

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICES

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND HITE, :  
Complainant :  
 :  
v. : DOCKET NO. E-21418  
 :  
CONSOLIDATED RAIL CORPORATION, :  
Respondent :

STIPULATIONS

The following facts are admitted by all parties to the above-captioned case and no further proof shall be required.

1. The Complainant herein is Raymond S. Hite, an adult male, who resides at 38 Benvenue Road, Duncannon, Pennsylvania 17020.

2. The Respondent herein is the Consolidated Rail Corporation, 600 Corporate Circle, Harrisburg, Pennsylvania 17110. The Respondent is an employer within the meaning of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, 43 P.S. 955(a).

3. The Complainant, on or about the 27th of October, 1981, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at Docket No. E-21418. This complaint was filed in the Harrisburg Regional Office. A copy of this complaint is attached hereto as Attachment 1, and is incorporated by reference

herein as if fully set forth.

4. On November 12, 1981, the Commission staff duly served all parties to this action with a copy of the complaint described in item 3 above in a manner which satisfies the requisites of 1 Pa. Code 33.32.

5. By letter dated December 10, 1981, Respondent by its Regional Personnel Manager, E. B. Ruark, submitted a statement of position to Complainant's formal complaint. A copy of this is attached as Attachment C.

6. In correspondence dated October 1, 1982, the Commission notified the Respondent that probable cause existed to credit the allegations contained in the above captioned complaint. A copy of this Probable Cause Finding and its cover letter is attached hereto as Attachment D.

7. After the determination of probable cause the Commission invited the Respondent to a conciliation conference in order to attempt to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion. This meeting was held on October 29, 1982. The efforts to conciliate failed.

8. In a letter dated February 18, 1983, the Commission notified the Respondent that it had voted to hold a Public Hearing in the above-captioned case. This is attached as Attachment E.

9. The Complainant, Raymond Hite, was hired by the Pennsylvania Railroad, a predecessor of Respondent, on October 28, 1941. The Complainant became an employee of

Respondent on April 1, 1976.

10. In April 1977, Complainant suffered an acute myocardial infraction. On July 8, 1977, Complainant was diagnosed as having severe coronary artery disease and on July 23, 1977, Complainant underwent coronary bypass surgery.

11. At the time of Complainant's coronary bypass surgery, he was on a medical leave of absence from his employment with Respondent. At the time of his acute myocardial infraction, Complainant was on active service with Respondent as a locomotive engineer.

12. Complainant returned to active service with Respondent as a locomotive engineer in September 1977 and was restricted to yard and local freight duty.

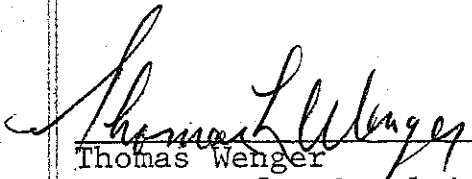
13. On or about October 2, 1978, Dr. G. W. Kunkel, M.D., Conrail Medical Officer, contrary to Company medical standards in effect at that time, lifted the Complainant's restriction to yard and local freight duty.

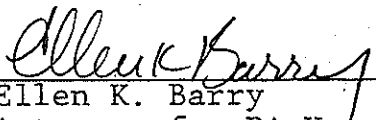
14. On or about February 3, 1981, Dr. P. R. Mansure, Conrail Medical Officer, consistent with company medical standards in effect as of that time, reinstated Complainant's restriction to yard and local freight duty.



15. At the time of the reinstitution of the restriction to yard and local freight duty, Complainant was on active service as a locomotive engineer assigned to the extra duty passenger list.

16. At all times material to this proceeding (April 1977 to date of this stipulation) it has been stated company policy that a locomotive engineer who has suffered a myocardial infraction is disqualified from working as a passenger or road freight engineer.

17. Complainant retired from active service with Respondent effective August 5, 1983.

  
Thomas Wenger  
Attorney for Complainant

  
Ellen K. Barry  
Attorney for PA Human Relations  
Commission

  
  
  
David H. Allhouse  
Attorneys for Respondent

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FINDINGS OF FACT\*

1. Locomotive engineer duties are not physically strenuous; great mental alertness is however required.

2. Conrail's trains have had accidents which were caused by the engineer's loss of consciousness.

3. A myocardial infarction, which may occur without any preceding pain (angina), may be accompanied by severe pain, or unconsciousness or death.

4. A safety device known as the dead man pedal is found in Conrail locomotives. Designed to activate the train's brakes if the engineer's foot leaves the pedal, the dead man may be bypassed by wedging it down. It is not necessarily activated if an engineer loses consciousness.

5. Persons who have had one myocardial infarction are at significantly greater risk of having a second infarction than are persons without coronary artery disease of having a first attack.

\*The foregoing "stipulations" are hereby incorporated herein as if fully set forth.

To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact.

6. Elevated blood pressure and overweight increase the risk of myocardial infarction.

7. Mr. Hite was diagnosed in July of 1977 as having three vessel coronary artery disease; only one vessel was surgically bypassed, increasing the risk to him of a second infarction in that part of his heart served by the remaining vessels.

CONCLUSIONS OF LAW

1. Complainant Raymond Hite is an individual within the meaning of the Pennsylvania Human Relations Act ("Act").
2. Respondent Conrail is an employer within the meaning of the Act.
3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this action.
4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
5. The parties having stipulated that the policy here at issue was in effect continuously between April of 1977 and the date of the stipulation entered into at the public hearing, Complainant has fairly alleged a continuing violation and the complaint in this case was timely filed.
6. Complainant has met his burden of establishing a prima facie case by proof that:
  - a. At the time of the action complained of he was handicapped within the meaning of the Act and pertinent regulations; and
  - b. Because of his handicap he suffered an adverse employment consequence.
7. Respondent has met its burden of proving that Mr. Hite's handicap was job-related in that it posed a demonstrable threat of harm to the health and safety of others.

OPINION

This case began with a complaint filed by Raymond S. Hite ("Complainant") against Consolidated Rail Corporation ("Respondent" or "Conrail") with the Pennsylvania Human Relations Commission ("Commission") on October 27, 1981 at Docket No. E-21418. Mr. Hite alleged that Conrail violated the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("Act") by restricting his employment because of a perceived handicap, history of heart by-pass surgery.

Commission staff conducted an investigation and found probable cause to credit the allegations of discrimination. When efforts to resolve this situation through conference, conciliation, and persuasion were unsuccessful, the case was approved for public hearing. It was heard in Harrisburg, Pennsylvania on December 4 and 5, 1984, by Commissioners Echols, Smith, and Wisniewski.

Mr. Hite was hired by the Pennsylvania Railroad, Respondent's predecessor, on October 28, 1941. He became a Conrail employee on April 1, 1976. In April of 1977, Mr. Hite suffered an acute myocardial infarction. He was not on duty at the time. He was subsequently diagnosed as having severe coronary artery disease. On July 23, 1977, he underwent coronary by-pass surgery.

At the time of his heart attack, Mr. Hite was on active service with Conrail as a locomotive engineer. He took a medical leave of absence until September of 1977, when he returned to active duty with a restriction to yard and local freight duty.

In October of 1978, a Dr. Kunkel, Conrail Medical Officer, lifted Mr. Hite's restriction to yard and local freight duty. This action was



contrary to company medical standards which were in effect at that time. The restriction was nevertheless not reinstated until February of 1981, at which time Mr. Hite had been on active service as a locomotive engineer assigned to the extra duty passenger list. His complaint to the Commission followed.<sup>1</sup> He continued to work for Conrail as a yard or local engineer until his retirement in October of 1983.

Mr. Hite bears the initial burden of making out a prima facie case of discrimination. General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649, 469 Pa. 291 (1976). We find in this case that he has done so by proving that he is a handicapped person within the meaning of the Act and pertinent regulations, and that he suffered an adverse employment consequence because of that handicap. Philadelphia Electric Co. v. Pennsylvania Human Relations Commission, 448 A.2d 701 (1982).

The Act nowhere defines "handicap or disability". Regulations supplying definitions were adopted by the Commission and upheld by Commonwealth Court in Pennsylvania State Police v. Pennsylvania Human Relations Commission and Phyllis Sweeting, 72 Pa. Cmwlth Ct. 520, 457 A.2d 584 (1983) and Pennsylvania State Police vs. Pennsylvania Human Relations Commission and Governor Williams, Pa. Cmwlth. Ct. 483 A.2d 1039 (1984). These provide in relevant part:

- Handicapped or disabled person - Includes 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.
  - (ii) As used in subparagraph (i) of this paragraph, the phrase:
    - (A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense

organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

- (B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- (C) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.
- (D) "is regarded as having an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.

16 Pa. Code §44.4.

Mr. Hite was in 1981 a handicapped person within the meaning of these sections. It is a reasonable conclusion from the testimony of both medical expert witnesses that he continued to suffer from coronary artery disease, a "physical or mental impairment" as defined above. As Commonwealth Court concluded in Williams, an employer's act of rejecting an applicant for medical reasons is per se an impairment of the major life activity of working within the meaning of the regulations. Unquestionably Conrail regarded Mr. Hite as handicapped. He also had a record of impairment going back to the period of total incapacity at the time of his heart attack and by-pass surgery.

It is not disputed that Mr. Hite was placed on restricted duty in February of 1981 by Respondent. Mr. Hite testified and we find that this

was an adverse employment consequence. Nor is it disputed that this action was taken pursuant to Conrail's policy of disqualifying from passenger duty any locomotive engineer who has had a myocardial infarction. Mr. Hite having made out a prima facie case, we must consider Conrail's explanation of its conduct.

The Act by its terms protects only persons whose handicaps are "non-job related":

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.

43 P.S. §954 (p).

Our regulations provide in relevant part:

Non-job related handicap or disability - Includes the following:

- (i) 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.
- (ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.
- (iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

Conrail argues that Mr. Hite's handicap is job-related within the meaning of these sections. It is not suggested that in 1981 Mr. Hite was in any way presently physically unable to perform passenger engineer duties; rather, the company contends that the threat of future harm to both Mr. Hite and others rendered his handicap job-related. We agree.

Neither party seriously suggests that a locomotive engineer's duties are especially physically demanding. The engineer in large part remains

seated, working the throttle and a number of levers, none requiring remarkable strength. In the event of certain problems an engineer may have to become more physically active, leaving the cab to attend to the situation. There was conflicting testimony about the degree of an engineer's involvement in problem situations outside the cab; we conclude that such involvement is minimal, and such situations, rare.

The parties also agree that an engineer must maintain a high degree of mental alertness. Various gauges measuring the performance of the locomotive must be monitored. The condition of the track must be constantly and closely observed. Obstacles in the right of way, such as automobiles stalled on crossing grades, must be detected and avoided if at all possible.

The parties differed in their assessments of the relative difficulty of operating freight as opposed to passenger trains. Mr. Hite testified that the greater length and weight of freight trains make them much more difficult to run; Conrail witnesses suggested that the higher speeds attained by passenger trains make them more difficult. There was no dispute about the critical distinction between passenger and freight service, however, namely the greatly increased potential for injury and loss of life in the event of a serious accident involving a passenger train. Nor did the parties dispute the high degree of care owed by Conrail to its passengers.

Conrail's witness Benjamin Black, Regional Road Foreman of its Eastern Region, testified to investigating at least five railroad collisions within the last five years. His uncontradicted testimony was that every one of these accidents was caused by engineer failure. In two cases, an engineer falling asleep at the controls caused the collision.

Much testimony addressed the operation of a safety device called the dead man pedal. The engineer's foot must remain on the pedal at all times.

If the foot is removed, a whistle blows for ten seconds, after which the locomotive's power is automatically reduced and the train's brakes applied. In each case involving a sleeping engineer, however, the dead man pedal did not activate, apparently because the engineer's foot never left the pedal. The pedal may also be by-passed by simply wedging it down.

Conrail's medical expert, cardiologist Bruce Berger, testified at length and credibly about coronary artery disease and its treatment in general. He also reviewed Mr. Hite's medical records, and testified specifically about Mr. Hite's situation. In general, Dr. Berger testified that any person who has survived one myocardial infarction is at a six to eight times greater risk of suffering a second one than is a person with normal coronary arteries. In particular, Dr. Berger also testified that several factors in Mr. Hite's case make him personally more prone to a second heart attack than he would otherwise be. First, although he was diagnosed as having three vessel coronary artery disease, only one of the three surgically by-passed. Second, both his weight and his blood pressure continued to be elevated after the surgery was performed. While not naming a specific risk factor, Mr. Hite's expert and personal cardiologist, Dr. Moffitt, agreed that Mr. Hite was at greater risk of a second heart attack than someone without coronary artery disease.

The record thus establishes to a degree of certainty which we find to be sufficient that persons like Mr. Hite have a significantly greater risk of heart attack than do persons who do not have coronary artery disease. They may experience sudden incapacitating pain, unconsciousness, or death. In the case of an engineer operating a passenger train, we find that such incapacitation could result in a collision, which would of course cause great harm to the individual, the crew, and the passengers. We therefore

conclude that Conrail has established that Mr. Hite's condition was job-related: allowing him to continue in passenger service would have posed a demonstrable threat to the health and safety of others, a threat greater than that posed by persons not similarly afflicted.

We emphasize that the risks involved here are not merely hypothetical. Respondent's concern with safety was not based upon fear of the unknown, but on known, measurable dangers with predictable, and potentially disastrous, consequences. Emphasizing also that this decision is limited to the factual context in which it arose, we recommend entry of the following final order, dismissing the complaint.

FOOTNOTES

1. Conrail argues that the complaint was untimely, as it followed the February, 1981 restriction by well over ninety days. The parties have however stipulated that the policy complained of was in effect continuously from 1977 through the date of this hearing, December of 1984. Mr. Hite has therefore alleged a continuing violation of the Act within the meaning of 16 Pa. Code § 42.11(a).

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CONSOLIDATED RAIL CORP., :  
Respondent :

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this case, the Hearing Panel concludes that Respondent did not violate Section 5 of the Act, and therefore recommends that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.



ALVIN E. ECHOLS, JR.  
CHAIRPERSON, HEARING PANEL



JOHN P. WISNIEWSKI  
HEARING COMMISSIONER



ROBERT JOHNSON SMITH  
HEARING COMMISSIONER

/EEC



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FINAL ORDER

AND NOW this 31st day of July, 1985, the Pennsylvania Human Relations Commission hereby adopts the foregoing findings of fact, conclusion of law, and opinion, in accordance with the recommendation of the hearing panel, and therefore

O R D E R S

pursuant to Section 9 of the Act that the complaint in this case be, and the same hereby is, DISMISSED.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 

JOSEPH X. YAFFE  
CHAIRPERSON

ATTEST:

BY: 

ELIZABETH M. SCOTT, SECRETARY