

HR-81-017-PE  
4-1700-455-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota,  
Department of Human Rights,

Complainant,

FINDINGS\_OF\_FACT,  
CONCLUSIONS\_OF  
LAW\_AND\_DECISION

vs.

Hibbing Taconite Company,

Defendant.

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on October 5, 1990 in Minneapolis, Minnesota, on October 22, 23 and 24, 1990 in Duluth, Minnesota, on October 30 and 31, and November 1, 1990 in Minneapolis, Minnesota.<sup>1</sup> The record on this matter closed on July 10, 1991, the date of submission of the last post-hearing brief.

Richard L. Varco, Assistant Attorney General, 1100 Bremer Tower, St. Paul, Minnesota 55155, appeared on behalf of the Complainant, Minnesota Department of Human Rights. Raymond L. Erickson and Richard J. Leighton, from the firm of Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A., 1000 First Bank Place, 130 West Superior Street, Duluth, Minnesota 55802-2094, appeared on behalf of the Respondent, Hibbing Taconite Company.

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUES

The issues which have been litigated in this case are as follows:  
(1) whether the class certification should be withdrawn and the claims of the putative class members dismissed; (2) whether the disability provisions of the pre-1983 version of the Minnesota Human Rights Act are unconstitutionally overbroad or void for vagueness; (3) whether applicants (charging parties and

class members herein) for a heavy labor job, who are perceived by the

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1An evidentiary hearing on the claim of class member Michael Pavich was conducted on June 24, 1988 due to the claimant's presence in the State at that time.

Respondent as being unable to perform the job without posing a serious threat to that applicant's or others' health and safety due to non-disabling anatomical anomalies of the low back, are disabled within the meaning of Minn. Stat. P 363.01, subd. 25 (1973); (4) whether Respondent was denied due process of law by the failure of the Minnesota Department of Human Rights to promulgate rules defining the term "disability"; (5) whether Respondent unlawfully discriminated against the charging parties and class members herein on the basis of "disability"; (6) if discrimination is proved, what is the appropriate measure of damages; (7) whether a cause of action under the Minnesota Human Rights Act survives the death of the individual in whose favor the cause of action lies; (8) whether the claims of Howard Wollin and Allan Pehling should be dismissed as untimely; (9) whether the claims of Jorgie Senich and Richard Harvotich should be dismissed because they lack the requisite evidentiary support due to the fact that no contemporaneous medical examinations were performed; and (10) whether Timothy Pogerals' claim should be dismissed because he withdrew his charge of discrimination and/or his second rejection for employment was unrelated to his low back condition.<sup>2</sup>

#### Procedural\_History

On or about April 12, 1976, Delano F. Inkman filed a charge of discrimination with the Minnesota Department of Human Rights (Department) alleging that Hibbing Taconite Company had discriminated against him on the basis of disability in

The initial Complaint in this case, which was filed on October 22, 1979, was issued on behalf of Delano Inkman and a class of individuals described as "all persons who have been denied employment, who would have been denied employment had they applied, or who will be denied employment, at Hibbing Taconite on or after October 12, 1975 . . . ." A Complaint seeking relief for Howard Wollin was issued on May 8, 1981. Thereafter, on February 17, 1983, an Amended Complaint was issued seeking relief for Inkman, Wollin, Pehling, Quick, Pavich and Pogerals, as well as:

all other persons who, in whole or in part, because of the condition of their lower back as revealed by low back

x-rays, have been denied employment, who would have been denied employment had they applied, or who will be denied employment at Hibbing Taconite, on or after April 22, 1979

. . . .

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2Some of these issues have already been decided on one or more occasions pursuant to motions brought by the parties. All of the previous Orders issued in this case are specifically incorporated by reference herein. The Judge will not duplicate the content of those previous Orders in this Decision.

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The Complainant moved to certify the class in this matter on or about July 17, 1987.<sup>3</sup> Respondent opposed the certification and, in addition, filed Motions to Dismiss on the basis of a lack of subject matter jurisdiction and on the ground that the "disability" provisions of the 1973 version of the Minnesota Human Rights Act were unconstitutional. In an Order dated November 18, 1987, the undersigned Administrative Law Judge certified this action as a class action on behalf of "all persons who, in whole or in part, because of the condition of their lower back as revealed by lower back x-rays, have been denied employment at Hibbing Taconite on or after April 22, 1979." Additionally, Respondent's Motions to Dismiss were denied. Notice to class members of the composition of the class was provided in a Notice dated December 17, 1987. The charging parties and class members numbered 20 individuals in this case.

On December 18, 1987, Respondent petitioned the Minnesota Court of Appeals for discretionary review of the November 18, 1987 Order and also petitioned the Minnesota Supreme Court for accelerated review. The Minnesota Court of Appeals denied discretionary review on January 12, 1988 and the petition for accelerated review was denied by the Minnesota Supreme Court on January 20, 1988. The Court of Appeals' Order expressly stated that the "Order shall not prevent Petitioner from raising the same issues on appeal from a final determination."

On January 27, 1989, Respondent moved for reconsideration of the November 18, 1987 Order which had certified the class and denied Respondent's Motions to Dismiss. This Judge deferred ruling on the Motion for reconsideration until the Minnesota Supreme Court issued a decision on *State, by Cooper v. Hennepin County (Tervo)*, 441 N.W.2d 106 (Minn. 1989), and until the Minnesota Court of Appeals had filed its decision in *Bauer v. Republic Airlines, Inc.*, 442 N.W.2d 818 (Minn. App. 1989), rev. den. August 25, 1989.

In an Order dated August 10, 1989, the undersigned Judge denied the Motion for reconsideration but advised both parties that the issues raised by Respondent should be reviewed by an appellate court as "important and doubtful" if possible.

On August 18, 1989, Respondent filed a Motion to reconsider and to certify the issues in the August 10, 1989 Order as "important and doubtful". That Motion was not opposed by Complainant. By Order dated October 16, 1989, the following issue was certified as important and doubtful under Rule 103.03(h) of the Minnesota Rules of Civil Appellate Procedure:

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3The litigation in this case was held in abeyance by agreement of the parties pend

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Whether applicants for a heavy labor job are disabled within the meaning of Minn. Stat. P 363.01, subd. 25 (1973), where the applicants are perceived by the prospective employer as being unable to perform the job without posing a serious threat to the applicant's or to others' health and safety due to non-disabling anatomical anomalies of the low back.

On November 14, 1989, Respondent filed a notice of appeal and obtained a writ of certiorari to review the certified question. The Complainant joined in arguing the propriety of appellate review of the certified question. Respondent also filed a direct appeal arguing not only the certified question but also the other rulings made in previous Orders issued by this Judge. In an Order dated December 12, 1989, the Minnesota Court of Appeals dissolved the writ of certiorari and dismissed the appeal on the grounds that the Order for certification did not arise from a Motion to dismiss or from summary judgment, and due to a lack of statutory authorization for certification in State agency proceedings. Thereafter, Respondent petitioned the Minnesota Supreme Court for discretionary review of the Court of Appeals' decision and for accelerated review. By Order dated February 21, 1990, the Minnesota Supreme Court denied both petitions. Thereafter, this matter was heard as a contested case on the dates set forth above.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT4

1. In 1973, the Minnesota Legislature amended Minn. Stat. § 363.03, subd. 1(2) to extend the coverage of the Minnesota Human Rights Act to what has been generically labeled as "disability discrimination". See, 1973 Minn. Laws, ch. 729, § 3. The amended statutory language provided, in part, as follows:

Except when based on a bona fide occupational qualification, it is an unfair employment practice:

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4The first 12 Findings result from the extensive litigation which supported Respondent's Motion to dismiss on the ground that the disability provision enacted in 1973 is unconstitutionally vague and overbroad. The Judge ruled on this Motion on two separate occasions. (See Procedural History above.) However, in those rulings, the Judge made no Findings of Fact, but rather addressed the supporting documentation in narrative fashion. This Motion record was offered, and received, into the evidentiary record in this case based upon a previous agreement of counsel in a prior litigation on the same issue (Eveleth, referenced above). Consequently, because no Findings were previously made on the evidentiary support for the Motion, and the same issue will be argued before an appellate court if an appeal is taken, the Judge has made Findings of Fact which, in part, reflect the evidentiary basis for Respondent's Motion stated above.

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(2) for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance or disability,

- (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
- (b) to discharge an employee; or
- (c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment \* \* \*. (Emphasis added.)

The Human Rights Act was also amended to define the term "disability" as follows:

Disability. "Disability" means a mental or physical condition which constitutes a handicap.

Minn. Laws of 1973, ch. 729, P 1; codified as Minn. Stat. P 363.01, subd. 25.

2. Although the term "handicap" was not defined anywhere in the Minnesota Human Rights Act, on the same day that the Legislature enacted the disability provisions set forth above, which included the term "handicap", the Legislature also enacted Minn. Laws of 1973, ch. 757, P 1, which defined "handicapped person" as follows:

For the purposes of Sections 256.452 to 256.483  
[pertaining to the Council for the Handicapped]  
"handicapped person" means one who, because of substantial  
physical, mental or emotional disability or dysfunction  
requires special services in order to enjoy the benefits  
of our society.

Minn. Stat. P 256.481.

3. When the bill containing the 1973 amendments to the Human Rights Act was enacted, various legislators expressed a concern regarding the interpretation of the term "disability". Consequently, then Commissioner of Human Rights, Samuel L. Richardson, intended that subsequent rulemaking proceedings would clarify the meaning of the term "disability". Commissioner Richardson realized, at that time, that the statutory disability provisions were left "open" because the Department was in "unchartered waters" and "didn't dare include some areas and leave out some areas." Commissioner Richardson acknowledged that it was important at that time to "sell" the Legislature on the fact that persons were being discriminated against due to a "disability". Richardson Deposition at 41-43, 53-55.

4. On July 12, 1973, the Department of Human Rights conducted an informational hearing concerning the applicability and implementation of the new statutory disability provisions. This meeting was held several weeks before the amendments to the Human Rights Act were to become effective. It was the Commissioner's intent to publish guidelines or policies concerning

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implementation of the disability provisions after charges were received and investigated concerning allegations of disability discrimination. However, no rules, policies or formal statutory interpretations of the disability provisions were promulgated or issued during Commissioner Richardson's tenure at the Department of Human Rights.

5. Commissioner William L. Wilson succeeded Commissioner Richardson at the Department of Human Rights and also became aware of the problem in the interpretation and implementation of the new statutory disability provisions. Consequently, Commissioner Wilson hired Ms. Mary Hartle and assigned her

specific responsibilities concerning rule promulgation in the area of disability discrimination. Thereafter, Ms. Hartle began a period of research and analysis in preparation for the development of proposed "disability" rules,

which efforts continued into the succeeding Commissioner, Marilyn McClure. Ms.

Hartle was subsequently appointed to a task force directed to review the issue

of substantive employment rules that would include the disability provisions. An issue that was addressed at that time was the difficulty in determining whether or not the Department had jurisdiction over particular claims of disability discrimination. Commissioner McClure established a task force to address the problem of the definition of "disability" specifically regarding the issue of jurisdiction. In an agency work plan drafted during the McClure administration, the author states "the jurisdictional category of discrimination and the basis of disability is relatively unexplained and certainly ill defined although the number of charges received by the Department

which allege disability discrimination continues to increase." See, Vigal (McClure) Deposition Exhibit D. However, in a "human rights committee" document entitled "Guidelines" dated October 1974, the author stated that "for

the purposes of defining disability, the Department will refer to definitions e

6. Contained in the Department of Human Rights "Agency Work Plan" for fiscal year 1980 was "Objective 11" which was "to develop an operational interpretation of the 'disability' category by February 1, 1980 and submit it to the task force assigned to develop a draft of rules on employment discrimination". See, Exhibit E of the Vigal (McClure) Deposition.

7. Part of the methodology devised by the Department for the development of a definition of "disability" included a review of closed files in order to determine how the Department was enforcing the statutory provisions. Mary Hartle undertook an extensive review of the closed files on disability discrimination cases in 1978 and 1979 in order to determine how the agency was

implementing the law with respect to jurisdictional issues. Based on her review, Ms. Hartle formed an opinion that if the term "disability" is defined too broadly, the more severely disabled persons would be hurt because she felt

it was the intent of the Legislature to protect those who were severely disabled. See, Hartle Deposition at 51-52.

8. In February of 1981, a staff recommendation was sent to Commissioner McClure which requested that formal rulemaking concerning disability discrimination "be cancelled until such time as staff can devote the time and energy necessary for its completion". See, Vigal Deposition Exhibit L. At that time, attorneys for mining companies in northern Minnesota, including Respondent, were attempting to prod the Department of Human Rights to

promulgate rules concerning the interpretation of disability discrimination. However, the Department declined to draft and promulgate rules.

9. In 1983, the Minnesota Legislature amended the Human Rights Act to specifically define what was meant by the term "disability" as follows:

Subd. 25. Disability. "Disability" means any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

Minn. Laws of 1983, ch. 276, P 1; codified as Minn. Stat. P 363.01, subd. 25. The above-definition of disability conforms with the definition contained in federal law.

10. The State Council for the Handicapped and legislative sponsors of the new definition had expressed concerns, as a basis for the 1983 amendment, about the unclear and circular definition of disability which had been enacted in 1973.

11. During the mid and late 1970s and early 1980s, Respondent was not sure how to comply with the prohibition against disability discrimination. Consequently, Respondent contacted attorney William O'Brien and doctors at the Mesaba Clinic concerning the use of back x-rays as a part of the pre-employment physical examination for potential employees. In August of 1977, Respondent received a no probable cause determination from the Department concerning a charge of disability discrimination which was filed in May of 1976. In a charge based on similar facts, the Department found probable cause in a determination issued in September of 1977 in the Inkman matter herein. The basis for probable cause (PC) and no probable cause (NPC) determinations for charges of disability discrimination issued by the Department were dealt with in a case-by-case manner with no apparent uniform departmental policy. However, concerning a charge of disability discrimination filed by Paul Mondati, a special assistant attorney general summarized a standard for finding probable cause in "low back cases" which was recommended to then Commissioner William L. Wilson in June of 1977. See, Wilson Deposition Exhibit F, Letter from Special Assistant Attorney General Norman B. Coleman, Jr.

12. After

13. Hibbing Taconite operates a facility in the Hibbing/Chisholm area in northeastern Minnesota that mines taconite ore and converts it into high grade iron pellets which are then shipped via rail to loading facilities on Lake Superior. In 1975, Hibbing Taconite began to expand its mining operations at the plant. An hourly work force of 243 employees in 1976 grew continuously to

a high of 909 hourly employees in 1981. The Hibbing Taconite facility

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consisted of five major departments: mining, plant operations, maintenance, administrative services, and an engineering department. General laborers, who were hourly employees, were utilized in the mining, plant, and maintenance departments. Applicants for laborer positions were hired as a result of a screening process that concluded in a physical examination. Applicants who were determined to be otherwise qualified for employment were sent to a physical examination as the last stage in the hiring process. The examining physician determined whether an individual was physically qualified to perform the work of a laborer at Hibbing Taconite. If the applicant was determined to be physically qualified, he/she was given available work at the plant or was placed in a pool from which they could be called at such time as Hibbing Taconite was hiring.

14. The occupational qualifications for the position of a laborer were developed by Respondent's medical consultants after those consultants had examined the workplace and become familiar with the types of work required of the laborer. Hibbing Taconite Company hired the staff doctors at the Mesaba Clinic for this consultation and used the clinic for the purpose of pre-employment physical examinations. Respondent relied on the medical judgment of the doctors at the Clinic and uniformly followed the recommendation of the doctor who performed the pre-employment physical examination. Hibbing Taconite consulted with the doctors at the Mesaba Clinic on a regular basis concerning the appropriateness of disqualifying conditions.

15. The pre-employment physical examination standards used by Hibbing Taconite from 1976 to 1982 provided for the rejection and disqualification of applicants with certain conditions including a "history of back pathology or other disabling back conditions which could be aggravated as determined by medical findings." The examining physician classified applicants for employment in one of four categories, A, B, C, or D. Those persons placed in the D category were individuals who had "defects listed above that cannot be corrected and make it inadvisable to employ them under any circumstances."

16. Each of the class members and charging parties herein was examined by a physician at the Mesaba Clinic for purposes of a pre-employment physical. During the relevant time period (1976 through 1982), back x-rays taken of Hibbing Taconite job applicants at the Mesaba Clinic were classified in one of three (A, B, or C) categories. Back conditions that merited a C classification were spondylolysis, spondylolisthesis, transitional lumbrosacral vertebra having transverse process articulations with the ala [sic] of the sacrum, thin intervertebral disc spaces at the L4-5 lumbrosacral level and marked general

hypertrophic degenerative changes in the upper spine, or moderate if at the L4, L5 or S1 level. Exhibit 302. Individuals with class C backs were judged to be poor risks for employment in the mining industry.

17. The pre-employment physical examination given applicants for hourly jobs at Hibbing Taconite was based on the assumption that each applicant could or would be employed as a general laborer. The laborer's position involves exposure to working conditions on a shift over a period of 24 hours a day, seven days a week, and 52 weeks a year. Due to the seniority agreement in effect at the time, all employees were required to hold an entry level job of laborer. Additiona

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18. The work of a general laborer is a physically demanding job requiring the cleaning of heavy equipment, moving items into and out of storage, working in the excavated pits, relocating power shovels and the performance of other heavy, physical work. Because of the large equipment that the laborer must work around, his/her work is made more strenuous because the parts, tools and related equipment is of a large scale. The laborer is required to work on uneven in and outdoor terrain, in oily, slick conditions, and at all hours of the night and in all weather, no matter how inclement. The materials with which the laborers work and which they must shovel by hand are very heavy. A cubic foot of ore concentrate weighs approximately 130 pounds and a cubic foot of ore pellets weighs approximately 135 pounds. The laborer's work oftentimes required repetitive, strenuous activities which had to be performed in cold weather and on irregular surfaces.

19. The pre-employment physical exam given job applicants at Hibbing Taconite had various components. The applicant arrived at the Mesaba Clinic and presented the examining doctor with no documents from Hibbing Taconite other than an authorization form. At that time, the employee was required to fill out his or her medical history and was then given a physical exam by a physician. The exam consisted of certain laboratory studies such as a urinalysis and blood pressure check, then a physical examination by a doctor which was followed by a back x-ray. If the medical history information supplied by the applicant raised any questions for the physician, he/she would explore those areas with the applicant. If a response from the applicant had clinical significance, it was noted along with any abnormalities found by the doctor. After the exam was completed and the back x-ray taken, the applicant was instructed to wait until he/she heard from Hibbing Taconite. Subsequently, the back x-ray report from a radiologist was reviewed by the Mesaba Clinic physician. On the basis of that information, the doctor assigned the applicant

an A, B, C, or D classification. This classification was not changed by Respondent after it was received. Applicants who failed their physical exams were so notified and rejected for employment and those who passed were subsequently hired.

20. The charging parties and class members herein were rejected from employment at Hibbing Taconite on the basis of their physical condition. Each was examined and given a D classification (non-employable defect) on the basis of a radiological assessment of his or her back in combination with the fact that the condition reported by the radiologist disqualified the applicant from engaging in the strenuous physical activity required of a general laborer at Hibbing Taconite as determined by the standards established at the Mesaba Clinic.

21. Injuries to employees' backs at Hibbing Taconite have been a recurrent and expensive problem. Oftentimes, it was not unusual to have at least 20 workers, all of whom had passed the pre-employment physical with "normal" backs, being treated due to back conditions. As a result of Respondent's concern to prevent back injuries, employees were instructed on proper lifting techniques, and on how to shovel and bend correctly so as not to sustain a back injury. The company's experience was that once a person sustained a back injury, the chances of recurrence were great.

22. The philosophy and purpose of pre-employment physicals required by Hibbing Taconite is expressed in written standards dated June 4, 1976. The document states as follows:

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The rising costs of Workers' Compensation together with new safety and health regulations indicate a need for good pre-employment physical examinations to insure the hiring of employees who are physically and mentally q

\* \* \*

The physical examination should not be used to deny employment to applicants who are not perfect. The physical examination should be used to determine if the applicant is qualified to work. Some applicants will be denied employment because of physical disabilities of various types. Following is a list of potential disqualifying conditions.

\* \* \*

Exhibit 299.

23. An inherent problem in giving pre-employment physical examinations which permit the applicant to provide his/her own medical history is that the

applicant can conceal physical problems and/or conditions which the applicant feels may be disqualifying.

24. All of the claims herein involve challenges to the legal "appropriateness" of applicants' disqualifications for employment based upon low back (spine) conditions revealed by x-rays taken during the pre-employment physical examination. Much of the medical testimony in this case focused upon the anatomy of the spine and upon the principles of biomechanics concerning the spine and surrounding tissues. The spinal column which runs down an individual's back consists of a set of vertebra which are intended to protect the spinal cord that runs from the neck down to approximately the fifth, or last, lumbar vertebra in the spine. The spinal cord is a round, cord-like tissue that divides into many nerves which enervate the lower limbs and internal organs. In addition to protecting the spinal cord, another major purpose of the spine is to support the human trunk and the abdomen. In between each of the vertebra, which are bones, are discs, a cushioning material which permits the movement of the spine.

25. Because the spine supports the upright human body, it is subjected to loads which change depending on activities engaged in. When an individual has a back injury, treating physicians frequently place activity-related limitations on the individual in order to decrease loads to the vertebra and/or discs. Activities such as bending or twisting, pushing or pulling, and other repetitive motions such as lifting, place burdens and pressures on the spine.

26. A human spine will wear and degenerate under normal aging conditions.

An individual who is engaged in heavy labor is subject to

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increased wear and degeneration of the spine due to the additional burdens of the job. These degenerative changes are permanent. Additionally, degenerative changes are usually progressive in nature so that, with heavy labor, the changes will result in further wear and tear of the spine. Individuals who engage in labor activity required in heavy industry can be expected to have more deterioration of the spine than individuals who engage in less strenuous activity.

27. The ability of the spine to support the human body is affected by anatomical defects in the soft tissue or bony structures. These defects may decrease the stability of the spine and have the potential to cause the spine to be weaker. These defects may also have the effect of producing accelerated degeneration.

28. Spondylolysis represents a break or fracture in the neural arch of the vertebra which results in a separation of the front and back portions of the vertebral body. This "separation" may result in back instability because the vertebra could move if the spine is overloaded. Spondylolysis can either be a congenital condition or may result from trauma. Spondylolysis can cause back pain, discomfort in the area, and there is also the possibility of a disc extruding which may produce neurological symptoms such as pain down the leg, impotence or incontinence.

29. Spondylolisthesis is the anterior slippage of one vertebra over another and can result as a natural consequence of spondylolysis. This slippage usually occurs between the fifth lumbar vertebra.

30. An individual with spondylolisthesis may have less ability than a person with a normal spine to endure an outside trauma. Additionally, the normal aging process of the spine may be accelerated with the presence of either spondylolysis or spondylolisthesis.

31. A transitional vertebra occurs when the S1 (first sacral) vertebra is not fused to the rest of the sacrum and, as a consequence, there are joints on all sides of the vertebra instead of solidly fused segments. As a result, there may be an instability because muscle tissue ends in the area of the fifth lumbar vertebra (L5) which is immediately above the S1 vertebra, resulting in less support in the area of the transitional vertebra. If instability results from the transitional vertebra, there may be increased degeneration which can cause irritation to the bones and nerves. In the area of the transitional vertebra, there are nerve rootlets which enervate the bladder, the genital organs, and which also control movement in the buttocks and legs.

32. If an injury results from the condition of spondylolysis, spondylolisthesis, or a transitional vertebra, it is difficult to assess the severity of the immediate problem or how long-lasting the injury may be.

33. A narrowed disc space means that the cushioning disc material has been reduced in some way or perhaps even completely collapsed, resulting in the two adjacent vertebra rubbing against each other. A narrowed disc space is particularly significant in young individuals because it is a progressive condition and strenuous labor may result in further degenerative changes. Spurs on the spine may result as part of the degeneration process which could result in nerve impingement producing the neurological symptoms of leg pain and leg weakness. An individual with narrowed disc spaces and associated degenerative changes may be more susceptible to low back pain and/or injury

which would result from physically demanding work.

34. Although all of the spinal conditions noted above could result in neurological symptoms and/or injury, there is no way to accurately predict whether or not those symptoms and/or injury will actually occur if an individual has one of the conditions described. An individual without any of the back conditions noted above is also susceptible to spinal injury if the stresses and loads imposed on that individual's back are excessive. The most valid "predictor" of an individual's ability to do strenuous physical labor if he/she has one of the conditions set forth above is the individual's past history of work and strenuous activity and whether or not the person has suffered a previous back injury or back pain. Additionally, the musculature of the individual and how "in-shape" the person is are also significant factors.

EDITOR'S NOTE: The remainder of the Findings have been omitted in the interest of brevity. They contain specific facts relating to the individual circumstances of a number of the Charging Parties or class members.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction in this matter and authority to make a final decision pursuant to Minn. Stat. §§ 14.50 and 363.071. The Complainant gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule.

2. The following Orders previously issued in this matter are specifically incorporated by reference herein:

a. an Order issued November 18, 1987 in which rulings were made on the following issues: (1) whether the disability provisions of Minn. Stat. chapter 363 (pre-1983 version) are unconstitutionally vague; (2) whether the disability provisions contained in

whether a class should be certified. Specifically incorporated

into the November 18 Order were Orders issued in the State\_v. Eveleth\_Taconite\_Company (HR-86-020-PE) case dated May 28 and September 21, 1987 on the same issues.

b. an Order on a Motion for Reconsideration dated August 10, 1989 which readdressed the following issues: (1) whether the disability provisions of Minn. Stat. chapter 363 are unconstitutionally vague or unenforceable because no rules have been promulgated by the Commissioner to implement the statute; (2) whether the charging parties are disabled within the meaning of Minn. Stat. chapter 363; and (3) whether this matter should be certified as a class action. This Order specifically incorporated the content of the November 18, 1987 Order referenced above.

3. The Conclusions of Law set forth below are made for the reasons set forth in the above-referenced Orders and the attached Memorandum. The Judge will not duplicate the content of Orders previously issued in this case in the Memorandum below.

4. Class certification is appropriate in this case as that class is defined in the Order issued August 10, 1989.

5. The disability provisions of the pre-1983 version of the Minnesota Human Rights Act are not unconstitutionally overbroad or void for vagueness as applied herein.

6. All of the charging parties and class members herein are disabled within the meaning of Minn. Stat. § 363.01, subd. 25 (1973).

7. Respondent was not denied due process of law by the failure of the Minnesota Department of Human Rights to promulgate rules defining the term "disability" as that term was defined in Minn. Stat. § 363.01, subd. 25 (1973).

8. The Respondent unlawfully discriminated against the charging parties and class members herein on the basis of disability within the meaning of Minn. Stat. chapter 363. The Respondent did not prove a legitimate, nondiscriminatory reason for the actions taken by it to disqualify the charging parties and class members from employment at Hibbing Taconite Company due to nondisabling anatomical anomalies of the low back.

9. Compensatory damages in the form of back pay for the years in which the claimant would have made more if he/she had been employed by Respondent up to the year(s) in which the claimant earned more money than he/she would have made at Hibbing Taconite Company are appropriate. Annual interest in the amount of six percent shall be computed on the awards. The Judge has deemed it appropriate to prorate offsetting income for claimants in years when the

initial hire date is mid-year and the breakdown in claimant's earnings cannot be easily determined. The damage awards herein shall be reduced by payroll and other related taxes which would have normally been assessed if the claimants had been employed by Respondent. Punitive damages and/or reinstatement will not be awarded to any claimant.

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10. The Judge has concluded that unemployment compensation benefits received by the claimants herein should be treated as an offset in the damage calculation. See, *Robertson\_v.\_Special\_School\_District\_No.\_1*, 347 N.W.2d 265, 267 (Minn. 1984).

11. Class member Daniel Aho is entitled to compensatory damages in the amount of \$4,929 for 1979 (assuming a \$2,000 offset for Mr. Aho's earnings as an electrician in 1979); \$2,028 in 1980; \$2,946 in 1981; and \$1,115 in 1982. Annual interest in the amount of six percent should be added to this award and all of the awards listed below. *Henry\_v.\_Metropolitan\_Waste\_Control\_Comm.*, 401 N.W.2d 401, 407 (Minn. App. 1987); *State\_v.\_Mower\_Cty.*, 434 N.W.2d 494 (Minn. App. 1989).

EDITOR'S NOTE: A number

19. Class member David Olson is not entitled to compensatory damages in this matter because he became a full-time student after his rejection from Hibbing Taconite Company and thus failed, in all respects, to mitigate any damages he sustained.

21. Allan Pehling's charge is dismissed as untimely, however, he is included as a class member in this action. Mr. Pehling is entitled to compensatory damages in the amount of \$8,903 for 1979; \$11,423 for 1980; \$14,081 for 1981; \$13,035 for 1982; \$10,635 for 1983; \$11,674 for 1984; \$2,349 for 1985; \$8,129 for 1986; \$15,227 for 1987; \$15,712 for 1988; \$16,233 for 1989; and \$1,494 for 1990.

22. Timothy Pogorels is entitled to compensatory damages in the amount of \$6,362 in 1979 and \$9,407 in 1980. These damages are for the period March 1979 through the end of 1980 when Mr. Pogorels would have been hired by Respondent absent the reasons for not hiring discussed in the Memorandum below.

27. Class member Albert Vesel is entitled to compensation damages in the

amount of \$5,127 for 1979; \$10,926 for 1980; \$15,275 for 1981; \$11,917 for 1982; and \$1,153 for 1983. Mr. Vesel's pension income during this period is from a collateral source and should not be considered offsetting income.

30. The claim of charging party Howard Wollin is dismissed with prejudice because he did not file a timely charge.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

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ORDER

1. Respondent shall pay compensatory damages to the charging parties and class members consistent with the Conclusions of Law above.

2. Respondent shall cease and desist from discriminating on the basis of disability with respect to hiring practices.

Dated this 16th day of August, 1991.

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PETER C. ERICKSON  
Administrative Law Judge

Reported: Transcript Prepared by Janet Shaddix & Associates.

MEMORANDUM

This case was commenced pursuant to Minn. Stat. chapter 363 (1978), which prohibited an employer from refusing to hire an individual based upon "disability" except when that refusal was based on a bona\_fide occupational qualification. Minn. Stat. P 363.03, subd. 1(2)(a) (1978). The term "disability" was defined as "a mental or physical condition which constitutes a handicap." Minn Stat. P 363.01, subd. 25 (1978). However, as a defense, the employer could prove that the claimant "suffers from a disability which in the circumstances poses a serious threat to the health or safety of the disabled

person or others." Minn. Stat. § 363.02, subd. 5 (1978).

The Judge has previously ruled that it is the Respondent's perception of the claimants which controls this action and is critical to the determination that each claimant is, in fact, disabled. The case of *Bauer\_v.\_Republic Airlines,\_Inc.*, 442 N.W.2d 818 (Minn. App. 1989), clearly states that the 1978 version of the Minnesota Human Rights Act concerning disability should be read the same as the 1983 amended version which includes an employer's perception as a basis for "disability" (Finding 9 quotes the 1983 amendment). In this case, the record is clear that the employer perceived that each claimant herein was unable to perform strenuous physical labor due to the existence of a low back anomaly ("impairment") revealed by x-ray. At that time in northeastern Minnesota, not being able to perform work which required strenuous physical labor would have been a substantial limitation on each of the claimants. Because Respondent's decisions to reject the charging parties and class members for employment were based on the physical impairments noted in the Findings of Fact, the three-part disparate treatment analysis by *McDonnell\_Douglass\_Corporation\_v.\_Green*, 411 U.S. 792 (1973) need not be used herein. See, *State\_by\_Cooper\_v.\_Hennepin\_County*, 441 N.W.2d 106, 110, n. 1 (Minn. 1989). A prima\_facie case has been proved. Consequently, the burden shifts to Respondent to prove either the "serious threat" or "bona\_fide occupational qualification" defense.

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Both parties to this action offered a great deal of medical evidence which the Judge will not attempt to duplicate herein. The Respondent has proved that individuals with the low back anatomical anomalies at issue herein may have an increased risk of suffering back pain or injury when engaged in heavy manual labor.<sup>5</sup> However, the Judge has concluded that this potential "increased risk" does not meet the serious threat standard or bona\_fide occupational qualification standard required by Minn. Stat. chapter 363. In order to prove that a medical condition constitutes a bona\_fide occupational qualification, Respondent must show that all or substantially all persons afflicted with the condition are unable to safely and efficiently perform the responsibilities of the employment position. *Lewis\_v.\_Remmele\_Engineering,\_Inc.*, 314 N.W.2d 1, 3 (Minn. 1981). To sustain a serious threat defense, Respondent must show that it relied upon competent medical advice that there exists a reasonably probable risk of serious harm. *Id.* at 4.

The record in this matter shows that there is no way to accurately predict if, when or how seriously an individual with a low back anomaly may suffer back pain or injury if engaged in manual labor. What is most predictive is the individual's past history of strenuous activity and history of back pain or injury. The record also shows that individuals with "normal" backs who were employed by Respondent suffered back injuries at such a rate that it posed a serious concern for Hibbing Taconite. Many of the individuals rejected by Respondent due to disqualifying back conditions had worked in strenuous occupations prior to applying for employment and continued to work doing physically demanding jobs without back problems for many years after the rejection. There are no medical studies that directly correlate the back conditions discussed herein and a person's propensity to sustain a back injury if employed in a physically strenuous job. Respondent's policy to reject all applicants with the back conditions at issue herein, even though based on medical advice, was discriminatory. Although some increased risk has been shown, Respondent has not shown that the policy reflects a reasonably probable risk of serious harm to the rejected applicants herein or that substantially all persons rejected could not safely perform the job.

Obviously, the intent behind not hiring anyone with a low back anomaly was to minimize both Respondent's exposure to workers compensation claims and the

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5Respondent's expert medical evidence was provided by Dr. George H. Marking, who practiced at the Mesaba Clinic from 1975 to 1982 in the areas of occupational and family medicine, and Dr. Donald P. Mersch, who began practicing at the Mesaba Clinic in 1977 in the area of family medicine. Each of these doctors had toured the mine sites and was familiar with the nature of the work of a general laborer at Hibbing Taconite Company. Dr. Marking performed the majority of the re-employment physicals for Respondent during the relevant time period herein.

risk to individual employees of future back problems or injury. These are commendable objectives. See, *Smith\_v.\_Olin\_Chemical\_Corp.*, 555 F.2d 1283, 1287-88 (5th Cir. 1977); and Finding 22 above. However, the Minnesota Human Rights Act mandates that individuals may not be disqualified from employment

based upon a perceived disabling condition unless that disabling condition is a bona\_fide occupational qualification or would pose a se

Each of the charging parties and class members, with the exception of Jorgie Senich and Richard Harvotich, was examined by a board-certified orthopedic surgeon contemporaneously with these hearings.<sup>7</sup> With respect to each individual examined, Drs. Wengler and Barron testified that the person should not have been disqualified from employment at Hibbing Taconite Company; that there was no basis to believe that that individual with a low back anomaly would have been any less able to perform strenuous physical labor than any other applicant with a "normal" back. Neither Jorgie Senich or Richard Harvotich had a contemporaneous medical examination. Respondent contends, therefore, that those claims should be dismissed. Each will be discussed below.

Richard Harvotich died on November 7, 1986 as a result of acute lymphocytic leukemia. Consequently, a medical examination could not be performed. At the time of his rejection, Mr. Harvotich's back x-ray revealed disc degeneration and spurring at the L4-5 and L5-S1 levels. His claim was

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<sup>6</sup>The Judge has given more weight to Complainant's expert testimony than Respondent's in reaching the determinations herein. It is apparent that at the time Hibbing Taconite's medical disqualification standards were developed, Respondent's primary concern was minimizing liability and costs by eliminating job applicants who presented any objective findings of increased risk for injury. Respondent's medical consultants, after familiarizing themselves with the jobsite and duties of a general laborer, advised that applicants with low back anomalies had a greater chance of suffering a back injury than applicants without the anomalies. During the hearing on this matter, Respondent's expert witnesses testified that with respect to the conditions at issue, it was probable that an individual with that condition would suffer a back injury if engaged in strenuous physical labor. See, Tr. VII pp. 1165, 1171, 1180, 1184, 1190; and Tr. VIII p. 1375. The injury could be anything from minor back pain to neurological problems requiring surgery. Complainant's experts, board certified orthopedic surgeons, testified that absent symptoms from the back anomaly, there is no correlation between suffering a back injury from manual labor and having an anomaly(ies) discussed herein. See, Tr. VI pp. 913, 914, 917; and Tr. IX p. 1423. In addition to Complainant's experts' qualifications as orthopedic surgeons, the fact that there are no studies which show a

relationship between the back anomalies herein and propensity for back injury, gives further weight to their testimony.

7The examinations were performed by Drs. Robert A. Wengler and Stephen E. Barron. Each examination and resulting evaluation included looking at the pre-employment x-rays taken at the Mesaba Clinic upon which Respondent's decisions to reject were made, current x-rays, an employment history and history of back problems. Testimony was given on these issues with respect to each claimant.

testified to by Mr. Harvotich's surviving spouse, Gail Sorensen. She stated

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that the claimant was employed at a pizza restaurant, which involved occasional strenuous work, and that her husband lifted weights during the relevant time period without experiencing back problems. The Judge has concluded that Dr. Barron's testimony and opinions regarding the significance of degenerative changes without other symptoms adequately support the allegation that Mr. Harvotich's rejection was unwarranted. See, Tr. IX, pp. 1420-36. Dr. Barron stated that degenerative changes such as those revealed in Mr. Harvotich's x-ray are a natural result of aging and, absent symptoms of pain or other ongoing back problems, do not predispose an individual to injury.

Respondent also contends that Mr. Harvotich's claim does not survive his death, citing Minn. Stat. § 573.01 which provides:

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However, the Judge has concluded that Respondent has read the words "injury to a person" too broadly and that the cited statute applies only to the extent that it permits the personal representative (in this case, the surviving spouse) to maintain the cause of action. See, *Johnson\_v.\_Taylor*, 435 N.W.2d 127 (Minn. App. 1989); *Webber\_v.\_Anderson*, 269 N.W.2d 892 (Minn. 1978).

During the evidentiary hearing on the Jorgie Senich claim, a letter from Dr. Bayard T. French dated February 28, 1980 was admitted into evidence over a hearsay objection because Dr. French was not called to testify. The Judge stated that the letter would only be used as corroborative evidence, and could not prove independently the issue of Ms. Senich's medical condition or her ability to perform the job of a laborer at Hibbing Taconite Company.

It is undisputed that the pre-employment back x-ray taken of Jorgie Senich revealed a grade I spondylolisthesis L5 on S1. Dr. French stated in his letter that "this minimal x-ray finding, with no clinical correlation, should not be sufficient to disqualify Jorgie Senich from employment." Ms. Senich has never experienced any back pain or problems from any activity she has engaged in. Dr. Robert Wengler testified that absent past or present symptoms, a grade I spondylolisthesis has no effect on an individual's capability to work in a physically demanding job. Tr. VI, p. 912. The Judge has concluded that there is enough other evidentiary support in the record, along with Dr. French's letter, to support Ms. Senich's claim.

Respondent argues that Tim Pogorels' claim should be dismissed with prejudice because: (a) Pogorels told Tim Miller that he had dropped his suit against Hibbing Taconite when he (Pogorels) reapplied for employment; and (b) Mr. Miller was going to hire Tim Pogorels in 1980 but did not only because of the bad reference from Pogorels' previous employer, the Hibbing Public Utility Company.

The record in this case is clear that Tim Pogorels was rejected for employment by Hibbing Taconite in 1976 due to a condition of spondylolisthesis which was revealed by pre-employment x-rays of his back. Mr. Pogorels

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reapplied in 1978 and again in March of 1979 when Tim Miller informed him that because of his (Pogorels) previously diagnosed condition of spondylolysis, the application would not be considered. Mr. Pogorels filed a charge of discrimination based on the March 1979 rejection which is the basis for his claim herein.

The Judge does believe that Mr. Pogorels did say something with respect to his suit against Hibbing Taconite when he saw Tim Miller in December of 1980, but that no official action was ever taking to terminate his claim. Tim Miller, on behalf of the Respondent, was prepared to hire Tim Pogorels in December of 1980 but did not due to the bad reference he received from the Hibbing Public Utility Company. The record is also clear that Tim Pogorels had been experiencing problems with alcoholism during that time which required commitment to an in-patient treatment facility.

The Judge has concluded that Tim Pogorels is entitled to damages from the date of the discrimination (March 1979) through the end of 1980, the time he would have been hired by Respondent absent reasons independent of his back

condition. At that time (end of 1980), Mr. Pogorels was effectively unavailable for employment or would not have been working even if employed due to his alcoholic condition. The back pay awarded herein reasonably compensates Timothy Pogorels for the discrimination he suffered. Respondent's willingness to hire Mr. Pogorels in late 1980 relieved it of any further obligation for compensatory damages.

Respondent contends that the claim of Howard Wollin should be dismissed because he did not file a timely charge. The record in this matter shows that Mr. Wollin was informed of his rejection for employment at Hibbing Taconite by way of

At the time that Mr. Wollin's charge was filed, the period in which to file a charge of discrimination was six months and that period was not a statute of limitations but rather was a jurisdictional prerequisite to a claim under the Minnesota Human Rights Act which was not subject to equitable tolling. See, Minn. Stat. § 363.06, subds. 1 and 3 (1978); *Carlson v. Independent School District No. 623*, 392 N.W.2d 216 (Minn. 1986). The Complainant argues, however, that the case of *State v. Russell Dieter Enterprises*, 418 N.W.2d 202 (Minn. App. 1988), controls this issue and permits Mr. Wollin's two affidavits to constitute a "verified charge" concerning his claim. In *Russell Dieter*, however, the charging party had filed informational documentation regarding her claim with the Minnesota Department of Human Rights within the six-month limitation. That did not happen regarding Mr. Wollin's claim. Consequently, the claim of Howard Wollin must be dismissed with prejudice.

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Respondent next asserts that the claim of Allen Pehling must be dismissed because he did not file a timely charge. The record in this matter shows that Mr. Pehling was initially rejected for employment at Hibbing Taconite Company on May 9, 1977 as a result of pre-employment x-rays which revealed a condition of spondylolysis with a transitional vertebra. Mr. Pehling did not file a charge as a result of this rejection. However, he applied again for employment at Hibbing Taconite in July of 1979. Due to his previous rejection based upon the findings in the pre-employment physical, Pehling was informed on August 3, 1979 that his application would not be further considered. Mr. Pehling

telephoned the Minnesota Department of Human Rights on August 3, 1979 and mailed the Department a handwritten statement alleging that he had been discriminated against which was received on December 24, 1979. Mr. Pehling executed a charge on March 7, 1980 which shows a "filed" stamp of July 15, 1980.

Complainant asserts that the handwritten allegation of discrimination received by the Department on December 24, 1979 constitutes a verified charge, citing *State\_v.\_Russell\_Dieter\_Enterprises*, supra. Respondent argues that the handwritten statement filed by Mr. Pehling with the Department of Human Rights does not constitute a "verified charge" within the meaning of Minn. Stat. §363.06, subd. 1 (1978). The Judge agrees. In *Russell\_Dieter\_Enterprises*, the court found that a letter from the charging party's attorney, an intake questionnaire, and copy of the charging party's statement to the police, which contained a signed statement certifying that the facts were true and correct, was a "verified charge" within the meaning of chapter 363. 412 N.W.2d 202, 205-06. The statement filed by Mr. Pehling within the six-month limitation period only recites that he was "denied because of previous physical exam in March 1977." The statement is not signed or verified in any way. Consequently, the Judge has concluded that Allen Pehling's charge was untimely.

The class action in this matter was certified for all persons who were discriminated against on or after April 22, 1979. Allen Pehling was rejected a second time by Respondent on August 3, 1979. Respondent contends that this second rejection was the consequence of its previous rejection in 1977 and not a separate act of alleged discrimination so no cause of action exists, citing, *et\_al., United\_Airlines,\_Inc.\_v.\_Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed.2d 571 (1977). Complainant argues that Allen Pehling was subjected to a continuing act of discrimination and thus, he should be at least be considered a class member due to the act of rejection in August of 1979, citing *Sigurdson v.\_Isanti\_County*, 448 N.W.2d 62 (Minn. 1989).

In *Sigurdson*, the continuing acts of discrimination resulted from the claimant's status of continued employment with the employer. In this case, Allen Pehling ha

The Judge has concluded that the August 1979 rejection constitutes a separate discriminatory act and is not merely the effect or consequence of the 1977 rejection. There was a two and one-half year period between the first

application and the second rejection. In the late summer of 1979, Mr. Pehling had completed an application for employment and was scheduled for a pre-employment physical exam on the date (August 3, 1979) when he received a phone call which cancelled the exam and further consideration of his application. This second rejection must have entailed a second decision-making process by Respondent which did not automatically flow from the action taken in 1977. By that time, probable cause on the Inkman charge had been found and Respondent was aware that a complaint was forthcoming. The Judge views the 1979 rejection as not merely the consequence of Respondent's actions in 1977 but the result of a second decisional process concerning Mr. Pehling. Consequently, although Mr. Pehling's charge has been found to be untimely, he will be included in the class which was certified in this action.

P.C.E.

