THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

BOARD OF INQUIRY

BETWEEN:

ROBERT BLANCHARD

- and -

LABOURERS' INTERNATIONAL UNION, LOCAL 1115 and DOUG SERROUL and BERNIE MacMASTER

Elizabeth Cusack, Q.C.,
Chairperson of a One Member Board of Inquiry

APPEARANCES:

Michael J. Wood, Q.C.,
for the Nova Scotia Human Rights Commission

Robert Blanchard,
appearing on his own behalf

Ronald A. Pink, Q.C.,
on behalf of Labourers' International Union,
Local 1115, Doug Serroul and Bernie MacMaster

DECISION dated June 29, 2002

This case was heard over a period of three days and evenings between June 3rd and 5th, 2002.

In its condensed form, the complaint alleges that Robert Blanchard was discriminated against by the Labourers' International Union, Local 1115 and/or Doug Serroul and/or Bernie MacMaster between 1992 and continuing in the matter of employment because of physical disability. The entire complaint is attached as Appendix A. All appendices are referenced as if incorporated in their entirety into the text of this document.

During the course of the hearing I was somewhat concerned that there was little evidence being presented on the period between 1992 and the end of 1996 and yet the complaint clearly related to the entire period up until the date of the complaint which was October 2, 1998 and continuing. Mr. Pink indicated that he had been lead to believe by the Commission and its counsel that he was only to deal with the complaint in respect of the super calendar project at Stora Forest Industries. I asked counsel to sort that out and I asked Mr. Blanchard his opinion. Mr. Blanchard was under the impression that the complaint was moving forward on all issues. I asked Mr. Blanchard to contact his legal counsel, Gary Corsano, to discuss the matter. Toward the end of the hearing counsel advised me and Mr. Blanchard agreed, that I would confine my decision on the complaint itself to the failure of the Union to facilitate employment at the super calendar construction site.

However, I have reviewed all of the evidence presented at the hearing as it indicates both the treatment of Mr. Blanchard by the Union and by one of the contractors the Union dealt with and,

in addition, indicated various tasks performed by Mr. Blanchard and efforts he made to obtain employment during and prior to the period indicated in the complaint. The evidence also covers the duties of a number of individuals employed in occupations Mr. Blanchard had alleged to the Commission he could have performed.

The parties did agree at the outset on certain issues. Despite the initial response of the Union in Exhibit 1, Tab 2, the Union agreed that it does have a duty to accommodate, the parties agreed that the complaint was within the jurisdiction of the Commission in the sense that the Union is required by the Nova Scotia Human Rights Act, cited, to avoid discrimination on the basis of physical disability and that the obligation is in respect of employment.

I have thoroughly reviewed the Human Rights Act, particularly section 3(l) (iii), section 4, section 5(1)(d), (g) and (o), section 6 (e), (f) (i). Those sections and the contexts in which they occur are appended as Appendix B.

Appended as Appendix C are terms from the Collective Agreement.

I note here as an aside, that the contract lacks gender neutrality in its language and seems to scream, rather loudly, that women are not welcome here. I add, however, that this and other remarks by Commission Counsel about obvious difficulties in welcoming women into this industrial union have not influenced my decision in any way, except to underscore the fact that the trade unions and their employers have a long way to go in complying with the spirit of the Human Rights Act in their Collective Agreements.

Although in the complaint Mr. Blanchard says that he was diagnosed with Multiple Sclerosis ("MS") in 1983, he testified in his evidence that his first attack was in 1984. Mr. Blanchard continued to work after the diagnosis but had some time off work between the time of his diagnosis and 1988. In 1990, he returned to Cape Breton and the evidence indicates that in 1991 he registered with Local 1115 of the Labourers' International Union, having transferred his membership from Alberta.

Mr. Blanchard is now 48 years old. His 88 year old mother resides with him and he keeps house for her, runs errands, cooks and cleans. He is divorced with two children aged 22 and 17. He receives a disability pension through Canada Pension and was receiving such a pension at the time of the alleged discrimination. He testified that between 1992 and 1997 he did odd jobs for friends, including carpentry and finish work. He built apartments, did carpet laying and other jobs. I was left with the impression that there was little significant reported income.

Subsequently, he took a computer control upgrading course at MacKenzie College in Sydney, Nova Scotia. He identified the company for which he did odd jobs as Beaton Renovations. He received a free apartment and some money for his work with Beaton. He said he was able to work with Beaton for eight to ten hours doing plumbing, faucets, toilet tank or bowl replacement, electric bulbs, switches and minor repairs. He said that at Syncrude he had experience with tool crib, which involved physical lifting and walking. The tool crib was the size of a trailer on a transfer truck box. The tool crib job was in the 1980's after he had problems with multiple sclerosis.

He said he had held a number of positions with Devco in track maintenance, carrying and spiking rails. He said that he was able to receive material for a warehouse and deal with salespersons, he did not handle material. He had been a member of the Labourers' Union since 1981 after leaving Cape Breton.

In 1992 he was employed by MacPherson Brothers Construction at the Point Aconi Power Plant Project, an industrial construction project, where he testified, he swept a floor and cleaned a

washroom trailer situate on a third floor of the site. He worked at Point Aconi for five weeks. This job involved keeping sinks clean and keeping the trailer spotless. There were three urinals and three or four stalls. The shift was eight hours long and he testified that he had no assistance whatsoever. He said he stocked the supply box. Someone carried supplies up to him, but he said he could have done that himself. Butch Pero was the foreman. He testified that a deal had been made to get him into the job. He said that Doug Serroul, one of the respondents, made an arrangement with Sandy MacPherson of MacPherson Brothers, a contractor, whereby Mr. MacPherson's son was admitted to the Union in return for a job for the complainant. He said he was laid off after five weeks. He testified that, as far as knew, there was a general layoff of about 30 people and he was caught up in that layoff. He said afterwards he heard that a supervisor said he was a safety hazard but other labourers had told him there was a lack of work.

In 1984, the first attack of MS left Mr. Blanchard's left side paralyzed, his speech was difficult. He had a six to eight month recovery and was able to recover through medicine and physiotherapy. He then walked with a cane and was less disabled than he is now. He worked for Syncrude in a tool crib after that. His second attack in 1987 left him paralyzed on the other side. He recovered and later he had some paralysis on the left side. That paralysis was only of brief duration. Mr. Blanchard testified that he had another attack last February or April. Although not clear, I believe he meant in the year 2001.

Mr. Blanchard demonstrated how he walks by standing from a wheelchair in which he was seated while testifying and walking around the witness table. This demonstration involved his grasping the table to support himself and walking around it, always holding on. The table was an ordinary banquet table. While doing so, he explained that "Some days are better than others. Some days are diamond; some days are stone." His movements were slow and deliberate.

A video tape which is Exhibit 3 was then presented. Mr. Blanchard had made this video along with a friend. The video was recorded over a number of hours on May 3, 2000. Mr. Blanchard indicated that some material seemed to have been edited out of the video but he felt that what we saw was essentially the original video.

In the video, Mr. Blanchard performed a number of activities. Those included taking beer bottles and pop bottles and other items out of his basement, up a set of stairs in his home, taking them outside and loading them onto a half ton truck. It included taking items to a recycler and unloading a half ton Ford F150 4X4. He demonstrated how he was able to handle the clutch and the various gears in the truck and turn circles and drive. He was shot from inside of the truck. He demonstrated walking up a set of concrete steps on the outside of a popular Glace Bay drinking establishment. He also demonstrated walking up a set of outdoor wooden steps, which appeared to be a fire escape also attached to this same establishment and going up to the top floor of that building to what appeared to be a third floor. Inside the drinking establishment, Mr. Blanchard demonstrated cleaning a bathroom, scrubbing a floor, using a heavy industrial type janitorial bucket with a squeeze handle, moving that bucket around, using the mop as a support while he moved, using the walls and various other features as a way of holding himself up. In addition to using his cane, he also demonstrated moving chairs out of the way and putting them on tables so that he could continue scrubbing the main floor of the lounge.

Mr. Blanchard also took garbage to a dump. He drove up to the dump, backed the truck in and took the garbage off the truck. He also climbed into the box of the truck to unload some of the garbage. He was shown removing beer cans and other items from his basement onto the back of the truck.

In another part of the video, Mr. Blanchard moved three wooden pallets off the truck on to the ground. One pallet he propped up sideways, the other two he dropped on to the ground. He

indicated that one of those pallets weighed 60 to 70 pounds and the others were 40 to 50 pounds.

At each stage in the video Mr. Blanchard's movements were very slow, stiff and guarded. He used walls, railings, a cane, truck box and other items as aids to his stability. When he walked without a cane or other item, he walked in a side to side, slow, shuffling motion. In all cases, he was obviously compensating for lower limb deficiency by using his upper body and usually his hands. Mr. Blanchard clearly had and has a more developed upper body than lower body. He testified that his physical limitations are the same now as they were during the period referred to in the complaint, that he had plateaued and has neither gotten better or worse. As a I understand the meaning of plateau, it would appear that what he recorded in the video made May 3rd, 2000, and what he demonstrated at the hearing were indicative of the condition which would have been observed by the two individual respondents at all relevant times in respect of the complaint.

I can best describe Mr. Blanchard's movements as being very similar to those of a person of very advanced years although he is quite a husky gentleman who has the appearance of being otherwise quite healthy. He particularly appears to have a great deal of upper body strength.

Mr. Blanchard said that he told Mr. Serroul and Mr. MacMaster about MS and they had asked him what he could do and what he could not do back in the early 90's. He said he spoke to them a couple of times about this.

Tab 5 of Exhibit 1 was a recommendation letter Mr. Blanchard received from Sandy MacPherson after he worked at the Point Aconi job. He said after that job he received no more referrals. He said that because he understood that the Stora project was a cost plus project that that was his only shot at a job after the Point Aconi project.

The job began at the end of 1996. In December of 1996 he thought he would surely be getting a job as he was one, two or five on the out-of-work list when he talked to Mr. Serroul about that job. He borrowed Five Thousand Dollars ($5,000.00) from a bank for Christmas 1996 expecting that he would get a job. He said his son needed a loan and it made his Christmas to be able to get that money for him. The Union provided confirmation to the Bank in the form of a letter stating that a job was anticipated.

Mr. Blanchard testified that he informed the Union in March of 1997 that he would take any kind of job. This was because the type of job he had hoped for was not available. His testimony in direct evidence was that in 1997 he told Mr. Serroul and Mr. MacMaster, that would be the business agent and the secretary of the Local, that he would take anything. He indicated that he talked to them three times in passing at the Union Hall on Dorchester Street in Sydney. He indicated that there was no other discussion about other jobs. He needed a small enclosed area or a foreman/steward job.

On cross-examination by Mr. Pink, he repeated that he said that he would take any kind of job and he said that he made that assertion from the end of March on. He then said, either in the middle or end of June, he recalls being in the parking lot getting out of his car and saying to Mr. Serroul that he would take anything because he was desperate. He also alleged that he made that known to Mr. MacMaster. He then said that he was sure he would have said something to Mr. MacMaster and he stated that both of those gentlemen "were good guys to help you". He then said, "That's why I don't know what happened". He said, "In the past he would have referred me, for whatever reason he didn't, I don't know".

Mr. Blanchard testified that it is safer for him to be in enclosed spaces and he said that safety is primary. He said that he can walk 15 to 20 feet without something to lean on and that he needs

a railing to go up and down stairs and uses a cane if there is no railing. When asked about the specifics of the job site in terms of whether there were tool cribs or tool boxes, Mr. Blanchard said he did not know what was on the job site. He did agree that while the work site might not have been the best and might have had slippery wet conditions, that he was sure that Mr. Serroul could have found a place for him because the workplace was a cost plus environment. He was unaware that there was any fixed price contracting. He admitted he had never seen the contracts.

Mr. Blanchard said he wasn't sure if the Union would have selected him first for a trailer job and then he said he could have been sent out as a general labourer and the contractor would have been sitting here (at the hearing) if they sent him home. He said there is an affirmative action requirement and some contractors accommodate. Mr. Blanchard agreed that he could not walk 10 to 20 miles a day. When asked about his ability to run away from a gas leak, he stated that there would have been masks available for him. He did not agree that he would have had a problem on the Stora site from gas leaks. He said he would not have been sent near that type of situation and as a general labourer he would not be sent to that environment by a company knowing the condition that he was in. He said, even if the whole site had to be evacuated, he could have been given a drive and he said, "That is accommodation".

Tab 7 in Exhibit 1 is an audit and review of Mr. Blanchard's job skills and in that document Mr. Blanchard indicated that he had a number of skills for his which viva voce evidence establishes that he did not have certificates, but for which in the past, he had had experience. Some of the experience was rather thin. For example, putting a patio deck in his own backyard. Although he had indicated on the form that he had concrete technology skills, his evidence as to what they were consisted of statement that he figured it was a just a matter of knowing how to level cement. When asked about pipe laying, he said, he imagined that meant putting pipe in a trench for pipe fitters. He imagined that he could do a number of the tasks which he had clearly indicated, in writing, that he had capability to do. He indicated that although he had specified that he had blasting and jackhammer mining type experience that that must have been a mix-up because that was a mistake. In the same way he did not have masonry tender skills but he imagined what they would involve and he said he would have tried it. Mr. Blanchard testified that late in 1996, Mr. MacMaster referred him to a job carrying staging around and he told Mr. MacMaster that he could not do it. He said he did not want to embarrass the Union by being so slow. He said that Mr. MacMaster told him that he had to make the referral, that the International was putting heat on the Union to go by the book. The significance of this was that if Mr. Blanchard was called out for referral on two occasions and did not take the job, he would go to the bottom of the out-of-work list.

Mr. Blanchard received a slip from Dr. Mike Ryan which is at Tab 9 in Exhibit 1. That slip was given to the Union to indicate that Mr. Blanchard was no longer available for work until further notice. The document is dated November 6, 1997. Mr. Blanchard's explanation of this note was that he was unable to work due to the "running around" and the "shafting" he got and "having to declare bankruptcy" and the "Union screwing around". He said that he wanted to get that lack of ability to work established before he did something that he was going to spend time in jail for . He testified that as a result of his visit to Dr. Ryan, he was referred to a psychiatrist, Dr. Munshi. When asked by the Chair how often he saw Dr. Munshi, he indicated that it was approximately five or six times. He testified that he stopped paying available-for-work Union dues because he could not afford them and he had plans of taking his Union to Court. He converted his dues to pensioners' dues or out-of-work dues. He indicated that he was "bummed" out and "not impressed" at the time.

When cross-examined about the size of the Stora super calendar building when it was under construction, Mr. Blanchard said that people could have come to him in a tool crib like at Fort MacMurray. He agreed that he lacked mobility and he agreed that a foreman would have to walk all over the job but he could not agree that that was the case at Stora because he was not there.

He testified that office work goes with tool crib and that supervisor, non-working foreman and janitor positions were available for referral at the Stora project.

He testified that he expected to receive compensation of Forty Thousand Dollars ($40,000.00) and he said that was based on "the hell I went through". He said all I wanted was enough for unemployment benefits. He testified that he should have had four hundred (400) hours of work at an average wage of Twenty-One Dollars and Fifty Cents ($21.50) an hour at the Stora site. He said he would have needed Eight Thousand to Nine Thousand Dollars ($8,000.00 to $9,000.00) worth of work at four hundred hours (400) in order to get unemployment insurance if a contractor would have kept him that long. He said the rest of the claim for Forty Thousand ($40,000.00) was based on general damages and stress and the "high stamp" for unemployment. Mr. Blanchard also testified that he wanted to receive a letter of apology from Mr. Serroul. He later explained that the kind of letter he wanted would be an admission of wrong-doing and an apology. He wanted his dues paid at a pension rate for a three year period. He wanted to go back on the list. He said that he would like to get his self-respect back and his credit rating back. He said that he would have claimed against any employer who had treated him unfairly and didn't give him the opportunity to do a job.

When cross-examined about the fact that the Collective Agreement requires the Union to provide competent and qualified workers who can perform any assignment for which the referral would be made, Mr. Blanchard said that if he couldn't perform the job or if there was no job he could perform, he would wait for another call. He said that Mr. Serroul's job was to try and find him work, enough for stamps, in the same way as he did at Point Aconi. He said he knows that Mr. Serroul did not do what he was supposed to do, by which he meant, that Mr. Serroul should have referred him for a job, because he (Mr. Serroul) knew contractors "will give guys a break".

Exhibit 1, Tab 9 contains a list of jobs in Mr. Blanchard's handwriting in which he indicated to the Union, work he could perform. He would not agree that that list was handed to the Union on the same date as Dr. Ryan's letter indicating he was to be off work. That letter is dated November 6, 1997.

When describing the impact of the alleged discrimination on him, Mr. Blanchard said that it tore his family apart. He said he was able to straighten things out through the use of professionals because he thought that everything which happened to him was his fault. Mr. Blanchard said that Mr. Serroul owed him and had the obligation of finding him a job. He said that you don't know what it is like to be totally paralyzed and to be back on your feet and to have the Union not do something for you. It was Mr. Blanchard's view that employers would bend over backwards if asked by the Union.

In cross-examination, Mr. Blanchard said that he was very grateful for having received work at the Point Aconi site through the effort of Mr. Serroul. It came out in cross-examination that Mr. Blanchard had told one of the supervisors at the Point Aconi site that he had become injured while sky diving. He said that someone had taken that personally. The official of the main contractor had apparently gotten teased for being so gullible as to believe the story Mr. Blanchard told. This caused some difficulties for Mr. Blanchard on the job site.

When it was put to Mr. Blanchard that it might be unusual for him to have had an eight hour a day job cleaning one trailer, he said he didn't ask if anyone else had a similar job. He did not deny that he was the only person being accommodated in that manner. He said he did not complain to the Union when he got laid off in 1992.

In cross-examination, Mr. Pink particularly highlighted that Mr. Blanchard had filled out the skills assessment in February of 1996 indicating he could do scaffolding work. He agreed that he really did not have experience doing that. He did not admit that he could not do that kind of work.

Subsequently, in the hearing, there was an admission by Mr. Blanchard through the Commission's counsel, that, that was the case. It became clear that Mr. Blanchard did not have either the physical ability to do most of the jobs indicated on the skills assessment of February 5th, 1996, nor did he have certification in a number of areas.

Mr. Blanchard testified that in January of 1997 at a Union meeting, he complained that it was unfair that he had been asked to take a scaffolding job because he would be put to the bottom of the list. He indicated that when he raised the issue at the Union meeting in January, that Mr. Serroul said words to the effect that he didn't "give an f... what the International Union says or what Washington says, I am going to tell you the first tool crib job that comes along, you're getting it." Mr. Blanchard said that he thought that the jurisdictional restrictions on labourers having their own tool crib would be overridden and that the labourers would get a tool crib. It was put to Mr. Blanchard that, on a number of occasions, he had discussions with Mr. Serroul in December, January and February and during those times was told that there was no tool crib available and that on not one of those occasions did he indicate that he would take any other job. He did not disagree. On cross-examination he was uncertain as to whether he actually said anything to Mr. MacMaster about taking any available job but he was adamant that he had said something to Mr. Serroul. Mr. Blanchard clearly linked the issue of wanting any job whatsoever with his bankruptcy in 1997 and indicated this was in the early spring.

Mr. Blanchard agreed that he knew of no job at the Stora site at which the Union could have employed him safely for a twelve hour period. He added that he was never given the opportunity to be at the Stora site. Mr. Pink added that perhaps there were ten hour shifts. He asked Mr. Blanchard when was the last time he had worked on his feet for ten hours in a shift. Mr. Blanchard said he hadn't done that since Fort MacMurray although he did say he had sometimes done that working on his own.

It is clear from his testimony that Mr. Blanchard worked under the table both for rent and for cash. Although he indicated that the cash was in small amounts. His Canada Pension started in 1984 and was reinstated after he stopped working in Alberta in 1987. Mr. Blanchard gets Seven Hundred Dollars ($700.00) a month Canada Pension. He received Canada Pension while working at Point Aconi. He later indicated that that was an acceptable practice in keeping with Canada Pension policy and that he would have required to pay it back if he had had ten weeks work and then received EI. He also received a small pension from his Alberta Local called "Funds Administrative".

JOHN BOWER

John Bower of Port Hawkesbury who owns Faejon (sp) Contracting testified that Faejon had two to ten employees on the site. They were unionized carpenters and labourers. He described the process of getting employees as calling the Union who would send the employees he wanted. He said his practice was not to describe the project but to get whoever was sent. He did say, however, that he might tell the Union something about what he needs. In dealing with Local 1115, he contacts Doug Serroul and Bernie MacMaster by telephone.

On the Stora super calendar project, Faejon were the general contractor for setting up trailers. He said they were involved on the project from 1996 to 2000, working directly for Stora. One of their jobs was to look after washrooms. The employees were either under Stora directly or one of Mr. Bower's foremen. The witness said that he was in the office except for three times a week and when he was on the job site, it was for ten minutes to an hour. He said there were men all over the place. He said there might have been 50 trailers all over the site. The trailers were blocked by carpenters assisted by labourers with one labourer for every two carpenters.

In addition to blocking and skirting the trailers, the labourers would be involved in moving trailers around. He said that they had set up a toilet trailer behind the building under construction and three such toilet trailers in the parking lot. He said that 2,000 men were using washroom trailers a day. They had to have supplies, the toilets had to be cleaned and the facility scrubbed. The witness said the fourth trailer was a long way away, it was a 1,500 to 2,000 foot walk over what he described as a 50 foot bank over a road bed for walking. He said there was only a path to this fourth trailer. The labourers working for Faejon received Twenty Dollars and Seventy-Six Cents ($20.76) per hour. The two labourers who worked on the trailers and who also did staging and garbage removal and whatever else had to be done as it was described, worked between 40 to 56 hours a week in one case and 48 to 52 hours a week in the other case during a five day week.

Neither Mr. Serroul nor Mr. MacMaster attempted to find a position with Faejon for the complainant. This gentleman had said that if he had been approached, he would have had to see what he was able to do. He watched the video, Exhibit 2, and heard all of Mr. Blanchard's testimony. He said based on that, he did not think he could have hired Mr. Blanchard although he would have considered hiring a person with disabilities. He did not see how it could happen because there was too much walking and too much physical work on the job. He pointed out that there was a 50 to 75 foot walkway over a steep bank and back up to get to the bathroom or a person might have to walk all around the building to get to the fourth trailer. He did say that a person could drive pretty well anywhere on the site. That is not necessarily the view of vehicular mobility considering subsequent testimony and the exhibits which were in evidence. It also appeared in cross-examination that each contractor on the site could only use one vehicle.

Mr. Bowers said it was not a cost plus project in the sense that one could build up costs and charge them to Stora. He said he did not request janitors, he only requested general labourers. There was no specific restriction on the time allotted for cleaning trailers. He said Monday was usually a bad day.

He said that safety was one of the main objects in the workplace. He agreed that he asked for specific skills when they were necessary. He agreed that individuals would have to wear particular safety equipment which he described in some detail. He reiterated in cross-examination that Mr. Blanchard would not have been able to work at Stora except in driving a truck and handling a tool crib. He again talked about the steep banks and stairs, rough areas on the job site and trying to keep up stamina eight to ten hours a day in rough conditions. He said it was all rock inside the building, there were backhoe's, cables, trenches and he said he would not have been comfortable asking Mr. Blanchard to go in there as it was not a place for him to be.

He described one gentleman who worked for him looking after washrooms for a period of time and described his duties as looking after the washrooms and shovelling gravel and working with plywood. This gentleman was on the job for a period of time which began approximately six months after the project started and ended in April of 1998. Another employee who handled washroom maintenance was Sandy Nock. He began working in January of 1998.

He indicated that staging could be up to 20 feet in height and was erected in five foot lengths, that portions of the staging were carried by hand, that there was stair climbing involved, that there was hauling material up by rope. The items had to be carried up or hauled up wooden planks of various dimensions. He said that guardrails go up on the staging after you complete the construction of the staging. The workers wore fall-arrest equipment.

Mr. Bower said that there was constant pressure by Stora to move fast. There were deadlines.

He said there were some things that Mr. Blanchard could have done on the site but that it would be very difficult to find him an eight hour job because the work of the labourers was divided up so much among different tasks that there would be difficulty trying to piece together work.

In cross-examination he agreed that although the job was not cost plus, that he could, on occasion, bill for overtime, but he said if Mr. Blanchard took longer than normal to do work, he would have some difficulty with that.

Mr. Bower described the work as steady. He said that there was more work in the summer than there was in the winter. In the winter the labourers who did washrooms had to shovel snow, had to shovel the walkways and steps and the walkways were on a slope. The walkways had to be sanded and salted. All of the offices had steps. Water had to be carried in buckets to the offices, they had to be swept, they had to be locked up. Mops and buckets were taken to four office trailers. Mr. Bower thought that a five gallon bucket of water with a mop weighed 15 to 20 pounds. Subsequent testimony indicates that is a gross underestimate. The bucket had to be carried over a distance of approximately 300 feet from the washroom trailer. However, it turns out that the office trailers had their own washrooms. Therefore, I am not clear on this. Other jobs performed by the labourers who did washrooms included getting paper, moving furniture and filing cabinets, demolishing equipment, working on roofs and moving trailers. There might have been occasions when a whole day would be necessary inside one washroom trailer when the project was really busy. He said that would have been for a couple of weeks out of a three year period and would have been in isolated days.

ALEXANDER NOCK

Alexander Nock of Whycocomagh testified that he worked as a labourer for Faejon on and off and his expertise included all trades, brick laying, carpentry and on the skills assessment he could answer yes to most work categories on the audit form.

In addition to working with Faejon, he worked for a company named Perlin at the site in 1996 with the carpenters doing form work, carrying forms, pouring concrete, digging trenches and bringing concrete to the work location. He said he started working with Faejon in the Spring of 1996. As there is some confusion about whether Faejon started in '96 or '97, it is not clear that that is an accurate date.

Mr. Nock said that he blocked trailers, buried wires and he worked on 12 to 15 trailers. He said he worked primarily on Stora's four bathroom trailers, one of which was for women. He worked on walkways and said he was hired as a general labourer. He said there was a big drive to clean the washrooms. He said this could be 10 to 12 times a day, there was a big turnover of people using the washrooms, so there were days when it could take all day and those days could last 10 to 12 hours. He recalls working on a roof; he recalls hauling garbage, hauling salt, hauling sand and supplies using a truck. At one point he had his own truck to salt and sand and to take supplies around and to move material off site.

He would sometimes take salt in five gallon buckets up the stairs to another level and at the end he was allowed to take his own truck but there was very strict protocol about using trucks and he said Faejon usually had only one truck on site.

He said between the summer of 1997 up to 1999, that maintaining the washrooms took most of his time particularly in the winter with shovelling and sanding. At times he took care of one or two trailers. He said he worked on loan to Stora and Stora would tell him what to do. He said he worked from the Spring of 1996 and was on steady to late 2000. He was a shop steward and did that job in addition to his regular job. He said he did not have to patrol the work site as a shop steward.

Mr. Nock said that he had watched the video of Mr. Blanchard and he said that it would be hard for Mr. Blanchard to do a lot of the work he had done on the site. Particularly, shovelling, salting, carrying full buckets any distance and working in slippery conditions. He said "It was real icy". He said he fell twice and he described the footing as very treacherous sometimes. He said the conditions inside the washrooms were not nice lots of days. There was always sand, there was always sweeping and mopping. He said some of the work was not necessarily heavy. He said he two trailers most of the time. He said that the labourers assigned to washroom duties would take turns doing the trailer in the back depending on whether they had other assignments outside of their washroom duties.

He thought the salt buckets weighed approximately 15 pounds. This is not consistent with some later testimony which describes them as much heavier.

He indicated that the paths on the hills had to be attended to anywhere from two to four times per day depending on conditions. He indicated that in the summer time one person would have to go down hill one to three times a day to do various tasks. He said his job included being a gopher for Stora employees. That might include gathering garbage. He indicated that there was no assistance in shovelling sand into or out of the truck and the salt and the sand were mixed together.

THOMAS ARCHIBALD MACPHERSON

Thomas Archibald MacPherson of Glace Bay testified next. He said that he was self-employed but worked for Adam Clarke, another company at the site. He worked in structural steel, piping, instrumentation and electrical work. He was the project manager at Stora during most of the super calendar project. His job on a fixed price contract was to get the job done on budget and on time. He worked usually from 6 a.m. to 7 p.m. seven days a week. He said at the top of the job he had 518 employees under him. The work by his company at the super calendar project included piping, structural steel, equipment installation, grouting and electrical work. He had helped put the tender together for the project. Adam Clarke had electricians, iron workers, labourers, operating engineers and millwrights. There were 15 labourers covering both shifts 24 hours a day around the clock. He said the job was a fast track job and the work of Adam Clarke began in July and was to be completed the following April. He wasn't clear on the years.

When the job superintendent made a request for workers, it was his responsibility to get employees. He dealt with Bernie MacMaster, "a lady named Kim", or the business agent, Doug Serroul. He would say what kind of worker he needed and for what. When they started Adam Clarke needed labourers to get water, look after the job site, deliver fuel to portable welding machines, deliver water to different floors of the construction site, to act as carpenters helpers on the scaffolding, to mix grouting by hand, for use under pumps.

He described the building as approximately 80 to 90 feet in height, 1200 feet long and 700 feet wide. He said that at the time Adam Clarke worked on the site, the labourers would be required to take five gallon jugs of Sparkling Spring water up to the workers on the first and second floor of the construction and into the washrooms and it was the same labourer who cleaned washrooms who had that job. He said each contractor had their own washrooms on the site. The water jugs being described are those same kind of jugs which are used commonly in water coolers in work sites and in homes. At the time of this project, those water coolers did not have handles. The same labourer who cleaned washrooms would also have to work on the scaffolding.

The same labourers who did washroom work also had to obtain diesel in five gallon containers at the Big Stop on the mainland side of the Causeway and they would use a truck for that purpose and would come back to the work site and service welding machines, boom trucks and small cranes at various times in the day. If they were not delivering fuel they would be working on

scaffolding with the carpenters and labourers. There were six different contractors involved in the scaffolding work. Adam Clarke had its own scaffolding. The scaffolding used by Adam Clarke filled four tractor trailers. It was used for piping in the racks, electrical work and fire alarm work. The MacPherson's said that the washroom labourers would clean for a couple of hours and then do other work. The washrooms were down along the building. One set had three stalls, two urinals and three sinks. On the upper deck a washroom located where the office trailers were had the same configuration. The washroom labourers knew that as soon as the washrooms were done they had to carry water and do scaffolding work and other work as required by the foreman or general foreman or else they would be reprimanded or Mr. Serroul would get a call about the person being laid off. Mr. MacPherson said those calls were made to Mr. Serroul.

Adam Clarke worked 12 hour shifts. Adam Clarke washrooms received one cleaning per shift, not two.

There was no discussion between Adam Clarke and Local 1115's representatives about hiring a person with disabilities. Mr. MacPherson said that he would not have been able to hire a person with a disability because of the type of job. He said if he could help a person, whether or not disabled, he would do so and would try to create jobs no matter what colour or creed. However, he said, "I would be charged for occupational health and safety violations if I endangered a disabled person". He said it was hard for him to pinpoint in what kind of a condition he could have employed a disabled person who has difficulty walking. He said in his experience he has not been able to hire a person with disabilities because his firm does all fixed price contracting. He said the firm worked on a cost plus basis, he could pass on the costs and would be able to do so provided that he indicated to the company for whom the work was done, that he was intending to hire a person with disabilities. He said in that instance he would get an argument, but he would persevere and do the hiring in any event.

Mr. MacPherson said in cross-examination that the washroom trailers were a quarter mile apart. There was a slope between and Stora had to be convinced to put a wooden walkway in. Eventually, they got one after five or six weeks. He said there was no job for somebody spending an entire day cleaning one washroom.

He said there were no tool cribs for the labourers, that tool cribs were looked after by the trade with the majority of work related to the crib and he said that on Adam Clarke construction sites, tool cribs are not "manned" full time. He said, "I call that dead wood". He said he put enough gang boxes on site to avoid time wasting. Those are boxes containing tools conveniently located where work is being done. He said there was a pipe fitter employed in a tool crib to repair extension cords and tools. It was later pointed out that these were tools used by the pipe fitters and it would not have been appropriate for a labourer to do that work. Mr. MacPherson said the number of water bottles needed on the site would depend on how much alcohol the men had to drink the night before. He said approximately, four to eight per shift. I took that to mean four to eight bottles per work location on the site for Adam Clarke employees. He said that the labourer handling the water for Adam Clarke would walk from the place where the water was kept to the door of the building. He said that would be approximately 100 feet and then could walk up to 600 feet within the building and perhaps a couple of hundred feet across the building once inside.

Mr. MacPherson said that during the construction phase in which they were involved, concrete flooring was still being poured. There was need to take care in walking and there were wads of concrete on the floor. It became safer to walk later on when the flooring was all in place. He described safety as a priority and that there would be reprimands for littering the floor with debris. He said generally, the floors were pretty acceptable.

He said fuel was carried in five gallon plastic jugs. They were carried and lifted up and dumped. The person would have to climb on some of the machines to do that. He guestimated that the diesel jugs weighed 20 to 25 pounds and that the labourer would take a truck as close to the machines as possible. He said fuel containers could be carried a thousand to 200 feet over terrain that was not always smooth, particularly, until the site preparation and levelling were done at the end of the job when there was landscaping.

Mr. MacPherson said that for someone who had trouble walking more than 15 feet, this would not be a good place to work because of the safety orientation of Stora. He said the labourer had to be able to install and remove safety harness, had to be in good shape to go through the orientation and on the site. Safety was a priority of Stora, the Nova Scotia Safety Association, Occupation and Health Safety Regulations and each company's safety supervisors.

Mr. MacPherson described one of the gas leaks. He said the fellows left the building in a hurry, everyone for himself and they were running. It was not a safe situation for someone with difficulty moving, in his opinion.

On re-direct, Mr. MacPherson indicated that employees took a safety course. They had to pass tests climbing and doing other tests depending on what activities they were expected to do on the job sit. He said that Mike MacKinnon, the safety supervisor, would decide whether the person could climb safely. He said that the person putting on the course would make decisions. He said that on the job site, most of the contractors had similar types of work including climbing, scaffolding, pipe work, electric work and so on.

He told Mr. Blanchard that on the part of the embankment where his company worked there were 15 steps and two or three steps to a platform. He said the steps were 36 to 40 inches in width.

Mr. Blanchard also asked whether all the work was done on the job site. Mr. MacPherson indicated that there was fabrication at another location.

Mr. MacPherson said that there were up to 2,700 to 2,800 employees for the last three or more months toward the end of the construction project in 2000. He said for most of the construction project there were approximately 2,000 employees. He said that the average scaffolding was 30 feet, that the odd one was 50 feet and that the standard was 30 to 40 feet. He described the scaffolding as tubular scaffolding with braces, with normally a ladder on the scaffolding. Labourers would climb up the scaffolding on the cross pieces. Those would be 18 to 24 inches apart as I understand it. In violation of safety orders, ladders were not always placed on the scaffolding, because of the rush to get a job completed. In response to questioning from the Chair, Mr. MacPherson said that tool boxes are 4 feet long. There are also steel boxes 12 feet in length on rubber castings. These are the locked gang boxes.

Mr. MacPherson described the pipe fitter who did the tool repair job as a gentleman who was closer to retirement age, who had some difficulty breathing but who could walk and climb and who did some other pipe fitting duties such as bolting phlanges.

The Chair asked Mr. MacPherson about the diesel fuel and he said that there were eight to ten cans of diesel required per trip and that there were a couple of trips a day.

He said that 95% of the employees were required to wear and use safety harnesses on the job and that 100% of the labourers wore safety harnesses. A safety harness weighs eight to ten pounds. Although Mr. MacPherson said that everyone had to climb, he did indicate that there was usually no checking to see if a person actually could climb.

Mr. MacPherson said that a labourer cost $38.00 to $40.00 per hour if you add in the costs of travel allowances, benefits, union dues and building trades dues and that includes a wage of $22.00 per hour.

In answer to a question by Mr. Wood, Mr. MacPherson indicated that any employee who tries to circumvent safety rules is removed, if caught. He said that properly erected scaffolding has stairs with railings.

In answer to a question by Mr. Pink, he indicated that scaffolding is removed after a day or day and a half, sometimes after a week. He described a lot of running up and down the scaffolding. He said that labourers had to have fall arrest courses and that there was a certificate for that.

Mr. MacPherson said that he had never run into a situation in which he could not hire someone because of not having a safety course. However, if the person did not pass such a course, he would be sent away.

CHARLES ERNEST REARDON

Charles Ernest Reardon was a labourer since 1975 and a member of Local of 1115. He was essentially a powder man. That is, someone who is involved in explosive work. He was employed at the Stora site by Able Construction and his job was primarily in scaffolding and concrete work. He believes he started in January of '96 and completed his employment in March of '97. His job with concrete forms was to take care of the carpenters' tools and equipment and getting trucks in place, hooking up forms and getting them in place. He did quality control work. He maintained tools, pumps, vibrators, shaped rebar, took care of finishers' tools and mixed gas. He took care of 14 tool boxes and he stocked a large trailer with different lengths of coil rods and some rebar. In the morning, he began his day in the main equipment trailer. He gave the crews who came to the trailer, their tools. This took three quarters of an hour to an hour. Then he went around to the 14 tool boxes on site and repaired equipment. After checking the box for repairs he would go back to the trailer to repair the equipment and he took approximately seven hours to do this. The trailer in which he repaired the equipment was on top of the site. He would go down a temporary stairway. He said that stairway was a set of stringers which dropped ten feet over the bank with a railing on either side. It was a 36 inch wide primitive.

Mr. Reardon said that when he started the job everything was on one level. Later there was a second level with tool boxes which he accessed by stairs. He said that the ground on the site was rough, but he never fell, although there was a lot of obstruction. He cleaned and shovelled steps and pathways. No one else did the tool and equipment work aside from himself. The equipment he described included concrete vibrators, brushes, switches and cords. He said that he had worked off site about 45 minutes a day carrying material and so on. He described carrying 80 pounds. He said on average he carried 35 to 40 pounds. He said there was safety orientation on the job. A person had to know WHMIS, and know evacuation. There had to be due diligence. There was no physical testing of employees. He indicated there was no washroom job. Lunchrooms and washrooms were cleaned up. Clean up work took a half hour to 45 minutes a day. The person who did that would then go on to other jobs. He indicated there were non-working foreman at Able managing the labourers. Each crew consisted of 18 to 25 employees. There was one non-working foreman per crew. He indicated that the foremen would not walk a lot. They were generally with their crew. He indicated that there were 14 crews, basing that on the fact that there were 14 tool boxes and so 14 non-working foremen.

Mr. Reardon indicated that he walked eight to ten miles a day on the job. He had no problems with his feet.

He indicated, based on his experience that he expected a non-working foreman would be selected, not necessarily because of seniority but because of experience and leadership qualities in concrete pouring and forms. He said that the non-working foreman would meet in the office and go back and forth between trailers in a day liaising with the general contractor. He described Allen Deveuax as such a foreman and said that he had scaffolding and concrete scissor lift or zoom boom experience. He said the foreman would have to have the ability to do math equations and assessments.

SANDY MACPHERSON

Alexander or Sandy MacPherson of Lingan was the owner of the company called MacPherson Brothers. MacPherson Brothers does service contracting for general contractors and they hire all of the trades. They get workers by calling the Union Hall and usually, in respect of the Labourers' Union they call Doug Serroul, the business agent.

Usually, MacPherson Brothers provide details of the job in order to get the skill they need, for example, excavating concrete.

At the super calendar site, MacPherson Brothers were mostly doing grouting work under the bases of pumps and tanks. This work involved building forms, mixing grout, placing it in the forms, the forms were of various dimensions. At most, MacPherson Brothers employed six labourers and they worked on scaffolding and grouting, more so on the grouting than the scaffolding. The highest level of scaffolding used by MacPherson Brothers at this site was inside of tanks and it was 30 to 40 feet high. Most scaffolds were three lifts or 15 feet in height, a lift being five feet.

The labourers did all of the work except for the forms which the carpenters connected. This company also did a small portion of the clean up with a firm called Kamyr. It had no washroom. Grout mixing was normally done at the site of the forms, otherwise at a central location, in which case it had to be carried. The grout was delivered in pallet lifts. The workers would carry it into the building to the storage area and that would take a walk of about 60 to 70 feet. Grout was approximately 50 pounds a bag. Grout could be carried to where ever it was needed. There was a tap outside for water and there were some hoses in the building. Five gallon buckets of water were used. These were also carried by the labourers. It was difficult for Mr. MacPherson to be clear on how much of the grout had to be carried from place to place and how much was done at the site where it was to be used.

Some of the contract was done on a fixed price basis and some was done cost plus time and material as extra work came in.

Mr. MacPherson employed Mr. Blanchard at the Point Aconi site in its construction phase from '92 to '94. Employment of Mr. Blanchard was for a five week period and during that time, which was in 1992, he was employed as a result of an agreement made between himself and Doug Serroul. Doug Serroul had wanted to have Mr. Blanchard hired and Mr. MacPherson had wanted to get his son in the Union. There was an agreement so that both of those objectives could be accomplished. Mr. MacPherson said, "I had some light duty but not enough to keep a guy going all day". At first he had Mr. Blanchard cleaning up, which turned out to mean sweeping coops, and then he had him work on a washroom. As I understand the evidence, Mr. Blanchard only swept on the main floor for one day. He said this went alright for a little while; then he got complaints from a Jones Power employee who indicated that Mr. Blanchard had made a statement that he had been injured after he had fallen out of an airplane and that turned out not be true.

The MacPherson Brothers' truck would take Mr. Blanchard from the gate to where he worked and back again.

Mr. MacPherson said he would not be in the best position to describe the complainant's work performance as he did not have much opportunity to review it. Mr. MacPherson said he was under pressure from the company which employed him to do the contract to have Mr. Blanchard do more work. When Mr. Blanchard was approached to do more work, he asked to be laid off.

Mr. MacPherson described his recollection of Mr. Blanchard as quite disabled, walking with a cane and not able to move about very swiftly.

Tab 5 in Exhibit 1 contains a letter of reference. Mr. MacPherson indicates that it was likely his wife who signed that but he did indicate as well that he had agreed to give it. He said he did so to help Mr. Blanchard out.

Mr. MacPherson does not recall any one talking to him about hiring Mr. Blanchard at Stora, but he said that Mr. Blanchard could not have done any work for his company at Stora. He could not have manipulated a wheelbarrow carrying 50 pound bags of grout. He said we worked a lot of ten hour days.

Mr. Blanchard asked him if he recalled one early morning when Mr. Blanchard asked Mr. MacPherson if he wanted him to empty buckets and Mr. MacPherson said that that was his son's job. Mr. MacPherson could not remember this.

On cross-examination by Mr. Blanchard, Mr. MacPherson said he vividly recalled Mr. Blanchard asking for the layoff. On further cross-examination by Mr. Blanchard, Mr. MacPherson indicated that the offended superintendent from Jones Power felt that he had been made fun of.

On further examination by Mr. Pink, Mr. MacPherson indicated that at the Stora site, mixed grout was moved by wheelbarrow pushed by labourers for 300 to 400 feet and then would have to be carried up steps and then wheeled again. The wheelbarrow would have to be taken up the staging to another level. Grouting was mixed and it would be taken in buckets. Those buckets were said to weigh about 50 pounds. The buckets could be carried up to 500 feet. Mr. MacPherson said that a fair bit of grout went upstairs. He said 35% was upstairs, 65% of the grout work was done on the main level. I asked whether mixed grout could be carried in wheelbarrows. Mr. MacPherson indicated that it was too liquid for that.

He indicated that the MacPherson Brothers' company had no non-working foreman on the Stora job site. He said non-working foreman are expected to be experienced. They are expected to be flexible and able to supervise different jobs. They need to be well-versed in digging trenches, building scaffold and all aspects of heavy construction. He described leadership skill as very important and communication skills as very important. He described this job as more complex than others. When asked he could not identify any job which was singular and compact in a confined space.

When asked again, he could not be specific about Mr. Blanchard's actual job performance at Point Aconi, although he had some vague recollection of him having difficulty going up steps and needing help for that purpose.

Mr. MacPherson said there were complaints about the way that the bathroom was cleaned at Point Aconi. It was hard to justify eight hours for something that would take half an hour to an hour with two other workers helping him. He said he saw that himself. He named Emerson Rose and his own son, Darren MacPherson, as helping.

Mr. Blanchard asked Mr. MacPherson if he remembered giving him the layoff notice and Mr. MacPherson indicated that that was not the case. Mr. MacPherson indicated that Mr. Blanchard received help a couple of times a week and that sweeping the floor was hard on him on the concrete floor.

JAMES PERO

James Pero of Alder Point, also referred to as "Butch", aged 58 and a long time labourer and member of Local 1115, testified that Mr. Serroul referred him for a job at Strescon Canada where he worked in construction of the pre-cast concrete building. He spent some time working on the steel concrete panels. He was a grouting foreman on a crew of six people. The job involving pouring or spreading liquid grout on the pre-cast concrete panels to ensure that there was no steel exposed. He was a non-working foreman but he worked when the job feel back in terms of productivity and time. He said July of 1996 was when he started. They were the first crew on the job. Strescon had four crews. There were 50 to 60 labourers at one point. It took a half hour to clean Strescon's trailer. Labourers carried water for drinking and also carried material for scaffolding. They used to go up to 100 feet. They used zoom booms and scaffolding ladders and whatever was needed to get to a position, they did. He said these labourers were hardly ever on the ground.

A labourer could make grout and lift himself on the zoom boom to reach a position. If the zoom boom or man lift, as it was called, when you got to the roof where the zoom boom didn't quite reach you had to step out of the zoom boom to get on to the roof and the opinion of Mr. Pero was that that would be impossible if a person were disabled. A person would fall over too easily and although there was a side railing, there just simply wasn't enough safety for a person with disabilities. He said the job at Stora was almost complete when he left and he can't comment too much on the safety issues at Stora but said there was an emphasis on safety.

Mr. Pero said the labourers on his job had to go over the edge of the roof using a life line and safety harness. These workers also had to walk out on beams using life lines. They had to have a fall ticket. They had to use a hand held mixer and grouting, using one foot to balance while trying to mix the grout.

G. MICHAEL KELLY

G. Michael Kelly, Director of Safety Services and Quality Manager for the Nova Scotia Construction Safety Association testified and Mr. Pink introduced Exhibit 4 which is a letter of opinion signed by A. Bruce Collins, General Manager and Mr. Kelly.

After hearing evidence as to Mr. Kelly's qualifications and giving the complainant and counsel for the Commission an opportunity to cross-examine him, I accepted the qualifications of Mr. Kelly to give evidence on issues related to workplace safety.

Mr. Kelly has been involved with the construction industry since he was a young adolescent. While the Construction Safety Association appears to be funded largely by employers, some 3,000 strong who pay by levy, the Board is comprised of representatives of government, industry and the building trades, both on the mainland of Nova Scotia and on Cape Breton Island.

Mr. Kelly has a Certificate as a Canadian Registered Professional. He is a certified health and safety consultant for the Canadian Society of Safety Engineers. He has the designation of Construction Health and Safety Officer with the Nova Scotia Health and Safety Association which has reciprocity with the Canadian Association. Among a number of designations, he also a member of Detra Notra Vertica, the American Health and Safety Organization. He is qualified to

do health and safety audits. He has lead auditor status in the International Standards Organization. The CRCP designation requires three to five years of experience, full time in health and safety and mastering 12 volumes of text and passing examinations with the Board. An 80% score is required for the designation. Training must be ongoing. The designation requires, in addition to practical skill, the preparation of four written papers.

Mr. Kelly has written several papers on occupational health and safety. He acts as a consultant to both employers and unions on matters of occupational health and safety. He does not management audits, system evaluations and post accident analyses. This is the first time that he has been qualified as an expert although he has given testimony in discoveries and other preliminary situations without having had to go to Court.

Mr. Pink fast forwarded the video prepared by the complainant and stopped at a point where each of the activities demonstrated in the video was displayed and reviewed the opinion, which is essentially expressed in the letter. He said that throughout the video, Mr. Blanchard had difficulty with mobility, his balance was poor, his legs were rigid from the hips down, that he compensated well with his upper body and he had to make a conscious effort for movement. He said that in all cases he demonstrated he needed some sort of support. I note here that that is not totally correct based on observation of the video. He noted that at the dump site where there was disturbed ground, but where the ground was fairly well structured and where there were no significant obstacles around the truck, Mr. Blanchard needed to maintain contact with the truck. He described his legs as two pedestals on which the body perched, instead of limbs with the usual moveable parts. He said that the curve of Mr. Blanchard's spine when he lifted was indicative of risky practice leading to lower and upper back injuries.

Mr. Kelly repeated these three themes throughout his narrative while the film was reviewed. He also noted that there would be a strain on the neck. He said Mr. Blanchard does a tremendous job of coping in terms of repetitive behaviour; however, his movements and techniques were very risky in the sense of causing permanent injury. He said that Mr. Blanchard attempted to have three point contact in all of his movements at all times to compensate for rigidity of his lower body and lack of balance.

Mr. Kelly noted that when Mr. Blanchard walked, with or without support, that he engaged in a sideways shuffle, moving his body from side to side as opposed to normal walking behaviour. He noted in climbing wooden stairs or the fire escape that Mr. Blanchard was using both side rails and using a strong upper body to move himself along. He stated that he could not have possibly gotten on to the staging without extra support. He noted other risky movements which he described as similar to an individual lifting heavy snow and using a type of throwing motion which can often result in back injuries. There is no need to go into all of the detailed narrative he gave as he watched the video during the hearing.

Mr. Kelly said that something as simple as a dropped hammer would be a significant risk for Mr. Blanchard. He indicated later that that risk would be of an injury to himself primarily. He indicated that he lacked the flexibility to react to the unexpected and would have serious difficulty in that situation. He indicated that he would have difficulty getting out of the way of a back-hoe or any person or object which suddenly swung or confronted him. He said he could not react if there was an emergency such as the collapse of a structure in a trench, he could not remove himself fast enough. He had an inability to evacuate. He indicated there was a risk to others on the work site. Workers tend to go to the aid of others and he said other workers would try to get him out and that would put the other workers at risk. He said that many tools on the work site would be too heavy for him to safely lift and there would be significant risk of lower back soft tissue injuries. He said many tools weigh 75 to 80 pounds. For example, a jackhammer for concrete weighs 88 pounds. He said that he could not shovel snow properly because of the transfer of the load to the lower spine. He would go with the shovel because of his lack of balance. He said that getting on and off a truck to unload or load sand and salt would be difficult

if not impossible because of balance problems and the frequency of with which it would be required. He said if Mr. Blanchard were referred to a job site as a labourer in any capacity, he would have to have a safety officer assigned just to Mr. Blanchard. He said there were very serious considerations in respect of health and safety violations with assigning him to a construction job site. He said there were serious liability issues entailed in assigning Mr. Blanchard to a job site and he indicated, in his opinion, that persons with the highest degree of control have responsibility for safety in the workplace and the supervisors would all face potential liability. While that is a matter of law, it is also a key element in the regulatory framework in which Mr. Kelly is trained, which I reviewed in arriving at the decision.

Mr. Wood asked Mr. Kelly if he would be surprised that Mr. Blanchard had been shovelling snow for the last five years. He said he would be surprised at that. Mr. Blanchard did not testify on that point.

When asked by Mr. Wood whether Mr. Blanchard could perform work in a tool crib, the response from Mr. Kelly was that many of the tools weigh 75 to 100 pounds and that the techniques he demonstrated for lifting would put him in danger. He could not respond to how he would do with respect to cleaning washrooms in an office. Mr. Kelly testified that grout weighs 40 kilograms per bag. He testified that diesel fuel weighs approximately 50 pounds per 5 gallon container and he indicated that water would weigh approximately 50 pounds as well per 5 gallon container.

Mr. Kelly said that on job sites, people are routinely disciplined for refusing to comply with proper lifting techniques and that they are required to try to modify that behaviour and that on a strict basis they can be prosecuted if anyone is using improper lifting techniques at a workplace.

Mr. Kelly said that he was disabled himself for a period of two years after a lower back injury and he said that there is a place for disabled workers on a work site if they have the skill and mobility.

He said that although the Workers' Compensation Regulations can accommodate light duty occupations and modified work environments that there is an exclusion in the legislation for construction because of the added risk to workers and others, as he described it.

When cross-examined by Mr. Blanchard, Mr. Kelly said that he did not observe Mr. Blanchard fall at any time in that video. Mr. Blanchard argued that he was lifting in the video using the strength of his legs and not the curvature of his back. This was not in normal evidence but in cross-examination. Mr. Blanchard was not easily persuaded to move his concerns to testimony at the end of the hearing, so I take those comments he made in asking questions into consideration given the circumstances of the case.

In answer to a question by Mr. Pink, Mr. Kelly described the construction environment as fluid, subject to change, unexpected; structures collapse, trenches collapse and he said that an older experienced workforce has response skills which are instinctive for dodging out of the way and catching objects which fall.

Mr. Kelly noted that there is usually a period of orientation for new workers on a job site to ensure that they use safe techniques. It was not clear from his testimony that such orientation was compulsory during the period under consideration. He said that all construction activities require strength, flexibility and mobility and he does not know of a sedentary occupation for labourers. He said that tools can weigh anything from a couple of pounds to 40 or 50 kilograms.

JIM KEHOE

Both solicitors and Mr. Blanchard agreed to the introduction of Exhibit 5 which was an investigation memo in question and answer form provided by Mr. Jim Kehoe. Not being totally satisfied with that and emphasizing the lack of cross-examination to the parties present, I felt it necessary to at least swear Mr. Kehoe since the memo was not even in the form of an Affidavit. Therefore, I placed him under oath and he validated his questions and answers.

I note as well, that the answers are paraphrased by an interrogator who is not identified. This lessens the usefulness of such evidence. However, I extract from it that Joneljim had approximately 50 employees on the super calendar construction site at any particular time and they were involved in heavy labour activities. There were no light duty activities of any kind, particularly, janitorial work and the work was cement pouring or finishing. Labourers were screened for ability to do tasks and some were sent home for inability to do tasks. The tasks performed included compaction, backfilling, cement finishing and pouring concrete. Shovelling was one of the tasks. There were no jobs for, janitorial work, truck driving or tool crib. The work was described as physically demanding and Mr. Kehoe indicated that you couldn't have someone working on his crew who could not climb and he would have sent such a person home. He had also stated that the workers he employed were going up and down staging or going up and down inside holes and were very seldom on level ground. Balance was essential.

Mr. Kehoe apparently said that you can't have a person who uses a cane on a construction site, that just would not have worked at Stora given the fast paced nature of the work being done there.

Since I do not know essentially how the questions were put or what conversation took place between the questions and the responses provided to us, I do not know how much leading was involved in this investigation. I take what Mr. Kehoe says on face value given the consent of all parties to its introduction. However, it has significantly less weight than the direct evidence given by witnesses who were subject to examination at the hearing.

GERALD NORMAN HILL

Gerald Norman Hill testified. He is 49 years old and has had two shoulder operations. He cannot lift overhead and cannot climb. He recently had surgery in June of 2001. He cannot lift objects of any significant weight. Prior to that injury he worked at Stora. He was there from July 1997 to December 2000. He no longer works. Mr. Hill worked for Kamyr as a general labourer and shop steward. The shop steward represents the Union. He resolves issues for the members. He was selected by the business agent. Mr. Serroul requested him to be a shop steward. He has no special status on the job in respect of the requirements to perform labourers' work. He had no permission to work less than the other workers. If he was on Union business he would see the supervisor and ask for 10 or 15 minutes to deal with a problem and then go straight back to his work.

His job at the super calendar project included jackhammer work, cutting concrete bases for machinery. He broke up poured concrete. It had to be roughed up before grouting to form a proper bond. He used big hammers for this. He indicated the hammers weighed 50 to 80 pounds. He also indicated that he had to deal with staging. He said jackhammering was hard on the body. He indicated that he had to do cleaning of two lunch rooms and two office trailers. He said the places he cleaned were located on the top of the hill in the main trailer lot. He said there were two lunch rooms 75 feet from the building. Although there were stairs in place, they were not close to the Kamyr trailers. There was a walkway from the top to the bottom of the hill and he said it was approximately 300 feet to the office trailers from the lunch site.

For the first eight months he worked on the job site, he worked an eight hour shift. He had one other labourer helping clean. However, Mr. Hill did most of the cleaning. He said that Mr. Ling

also worked at chipping and cleaning and that there were up to 16 labourers on the site at one point around the shut down period but generally there were two to four labourers.

He said after eight months there was a lay-off. He was off the site for a period of time. In one part of the job while he was shop steward, he did a lot of grouting work. In the first eight months he handled 2,500 bags of grout with Mr. Ling.

He described that the bags of grout would be mixed with a hand mixer and electric mixer as well. He said that there were big open trenches in the building at the time and there were a lot of people working. He said that he would be pouring the grout into columns using five gallon buckets. The columns were about six feet. There would be one labourer on top passing the bucket up and then he would dump the grout in. He also indicated after the lay-off, he worked on clean-up of hydraulic fluid. He would use rags, vacuum cleaners, buckets and 45 gallon drums. Anywhere there was a spill he would clean it up. Either he would work alone or with one other labourer. Rags were used for floor drying pads, vacuum cleaning and mopping. This was done every day for a portion of the day and on top of that the trailers, some staging and fire watch. Fire watch involved ensuring that the paper around the super calendar machine did not catch fire. This was up to an hour a day. In addition to those duties, after the period of the lay-off, Mr. Hill was involved in erecting staging, carrying drinking water to five locations in the building. There was a lot of up and down. Crates had to be dismantled and thrown in a dumpster.

The cleaning of hydraulic fuel was described as very dangerous with slippery conditions, climbing up on top of and inside of some equipment, going into quite dangerous and confined spaces using face masks and air fans for safety.

The work during the shut down period was described as hazardous with more materials and a lot of cleaning to be done. Exhibit 8, a photograph, demonstrates a super calendar machine which had to be cleaned and the rapidity with which that had to be done was stressed. While the cleaning was taking place, there would be 10 to 12 trades persons waiting to get in. This was an ongoing job that had to take place several times a day. Cleaning of this machine which was the Labourers' responsibility had to take place over a 16 to 24 hour day depending on the circumstances. This involved crawling into machinery, into tight areas that were hard to get into.

Mr. Hill's injury came about as a result of one of the slips that he had working in these kinds of conditions. When asked about whether there was any work available which Mr. Blanchard could have performed, he said, "Not in my area, not around hydraulic fluid". Then when asked about other areas, he went through all of the various jobs that he had performed at Stora and described the heavy work involved, the terrain, pathways, shovelling and grouting. He reviewed evidence he had already given and certainly left the impression that there would be no work that Mr. Blanchard could have done, but he did not directly say that throughout the rest of his description of the job site.

BERNIE MacMASTER

Bernie MacMaster testified that he has been a member of Local 1115 for 28 years and more recently has been secretary/treasurer during the relevant period. He said that Mr. Blanchard refused a staging job at Stora in December of 1996. He said that as a result he went to the next gentleman on the out-of-work list. He could not recall who that was. He said that the list had been in place since 1996 and had been instituted because of pressure from the International Union. Prior to that period of time, the Union would pick qualified and competent persons who were unemployed and would hire the next qualified person. He said that in January of 1997, Mr. Blanchard raised the issue of his being offered a job under new business and complained about

being called. Under the International's protocol, anyone who refuses to be sent out to a job on two occasions, goes to the bottom of the list.

Mr. MacMaster stated that as a result of this complaint, the International Union was contacted and Robert Luscombe of the General Executive Board Council directed, by letter exhibited in Tab 8 of Exhibit 1, that a variance was be available for disabled workers in Local 1115. This meant that Mr. Blanchard only had to be called for work he could perform and could refuse work if he could not perform it without dropping to the bottom of the list after the second refusal.

At the union meeting in January, Mr. Blanchard said he wanted a tool crib or warehouse job. Mr. MacMaster heard Mr. Blanchard say this on another occasion after that January meeting. He also heard Mr. Serroul tell Mr. Blanchard that he would have the kind of job he wanted if it came up. There was no discussion directly between Mr. Blanchard and Mr. MacMaster about Mr. Blanchard's job preference. He said that at no time did Mr. Blanchard indicate to him that he would take any job that was available.

Mr. MacMaster was examined by Mr. Wood and said that Mr. Blanchard was clearly told that no matter what the list said, he would get a job if the kind he wanted came up. He said that about 300 labourers were referred for jobs out of an out-of-work list of approximately 600 labourers at the time of the Stora project.

Mr. MacMaster said that most referrals were made because of calls to himself as long as he was in the hall. Surprisingly, he said it was not his job to refer persons with disabilities. He did not know whose job it was. He said that his job was to refer qualified men.

Mr. MacMaster also made the unfortunate and erroneous comment that contractors do not have an obligation to accommodate.

Mr. MacMaster did not seem to understand what Mr. Blanchard's seniority was during the relevant period of the Stora project and so he was referred to Exhibit 2, Tab 1 which was prepared by Mr. Wood and he admitted that Mr. Blanchard was close to the top of the list, one or two in the period 1996-97. The number two position changed to the number one position somewhere between February and May 1997 and from May 7th, 1997 to the fall of 1997, Mr. Blanchard was number one.

With reference to Exhibit 2 which contains a large number of referral slips, it is clear that the referrals made by the Union during the portion of 1997 indicated in the Exhibit, were for people who were significantly lower down on the list than Mr. Blanchard. When cross-examined about whether any of those jobs which had been referred were light duties and after being given specific examples, Mr. Blanchard indicated in every case, that the jobs were not ones that could reasonably be described as light duties. When asked specifically about non-working foremen, he said that non-working foremen on small jobs with masonry concrete have to do some labour work. They have to be all over the site. He said with Stora a foreman might have to walk a thousand feet to go visit the next person he supervised. One might have to go from the fourth floor to the first floor. He indicated that he did not pick foremen or shop stewards. That was the business manager's job. He was asked about referral slip 1659 which was for a flagging job and he said he had had that job himself in the 70's, 80's and 90's. He said that flagging involves 10 to 12 hour a day on one's feet and that one must have a traffic control course from the Department of Transportation.

Mr. MacMaster said that to become a Labourer, a person fills out a résumé with qualifications, safety training, companies one has worked for and telephone numbers of those companies. He said the labourers are the lowest paid of the trades. One way of becoming a member of the

Union is to certify a non-Union contractor. When asked about how many women were members of the Labourers' Union, he named two, one of whom is still in the Local.

Mr. MacMaster denied that he told Mr. Blanchard he knew he could not do the job. Mr. Blanchard disagreed with that during his examination of Mr. MacMaster. On this point I believe Mr. Blanchard has the clearer recollection. He was asked if a flag person could sit on a stool and he said no. He said from the 1980's on, there was a requirement of having to stand up for the shift. He also said if you able to take a break from flagging, that you would have to do other work including piping work or working on driveways. He said doing highway work could involve walking eight to 12 kilometres a day.

Mr. MacMaster said that during the period 1992 to 1997, no other job-seeking labourers had disabilities. A gentleman who had diabetes was referred, but there was no direct discussion with the employer about his physical condition as I understand the evidence.

Employers on the job site were approached to resolve jurisdictional disputes.

Based on his own experience of being on the job site several times, he said no one like Mr. Blanchard could do any job on that site because he himself had a hard time walking around due to overhead hazards, machinery to dodge, debris on the floor and holes to avoid. When Mr. Blanchard asked him why he did not call Mr. Blanchard up for any other job, he said, "I did not do that because I overheard you say that you wanted only a warehouse or tool crib job". Mr. Wood asked him had he not overheard that, would he have sent him out and he said "No, because he would have been a danger to himself and others".

Mr. MacMaster had said that he had had trouble getting to the upper levels of the work site because he had a bad knee and bad back. He said he walked up the embankment, hanging on to both rails. He said that the bank was steep and it was difficult for him to get up. He said that on every trip he made to the site, he walked over about three quarters of the site. He said he walked five or 6 kilometres every day he was on the site. He said that if he had to do it today, he couldn't do more than half of the site in one day. Mr. MacMaster is considerably over-weight in addition to other physical characteristics he described.

Mr. MacMaster said that during the period 1995 through 1997, he spent about three quarters of his time in the office and one quarter of his time on job sites and that primarily, as I understood it, would have been the Stora site and now he spends more time on job sites.

DOUG SERROUL

Mr. Doug Serroul has been the business manager of Local 1115 since June of 1991. He has been a member of the Local since April of 1973. He is the Business Manager of the Atlantic District Council of the Labourers' International Union. He has experience in all aspects of labour and did hard rock mining in Wreck Cove, Lingan, Phalen, Donkin tunnels, Pickle Lake, Ontario and Lynn Lake, Ontario. He has worked in cement, scaffolding, masonry tendering. He has been a steward, a foreman and a general foreman. He was never a supervisor.

Mr. Serroul first met Mr. Blanchard when he became the business agent and according to the records, Mr. Blanchard transferred to Local 1115 in 1990 Mr. Blanchard had said 1991. He said at the time he first met Mr. Blanchard he remembers him walking with two canes but he referred him to the Point Aconi site. He said most of the labourers were doing general labour at that site. There were approximately 130 of those general labourers and some 50 hard rock miners. He said that Mr. Blanchard did not ask for a general labourer job. He made an arrangement with Sandy MacPherson. Mr. Blanchard told Mr. Serroul that he was laid off. He said approximately a week before that, he had a call from Sandy MacPherson to have a talk about Mr. Blanchard's a claim

that he fell out of a plane while sky diving. Mr. Serroul said he found that funny but he said that somebody took it seriously and told everyone on the site and everyone was laughing at the individual. He then spoke to Mr. Blanchard and asked him not to bring attention to himself and told him that the Union was trying to keep him on an eight hour shift and trying to cover for him. He said he was "kind of proud of what we did", that is, getting him a job.

Mr. Serroul said that Mr. Blanchard began to pay retiree dues after a while. He had reactivated his status in 1995. At that time Mr. Serroul had a directive about establishing an out-of-work list. He said that in 1996 an out-of-work list was struck. Before that a rolodex was used. The Local arranged for members to fill out audits as indicated in Tab 7, Exhibit1. That particular audit form is Mr. Blanchard's form. Audits were intended to provide detail of each member's skill sets.

Mr. Serroul recalls Mr. Blanchard coming in about getting on the list. He said he felt badly when he saw him come in because he had nothing for persons with "handicaps". He said he had the discussion with him about whether he could work and Mr. Blanchard said to him that because there was a big job coming up, there should be a warehouse job. He said he had taken a computer course and Mr. Serroul said that his response to this was that if that's what you want and a warehouse job comes up, it will be years. He said that Mr. Blanchard was waiting for that kind of a job. He said that Mr. Blanchard did not ask for or indicate any other type of work he would like to do. He noted that Mr. Blanchard should have been at the bottom of the list, that he was given number 50 at the time that this list was prepared. Although this was a mistake and it was not changed. I took from this that it was not changed so as to give Mr. Blanchard a break.

Mr. Serroul said that he was away at the time that Mr. MacMaster referred Mr. Blanchard for a staging job and that when he found out he gave Mr. MacMaster a blast. He said he did not even have the qualifications for staging and was not certified. Tab 7 of Exhibit 1 was reviewed. He said that under the local rules if you lied on the form about your qualifications, you would go to the bottom of the list if called and you could not do the work, which you specified you could do.

Mr. Serroul testified that it was impossible for Mr. Blanchard to do the things he said he could do in his audit. He described the January Local meeting at which Mr. Blanchard complained about having been sent out for the scaffolding job. He said "I told Bobby we would apply for a variance". He described using colourful language to indicate that if any tool crib or warehouse job came up, no matter where Mr. Blanchard was on the list, that he would refer him despite the position of the International Union. He said that no one at the meeting objected to this. He said that after that, Mr. Blanchard called a few times asking about a warehouse or tool crib job. He said he did not ask for anything else and he did not ask to be dispatched for any available job. He said the warehouse job off site was due to jurisdictional disputes. Mark Coopers had this job and it was staffed by a teamster. He said there were other tool cribs but they were run by the specific trades which had the tool cribs and that there was no tool crib for labourers. At no time did he believe Mr. Blanchard wanted any other form of labouring job. He said that he did not know that Mr. Blanchard was on CPP disability at the time he was attempting to obtain work at the super calendar site.

When asked whether he made any specific attempt to secure a job with Mark Cooper, All Steel, he said he was on the site 14 or more days a month and just about every visit to the site, he would go after Mark to get a labourer into his warehouse. The teamsters threatened a grievance if that occurred. Cyril Oliver who was the teamster in the warehouse said there was no f..... way for this to happen. He said he kept trying and telling the employer that Mr. Blanchard was a good guy, but by the Fall of 1997 he was aware that it was just not going to happen. He said at the end of September 1997, he told Mr. Blanchard that he was not going to get a warehouse or tool crib job. He said that Mr. Blanchard told him that if he sent him up to the work site for any job, that if the contractor then tried to send out of the job site, he would file a complaint and take that contractor before the Human Rights Commission. He said he would not refer him to a general labourers job because of his physical limitations. He said the job which the Teamsters

Union had in the warehouse with a computer for inventory would have been good for Mr. Blanchard. But he described the opposition of the Teamsters to any move he made to get the position for Mr. Blanchard.

Mr. Serroul described the Stora job as a fast track job. He said that after grouping their membership into segments of fifty people, the Union started training its membership in fall arrest, in confined space, first aid and traffic control. This was well prior to the start up of this job. They advertised this training at meetings. They put up sheets in the Union Hall advertising the dates of courses, asking people to sign up. Instructors were advising the Local that members were not attending. Mr. Serroul issued warnings that the safety course was a pre-requisite for a job. He said that first aid was not mandatory but they had St. John Ambulance training. There was a Workplace Hazardous Materials Information System (WHMIS) course, fall protection and confined space training. He said that people would be sent back if they did not have the proper certification.

He said that Mr. Blanchard could have done warehouse jobs without some of these certificates but not anything else. He also testified that Mr. Blanchard must have known about the courses because he was attending meetings at the Union Hall and attending at the Union Hall at other times. He said there was no other person of Mr. Blanchard's apparent disabilities on the out-of-work list but there were people who had had heart surgery, by-passes, diabetes, who were older workers who could not climb or build as fast. He said those people would be the last people to get on the job and they would be the first people laid off. When I asked him about why they would be the first laid off, it was because there was no seniority in a construction industry and employers would get rid of those people who could not work as efficiently.

Mr. Serroul said that he would have sent Mr. Blanchard to a tool crib or warehouse job. He said, "I gave my word", he said that he always followed up when he gave his word. He said that the steward duties are not full time, that the job steward would be a cement finisher or have some other responsibility. He said both stewards have taken courses. There is only one job steward per company regardless of the size of the workforce with that company. The only perk for being a job steward is that you are the only person with seniority on the job site by Collective Agreement. The steward has to be able to do the worst jobs on the job site because otherwise the steward can be laid off if not capable of not performing the jobs and referral to difficult jobs is a method that the employers will use to try and get rid of a steward who is causing difficulties.

Mr. Serroul said that an employer wanting to get rid of somebody who was older, or a steward, will have a general layoff and include that person in the general layoff, so as to create the impression that the particular worker is not being targeted.

He said it is the duty of the Union to provide competent and qualified workers and that is a duty which is contained in the Collective Agreement. With respect to trucking, Mr. Serroul said the teamsters get truck driving if there is more than two hours worth of driving per day. He said janitorial work can be done in confined spaces and if he could have found a one washroom job, easy to access, he would have tried to accommodate that. But he said, nothing like that came up. He said in 14 working days on the site a month, he lost 32 pounds from walking the site.

When asked whether he tried to see what Mr. Blanchard could have been slipped into, he said that he was always looking for ways to squeeze guys in. He said there were always 50 or more people hanging around the hall when he would come back from a trip to Port Hawkesbury. He said, "I looked for jobs for Bobby and the rest of our people".

Mr. Serroul said in 1992 he was placed on the Occupational Health and Safety Advisory Council in Nova Scotia. This organization worked four days a month revising the Occupational Health and Safety legislation in Nova Scotia and they worked from 1992 to 1998 on the project. He said as a

result he was familiar with the new legislation and he said that imposed obligations on employers to avoid letting an employee fall into danger or create danger for others. He talked about the high fines for non-compliance.

Mr. Serroul said that the Labourers' Union must ensure that their referrals are well trained. He gave the example of a fatality within Local 1115 involving an individual working at a K-Mart construction site. That individual, aged 63, was 10 feet up on a scaffold with a jack hammer when a wall gave way and presumably, because of his age and his state of physical health, the worker hesitated. The Department of Labour took the company to Court and in the decision, the Court ruled that the Union did not train the worker enough. Mr. Serroul said that after that, "we changed our philosophy and train our people in aspects of safety and safe working procedures". He said that as a result of that incident there is a concern about sending people like Mr. Blanchard out because they cannot react quickly on the job site. The Union knows that in any Court proceedings the employer will involve the Union.

Mr. Serroul said there was no job on that site which Mr. Blanchard could have done. He would have had to walk for miles. There was always a problem with blisters on the workers' feet. That was a major complaint at the nursing station. He said that the calendar machine was about a 1,000 feet long. When asked whether a job could have been adjusted for Mr. Blanchard, he said it was the fastest track job in Cape Breton. He said it was a four year job compressed into 27 months. He said the workers were run off their feet and a person such as Mr. Blanchard could not have been accommodated. He went on to say that there were three or four gas leaks and that he personally was gassed twice over a two day period. He said even though he warned workers because of his draegerman experience that he sensed the gas coming, people didn't pay attention to him and thought he was joking. He said that he saw approximately 2,000 men come down off towers and staging, running, screaming, choking and vomiting. He said people with big bellies ran from the top of the hill and had to run in the other direction. He said there were no proper evacuation procedures at the time and that after a meeting with the Union and the company that the next day there were masks and respirators available along with training for the employees so that they were told that they must slow down in an emergency. They must go to designated assembly points. He said that Mr. Blanchard never would have gotten out of there and that there are still employees with lung damage from the gas leaks. He said there could have been no reasonable accommodation for Mr. Blanchard with respect to evacuation issues.

Mr. Blanchard questioned Mr. Serroul, arguing that it did not make sense for him to ask for a layoff at Point Aconi after five weeks when he needed ten weeks for Unemployment Insurance. Mr. Serroul disagreed.

Mr. Serroul stated that members of the Local apply on their own for commercial jobs. They are not referred out of the Union Hall. He also said that commercial contractors who bid on industrial jobs are able to retain some of their own regular staff. Mr. Serroul also indicated that there were no industrial jobs between the Point Aconi job and the super calendar job and also he indicated that Mr. Blanchard would have known that the commercial work available was "dog eat dog" work. Mr. Blanchard did not apply for any work through the Union Hall during the period between his layoff at Point Aconi and the period when he was looking for work at the Stora site. He was not aware of Mr. Blanchard soliciting any commercial work and this is confirmed by Mr. Blanchard. Mr. Serroul admitted that he did not discuss positions for Mr. Blanchard with any other employees at Stora other than the warehouse job.

When asked about going after other employers to seek accommodation for Mr. Blanchard to do trailer work, Mr. Serroul indicated that due to the fast pace of the job and the time limits that were imposed on the labourers doing that type of cleaning that he could not see it. He indicated that the usual time limit was two hours and he said he heard of much shorter time limits and he said that this gentleman was only looking for warehouse and tool crib work.

Mr. Serroul described the arrangement he had with Mr. Blanchard as an agreement. He said that he would have tried to get Mr. Blanchard another kind of a job if another one had come along, even if it wasn't a tool crib or warehouse job. I took him to mean another job suited to his perception of Mr. Blanchard's abilities. When asked about what his view was of the Union's obligations to accommodate, he said there was an obligation to accommodate a person with disabilities as long as there would be no undue hardship. He said he probably knew that because of his work with the Safety Council. However, when asked if he had ever specifically gone out to speak to an employer about accommodation for Mr. Blanchard, his response was "Why would you?" This type of response was confirmed a second time. I was greatly concerned about this answer.

When I asked Mr. Serroul about what training the Local had on human rights issues, he indicated that there was one session put on by Mr. Pink and Mr. Larkin at a seminar at the Delta Hotel to which other Unions were invited. Mr. Serroul and perhaps some other members of the Local attended that. Prior to the relevant time period, the company was emphasizing safety training and more recently they have hired a full-time training director. They spent approximately Two Hundred Thousand Dollars ($200,000.00) last year on training. They hire and train instructors at the same rate as a commercial construction worker would earn. They do training for other organizations. They include providing in-kind services in the Two Hundred Thousand Dollar ($200,000.00) figure.

When questioned about why he would not have sent Mr. Blanchard to any job in response to his request for any job, Mr. Serroul indicated that he was not prepared to send people out if that would have been inappropriate. It wasn't clear that this was actually expressed directly to Mr. Blanchard. He said he didn't really have a chance to converse with Mr. Blanchard because he walked out, when the discussion occurred.

Mr. Wood asked Mr. Serroul whether he assumed that Mr. Blanchard was too disabled to work on the Stora site, Mr. Serroul said, "No, I know he was".

Mr. Serroul indicated the letter of reference to the lender was part of a series of letters that the Local provides on an ongoing basis to employees and that they will send such letters indicating that the employee will be soon be working regardless of whether, in fact, is true. He said there were probably another 50 people or so who received such letters around the time of December 1996. He indicated that he knew all along that Mr. Blanchard was in financial difficulty regardless of whether he actually went bankrupt in the Spring of 1997. He also said that since Mr. Blanchard had said that he was going to complain to Human Rights if he was sent home from a job, that he simply was not going to send someone to a job site who was going to complain to the Human Rights Commission about an employer. He said, "I have an obligation to the companies to supply competent, qualified people so that the companies will make money and will be able to hire our people again". He said, "We are not there to put a company out of business".

When asked whose job it is to talk to an employer about an accommodation, Mr. Serroul said that it's no one else's job and that if it was the Union's job that he would have to be the spokesperson. Instead of saying whether is was his job or not, he said, "I'll find this out when the Chair speaks". He indicated that he settles most disagreements with the company, particularly on jurisdictional issues but there are some companies with which it is very difficult to get agreement. He said that he did not make an assessment of Mr. Blanchard's ability to perform a job but he can tell from the way he walks, that he couldn't. He indicated that he didn't think any employers would be able to accommodate even if they were willing to, not within the Labourers' jurisdiction, but there might have been room for accommodation by the operating engineers for somebody sitting in a crane. The teamsters might have been able to accommodate because there was a warehouse job. He said, "We probably have the hardest craft in industry for disabilities".

Mr. Serroul said he remembered seeing Mr. Blanchard trying to sweep the floor at Point Aconi on the first day he was on the site and he said he was having a difficult time trying to sweep that floor. He said he did not see any difference in the way Mr. Blanchard appeared at the time he was at the Point Aconi site and the time he appeared at the Union Hall seeking a job on the Stora site. Since Mr. Blanchard could not handle the sweeping job, he didn't think he could have handled the kinds of labour jobs that were available in Port Hawkesbury. He did not directly answer a question about whether he had discussed Mr. Blanchard's physical limitations with him directly but he said instead, since Mr. Blanchard looked for a job sitting in a chair in front of a computer doing inventory work, he didn't think he needed much physical ability for that.

Mr. Blanchard asked Mr. Serroul why he would have been making a threat to complain to the Human Rights Commission considering the fact that he had told Mr. MacMaster that he did not want to embarrass the Union by going out on a job climbing scaffolding that he wasn't capable of doing.

Mr. Blanchard's position throughout was simply that he did not make any threats.

ROBERT BLANCHARD

Mr. Blanchard was invited to testify again after all other evidence was finished that he respond to evidence he had heard from the other witnesses. What follows is the extent of his evidence.

Mr. Blanchard spoke about his time at Point Aconi. He said that he was proud of the job he did, that he did not receive help and did not need it. He said that people carried supplies but that wasn't necessary. He said that he drove himself to the gate and waited for a ride to Mr. MacPherson's trailer. He said the trailer he cleaned was on the third floor of the building and he walked two or three flights of stairs with railings. He said that he worked eight hours continuously and he would sit down if there was a break. He said that he would volunteer to do other jobs.

He said that he definitely asked Mr. Serroul for any job because he was going bankrupt. The first payment was due on his loan and he had declared bankruptcy. This is somewhat contradictory. He said that he had the discussion about taking any job at all in March not in September of 1997. He knows this because this was the time that his first payment was due and he was about to go bankrupt. He said that he did not apply for any commercial jobs because he was taking care of his mother. He said he was doing odd jobs on the side. He said that he might have made between $500 a year, $20 here - $20 there doing odd jobs.

He said that he expected he would have made $12,000.00 at Stora; that he would have made $8,000.00 on a high Unemployment Stamp; that he was entitled to $10,000.00 damages for suffering and $7,600.00 in legal fees that he owes to Sampson MacDougall.

Mr. Blanchard testified that he needed Seven Hundred and Fifty hours (750) of work at Twenty Dollars ($20.00) per hour for stamps and would get three quarters of his salary in wages. He said that he has a WHMIS certificate, first aid certificate and no certificates for other safety courses. His education is grade 12 academic. He had a drafting and blue printing course from Vocational School in 1974-75. He took the eight month computer course in electronic office procedure at MacKenzie College. He said that he was pretty sure that he might have told Bernie MacMaster that he would take any kind of job. He does not know for sure what he would need for stamps.

When asked by Mr. Pink whether there was any job on the Stora site that he could have done which would last a full day, he said that that was Mr. Serroul's job to get a job for him. He said

he heard of other people who were on the job but he said, "I'd rather not say who they were". He would not put them through a hearing such as this.

He said that Mr. Kelly was not qualified to assess him medically.

EXHIBIT 1

Joint Exhibit Book 1

This was introduced by agreement between Mr. Pink and Mr. Wood on behalf of their clients but also with Mr. Blanchard's agreement.

At Tab 2 in that document there is a response to the Commission from Local 1115 that the employer is obligated to request competent and qualified workmen (emphasis added) and then the Union's obligation under this article is to supply, when available, "competent and qualified work men as requested", with preference being given to Local workers who "possess the necessary skills and qualifications".

Although the Collective Agreement was not formally introduced as an exhibit, when I noted its absence as an exhibit and inquired about that, the parties agreed that I could consider it as being in evidence. After the hearing, I requested and received written permission from all three counsel, including Mr. Corsano for Mr. Blanchard, to review the full Collective Agreement and did so. I had been referred to excerpts at the hearing. I consider the Agreement to be Exhibit 4. The Collective Agreement is entitled "Cape Breton Industrial Projects Collective Agreement 1996 to 1999 between Construction Management Bureau Limited and the Cape Breton Island Building and Construction Trades Council" of which the Labourers' Union, Local 1115, is a signatory.

The Union's position in its formal response to the complaint, was that the duty to accommodate is not a duty which rests upon the Union; it is the duty which rests upon the Employer. The Union went on to say that they had not referred Mr. Blanchard to work because the Union was "unaware of where there is any job which Mr. Blanchard could fulfill, notwithstanding his condition, even if there was a reasonable form of accommodation". Then the Union said that within its jurisdiction in the construction industry, "...the ability to be mobile is imperative".

Tab 3 is a sheet showing the dues paid by Mr. Blanchard indicating when he was paying full time and when he was paying off-work or pensioners' dues. Pensioners' dues are indicated in 1995 for a four month period in the summer. They are also indicated in 1998 beginning in February up to February of 2001. He was paying full-time dues in the interim. No dues are indicated after that period.

Tab 4 is a résumé prepared by Mr. Blanchard. It is in some respects supplemented by his testimony or clarified by his testimony. It indicates Mr. Blanchard's qualifications with respect to computer training, tool crib attendancy, purchasing, receiving, shipping and domestic work. It also indicates that as a volunteer throughout the period 1994 to 1997, Mr. Blanchard was involved in fund raising for the MS Society in an active and very successful way.

Tab 5, the recommendation from Sandy MacPherson, indicates that Mr. Blanchard is a good worker.

Tab 7 is the skills audit.

Tab 8 the response of the International to the request for a variance includes the following wording,

"Granted. Applicants who are prevented from performing specific tasks because of a medical condition, however, should not, in the first place, be called for a referral requiring skills they cannot possibly perform. In order to avoid such situations, we suggest that rather than put applicants with permanent medical restrictions in the position of having to refuse a job he/she is unable to perform, the applicant, upon registering, should indicate which tasks they are capable of performing. If an applicant is called and cannot perform a task because of a medical condition, and the inability to perform that task is not indicated on the registration form, the applicant should be accountable for that refusal.

This procedure was not strictly followed in the case of Mr. Blanchard who was not subsequently asked to specify those activities he could perform. There is, however, the list in Tab 9 of things he was qualified to do and by implication perhaps one would then expect that he was unqualified to do other forms of industrial labour, despite his audit form (Tab 7). More importantly, the skills audit was on file with the Local.

Tab 10 contains a letter dated March 13th, 1998 from Mr. Serroul to Mr. Blanchard in which he was asked to indicate by doctor's letter, whether he was still unavailable for work and also to indicate through doctor's slip what work he is able to perform. I am not clear about the reason for this letter.

Tab 11 is a response in which Mr. Blanchard says he would like to be taken off the out-of-work list and to begin paying pension dues. This is dated March 27th, 1998.

Tab 12 is a letter from Dr. M.T. Ryan, Mr. Blanchard's physician dated on January 18, 2000, which very briefly says that he would be fit work on a construction site, in a warehouse or janitorial work which did not involve a great deal of walking. There is no explanation in the exhibits or otherwise as to what change there was from November 6th, 1997 when Dr. Ryan wrote a slip indicating "unable to work until further notice". No reasons were given for the information provided by Dr. Ryan in either case.

Exhibit 9 is a hand-written list of lost wages, so-called, which was provided by Mr. Blanchard. The figures indicated on that list include Twelve Thousand Dollars ($12,000.00) he said he would have earned at Stora; Eight Thousand Dollars ($8,000.00) he said he would have earned in Employment Insurance benefits; Ten Thousand Dollars ($10,000.00) he said he should receive for personal damage and suffering; Seven Thousand Six Hundred Dollars ($7,600.00) he should receive in legal fees. This was presented by Mr. Blanchard at the end of the hearing after a number of requests I made for him to provide documentation to support any potential damages claim. I repeatedly asked him to confer with Commission counsel and/or his own lawyer on the need for supporting documents.

Exhibit 6 is a blow up photograph of large storage tanks which were constructed on the relevant site during the period of the super calendar construction. The labourers constructed the staging for this part of the project.

Exhibit 8 is a photograph of one of the machines which was installed during the construction period and there was a detailed description of the job of the labourers in terms of cleaning hydraulic fluid around that piece of machinery and the dangers entailed in confined spaces and slippery conditions.

Exhibit 7 is a series of photographs which were copied from the records of Stora Forest Industries showing various stages of the project indicating trailers, parking lots, heavy equipment, concrete forms, concrete pads, the construction of excavation work, erection of form work, the panels for the walls which required grouting, demonstration of winter conditions, demonstration of the rough ground within the building itself while under construction, a

demonstration of rebar sticking out from concrete on flooring, a demonstration of structures under construction on the flooring and equipment and debris and gobs of hardened concrete, pieces of debris on the floor, demonstration of a partially finished floor with rebar crisscrossed across it, rebar sticking out of the concrete in hooked conformation, lines or cords scattered across the floor, demonstration of columns of rebar and forms in which labourers were expected to crawl after having mounted ladders, using various pieces of equipment to pour and vibrate and tap down cement, demonstration of the kind of mistakes which could occur if the cement was not properly tended by the labourers; demonstration of busy traffic conditions around the doorways as well as debris and congestion around doorways, demonstration of staging with and without ladders at various levels including elaborate staging with heavy wooden planks around the tanks under construction, indication of the heights to which persons would be expected to climb without ladders in certain circumstances regardless of the rules, a demonstration of holes in the site and darkened conditions around those holes, cluttered premises around the tank sites with wheelbarrows, platforms, crating, pipe material, planks and other discarded and note yet used materials. There was a demonstration of conditions above ground and the obviously very difficult footing conditions at various stages of the project.

In 1997 by the middle of the year there was a concrete floor in place in some parts of the building but there are gaps in that and there was still debris, still rebar, there was still solidified concrete piles and there were many obstacles. There were trenches around the tanks containing water, rocks, totally uneven ground, embankments, pieces of plywood for walking across. Even at the latter part of 1997, there were still parts of the building sites which had incomplete or absent flooring and there were considerable excavations on the outside of the building. By September of 1997, the super calendar machinery was installed, the tanks were not yet completed. Testing was being done on machinery as it was being installed. Parts of machinery were still being uncrated. Through November walkways with rails and stairways with rails were in place. Steel stairways with rails were in place on the equipment for mounting the equipment in some cases. In other cases there was still staging and uncrating right to the end of November and in to December. In the Spring of 1998, we can see that there is some landscaping in place. The photographs and accompanying testimony in chronological sequence were very helpful.

SUBMISSIONS

At the outset of the hearing, the parties agreed that Local 1115, as a Union, has a duty to comply with the Human Rights Act.

On behalf of the Local, Mr. Pink modified Mr. Wood's assertion of a duty to accommodate and to avoid discrimination. As I understood him, he narrowed the obligations of the Union as follows:

(a) not to discriminate in the referral process; and

(b) to accommodate as best we can, the individuals on the out-of-work list.

Mr. Blanchard's position was that he had a right to be referred regardless of his physical problems, as he would have dealt with any employer who would not take him by filing a complaint under the Human Rights Act.

On summation, the Commission's position was that in order to comply with the standards set in Grismer and Meiorin (see index of cases appended as Appendix D), the Union could not have simply "pass the buck" to the employers, but had to actively have gone "to bat" for the complainant.

Mr. Wood's point, with which I agree in part, is that, since a broader effort to go after a job for Mr. Blanchard was not made, we do not know what accommodation an employer might have

made. Mr. Wood argued citing Oster that if there could not have been a job for the complainant, then that affects the claim for remedy. In Oster because the complainant lacked specific job qualifications (and for other reasons), she was not awarded damages for lost income.

Mr. Wood took the position that it was not up to Mr. Blanchard to identify what he could do on the site. However, it is clear that the complainant was required by law to take active steps to assist in his placement. See Renaud at paragragh 50 which reads as follows:

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

As a result of the complainant's failure to straightforwardly provide the respondents with a clear indication of what work he could do and as a result of his insistence at a union meeting that he only be referred for a narrow range of jobs, Mr. Serroul and Mr. MacMaster had some reason to believe that Mr. Blanchard did not expect a referral to other jobs. This is particularly reinforced by their observation of Mr. Blanchard and Mr. Serroul's recollection of his difficulties in Point Aconi. Mr. Wood suggested that some of the larger employers might have been able to structure a job to fit with Mr. Blanchard's skill and limitations. To some degree a diminishment of efficiency would not have caused undue hardship to an employer with 100 employees as compared to a contractor with a smaller workforce. On a cost plus contract there would be less hardship according to Mr. Blanchard's perspective. This is based on an hourly rate of $38.00.

Mr. Wood argued that, if pressed by the Union, such an employer would have been required by law to accommodate. He also indicated, that since no evidence was called on economic matters, I should not consider the issue. He did agree that safety was a valid consideration. He opined that a ruling in Mr. Blanchard's favour would not open the floodgates.

Lack of evidence on economic matters was problematic, but there are some common sense considerations about the need for safety and efficiency, the obligations of employers in Workers Compensation which are public matters of law or general knowledge which I may consider, although in the former case, particularly subject to judicial review.

Mr. Wood correctly pointed out that employers and employees cannot contract out of their obligations to abide by human rights legislation. (As in Renaud).

The Commission's position on remedy was that although the average remedy in Nova Scotia and in other jurisdictions is Four Thousand Dollars ($4,000.00) and although the statutory limit in Ontario is Ten Thousand Dollars ($10,000.00), there is no legislated reason for restricting the remedy to the average. He suggests the possibility of awarding pre-judgment interest and provided a post-hearing brief on that issue.

He was unclear about damages for loss of work, other than in his reference to Oster. He was not certain that a letter of apology should be awarded.

He advocated for an order with respect to training to be worked out between the Commission and the Respondents. He asked for an order for training the shop stewards, executive, business agent and secretary/treasurer of the Union. Although he believed that the Tribunal has jurisdiction to award costs, he indicated that that is not done.

Mr. Blanchard spoke very briefly on summation, relying on what Mr. Wood had stated for the Commission. He stated that the facts are "muddy". He advocated sensitivity training. He said

that something would have been worked out with respect to Cyril Oliver's position in Mark Cooper's (Allsteel) Warehouse. He indicated that he could have been invited to a meeting, that something could have been worked out, that he should have had an opportunity to meet with the Teamsters.

Mr. Blanchard said that he spent Eight Thousand Dollars ($8,000.00), in legal fees. His evidence had been for a slightly lesser figure. He said it breaks my heart to have to take my Union to task.

He ended his summation with the assertion that he could have worked in a warehouse, tool crib, cleaning trailers or "something".

Mr. Pink's lengthy summation is significantly reduced in this summary. He made an unqualified opening statement that the Union has a duty to accommodate. Although Mr. Wood had invited me to give policy guidance for the Commission and the public, Mr. Pink argued that that was too difficult, based on the facts of the case.

Mr. Pink did agree that the Human Rights Act applies regardless of the terms of a Collective Agreement. Mr. Pink agreed that the Union's duty to accommodate is to the point of undue hardship.

He also agreed with the leading cases that an individual assessment of Mr. Blanchard's situation was required. (For example, Grismer).

He stated that Mr. Blanchard could not have done the work of a labourer on that job site and that jurisdictional considerations prevented the Union from making a referral to work which was controlled by other trades, specifying warehouse and tool crib work.

He argued that Mr. Blanchard did not seek a job other than that of a tool crib attendant or warehouse attendant and, in that respect, the Union accommodated him. He said that the Union promised it, looked for it and begged for it.

Mr. Pink argued that Mr. Blanchard refused a job in December 1996 because he could not do it and then later looked for it.

He made the point that the warehouse was moved offsite to avoid inter-union, jurisdictional wrangling.

He indicated that I should rely on the evidence of all of the witnesses that there were no jobs at Stora which Mr. Blanchard could perform, that there was expert evidence that the site was unsafe for Mr. Blanchard and that there was a danger to Mr. Blanchard and others if he did so. He emphasized the need to comply with health and safety standards and laws.

Mr. Pink also spoke of Mr. Blanchard's lack of training and even if one would argue that such training could have been fast-tracked for him, he either did not want the other aspects of the labourers job (eg. climbing) or could not do them.

Surprisingly, Mr. Pink asked me to examine where is the evidence that Mr. Blanchard could have done something productively, instead of only light duties part-time on this work site given the requirements of the site. I noted here some confusion on the part of the Respondents about who bears the onus.

He did not believe that a less than full-time job was an option, although that had been discussed by Mr. Wood. Mr Pink said this would cause other employees to ask to have an excuse and want exceptions. He emphasized health and safety as a serious matter.

In his opinion, Mr. Blanchard was not seeking janitorial work, just tool crib or warehouse work. Regard should be given to the successful placement in 1992 and the efforts made.

Mr. Pink discussed a balancing of the priorities in the Occupational Health and Safety Act and Human Rights Act.

He emphasized the uniqueness of the job site and the duty of ensuring a safe work environment.

Mr. Pink acknowledged the duty to provide an individual assessment and cited Meiorin on that point.

Mr. Pink alleged that Mr. Blanchard would have been in an unsafe situation and performing work of no value. I took him to mean that clean toilets and sinks do not produce income or that work performed too slowly is not cost-efficient.

He emphasized that Mr. Blanchard did not seek work as a labourer since 1990, other than at Point Aconi and Stora.

In referring to the assertion of Mr. Blanchard that an employer not the Union would have been responding at the hearing if the Union had made the referral, Mr. Pink spoke of the mind set of a person who was going to make someone "responsible".

On the question I had raised about consulting more broadly with the employers, Mr. Pink's response was that the Union was on the job site everyday and there was no point in asking a question to which Mr. Serroul knew the answer, although he did appear to concede that it would have been reasonable to approach employers about spreading work among a number of them to accommodate Mr. Blanchard. However, he maintained that we do not get to that point because of Mr. Blanchard's focus on a tool crib or warehouse position.

Mr. Pink indicates that the complainant had an obligation to communicate clearly if he wanted a janitorial job or other small space job with no time restrictions. Mr. Pink suggested that the agreement to hold out for a tool crib job was accommodation in itself.

There was a passing reference to Workers' Compensation.

Accommodation was neither reasonable or possible on this site according to Mr. Pink.

Mr. Pink walked me, in some detail, through the cases appended in his brief. I have read them carefully in addition to other cases he provided at the hearing and the cases provided on behalf of Mr. Blanchard. See citations appended.

He cited the Pannu case, a post Grismer and Meiorin case at paragraph 107 as authority for the proposition that it is inappropriate for an employer to shift the risk of danger from one worker to another and indicated this in what would have happened in respect of evacuation.

Mr. Pink was of the opinion that the Union could not have asked Mr. Blanchard to provide a medical assessment, a functional capacity test or other invasive test.

He urged me to find that Mr. Blanchard's medical condition reasonably precluded him from performing the duties of a labourer as per section 6(e) of the Human Rights Act which reads as follows:

Subsection (1) of section 5 does not apply

(e) where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity.

In the alternative, he requested that I find that fitness is a bona fide occupational qualification for a labourer as per section 6(f).

Mr. Pink spoke of the danger of making any policy statements. He made the floodgate argument saying Mr. Hill, one of the witnesses, could claim a right to employment despite his injured shoulders and inability to lift.

On the issue of damages, he made the following points:

1. Mr. Blanchard only lasted five weeks at Point Aconi in a friendly environment;

1. There were several other contingencies including lack of training and certification;

1. There is no specific authority for pre-judgment interest; and

1. The Tribunal has no jurisdiction to award costs and there is no proof of costs.

Mr. Wood responded that both parties appear to agree on the general principles. He argued that safety issues could not be used to outweigh the right to accommodate when there was no individual assessment. He indicated that Mr. Serroul should have looked for more than a tool crib or warehouse job.

He argued that Mr. Kelly's opinion ought not to figure largely in the decision because he had not been to the super calendar construction site, could not give an opinion on Mr. Blanchard's suitability for janitorial work and spoke in generalities about construction sites.

Mr. Wood objected to Mr. Pink's description of onus on Mr. Blanchard to assist in his accommodation. While Mr. Wood acknowledged that employers have some obligation in this situation, he did not believe that this excused the Union and he argued that Mr. Serroul and Mr. MacMaster were in the best position to deal with the issue. He agrees that there is a communication issue between Mr. Blanchard and the individual respondents and conflicting evidence on that point.

Mr. Wood did not agree that the exemption provided by the International Union in respect of the out-of-work list was accommodation, because there was no follow-up effort to get him the position.

I have provided more detail of my evidence than one might normally do, because, in many respects, this situation is unique, not only from the Complainant's perspective, but also the Respondents'. At the same time, the statutory authority and principles are clear.

I have carefully weighed all of the evidence and conclude as follows with respect to some of the facts in issue.

Mr. Blanchard did not clearly communicate to the individual Respondents his interest in a job outside of the warehouse - tool crib positions. To the extent that there is any conflict on that, I prefer Mr. Serroul's evidence to Mr. Blanchard's evidence.

I also prefer Mr. Serroul's evidence to Mr. Blanchard's in respect of the date when Mr. Blanchard was finally told by Mr. Serroul that there would not be a position for him in line with what he had requested. I believe that occurred in September of 1997 and that any discussion about any other job, if it did occur, would more likely have occurred then.

I find as a fact that Mr. Blanchard was suffering from Multiple Sclerosis throughout the period specified in the complaint and still suffers from Multiple Sclerosis and that he was able to sustain a job as a tool crib attendant during an extensive period in the 1980's when he was suffering from the disease and similar symptoms of the disease. I rely on Mr. Blanchard's evidence on this issue. I did not believe it was necessary to call expert evidence when there is no contest about the existence of a disease or disability or when some of its symptoms are manifestly obvious. There was no disagreement among the parties about the course of the disease or Mr. Blanchard's assertion that his symptoms had plateaued as indicated above.

I find as a fact that Mr. Blanchard voluntarily terminated his employment at the Point Aconi site when confronted with the prospect of having to be more productive in the sense of being more efficient in his work on the job site. On this point, I believe the evidence of Sandy MacPherson and the not evidence of Mr. Blanchard. I do not believe that Mr. Blanchard attempted to deliberately mislead the tribunal. I think that his enthusiasm for getting into the workforce and his feeling of having been mistreated by the Union and the passage of time have likely clouded his recollection.

I find as a matter of fact that Mr. Blanchard asserted at a public meeting of the Local in January of 1997 that he should not be required to accept scaffolding or other physically demanding work. I find that as a result of that appropriate complaint, Mr. Serroul acted appropriately in communicating with the International that he wished to have an exemption which would permit Mr. Blanchard to stay at the top of the list despite his priority for more physically demanding work than he could do. This request was accommodated by the International and Mr. Blanchard stayed at the top of the out-of-work list or no lower than second for several ensuing months until he withdrew.

I disagree with Mr. Pink and find that as a matter of mixed law and fact, that there was a partial accommodation of Mr. Blanchard's physical disabilities by ensuring that he remained at the top of the list and so had priority for the light duty positions which he had specifically requested.

I find that as a matter of fact, that Mr. Blanchard failed to provide the Union with an honest inventory of his skills and that the inventory he provided to the employer was misleading, but that in some respects that would have been obvious to the Union.

I find that as Mr. Blanchard was unqualified in the sense of having training, experience, safety training or expertise in many of the skills which he claimed to have in the audit, that such lack of ability or training having been fairly obvious in some respects, would have reasonably lead the business agent and secretary/treasurer to rely on Mr. Blanchard's assertion that he should not be called out for anything but the specific duties he had requested.

I find as a matter of fact that the super calendar site was, at every stage of the construction process, from start to completion, a difficult and dangerous environment in which to work.

I find as a fact that, in most cases, in order for an employee to safely work at the site, he or she required physical agility, balance and coordination in excess of that which Mr. Blanchard could

manifest. Labourers were expected to be adaptable to a number of tasks in the run of most days, almost all of which required these skills at any time.

I specifically find that there was a serious and real danger of permanent physical injury and death from chemical gas leaks at this site. There was no evidence on the way in which gas masks would alleviate this problem but on the whole, the evidence about safety and my observation of Mr. Blanchard and his video, I do not believe they would have been enough.

I find as a matter of fact that Mr. Blanchard would have had extreme difficulty in surviving the first two gas leaks which occurred regardless of where he might have been situate on the super calendar site at the time of those leaks. If Mr. Blanchard had not complied with the requirement to have a gas mask available for his use at all times or had difficulty coordinating the application of the mask with his egress from the premises and progress to a safe location he would have suffered permanent or fatal injury. Given the evidence about ground conditions and obstructions and the numbers of people on site, I do not believe that the use of an ATV or light truck would be a reasonable escape mechanism for Mr. Blanchard in a panic situation.

Although in his demonstration of skills taken in the year 2000, Mr. Blanchard demonstrated that he could climb a ladder, climb stairs, walked 15 to 20 paces without support and could lift objects of some considerable weight, it is clear that he could not move, climb, clamber in and out of equipment, balance himself on roofs, lean over the edge of a building, regardless of the use of safety harnesses and railings without endangering himself and others either in the case of an emergency situation or in other cases where speed, congestion, agility, obstructions, moving objects, rapidly moving individuals, would have had to have been dealt with. This was admitted at the end of the hearing, but I emphasize my own conclusion on a review of the whole of the evidence.

I find as a matter of fact and I believe with the agreement of at least the Commission and the Union and individual Respondents, that Mr. Blanchard could not work in conditions other than ones in which he had railings and walls to help with balance and limited walking requirements. He was in a wheelchair throughout the hearing and had great difficulty ambulating when out of it. This was his plateaued state.

I find as a matter of fact that Mr. Blanchard would likely have been dismissed from employment if he had been assigned to any work at the Stora site which required most of the physical attributes or skills to which I have referred. I find as a matter of fact that all of the jobs for which Local 1115 were requested to make referrals, required those attributes.

I find as a matter of fact that Mr. Serroul had the occasion to refer Mr. Blanchard to a janitorial job at the Point Aconi site and had an opportunity to observe him in that position and interacted with his employer at that site. He observed no significant change in Mr. Blanchard's mobility between that time and 1996 and was operating in good faith under the assumption that Mr. Blanchard could not perform the physical activities to which I have referred.

I find as a matter of fact that Mr. Blanchard had computer skills and although there were some personal safety issues and serious job efficiency issues and issues of economy, he had the ability to work in a tool crib or warehouse and the ability to clean trailers subject to the safety issues on the Stora site. There is no evidence that the warehouse site was dangerous in the sense of climbing rough terrain, gas leaks or other significant characteristics of the super calendar site, but there would have been issues involving safe body mechanics.

There was no light duty or semi-sedentary tool crib job within the jurisdiction of the Labourers at this site. There were no discrete jobs with any individual employer which fit Mr. Blanchard's

qualifications or physical restriction or which could be reasonably accommodated by a single employer. There was no provision for part-time employment in the Collective Agreement.

THE DUTY TO ACCOMMODATE

All parties are in agreement that the standard to be applied in this case to support the exclusions under section 6 (e) and (f) of the Act are those standards set out in the Meiorin case in the Supreme Court of Canada, British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U 1999 Carswell BC 1907, 35 C.H.R.R.D/257.

An employer may justify the impugned standard by establishing on the balance of probabilities:

(1) that the employer adopted the standard for purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics [page 33] of the claimant without imposing undue hardship upon the employer.

This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in Central Alberta Dairy Pool, supra, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the prima facie case of discrimination stands. Paras. 54-55 Meiorin

In Mr. Blanchard's case, the standard applied would be the standard of physical agility, coordination and speed and greater use of his lower limbs.

Mr. Pink would like the test to be reworded as follows:

A trade union may justify the impugned standard by establishing on the balance of probabilities:

(1) that the trade union adopted the standard for a purpose rationally connected to the referral of members to work;

(2) that the trade union adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate referral-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate referral-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual members sharing the characteristics of the claimant without imposing undue hardship on the trade union or the employers to whom the individuals are referred by the Trade Union.

With all due respect I do not agree that the adaptation as worded by Mr. Pink goes far enough. Given the circumstances of this case, it would have been very awkward and difficult for all of the various employers at the super calendar site to have been joined in this proceeding as respondents. A trade union is being accused of failing to live up to its duty to act in a non-discriminatory manner in respect of referral to employment.

The issue is undue hardship on the Union. Hardship on the employer is a related but secondary consideration. The relevant issue is whether the Union did all it could do to try to get Mr. Blanchard a job, given legitimate, reasonable occupational standards and reasonable bona fide job requirements as discussed in more detail below. This is the third Meiorin standard as it applies in this case. I do not disagree with parts one and two of the revised. It seems to me that Mr. Pink's version of the test clearly tries to pass the buck. In other words, under his proposal, the trade union can rely on the fact that the employers would have undue hardship in accommodating and, as a result, not make extraordinary efforts to refer this individual out for work.

What kind of hardship might a trade union endure to meet the standard of its own accountability?

In this case, when negotiating its contract, the Union could have put on the table a requirement that there be reasonable accommodation for members who are disabled. There was no evidence to indicate that in 1996 or prior to that, any such accommodation was sought with co-bargainers or employers either. This was despite the Local clearly having at least this one individual who had obvious characteristics of a disabled person.

Secondly, in this specific case, Local 1115 might, without great hardship, have made a greater effort to canvass several individual employers at Stora Forest Industries to see if individually they could have employed this gentleman.

Thirdly, without great undue hardship, the Local could have requested a joint meeting of a number of employers or have worked through the Construction Management Bureau Limited, the Employers' Organization and the Cape Breton Island Building and Construction Trades Council, the Union organization, to seek some accommodation for this individual, both with the other employers and intra-jurisdictionally with the other trades.

The Local could have attempted to make a case using the Trade Union Act, if necessary, to challenge the jurisdiction of the Teamsters Union to the coveted warehouse job on the basis that human rights' considerations at play took precedence over legislation, tradition and contracts. Since the Union did not make any of those efforts, then I must consider whether it can be said that they met the test of undue hardship. I understand from evidence that the person who had the Teamsters' job was an older worker with a need for light duties. On that basis, as well as the jurisdictional history, I think that any legal effort would have been futile. On that basis at the relevant time the failure to enter into such a battle was reasonable.

It was agreed by all parties that it was within my province to examine other legislation as it related to the obligations of the respondents in this case. In particular, it was agreed that I could consider the Occupational Health and Safety Act S.N.S. 1996 c.7 and the Trade Union Act R.S.N.S. 1989, c.475, as amended. I have appended some of the relevant sections of the Occupational Health and Safety Act in Appendix E and the Trade Union Act in Appendix F.

Section 15 of the Occupational Health and Safety Act S.N.S. 1996 c.7 requires that every contractor should take every precaution in the circumstances to ensure the health and safety of persons at or near a project and that every employee performing work in respect of the project

complies with the Act and Regulations. Sections 13 to 23 outline duties of several players on a job site and various levels of responsibility.

Section 17 imposes obligations on employees at the work site to take every reasonable precaution to protect the employees own health and safety and that of other persons at or near the workplace. Under Section 43 an employee has the right to refuse, on reasonable grounds, to do any act which the employee thinks will endanger the employee's health or safety or the health or safety of any other person, that certain conditions are met and with various provisions for reassignment subject to collective agreements and so on. See the Appendix.

However, this particular section does not permit the refusal of work if the danger referred to is inherent in the work of the employee. This would mean that if the complainant were asked to climb scaffolding, for example, and was unable to do that, he would not have the right under s.43 to refuse that work. Any refusal by someone with a disability of a physical nature, to perform a task, could cause some confusion if that worker refuses unsafe work, particularly, as there is a restriction on assignment of another individual to a particular job until certain steps are taken as set forth in section 44. There are also potential complications about reassignment.

Because of the exclusion, section 43 might be considered more of a potential inconvenience than a hardship.

Under s.74 of the Act, a person who contravenes the Occupational Health and Safety Act or an order or the Regulations or provision of the Code of Practice adopted pursuant to s.66 is guilty of an offence and liable on summary conviction to a fine not exceeding Two Hundred and Fifty Thousand Dollars ($250,000.00) or term of imprisonment not exceeding two years or, to both fine and imprisonment. There are provisions to increase the fine by Twenty Five Thousand Dollars ($25,000.00) a day and there are provisions for increasing the fine in the amount of any monetary benefit accruing to the offender as a result of the offence. There are several other provisions relating both to other consequences and publication of the offence and public education. Acts of superintendents and supervisors and managers can bind the employer and there can, as well, be specific liability under the Act under s.77 for officers, directors, managers or agents of a corporation who directs, authorizes, assents to, acquiesces or participates in the commission of an offence.

Section 82 is the regulatory section and section 83 authorizes deviations from the Regulations only where the director is satisfied that the deviation affords protection for the health and safety of the employees equal to or greater than the protection prescribed by the regulations from which the deviation is requested.

The effective date of the Occupational Health and Safety Act as it now exists was January 1st, 1997 except for specific sections which came into effect on later dates. This is shortly after the start up of the super calendar job. The later effective dates were for sections 22, 27, 28, 86 and 87. At least six out of the nine sets of regulations under the Occupational Health and Safety Act are relevant to a construction site. One set is the WHMIS Regulations. Those are the Workplace Hazardous Materials Information System Regulations, N.S. Reg 64/89, originating in Regulation 196/88, the Fall Protection regulations N.S. Reg 2/96, the First Aid Regulations, N.S. Reg 104/01, not in force at the time, originating after amendments in N.S. Reg 155/96. General Blasting Regulations, N.S. Reg 196, originating in earlier regulations from 1990 and the Occupational Safety General Regulations, N.S. Reg 52/00 which were effective May 1, 2000 and therefore were not effective at the time relevant to the complaint.

Based on a review of the Occupational Health and Safety legislation and Regulations as well as the assertions of every single witness in the hearing, including the complainant, attention to safety was a primary issue on the work site and was a primary issue for the Local, all contractors

and Stora in advance of the project's start up. I believe it is fair to say that in considering questions of accommodation and undue hardship one must balance the safety considerations with the right of the person with disabilities to an opportunity to have employment in such an industrial setting.

Although throughout his evidence, the complainant persisted in the view point that he should have been referred to any job after it became clear that he was not going to get a warehouse or tool crib job and although he maintained that that could have been done, it has been agreed that the only occupations which he could safely have done on the work site were tool crib, warehouse and bathroom cleaning jobs. Having said that, there was certainly still an issue as to whether a bathroom job was available if it required walking around the work site or long hours or snow and ice duties.. There was the additional consideration raised by the employer about the ability of Mr. Blanchard to evacuate from any position at the site even if he was cleaning in a trailer.

The respondents argue that they applied a reasonable rule or standard to the complainant and that was that he be able to perform the job that he was being called for taking into account the essential duties of the job and his physical limitations.

Because of the safety concerns on this job site, I conclude that, in general terms, it was appropriate to apply to any employee wishing to perform the work of a labourer on that particular job site, a standard that the employee be sufficiently agile and well-coordinated to complete work in a manner which was safe to that employee and to others in the work environment. This standard would encompass reasonable speed in making the necessary bodily movements. For parts one and two of the Meiorin test I think it is fair to say that there was a rational connection between the requirement of being able to safely handle work on the site and the failure to make a referral. I also conclude that there was an on honest and good faith belief that safety was a primary factor at the site and therefore, that in order to be qualified to work at the site, an individual had to have physical agility, good coordination of al limbs and reasonable speed of ambulation..

On the issue of competence, I think it would be reasonable to require that the complainant would have to have the stamina to complete work in a reasonable time over and above issues of safety if there was an honest and good faith belief that those restrictions could not have been accommodated on the Stora site.

It was contrary to the interests of the Local to send an employee to the job site if that employee could not safely do the job.

On consideration of all of the evidence, Mr. Blanchard would have posed a danger to himself primarily and also to others on the site. Although there was a great deal of evidence on occupational health and safety issues as they relate specifically to Mr. Blanchard, there was a failure to provide evidence on the economic impact on the employers of work place accidents.

There was also a failure to provide evidence of the specific deterrents in the occupational health legislation but it was agreed that I could canvass that issue as it was a matter of law.

The historical reasons for the health and safety concerns were not in evidence except for passing references to the Westray Mine disaster but those factors are notorious, public and obvious in Nova Scotia. I note section 5 of the Occupational Health and Safety Act which reads as follows:

Notwithstanding any general or special Act, where there is a conflict between this Act and the regulation and any other enactment, this Act and the regulations prevail. 1996, c.7, s.5

This language is unconditionally explicit and must inform my application of the Human Rights Act in the circumstances of this case because of the reasonably obvious concern that Mr. Blanchard's available jobs at the relevant times would have, more likely than not, caused danger to himself and others. It is not necessary for the determination of this case for me to provide an analysis of the strictness with which the balancing of the Human Rights Act and other legislation must be made. The priority of safety considerations on a job site cannot be used as an excuse when accommodation is possible to the point of undue hardship.

Although in this case, as in others, the Union and individual respondents had an obligation to ensure that there was an individual assessment of Mr. Blanchard's capabilities, I do not think that this required a medical opinion or that an occupational therapist be employed by the Union to make such an assessment or at least in this unique situation. The Union had been directed by the International to take an inventory of the capabilities of employees with disabilities and although that was not specifically done in writing, after that there was an inventory. Mr. Serroul, in particular, had a great deal of experience in dealing with the referral of Mr. Blanchard to the work site at Point Aconi and, secondly, in interacting with Mr. Blanchard and Mr. Blanchard had indicated himself the kinds of jobs which he preferred, which were jobs not involving the heavier duties which all of the labourers on the site were required to perform to varying degrees. I include in that statement the non-working foremen who, from time to time, participated in work as did working foremen. I particularly note the great amount of walking that most of those in allegedly easier jobs had to endure in less than easy conditions and, in fact, quite hazardous conditions. Direct visual observation of Mr. Blanchard would have made it clear that he simply did not have the motor skills and the balance to escape unaided from the dangerous situation posed by a gas leak or to escape from numerous other unexpected hazards in the workplace.

The opinion of Mr. Kelly was that if he were to employ Mr. Blanchard in a position on the site, that he would have to select an individual safety officer to keep an eye on him at all times to ensure his personal safety. Someone would have had to monitor the situation to get Mr. Blanchard out of the job site to a safe location in the event of a disaster and that would have included having transportation at hand. While work in a tool crib, warehouse or specific trailer would have avoided some of the hazards, access to these sites would have been hazardous.

Thirty Eight Dollars ($38.00) an hour is a round figure for the cost of a labourer on site. Based on the evidence of how long it normally took to clean a trailer and how long it took Mr. Blanchard to perform work at the Point Aconi site as well as based on observation of his video and of his demonstration of movement at the hearing, there simply could be no question that it would be to the financial detriment, to the point of hardship to an employer to hire Mr. Blanchard to clean bathrooms or trailers or to tend tool boxes around the site or to do any occupation which required moving from place to place. This would have been the case no matter how carefully arrangements were made to limit the amount of mobility, climbing and agility as well as coordination that would be required of Mr. Blanchard.

At this job site, there were no unique jobs that could be practically created, in my opinion, to combine truck driving, janitorial work and office work or tool crib work, of an ongoing nature, that would keep Mr. Blanchard employed.

It was suggested that in the case of larger workforces on the site and in cases where there was cost plus work, that employment of somebody who was not competent or capable of doing particular work with reasonable efficiency and in an economical way could be justified and, further, that it was required. There was no evidence lead about anything other than the bare bones of how cost plus contracting works. While it is agreed that this cost could have been buried in the total cost of sub-contract or sub-contracts, I find that, in this case, an employee who could not work with any reasonable degree of efficiency would more than not have caused hardship for both the employer and the Local, in their respective roles.

It would appear to be totally unbusinesslike and contrary to the interests of the Union to drive up costs to an owner or a chief contractor by supplying individual workers who were not competent or capable of performing the work reasonably efficiently, safely and in compliance with the law, even with extraordinary accommodation.

This does not mean that where accommodation could reasonably be made without undue economic hardship to an employer and undue safety risks, that the Union should not have been held to a requirement to force the issue in a more aggressive way. For example, if a person with disabilities suffered from deafness, it would not be an excuse to say that he might not hear an alarm if a simple light system could be placed in the work environment to flash whenever there was a gas leak. If an employee would take an extra hour a day to complete his work, that would not be undue hardship. Mr. Blanchard needed an unduly unproductive length of time to complete simple labour such as cleaning or moving material or equipment. While I struggled with the issue of how much slowness could be accommodated, I concluded that Mr. Blanchard's slowness would have caused him to require assistance at an even greater and unreasonable cost to the employers and breach of the requirement of the Union to provide competent employees. I do not agree that the requirement in the Collective Agreement to supply competent and qualified workers was, on its own, a legitimate reason for refusing to make a referral, but it was in the context of all of the factors in this case.

I think it was rightly pointed out that if Mr. Blanchard was a member of another trade which had less physically demanding work, there might have been every reason to make a different decision, but only if there could be accommodation for his emergency egress from the work site in addition, to his ability to carry out the work safely and in a reasonably timely fashion.

I find as a matter of fact, that at some point, Mr. Blanchard tried to communicate to Mr. Serroul but probably not Mr. MacMaster that he wanted to be referred to any job. However, he did so within the context of a threat to make a complaint under the Human Rights Act if he was let go from the job for inability to perform it. I believe that this communication occurred several months after Mr. Blanchard alleged. Provisions of the Collective Agreement are, in themselves, not an excuse for failure to accommodate. See Renaud v. Central Okanagan School District No. 23 1992 Carswell BC 257, 16 C.H.H.R. D/425 at para. 50. SCC per Sopinka J. at para 33. The provisions in the Agreement provide some of the context in which events happened and indicate some of the problems faced by the Union. That is, they are a factor to consider in determining what the Respondents had to juggle in order to accommodate Mr. Blanchard but are only legitimately obstacles to the extent that they meet the standards set forth in sections 5 and 6 of the Human Rights Act as appended.

In Article 3.07 of the Collective Agreement, the Union is required to indemnify the employer for any third party demands relating to compliance with Article 3. Article 3.01 is the rule requiring referral of competent and qualified workers. It is also the article which governs union security and that is union dues check-off and related requirements. The indemnification clause appears to cover the referral of competent and qualified workers and is, therefore, problematic for a local which is expected to refer a worker who is not able to perform work due to physical limitations, or who cannot perform work up to reasonable, efficient, economical industrial standards.

This article in the Collective Agreement clearly places the Union in a bit of a trap. It can be blamed by the employer if there is an accident involving an employee who is not competent or qualified for particular work. This could, in certain circumstances, include the incompetence of somebody with certain physical limitations who then causes danger to that individual or to another worker or workers. The cost of any fines, Workers' Compensation assessment or other cost of any problem can rebound on the Union.

As several Unions are signatory to the Collective Agreement, their representative agency as well as the employers and their representative agency are all responsible for this type of wording and all other clauses about which I will comment further.

Article 4.01 makes it clear that a shop steward is required to perform the work of a journeyman and is required to work overtime if more than three employees of the craft are on site. Article 4.06 gives seniority to the job steward.

Article 5.01, the management rights clause, gives the employer the right to "maintain discipline and efficiency", and to layoff and to discharge employees for just cause.

Article 5.01 also gives the employers the right "to determine schedules of construction operation". There is a further requirement that "the employer, in exercise of these rights, shall not discriminate against any member of the union".

Article 7 sets out the normal hours of work. Those could be either five eight hour shifts or four ten hours shifts with two ten minute rest periods and a half hour lunch break and various other breaks scheduled for overtime. The appendix to the Labourers' portion of the contract requires a lunch break every four hours worked.

Article 18 sets out the mechanism for dealing with jurisdictional disputes. The process is convoluted and requires referral to the National Joint Board Building Trades Department of the AFLCIO, referral to the International Unions and if work stoppage is imminent or perceived, referral to the construction panel of the Labour Relations Board of Nova Scotia under s.51 of the Trade Union Act R.S.N.S. 1989 c.475 as amended.

Article 20 is the health and safety provision which requires workers to comply with the employer's health and safety rules as well as the Occupational Health and Safety Act. In the latter case, failure to comply can result in automatic dismissal. Employees are not required to work under unsafe conditions where the employer has control over such conditions.

Under Article 20.07 each craft can have its own office and lunch room, fresh drinking water. Tool sheds and lunch rooms are normally maintained by the craft using the same except where other general arrangements have been made on the site. Under the Labourers' Appendix, the Union has the right to refer labourers for jobs as foremen. Under the Labourers' Appendix, work assignments for Labourers are generally from the Labourers' foremen except where work is assigned under a trade foreman. Under the Labourers' Appendix there were to be no punitive measures for labourers who do not want to work overtime. There was a travel allowance in this Appendix of Fifty-one Dollars ($51.00) a day for workers who lived more than forty five miles from the job site.

Also appended to this Collective Agreement, were Stora's Project Rules.

Rule 6 required that any worker who was incompetent or otherwise not qualified to perform in a work like manner, in the trade for which that worker was hired, would be subject to progressive discipline including written notice, suspension and dismissal.

Under Rule 12 failure to follow the safety rules would result in a written warning and, on repetition, dismissal.

The latter two provisions contradict, somewhat, evidence I heard from various witnesses as to immediate consequences for incompetence. Clearly, the article relating to health and safety is

modified by the appendix. Therefore, there is room for a second and then a third chance, before dismissal.

As I have previously stated, the law is clear that the Local's obligations under the Human Rights Act are superior to its obligations under the Agreement. I believe I am right in concluding as a matter of law that the existence of provisions in an existing Collective Agreement are contextual factors which may, in certain circumstances, contribute to undue hardship, if those provisions are reasonably necessary for economic efficiency, labour peace and workplace safety. In other words, there must be a balance, bearing in mind that the test for the Union is acting to the point of undue hardship while not abrogating its role of representing all of the workers in who have an interest in those three important goals, although they might express that interest in different terms.

Where agreements do not specify a protocol for dealing with human rights requirements for protecting workers from discrimination in the categories enumerated under the Human Rights Act, there is still an obligation on a union when making a referral, to ensure that those legislated workers' rights are clearly and zealously guarded to the standard of undue hardship.

It is problematic in this case that the relevant Collective Agreement is not between an individual employer and individual employee.

This makes it more difficult for an individual union to pro-actively relate to all of the other players when trying to protect or promote a human right while dealing with multi-faceted, multi-party contractual and statutory considerations.

This problem can be resolved more easily if the human rights of workers in respect of the enumerated grounds under the Human Rights Act, are clearly priorized in Collective Agreements. Then protocols for problems such as referral of a worker with disabilities will be addressed in their correct priority. Negotiations to get accommodation from other unions and contractors can be balanced with other considerations in the agreement and relevant legislation, without losing sight of the importance of the workers' human rights and the underlying obligations of the contracting parties.

Although I reach the conclusion that the Union acted to the point of undue hardship in this case, it would have been easier for me to conclude that the Union met the standard, if it had provided proof that it had tried to bargain for recognition of human rights of workers, in the Collective Agreement, either directly or indirectly, within the constraints under which it bargains in the industrial sector.

In this case, obligation to provide competent workers as set forth in the Collective Agreement, was reasonable, rational and good-faith referral consideration and one which could only be applied after taking all reasonable steps to determine whether accommodation is possible. Under the unique circumstances of this case, I concluded that was done.

In this case, the Union had the obligation to comply with the Trade Union Act R.S.N.S. 1989, c.475, as amended. The Trade Union Act has provisions for dealing with jurisdictional disputes which are defined as disputes between two or more unions or between an employer or employers' organization and one or more unions over the assignment of work, s.2(1)(n).

Sections 50 and 51 deal with actual or potential work stoppage due to jurisdictional disputes and provide a means for the assurance of Labour Relation Board decisions and orders in respect of jurisdictional disputes. Section 51(6) provides for the Board to assign work in a jurisdictional work unless there is a written agreement or binding arbitration or tribunal decision.

Such matters are dealt with by the Construction Industry Panel in construction industry cases. There are other provisions for dealing with such disputes in the commercial world.

A conciliation board of inquiry may resolve disputes.

The individual Respondents were faced with the realization that jurisdictional arguments would be raised under the Act if they went after work which is normally performed by another Union. For example, there was evidence of threats from the Teamsters.

While it might be alleged that I am assuming too much, I think it is a matter of broad public knowledge that despite the best efforts of trade unions and employers in Nova Scotia to enjoy labour peace, that industrial unrest is likely to be fomented quite quickly when there are unresolved jurisdictional disputes. I also think it is common knowledge on which I can rely, that the resolution of jurisdictional disputes is very costly. There is a clear tradition of awarding the work which Mr. Blanchard wanted at the warehouse to the Teamsters Union and that that was not likely to have been overcome in this case even by resorting to a mechanism within the Trade Union Act. The work was guaranteed to the Teamsters in collective bargaining.

It is unlikely that there would have been accommodation of Mr. Blanchard from other trade unions and more likely that any accommodation would have to come from an individual employer who employed a number of labourers or a group of employers who employed labourers. Like the Labourers' Union, all of the Locals would clearly have had older workers and workers with some limitations such as obesity, diabetes and other physical problems. There was evidence on this problem. Each of those Unions would have wanted to reserve the lighter duties such as tool crib attendant and light janitorial work for its own older members or members with some disabilities.

Mr. Blanchard had limited the job search options. Mr. Serroul and Mr. MacMaster attempted to work within those constraints and took efforts to do so. It was reasonable, under all of the circumstances of the case, for Mr. Serroul to have refrained from pushing jurisdictional issues or to attempt to modify requirements of the Collective Agreement because of concerns about causing a great deal of havoc for the Local.

The Local could have done more as I stated, and were less creative than, they could have been with the hindsight produced by the complaint. However, given all of the factors which I have reviewed, the extra efforts would have been futile, particularly because of safety concerns.

The standard of undue hardship did not require the Union and individual respondents to make efforts which, on the balance of probabilities, would be futile.

Some unfortunate remarks of Mr. MacMaster and Mr. Serroul at the hearing, were made in the heat of the moment under a lot of pressure in the hearing, and I did not conclude on long reflection that they were indicative of a lack of concern for Mr. Blanchard's right to accommodation in the matter of employment or that they had a connection to his treatment during the period relevant to the complaint.

For clarification, I have concluded as follows:

(a) the nature and extent of his disability reasonably precluded the performance of the jobs to which Mr. Blanchard sought referral;

(a) denial of referral was based on bona fide occupational qualifications, related primarily to safety considerations and, to a lesser degree, economic and workplace stability factors as elaborated below;

(a) the Union and individual Respondents accommodated Mr. Blanchard in the referral process to the point of undue hardship (under the circumstances of this case).

I have concluded that the Union and individual Respondents did meet the tests set forth in Grismer, Meiorin and other cases referenced and cited in the appendices to the extent that they are consistent with those cases.

I do take the opportunity, however, as in invited by the Commission, despite Mr. Pink's objection on behalf of the Respondent, to say that it is a very risky thing and very inappropriate to make assumptions about a person's limitations based merely on perceived physical limitations that is forbidden by the Act. I do not think that happened here.

In this case, the Local and the two named Respondents did technically discriminate by intentionally not referring Mr. Blanchard for positions at the Stora super calendar site because of his perceived and/or objectively real characteristics related to disability arising from Multiple Sclerosis.

However, I have concluded that sections 6 (e) and (f) provide the Respondents exemption from culpable discrimination for all of the reasons indicated.

Based on a review of all of the evidence and for the reasons affecting my decision in respect of the Local, despite some ignorance of their individual obligations indicated by unfortunate statements made at the hearing, Mr. Serroul and Mr. MacMaster did not commit culpable discrimination against Mr. Blanchard in the matter of employment or otherwise under the Human Rights Act. Mr. Serroul, in particular, could have done more to accommodate as I have pointed out, but he was clearly of the view that his effects would have been futile. Likely, they would have been because of the economic and safety issues to which I have made reference.

Accommodation was made by three gentlemen to the point of undue hardship, because of the safety issues in particular. Insisting on referral would have been inappropriate for that reason.

If, on any review, I am held to be wrong in my conclusions about the Union having met its obligations under the Act, I will state here what my award would have been had I been able to find otherwise.

I would have found that there were several contingencies which would not have persuaded me that a full term of employment would have been served by Mr. Blanchard. He lasted five weeks at the Point Aconi site. He testified he needed 800 hours. Later he testified that he needed 750 hours on the Stora site in order to qualify for employment insurance.

It is not clear that even with the best of accommodation, that he would have made it through that job. In fact, the evidence strongly suggests the contrary. I was not provided with clear documented or otherwise reliable evidence as to the amount of money which Mr. Blanchard would have received in employment insurance benefits. I reminded Mr. Blanchard a number of times during the hearing that he should confer with his counsel, Gary Corsano, or otherwise try and obtain for me, specific documentary evidence to support his claim for damages. We do have evidence of his hourly rate which would have varied as indicated in the Collective Agreement and other evidence. While that evidence was somewhat contradictory, I believe he would have earned approximately Twenty-two dollars ($22.00) an hour, perhaps slightly less than that; plus a travel allowance as indicated in the contract, because he clearly lived more than the required distance from the work site.

While Unemployment Insurance, as it was then called, was a collateral benefit, it might be argued that there should be no compensation for loss of it and, in this case, because I believe there were serious contingencies with respect to whether Mr. Blanchard would have been able to work a full term of eligibility, I would not have been prepared to award the full amount of waged work required to both obtain Employment Insurance.

Therefore, I would have awarded Eight Thousand Dollars ($8,000.00) for lost income from all sources relevant to his situation. I also took into account in making this award, the possibility that Mr. Serroul would have been found a part-time, as opposed to a full-time job which would have required agreement of the parties to the Collective Agreement to modify the work week and that modification of the Collective Agreement was required.

Had I been able to find that the safety factor did not trump his right to the kind of accommodation that could otherwise have been found in this specific fluid and large work force, had there been a concerted effort by the Union to work with and goad the employers into identifying jobs which could have been combined in identifying where modified work hours might be applicable, where there might be safer conditions and so on, I would have, in this case, awarded more than the usual Four Thousand Dollars ($4,000.00) for this very brave gentleman, who obviously wanted to work. Unemployment for those who seek employment can be very demoralizing. In this case, I believe Mr. Blanchard went to some extraordinary efforts to keep active and, aside from making a very commendable contribution in looking after his mother and returning to school, he worked very hard at encouraging his Union to find him a job. If I had ruled in his favour, I would have awarded an additional Fifteen Thousand Dollars ($15,000.00) for the suffering inflicted upon him. Because of lack of evidence as to interest rates, I would award pre-judgment interest at the rate of two point five percent (2.5%) on the Fifteen Thousand Dollars ($15,000.00) and four percent (4%) on the pecuniary damage award. I agree generally with the reasoning set forth in the decision of Hill v. Misener [1997] N.S.H.R.B.I.D. No. 2 June 9, 1997.

In the Bernard case, the Canadian Human Rights Commission awarded costs. Although there is no direct statutory provision for costs, I agree with Mr. Wood that s.34(8) of the Act is broad enough to justify the award of costs. I also believe that it is important for counsel to represent the complainants individually in order to get cases before a board of inquiry. As pointed out in the Bernard and Waycobah case, counsel can play an invaluable role at a hearing and that cost awards facilitate exercise of the right. In the same way, they provide an invaluable role prior to a hearing because of the limited resources of the Commission and the role it plays which is limited in its ability to accommodate the need of complainants for legal advice.

Mr. Blanchard did not have a lawyer at the hearing, but he had a lawyer on retainer as the case was pursued to the point of the hearing. For a number of reasons which are not in evidence, but which I believe are obvious, counsel can play a pivotal role in assisting a complainant to obtain a hearing when a case is not settled.

I would have made a cost award in this case, but would have required representations of a specific nature, post-hearing, about costs. I would not have awarded full solicitor and client costs and perhaps not more than one-third to one-half percent of a reasonable account.

In addition to the monetary awards indicated above and costs, I would have ordered the following, had I made the finding the Commission and Mr. Blanchard requested:

(a) I would have ordered that Local 1115 be required to undertake such training as it and the Human Rights Commission shall agree upon to educate its executive and employees, as well as its stewards and interested members in all aspects of the Human Rights Act, particularly as they refer to referral of injured workers and workers with other disabilities;

(a) I would have ordered that included in that training would be training as to the balancing of collective bargaining issues and obligations under relevant collateral legislation including the Occupational Health and Safety Act, Workers' Compensation Act and Trade Union Act;

(a) I would have ordered the Union to seek education, as recommended by the Commission, in how dialogue with other unions with which they bargain and work and individual employers with which they work as well as the representative organizations about inclusion of compliance with the Human Rights Act in the Collective Agreement and accommodation of workers with disabilities, in particular;

(a) Under all of the circumstances of this case, considering that this Local did not create a chilled atmosphere for the employee, but had a positive attitude and made significant efforts to accommodate, despite my observations of some shortcomings, I would not have ordered an apology. I agree that a coerced apology is not worthwhile;

(a) I would not have ordered reinstatement of Mr. Blanchard to the active list for other benefits which he claimed as he took himself out of the active dues paying category system. Although he states that this was because of discrimination, I conclude he did not intend to look for further work for a range of reasons unconnected with his perception of the Union's treatment of him, about which elaboration is unnecessary here;

(a) I would have ordered one year for completion of education programs.

I make no comment on what I would have awarded in respect of the individual Respondents had I upheld the complaints against them. I do not believe this will be of assistance to anyone reading this decision.

DATED June 28, 2002.

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Elizabeth Cusack, Q.C.
Board of Inquiry
Human Rights Commission