COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT A. CULVER, :
Complainant
:
v. DOCKET NO. E-14582
:
INTERSTATE MOTOR FREIGHT SYSTEM,
Respondent :

FINDINGS OF FACT

1. The Complainant herein is Robert A. Culver, an adult male, who resides at 124 S. Second Street, Hughesville, Pennsylvania 17737. (S.F.#1).*

2. The Respondent herein is Interstate Motor Freight System trading as Interstate System, a foreign corporation with its headquarters located at 110 Ionia Avenue, N.W. Grand Rapids, Michigan, 49503, registered to do business in Pennsylvania and with a place of business located on Old Route 15, White Deer, Pennsylvania 17777. The Respondent's registered agent for receipt

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* Abbreviations used for citations to the record in these Findings are as follows:

S.F.	-	Stipulations of Fact
N.T.	-	Notes of Testimony
Exh.	-	Exhibit
M J S D.T.	-	Deposition Testimony of Dr. Mary Jane Stackowski
WGR D.T.	-	Depostion Testimony of Dr. William G. Reish
RKS D.T.	-	Deposition Testimony of Dr. Richard K. Straley

of process in Pennsylvania is the U.S. Corporation located at 225 South Fifteenth Street, Philadelphia, Pennsylvania 19109. (S.F.#2).

3. The Complainant, on or about September 13, 1978, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at docket number E-14582. (S.F.#3).

4. On September 22, 1978, Commission staff duly served all parties to this action with a copy of the complaint in a manner which satisfies the requisites of 1 Pa. Code 33.32. (S.F.#4).

5. In correspondence, dated September 28, 1979, the Respondent acknowledged receipt of the above captioned complaint. (S.F. #5).

6. In correspondence, dated November 29, 1978, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the above captioned complaint. (S.F.#6).

7. Subsequent to the determination of probable cause, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation, and persuasion but were unable to do so. (S.F.#7).

8. On July 24, 1978, the Complainant applied for employment as a "road driver" with the Respondent. (S.F.#8).

9. On July 31, 1978, the Complainant was certified by the Respondent as having passed two tests (the Road Test and Written Examination). Successful completion of these tests is a prerequisite to employment with the Respondent. (S.F.#9).

10. On August 7, 1978 the Complainant was given a physical examination by the Respondent's physician who signed a form indicating that Complainant was physically qualified under the U.S. Department of Transportation Regulations to work as a driver. (S.F.#10; Exh. C.D.1).

11. The Complainant, as a part of the physical examination required by the Respondent, had an x-ray of the lumbar spine taken on August 7, 1978. (S.F.#11).

12. The Complainant began to work for the Respondent as a driver on August 12, 1978. (S.F.#12).

13. A report of the interpretation of the lumbar X-rays was prepared by M.J. Stackowski, M.D., on August 8, 1978. This report indicated, "There is Arthritic Disease with Spur Formation Involving the L-3 and the L-4 Vertebral Bodies. There is definite narrowing at the L-5 S-1 disc space". (S.F.#13).

14. On September 3, 1978, the Complainant was terminated from his employment with the Respondent for his failure to meet the Respondent's physical requirements. (S.F.#14; Exh. C-9).

15. The decision to terminate the Complainant was based solely upon the X-ray report furnished by Dr. Stackowski. (S.F.#14; Exh. C-15).

16. Doctor Stackowski did not play any role in either the hiring or the termination of the Complainant other than furnishing the X-ray report. The Respondent did not request any recommendation from her regarding the ability of the Complainant to perform the duties of an over the road driver. (MJS D.T. 19; N.T. 92, 93).

17. The Complainant has been diagnosed, by virtue of X-rays of the lumbar spine taken on August 7, 1978, as having degenerative disc disease and arthritis. (MJS D.T. 9; WGR D.T. 32; RKS D.T. 51, 16, 24).

18. Radiographic studies (x-rays) are a medical tool that can show the existence, or amount of change, related to degenerative disc disease and arthritis. X-rays present a limited picture of an individual's back health. (MJS D.T. 22; WGR D.T. 28; RKS D.T. 18, 20).

19. X-ray studies alone cannot be used to determine disability or symptomatology in individuals diagnosed as having degenerative disc disease and arthritis. (MJS D.T. 22; WGR D.T. 28; RKS D.T. 19).

20. Proper evaluation of the physical condition of an individual with an X-ray finding of degenerative disc disease and arthritis requires correlation of the X-rays, a physical examination and a personal medical history. (MJS D.T. 23; WGR D.T. 15, 21; RKS D.T. 20).

21. It is impossible to correlate the degree of degenerative disc disease identifiable on X-ray with the specific degree of impairment or discomfort in any particular individual solely by review of the X-ray. (RKS D.T. 19, 20, 25; Exh. C-8).

22. Not all individuals who exhibit radiographic evidence of degenerative disc disease and arthritis either have or will develop objective symptomatology associated with the disorder. (MJS D.T. 21, 27; WGR D.T. 7, 8; RKS D.T. 20, 38, 39).

23. While an individual with radiographic evidence of degenerative disc disease and arthritis has some undetermined amount of increased risk of

possible unknown future harm as a result of the radiographic evidence, the mere existence of the disease itself does not incapacitate the individual. (MJS D.T. 34; WGR D.T. 9, 23, 29, 30; RKS D.T. 22, 23, 25, 38).

24. Generally, the exact nature, severity, and length of time before onset of future disability, if any, of an individual with degenerative disc disease and arthritis cannot be dermined within a reasonable degree of medical certainty. (MJS D.T. 32; WGR D.T. 29; RKS D.T. 22, 23, 38, 39).

25. It is medically impossible to determine whether the Complainant will ever suffer from a future back disorder. (RKS D.T. 25; WGR D.T. 12).

26. William G. Reish, M.D. is an orthopedic surgeon who performed a physical examination of the Complainant on behalf of the Respondent on August 2, 1978 and found him qualified for employment. (S.F.#10, WGR D.T. 4, 5, 22, 28).

27. Doctor Reish did not make any recommendation regarding hiring the Complainant nor did he make a recommendation regarding, or participate in, the determination that the Complainant was physically unqualified and should be terminated. (WGR D.T. 8, 22; Exh. C-9; N.T. 92, 93, 94).

28. Richard K. Straley, M.D., an orthopedic surgeon, examined the Complainant on September 29, 1978. Doctor Straley concluded that the Complainant was capable to performing the duties of an over the road driver. (RKS D.T. 6, 21, 22, 25; Exh. C-8).

29. The medical opinion reached by Doctor Straley that the Complainant could perform heavy labor and could perform the duties of an over the road truck driver was based upon a thorough physical examination, a personal

medical history and a review of the same back X-ray used by the Respondent. (Exh. C-8, RKS D.T. 7, 9, 14, 21, 22).

30. The physical examination performed by Doctor Straley focused on the low back and included a number of tests designed to determine physical limitations occasioned by significant disc disease problems. (RKS D.T. 10 through 14; Exh. C-8).

31. The Complainant both prior and subsequent to his employment with the Respondent engaged in work of a physical nature which included heavy lifting, bending, stooping, crawling, twisting and turning. (N.T. 14-23, 37-46).

32. The only difficulty that the Complainant has ever had with his back occurred some twenty years prior to his employment with the Respondent. It was temporary in nature and did not result in any time off from work. (Exh. C-8, N.T. 17, 18).

33. The Complainant would not have been disqualified from employment with the Respondent under applicable U.S. Department of Transportation Regulations without a demonstration that his diagnosed arthritis or orthopedic disease interferred with his ability to control and operate a motor vehicle safely. (Exh. C-11 at §391.41(b)(7)).

34. Applicable U.S. Departmentof Transportation Regulations do not require use of X-rays unless physical examination results so dictate. (Exh. C-11 at §391.43 page 442-Spine).

35. The Complainant made immediate and substantial efforts to find employment after his termination by the Respondent. (N.T. 29-38; Exh. C-1 through C-4).

36. Had the Complainant not been terminated by the Respondent, his date of seniority would have been August 12, 1978 and in terms of seniority, he would be immediately junior to Larry Smith (seniority date - 7/22/78) and immediately senior to Richard Miller (seniority date - 8/26/78) and Peter Pires (seniority date - 8/26/78). (N.T. 107-111).

37. Had Complainant not been terminated by the Respondent in September, 1978, he would have been laid off on October 5, 1979 and would not have been returned to work to date. (N.T. 125; Exh. R-10).

38. During the period in time from September 4, 1978 through October 6, 1979, Larry Smith's gross wages were $25,077.73. During this same period of time, Richard Miller's gross were $16,950.19, however, he missed a substantial period of time from work due to illness. Peter Pires, who has the same seniority date as Miller, had gross earnings of $21,942.05 during the same period of time. (N.T. 108, 109).

39. The Complainant during the period of time from September 4, 1978 through October 6, 1979, earned approximately $12,301.03 calculated as follows:

1)	3 trips for Professional Drivers, Inc. -	240.00
2)	1978 wages from Strick, Inc.	3,723.83
3)	1979 wages from Strick (based on total wage of 10,838.47, average weekly salary was $208.43 multiplied by 40 week - up to 10/6/79.	8,337.20
	TOTAL	12,301.03

(N.T. 38-41; Exh. C-4, 5).

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v.	:	DOCKET NO. E-14582
INTERSTATE MOTOR FREIGHT SYSTEM, Respondent	:	

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties to and the subject matter of this Complaint.

2. The parties and the PHRC have fully complied with all of the procedural prerequisites to a Public Hearing in this matter.

3. The pre-hearing investigation of this matter, resulting in a finding of probable cause to credit the allegations of the complaint, was conducted by PHRC staff in a fair and reasonable manner and in accordance with due process of law.

4. The public hearing constituted a de novo review of all of the evidence. The finding of probable cause, although a procedural prerequisite to the hearing, was not introduced as evidence nor was it considered.

5. Degenerative disc disease is a handicap or disability within the meaning of the Pennsylvania Human Relations Act ("PHRA").

6. Arthritis is a handicap or disability within the meaning of the PHRA.

7. Respondent terminated Complainant from his position as an "over the road" driver because of a non-job related handicap or disability in violation of §5(a) of the PHRA, 43 P.S. §955(a).

8. The Respondent was in no way prejudiced by investigative findings of the PHRC staff that probable cause to credit the allegations was lacking in other complaints of discrimination due to back-related handicaps filed against Respondent.

9. The doctrine of estoppel is not applicable to preclude PHRC processing of this case.

10. Application of the PHRA to the facts of this case is in no way inconsistent with the operation of federal Department of Transportation regulations and accordingly the doctrine of federal preemption does not preclude the PHRC from acting in this case.

11. The PHRC has authority to order that a prevailing complainant in an action alleging an unlawful termination be awarded backpay with interest and that he be reinstated with accrued seniority and all other applicable benefits.

12. Whenever the PHRC concludes that a respondent has engaged in an unlawful discriminatory practice, the Commission may order such affirmative action as in its judgement will effectuate the purposes of the Act.

13. The full remedy ordered by the PHRC in this matter can be implemented without the consent, approval, or participation of any union. The PHRC is not deprived of jurisdiction over this matter due to the non-joinder of any union.

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ROBERT CULVER, :
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OPINION

I. INTRODUCTION

The essential facts surrounding this case are not in dispute. On July 24, 1978, the Complainant, Robert A. Culver, applied for employment as a road driver with the Respondent, Interstate Motor Freight System ("Interstate"). He took and passed several tests, received a physical examination including back x-rays and began working on August 12, 1978. Sometime after this date, Interstate received the x-ray report of Mr. Culver's lumbar spine and based upon this report, on September 3, 1978, terminated him.

On or about September 13, 1978, Culver filed a complaint with the Pennsylvania Human Relations Commission ("PHRC" or "Commission") alleging in part that Interstate had discriminated against him because of a non-job related handicap or disability, his failure to "pass his back x-rays."

An investigation by PHRC staff was conducted and resulted in a finding of probable cause to credit the allegations of the complaint. Efforts to conciliate the matter were unsuccessful and on July 18, 1980 a public hearing

was convened before a panel consisting of Commissioners E.E. Smith (presiding), Doris M. Leader and Raquel Otero de Yiengst.

The Pennsylvania Human Relations Act ("PHRA" or "the Act"), act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq., sets forth at §5, 43 P.S. §955 that:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification ... (a) For any employer because of the ... non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual...

Nowhere in the Act are the terms "handicap or disability" specifically defined, however at §4(p), 43 P.S. §954(p) it says:

> The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job related.

It being beyond cavil that Interstate terminated Mr. Culver from his position as road driver because of certain back conditions revealed by x-rays of Culver's lumbar spine, the primary inquiry that emerges from this case is whether those conditions (degenerative disc disease and arthritis) as present in Robert A. Culver constituted non-job related handicaps or disabilities.

II. CULVER'S CONDITION CONSTITUTED A HANDICAP OR DISABILITY WITHIN THE MEANING OF THE PHRA

On November 8, 1978, several months after the filing of Culver's complaint, PHRC regulations became effective concerning the Act's prohibition against discrimination due to handicap or disability. The regulations, at

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16 Pa. Code §44.4 set forth in relevant part that:

> Handicapped or disabled person - inclues the following:
>
> (i) A person who:
>
> (A) has a physical or mental impairment which substantially limits one or more major life activities;
>
> (B) has a record of such an impairment; or
>
> (C) is regarded as having such an impairment...

Because the regulations pre-date Culver's complaint, substantive affirmative duties they impose, such as the duty to modify a job to accommodate a handicapped worker, could not be applied retroactively to Mr. Culver's case. The regulatory definition of "Handicapped or disabled person," on the other hand, can be utilized, at least as instructive, in the context of this adjudication.

The prohibition against discrimination due to handicap or disability was added to the other anti-discrimination provisions of the PHRA by a 1974 amendment. From that time forward the terms "handicap or disability" necessarily meant something. And when, in 1978, the Commission adopted a regulatory definition of the terms, it obviously deemed it to be a lawful, fair and reasonable definition. Using the definition for instructive purposes in this case is thus "... not the type of retroactivity which is condemned by law." Securities and Exchange Commission v. Chenery, 322 U.S. 194, 203 (1974).

A review of the evidence in light of the regulatory definition makes clear that the Complainant has a handicap or disability. It is undisputed in the record that he is afflicted with degenerative disc disease and degenerative arthritis, manifest by disc space narrowing and spurring

in the discs located in the lumbar spine. These disorders can cause physical problems including pain, discomfort, disc limitation, etc., and can make achievement unusually difficult. It is thus apparent that, in the language of the regulatory definition, Culver suffers from a "physical ... impairment which substantially limits ... major life activities."

Furthermore, Culver's condition also fits into the regulatory definition to the extent that it "is regarded as ... such an impairment." Most of Interstate's evidence was directed toward showing that Mr. Culver's back problems would likely result in a substantial limitation on his ability to perform heavy physical labor. It is for this very reason that Interstate terminated him. It is thus undeniably clear that Interstate regarded Mr. Culver as handicapped. And it is imperative, in order to preserve the integrity of the anti-handicap discrimination provisions of the Act, that full protection be extended to those "regarded as" as well as those actually handicapped.

This view has been adopted by several of the courts that have had occasion to consider the issue. In Dairy Equipment Co. v. Wisconsin Department of Industry, Labor and Human Relations, 290 N.W.2d 330,335 (Wisc. Sup. 1980), the court extended the protections of Wisconsin's anti-handicap discrimination statute to an otherwise qualified truck driver discharged by his employer because of safety concerns due to his having only one kidney:

> It would be both ironic and insidious if the legislative intent in providing the protection of the Fair Employment Act were afforded to persons who actually have a handicap that makes "achievement unusually difficult" or limits their capacity to work, but the same protection is denied to those whom employers perceive as being handicapped. Congress recognized this situation and it included within the definition of the term "handicapped individuals" persons who are regarded as having an impairment. (emphasis in original).

Similarly, in Barnes v. Washington Natural Gas Co., 591 P.2d 461, 464-465 (Wash.Ct.App. 1979), the court found the state's anti-handicap discrimination statute to extend to an employee who was erroneously believed to be epileptic:

> It would defeat legislative purpose to limit the handicap provisions of the law against discrimination to those who are actually afflicted with a handicap, such as epilepsy, and exclude from its provision those perceived as having such a condition. Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent. The intent of the law is to protect workers against such prejudgment based upon insufficient information. The law's application, therefore, should not be limited to those who actually have handicaps, excluding those who are discriminated against in the same way because they are only thought to have handicaps.

Several other jurisdictions have had the opportunity to consider whether specific back problems constitute handicaps or disabilities and all have answered in the affirmative, Bucyrus-Erie Co. v. Wisc. DILHR, 13 EPD 11,580 (Wisc. Cir. 1977) (congential back defects discovered by x-ray including spondylolisthesis constitute handicap); and City of New York v. Donnaruma, 22 EPD 30,864 (N.Y. Supreme Ct. 1979) (x-ray finding of degenerative osteoarthritis constitutes handicap).

In view of the persuasive determinations of the courts referred to above and in view of the fact that Mr. Culver's condition not only constitutes a physical impairment which substantially impairs major life activities, but is also clearly regarded by Interstate as being such an impairment, the ineluctable conclusion is drawn that Mr. Culver has a handicap or disability within the meaning of the Act.

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III. CULVER'S HANDICAP OR DISABILITY IS NON-JOB RELATED WITHIN THE MEANING OF THE PHRA

The next, and certainly the most important issue to arise in this case, is whether or not Culver's handicap is job related. And the burden of proof with respect to this issue rests upon the Respondent.

Mr. Culver has been demonstrated to be handicapped within the meaning of the Act. In every other respect, he is qualified for an over the road driver position. Having been terminated from that position because of his handicap when others without such a handicap were not terminated the burden of proof shifts to the Respondent to offer a sound business rationale in support of the termination. The nature and dimensions of the rationale are specifically spelled out by the Act's reference to a "non-job related handicap or disability" (emphasis added).

To be job related a handicap must "substantially interfere with the ability to perform the essential functions" of the job. There is no contention by Interstate that Mr. Culver was unable to perform the routine driving functions of the over the road position. Rather they argue that his handicap is job related because of the potential safety hazard it poses.

The PHRC agrees with Interstate that safety is an essential function of a driver's job. Common carriers bear the highest obligation to conduct their business in accordance with rigid safety standards, not just for the benefit of themselves or their employees, but also for the benefit of the public at large. Interstate's evidence failed to convince the Commission, however, that Mr. Culver's handicap would in any way interfere with the essential safety function.

Although there were some minor areas of disagreement amongst the three physicians whose testimony was introduced by deposition, they agreed convincingly on the most significant issues.

The doctors agreed that X-rays are a useful tool for determining the existence of degenerative disc disease and degenerative arthritis but that they should not be relied upon to make sophisticated analyses concerning these conditions. The doctors agreed that for proper diagnosis a medical history and physical examination are very important, in addition to the X-rays.

There was also accord amongst the physicians that Mr. Culver's X-rays demonstrated evidence of back disorders. However, they all agreed that the existence of disabling consequences, if any, could not be ascertained from X-rays alone. Finally, the doctors agreed that in spite of the increased risk Mr. Culver suffered of disabling back problems, the extent of that risk could not be identified; i.e. none would predict when, or even if Mr. Culver would incur in the future disabling back disorders.

From the expert testimony, the Commission is wholly unconvinced that the risk factor for Mr. Culver is great. We are particularly impressed by the fact that both physicians who examined him and reviewed his X-rays, Reish and Straley, rated Culver physically qualified to perform the work of an over the road truck driver. We were also very much persuaded by the apparent importance the experts attached to the fact that Culver was asymptomatic and that he had performed hard manual labor throughout his life with only one relatively minor back injury.

The Commission acknowledges Interstate's contention that the job from which Culver was terminated is a grueling one. Similarly we are persuaded by the expert evidence that such labor could aggravate Culver's back disorder and that serious disability could occur without prior warning due to the traumatization that even a normal back incurs in the trucking industry. We cannot agree, however, with that which is implicit in Interstate's decision to

terminate Mr. Culver; i.e. that his back made him a significantly higher risk for a disabling injury. Not only has Interstate's evidence been unpersuasive on this issue, but in fact the record suggests the very opposite.

Even Interstate's examining physician considered Culver medically qualified for the job. His risk of injury, with all the safety ramifications such risk implies, may be slightly higher than Interstate wishes to incur. However, the world is not made up of physically perfect human specimens and thus Interstate must choose from the imperfect among us. In light of this, the Commission believes the decision made by Interstate with respect to Mr. Culver to go beyond legitimate considerations of job and safety relatedness.*

As a variant of the same issue Respondent has also contended that Complainant's radiologically evidenced back condition is a bonafide occupational qualification ("BFOQ"). To be a BFOQ a factor in an employment decision must be such that all or substantially all within the class determined by the factor must be unable to perform the job safely and effectively.

BFOQ reasoning is simply inapplicable to the case. The evidence overwhelmingly establishes that little can be determined from mere radiologic evidence of back disorders. Certainly the whole class of individuals exhibiting such evidence cannot be disqualified from a job because of it. And while the risks associated with this class are admittedly higher, "Even a true

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* Although the nature of this ruling eliminates the need for any particular finding on this issue, the Commission wishes to note its displeasure with the clear implication of evidence introduced at the hearing from Interstate's policy manual to the effect that Interstate's true concern is increased cost of insurance - a factor specifically forbidden from consideration by §4(p) of the Act, 43 P.S. §954(p).

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generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." City of Los Angeles Department of Water and Power, et al. v. Manhart, et al., 435 U.S. 702, 708 (1978).

Respondent conducts preemployment physical exams along with its X-ray program. It would not be impractical truly to judge each candidate for employment as an individual, as Respondent already purports to do, rather than making the most generalized class based decisions depending upon gross X-ray results. In fact, had Respondent heeded the advice of Dr. Reish, whom it employed to examine Complainant, rather than allowing a non-medically trained plant executive to determine Complainant's medical suitability for the job, Culver would have never been terminated.

Clearly then, radiological evidence of back disorders does not constitute a BFOQ. Bucyrus-Erie v. Wisc. D.I.L.H.R., 13 EPD ¶11,580 (Wisc. Cir.Ct. 1977) is in accord. By so holding, however, the Commission does not wish to condemn Interstate's X-ray program per se. The Commission has no objection to this or any other bona fide pre-employment screening device so long as its use is strictly tailored to assessing job related conditions.

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IV. NONE OF THE OTHER TECHNICAL LEGAL ISSUES RAISED BY INTERSTATE PRECLUDE A FINDING FOR THE COMPLAINANT IN THIS CASE

Respondent raised a barrage of secondary issues before, during, and after the hearing, suggesting various bases for ousting the Commission's jurisdiction or otherwise precluding a finding for the Complainant. All of these are without merit.

A. Estoppel

Complaints filed against Interstate by Edward Krauser, Elmer Gresh, and George Welliver are strikingly similar to that of the complaint. Those cases, however, all resulted in staff investigators' findings of no probable cause to credit the allegations - Krauser's before, and Gresh's and Welliver's after Culver's. Based upon these other three findings, Respondent contends that the Commission is estopped from proceeding against it in Culver's case.

What Respondent misunderstands is that it is Mr. Culver, not the PHRC, proceeding against it. Culver, as is his statutory entitlement, has filed a complaint of unlawful discrimination. Although the statute provides and he has elected to utilize, Commission staff counsel at the hearing, the function of the Commissioners themselves is not the least bit prosecutorial. Rather, Commissioners hear and adjudicate matters properly before them in as fair and impartial a fashion as possible.

The equitable doctrine of estoppel prohibits a party from proceeding against another if it has induced the party to rely to its detriment upon certain facts underlying the cause of action. Here Respondent claims that by virtue of the Krauser, Gresh, and Welliver no cause findings, the Commission has induced it to rely upon the legitimacy of its X-ray program and cannot now base an action against it upon an assertion of impropriety in the

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program.

But Mr. Culver has done nothing to induce Interstate's reliance. At worst Interstate has been "victimized" by three inaccurate PHRC staff determinations, all of which were in its favor. While this perhaps should be embarassing to the PHRC staff, it would be unconscionable if it should be a basis to deprive Mr. Culver of an otherwise rightful determination in support of his claim. Just as courts frequently overrule their previous decisions, the Commissioners cannot and will not be timid, upon a de novo hearing, about ruling inconsistently with staff's earlier conclusions.

Furthermore, the inconsistency of the findings is not that clear. Even if the Commission were to be bound by staff findings in the other cases, it was incumbent upon Respondent, who raised the issue, to demonstrate the identity of Culver's case and the others. Very little evidence was introduced on this issue.

Respondent's counsel asserted repeatedly that the Commissioners could "pull the file" on the other cases. But he knew or certainly should have known that this was a de novo hearing and the Commissioners could not and would not consider any evidence not in the record. And while some similarity between Complainants Krauser, Culver, Gresh, and Welliver must be acknowledged, the expert depositions were persuasive to the effect that X-ray findings alone are an insufficient basis for determining the severity or disabling consequences of back ailments. Simply puts, the relative identity of the back conditions of the four complainants was in no sense established of record in this case.

Finally, the most important element of the estoppel doctrine is missing here - that reliance be to the detriment of the party espousing the doctrine. Interstate insists it was prejudiced but does not make clear how.

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First it must be recalled that only the Krauser finding preceded Culver's. Interstate can thus claim reliance only upon that PHRC staff determination. But how did it rely? It did not in any way change its position but rather maintained the same X-ray program which it had been using prior to Krauser. That Interstate viewed Krauser as a sanctioning of the program only postponed the day of judgment before the Commissioners, all to Mr. Krauser's detriment, if anyone, not to Interstate's.

B. Federal Preemption

U.S. Department of Transportation ("DOT") regulations set forth at 49 C.F.R. §391.41(b) that:

> A person is physically qualified to drive a motor vehicle if he - ... (7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuro-muscular, or vascular disease which interferes with his ability to control and operate a motor vehicle safely. (Emphasis added.)

Interstate argues that this regulation preempts the PHRA and precludes further action in this matter. The Commission disagrees.

In deference to our unique system of federalism, federal preemption of state regulation should not be taken lightly, especially where the "historic police powers of the States" are involved. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132,142,146 (1963); De Canas v. Bica, 424 U.S. 351, 356 (1976); Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 139 (1973). The general rule is that federal law applies exclusively only in cases where the federal statutory scheme is so pervasive as to leave no room for state involvement, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973), "Application of state Law ... would operate to frustrate the purpose of the federal legislation," Teamsters Union, Local 20 v. Morton, 377 U.S. 252, 258 (1964), or Congress has unequivocally

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so stated. De Canas v. Bica, supra, 424 U.S. at 357.

Notwithstanding Respondent's expressed fears to the contrary, this adjudication leaves the U.S. Constitution and its Supremacy Clause well intact. The clear purpose of the DOT regulations is the assurance that none other than safe drivers will be fulfilling the important roles as over the road truck operators. Nothing in the regulations or in the enabling legislation, however, even remotely suggests a federal intention to preempt the unrelated exercise of a traditional state police power like the guarantee of its citizens' civil rights, so long as that exercise does not frustrate or is not in any way inconsistent with the federal regulatory scheme. No such inconsistency exists here.

Protection under the PHRA is expressly restricted to those with a non-job related handicap or disability. Of course, safety is a vital concern in the trucking industry and any physical condition which would demonstrably and significantly impact upon a driver's ability to operate properly his or her vehicle would necessarily be job related. The Commission understands this and believes it has ruled accordingly. In Part III of this Opinion, concerning the job relatedness of Culver's condition, safety was the principal factor we considered.

Respondent also urges that the DOT regulations expressly reserve for the trucking industry the right to make standards stricter than those mandated by the regulations. While that is true, it is equally important that such stricter standards are not required. Neither the DOT regulations nor Interstate anticipate physically perfect human specimens and we believe that our decision, finding unlawful the termination from employment of a man because of his non-job related handicap, a condition we specifically find would not affect his safe and effective performance of the job, is in harmony with both

the spirit and the letter of the federal regulations.

C. The Investigation and Probable Cause Finding

For a variety of reasons, principally its alleged undue haste, Respondent contended that the investigation itself and the resultant finding of probable cause to credit the allegation, were so deficient as to have deprived Respondent of due process of law. Although persuasive evidence in support of this contention was totally absent, regardless, it is without merit.

The public hearing offered Respondent a full de novo opportunity to present its entire case. Respondent's counsel called and examined the witnesses of his choosing and submitted documentary evidence into the record as he saw fit. He had the full opportunity he could wish to cross-examine witnesses called on behalf of Mr. Culver.

The finding of probable cause was not introduced as evidence, was not considered, and was never even seen by the hearing panel or any other Commissioner. It served implicitly, as a procedural prerequisite to the hearing in accordance with §9 of the Act, 43 P.S. §959, but would never even have been mentioned at the hearing had Respondent's counsel not called Thomas Myers, author of the finding, as a witness.

This adjudication is made solely upon the hearing record. Thus, although Respondent's proof showed the actual existence of no significant defects in the investigation or finding, even were they to exist they would be of no moment and would not affect Respondent's due process rights as they would have no possible bearing upon the outcome of this matter.

D. Labor Union As An Indispensible Party

Interstate contends that a controlling collective bargaining agreement makes the labor organization representing over the road drivers an indispensable party to this matter and that failure to have joined them de-

feats PHRC jurisdiction. This claim too is rejected.

Necessary parties are those without whom a proper remedy cannot be effectuated. Interstate argues that a certain Teamsters Union local is such a necessary or indispensable party because a retroactive seniority remedy would require their concurrence and would affect a fundamental restructuring of the bargaining unit.

Preliminarily it must be noted that this issue was raised by Interstate for the first time in a Supplementary brief without supporting affidavits or exhibits. No contract was introduced in evidence and nothing else in the record other than counsel's bald assertion in his brief supports his interpretation of the collective bargaining agreement. The Commission finds this interpretation difficult to accept but regardless, Interstate's argument fails.

The authority of the PHRC to fully remedy unlawful employment discrimination has been confirmed by the courts of this Commonwealth on numerous occasions. All the Commission's final order in this case accomplishes is the restoration of Complainant to his rightful place, i.e. the position in which he would have found himself had Respondent perpetrated no unlawful discriminatory Act. To the extent that a contract between two private parties such as Interstate and a union impinge upon this statutorily sanctioned exercise of remedial authority by the Commission, it is the contract provision, not the agency order which must give way.

V. REMEDY

The authority of the Commission to take appropriate affirmative action based upon a finding that the Respondent engaged in an unlawful discriminatory practice is clear. Section 9 of the Act, 43 P.S. §959, provides

that such action may include without being limited to: reinstatement, backpay and such other action as in the judgment of the Commission will effectuate the purposes of the Act. These actions of course, are in addition to a mandate that the Respondent cease and desist from engaging in the unlawful discriminatory practice.

To effectuate the purposes of the Act, the Commission deems it appropriate that Interstate fully restore Mr. Culver to his rightful place, i.e. where he would have been but for his discriminatory termination. Accordingly, in addition to backpay and reinstatement, the Commission has ordered that Culver be given a retroactive seniority date of August 12, 1978 and be extended all accrued benefits due and owing.

Backpay, the difference between what Mr. Culver would have earned had he remained with the Respondent less interim wages, has been measured as follows: Had the Complainant remained with the Respondent he would have worked until October 6, 1979 and would currently be on layoff. His seniority date would place him immediately junior to Larry Smith and immediately senior to Michael Miller and Peter Pires. Since drivers for the Respondent are paid on a formula basis which, unlike a straight hourly rate, will vary with the individual, it is impossible to calculate exactly how much he would have earned. However, it is possible to arrive at a reasonable figure by taking the wages earned by the employee immediately junior in seniority to the Complainant and use his wages as a guide. Here, both Miller and Pires were next hired by the Respondent, but Miller missed a significant amount of time due to illness. As a result, it is appropriate to use the wage figure earned by Mr. Pires from September 4, 1978 through October 6, 1979, $21,942.05, as the basis for the award. This figure is then reduced by the interim earning of $12,301.03 for a total of $9,641.02. Interest at 6%, compounded annually, has also been ordered.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT A. CULVER,
Complainant

v.

INTERSTATE MOTOR FREIGHT SYSTEMS,
Respondent

DOCKET NO. E-14582

O R D E R

AND NOW, this 6th day of January, 1981, upon consideration of the Findings of Fact, Conclusions of Law and Opinion of the Pennsylvania Human Relations Commission ("PHRC"), it is hereby Ordered:

1. That Respondent shall cease and desist from refusing to hire, or from terminating, handicapped or disabled individuals unless the handicap or disability substantially interferes with the ability of the individual applicant or employee to perform the essential functions of the particular position involved.

2. That within thirty days of the date of this Order, the Respondent shall pay to the Complainant back wages amounting to $9,641.02 plus 6% interest per annum computed from the date of the termination to the date payment is made to the Complainant. The check should be made payable to Robert A. Culver and delivered in care of Michael Hardiman, Pennsylvania Human Relations Commission, 301 Muench Street, Harrisburg, PA 17102.

3. That the Respondent shall immediately reinstate the Complainant to his position of driver with a seniority date of August 12, 1978. Written verification of reinstatement shall be provided to the Complainant, copy to Mr. Hardiman, within thirty days of the date of this Order. (However, if the Complainant would presently be in a layoff status had he never been terminated by Respondent on September 3, 1978 due to his back, nothing in this paragraph shall preclude Respondent from reinstating him to a layoff status, subject to recall in accordance with his August 12, 1978 seniority date.)

4. That the Respondent shall provide the Complainant with all benefits to which he is entitled by virtue of his employment and accrued seniority including, but not limited to, accrued vacation entitlement, membership in group health insurance program, and accrued pension benefits. A written description of all benefits provided must be furnished to Complainant, copy to Mr. Hardiman, within thirty days of the date of this Order.

5. That the Respondent shall review its current physical qualifications policy in light of PHRC Regulations at 16 Pa. Code, Chapter 44, and shall revise, as necessary, its policy to comply with the provisions found therein.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:

BY: Elizabeth Scott
ELIZABETH SCOTT, SECRETARY

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COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, it is the view of the hearing panel that Respondent has terminated Complainant from employment due to a non-job related handicap or disability in violation of §5(a) of the Pennsylvania Human Relations Act. Accordingly, it is the Panel's recommendation that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted by the full Pennsylvania Human Relations Commission.

Everett E. Smith, Panel Chairperson — Date

Doris M. Leader, Commissioner — Date

Raquel Otero Yiengst, Commissioner — Date

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ROBERT A. CULVER, :
Complainant
:
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:
INTERSTATE MOTOR FREIGHT SYSTEM,
Respondent :

FINDINGS OF FACT

1. The Complainant herein is Robert A. Culver, an adult male, who resides at 124 S. Second Street, Hughesville, Pennsylvania 17737. (S.F.#1).*

2. The Respondent herein is Interstate Motor Freight System trading as Interstate System, a foreign corporation with its headquarters located at 110 Ionia Avenue, N.W. Grand Rapids, Michigan, 49503, registered to do business in Pennsylvania and with a place of business located on Old Route 15, White Deer, Pennsylvania 17777. The Respondent's registered agent for receipt

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* Abbreviations used for citations to the record in these Findings are as follows:

S.F.	-	Stipulations of Fact
N.T.	-	Notes of Testimony
Exh.	-	Exhibit
M J S D.T.	-	Deposition Testimony of Dr. Mary Jane Stackowski
WGR D.T.	-	Depostion Testimony of Dr. William G. Reish
RKS D.T.	-	Deposition Testimony of Dr. Richard K. Straley

of process in Pennsylvania is the U.S. Corporation located at 225 South Fifteenth Street, Philadelphia, Pennsylvania 19109. (S.F.#2).

3. The Complainant, on or about September 13, 1978, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at docket number E-14582. (S.F.#3).

4. On September 22, 1978, Commission staff duly served all parties to this action with a copy of the complaint in a manner which satisfies the requisites of 1 Pa. Code 33.32. (S.F.#4).

5. In correspondence, dated September 28, 1979, the Respondent acknowledged receipt of the above captioned complaint. (S.F. #5).

6. In correspondence, dated November 29, 1978, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the above captioned complaint. (S.F.#6).

7. Subsequent to the determination of probable cause, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation, and persuasion but were unable to do so. (S.F.#7).

8. On July 24, 1978, the Complainant applied for employment as a "road driver" with the Respondent. (S.F.#8).

9. On July 31, 1978, the Complainant was certified by the Respondent as having passed two tests (the Road Test and Written Examination). Successful completion of these tests is a prerequisite to employment with the Respondent. (S.F.#9).

10. On August 7, 1978 the Complainant was given a physical examination by the Respondent's physician who signed a form indicating that Complainant was physically qualified under the U.S. Department of Transportation Regulations to work as a driver. (S.F.#10; Exh. C.D.1).

11. The Complainant, as a part of the physical examination required by the Respondent, had an x-ray of the lumbar spine taken on August 7, 1978. (S.F.#11).

12. The Complainant began to work for the Respondent as a driver on August 12, 1978. (S.F.#12).

13. A report of the interpretation of the lumbar X-rays was prepared by M.J. Stackowski, M.D., on August 8, 1978. This report indicated, "There is Arthritic Disease with Spur Formation Involving the L-3 and the L-4 Vertebral Bodies. There is definite narrowing at the L-5 S-1 disc space". (S.F.#13).

14. On September 3, 1978, the Complainant was terminated from his employment with the Respondent for his failure to meet the Respondent's physical requirements. (S.F.#14; Exh. C-9).

15. The decision to terminate the Complainant was based solely upon the X-ray report furnished by Dr. Stackowski. (S.F.#14; Exh. C-15).

16. Doctor Stackowski did not play any role in either the hiring or the termination of the Complainant other than furnishing the X-ray report. The Respondent did not request any recommendation from her regarding the ability of the Complainant to perform the duties of an over the road driver. (MJS D.T. 19; N.T. 92, 93).

17. The Complainant has been diagnosed, by virtue of X-rays of the lumbar spine taken on August 7, 1978, as having degenerative disc disease and arthritis. (MJS D.T. 9; WGR D.T. 32; RKS D.T. 51, 16, 24).

18. Radiographic studies (x-rays) are a medical tool that can show the existence, or amount of change, related to degenerative disc disease and arthritis. X-rays present a limited picture of an individual's back health. (MJS D.T. 22; WGR D.T. 28; RKS D.T. 18, 20).

19. X-ray studies alone cannot be used to determine disability or symptomatology in individuals diagnosed as having degenerative disc disease and arthritis. (MJS D.T. 22; WGR D.T. 28; RKS D.T. 19).

20. Proper evaluation of the physical condition of an individual with an X-ray finding of degenerative disc disease and arthritis requires correlation of the X-rays, a physical examination and a personal medical history. (MJS D.T. 23; WGR D.T. 15, 21; RKS D.T. 20).

21. It is impossible to correlate the degree of degenerative disc disease identifiable on X-ray with the specific degree of impairment or discomfort in any particular individual solely by review of the X-ray. (RKS D.T. 19, 20, 25; Exh. C-8).

22. Not all individuals who exhibit radiographic evidence of degenerative disc disease and arthritis either have or will develop objective symptomatology associated with the disorder. (MJS D.T. 21, 27; WGR D.T. 7, 8; RKS D.T. 20, 38, 39).

23. While an individual with radiographic evidence of degenerative disc disease and arthritis has some undetermined amount of increased risk of

possible unknown future harm as a result of the radiographic evidence, the mere existence of the disease itself does not incapacitate the individual. (MJS D.T. 34; WGR D.T. 9, 23, 29, 30; RKS D.T. 22, 23, 25, 38).

24. Generally, the exact nature, severity, and length of time before onset of future disability, if any, of an individual with degenerative disc disease and arthritis cannot be dermined within a reasonable degree of medical certainty. (MJS D.T. 32; WGR D.T. 29; RKS D.T. 22, 23, 38, 39).

25. It is medically impossible to determine whether the Complainant will ever suffer from a future back disorder. (RKS D.T. 25; WGR D.T. 12).

26. William G. Reish, M.D. is an orthopedic surgeon who performed a physical examination of the Complainant on behalf of the Respondent on August 2, 1978 and found him qualified for employment. (S.F.#10, WGR D.T. 4, 5, 22, 28).

27. Doctor Reish did not make any recommendation regarding hiring the Complainant nor did he make a recommendation regarding, or participate in, the determination that the Complainant was physically unqualified and should be terminated. (WGR D.T. 8, 22; Exh. C-9; N.T. 92, 93, 94).

28. Richard K. Straley, M.D., an orthopedic surgeon, examined the Complainant on September 29, 1978. Doctor Straley concluded that the Complainant was capable to performing the duties of an over the road driver. (RKS D.T. 6, 21, 22, 25; Exh. C-8).

29. The medical opinion reached by Doctor Straley that the Complainant could perform heavy labor and could perform the duties of an over the road truck driver was based upon a thorough physical examination, a personal

medical history and a review of the same back X-ray used by the Respondent. (Exh. C-8, RKS D.T. 7, 9, 14, 21, 22).

30. The physical examination performed by Doctor Straley focused on the low back and included a number of tests designed to determine physical limitations occasioned by significant disc disease problems. (RKS D.T. 10 through 14; Exh. C-8).

31. The Complainant both prior and subsequent to his employment with the Respondent engaged in work of a physical nature which included heavy lifting, bending, stooping, crawling, twisting and turning. (N.T. 14-23, 37-46).

32. The only difficulty that the Complainant has ever had with his back occurred some twenty years prior to his employment with the Respondent. It was temporary in nature and did not result in any time off from work. (Exh. C-8, N.T. 17, 18).

33. The Complainant would not have been disqualified from employment with the Respondent under applicable U.S. Department of Transportation Regulations without a demonstration that his diagnosed arthritis or orthopedic disease interferred with his ability to control and operate a motor vehicle safely. (Exh. C-11 at §391.41(b)(7)).

34. Applicable U.S. Departmentof Transportation Regulations do not require use of X-rays unless physical examination results so dictate. (Exh. C-11 at §391.43 page 442-Spine).

35. The Complainant made immediate and substantial efforts to find employment after his termination by the Respondent. (N.T. 29-38; Exh. C-1 through C-4).

36. Had the Complainant not been terminated by the Respondent, his date of seniority would have been August 12, 1978 and in terms of seniority, he would be immediately junior to Larry Smith (seniority date - 7/22/78) and immediately senior to Richard Miller (seniority date - 8/26/78) and Peter Pires (seniority date - 8/26/78). (N.T. 107-111).

37. Had Complainant not been terminated by the Respondent in September, 1978, he would have been laid off on October 5, 1979 and would not have been returned to work to date. (N.T. 125; Exh. R-10).

38. During the period in time from September 4, 1978 through October 6, 1979, Larry Smith's gross wages were $25,077.73. During this same period of time, Richard Miller's gross were $16,950.19, however, he missed a substantial period of time from work due to illness. Peter Pires, who has the same seniority date as Miller, had gross earnings of $21,942.05 during the same period of time. (N.T. 108, 109).

39. The Complainant during the period of time from September 4, 1978 through October 6, 1979, earned approximately $12,301.03 calculated as follows:

1)	3 trips for Professional Drivers, Inc. -	240.00
2)	1978 wages from Strick, Inc.	3,723.83
3)	1979 wages from Strick (based on total wage of 10,838.47, average weekly salary was $208.43 multiplied by 40 week - up to 10/6/79.	8,337.20
	TOTAL	12,301.03

(N.T. 38-41; Exh. C-4, 5).

COMMONWEALTH OF PENNSYLVANIA

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v.	:	DOCKET NO. E-14582
INTERSTATE MOTOR FREIGHT SYSTEM, Respondent	:	

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties to and the subject matter of this Complaint.

2. The parties and the PHRC have fully complied with all of the procedural prerequisites to a Public Hearing in this matter.

3. The pre-hearing investigation of this matter, resulting in a finding of probable cause to credit the allegations of the complaint, was conducted by PHRC staff in a fair and reasonable manner and in accordance with due process of law.

4. The public hearing constituted a de novo review of all of the evidence. The finding of probable cause, although a procedural prerequisite to the hearing, was not introduced as evidence nor was it considered.

5. Degenerative disc disease is a handicap or disability within the meaning of the Pennsylvania Human Relations Act ("PHRA").

6. Arthritis is a handicap or disability within the meaning of the PHRA.

7. Respondent terminated Complainant from his position as an "over the road" driver because of a non-job related handicap or disability in violation of §5(a) of the PHRA, 43 P.S. §955(a).

8. The Respondent was in no way prejudiced by investigative findings of the PHRC staff that probable cause to credit the allegations was lacking in other complaints of discrimination due to back-related handicaps filed against Respondent.

9. The doctrine of estoppel is not applicable to preclude PHRC processing of this case.

10. Application of the PHRA to the facts of this case is in no way inconsistent with the operation of federal Department of Transportation regulations and accordingly the doctrine of federal preemption does not preclude the PHRC from acting in this case.

11. The PHRC has authority to order that a prevailing complainant in an action alleging an unlawful termination be awarded backpay with interest and that he be reinstated with accrued seniority and all other applicable benefits.

12. Whenever the PHRC concludes that a respondent has engaged in an unlawful discriminatory practice, the Commission may order such affirmative action as in its judgement will effectuate the purposes of the Act.

13. The full remedy ordered by the PHRC in this matter can be implemented without the consent, approval, or participation of any union. The PHRC is not deprived of jurisdiction over this matter due to the non-joinder of any union.

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ROBERT CULVER, Complainant	:	
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INTERSTATE MOTOR FREIGHT SYSTEM, Respondent	:	

OPINION

I. INTRODUCTION

The essential facts surrounding this case are not in dispute. On July 24, 1978, the Complainant, Robert A. Culver, applied for employment as a road driver with the Respondent, Interstate Motor Freight System ("Interstate"). He took and passed several tests, received a physical examination including back x-rays and began working on August 12, 1978. Sometime after this date, Interstate received the x-ray report of Mr. Culver's lumbar spine and based upon this report, on September 3, 1978, terminated him.

On or about September 13, 1978, Culver filed a complaint with the Pennsylvania Human Relations Commission ("PHRC" or "Commission") alleging in part that Interstate had discriminated against him because of a non-job related handicap or disability, his failure to "pass his back x-rays."

An investigation by PHRC staff was conducted and resulted in a finding of probable cause to credit the allegations of the complaint. Efforts to conciliate the matter were unsuccessful and on July 18, 1980 a public hearing

was convened before a panel consisting of Commissioners E.E. Smith (presiding), Doris M. Leader and Raquel Otero de Yiengst.

The Pennsylvania Human Relations Act ("PHRA" or "the Act"), act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq., sets forth at §5, 43 P.S. §955 that:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification ... (a) For any employer because of the ... non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual...

Nowhere in the Act are the terms "handicap or disability" specifically defined, however at §4(p), 43 P.S. §954(p) it says:

> The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job related.

It being beyond cavil that Interstate terminated Mr. Culver from his position as road driver because of certain back conditions revealed by x-rays of Culver's lumbar spine, the primary inquiry that emerges from this case is whether those conditions (degenerative disc disease and arthritis) as present in Robert A. Culver constituted non-job related handicaps or disabilities.

II. CULVER'S CONDITION CONSTITUTED A HANDICAP OR DISABILITY WITHIN THE MEANING OF THE PHRA

On November 8, 1978, several months after the filing of Culver's complaint, PHRC regulations became effective concerning the Act's prohibition against discrimination due to handicap or disability. The regulations, at

16 Pa. Code §44.4 set forth in relevant part that:

> Handicapped or disabled person - inclues the following:
>
> (i) A person who:
>
> (A) has a physical or mental impairment which substantially limits one or more major life activities;
>
> (B) has a record of such an impairment; or
>
> (C) is regarded as having such an impairment...

Because the regulations pre-date Culver's complaint, substantive affirmative duties they impose, such as the duty to modify a job to accommodate a handicapped worker, could not be applied retroactively to Mr. Culver's case. The regulatory definition of "Handicapped or disabled person," on the other hand, can be utilized, at least as instructive, in the context of this adjudication.

The prohibition against discrimination due to handicap or disability was added to the other anti-discrimination provisions of the PHRA by a 1974 amendment. From that time forward the terms "handicap or disability" necessarily meant something. And when, in 1978, the Commission adopted a regulatory definition of the terms, it obviously deemed it to be a lawful, fair and reasonable definition. Using the definition for instructive purposes in this case is thus "... not the type of retroactivity which is condemned by law." Securities and Exchange Commission v. Chenery, 322 U.S. 194, 203 (1974).

A review of the evidence in light of the regulatory definition makes clear that the Complainant has a handicap or disability. It is undisputed in the record that he is afflicted with degenerative disc disease and degenerative arthritis, manifest by disc space narrowing and spurring

in the discs located in the lumbar spine. These disorders can cause physical problems including pain, discomfort, disc limitation, etc., and can make achievement unusually difficult. It is thus apparent that, in the language of the regulatory definition, Culver suffers from a "physical ... impairment which substantially limits ... major life activities."

Furthermore, Culver's condition also fits into the regulatory definition to the extent that it "is regarded as ... such an impairment." Most of Interstate's evidence was directed toward showing that Mr. Culver's back problems would likely result in a substantial limitation on his ability to perform heavy physical labor. It is for this very reason that Interstate terminated him. It is thus undeniably clear that Interstate regarded Mr. Culver as handicapped. And it is imperative, in order to preserve the integrity of the anti-handicap discrimination provisions of the Act, that full protection be extended to those "regarded as" as well as those actually handicapped.

This view has been adopted by several of the courts that have had occasion to consider the issue. In Dairy Equipment Co. v. Wisconsin Department of Industry, Labor and Human Relations, 290 N.W.2d 330,335 (Wisc. Sup. 1980), the court extended the protections of Wisconsin's anti-handicap discrimination statute to an otherwise qualified truck driver discharged by his employer because of safety concerns due to his having only one kidney:

> It would be both ironic and insidious if the legislative intent in providing the protection of the Fair Employment Act were afforded to persons who actually have a handicap that makes "achievement unusually difficult" or limits their capacity to work, but the same protection is denied to those whom employers perceive as being handicapped. Congress recognized this situation and it included within the definition of the term "handicapped individuals" persons who are regarded as having an impairment. (emphasis in original).

Similarly, in Barnes v. Washington Natural Gas Co., 591 P.2d 461, 464-465 (Wash.Ct.App. 1979), the court found the state's anti-handicap discrimination statute to extend to an employee who was erroneously believed to be epileptic:

> It would defeat legislative purpose to limit the handicap provisions of the law against discrimination to those who are actually afflicted with a handicap, such as epilepsy, and exclude from its provision those perceived as having such a condition. Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent. The intent of the law is to protect workers against such prejudgment based upon insufficient information. The law's application, therefore, should not be limited to those who actually have handicaps, excluding those who are discriminated against in the same way because they are only thought to have handicaps.

Several other jurisdictions have had the opportunity to consider whether specific back problems constitute handicaps or disabilities and all have answered in the affirmative, Bucyrus-Erie Co. v. Wisc. DILHR, 13 EPD 11,580 (Wisc. Cir. 1977) (congential back defects discovered by x-ray including spondylolisthesis constitute handicap); and City of New York v. Donnaruma, 22 EPD 30,864 (N.Y. Supreme Ct. 1979) (x-ray finding of degenerative osteoarthritis constitutes handicap).

In view of the persuasive determinations of the courts referred to above and in view of the fact that Mr. Culver's condition not only constitutes a physical impairment which substantially impairs major life activities, but is also clearly regarded by Interstate as being such an impairment, the ineluctable conclusion is drawn that Mr. Culver has a handicap or disability within the meaning of the Act.

III. CULVER'S HANDICAP OR DISABILITY IS NON-JOB RELATED WITHIN THE MEANING OF THE PHRA

The next, and certainly the most important issue to arise in this case, is whether or not Culver's handicap is job related. And the burden of proof with respect to this issue rests upon the Respondent.

Mr. Culver has been demonstrated to be handicapped within the meaning of the Act. In every other respect, he is qualified for an over the road driver position. Having been terminated from that position because of his handicap when others without such a handicap were not terminated the burden of proof shifts to the Respondent to offer a sound business rationale in support of the termination. The nature and dimensions of the rationale are specifically spelled out by the Act's reference to a "non-job related handicap or disability" (emphasis added).

To be job related a handicap must "substantially interfere with the ability to perform the essential functions" of the job. There is no contention by Interstate that Mr. Culver was unable to perform the routine driving functions of the over the road position. Rather they argue that his handicap is job related because of the potential safety hazard it poses.

The PHRC agrees with Interstate that safety is an essential function of a driver's job. Common carriers bear the highest obligation to conduct their business in accordance with rigid safety standards, not just for the benefit of themselves or their employees, but also for the benefit of the public at large. Interstate's evidence failed to convince the Commission, however, that Mr. Culver's handicap would in any way interfere with the essential safety function.

Although there were some minor areas of disagreement amongst the three physicians whose testimony was introduced by deposition, they agreed convincingly on the most significant issues.

The doctors agreed that X-rays are a useful tool for determining the existence of degenerative disc disease and degenerative arthritis but that they should not be relied upon to make sophisticated analyses concerning these conditions. The doctors agreed that for proper diagnosis a medical history and physical examination are very important, in addition to the X-rays.

There was also accord amongst the physicians that Mr. Culver's X-rays demonstrated evidence of back disorders. However, they all agreed that the existence of disabling consequences, if any, could not be ascertained from X-rays alone. Finally, the doctors agreed that in spite of the increased risk Mr. Culver suffered of disabling back problems, the extent of that risk could not be identified; i.e. none would predict when, or even if Mr. Culver would incur in the future disabling back disorders.

From the expert testimony, the Commission is wholly unconvinced that the risk factor for Mr. Culver is great. We are particularly impressed by the fact that both physicians who examined him and reviewed his X-rays, Reish and Straley, rated Culver physically qualified to perform the work of an over the road truck driver. We were also very much persuaded by the apparent importance the experts attached to the fact that Culver was asymptomatic and that he had performed hard manual labor throughout his life with only one relatively minor back injury.

The Commission acknowledges Interstate's contention that the job from which Culver was terminated is a grueling one. Similarly we are persuaded by the expert evidence that such labor could aggravate Culver's back disorder and that serious disability could occur without prior warning due to the traumatization that even a normal back incurs in the trucking industry. We cannot agree, however, with that which is implicit in Interstate's decision to

terminate Mr. Culver; i.e. that his back made him a significantly higher risk for a disabling injury. Not only has Interstate's evidence been unpersuasive on this issue, but in fact the record suggests the very opposite.

Even Interstate's examining physician considered Culver medically qualified for the job. His risk of injury, with all the safety ramifications such risk implies, may be slightly higher than Interstate wishes to incur. However, the world is not made up of physically perfect human specimens and thus Interstate must choose from the imperfect among us. In light of this, the Commission believes the decision made by Interstate with respect to Mr. Culver to go beyond legitimate considerations of job and safety relatedness.*

As a variant of the same issue Respondent has also contended that Complainant's radiologically evidenced back condition is a bonafide occupational qualification ("BFOQ"). To be a BFOQ a factor in an employment decision must be such that all or substantially all within the class determined by the factor must be unable to perform the job safely and effectively.

BFOQ reasoning is simply inapplicable to the case. The evidence overwhelmingly establishes that little can be determined from mere radiologic evidence of back disorders. Certainly the whole class of individuals exhibiting such evidence cannot be disqualified from a job because of it. And while the risks associated with this class are admittedly higher, "Even a true

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* Although the nature of this ruling eliminates the need for any particular finding on this issue, the Commission wishes to note its displeasure with the clear implication of evidence introduced at the hearing from Interstate's policy manual to the effect that Interstate's true concern is increased cost of insurance - a factor specifically forbidden from consideration by §4(p) of the Act, 43 P.S. §954(p).

generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." City of Los Angeles Department of Water and Power, et al. v. Manhart, et al., 435 U.S. 702, 708 (1978).

Respondent conducts preemployment physical exams along with its X-ray program. It would not be impractical truly to judge each candidate for employment as an individual, as Respondent already purports to do, rather than making the most generalized class based decisions depending upon gross X-ray results. In fact, had Respondent heeded the advice of Dr. Reish, whom it employed to examine Complainant, rather than allowing a non-medically trained plant executive to determine Complainant's medical suitability for the job, Culver would have never been terminated.

Clearly then, radiological evidence of back disorders does not constitute a BFOQ. Bucyrus-Erie v. Wisc. D.I.L.H.R., 13 EPD ¶11,580 (Wisc. Cir.Ct. 1977) is in accord. By so holding, however, the Commission does not wish to condemn Interstate's X-ray program per se. The Commission has no objection to this or any other bona fide pre-employment screening device so long as its use is strictly tailored to assessing job related conditions.

IV. NONE OF THE OTHER TECHNICAL LEGAL ISSUES RAISED BY INTERSTATE PRECLUDE A FINDING FOR THE COMPLAINANT IN THIS CASE

Respondent raised a barrage of secondary issues before, during, and after the hearing, suggesting various bases for ousting the Commission's jurisdiction or otherwise precluding a finding for the Complainant. All of these are without merit.

A. Estoppel

Complaints filed against Interstate by Edward Krauser, Elmer Gresh, and George Welliver are strikingly similar to that of the complaint. Those cases, however, all resulted in staff investigators' findings of no probable cause to credit the allegations - Krauser's before, and Gresh's and Welliver's after Culver's. Based upon these other three findings, Respondent contends that the Commission is estopped from proceeding against it in Culver's case.

What Respondent misunderstands is that it is Mr. Culver, not the PHRC, proceeding against it. Culver, as is his statutory entitlement, has filed a complaint of unlawful discrimination. Although the statute provides and he has elected to utilize, Commission staff counsel at the hearing, the function of the Commissioners themselves is not the least bit prosecutorial. Rather, Commissioners hear and adjudicate matters properly before them in as fair and impartial a fashion as possible.

The equitable doctrine of estoppel prohibits a party from proceeding against another if it has induced the party to rely to its detriment upon certain facts underlying the cause of action. Here Respondent claims that by virtue of the Krauser, Gresh, and Welliver no cause findings, the Commission has induced it to rely upon the legitimacy of its X-ray program and cannot now base an action against it upon an assertion of impropriety in the

program.

But Mr. Culver has done nothing to induce Interstate's reliance. At worst Interstate has been "victimized" by three inaccurate PHRC staff determinations, all of which were in its favor. While this perhaps should be embarassing to the PHRC staff, it would be unconscionable if it should be a basis to deprive Mr. Culver of an otherwise rightful determination in support of his claim. Just as courts frequently overrule their previous decisions, the Commissioners cannot and will not be timid, upon a de novo hearing, about ruling inconsistently with staff's earlier conclusions.

Furthermore, the inconsistency of the findings is not that clear. Even if the Commission were to be bound by staff findings in the other cases, it was incumbent upon Respondent, who raised the issue, to demonstrate the identity of Culver's case and the others. Very little evidence was introduced on this issue.

Respondent's counsel asserted repeatedly that the Commissioners could "pull the file" on the other cases. But he knew or certainly should have known that this was a de novo hearing and the Commissioners could not and would not consider any evidence not in the record. And while some similarity between Complainants Krauser, Culver, Gresh, and Welliver must be acknowledged, the expert depositions were persuasive to the effect that X-ray findings alone are an insufficient basis for determining the severity or disabling consequences of back ailments. Simply puts, the relative identity of the back conditions of the four complainants was in no sense established of record in this case.

Finally, the most important element of the estoppel doctrine is missing here - that reliance be to the <u>detriment</u> of the party espousing the doctrine. Interstate insists it was prejudiced but does not make clear how.

First it must be recalled that only the Krauser finding preceded Culver's. Interstate can thus claim reliance only upon that PHRC staff determination. But how did it rely? It did not in any way change its position but rather maintained the same X-ray program which it had been using prior to Krauser. That Interstate viewed Krauser as a sanctioning of the program only postponed the day of judgment before the Commissioners, all to Mr. Krauser's detriment, if anyone, not to Interstate's.

B. Federal Preemption

U.S. Department of Transportation ("DOT") regulations set forth at 49 C.F.R. §391.41(b) that:

> A person is physically qualified to drive a motor vehicle if he - ... (7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuro-muscular, or vascular disease which interferes with his ability to control and operate a motor vehicle safely. (Emphasis added.)

Interstate argues that this regulation preempts the PHRA and precludes further action in this matter. The Commission disagrees.

In deference to our unique system of federalism, federal preemption of state regulation should not be taken lightly, especially where the "historic police powers of the States" are involved. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132,142,146 (1963); De Canas v. Bica, 424 U.S. 351, 356 (1976); Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 139 (1973). The general rule is that federal law applies exclusively only in cases where the federal statutory scheme is so pervasive as to leave no room for state involvement, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973), "Application of state Law ... would operate to frustrate the purpose of the federal legislation," Teamsters Union, Local 20 v. Morton, 377 U.S. 252, 258 (1964), or Congress has unequivocally

so stated. De Canas v. Bica, supra, 424 U.S. at 357.

Notwithstanding Respondent's expressed fears to the contrary, this adjudication leaves the U.S. Constitution and its Supremacy Clause well intact. The clear purpose of the DOT regulations is the assurance that none other than safe drivers will be fulfilling the important roles as over the road truck operators. Nothing in the regulations or in the enabling legislation, however, even remotely suggests a federal intention to preempt the unrelated exercise of a traditional state police power like the guarantee of its citizens' civil rights, so long as that exercise does not frustrate or is not in any way inconsistent with the federal regulatory scheme. No such inconsistency exists here.

Protection under the PHRA is expressly restricted to those with a non-job related handicap or disability. Of course, safety is a vital concern in the trucking industry and any physical condition which would demonstrably and significantly impact upon a driver's ability to operate properly his or her vehicle would necessarily be job related. The Commission understands this and believes it has ruled accordingly. In Part III of this Opinion, concerning the job relatedness of Culver's condition, safety was the principal factor we considered.

Respondent also urges that the DOT regulations expressly reserve for the trucking industry the right to make standards stricter than those mandated by the regulations. While that is true, it is equally important that such stricter standards are not required. Neither the DOT regulations nor Interstate anticipate physically perfect human specimens and we believe that our decision, finding unlawful the termination from employment of a man because of his non-job related handicap, a condition we specifically find would not affect his safe and effective performance of the job, is in harmony with both

the spirit and the letter of the federal regulations.

C. The Investigation and Probable Cause Finding

For a variety of reasons, principally its alleged undue haste, Respondent contended that the investigation itself and the resultant finding of probable cause to credit the allegation, were so deficient as to have deprived Respondent of due process of law. Although persuasive evidence in support of this contention was totally absent, regardless, it is without merit.

The public hearing offered Respondent a full de novo opportunity to present its entire case. Respondent's counsel called and examined the witnesses of his choosing and submitted documentary evidence into the record as he saw fit. He had the full opportunity he could wish to cross-examine witnesses called on behalf of Mr. Culver.

The finding of probable cause was not introduced as evidence, was not considered, and was never even seen by the hearing panel or any other Commissioner. It served implicitly, as a procedural prerequisite to the hearing in accordance with §9 of the Act, 43 P.S. §959, but would never even have been mentioned at the hearing had Respondent's counsel not called Thomas Myers, author of the finding, as a witness.

This adjudication is made solely upon the hearing record. Thus, although Respondent's proof showed the actual existence of no significant defects in the investigation or finding, even were they to exist they would be of no moment and would not affect Respondent's due process rights as they would have no possible bearing upon the outcome of this matter.

D. Labor Union As An Indispensible Party

Interstate contends that a controlling collective bargaining agreement makes the labor organization representing over the road drivers an indispensable party to this matter and that failure to have joined them de-

feats PHRC jurisdiction. This claim too is rejected.

Necessary parties are those without whom a proper remedy cannot be effectuated. Interstate argues that a certain Teamsters Union local is such a necessary or indispensable party because a retroactive seniority remedy would require their concurrence and would affect a fundamental restructuring of the bargaining unit.

Preliminarily it must be noted that this issue was raised by Interstate for the first time in a Supplementary brief without supporting affidavits or exhibits. No contract was introduced in evidence and nothing else in the record other than counsel's bald assertion in his brief supports his interpretation of the collective bargaining agreement. The Commission finds this interpretation difficult to accept but regardless, Interstate's argument fails.

The authority of the PHRC to fully remedy unlawful employment discrimination has been confirmed by the courts of this Commonwealth on numerous occasions. All the Commission's final order in this case accomplishes is the restoration of Complainant to his rightful place, i.e. the position in which he would have found himself had Respondent perpetrated no unlawful discriminatory Act. To the extent that a contract between two private parties such as Interstate and a union impinge upon this statutorily sanctioned exercise of remedial authority by the Commission, it is the contract provision, not the agency order which must give way.

V. REMEDY

The authority of the Commission to take appropriate affirmative action based upon a finding that the Respondent engaged in an unlawful discriminatory practice is clear. Section 9 of the Act, 43 P.S. §959, provides

that such action may include without being limited to: reinstatement, backpay and such other action as in the judgment of the Commission will effectuate the purposes of the Act. These actions of course, are in addition to a mandate that the Respondent cease and desist from engaging in the unlawful discriminatory practice.

To effectuate the purposes of the Act, the Commission deems it appropriate that Interstate fully restore Mr. Culver to his rightful place, i.e. where he would have been but for his discriminatory termination. Accordingly, in addition to backpay and reinstatement, the Commission has ordered that Culver be given a retroactive seniority date of August 12, 1978 and be extended all accrued benefits due and owing.

Backpay, the difference between what Mr. Culver would have earned had he remained with the Respondent less interim wages, has been measured as follows: Had the Complainant remained with the Respondent he would have worked until October 6, 1979 and would currently be on layoff. His seniority date would place him immediately junior to Larry Smith and immediately senior to Michael Miller and Peter Pires. Since drivers for the Respondent are paid on a formula basis which, unlike a straight hourly rate, will vary with the individual, it is impossible to calculate exactly how much he would have earned. However, it is possible to arrive at a reasonable figure by taking the wages earned by the employee immediately junior in seniority to the Complainant and use his wages as a guide. Here, both Miller and Pires were next hired by the Respondent, but Miller missed a significant amount of time due to illness. As a result, it is appropriate to use the wage figure earned by Mr. Pires from September 4, 1978 through October 6, 1979, $21,942.05, as the basis for the award. This figure is then reduced by the interim earning of $12,301.03 for a total of $9,641.02. Interest at 6%, compounded annually, has also been ordered.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT A. CULVER,
Complainant

v.

INTERSTATE MOTOR FREIGHT SYSTEMS,
Respondent

DOCKET NO. E-14582

O R D E R

AND NOW, this 6th day of January, 1981, upon consideration of the Findings of Fact, Conclusions of Law and Opinion of the Pennsylvania Human Relations Commission ("PHRC"), it is hereby Ordered:

1. That Respondent shall cease and desist from refusing to hire, or from terminating, handicapped or disabled individuals unless the handicap or disability substantially interferes with the ability of the individual applicant or employee to perform the essential functions of the particular position involved.

2. That within thirty days of the date of this Order, the Respondent shall pay to the Complainant back wages amounting to $9,641.02 plus 6% interest per annum computed from the date of the termination to the date payment is made to the Complainant. The check should be made payable to Robert A. Culver and delivered in care of Michael Hardiman, Pennsylvania Human Relations Commission, 301 Muench Street, Harrisburg, PA 17102.

3. That the Respondent shall immediately reinstate the Complainant to his position of driver with a seniority date of August 12, 1978. Written verification of reinstatement shall be provided to the Complainant, copy to Mr. Hardiman, within thirty days of the date of this Order. (However, if the Complainant would presently be in a layoff status had he never been terminated by Respondent on September 3, 1978 due to his back, nothing in this paragraph shall preclude Respondent from reinstating him to a layoff status, subject to recall in accordance with his August 12, 1978 seniority date.)

4. That the Respondent shall provide the Complainant with all benefits to which he is entitled by virtue of his employment and accrued seniority including, but not limited to, accrued vacation entitlement, membership in group health insurance program, and accrued pension benefits. A written description of all benefits provided must be furnished to Complainant, copy to Mr. Hardiman, within thirty days of the date of this Order.

5. That the Respondent shall review its current physical qualifications policy in light of PHRC Regulations at 16 Pa. Code, Chapter 44, and shall revise, as necessary, its policy to comply with the provisions found therein.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:

BY: _____
ELIZABETH SCOTT, SECRETARY

DEC 3 1980

OA-501 12-67

COMMONWEALTH OF PENNSYLVANIA

November 25, 1980

SUBJECT: FINAL ORDER IN CULVER v. INTERSTATE MOTOR FREIGHT SYSTEM, E-14582

TO: COMMISSIONERS via HOWARD TUCKER, DIRECTOR OF COMPLIANCE

FROM: BENJAMIN G. LIPMAN, ASSISTANT GENERAL COUNSEL

Howard:

Attached are originals of the following with respect to the above-referenced matter:

1) Signed recommendation of Hearing Panel
2) Findings of Fact
3) Conclusions of Law
4) Opinion
5) Final Order

Please include in the packet for the next Commission meeting.

sjc

cc: E. E. Smith

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT A. CULVER,
Complainant

v.

INTERSTATE MOTOR FREIGHT SYSTEM,
Respondent

DOCKET NO. E-14582

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, it is the view of the hearing panel that Respondent has terminated Complainant from employment due to a non-job related handicap or disability in violation of §5(a) of the Pennsylvania Human Relations Act. Accordingly, it is the Panel's recommendation that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted by the full Pennsylvania Human Relations Commission.

Everett E. Smith, Panel Chairperson — Date

Doris M. Leader, Commissioner — Date

Raquel Otero Yiengst, Commissioner — Date

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT A. CULVER, :
Complainant
:
v. DOCKET NO. E-14582
:
INTERSTATE MOTOR FREIGHT SYSTEM,
Respondent :

FINDINGS OF FACT

1. The Complainant herein is Robert A. Culver, an adult male, who resides at 124 S. Second Street, Hughesville, Pennsylvania 17737. (S.F.#1).*

2. The Respondent herein is Interstate Motor Freight System trading as Interstate System, a foreign corporation with its headquarters located at 110 Ionia Avenue, N.W. Grand Rapids, Michigan, 49503, registered to do business in Pennsylvania and with a place of business located on Old Route 15, White Deer, Pennsylvania 17777. The Respondent's registered agent for receipt

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* Abbreviations used for citations to the record in these Findings are as follows:

S.F.	-	Stipulations of Fact
N.T.	-	Notes of Testimony
Exh.	-	Exhibit
M J S D.T.	-	Deposition Testimony of Dr. Mary Jane Stackowski
WGR D.T.	-/	Depostion Testimony of Dr. William G. Reish
RKS D.T.	-	Deposition Testimony of Dr. Richard K. Straley

of process in Pennsylvania is the U.S. Corporation located at 225 South Fifteenth Street, Philadelphia, Pennsylvania 19109. (S.F.#2).

3. The Complainant, on or about September 13, 1978, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at docket number E-14582. (S.F.#3).

4. On September 22, 1978, Commission staff duly served all parties to this action with a copy of the complaint in a manner which satisfies the requisites of 1 Pa. Code 33.32. (S.F.#4).

5. In correspondence, dated September 28, 1979, the Respondent acknowledged receipt of the above captioned complaint. (S.F. #5).

6. In correspondence, dated November 29, 1978, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the above captioned complaint. (S.F.#6).

7. Subsequent to the determination of probable cause, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation, and persuasion but were unable to do so. (S.F.#7).

8. On July 24, 1978, the Complainant applied for employment as a "road driver" with the Respondent. (S.F.#8).

9. On July 31, 1978, the Complainant was certified by the Respondent as having passed two tests (the Road Test and Written Examination). Successful completion of these tests is a prerequisite to employment with the Respondent. (S.F.#9).

10. On August 7, 1978 the Complainant was given a physical examination by the Respondent's physician who signed a form indicating that Complainant was physically qualified under the U.S. Department of Transportation Regulations to work as a driver. (S.F.#10; Exh. C.D.1).

11. The Complainant, as a part of the physical examination required by the Respondent, had an x-ray of the lumbar spine taken on August 7, 1978. (S.F.#11).

12. The Complainant began to work for the Respondent as a driver on August 12, 1978. (S.F.#12).

13. A report of the interpretation of the lumbar X-rays was prepared by M.J. Stackowski, M.D., on August 8, 1978. This report indicated, "There is Arthritic Disease with Spur Formation Involving the L-3 and the L-4 Vertebral Bodies. There is definite narrowing at the L-5 S-1 disc space". (S.F.#13).

14. On September 3, 1978, the Complainant was terminated from his employment with the Respondent for his failure to meet the Respondent's physical requirements. (S.F.#14; Exh. C-9).

15. The decision to terminate the Complainant was based solely upon the X-ray report furnished by Dr. Stackowski. (S.F.#14; Exh. C-15).

16. Doctor Stackowski did not play any role in either the hiring or the termination of the Complainant other than furnishing the X-ray report. The Respondent did not request any recommendation from her regarding the ability of the Complainant to perform the duties of an over the road driver. (MJS D.T. 19; N.T. 92, 93).

17. The Complainant has been diagnosed, by virtue of X-rays of the lumbar spine taken on August 7, 1978, as having degenerative disc disease and arthritis. (MJS D.T. 9; WGR D.T. 32; RKS D.T. 51, 16, 24).

18. Radiographic studies (x-rays) are a medical tool that can show the existence, or amount of change, related to degenerative disc disease and arthritis. X-rays present a limited picture of an individual's back health. (MJS D.T. 22; WGR D.T. 28; RKS D.T. 18, 20).

19. X-ray studies alone cannot be used to determine disability or symptomatology in individuals diagnosed as having degenerative disc disease and arthritis. (MJS D.T. 22; WGR D.T. 28; RKS D.T. 19).

20. Proper evaluation of the physical condition of an individual with an X-ray finding of degenerative disc disease and arthritis requires correlation of the X-rays, a physical examination and a personal medical history. (MJS D.T. 23; WGR D.T. 15, 21; RKS D.T. 20).

21. It is impossible to correlate the degree of degenerative disc disease identifiable on X-ray with the specific degree of impairment or discomfort in any particular individual solely by review of the X-ray. (RKS D.T. 19, 20, 25; Exh. C-8).

22. Not all individuals who exhibit radiographic evidence of degenerative disc disease and arthritis either have or will develop objective symptomatology associated with the disorder. (MJS D.T. 21, 27; WGR D.T. 7, 8; RKS D.T. 20, 38, 39).

23. While an individual with radiographic evidence of degenerative disc disease and arthritis has some undetermined amount of increased risk of

possible unknown future harm as a result of the radiographic evidence, the mere existence of the disease itself does not incapacitate the individual. (MJS D.T. 34; WGR D.T. 9, 23, 29, 30; RKS D.T. 22, 23, 25, 38).

24. Generally, the exact nature, severity, and length of time before onset of future disability, if any, of an individual with degenerative disc disease and arthritis cannot be dermined within a reasonable degree of medical certainty. (MJS D.T. 32; WGR D.T. 29; RKS D.T. 22, 23, 38, 39).

25. It is medically impossible to determine whether the Complainant will ever suffer from a future back disorder. (RKS D.T. 25; WGR D.T. 12).

26. William G. Reish, M.D. is an orthopedic surgeon who performed a physical examination of the Complainant on behalf of the Respondent on August 2, 1978 and found him qualified for employment. (S.F.#10, WGR D.T. 4, 5, 22, 28).

27. Doctor Reish did not make any recommendation regarding hiring the Complainant nor did he make a recommendation regarding, or participate in, the determination that the Complainant was physically unqualified and should be terminated. (WGR D.T. 8, 22; Exh. C-9; N.T. 92, 93, 94).

28. Richard K. Straley, M.D., an orthopedic surgeon, examined the Complainant on September 29, 1978. Doctor Straley concluded that the Complainant was capable to performing the duties of an over the road driver. (RKS D.T. 6, 21, 22, 25; Exh. C-8).

29. The medical opinion reached by Doctor Straley that the Complainant could perform heavy labor and could perform the duties of an over the road truck driver was based upon a thorough physical examination, a personal

medical history and a review of the same back X-ray used by the Respondent. (Exh. C-8, RKS D.T. 7, 9, 14, 21, 22).

30. The physical examination performed by Doctor Straley focused on the low back and included a number of tests designed to determine physical limitations occasioned by significant disc disease problems. (RKS D.T. 10 through 14; Exh. C-8).

31. The Complainant both prior and subsequent to his employment with the Respondent engaged in work of a physical nature which included heavy lifting, bending, stooping, crawling, twisting and turning. (N.T. 14-23, 37-46).

32. The only difficulty that the Complainant has ever had with his back occurred some twenty years prior to his employment with the Respondent. It was temporary in nature and did not result in any time off from work. (Exh. C-8, N.T. 17, 18).

33. The Complainant would not have been disqualified from employment with the Respondent under applicable U.S. Department of Transportation Regulations without a demonstration that his diagnosed arthritis or orthopedic disease interferred with his ability to control and operate a motor vehicle safely. (Exh. C-11 at §391.41(b)(7)).

34. Applicable U.S. Departmentof Transportation Regulations do not require use of X-rays unless physical examination results so dictate. (Exh. C-11 at §391.43 page 442-Spine).

35. The Complainant made immediate and substantial efforts to find employment after his termination by the Respondent. (N.T. 29-38; Exh. C-1 through C-4).

36. Had the Complainant not been terminated by the Respondent, his date of seniority would have been August 12, 1978 and in terms of seniority, he would be immediately junior to Larry Smith (seniority date - 7/22/78) and immediately senior to Richard Miller (seniority date - 8/26/78) and Peter Pires (seniority date - 8/26/78). (N.T. 107-111).

37. Had Complainant not been terminated by the Respondent in September, 1978, he would have been laid off on October 5, 1979 and would not have been returned to work to date. (N.T. 125; Exh. R-10).

38. During the period in time from September 4, 1978 through October 6, 1979, Larry Smith's gross wages were $25,077.73. During this same period of time, Richard Miller's gross were $16,950.19, however, he missed a substantial period of time from work due to illness. Peter Pires, who has the same seniority date as Miller, had gross earnings of $21,942.05 during the same period of time. (N.T. 108, 109).

39. The Complainant during the period of time from September 4, 1978 through October 6, 1979, earned approximately $12,301.03 calculated as follows:

1) 3 trips for Professional Drivers, Inc. -	240.00
2) 1978 wages from Strick, Inc.	3,723.83
3) 1979 wages from Strick (based on total wage of 10,838.47, average weekly salary was $208.43 multiplied by 40 week - up to 10/6/79.	8,337.20
TOTAL	12,301.03

(N.T. 38-41; Exh. C-4, 5).

COMMONWEALTH OF PENNSYLVANIA

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ROBERT A. CULVER,
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v.

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Respondent

DOCKET NO. E-14582

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties to and the subject matter of this Complaint.

2. The parties and the PHRC have fully complied with all of the procedural prerequisites to a Public Hearing in this matter.

3. The pre-hearing investigation of this matter, resulting in a finding of probable cause to credit the allegations of the complaint, was conducted by PHRC staff in a fair and reasonable manner and in accordance with due process of law.

4. The public hearing constituted a de novo review of all of the evidence. The finding of probable cause, although a procedural prerequisite to the hearing, was not introduced as evidence nor was it considered.

5. Degenerative disc disease is a handicap or disability within the meaning of the Pennsylvania Human Relations Act ("PHRA").

6. Arthritis is a handicap or disability within the meaning of the PHRA.

7. Respondent terminated Complainant from his position as an "over the road" driver because of a non-job related handicap or disability in violation of §5(a) of the PHRA, 43 P.S. §955(a).

8. The Respondent was in no way prejudiced by investigative findings of the PHRC staff that probable cause to credit the allegations was lacking in other complaints of discrimination due to back-related handicaps filed against Respondent.

9. The doctrine of estoppel is not applicable to preclude PHRC processing of this case.

10. Application of the PHRA to the facts of this case is in no way inconsistent with the operation of federal Department of Transportation regulations and accordingly the doctrine of federal preemption does not preclude the PHRC from acting in this case.

11. The PHRC has authority to order that a prevailing complainant in an action alleging an unlawful termination be awarded backpay with interest and that he be reinstated with accrued seniority and all other applicable benefits.

12. Whenever the PHRC concludes that a respondent has engaged in an unlawful discriminatory practice, the Commission may order such affirmative action as in its judgement will effectuate the purposes of the Act.

13. The full remedy ordered by the PHRC in this matter can be implemented without the consent, approval, or participation of any union. The PHRC is not deprived of jurisdiction over this matter due to the non-joinder of any union.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT CULVER, :
Complainant
:
v. : DOCKET NO. E-14582
:
INTERSTATE MOTOR FREIGHT SYSTEM, :
Respondent

OPINION

I. INTRODUCTION

The essential facts surrounding this case are not in dispute. On July 24, 1978, the Complainant, Robert A. Culver, applied for employment as a road driver with the Respondent, Interstate Motor Freight System ("Interstate"). He took and passed several tests, received a physical examination including back x-rays and began working on August 12, 1978. Sometime after this date, Interstate received the x-ray report of Mr. Culver's lumbar spine and based upon this report, on September 3, 1978, terminated him.

On or about September 13, 1978, Culver filed a complaint with the Pennsylvania Human Relations Commission ("PHRC" or "Commission") alleging in part that Interstate had discriminated against him because of a non-job related handicap or disability, his failure to "pass his back x-rays."

An investigation by PHRC staff was conducted and resulted in a finding of probable cause to credit the allegations of the complaint. Efforts to conciliate the matter were unsuccessful and on July 18, 1980 a public hearing

was convened before a panel consisting of Commissioners E.E. Smith (presiding), Doris M. Leader and Raquel Otero de Yiengst.

The Pennsylvania Human Relations Act ("PHRA" or "the Act"), act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq., sets forth at §5, 43 P.S. §955 that:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification ... (a) For any employer because of the ... non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual...

Nowhere in the Act are the terms "handicap or disability" specifically defined, however at §4(p), 43 P.S. §954(p) it says:

> The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job related.

It being beyond cavil that Interstate terminated Mr. Culver from his position as road driver because of certain back conditions revealed by x-rays of Culver's lumbar spine, the primary inquiry that emerges from this case is whether those conditions (degenerative disc disease and arthritis) as present in Robert A. Culver constituted non-job related handicaps or disabilities.

II. CULVER'S CONDITION CONSTITUTED A HANDICAP OR DISABILITY WITHIN THE MEANING OF THE PHRA

On November 8, 1978, several months after the filing of Culver's complaint, PHRC regulations became effective concerning the Act's prohibition against discrimination due to handicap or disability. The regulations, at

16 Pa. Code §44.4 set forth in relevant part that:

> Handicapped or disabled person - inclues the following:
>
> (i) A person who:
>
> (A) has a physical or mental impairment which substantially limits one or more major life activities;
>
> (B) has a record of such an impairment; or
>
> (C) is regarded as having such an impairment...

Because the regulations pre-date Culver's complaint, substantive affirmative duties they impose, such as the duty to modify a job to accommodate a handicapped worker, could not be applied retroactively to Mr. Culver's case. The regulatory definition of "Handicapped or disabled person," on the other hand, can be utilized, at least as instructive, in the context of this adjudication.

The prohibition against discrimination due to handicap or disability was added to the other anti-discrimination provisions of the PHRA by a 1974 amendment. From that time forward the terms "handicap or disability" necessarily meant something. And when, in 1978, the Commission adopted a regulatory definition of the terms, it obviously deemed it to be a lawful, fair and reasonable definition. Using the definition for instructive purposes in this case is thus "... not the type of retroactivity which is condemned by law." Securities and Exchange Commission v. Chenery, 322 U.S. 194, 203 (1974).

A review of the evidence in light of the regulatory definition makes clear that the Complainant has a handicap or disability. It is undisputed in the record that he is afflicted with degenerative disc disease and degenerative arthritis, manifest by disc space narrowing and spurring

in the discs located in the lumbar spine. These disorders can cause physical problems including pain, discomfort, disc limitation, etc., and can make achievement unusually difficult. It is thus apparent that, in the language of the regulatory definition, Culver suffers from a "physical ... impairment which substantially limits ... major life activities."

Furthermore, Culver's condition also fits into the regulatory definition to the extent that it "is regarded as ... such an impairment." Most of Interstate's evidence was directed toward showing that Mr. Culver's back problems would likely result in a substantial limitation on his ability to perform heavy physical labor. It is for this very reason that Interstate terminated him. It is thus undeniably clear that Interstate regarded Mr. Culver as handicapped. And it is imperative, in order to preserve the integrity of the anti-handicap discrimination provisions of the Act, that full protection be extended to those "regarded as" as well as those actually handicapped.

This view has been adopted by several of the courts that have had occasion to consider the issue. In Dairy Equipment Co. v. Wisconsin Department of Industry, Labor and Human Relations, 290 N.W.2d 330,335 (Wisc. Sup. 1980), the court extended the protections of Wisconsin's anti-handicap discrimination statute to an otherwise qualified truck driver discharged by his employer because of safety concerns due to his having only one kidney:

> It would be both ironic and insidious if the legislative intent in providing the protection of the Fair Employment Act were afforded to persons who actually have a handicap that makes "achievement unusually difficult" or limits their capacity to work, but the same protection is denied to those whom employers perceive as being handicapped. Congress recognized this situation and it included within the definition of the term "handicapped individuals" persons who are regarded as having an impairment. (emphasis in original).

Similarly, in Barnes v. Washington Natural Gas Co., 591 P.2d 461, 464-465 (Wash.Ct.App. 1979), the court found the state's anti-handicap discrimination statute to extend to an employee who was erroneously believed to be epileptic:

> It would defeat legislative purpose to limit the handicap provisions of the law against discrimination to those who are actually afflicted with a handicap, such as epilepsy, and exclude from its provision those perceived as having such a condition. Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent. The intent of the law is to protect workers against such prejudgment based upon insufficient information. The law's application, therefore, should not be limited to those who actually have handicaps, excluding those who are discriminated against in the same way because they are only thought to have handicaps.

Several other jurisdictions have had the opportunity to consider whether specific back problems constitute handicaps or disabilities and all have answered in the affirmative, Bucyrus-Erie Co. v. Wisc. DILHR, 13 EPD 11,580 (Wisc. Cir. 1977) (congential back defects discovered by x-ray including spondylolisthesis constitute handicap); and City of New York v. Donnaruma, 22 EPD 30,864 (N.Y. Supreme Ct. 1979) (x-ray finding of degenerative osteoarthritis constitutes handicap).

In view of the persuasive determinations of the courts referred to above and in view of the fact that Mr. Culver's condition not only constitutes a physical impairment which substantially impairs major life activities, but is also clearly regarded by Interstate as being such an impairment, the ineluctable conclusion is drawn that Mr. Culver has a handicap or disability within the meaning of the Act.

III. CULVER'S HANDICAP OR DISABILITY IS NON-JOB RELATED WITHIN THE MEANING OF THE PHRA

The next, and certainly the most important issue to arise in this case, is whether or not Culver's handicap is job related. And the burden of proof with respect to this issue rests upon the Respondent.

Mr. Culver has been demonstrated to be handicapped within the meaning of the Act. In every other respect, he is qualified for an over the road driver position. Having been terminated from that position because of his handicap when others without such a handicap were not terminated the burden of proof shifts to the Respondent to offer a sound business rationale in support of the termination. The nature and dimensions of the rationale are specifically spelled out by the Act's reference to a "non-job related handicap or disability" (emphasis added).

To be job related a handicap must "substantially interfere with the ability to perform the essential functions" of the job. There is no contention by Interstate that Mr. Culver was unable to perform the routine driving functions of the over the road position. Rather they argue that his handicap is job related because of the potential safety hazard it poses.

The PHRC agrees with Interstate that safety is an essential function of a driver's job. Common carriers bear the highest obligation to conduct their business in accordance with rigid safety standards, not just for the benefit of themselves or their employees, but also for the benefit of the public at large. Interstate's evidence failed to convince the Commission, however, that Mr. Culver's handicap would in any way interfere with the essential safety function.

Although there were some minor areas of disagreement amongst the three physicians whose testimony was introduced by deposition, they agreed convincingly on the most significant issues.

The doctors agreed that X-rays are a useful tool for determining the existence of degenerative disc disease and degenerative arthritis but that they should not be relied upon to make sophisticated analyses concerning these conditions. The doctors agreed that for proper diagnosis a medical history and physical examination are very important, in addition to the X-rays.

There was also accord amongst the physicians that Mr. Culver's X-rays demonstrated evidence of back disorders. However, they all agreed that the existence of disabling consequences, if any, could not be ascertained from X-rays alone. Finally, the doctors agreed that in spite of the increased risk Mr. Culver suffered of disabling back problems, the extent of that risk could not be identified; i.e. none would predict when, or even if Mr. Culver would incur in the future disabling back disorders.

From the expert testimony, the Commission is wholly unconvinced that the risk factor for Mr. Culver is great. We are particularly impressed by the fact that both physicians who examined him and reviewed his X-rays, Reish and Straley, rated Culver physically qualified to perform the work of an over the road truck driver. We were also very much persuaded by the apparent importance the experts attached to the fact that Culver was asymptomatic and that he had performed hard manual labor throughout his life with only one relatively minor back injury.

The Commission acknowledges Interstate's contention that the job from which Culver was terminated is a grueling one. Similarly we are persuaded by the expert evidence that such labor could aggravate Culver's back disorder and that serious disability could occur without prior warning due to the traumatization that even a normal back incurs in the trucking industry. We cannot agree, however, with that which is implicit in Interstate's decision to

terminate Mr. Culver; i.e. that his back made him a significantly higher risk for a disabling injury. Not only has Interstate's evidence been unpersuasive on this issue, but in fact the record suggests the very opposite.

Even Interstate's examining physician considered Culver medically qualified for the job. His risk of injury, with all the safety ramifications such risk implies, may be slightly higher than Interstate wishes to incur. However, the world is not made up of physically perfect human specimens and thus Interstate must choose from the imperfect among us. In light of this, the Commission believes the decision made by Interstate with respect to Mr. Culver to go beyond legitimate considerations of job and safety relatedness.*

As a variant of the same issue Respondent has also contended that Complainant's radiologically evidenced back condition is a bonafide occupational qualification ("BFOQ"). To be a BFOQ a factor in an employment decision must be such that all or substantially all within the class determined by the factor must be unable to perform the job safely and effectively.

BFOQ reasoning is simply inapplicable to the case. The evidence overwhelmingly establishes that little can be determined from mere radiologic evidence of back disorders. Certainly the whole class of individuals exhibiting such evidence cannot be disqualified from a job because of it. And while the risks associated with this class are admittedly higher, "Even a true

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* Although the nature of this ruling eliminates the need for any particular finding on this issue, the Commission wishes to note its displeasure with the clear implication of evidence introduced at the hearing from Interstate's policy manual to the effect that Interstate's true concern is increased cost of insurance - a factor specifically forbidden from consideration by §4(p) of the Act, 43 P.S. §954(p).

generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." City of Los Angeles Department of Water and Power, et al. v. Manhart, et al., 435 U.S. 702, 708 (1978).

Respondent conducts preemployment physical exams along with its X-ray program. It would not be impractical truly to judge each candidate for employment as an individual, as Respondent already purports to do, rather than making the most generalized class based decisions depending upon gross X-ray results. In fact, had Respondent heeded the advice of Dr. Reish, whom it employed to examine Complainant, rather than allowing a non-medically trained plant executive to determine Complainant's medical suitability for the job, Culver would have never been terminated.

Clearly then, radiological evidence of back disorders does not constitute a BFOQ. Bucyrus-Erie v. Wisc. D.I.L.H.R., 13 EPD ¶11,580 (Wisc. Cir.Ct. 1977) is in accord. By so holding, however, the Commission does not wish to condemn Interstate's X-ray program per se. The Commission has no objection to this or any other bona fide pre-employment screening device so long as its use is strictly tailored to assessing job related conditions.

IV. NONE OF THE OTHER TECHNICAL LEGAL ISSUES RAISED BY INTERSTATE PRECLUDE A FINDING FOR THE COMPLAINANT IN THIS CASE

Respondent raised a barrage of secondary issues before, during, and after the hearing, suggesting various bases for ousting the Commission's jurisdiction or otherwise precluding a finding for the Complainant. All of these are without merit.

A. Estoppel

Complaints filed against Interstate by Edward Krauser, Elmer Gresh, and George Welliver are strikingly similar to that of the complaint. Those cases, however, all resulted in staff investigators' findings of no probable cause to credit the allegations - Krauser's before, and Gresh's and Welliver's after Culver's. Based upon these other three findings, Respondent contends that the Commission is estopped from proceeding against it in Culver's case.

What Respondent misunderstands is that it is Mr. Culver, not the PHRC, proceeding against it. Culver, as is his statutory entitlement, has filed a complaint of unlawful discrimination. Although the statute provides and he has elected to utilize, Commission staff counsel at the hearing, the function of the Commissioners themselves is not the least bit prosecutorial. Rather, Commissioners hear and adjudicate matters properly before them in as fair and impartial a fashion as possible.

The equitable doctrine of estoppel prohibits a party from proceeding against another if it has induced the party to rely to its detriment upon certain facts underlying the cause of action. Here Respondent claims that by virtue of the Krauser, Gresh, and Welliver no cause findings, the Commission has induced it to rely upon the legitimacy of its X-ray program and cannot now base an action against it upon an assertion of impropriety in the

program.

But Mr. Culver has done nothing to induce Interstate's reliance. At worst Interstate has been "victimized" by three inaccurate PHRC staff determinations, all of which were in its favor. While this perhaps should be embarassing to the PHRC staff, it would be unconscionable if it should be a basis to deprive Mr. Culver of an otherwise rightful determination in support of his claim. Just as courts frequently overrule their previous decisions, the Commissioners cannot and will not be timid, upon a de novo hearing, about ruling inconsistently with staff's earlier conclusions.

Furthermore, the inconsistency of the findings is not that clear. Even if the Commission were to be bound by staff findings in the other cases, it was incumbent upon Respondent, who raised the issue, to demonstrate the identity of Culver's case and the others. Very little evidence was introduced on this issue.

Respondent's counsel asserted repeatedly that the Commissioners could "pull the file" on the other cases. But he knew or certainly should have known that this was a de novo hearing and the Commissioners could not and would not consider any evidence not in the record. And while some similarity between Complainants Krauser, Culver, Gresh, and Welliver must be acknowledged, the expert depositions were persuasive to the effect that X-ray findings alone are an insufficient basis for determining the severity or disabling consequences of back ailments. Simply puts, the relative identity of the back conditions of the four complainants was in no sense established of record in this case.

Finally, the most important element of the estoppel doctrine is missing here - that reliance be to the <u>detriment</u> of the party espousing the doctrine. Interstate insists it was prejudiced but does not make clear how.

First it must be recalled that only the Krauser finding preceded Culver's. Interstate can thus claim reliance only upon that PHRC staff determination. But how did it rely? It did not in any way change its position but rather maintained the same X-ray program which it had been using prior to Krauser. That Interstate viewed Krauser as a sanctioning of the program only postponed the day of judgment before the Commissioners, all to Mr. Krauser's detriment, if anyone, not to Interstate's.

B. Federal Preemption

U.S. Department of Transportation ("DOT") regulations set forth at 49 C.F.R. §391.41(b) that:

> A person is physically qualified to drive a motor vehicle if he - ... (7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuro-muscular, or vascular disease which interferes with his ability to control and operate a motor vehicle safely. (Emphasis added.)

Interstate argues that this regulation preempts the PHRA and precludes further action in this matter. The Commission disagrees.

In deference to our unique system of federalism, federal preemption of state regulation should not be taken lightly, especially where the "historic police powers of the States" are involved. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132,142,146 (1963); De Canas v. Bica, 424 U.S. 351, 356 (1976); Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 139 (1973). The general rule is that federal law applies exclusively only in cases where the federal statutory scheme is so pervasive as to leave no room for state involvement, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973), "Application of state Law ... would operate to frustrate the purpose of the federal legislation," Teamsters Union Local 20 v. Morton, 377 U.S. 252, 258 (1964), or Congress has unequivocally

so stated. De Canas v. Bica, supra, 424 U.S. at 357.

Notwithstanding Respondent's expressed fears to the contrary, this adjudication leaves the U.S. Constitution and its Supremacy Clause well intact. The clear purpose of the DOT regulations is the assurance that none other than safe drivers will be fulfilling the important roles as over the road truck operators. Nothing in the regulations or in the enabling legislation, however, even remotely suggests a federal intention to preempt the unrelated exercise of a traditional state police power like the guarantee of its citizens' civil rights, so long as that exercise does not frustrate or is not in any way inconsistent with the federal regulatory scheme. No such inconsistency exists here.

Protection under the PHRA is expressly restricted to those with a non-job related handicap or disability. Of course, safety is a vital concern in the trucking industry and any physical condition which would demonstrably and significantly impact upon a driver's ability to operate properly his or her vehicle would necessarily be job related. The Commission understands this and believes it has ruled accordingly. In Part III of this Opinion, concerning the job relatedness of Culver's condition, safety was the principal factor we considered.

Respondent also urges that the DOT regulations expressly reserve for the trucking industry the right to make standards stricter than those mandated by the regulations. While that is true, it is equally important that such stricter standards are not required. Neither the DOT regulations nor Interstate anticipate physically perfect human specimens and we believe that our decision, finding unlawful the termination from employment of a man because of his non-job related handicap, a condition we specifically find would not affect his safe and effective performance of the job, is in harmony with both

the spirit and the letter of the federal regulations.

C. The Investigation and Probable Cause Finding

For a variety of reasons, principally its alleged undue haste, Respondent contended that the investigation itself and the resultant finding of probable cause to credit the allegation, were so deficient as to have deprived Respondent of due process of law. Although persuasive evidence in support of this contention was totally absent, regardless, it is without merit.

The public hearing offered Respondent a full de novo opportunity to present its entire case. Respondent's counsel called and examined the witnesses of his choosing and submitted documentary evidence into the record as he saw fit. He had the full opportunity he could wish to cross-examine witnesses called on behalf of Mr. Culver.

The finding of probable cause was not introduced as evidence, was not considered, and was never even seen by the hearing panel or any other Commissioner. It served implicitly, as a procedural prerequisite to the hearing in accordance with §9 of the Act, 43 P.S. §959, but would never even have been mentioned at the hearing had Respondent's counsel not called Thomas Myers, author of the finding, as a witness.

This adjudication is made solely upon the hearing record. Thus, although Respondent's proof showed the actual existence of no significant defects in the investigation or finding, even were they to exist they would be of no moment and would not affect Respondent's due process rights as they would have no possible bearing upon the outcome of this matter.

D. Labor Union As An Indispensible Party

Interstate contends that a controlling collective bargaining agreement makes the labor organization representing over the road drivers an indispensable party to this matter and that failure to have joined them de-

feats PHRC jurisdiction. This claim too is rejected.

Necessary parties are those without whom a proper remedy cannot be effectuated. Interstate argues that a certain Teamsters Union local is such a necessary or indispensable party because a retroactive seniority remedy would require their concurrence and would affect a fundamental restructuring of the bargaining unit.

Preliminarily it must be noted that this issue was raised by Interstate for the first time in a Supplementary brief without supporting affidavits or exhibits. No contract was introduced in evidence and nothing else in the record other than counsel's bald assertion in his brief supports his interpretation of the collective bargaining agreement. The Commission finds this interpretation difficult to accept but regardless, Interstate's argument fails.

The authority of the PHRC to fully remedy unlawful employment discrimination has been confirmed by the courts of this Commonwealth on numerous occasions. All the Commission's final order in this case accomplishes is the restoration of Complainant to his rightful place, i.e. the position in which he would have found himself had Respondent perpetrated no unlawful discriminatory Act. To the extent that a contract between two private parties such as Interstate and a union impinge upon this statutorily sanctioned exercise of remedial authority by the Commission, it is the contract provision, not the agency order which must give way.

V. REMEDY

The authority of the Commission to take appropriate affirmative action based upon a finding that the Respondent engaged in an unlawful discriminatory practice is clear. Section 9 of the Act, 43 P.S. §959, provides

that such action may include without being limited to: reinstatement, backpay and such other action as in the judgment of the Commission will effectuate the purposes of the Act. These actions of course, are in addition to a mandate that the Respondent cease and desist from engaging in the unlawful discriminatory practice.

To effectuate the purposes of the Act, the Commission deems it appropriate that Interstate fully restore Mr. Culver to his rightful place, i.e. where he would have been but for his discriminatory termination. Accordingly, in addition to backpay and reinstatement, the Commission has ordered that Culver be given a retroactive seniority date of August 12, 1978 and be extended all accrued benefits due and owing.

Backpay, the difference between what Mr. Culver would have earned had he remained with the Respondent less interim wages, has been measured as follows: Had the Complainant remained with the Respondent he would have worked until October 6, 1979 and would currently be on layoff. His seniority date would place him immediately junior to Larry Smith and immediately senior to Michael Miller and Peter Pires. Since drivers for the Respondent are paid on a formula basis which, unlike a straight hourly rate, will vary with the individual, it is impossible to calculate exactly how much he would have earned. However, it is possible to arrive at a reasonable figure by taking the wages earned by the employee immediately junior in seniority to the Complainant and use his wages as a guide. Here, both Miller and Pires were next hired by the Respondent, but Miller missed a significant amount of time due to illness. As a result, it is appropriate to use the wage figure earned by Mr. Pires from September 4, 1978 through October 6, 1979, $21,942.05, as the basis for the award. This figure is then reduced by the interim earning of $12,301.03 for a total of $9,641.02. Interest at 6%, compounded annually, has also been ordered.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT A. CULVER, :
Complainant
:
v. DOCKET NO. E-14582
:
INTERSTATE MOTOR FREIGHT SYSTEMS,
Respondent :

O R D E R

AND NOW, this _____ day of _____, 1980, upon consideration of the Findings of Fact, Conclusions of Law, and Opinion of the Pennsylvania Human Relations Commission ("PHRC"), it is hereby Ordered:

1. That Respondent shall cease and desist from refusing to hire, or from terminating, handicapped or disabled individuals unless the handicap or disability substantially interferes with the ability of the individual applicant or employee to perform the essential functions of the particular position involved.

2. That within thirty days of the date of this Order, the Respondent shall pay to the Complainant back wages amounting to $9,641.02 plus 6% interest computed from the date of the termination. The check should be made payable to Robert A. Culver and delivered in care of Michael Hardiman, Pennsylvania Human Relations Commission, 301 Muench Street, Harrisburg, PA 17102.

3. That the Respondent shall immediately reinstate the Complainant to his position of driver with a seniority date of August 12, 1978. Written verification of reinstatement shall be provided to the Complainant, copy to Mr. Hardiman, within thirty days of the date of this Order. (However, if the Complainant would presently be in a layoff status had he never been terminated by Respondent on September 3, 1978 due to his back, nothing in this paragraph shall preclude Respondent from reinstating him to a layoff status, subject to recall in accordance with his August 12, 1978 seniority date.)

4. That the Respondent shall provide the Complainant with all benefits to which he is entitled by virtue of his employment and accrued seniority including, but not limited to, accrued vacation entitlement, membership in group health insurance program, and accrued pension benefits. A written description of all benefits provided must be furnished to Complainant, copy to Mr. Hardiman, within thirty days of the date of this Order.

5. That the Respondent shall review its current physical qualifications policy in light of PHRC Regulations at 16 Pa. Code, Chapter 44, and shall revise, as necessary, its policy to comply with the provisions found therein.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:

BY: _____
ELIZABETH SCOTT, SECRETARY