1/6/87

THE STATE OF NEW HAMPSHIRE

COMMISSION FOR HUMAN RIGHTS

EPH 2151-1051-70

David F. Robbins

v.

W.R. Grace and Company

FINDINGS AND ORDER

I. PROCEDURAL HISTORY

On September 2, 1981 Complainant David F. Robbins filed a timely charge of discrimination on the basis of physical handicap with the New Hampshire Commission for Human Rights (hereinafter Commission). The Commission staff investigated the complaint and Investigating Commissioner Barry Palmer's Probable Cause finding was issued on March 5, 1984. Respondent W.R. Grace and Company requested reconsideration of the finding, and the request for reconsideration was denied by Commissioner Palmer on July 10, 1985. A hearing was held on January 7, 1986, before Commissioners Gail Paine, George McAvoy and Celina Tamposi, with Commissioner Paine serving as Hearing Chair.

II. FINDINGS OF FACT

1. On January 8, 1981, Complainant David F. Robbins applied to Respondent W.R. Grace and Company for a job.

2. Complainant had previously worked for twenty-five years at Nashua Corporation starting as a laborer, and later as a foreman and technician, and had also for nineteen years until 1979 operated and worked on his own trucking business, part-time, delivering heavy machinery and picking up industrial waste and scrap iron. He was accustomed to working very long hours and moving heavy objects.

3. Complainant had a history of hypertension (high blood pressure); and his personal physician, Dr. Harris Berman of the Matthew Thornton Health Clinic, had prescribed hydrochlorothiazide (HCTZ, a medication for high blood pressure) in 1979. On May 28, 1979, at the time the medication was prescribed, Complainant's blood pressure was recorded as 160/100. On February 24, 1981, Complainant's blood pressure was recorded on one reading as 160/104 and on a second reading as 150/90. Complainant was taken off HCTZ at this time because it had caused a blood sugar elevation. Subsequently, Complainant's blood pressure was 158/90 on March 11, 1981, and 158/90 and 140/90 on March 12, 1981.

4. The plant at which Complainant applied is located in Nashua. It is a large chemical manufacturing facility including seven major buildings and many small outbuildings spread over thirty-three acres. The environment includes heavy machinery, large vats, extensive piping, and narrow, steep steel stairways and ladders, as well as hazardous chemicals, including cyclide, sulphuric acid, caustic soda, and anhydrous ammonia.

5. Respondent had no job openings at the time of Complainant's original application on January 8, 1981. In May, 1981, Complainant was called in and interviewed by Respondent's personnel manager David J. Petrini for the position of production general helper. After a second interview by production superintendent Neil Toomey, Complainant was informed that a job would be offered to him provided he passed the company physical examination; and an appointment was set up for Complainant with company physician Dr. Leon C. Haas.

6. The job of production general helper is a heavy labor job requiring constant lifting. A helper must regularly lift bags and boxes weighing between 28 and 100 pounds, move filled barrels weighing up to 640 pounds, and climb up and down narrow steel stairways and ladders, many times each day. A helper must handle the dangerous materials referred to above, and must also form part of an emergency team ready to rush to the scene when an accident occurs. In an emergency, members of the designated team are expected to

don cumbersome equipment and run to the scene carrying additional heavy equipment.

7. Dr. Leon C. Haas, Respondent's company physician, is a general practitioner with two years of training in internal medicine. At the time of Complainant's application Dr. Haas did physical examinations on all prospective employees of Respondent. Dr. Haas also did pre-employment physicals for other companies and had done a total of between two and three hundred such physicals prior to examining Complainant. When he began to do physicals for Respondent in 1980 Dr. Haas was given a thorough, full-day tour of Respondent's facility, so that he was familiar with the requirements of the job for which he would be examining candidates. Dr. Haas also received copies of the company safety manual and about 200 data sheets regarding dangerous chemicals used at the plant, but he did not receive any specific guidelines from Respondent regarding the acceptance or rejection of candidates.

8. Dr. Haas first examined Complainant on May 22, 1981. At that time Complainant's blood pressure was recorded on two readings as 150/108 and 164/100. The first reading was taken by a nurse and the second by Dr. Haas, who used a large blood pressure cuff due to the size of Complainant's arm. Haas concluded that these were "moderately severe high blood pressure readings." On his "Report of Physical Examination " Haas noted "hypertension" and "moderate obesity." A history was taken during which complainant mentioned an old right leg injury which had caused a gait disorder.

9. Haas' examination revealed that Complainant had a reduced range of motion in his right leg. Complainant "had a limp," he "could not really bend his right leg very well," and he had noticeable difficulty getting up on the examining table. Haas put Complainant through a range of motion tests, found a "rather severe" limitation in the right hip and knee, and concluded that this was the result of degenerative arthritis. Dr. Haas did not note these findings in his written report; his custom was to report his findings to Mr. Petrini by telephone.

10. In addition, Dr. Haas found that Complainant had a problem with obesity, his weight being 284 pounds, and "2+ pitting pedal edema" (swelling of the feet or ankles). Dr. Haas concluded that Complainant suffered from "mild congestive heart failure," and also noted Complainant's smoking and alcohol consumption.

11. After the examination on May 22, 1981, Dr. Haas spoke with Mr. Petrini and told him that Complainant was not medically fit for employment as a production helper.

12. Apparently at the request of both Mr. Petrini and Complainant, Dr. Haas agreed to examine Complainant a second time, telling Complainant that he should try to get his blood pressure down in the interval. However, due to his conclusion that Complainant suffered from arthritis and other medical problems, Dr. Haas had in fact no intention of reconsidering his decision that Complainant was unfit for very heavy labor because he had "bad arthritis" and ran a risk of heart attack if he performed heavy labor. Dr. Haas concluded that Complainant's arthritis rendered him unable to do the job, and also that it would be hazardous for Complainant to do it.

13. On May 25, 1981 Complainant was examined at the Matthew Thornton Health Clinic, where his blood pressure was recorded as 164/98 with a regular cuff and then 142/90 and 150/96 on two determinations with a wide cuff. Matthew Thornton records note that Complainant had re-started on hydrochlorothiazide (HCTZ - a type of blood pressure medication that had earlier been prescribed for him.) after being informed at a pre-employment physical that his blood pressure was too high.

14. Complainant's blood pressure was checked daily from May 26, 1981 to June 2, 1981. During that time his systolic (upper) readings ranged from a low of 138 to a high of 152 and his diastolic (lower) recordings ranged from a low of 74 to a high of 92.

15. Matthew Thornton records state that on June 2, 1981 Complainant "was given a note for his employer stating that his blood pressure was under adequate control."

16. Dr. Haas examined Complainant for a second time on June 5, 1986. At that time Dr. Haas found that Complainant had lost six pounds and that his blood pressure on two determinations was 150/100 and 150/90. Dr. Haas again informed Complainant that he would not certify Complainant fit to work as a production helper due to Complainant's "several medical problems previously outlined.

17. According to Dr. Haas, under the World Health Organization standard, anyone whose blood pressure was in excess of 145/95 on several readings over a six month period would be considered to have high blood pressure. Dr. Haas testified that Complainant's June 5, 1981 readings were "better" than the May 22 readings, but were still "a little high," a reading of about 140/80 being preferable.

18. At Mr. Petrini's request, Dr. Haas agreed to examine Complainant's records from Matthew Thornton. (Complainant had spoken of his recent examination there.) Dr. Haas reviewed these records, but they did not change his opinion that Complainant was not medically fit for employment in a heavy labor job.

19. Complainant's Matthew Thornton records show that Complainant was put through range of motion and leg raising tests in May, 1979 and February 1981. Dr. Haas found that these tests confirmed his diagnosis of arthritis, showing in 1979 that Complainant had a decreased range of motion in his legs and that his leg raising was restricted to 45 degrees. Dr. Haas stated that 45 degrees was well below normal and that the decrease could not be caused by obesity.

20. Dr. Haas' opinion was unchanged after reviewing the Matthew Thornton records, and he again informed Mr. Petrini that Complainant was not physically fit to do the very heavy labor in question. Mr. Petrini then finally informed Complainant that he would not be hired due to failure to pass the physical exam.

21. Dr. Haas' opinion is supported by the opinion of Dr. Steven J. Scheer, an expert in physical medicine and rehabilitation. Dr. Scheer is familiar with the job requirements and work environment of the position in question, and is also experienced in the evaluation of disabled persons with regard to their ability to return to work. After reviewing both the Matthew Thornton records and Dr. Haas' findings, Dr. Scheer came to the conclusion that he could not "in good conscience recommend Mr. Robbins" for the job in question.

22. Dr. Scheer stated that he came to the conclusion that he would not recommend Complainant for the job on the basis of Complainant's limited range of motion, confirmed by both Dr. Haas and the Matthew Thornton records, and on the basis of Complainant's history of right-leg injury, noted by Dr. Haas. Dr. Scheer confirmed Dr. Haas' assertion that Complainant's limited range of motion was not caused by obesity and stated that it was apparantly caused by a degenerative condition. He stated his concern about the steep stairs, slippery floors, bending and lifting Complainant would have had to deal with on the job, and the problems that would be caused by Complainant's seriously restricted range of motion.

23. Dr. Harris Berman, Complainant's personal physician in 1981, was at that time medical director of Matthew Thornton and a practicing physician specializing in internal medicine. He had been Complainant's personal physician since May, 1979 and was familiar with Complainant's physical condition. He had never been inside Respondent's plant and was not familiar with the requirements of the job. He had no experience conducting pre-employment physicals and little experience with industrial injuries. He was and is a board-certified internist.

24. After reviewing Mr. Petrini's written statement describing the job in question, Dr. Berman gave it as his opinion that Complainant was "physically capable of this kind of work"

and that there was nothing in his condition that would either interfere with his ability to do the job or cause a hazard to himself or others. Dr. Berman reported that, in his opinion Complainant suffered only from mild high blood pressure and had "no other significant medical problem" at the time he was turned down for employment at W.R. Grace.

25. In spite of having been diagnosed as having high blood pressure as early as 1979, Complainant was able to work twelve-hour days, combining employment as a foreman and technician at Nashua Corporation with work in his own business, transporting industrial machinery and scrap. According to Dr. Berman, Complainant was fit for normal employment both in 1981 and at the time of the hearing. We credit Dr. Berman's opinion of Complainant's general fitness for employment.

26. As to Complainant's ability to do the particular job in question here and to do it safely, we credit the opinions of Dr. Haas and Dr. Scheer and not that of Dr. Berman. We find that Complainant suffered from high blood pressure and from a seriously restricted range of motion in his right leg caused by a degenerative condition, probably arthritis. These conditions would have interfered with Complainant's ability to perform the heavy labor job for which he was rejected and would have presented a hazard to himself and others in the dangerous work environment obtaining in the W. R. Grace plant.

III. CONCLUSIONS OF LAW

A. Delay

Respondent argues that this complaint should be dismissed because of "extended" administrative delay in the Commission's processing of the case. Respondent bases its argument on a series of cases decided by the New York state courts prior to 1979 and on the increased backpay liability it argues may result from the delay in bringing the case to hearing.

The Commission must decline to dismiss this case on the basis of administrative delay. Respondent's liability to the Complainant for lost wages, should the Commission find discrimination, does not end with the date of the hearing, nor with the date of the order, but continues until complainant is hired either by respondent or elsewhere in a job comparable to the one he would have had but for the discrimination. Burns v. Town of Gorham 122 N.H. 401 (1982). Complainant is of course required to make every effort to

mitigate damages by looking for comparable employment elsewhere. Respondent's potential liability for lost wages is therefore entirely unaffected by the length of the Commission's administrative process.

More important, if the Commission were to dismiss this case on the basis of administrative delay and without consideration of the merits, we would deprive Complainant of a property right without due process of law, according to a decision of the United States Supreme Court. Logan v. Zimmerman Brush Co. 45 U.S. 422, 102 S.Ct. 1148, 28 FEP Cases 9 (1982). The "right to redress discrimination" created by a state civil rights law is a property right which the state, having once created it, "may not finally destroy without first giving the putative owner an opportunity to present his claim of entitlement." Logan 28 FEP Cases at 13-14.

Respondent has presented no evidence that Complainant failed to cooperate with the Commission's process, and makes no such argument. Had that been the case, the Commission would of course be free to dismiss the complaint. Ibid at 14, note 7. As the case stands, however, to dismiss the complaint due to administrative delays that have not been caused in any way by Complainant would be to deprive Complainant of consideration of the merits of his case as a result of circumstances wholly beyond his control in violation of the Fourteenth Amendment to the United States Constitution. Logan, supra and Rhode Island State Police v. Madison 32 FEP Cases 1862 (R.I. Super. Ct. 1983)

Since all the New York cases relied on by Respondent were decided well before Logan, they must be regarded as overruled by that case, and the Commission declines to rely on them.

Complainant is "entitled to have the Commission consider the merits of his charge" and we shall now proceed to do so. Logan at 14.

B. Handicap

Our first consideration must be whether Complainant was denied employment by Respondent due to a handicap (or handicaps) or because Respondent regarded Complainant as suffering from a handicap. Commission Rule Hum 405.01 defines handicap as a "permanent, long,term, or chronic" impairment and Rule Hum 405.06 states that coverage extends to an individual who "(a) Has a physical or mental impairment which substantially limits one or major life activities; (b) Has a record of such an impairment; (c) Is regarded as having such an impairment." Respondent has stated

that Complainant was denied employment due to certain physical conditions revealed by a medical examination. The Commission must therefore determine whether these conditions come within the definition established by Rules 405.01 and 405.06.

A physical condition will be covered within the rules only if it is "an impairment which substantially limits one or more major life activities." The conditions for which Complainant was rejected for employment at W.R. Grace do not qualify as such impairments. The decision as to whether a particular condition or set of conditions qualifies as such an impairment must be made on a case-by-case basis, with reference to the individual job seeker. E.E. Black Ltd. v. Marshall 23 FEP Cases 1253, 1262 (U.S.D.C. Hawaii, 1980) In this case, Complainant Robbins had been able to work long hours and do heavy labor, in spite of his medical condition. His own doctor classed him as fit for employment, and Respondent's doctor rejected him only for one particularly strenuous job in an unusually dangerous work environment. The record does not indicate that Complainant's physical condition would have prevented him from getting a different job within his ability and training, as a factory laborer, foreman, and technician, in any less strenuous and dangerous environment. A condition that prevents Complainant from obtaining one particular job but does not interfere with his general employability in his own field may not be considered a substantially limiting impairment. Jasany v. U.S. Postal Service 37 FEP 211 (6th Cir., 1985), Forrisi v. Bowen 41 FEP Cases 190 (4th Cir., 1986), Galuska and Landry v. Dept. of Personnel and Fish and Game Dept. (Commission decision, 1985).

C. Discrimination

Even, if we held that Complainant's medical condition constituted a covered handicap, we would hold that Respondent's actions were lawful. Respondent asserts that it excluded Complainant from employment on the basis of a bona fide occupational qualification in that the job required "mobility and flexibility, the ability to handle heavy objects and the need for constant bending, lifting and climbing," and that Mr. Robbins' physical condition, especially his arthritis, his limited range of motion, and his high blood pressure, combined with his smoking, drinking and overweight, rendered him unable to perform these "strenuous tasks over and over again in the course of a single day, day after day and week after week." Respondent correctly asserts that there was a reasonable prohibility that Mr. Robbins could not have performed this strenuous job for any length of time without endangering his own health and safety.

The standard for determining when a handicapped individual is qualified to engage in a particular type of work has been established by the United States Supreme Court. A qualified handicapped individual is "one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis 442 U.S. 397, 406 (1979).

In an employment case such as we have before us, a complainant falls under the protection of the antidiscrimination laws only if he is qualified for and able safely to perform all necessary functions of the job in question, in spite of his handicap. RSA 354-A:3(13) and Commission Rule HUM 405.03.

It is lawful for an employer to establish physical qualifications necessitated by the requirements of the job. Davis at 407. It is equally lawful for an employer to decline to hire where "it had a factual basis to believe that, to a reasonable probability, the employee's physical handicap renders him unable to perform his duties or to perform such duties in a manner which will not endanger his own health or safety or the health or safety of others." Maine Human Rights Commission v. Candian Pacific Ltd. 31 FEP Cases 1028, 1035 (Me. Sup. Jud. Ct., 1983)

The particular physical qualifications to be used must depend on the specific dangers posed by the duties and working environment of the job in question, and may lawfully be predicated on hazards posed to the public, to co-workers, or to the employee himself. In Davis the court upheld a hearing requirement for nurses based on the danger to patients posed by a nurse who could not hear a doctor's orders. Lower courts have repeatedly upheld physical requirements and exclusions on the basis of a hazard posed to the employee himself, particularly in strenuous occupations. "An employer can not be said to have discriminated against an employee if it proves to a reasonable probability that job duties and working conditions would be hazardous to the employee's health in the future..." Bucyrus-Erie Co. v. Department of Industry, Labor, and Human Relations 22 FEP cases 562, 567.(Wis.Cir. Ct. 1977) See also Treadwell v. Alexander 32 FEP cases 63 (11th Cir., 1983), Bey v. Bolger 32 FEP cases 1652 (E.D. Pa. 1982), Clark v. Chicago, Milwaukee, St. Paul, and Pacific Railroad Company 12 FEP cases 1103 (Washington Superior Court, Spokane Cty. 1975), School Board of Pinellas Cty. v. Rateau 39 FEP cases 1786 (Florida Dist. Ct. of App., 1st Dist. 1984).

In this case the job in question was unusually strenuous, and the working conditions unusually dangerous. Complainant would have been required to lift bags and boxes weighing between 28 and 100 pounds, to move filled barrels weighing up to 640 pounds, to climb up and down narrow steel stairways and ladders, and to do these things over and over

again, all day, every day. This work is performed in an environment containing many dangerous chemicals, where the materials being handled are often dangerous and must be handled very carefully to guard against injury. An employee who, through lack of joint flexibility, could lose his footing on a narrow steel stairway or be unable to hold on to a full bag containing a dangerous chemical would pose a serious hazard not only to himself but also to his co-workers.

As a production general helper, Complainant would also have been required to form part of an emergency team. When a chemical accident occurs, members of the designated team must don cumbersome equipment and race to the accident site carrying more equipment. Although Respondent provided no evidence on how frequently an employee has to do this, it is clear that particiation in an emergency team is an essential part of the job. An essential duty performed only occasionally may form the basis of a bona fide occupational qualification and a lawful refusal to hire if in the opinion of a qualified physician the applicant could not safely perform their duty. Treadwell at 65.

An employer may not assume inability to function in a particular context merely because the applicant possesses a handicap. Davis at 405. Nor may an employer lawfully fail to hire on the basis of speculative conclusions regarding the risks posed by a particular handicap. Commission Rule Hum 405.04. Lawful failure to hire due to handicap must be based on an individual evaluation of the disabilities and abilities of the applicant as well as the duties and working conditions of the job in question. Commission Rule Hum 405.05.

An employer may lawfully fail to hire due to handicap on the basis of an opinion submitted by a physician who has examined the applicant and who is familiar with the requirements of the job. Treadwell, supra and Clark, supra. Respondent may, as in these cases, by the evidence of a qualified physician, meet its burden of persuasion that its physical criteria for employment are necessary for the job in question and that Complainant cannot perform the essential functions of the job without endangering his own health and safety Bey, supra at 1665.

In this case an individual evaluation was performed by a qualified physician familiar with the requirements of the job in question. Dr. Haas was thoroughly experienced in performing pre-employment physicals, having performed between two and three hundred, including twenty-five for Respondent, before he came to examine Complainant. He was particularly familiar with the requirements and working conditions at Respondent's plant. Before he began conducting physicals for Respondent he was given a tour of the plant during which Respondent personnel manager Petrini

explained the requirements of the various jobs. Dr. Haas had also reviewed about 200 data sheets on the various chemicals used at the plant, and in his capacity as company physician he had treated on-the-job injuries suffered by Respondent's employees. He was therefore intimately familiar, in a way no outside physician could be, with the demands and dangers of the job for which he examined Mr. Robbins.

Respondent did not reject Mr. Robbins on the basis of stereotypical assumptions about persons with arthritis or high blood pressure. Respondent rejected Mr. Robbins on the basis of Dr. Haas' recommendation and only after Dr. Haas had made an individual examination of Mr. Robbins and an individual evaluation of Mr. Robbins' physical condition. In fact, contrary to Respondent's usual procedure, Mr. Petrini instructed Dr. Haas to see Complainant a second time and to review Complainant's medical records.

After this detailed evaluation, Dr. Haas found that Complainant's limited range of motion and high blood pressure, combined with smoking, alcohol consumption and obesity "would render him unable to do the demanding work required and, in fact, posed potentially serious risks to his future health," and that Complainant's "attempting such work, could precipitate an acute medical problem."

In the course of his interview with Mr. Petrini, and again when giving his medical history to Dr. Haas, Complainant admitted to an old leg injury which Dr. Haas states caused a "gait disorder." Although in his testimony at hearing complainant denied ever having injured his leg, it is clear that both Dr. Haas and Mr. Petrini had good reason to believe that he had done so. It is not necessary for us to decide whether or not Mr. Robbins ever actually injured his leg; we must only decide whether Respondent acted lawfully on the basis of the information it had at the time, and in June, 1981 Dr. Haas and Mr. Petrini believed that Complainant had suffered a leg injury and that this previous injury affected Complainant's leg motion. Dr. Scheer's testimony confirmed that such a history of injury is an important consideration in determining fitness to do this type of heavy physical labor. The risks of injury resulting from a weakness caused by a history of previous injury is a lawful consideration in examining an applicant for very heavy physical labor. Clark, supra.

Dr. Berman, Complainant's own physician at the time, testified that Complainant suffered from mild high blood pressure and that the range of motion and leg raising limitations appearing on Complainant's record were not a significant problem. Dr. Berman gave it as his opinion that Mr. Robbins was fit to do the heavy physical labor required by the job he applied for in June, 1981, and if he had been hired, would have posed no hazard to himself or others.

We chose, however, to credit Dr. Haas' testimony on these issues, rather than Dr. Berman's. Dr. Haas, as we have discussed, was thoroughly familiar with the requirements of the job, while Dr. Berman testified that his only knowledge of its demands came from Mr. Robbins and, much later, from a written description provided to him in the course of the investigation by a Commission staff member. In addition, Dr. Berman had no experience whatsoever in conducting pre-employment physicals and evaluating applicants as to their fitness for the requirements of a particular job.

The final decision to reject Mr. Robbins was made by Daniel Petrini in June, 1981 after receiving a firm opinion from Dr. Haas, based on two visits and a review of Complainant's medical records, to the effect that Complainant was unfit for the heavy physical work required, that such work would pose a serious hazard to Complainant, and that Complainant should not be hired. The only other information available to Respondent at that time was a note from Dr. Berman which was not produced in evidence but which, according to Dr. Berman's records, stated only that Complainant's blood pressure was under adequate control. Mr. Petrini, believing himself unqualified to evaluate Complainant's medical condition, asked Mr. Robbins to show the note to Dr. Haas. Dr. Haas testified that he was not sure he ever saw the note, but it is irrelevant that he did not, since he reviewed the medical records, which refer to the contents of the note. After reviewing these records Dr. Haas strongly reiterated his opinion that Mr. Robbins' physical problems would prevent his safely performing the job in question.

Thus, at the time Respondent decided not to hire Complainant, it had a factual basis for believing that Mr. Robbins' physical handicap rendered him unable to perform the duties required without endangering his own health or safety or the health or safety of others, and therefore lawfully decided not to hire Complainant. Maine Human Rights Commission, supra at 1035. Although Dr. Berman later produced a detailed statement disagreeing with Dr. Haas' findings as to Complainant's condition, this information was not available to Mr. Petrini when he made the decision. The issue that we must decide is whether Respondent's actions were lawful "based on the information it had...at the time it made the final decision..." Treadwell, supra at 63. We find that they were. Faced with the substantial evidence described above, Respondent "had no duty to investigate further." Cook v. U.S. Department of Labor 29 FEP cases 1558 (9th Cir. 1982). "A finding of discrimination cannot be predicated on information [the employer] did not have before it at the time it made the final decision." Treadwell at 65.

Additional evidence was presented at hearing which, although it could not have had any effect on Respondent's decision, confirms Dr. Haas' opinion that Mr. Robbins could not safely

perform the duties of the job. This was the testimony of Dr. Scheer, a physician experienced in rehabilitation medicine and in the evaluation of handicapped individuals in preparation for their return to work. Although Dr. Scheer never examined the Complainant, he did examine both Dr. Haas' reports and Complainant's medical records, and also familiarized himself with the requirements of the job by taking a tour of the plant. It was Dr. Scheer's opinion that the range of motion limitations shown on Complainant's records were "considerably abnormal" and would, when combined with Mr. Robbins' reported history of a leg injury, create concerns about Mr. Robbins' ability to do a job requiring climbing steep stairs and manipulating very heavy objects. Dr. Scheer stated that he could not "in good conscience recommend Mr. Robbins" for this job.

We hold, on the basis of the facts and law discussed above, that Respondent's action in failing to hire Complainaint was unlawful.

IV. ORDER

On the bases of the above holding, the complaint is hereby DISMISSED.

12/19/86
Date

Commissioner Celina A. Tamposi

12/11/86
Date

Commissioner George E. McAvoy

Gail F. Paine, Commissioner, concurring in part and dissenting in part.

I concur with the majority's Findings of Fact except as follows:

I would credit the testimony of Dr. Berman with regard to Complainant's physical condition in May and June, 1981, at the time he was refused employment by Respondent, and find:

1. Complainant was suffering from hypertension, but it was mild and controllable.

2. Complainant was not suffering from arthritis; the limitations in range of motion shown on Complainant's medical record from 1979 were not a significant problem and were not an indication of the presence of arthritis.

3. Complainant was not suffering from heart disease.

4. Complainant was mildly obese.

5. Complainant was physically capable of performing the job of production general helper at W.R.Grace without creating a hazard for himself or others.

Dr. Harris Berman, Executive Director of the Matthew Thornton Health Plan, who testified for Complainant, is a board certified internist who had been complainant's personal physician for two years prior to June, 1981. The range of motion test results from 1979, on which so much of Respondent's argument is based, were based on tests conducted at Matthew Thornton by technicians working under the supervision of Dr. Berman. Dr. Berman testified that he saw no significant problem in the range of motion test results noted in the Matthew Thornton records, and I would credit Dr. Berman's interpretation of his own clinic's records over the interpretation of either Dr. Scheer or Dr. Haas.

Dr. Haas, the only one of Respondent's expert witnesses who had actually examined Complainant, is a general practitioner with no board certification who had been in practice since sometime in 1980. Dr. Haas' opinion, based on one examination lasting approximately one-half hour, a second examination lasting ten or fifteen minutes, and a review of Complainant's Matthew Thornton records, was that Complainant was unfit for the job due to hypertension, obesity, "mild congestive heart failure," and "severe arthritis involving the right lower extremity." Dr. Haas also stated in writing in 1981, that Complainant's Matthew Thornton records confirmed the existence of the four problems noted. This opinion was flatly contradicted by Dr. Berman, who stated that Complainant showed "no evidence of congestive heart failure", that Complainant's ambulation was "perfectly satisfactory," and that Complainant was fit to do physical work.

In addition, many elements of Dr. Haas' testimony lacked credibility. Dr. Haas contradicted himself at hearing as to the main reason for his decision to recommend against hiring Complainant. In answer to questions from Complainant's attorney, Dr. Haas testified that he had made up his mind after the May 22 examination to recommend against Mr. Robbins, and scheduled the second examination in June only to "let him down a little easier." Dr. Haas testified that he would not have reconsidered this decision in June, no matter how much Complainant's hypertension had improved, because "the main reason the man could not do this job of carrying around heavy bundles, lifting packages, being on his feet all day, is because he has bad arthritis." However, in answer to the attorney's next question, Dr. Haas testified: "Now, my main concern was not so much that this man would have arthritis and that in six months after doing heavy work he would be disabled... My concern for him personally was that he could get out there and start doing a lot of heavy things and have a heart attack." [emphasis added]

Haas' testimony and written opinion were also contradicted by his own records made at the time he examined Complainant. These records show references to hypertension and obesity but make no mention whatever of any problems involving the heart, joints, extremities or arthritis. On the physical examination forms dated May 22, 1981 there are check marks next to the words "hear" and "extremities." Dr. Haas testified that such a check mark on his examination forms usually means "normal".

In addition, Dr. Haas testified that Mr. Robbins' Matthew Thornton medical records from 1981 do not support a diagnosis of heart disease, further contradicting his own 1981 written opinion. Complainant's 1981 records in fact contain a notation of a normal electrocardiogram and chest x-ray. Dr. Haas never explained at hearing how he came to his diagnosis of congestive heart failure.

Dr. Scheer, Respondent's expert in rehabilitation medicine, never examined Complainant and based his opinion on Dr. Haas' report and records and Complainant's medical records from Matthew Thornton. Dr. Scheer testified that he would not disqualify Complainant from heavy labor based on the hypertension readings appearing in the record, but that he would disqualify Complainant based on the range-of-motion limitations he finds in the Matthew Thornton records described by Dr. Haas in his report.

However, Dr. Berman must be considered more qualified to interpret the Matthew Thornton records than either Dr. Scheer or Dr. Haas, and Dr. Haas' own findings are discredited by their internal contradictions. Since Dr. Scheer's opinion is based not on examination but on a combination of his interpretation of the Matthew Thornton records and Dr. Haas' findings, I decline to credit Dr. Scheer's opinion over that of Dr. Berman.

With regard to the majority's conclusions of Law, I again concur in part and dissent in part. I concur with the majority's conclusions on the issue of delay.

I dissent from the majority's ruling that Complainant is not covered under the law against discrimination on the basis of handicap.

Dr. Haas, who conducted the examination on which Respondent relied, stated in his letter of October 20, 1981 that he had found Complainant to be suffering from the following: "1) moderate to severe hypertension, 2) obesity, 3) mild congestive heart failure, 4) sever arthritis involving the right lower extremity." At hearing Dr. Haas' testimony and the testimony of Respondent's other witnesses focussed on hypertension and arthritis. The majority nevertheless finds that Complainant was neither handicapped nor regarded as handicapped.

State and federal courts in other jurisdictions, ruling on cases similar to the one before us, have adopted a broad definition of the term "handicap" which is consistant with the definition in the Commission's rules. The Wisconsin Supreme Court, ruling on a case involving a man with asthma, held that the term "handicap" is not confined to those conditions that disable a person from all normal remunerative employment, nor to those which require rehabilitative training, nor to obvious, visible handicaps such as paraplegia. Instead the court defined handicap as it is defined in Webster's Third New International Dictionary, "a disadvantage that makes achievement unusually difficult; esp.: a physical disability that limits the capacity to work, " and held that an asthmatic was handicapped for purposes of the state anti-discrimination law. Milwaukee Road v. Wisconsin DILHR FEP cases 938 (1974). The court advised that chronic migraine headaches would also be considered a covered handicap. Similarly, both arthitis and high blood pressure have been held to be within the coverage of various state and federal anti-discrimination laws. J.C. Penny Co. v. Wisconsin DILHR 12 FEP Cases 1109 (Wis.Cir.Ct 1976) [arthritis], American National Insurance Co. v. Fair Employment and Housing Commission 34 FEP Cases 818 (Cal.Sup.Ct. 1982) [high blood pressure], Bey v.Bolger 32 FEP Cases 1652 (U.S. C.C.E.D.Pa. 1982) [high blood pressure].

The coverage of the New Hampshire statute extends to applicants who are regarded as suffering from an impairment that substantially limits one or more major life activities. Commission Rule Hum 405.06 (c). What counts in this analysis is not whether the complainant regards himself as handicapped, nor even whether he is actually handicapped, but whether respondent, in deciding whether or not to employ him regarded him as handicapped. E.E. Black Ltd. et al v. Marshal 23 FEP Cases 1253 (U.S.D.C. Hawaii, 1980), Barnes v. Washington Natural Gas Co. 27 FEP Cases, 503 (Wash. Ct. of App. 1979).

Dr. Haas testified that Complainant's blood pressure, taken several times on two different dates more than two weeks apart, varied, on May 22 from 164/100 to 150/108 and on June 5 fromo 150/100 to 150/90, and that he regarded this as moderately severe high blood pressure. He also indicated, as did Dr. Berman, that high blood pressure is a chronic condition which can be very serious and which requires long term medical treatment.

Dr. Haas also testified that Complainant suffered from "bad arthritis," and that he reached this conclusion on the basis of the range of motion tests he performed on Complainant, as well as records of previous tests performed on Complainant at the Matthew Thornton Clinic, and his own observations of Complainant's ability to move about and climb up on the examination table. Dr. Scheer, an expert in rehabilitation medicine who had reviewed both Dr. Haas' reports and Complainant's Matthew Thornton records, described Complainant's condition as "degenerative." Clearly this describes a long-term, chronic condition. The two doctors do not use the same terminology, but both clearly describe a chronic impairment involving a limitation of motion in Complainant's leg.

Mr. Petrini, who made the final hiring decision for Respondent, testified that he made a provisional job offer to Complainant, pending the outcome of Complainant's physical examination by Dr. Haas. Mr. Petrini testified repeatedly that he relied entirely on Dr. Haas' medical opinion in deciding whether an employee was physically able to do the job, and that it was due to Haas' medical disqualification that Complainant was finally rejected for the job.

This case must be distinguished from the Commission's earlier decision, Galuszka and Landry v. N.H. Dept. of Personnel and N.H. Dept. of Fish and Game (1985). In that case Complainant's impairment, nearsightedness, prevented them from getting one particular type of job, but did not prevent them from engaging in many other very active occupations. Their impairment did not substantially limit their ability to work.

However, the impairment described by Dr. Haas in explaining his reasons for disqualifying Complainant from the W.R. Grace job would have much broader consequences. Such impairments would disqualify Complainant not only from the job in question but from many other heavy labor jobs for which he would otherwise be qualified.

Clearly Mr. Robbins is a handicapped individual and was so regarded by Respondent when it rejected him for employment, within the meaning of Commission Rules Hum 405.01 and 405.06

I also dissent from the majority's conclusion that Respondent's refusal to hire Mr. Robbins was legitimate under RSA 354-A. Respondent has admitted that it denied Mr. Robbins a job on the basis of certain medical conditions which I find to be handicaps. Therefore, the burden is on the respondent to demonstrate that

its action is legitimate either due to a bona fide occupational qualification or because complainant's handicap "renders him unable to perform his duties" without hazard to himself or others. Maine-Human Rights Commission v. Canadian-Pacific Ltd. 31 FEP CASES 1028, 1031, (Me. Sup.Jud.Ct., 1983). see also Kimmel v. Crowley Maritime Corp. 39 FEP Cases 363 (Wash.Ct. of App., 1979), Chicago & North Western Railroad v. Labor and Industry Review Commission 21 FEP Cases 1744 (Wis.Ct. of App. 1979), Bucyrus-Erie Co. v.Wisconsin Dept. of Industry, Labor and Human Relations 22 FEP Cases (Wis. Sup. Ct. 1979), Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Wisconsin DILHR 8 FEP Cases 939 (Wis.Sup.Ct. 1974), E.E. Black Ltd. v. Marshall 23 FEP Cases 1253 (U.S.D.C.,Hawaii, 1980), Bentivegna v. U.S. Dept. of Labor 30 FEP Cases 875 (9th Cir. 1982).

A bona fide occupational qualification exists only when Respondent is able to "prove by a preponderance of the evidence (1) that the essence of the business operation requires the discriminatory practice and (2) that it had a factual basis to believe that all or substantially all persons in the excluded category would be unable to safely or efficiently perform the duties of the job involved." Maine Human Rights Commission at 1033, Dothard v. Rawlinson 433 U.S. 321, 333, 94 S. Ct. 2720, 53 L.Ed. 2d 786, 15 FEP Cases 10, 15.

By definition, a bona fide occupational qualification refers to an "excluded category" and requires policies or guidelines as to who shall be excluded. In this case Respondent has admitted that no such guidelines ever existed.

Respondent could also have demonstrated that its refusal to employ Mr. Robbins was legitimate by showing that Complainant was unable safely to perform the duties of the job in question. Maine Human Rights Commission at 1032, the "safety defense." This defense must be based upon an individual evaluation of the complaint and the job requirements, and may not be made on the basis of speculation or stereotypical assumptions. Commission Rules 405.03, 405.04 and 405.05. Respondent's evidence was insufficient to establish this defense.

The fact that the employer made the decision in good faith on the basis of reasonable appearances or a rational relationship to employee safety is not enough to legitimize the rejection of an employee on the basis of a physical handicap. Maine Human Rights Commission at 1033, Mantolete v. Bolger 38 FEP Cases 1081 (9th Cir. 1985), Montgomery Ward v. Bureau of Labor 16 FEP Cases 80 (Ore. Sup. Ct. 1977). "We believe that permitting an employer to justify discriminatory policies merely by showing that those policies had some rational relationship to employee safety would greatly weaken the state's clear objective ... of according strong guarantees against employment discrimination." Maine Human Rights Commission, supra.

In making an employment decision, the employer must take into account the future effects of a job on a handicapped person's

health or safety. "We do not believe that the legislature intended to require an employer to employ a handicapped person when the employer could prove that it had a factual basis to believe, to a reasonable probability, that such employment would cause a future deterioration of the employee's health or endanger his safety or endanger the health and safety of others." Maine Human Rights Commission at 1035.

Such a rejection based upon future hazard must have a factual and not a speculative basis. "An employer cannot, however, presently deny an employee an equal opportunity to obtain gainful employment on the mere possibility that his physical handicap might endanger his or others' health or safety at some indefinite future time." Ibid. [emphasis added] See Commission Rule 405.04 and Chicago v. North Western Railroad 21 FEP Cases 1744, 1745, Bucyrus-Erie 22 FEP Cases 563, 568, E.E. Black Ltd. 23 FEP Cases 1253 , 1264-65, Bentivegna 30 FEP Cases 875, 877, Mantolete 38 FEP Cases 1081, 1086.

The fact that an employer's decision was based upon the opinion of a physician will not necessarily insulate the employer from liability for discrimination, if it does not appear that there is sufficient evidence to show that the individual's employment "would pose a reasonable probability of substantial harm." Mantolete 38 FEP Cases at 1086, Bucyrus-Erie 22 FEP Cases at 568, Chicago & North Western R.R. 21 FEP Cases at 1746. See also Chicago, Milwaukee, St.Paul &Pacific R.R. 8 FEP Cases 938, Kimmel 39 FEP Cases 363, Bentivegna 30 FEP Cases 875, and Maine Human Rights Commission 31 FEP Cases 1029.

Even when the company doctor has personally examined the applicant, the employer may not avoid liability merely by stating its categorical reliance on the doctor's opinion, but must demonstrate facts sufficient to show a probability of substantial harm that will result from the complainant's employment. Chicago, Milwaukee, St.Paul & Pacific R.R., supra; Bucyrus-Erie, supra, Bentivegna, supra; and Mantolete, supra.

The burden of persuasion that Complainant was unable safely to perform the duties of the job is on the employer, and the employer must produce substantial evidence to satisfy it. This remains true when the job in question is difficult or dangerous. In Bucyrus-Erie the Wisconsin Supreme Court considered a case involving an applicant for a job as a welder, whose medical examination revealed an incomplete spinal fusion, spondylolisthesis (displacement of a vertebra) and possible spondylolysis (disintegration or dissolution of a vertebra). The position involved welding in cramped quarters inside unfinished machinery and handling heavy equipment, sometimes while standing on a ladder or suspended from a cable. The employer had actually experienced a situation in which a welder suffering from back pain had been unable to extricate himself from inside an unfinished machine. Nevertheless, the court upheld a decision finding that the employer had unlawfully discriminated against the applicant, where the applicant had held other strenuous jobs

without difficulty and the company doctor was unable to say when or if complainant was likely to develop an actual back problem, whether the problem would be disabling if it did develop, or what percentage of such persons actually develop problems. 22 FEP Cases at 569.

In Chicago & North Western Railroad, a Wisconsin court of appeals dealt with a case involving a Complainant with a history of epilepsy who had applied for a job as a welder with the railroad, where he would be required to operate on fifty-foot bridges and under derailed cars, stand as close as three feet to a moving train, drive a special truck fitted for use on train tracks, and operate an abrasive wheel and an acetylene torch. The court noted that in this case, "If possibilities became actualities, a tragedy may result." However, the court held that it was necessary to deal with the "reasonably probable" and upheld a decision against the employer on the grounds of medical expert testimony that medication could prevent future seizures in "seventy to ninety percent of patients" and that it was possible to conclude the employer had "not shown a reasonable probability" that the applicant would have a future seizure, or that if he did, he would injure himself or others. 21 FEP Cases at 1746.

In order to show that it made a lawful decision not to employ Complainant, Respondent must show that it considered not only the opinion of its own doctor, but also other appropriate medical information of which the decision-maker was aware, or which he knew was available. Kimmel, supra; Bucyrus-Erie, supra; Chicago, North Western R.R., supra.

In this case Respondent has not met its burden of showing that a reasonable probability existed that complainant's employment would have been a hazard to himself or others.

In making its decision Respondent relied categorically on the opinion of Dr. Haas. This opinion, contradictory and poorly substantiated, is insufficient to satisfy Respondent's burden. Nor is it buttressed by the opinion of Dr. Scheer which was based largely on Dr. Haas' own findings, and particularly on portions of those findings that were both unsubstantiated by the contemporary records and flatly contradicted by Complainant's own physician, Dr. Berman.

Respondent had the opportunity to consider Dr. Berman's opinion before making the final decision, but failed to do so. Both Mr. Robbins and Dr. Berman testified that Robbins received a note in early June from Berman for Robbins' potential employer, in reference to Robbins' medical condition. This note is also referred to in the medical records provided by Matthew Thornton, and the date shown is June 2, 1981. Mr. Petrini testified that he recalled receiving a note coming from Matthew Thornton, but that he did not take it into account, simply telling Complainant to give it to Dr. Haas. Dr. Haas testified that he did not recall if he had seen this note. However, Dr. Haas testified that he did receive Complainant's Matthew Thornton medical records in June,

1981 and that he reviewed them at that time. There is an entry in the Matthew Thornton records dated June 2, 1981, which reads in pertinent part: "Pt. was given a note for his employer stating that his B P was presently under adequate control. If they have any further questions, they should contact us." Dr. Haas also admitted that certain portions of his opinion were directly contradicted by the Matthew Thornton records.

Clearly, both Mr. Petrini and Dr. Haas were aware that there was substantial medical evidence in opposition to Dr. Haas' opinion, but they failed to take this into account. They had the opportunity to obtain further information, and they failed to do so.

I find that Respondent has failed to satisfy its burden of persuasion in this case, and I conclude that Complainant was unlawfully denied employment in violation of RSA 354-A:8.

I would order a further hearing to determine appropriate relief.

December 31, 1986
Date

Gail F. Paine
Gail F. Paine, Commissioner

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. JANUARY TERM, 1987

SUPERIOR COURT

David F. Robbins

v.

W. R. Grace and Company

v.

New Hampshire Commission for Human Rights

PETITION AND APPEAL FROM DECISION AND ORDER OF THE NEW HAMPSHIRE HUMAN RIGHTS COMMISSION

NOW COMES David F. Robbins, by and through counsel, The Legal Clinics, P.A., and complains against the New Hampshire Commission for Human Rights, 61 South Spring Street, Concord, County of Merrimack, New Hampshire (hereafter NHCHR), and W.R. Grace and Company, Organic Chemical Division, Poisson Avenue, Nashua, County of Hillsborough, New Hampshire, and respectfully represents as follows:

1. On September 2, 1981, Petitioner, David F. Robbins, filed a charge of discrimination with NHCHR (a copy of which is attached hereto) which resulted in a hearing held January 7, 1986 before Commissioners, Gail F. Paine, Chairperson, George McAvoy, and Celina A. Tamposi.

2. On January 6, 1987, a copy of the Decision and Order of the NHCHR steming from said January 7, 1986 hearing, was forwarded to Petitioner's attorney, and it is asserted that said Decision and Order were received by Petitioner's attorney on January 8, 1987. A copy of NHCHR's Decision and Order is attached hereto.

3. The Findings of Fact and Conclusions of Law of NHCHR as set forth in the decision and order herein, are contrary to and not supported sufficiently by the evidence presented at hearing and are unreasonable, unjust and unlawful.

4. Petitioner is aggrieved by the Decision of NHCHR as follows:

A. The ruling of NHCHR that Petitioner's complaint is not covered by RSA 354-A:8I and Commission Rule HUM 405.01-405.06 is illegal as a matter of law.

B. Findings of Fact in the Decision of NHCHR that Petitioner had numerous medical problems including but not limited to severe limitations in range of motion, degenerative arthritis, obesity, and mild congestive heart failure are inaccurate, not substantiated anywhere in the record or the evidence and should be set aside.

C. The Conclusion of Law by NHCHR that no discrimination occurred is contrary to RSA 354-A:8I and Commission Rule HUM 405.01-405.06. The Decision is unreasonable, unjust, unlawful and not supported by sufficient evidence.

WHEREFORE, Petitioner prays that in accordance with RSA 354-A:10, the Court:

A. Set aside the Decision and Order of the NHCHR that Petitioner's complaint is not within the protection of RSA 354-A:8;

B. Set aside the Decision and Order of the NHCHR that no discrimination has occurred.

C. Enter an Order that illegal discrimination has occurred with reference to Petitioner's complaint and remand to the NHCHR with an Order that further proceedings be held to fashion appropriate relief.

D. For such other and further relief as the Court deems just.

Respectfully submitted
David F. Robbins
By His Attorneys,
The Legal Clinics, P.A

Dated: January 30, 1987

Christopher J. Garner, John M. Lewis

Christopher J. Garner
and John M. Lewis
24A Broad Street
Nashua, New Hampshire 03060
(603) 889-8857

Original Sent To
Peter Foley, AG
2/24/87

February 17, 1987

BILL IN EQUITY

IT IS ORDERED that the plaintiff(s) notify the defendant(s) to appear at the HILLSBOROUGH SUPERIOR COURT in Manchester, on the first Tuesday of April, 1987 to answer the said bill of complaint, by causing a true and attested copy of said bill and this order to be served on said defendant(s) at least fourteen (14) days prior to said return day.

It is further ordered that said defendant(s), each of them, file with the clerk of court, within thirty (30) days after the return day, a Plea, Answer, or Demurrer, and deliver a copy of said instrument to: The Legal Clinic, 24A Broad Street, Nashua, NH 03061 Esquire, Plaintiff's attorney; otherwise, said bill shall be taken as confessed.

The foregoing is a true copy of a Bill in Equity, entered as aforesaid, and of the order of notice thereon.

Attest: _____
Clerk of Court

/ for Service)

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS February 17, 1987

ORDER OF NOTICE
***** ** ******

No. 87-E-20184 BILL IN EQUITY

Re: Robbins, David E. v/s Wells Industrial Capital

This bill _____

having been entered in said court on February 2, 1987

IT IS ORDERED that the plaintiff(s) notify the defendant(s) to appear at the HILLSBOROUGH SUPERIOR COURT in Manchester, on the first Tuesday of April, 1987 to answer the said bill of complaint, by causing a true and attested copy of said bill and this order to be served on said defendant(s) at least fourteen (14) days prior to said return day.

It is further ordered that said defendant(s), each of them, file with the clerk of court, within thirty (30) days after the return day, a Plea, Answer, or Demurrer, and deliver a copy of said instrument to:

The Legal Clinic
24A Broad Street, Nashua, NH 03061 Esquire, Plaintiff's attorney; otherwise, said bill shall be taken as confessed.

The foregoing is a true copy of a Bill in Equity, entered as aforesaid, and of the order of notice thereon.

Attest: _____
Clerk of Court