

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

ROBERT HAL TAYLOR, COMPLAINANT

v.

ROCKWELL INTERNATIONAL, TRUCK AXLE DIVISION, RESPONDENT

DOCKET NO. E-16027

FINDING OF FACTS

CONCLUSIONS OF LAW

OPINION

DISSENTING OPINION

RECOMMENDATION OF HEARING COMMISSIONER

FINAL ORDER

FINDINGS OF FACT

1. Complainant is Robert Hal Taylor, an adult male residing in Wampum, PA with the mailing address of P.O. Box 1055, R.D. 1, Wampum, PA 16157.
2. Respondent Rockwell International, Truck Axle Division, with a facility at Hobert Street, New Castle, PA, is a corporation authorized to do business in, and employing more than four persons within, the Commonwealth of Pennsylvania.
3. Complainant filed a complaint with the Pennsylvania Human Relations Commission on or about June 6, 1979 at Docket No. E-16027 alleging that Respondent's refusal to hire him violated the Pennsylvania Human Relations Act.
4. Commission staff found probable cause to credit Mr. Taylor's allegations of discrimination. The parties attempted to conciliate the matter but were unable to do so.
5. Complainant applied for a position with Respondent as a forge hammer operator at its New Castle facility in January of 1979.

6. Respondent rejected Complainant's application because x-rays of his back, performed as part of a pre-employment physical examination, revealed spina bifida occulta of the sacral vertebra and spurring in the space between the fourth and fifth vertebrae.
7. Other than his back conditions, Respondent viewed Complainant as well-qualified to perform the duties of forge hammer operator.
8. After rejecting Mr. Taylor's application, Rockwell continued to seek applicants of equal qualifications.
9. The duties of a forge hammer operator are strenuous and hazardous; operators work together, manipulating red hot steel billets with heavy tongs while a 15,000 pound hammer repeatedly strikes the billets.
10. Many forge hammer operators have incurred back and other injuries while performing their duties.
11. At the time of his application, Mr. Taylor experienced no symptoms as a result of his back conditions.
12. Dr. Medlock's testimony that Mr. Taylor would have injured his back within a short time was not based on data in the record connecting the conditions Mr. Taylor had with injury to forge hammer operators.

CONCLUSIONS OF LAW

1. Complainant is an individual with the meaning of the Act.
2. Respondent is an employer within the meaning of the Act.
3. This 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 hearing in this case.
5. Complainant has met his burden of establishing a prima facie case under the Act by proof that:
 - a. He was at the time of events giving rise to this case a handicapped or disabled person;
 - b. He applied for a position for which he was qualified.
 - c. His application was rejected; and
 - d. The employer continued to seek applicants of equal qualifications.
6. Respondent has failed to meet its burden of proving that Mr. Taylor had a job-related handicap within the meaning of the Act.

OPINION

To the extent that this opinion recites facts in addition to those already listed, such facts shall be considered to be additional Findings of Fact.

This case began with a complaint filed by Robert Hal Taylor ("Complainant") against Rockwell International, Truck Axle Division ("Respondent" or "Rockwell") with the Pennsylvania Human Relations Commission ("Commission") on or about June 6, 1979 at Docket No. E-16027. Mr. Taylor alleged that Rockwell violated Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §§951 et seq. ("Act") by refusing to hire him for an entry level position in the forging department; he claimed that Rockwell erroneously regarded him as having a job-related disability. Rockwell has consistently denied any violation of the Act.

Commission Staff investigated and found probable cause to credit the allegations of discrimination. Efforts at conciliation were unsuccessful. A public hearing was held on January 17, May 23, and May 24, 1984, before Commissioners Wisniewski, Panel Chairperson, and Clark and Denson, Hearing Commissioners. On December 18, 1984, the panel visited Rockwell's New Castle plant and observed the forge hammer operation.

Complainant bears the initial burden of establishing a prima facie case of discrimination under the Act. General Electric Corp. v. Pennsylvania Human Relations Commission, 469 Pa. 202, 265 A.2d 649 (1976). If he meets this burden, Respondent may prevail by showing a legitimate, non-discriminatory reason for its conduct; in this case Respondent could do this by proof that Mr. Taylor had a job-related disability at the time of his application. National Railroad Passenger Corp. v. Pennsylvania Human Relations Commission, 70 Pa. Commw. 62, 452 A.2d 301 (1982).

Complainant's initial burden under the Act is well settled; he can make out his prima facie case by proof that:

1. He is a member of a protected class;
2. He applied for a position for which he was qualified;
3. His application was rejected; and
4. The employer continued to seek applicants of equal qualification.

National Railroad Passenger Corp.; Pennsylvania State Police v. Pennsylvania Human Relations Commission, 72 Pa. Commw. 520, 457 A.2d 584 (1983).

Complainant has met this burden. His application with Rockwell was rejected by them solely because of back conditions which were revealed by an x-ray taken as part of a required pre-employment physical; in all other ways they found him well qualified. Respondent raises a number of arguments relating to Mr. Taylor's qualifications apart from his back conditions. We find the record to establish quite clearly that his back conditions were the sole reason for rejection of his application. He was therefore a handicapped person at that time within the meaning of the Act, our regulations, and relevant caselaw. Pennsylvania State Police v. Pennsylvania Human Relations Commission, ___ Pa. Commw, ___ 483, A.2d 1039 (1984). After his application was rejected, Rockwell continued to seek applicants with equal qualifications. Complainant having made out a prima facie case, we must consider Respondent's explanation of events.

The parties agree that the x-ray of Mr. Taylor's back revealed two abnormal conditions: spina bifida occulta of the first sacral vertebra, and spurring in the disc space between the fourth and fifth lumbar vertebrae. Spina bifida occulta was defined by each party's expert witness as a failure of the bones surrounding the spinal column to completely close, leaving in Mr. Taylor's case a small opening in the first sacral vertebra. Spurring consists of bony outgrowths on the vertebrae, in this case limited to an area between the fourth and fifth lumbar vertebrae. It is also agreed that Mr. Taylor experienced no symptoms as a result of these conditions at the time of his application to Rockwell. The parties vigorously dispute the degree to which these conditions would have posed a risk of future harm to Mr. Taylor and his co-workers.

Our regulations provide that the possibility of future harm may in some circumstances 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.

16 Pa. Code §44.4 (5)(ii) and (iii).

We find that Respondent has failed to meet its burden of proving that Mr. Taylor's conditions were job-related handicaps within the meaning of these sections.

The duties of a forge hammer operator in 1979 were both strenuous and potentially hazardous. Improvements in the plant between 1979 and the time of this hearing did not materially alter the duties of forge hammer operators. Rockwell's New Castle plant has at all relevant times manufactured truck axles using a forging process. Each truck axle begins as a steel billet several feet long, weighing between 120 and 350 pounds. The billet is heated in a furnace until it is red hot, then manipulated using tongs and a hoist onto the lower die of the forging hammer. Two hammer operators working together use heavy tongs to hold and twist the billet as a 15,000 pound drop hammer repeatedly strikes it with great force. While the hammer operators do not, of course, themselves bear the weight of the billet, they do absorb some of the impact of the hammer blows, and must manipulate the billet between blows using the tongs.

Respondent's witness Lewis Aronson testified that hammer operators at the plant have incurred serious back and other injuries in a variety of ways. If the billet is misplaced or the tongs incorrectly held, the force which must be absorbed by the operators is greatly increased; the tongs may be thrown free by the hammer's blows, with great potential for seriously injuring the operators. There have been accidents when the billet was lodged in the upper die of the hammer and a hammer operator, still gripping the billet with tongs, was jerked off his feet when the hammer rose, carrying both billet and hammer operator up with it.

Respondent's expert witness, James B. Medlock, M.D., testified that, after reviewing Mr. Taylor's x-ray report, he concluded that Mr. Taylor could not perform the job of forge hammer operator without posing a threat to himself and to others. Asked to predict when Mr. Taylor would have suffered a disabling back injury, he replied:

I cannot pinpoint it to a specific time interval, but he would have undoubtedly injured his back very soon after commencing work in the forge area. Perhaps within a period of weeks or maybe a month or so, but it wouldn't have taken long until he would have had sufficient forces applied to his back that he would have had injury.

Medlock Deposition, p.20.

Respondent's evidence, while demonstrating that forge hammer operators perform hazardous work, fails to show that the risk to Mr. Taylor would have been any greater than that faced by

every forge hammer operator. In no instance was injury to an operator shown to have had any relationship whatsoever to either spina bifida occulta or spurring of the lumbar vertebrae. Nor did Dr. Medlock provide any data in support of his opinion that Mr. Taylor would promptly incur a disabling injury if employed as a forge hammer operator.

Our prior cases have consistently rejected similar speculative attempts to establish job-relatedness. In Williams v. State Police, upheld by Commonwealth Court in Pennsylvania State Police v. Pennsylvania Human Relations Commission, ___ Pa. Commw. ___, 483 A.2d 1039 (1984), we rejected Respondent's claim that a missing kidney posed a job-related handicap to a prospective State Trooper. The claim of job relatedness there as here was based solely on the opinion of a physician employed by the Respondent. There as here the record established only that the work, while unquestionably dangerous, was as dangerous for Mr. Williams as for anyone else.

In December of 1984, in Lewis and Birch v. Carolina Freight, E-19317 and E-19318, we rejected the company's claim that spurring of the vertebrae constituted a job related handicap for over the road truck drivers. We found a failure to establish with "any reasonable degree of likelihood" (Finding of Fact No.3) that the sudden, severe incapacity predicted by the examining physician would in fact occur.

Our interpretation of the regulatory requirement of a demonstrable threat of harm has been upheld by Commonwealth Court. In affirming our Williams decision, the Court held.

The purpose of 16 Pa. Code §44.4(ii) was to give the same degree of self-determination to the handicapped as to the able-bodied. It is inconsistent with that purpose to treat a threat of harm equally posed to handicapped and able bodied persons as job-related only in the case of the handicapped.
A.2d at ___.

We therefore conclude that Respondent refused to hire Complainant solely on the basis of his non-job-related handicaps, in violation of Section 5(a) of the Act. Following such a finding we are empowered by Section 9 of the Act to award relief, including hiring and lost wages. Interest on backpay awards may also be ordered. Goetz v. Norristown Area School District, 16 Pa. Commw. Ct. 389, 328 A.2d 579 (1975). Pennsylvania Courts have consistently allowed us broad discretion in the fashioning of such awards. Pennsylvania Human Relations Commission v. Alto Reste Park, 453 Pa. 124, 306 A.2d 881 (1973); Murphy et al. v. Pennsylvania Human Relations Commission, ___ Pa. ___, 486 A.2d 388 (1985). Our computations of backpay must be reasonably calculated to replace earnings lost as a result of discriminatory conduct; they need not and often cannot be mathematically precise.

Complainant here has requested both lost wages and an offer of employment, and we find that the Act's purposes will be effectuated by awarding both. For purposes of computing the award, we accept the calculations summarized in Complainant's Exhibit 13. We therefore order relief as described with specifically in the order which follows.

DISSENTING OPINION

We respectfully dissent.

Respondent in our view has satisfied its burden of establishing the job-relatedness of Mr. Taylor's handicaps. The testimony of Respondent's witnesses more than adequately demonstrated the threat of harm both to Mr. Taylor and to his co-workers which will result from the Commission's decision in this case. That decision ignores a factor which we find to be quite significant, namely the long experience of Dr. Medlock with actual working conditions in the forge area. Also brushed off are the many and serious injuries indisputably incurred by workers in that area. Finally, our own personal observation of the operation of the forge persuades us that the operator's duties will pose a particular and more serious threat to Mr. Taylor than to persons not suffering from his back conditions. We therefore would find that Respondent has met its burden of proving job-relatedness, and would dismiss this complaint.



JOHN P. WISNIEWSKI
HEARING PANEL CHAIRPERSON



RITA CLARK
HEARING COMMISSIONER

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DOCKET NO. E-16027

RECOMMENDATION OF HEARING COMMISSIONER

Upon consideration of the entire record in this case, the Hearing Commissioner concludes that Respondent violated Section 5(a) of the Pennsylvania Human Relations 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.


CARL E. DENSON
HEARING COMMISSIONER

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ORDER

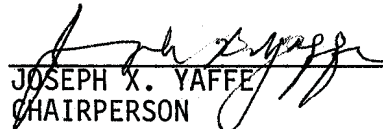
AND NOW, this 28th day of June, 1985, the Pennsylvania Human Relations Commission hereby adopts the foregoing findings of fact, conclusions of law, and opinion, in accordance with the recommendation of the Hearing Commissioner, pursuant to Section 9 of the Act, and therefore

ORDERS

1. Respondent shall cease and desist from discriminating against forge hammer operator applicants on the basis of non-job related handicaps or disabilities.
2. Respondent shall pay to Complainant a lump sum of \$44,787.26, representing the amount of wages lost by Complainant as a result of Respondent's unlawful discriminatory conduct, by check payable to Robert Hall Taylor, within thirty (30) days of the effective date of this Order, plus interest of six percent compounded annually from the actual date of this Order.
3. Respondent shall offer to Complainant the next available position of forge hammer operators or any equivalent position which is acceptable to Complainant, at its New Castle facility.
4. Within thirty (30) days of the effective date of this Order, Respondent shall provide written verification of its compliance with Paragraphs 1 and 2 of this Order to Michael Foreman, Esquire, Assistant General Counsel, Pennsylvania Human Relations Commission, 11th Floor, State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:


JOSEPH X. YAFFE
CHAIRPERSON

ATTEST:


ELIZABETH M. SCOTT
SECRETARY