor had two right

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- 19 hand levers that are vertically parallel and that move backwards and forwards independently, operating the shovel on the front and the mower in the back. There was also a clutch, brake, gearshift and throttle. Mr. Ward was of the opinion that this tractor was "much more complicated" to drive than a motorized forklift. (Transcript page 472).

Mr. Ronald Hodgkinson, president of A & R Food Services Limited in London, explained that Mr. Ward had worked with him in the summer of 1978. His business involves operating refreshment stands, selling novelty souvenir giftware and operating amusement rides and riverboats in Springbank Park in London. While employed there, Mr. Ward operated pedal boats, and was required, with three or four other people, to lift these boats in and out of the water. He also operated a river boat, seating between 30 and 55 passengers, In the words of Mr. Hodgkinson: (Transcript page 9)

...He would have to control the boat, he would have to take it away from the wharf, he would have to take it on the river on its cruise, and then he would have to dock the boat again.

Q.: I docking one of these boats pretty tricky?

A.: Well it is pretty tricky, yes it is. Because it depends on the current of the river. Also as he is docking it, as the boat is slowed down, he would have to be able to manoeuvre himself off of the boat, and he would have to tie the boat up to the dock.

Mr. Ward was required to put the paddle boats into the water at the beginning of the season, and take them out when the season is finished. At the start of the summer season, the

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- 20 boats

are moved from the warehouse, put on a trailer, and carted down to the park. They are then physically taken off the trailer to the water (20-30 feet). There are 50 such boats that must be moved in this way; between 2 and 4 people would carry each boat. The boats weigh approximately 250 pounds each. Mr. Hodgkinson testified that he was "very satisfied" with Mr. Ward's work, that he was aware that Mr. Ward was missing the digits on his right hand, and that this was not an adverse factor in the performance of his duties. (Transcript page p-10).

While employed in the summer of 1979 at the London Free Press, Mr. Ward regularly loaded boxes about a foot square onto a flat truck, each box weighing 10 or 15 pounds. There was no evidence of any injuries occurring to Mr. Ward or to his fellow employees on any of these jobs as a result of his disability; in fact, his supervisors at Woolco and A & R Foods were both extremely satisfied with his work.

Mr. Ward also testified as to his involvement with sports, being active on the senior football team in high school and having taken part in parachuting. He testified as to helping friends move furniture, which involved carrying, among other things, a piano up and down a staircase with another person. It is clear that Mr. Ward is an athletic and strong young man, who does not appear to be afraid of taking risks. Further, he does not appear to have allowed his birth defect to have held him

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- 21 back

in any noticeable way.

Michael Ward was also tested by Dr. Leon F. Koyl, a medical doctor who acts, among other things, as a consultant to DeHavilland Aircraft of Canada. He has had wide experience in job evaluation and has undertaken a job study at DeHavilland to establish a minimum acceptable profile of competence for

each job. He also acts as consultant to Impco Health Services Limited, a subsidiary of Imperial Life. He has performed job evaluations in many areas of employment and has acted in the past as an expert witness on the subject of job evaluation techniques.

The particular system of job evaluation which he espouses is called GULHEMP. The characteristics measured by this test are general physique ("G"), upper extremities ("U"), lower extremities ("L"), hearing ("H"), visual stimuli ("E"), intelligence ("M"), and personality ("P"). People are evaluated on each of these factors on a scale ranging from one to five. He described level 1 as being 'Superman', level 2 being average, 3 and 4 being below average, and 5 being a person who may be recovering from an injury. Dr. Koysl testified that a job evaluation had been done of the warehouse function at DeHavilland, using the GULHEMP system. The minimum acceptable levels for warehouseman at DeHavilland were determined to be: general physique - 2; upper extremities - 3; lower extremities - hearing - 4; eyesight - 3; intelligence - 4; and personality - 4.

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- 22 Thus, according to Dr. Koysl's evaluation of the warehouseman's function at DeHavilland, the minimum standard for upper extremities (which includes arms,

hands and fingers) would be below normal, and Mr. Ward would meet this standard. (Transcript page 240). While this testing was directly relevant only to the warehouse function at DeHavilland, Dr. Koysl felt that theirs' was a wider type of warehousing, shipping, and receiving, than at an express terminal, since at DeHavilland it is a mixture of raw and packaged goods while at CN Express, all of the goods are packaged. Dr. Koysl did study the job description for CN warehouseman, and his expert opinion was that Mr. Ward could do the job, without any danger to himself or to other employees.

His examination of Mr. Ward was introduced into evidence as Exhibit C-9, in the form of a letter to Mr. Juriansz. The report states, in part, as follows:

...He has congenital absence of the phalanges of his right hand with well developed calluses and pads over all five metacarpal heads. He can oppose the first to the fifth metacarpal powerfully enough that I cannot withdraw my finger from the opposed metacarpal. The actual power of his grip with his right hand is 10 kg. compared to 50 kg. with his intact left hand. The difference is entirely leverage with his fingers. I was interested to note that the fine movements of his right hand are also very good. He can button and unbutton a two-button cuff on his left sleeve with his right hand without difficulty.

In summary, therefore, I would say that Mr. Ward is a very healthy, husky young man. He is physically fit and the type who would tolerate eight hours of bending, lifting and twisting better than any other type of young person because of his experience in playing football without damaging himself. He has

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a congenital absence of the digits of his right hand, but this could not really be classed as a disability in that he can use his right hand for fine movements and also for grasping and lifting and holding... I can find nothing in the job description nor in the internal memo to the medical clinic that would suggest that this young man is not able to do the job of Express Warehouseman...

It should be noted that Dr. Koysl's report and testimony did not address the question of stability, a factor which Dr. Murray felt would be lacking in

Mr. Ward because of the absence of digits. There is also some conflict between Dr. Koysl's and Dr. Murray's manometer readings of the strength in Mr.

Ward's right hand, although this might be attributable to various factors.

Both doctors, however, agree that his strength is much more limited in his right than in his left hand.

Dr. Koysl testified that Mr. Ward would have been hired as a warehouseman at DeHavilland, despite his disability (Transcript page 246):

Q.: So if you had examined Michael at DeHavilland's warehouse, what would be your medical opinion of his suitability for employment?

A.: I would recommend that they hire him, based on the fact that he has a fixed disability, which he has adjusted to and has therefore almost no disability, and would allow him to do the job completely without restrictions...

In response to a question from the Tribunal, Dr. Koysl stated that:

...Part of the pre-employment examination is to take him (i.e. an applicant such as Mr. Ward) out on the floor with supervision and see if he can do it with care. And if he can do it, then that gives useful data

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to work on. If he can't do it at first, then we have to find out whether that is because he lacks some knowledge or whether he lacks the ability.

Madam Chairman: So you would actually test him on the floor first?

The Witness: Test him on the floor, yes. (Transcript page 244)

The Respondent brought forward witnesses in an attempt to show that the position of warehouseman was a hazardous one at CN Express, and that the incidence of hand injuries there was higher than in other places of employment. Mr. John Zadowsky is Statistical Supervisor, Accident Prevention, for CN Rail at - the Montreal headquarters. His job entails receiving statistics on accidents from all the regions for CN Rail and CN Express, and compiling these statistics for certain specific purposes. For the purposes of the Tribunal, Mr. Zadowsky brought forward statistics on accident ratios in CN Express for 1979, 1980 and to July 1981.

I did not find Mr. Zadowsky's statistics, presented in Exhibits R-7 and R-8, very helpful. First of all, it should be pointed out that the definition of 'disabling' used by Mr. Zadowsky is quite different from the meaning of 'disabled' under the Act. For Mr. Zadowsky's purposes, a 'disabling' injury is one that causes an employee to miss a minimum of one day following the accident. (Transcript page 426). His figures did not compare the ratios of CN Express with other industries or with general industry, but only with CN Rail. The only conclusion to

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drawn is that CN Express is more or less hazardous generally, or in relation to hand injuries, than CN Rail. This may not necessarily be a helpful or even relevant comparison.

Dr. James Fisher, an industrial organization psychologist felt that the conclusion could be drawn from these statistics that:

...when you look at the original data, the accident rates per million manhours, you find that the accident rates for hand injuries at CN Express is extremely high and exceeds the accident rate at CN Rail by the effect of three to one. So in fact CN Express is a much more hazardous place to work from the point of view of hand injuries. (Transcript page 623)

He stated that the general accident rate for CN Express in a given year was

55.59 accidents per million manhours, whereas in the mining industry generally in Ontario the rate was 43.2; the rate for the wholesale and retail

trade is 14.50; finance, insurance and real estate 4. His conclusion was that

in terms of overall accident rates, CN Express is a very hazardous operation,

particularly in respect to hand injuries (Page 630), even though he agreed

that proportionally, there are more injuries of types other than hand

injuries at CN Express (page 636). For all industries in the private sector, the accident rate per million manhours is 19, 22% of all injuries being hand

injuries. However, in CN Express, the percentage of disabling injuries that

are hand injuries is 12.21%. (Page 638).

Dr. Koyle felt that the accident rate for upper extremities at CN Express is

below the average of what the Workman's Compensation

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sees. (Transcript page 247).

The Respondent brought forward evidence from Dr. Peter Moon, also an industrial psychologist, who performed a job evaluation for CN Express, and

also attended at the warehouse in London. The type of evaluation performed by

Dr. Moon involved an employee and also a supervisor at the work site, who

along with the job analyst make ratings on a great number of activities and

demands on the particular job. The analysis is done with a questionnaire

which contains many separate items of information; the responses are analyzed

electronically in Utah and fed back into a form which can then be evaluated.

This particular system of job - - analysis is called the 'PAQ' method, short

for Position Analysis Questionnaire. The analysts actually observe the work

being done, and rate the job on the basis of the number of activities performed and the physical and other demands of the job. The aim is not

to see how well the employee does the job, but merely to break down the components of the job into particular functions. Mr. Ward himself was not observed; in fact Dr. Moon had never met Mr. Ward.

The results of the PAQ questionnaire, after being analysed by the computer, give aptitude ratings required for each specific job function. Dr. Moon stated that the two items given the highest rating were - interpreting what is sensed, i.e. being aware of environmental conditions, and work output, i.e. controlling machines and processes using miscellaneous equipment and

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- 27 performing, handling, and related activities, and working in a hazardous job situation.

Aptitudes required for certain functions are expressed in percentile scores, for example, "static strength", meaning body strength, including muscles, arms, hands and fingers is given a 90% rating. (Transcript page 575).

When asked by Mr. Band whether he felt that stability of grasp was an important part of the work of warehouseman, based on his analysis of the job function and the PAQ results, he replied (Transcript page 576):

A.: Well, this is more my own observation, but if the man is steadying down the 100 pound television set from the say eight feet, then steadiness of grip is certainly important.

He felt that steadiness of grip would be most important in terms of handling and moving heavy items, and also with large or awkward items.

Mr. Band attempted to have Dr. Moon confirm that CN's minimum standard was job-related: (Transcript page 578).

Q.: Keeping in mind what you saw, and your own evidence and expertise and background, and keeping in mind the nature of the work that you described, holding and carrying and lifting, what is your opinion as to the bona fides of that requirement as it related to the job, or does it relate to the job, first of all?

A.: I believe it relates to the job.

Q.: Yes?

A.: That I was not privileged to hear that testimony, but I would think in terms of

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my own experience that would be absolute minimal and in applying a standard like that, they may be thinking in terms of optimal conditions for the person to perform.

And further, on the question of whether two fully developed hands were necessary for the job:

Q.: In your opinion, and based on your experience and the tests and procedures you followed, would there be a need to have certain functions in your hand -- both hands, to carry those parcels and place them?

A.: In simple terms that kind of operation would be hazardous for anyone.

Another attribute, besides stability, which was given a high percentile rating in the PAQ was hand-eye control, and hand-eye-foot coordination. He

felt, for example, that working with parcels from a height would require

hand-eye coordination, as well as strength. He felt that the grasp function

was important for handling, loading, unloading, carrying and positioning, and

also for sending tactile information to the brain. Both the 'power' grip and

the 'hook' grip were important to the job. Mr. Band asked: (Transcript page 583)

Q.: Is that a power grip for both hands or just one that is necessary? Can you have it in both or one for type of work you have seen?

A.: I think for ease of operating, and again safety, that ideally one should have the power grip in both hands, particularly with the heavier, difficult-shaped goods.

Q.: Well, what's the problem with -- you refer to stability. If you don't have the power grip in one hand or

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have it to a limited extent, is there a problem or could there be a problem of safety arise?

A.: I believe there could.

He also believed that the risk of injury would be increased where a large item was being carried by two people and one person was missing digits

on one
hand.

Dr. James Fisher, as a 'human factors engineer' explained how machines have evolved to fill the needs of the average user, i.e. to be gripped by the fingers and hands. Thus, he felt that the minimum standard of CN Express was reasonable in that it recognized the symmetry of the hands and the fact that the machines and vehicles being used were designed with this in mind:

So in terms of the requirement of having at least one finger and one thumb, my personal opinion, my professional opinion here is that that is a minimum requirement and even with one finger and one thumb, there still may be times when an individual, no matter how motivated or competent, could not fully compensate for the basic symmetry in his two hands. So that there could be a stability problem which in turn could lead to a loss of efficiency and, worse still, perhaps to a hazard. (Transcript page 632).

Discrimination under sections 7 and 10

The first issue to be decided is whether the complainant has proved a prima facie case of discrimination under sections 7 and 10 of the Canadian Human Rights Act. The onus is on the complainant to prove discrimination, and only when this issue is answered in the affirmative do we deal with the question of

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the respondent was justified in discriminating because of a bona fide occupational requirement under section 14. Once a prima facie case has been

proved by the complainant, the burden of proof then shifts to the respondent.

The Act gives the respondent the opportunity to show that the policy or practice which resulted in the discrimination was justified in that it was

job-related and based on the "practical reality of the workaday world and of life". 1

The rights of physically handicapped people are protected by the Canadian Human Rights Act only in relation to employment. For example, unfair treatment given to the handicapped in relation to the provision of goods, services, facilities or accommodation customarily given to the general public (section 5), or the provision of commercial premises or residential accommodation (section 6) are not protected. The specific extension of the right to work in a discrimination-free environment is, I believe, a

recognition on the part of the legislators of Canada, that disabled people as a group are able and willing to do many jobs which perhaps in the past they have been excluded from performing, because of discriminatory attitudes and employment practices of many employers and the general public. The protection now given under the Canadian Human Rights Act is a recognition that assumptions previously made about handicapped people, relating to their ability or lack of ability to perform certain jobs, will no longer be permitted where there is no proof that the handicapped

1. Cosgrove v. The Corporation for the City of North Bay, 21 O.R. (2d) 607 (Ont. C.A.)

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- 31 person's ability to perform that particular job is impaired. The movement in the direction of accomodating the special needs of the handicapped in relation to employment is certainly a good one - not only to the handicapped themselves who are now doing jobs from which they were excluded in the past, but for the general public, who by seeing more disabled people in the workplace, are reminded that the disabled are now coming to occupy their proper place in the economic life of the country.

The added visibility given to handicapped people as a result of the provisions of the Canadian Human Rights Act (and similar provincial statutes) as well as the publicity surrounding 1981 as the 'Year of the Disabled' have been important factors in removing some of the barriers which have prevented the handicapped from occupying their rightful place in the workforce.

However, the Canadian Human Rights Act does not direct that employers must hire all handicapped people who apply for particular jobs. There are certainly some jobs which the handicapped cannot perform, because of the nature of the handicap, and the particular requirements of the job. For example, if the job could be categorized as a hazardous one, and if there were some connection between the applicant's handicap and the risk of injury, the employer might be able to establish that a bona fide occupational requirement which sets up a certain minimum in terms of physical ability is

justified. However, the point must be made that the very fact that the handicapped are now

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rights to protest discrimination in relation to employment under the Canadian Human Rights Act provides a very strong indication that assumptions

made by employers about what they think are the abilities of the handicapped

are no longer sufficient to counter a charge of discrimination under the Act.

The issue of what constitutes an effective bona fide occupational requirement

in relation to the job in this particular case will be discussed below.

As the rights given to the handicapped under the Act are fairly recent and rather restrictive in terms of the general coverage of the Act, we must

deal with the interpretation to be given to these rights. The Act is a remedial one, and the Interpretation Act (R.S.1970, 1-23, s. 11) declares

that such statutes "shall be given such fair, large and liberal construction

and interpretation as best ensures the attainment of its objects". The purpose of the Act is set out in section 2(a);

"The purpose of this Act is to extend the present laws in Canada to give

effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory ...employment practices based on physical handicap; ..."

In light of the stated purpose of the Act, and the direction given in the

Interpretation Act, it is clear that the intention

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Parliament is that the rights of the handicapped in relation to employment

should be interpreted broadly.

It was suggested by counsel for the respondent that section 14(a) does not constitute a true exception to the Act, but merely states a situation

where conduct which otherwise would be considered to be discriminatory is

judged not to be so. (Transcript page 752). He suggests that since it is not an exception, it should be given the "fair, large and liberal" interpretation normally given to statutes. In general, exceptions in statutes are narrowly construed. I do not agree with his view of section 14. While the marginal note in the Act refers to section 14 as an 'exception', it is clear that this is not a part of the Act, although it may serve as a guide to the content of the Act and as a visual aid to comprehension of the statute. (Driedger, The Construction of Statutes, 1974, Butterworths, page 109) Statutes are to be read as a whole, and in doing so, and in reading decisions which have dealt with section 14, I am content to give section 14 the narrow interpretation normally given to statutory exceptions.

In dealing with the rights of the handicapped, the issue of whether the employer intended to discriminate is relevant. As was pointed out by counsel for the Respondent, CN has many employees and many handicapped employees, and is making a real effort to accomodate handicapped people in jobs within their jurisdiction. However, the facts in this case indicate that

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- 34 the employer, by setting a minimum physical standard for the job of warehouseman, has effectively precluded a certain type of handicapped employee from performing this job. The employer in this case contends, in effect, that the right of a handicapped applicant to perform a certain job is not absolute, and that the employer has a responsibility to protect the handicapped applicant from further injury, and to protect other employees and the public from injuries that might result from the handicapped applicant's job performance. It has been urged that where the limited ability of an employee places the public or other employees in greater jeopardy, the burden or proof on the employer to establish a bona fide occupational requirement will be lighter.

It seems quite clear that CN Express in this case did not intend to discriminate against Mr. Ward. It is also clear from several cases dealing with human rights Acts that an intention to discriminate is not absolutely necessary in proving that 'discrimination' within the meaning of the Act took place. (Re Attorney General for Alberta and Gares et al (1976), 67

D.L.R. 635
(Alta. S.C.), Foster v. B. C. Forest Products Ltd. 1980 2 W.W.R. 289
(B.C.S.C.), among others). The fact that the employer's practices
resulted in
discrimination against an employee or class of employees is the
relevant
factor. Thus, even though in this case CN was concerned primarily with
the
safety factor, it could still be interpreted as discrimination if the
practice had the result of precluding Mr. Ward, a handicapped employee,
from
employment in that particular job, unless

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- 35 there
was a section 14 exception.

It is important in cases such as these to try to balance the rights of
the handicapped with the rights and obligations of employers. There are
many
rights which are not absolute. Dean Charles in Black United Front v.
Bramhill
(N.S. Board of Inquiry, 2 C.H.R.R. D 249) stated that the respondent's
"right" to freedom of speech is not absolute; where this "right"
infringes on
another's right to be free from discrimination based on a prohibited
ground
under a Human Rights Act, the rights to freedom of speech will be
overridden.
Similarly, a visually impaired person would not have an absolute right
to be
hired as, for example, an airline pilot. The actual requirements of the
job
must be looked at, 50 that the rights of the applicant and the needs of
the
employer for that particular job are balanced.

The obligation of the employer to provide a safe employment environment
for his or her workers is an important one, and one which should be
taken
seriously by employers. The current trend towards providing higher
occupational health and safety standards for employees is entirely
necessary.
However, the Canadian Human Rights Act does come into play where
minimum
physical standards set for employees in certain jobs have the effect of
excluding employees with handicaps, even though the intention behind
applying
such standards is the very laudable one of improving safety in the
workplace.
The required standard must be directly related to the needs of the job,
and
there

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be some evidence that the handicapped applicant, by failing to meet the minimum physical requirement, is therefore unable to perform the job as well as a non-handicapped employee. Anything less would have the result of allowing employers to assume that an employee, by virtue of having a handicap, is unable to do a particular job, perhaps based on nothing other than the employer's prejudiced or outdated attitudes as to what the handicapped can or cannot do. For example, previous human rights cases have held that minimum height and weight requirements, which have the effect of excluding virtually all women from a job, are discriminatory on the basis of sex. The employer's allegations that the height and weight restriction were a bona fide occupational requirement were not upheld, inter alia, since there was no correlation between the minimum standards and the functions of the job. (Colfer v. Ottawa Board of Commissioners of Police, Ontario Board of Inquiry, 1979)

The complainant has attempted to prove a prima facie case of discrimination on the basis of physical handicap under sections 7 and 10 of the Act, which have been previously set out. The "prohibited ground of discrimination" referred to in section 7 brings into play section 3, which includes physical handicap in relation to employment as a prohibited ground. It is clear that Mr. Ward's congenital hand defect fits within the definition of physical handicap.

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Despite the fact that there has been no intention on the part of the employer to discriminate against Mr. Ward, I find that a prima facie case of discrimination has been made out, in that the policy in place at CN requiring as a minimum standard that applicants for the job of warehouseman possess one intact hand and at least 2 digits on the other hand, i.e. a 'functional

hand', has had the result of precluding Mr. Ward, an otherwise qualified applicant, from employment on the basis of his physical handicap.

Bona fide occupational requirement - Section 14

A prima facie case of discrimination having been proved, the burden now shifts to the employer to establish that the discriminatory practice was

"based on a bona fide occupational requirement". The questions of what constitutes a bona fide occupational requirement, and the extent of the burden of proof necessary to establish such a requirement, are both of great importance.

Legal dictionaries generally agree that bona fide means "honestly" and "in good faith", In the present context, that definition by itself is not particularly useful. Stroud's Judicial Dictionary (3rd ed. 1952) offers a comprehensive definition, and it would be correct to say that a bona fide belief, for example, must not only be honest and held in good faith, but should be true, real, genuine and substantial.

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The much-applied test of a "bona fide occupational requirement" is contained in *Cosgrove v. The Corporation for the City of North Bay (Ontario Board of Inquiry, 1976, 21 O.R. (2d) 607 (Ont. C.A.)*.

"..."Bona fide" is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularly define the expression in one or several of the following terms viz., honestly, in good faith, sincere, without fraud or deceit, unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable.

...However, that cannot be the end of the matter or the sole meaning to be attributed to "Bona fide", for otherwise standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of the job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However, if it requires such a limitation as a condition of employment or continuing employment, I would have no doubt that such limitation would not qualify as a bona fide occupational qualification or requirement under the exemption created by sec. 4(6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason "based on the practical reality of the work a day world and of life".

The last phrase - "based on the practical reality of the work a day world and of life" - has become the test of a bona fide occupational requirement. According to this test, the requirement

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must have an objective basis in reality or fact. It is not enough for an employer to assume that, simply because an applicant or employee is handicapped, he or she cannot do the job.

In the context of this case, a bona fide occupational requirement must be an honest, genuine requirement, one that is real and substantial. It is not the employer's belief as to the job requirement that must be bona fide, but the job requirement itself. Thus, the employer's subjective analysis of the job, his or her belief as to what kind of person the job requires, is not enough. There must be an objective analysis of the job, and of the requirements necessary to get the job done. Using the analogy in the Cosgrove case, it is not enough that the airline, subjectively, honestly believes that its stewardesses be under 25. Unless there is some relation between the requirement and the actual duties of the job, it will not be considered a valid exception.

To determine the true meaning of section 14, we must resort to the canons of statutory interpretation, In the context of the Canadian Human Rights Act, the criterion of statutory interpretation as set out by Driedger in The Construction of Statutes is accepted:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of Parliament.

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- 40 To interpret section 14 without demanding an objective basis for that requirement would be contrary to the Act's overall intent, set out in section 2, which is to protect people from certain types of discrimination.

The onus is on the employer to establish to the Tribunal that the occupational requirement which precludes the applicant from employment

is a bona fide requirement. It is not a question of meeting the Tribunal's reasonable standards but of showing that, in the context of the issue before the Tribunal, the requirements set out are reasonable requirements, that they are objectively justifiable.

There have been a fair number of cases dealing with minimum physical standards for employment, and whether they constitute valid occupational requirements. In *Shack v. London Driv-Ur-Self* (Ontario Board of Inquiry, 1974) the complainant was denied employment because of her sex. The job involved driving and preparing heavy trucks for rental. It was assumed that women would be incapable of performing such tasks. However, the complainant had experience in such employment, and in fact, demonstrated this ability to the Board. It was found that the respondent was not entitled to the exception of a bona fide occupational requirement.

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In the case of *Hawkes v. Brown's Ornamental Iron Works* (Ontario Board of Inquiry, 1977), it was determined that the respondent had assumed that Mrs.

Hawkes could not perform the duties of the job because of her age (51), whereas in fact she had undertaken training as a welder to obtain a marketable skill. On the matter of a bona fide occupational requirement, the

Board stated:

...To make this provision (i.e. a bona fide occupational requirement) applicable, it is necessary for a respondent to establish a job classification and description, supported by substantial grounds for a bona fide belief in the validity of the qualification. There is now a significant number of decisions in this matter, and it seems clearly established that the subsection may only be used to justify discrimination based on age when the respondent has satisfied the Board that there are sound reasons for the qualifications.

This decision is based on the Ontario Act, whose relevant provision is similar to that found in the Canadian Human Rights Act. The reference to age could certainly be extended to other types of discrimination prohibited by the Act, such as discrimination based on physical handicap.

There have been many cases which say that the burden of proof on the employer to justify an employment requirement will be considerably less

where
it can be shown that there are safety implications for the employee or
for
his/her fellow employees or the general public. However, even though
the
burden of proof is

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where safety is a factor or where the job is a hazardous one, the
bona fide occupational requirement must still be strictly contrued.

The Cosgrove case dealt with a bona fide occupational requirement that
Fire Prevention Officers retire at age sixty. The Board relied heavily
on the
evidence of four witnesses, and found as a fact that retirement at age
sixty,
because of the hazardous nature of the job and the need for stamina and
quick
responses, was a bona fide occupational requirement. During the course
of the
decision, the test for "bona fide occupational requirement" was set
down. The
Divisional Court refused to overturn the decision on the basis that it
was a
finding of fact that retirement at age sixty for that particular job
was a
"bona fide occupational requirement". The Court of Appeal dismissed the
application for leave to appeal, stating that they agreed with the test
of
bona fides as stated by the Board of Inquiry.

A case with similar facts reached a different conclusion. (Hall and
Gray
v. I.A.F.P. and Etobicoke Fire Dept., (Ontario Board of Inquiry, 1977);
(1980), 26 O.R. (2d) 308, (aff'd at Ontario Court of Appeal, leave to
appeal
granted to Supreme Court of Canada)). In this case the Board of Inquiry
found
that there had been insufficient evidence to justify the requirement
that
firefighters retire at age sixty. The Board stated (at page 314 of the
Divisional Court decision):

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... The meaning of "bona fide" that seems most consistent with this
objective would be "real" or "genuine" i.e. that there is a sound
reason
for imposing an age limitation, and the onus of establishing this
justification for discrimination is on the person alleging it to be
justified. The conclusion of the Board is that the evidence falls short
of establishing in this case that it is a bona fide occupational
requirement of firefighters that they be no more than sixty years of

age.

This decision was overturned by the Ontario Divisional Court, who felt that to require evidence of the bona fides of a requirement would go beyond

the test of bona fides stated in Cosgrove. A strong dissent at the Divisional

Court level by Cory, J. states that a careful review of the Board's reasons

indicates that compelling scientific or statistical data was not required by

the Board, and that a test similar to that set out in Cosgrove was followed.

He states, on page 322, that

...the Board's conclusion makes it quite clear that in this case the evidence fell short of establishing that the age requirement was a bona fide occupational requirement.

The question of the extent of evidence required to render an occupational requirement bona fide is now before the Supreme Court of Canada.

The recent case of Bhinder v. CN Railways (Canadian Human Rights Tribunal, September 1981) provides a useful summary of cases in the federal

and provincial jurisdictions dealing with occupational requirements. It summarizes the cases by saying that they generally turn on the degree of

potential hazard involved in the job, and the possibility of assessing candidates

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an alternative basis, i.e. their actual ability rather than a shorthand presumption based on the particular characteristic (at page 88). The weight

of the burden on employers to justify an otherwise discriminatory employment

qualification will vary according to the degree of danger involved and the

necessity of the requirement.

The Bhinder case decided that the respondent had engaged in a discriminatory practice by requiring that the complainant comply with its

policy that all persons in its Toronto yard wear hard hats, thereby violating

Mr. Bhinder's right to comply with his religious beliefs which forbid the

wearing of any head covering but a turban. On the question of whether the

employer is justified in setting standards to prevent an employee from injuring himself, the Tribunal states (at page 93-4):

... even where there may be some increase in risk of harm to an employee if the occupational requirement is not met, to the greatest extent possible, the decision whether or not to bear those risks should be left with the individual, when the requirement discriminates against that person. This is consistent with the general mandate of human rights legislation; that decisions affecting individuals should be made on an individual basis and not according to characteristics which tend to exclude persons en masse.

Although the Bhinder case can be distinguished from the instant case on the facts, I would reach the same conclusion here, where the discrimination is based on handicap rather than religion. The Bhinder case did not involve the situation where

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the safety of other employees is also in issue. It should be noted that at common law, an employer had a duty to take reasonable care for the safety of his or her employees. One facet of this duty was to provide a competent staff of employees; however, the safety of the employees working conditions would not have to be warranted by the employer, as the exercise of due care and skill was sufficient. These common law rights and duties have been largely abolished by the provincial Workers' Compensation Acts, so that the Ontario Act provides that the provisions of the Act are in lieu of all rights of action that may have existed against the employer.

It can be concluded easily from the evidence that Mr. Ward was capable of doing the job of warehouseman at CN Express. The medical witnesses did not dispute that Mr. Ward, because of his physical strength and adaptation to his disability, could do this type of heavy work. However, can we also conclude that, since Mr. Ward is missing digits on his right hand, and since hand injuries are the second most common type of injury at CN Express, that Mr. Ward would present a danger to his fellow employees, despite the fact that he has worked in similar employment without incident, that he has been compensating for his disability since birth, and that he is perhaps stronger than some non-handicapped employees? Evidence was presented that the

major
cause of accidents is inattention; surely all employees are potential
safety
risks to their fellow employees,

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the extent that they are subject to bouts of inattention. Anyone can
have
an accident, and just because a person with a disability has an
accident,
doesn't necessarily mean that the disability played a part. It is, for
example, conceivable that these accidents could be caused by employees
who
are nervous or jumpy, because of drinking too much coffee or recovering
from
a hangover. If the statistics indicate that there are many accidents at
the
work site, the conclusion could be reached not that the job is
particularly
hazardous, but rather that training in safety procedures may be
inadequate.

Mr. Brodie, supervisor at the London terminal, testified that about
5-10% of the work involved 2 or more people working in tandem. In fact,
Mr.

Ward has worked in this way, and has never been involved in any type of
accident. Nor has he caused himself any injury in a work situation. In
any
case, it appears that such a small part of the job involves working in
tandem
that to deny a handicapped person a job because of this would be
unjustified.

Indeed, there was evidence that there are functions that some employees
do
not perform for one reason or another, in which case that particular
function
is done by another employee.

The burden is on the employer to show that its physical requirement is
rationally based and is not founded on unwarranted assumptions or
stereotypes, i.e. that "it is supported in fact and reason". I have
concluded

that the employer assumed that applicants lacking digits on a hand
would be
unable to perform the job, and that this policy does not take into
account
the exceptional individual, such as Michael Ward, who has demonstrated
that
he can do the job despite his disability. Based on the

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evidence, I am unable to conclude that if Mr. Ward were given the job at CN Express, that he would prove a safety risk to his fellow employees.

It may be true that many people missing digits on one hand would be unable to do this job. But Michael Ward has demonstrated that he has the skills (from his previous employment and experience), the motivation, the physical strength, and the ability in his two hands, to do what these other people cannot. Minimum physical standards may be a good guideline for employers. However, persons who do not reach the minimum should not be excluded absolutely. Dr. McGeough testified that an applicant who met the minimum requirement, i.e. who had two digits as well as an intact hand, would be tested individually, since different people have different hand functions, even in a normal hand, and such a person, even though meeting the minimum requirement, might be unable to perform the duties of the job. Similarly, a person who fails to meet the minimum should be given the opportunity to show that he too can do the job, despite the handicap.

Counsel for the respondent has contended that:
...An occupational requirement sets a standard of general application. Evidence that individual persons may be able to perform the job would only be relevant if large numbers are excluded from performing the job. Or if individual testing is practicable. (Transcript page 711)

I feel that evidence that a particular person can do a job is
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- 48 relevant
in considering a standard of general application, and that it should not be necessary to find that large numbers are excluded by the requirement.
While there is no test which can measure an employee for safety it cannot be said that individual testing is impractical. In fact, all applicants for employment are required to have a medical examination performed by the CN doctor. Some applicants have to travel a distance to do this, and suffer some inconvenience. There are many jobs which require the employee to endure a probationary period, so that a decision can be made as to whether they are right for the job. Surely this is a form of individual testing. I am not suggesting that all applicants would be entitled to undergo a probationary period. For example, the job requires that the incumbent be physically

fit;
a person who was obviously unfit would be automatically excluded.
However, a
person such as Mr. Ward, who has had experience with this type of work,
who
had previous employers who could testify as to his ability, who had
above-average physical strength, who had no record of accidents either
personal or work-related and who, because of his adaptation to the
fixed
disability, suffers little disadvantage because of it, should be given
an
opportunity to show that the employers fears are unfounded, and not
based in
reality and fact.

In conclusion, I find that the evidence has failed to show that CN
Express' physical requirement represents a "bona fide occupational
requirement" to justify discriminating against Mr. Ward on the basis of
physical handicap.

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Counsel for the Complainant and the Commission has strongly urged the

Tribunal that anatomical standards constitute an irrebutable
presumption that
the handicapped cannot meet, and that section 14 should be read as
prohibiting irrebutable presumptions. This proposition is garnered from
United States Law. I do not think that anatomical standards are
necessarily
a violation of the bona fide rule. If the standards are related to the
skills
necessary to do the particular job, they may well be justifiable. In
any
case, I do not feel that, within the context of the present case, the
Tribunal should extend the interpretation of section 14 to cover the
prohibition of irrebutable presumptions.

Nor is it necessary in this case to include in the definition of
discrimination the failure to make accomodation for handicapped
employees.

Mr. Juriansz contended that, if the Tribunal were to find that Mr. Ward
could
not perform some of the duties of the job, i.e. operate the motorized
forklift and the dock plate, the Tribunal should rule that where the
duties
are peripheral to the job and where the handicapped applicant can do
the
majority of the. duties, accomodation should be made by the employer.
(Transcript. page 667). This concept is again based on United States
law, and
by analogy from cases of discrimination based on religion. It is not
necessary to deal with this question in the instant case, having found
that
Mr. Ward would be able to operate these pieces of equipment.

Having found a violation of the Act, the question of damages

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- 50 arises.

The Complainant has asked for an amount representing the wages lost in the summer of 1979, and an amount compensating for suffering of hurt feelings or self-respect.

The power to award damages for lost wages is found in section 41(2)(c) of the Act. The amount claimed is what Mr. Ward would have earned in the

summer of 1979 had he been employed at the London terminal of CN Express.

Based on the period June 2 to August 31, the amount comes to \$3,440.00, which

represents 13 weeks at a salary of \$264.65 per week. This amount is mitigated

by the fact that Mr. Ward in that summer earned \$1,384.00 at the London Free

Press and \$610 at Woolco. The total claim for lost wages is \$1,446.00.

I find

this amount justified.

The Tribunal has power to award a sum in relation to hurt feelings and injury to feelings of self-respect under section 41(3)(b) which states:

In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

...

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

It is not necessary to find that the discrimination was wilful to make an award under this subsection. The Act gives no direction on what is to be considered in making the award, or the extent of the hurt feelings that must be suffered in order

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- 51 to justify an award.

Both Mr. Ward and his mother, Mrs. Joan Ward, gave testimony as to the effect of the discrimination. This was apparently the first time that he had been referred to as being handicapped, and it was a shock. Mrs. Ward, at page

194, describes what happened after he heard the result of the Toronto medical:

I remember very vividly when Mike went to Toronto, because he called and said that he was back, and I said to him "did you get the job" and he said "I'll talk to you later", and I drove down to get him and I said, well "how did it go?" and he said "they told me I'm handicapped". And I said "Ah, come on", and he said, "no, that what they said", and he was pretty mad.

... When he came home he announced to me that he was going to strip the paint or varnish off an old desk chair that is about a hundred years old, and I said "you're not touching that chair, fellow", but I said "there's an old table downstairs, go and get it and go take your frustration out on it", and that's exactly what he did, was went out in the backyard, and put on the stripper and worked at this table I suppose to relieve him of the frustration.

...I think his attitude was very good to his hand. I think he knew he had it, he didn't have to hide it, he is quite capable of doing a lot of things with both the hands he does have.

...And I think that this was a real kick in the behind for him to go down there and have somebody say to him you are handicapped. And I think that that is the thing that stuck in his mind, you know, To have somebody say that to you.

Q.: You began to tell us how the incident has affected him. You mentioned that he wasn't conscious of his hand...

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A.: I was saying that I think he was very natural with his hand, and I think like one of his friends said to me, he has become more self-conscious. As a matter of fact a cousin that he was out visiting in Banff, before she went away, apparently spoke to her mother and dad, and she said I don't think Joan and Bob have any realization how this thing has affected Mike...

Mr. Ward in his testimony of page 453 stated that "I don't think I've ever been that tom up about something, really. It really bothered me". There are further indications at pages 488 and 491 of how this incident affected Mr. Ward. Both Michael Ward and Mrs. Jean Ward were honest and straightforward witnesses, and I find their testimony on this matter credible.

There are few decisions from Tribunals appointed under the Act dealing with damages for hurt feelings. In Phalen v. The Solicitor General of Canada 2 C.H.R.R. D/433 an amount of \$2500 for suffering to feelings and self-respect was awarded, based on the complainants feeling of anger and embarrassment as a result of the discriminatory incident. Phalen relied on the Review Tribunal decision in Foreman et al v. VIA Rail, 1 C.H.R.R. D/233

which stated that:

"...the compensation referred to in Section 41(3) should, like that under Section 41(2), be available as a matter of course where the circumstances to which it refers exist, unless it can be shown that there are good reasons for denying such relief. It is true that Parliament saw fit to deal with this type of compensation in a separate section... This does not indicate to us, however, that it is an extraordinary remedy calling for unusual circumstances to justify its award."