IN THE MATTER OF: The *Human Rights Act*, R.S.N.S., 1989, c. 214 as amended

AND

IN THE MATTER OF: A Nova Scotia Human Rights Board of Inquiry

BETWEEN:

Sandra Wakeham

(the "Complainant")

-and-

Nova Scotia Department of Environment

(the "Respondent")

-and-

Nova Scotia Human Rights Commission

(the "Commission")

RULING ON THE MERITS
OF THE COMPLAINT

Nova Scotia Human Rights Board of Inquiry:	Kathryn A. Raymond, Q.C., Chair
Place of Hearing:	Halifax and Dartmouth, Nova Scotia
Dates of Hearing:	June 27, 28, 29 and 30, 2016; July 4, 5, 6, 7, 8, 11, 12, 13, 19, 20, 21 and 22, 2016; August 2 and 3, 2016;
Dates of Final Written Submissions:	October 31, 2016 and November 15, 2016
Representation:	Ms. Sandra Wakeham, the Complainant Ms. Ann Smith, Q.C. and Mr. Jason Cooke, Counsel for the Commission Mr. Andrew Taillon, Counsel for the Respondent
Date of Interim Ruling on the Merits:	June 9, 2017

INDEX

The Complaint

1. This inquiry arises from a complaint by Sandra Wakeham (the "Complainant" or "Ms. Wakeham"), against her employer, the Nova Scotia Department of Environment (the "Respondent"), alleging discrimination in the context of her employment on the basis of physical disability contrary to Section 5(1)(d) and (o) of the Nova Scotia *Human Rights Act*, R.S.N.S., 1989, c. 214, as amended (the "*Act*").

2. The Complainant was first employed by the Respondent on February 8, 1991. She worked in a service centre as a clerk providing administrative services to members of the public requiring licenses, permits and other services, such as water testing, from the Respondent.

3. In 1999, the Complainant was involved in a motor vehicle accident in which she was injured. She was off work on long-term disability from November 2001 to March 2004. The Complainant was involved in a second motor vehicle accident in 2005 and sustained further injuries. The Complainant alleges that she suffers from chronic pain as a result of the injuries that she sustained in these two motor vehicle accidents.

4. The Complainant has continued to be employed by the Respondent but has had a series of health-related absences from work over the years since her first motor vehicle accident. Most recently, she had been off work from September 2011 on short-term disability. She returned to work on February 20, 2012.

5. The Complainant alleges that the Respondent did not accommodate her when she returned to work. She alleges that this aggravated her injuries and caused her to go off work on March 9, 2012. In her written complaint of discrimination Ms. Wakeham stated that she had asked the Respondent several times that she not be responsible for mail duties, which were part of her tasks as a clerk, as she believed that those duties were aggravating her injuries. She alleges that she was told by the Respondent that mail duties were part of her responsibilities. The Complainant also alleges that she applied for other positions within the workplace as a requested accommodation, as other positions

would have better suited her capabilities, but was unable to secure any of these positions.

6. The Complainant alleges that, when she returned to work in February 2012, she was called into an unexpected meeting with management and denied access to union representation. She alleges that, at the meeting, she was informed that she was being placed on an attendance management plan by the Respondent. She was given a letter that listed the ways she had been accommodated and was informed that, if her attendance did not improve, she would be terminated. The letter included a color-coded chart that had been prepared by the Respondent. The chart identified the times that she had missed work over the previous three years, including disability-related absences. The Complainant alleges that the attendance management plan is discriminatory. The Complainant also claims that she was effectively accused of doing things to aggravate her own injuries and was told by the Respondent that she had to take responsibility for her situation.

7. The Complainant alleges that the above events caused her stress and anxiety, which made her condition worse and that, as a result, she became unable to work on March 9, 2012. She was left without income. The Complainant subsequently became eligible for long-term disability and received a retroactive payment of same. To date, the Complainant has not returned to work. She has been in receipt of long-term disability since March 10, 2012.

8. The Complainant's written complaint form, which was filed with the Nova Scotia Human Rights Commission (the "Commission") in September 2012, notes that there had been no diagnosis from her physicians and that she was being treated by an osteopath.

Clarification of the Parameters of the Complaint

9. On December 22, 2015, the Nova Scotia Court of Appeal issued a decision with respect to an appeal of a decision by this Board respecting a preliminary motion that had been

brought by the Complainant to amend her complaint. The Complainant alleged that she had both physical and mental disabilities for many years. The Complainant asked this Board to permit her complaint to be heard based on both physical and mental disability. She also wished to clarify that the relevant time period for the Respondent's alleged failures to accommodate her dated back to her first motor vehicle accident in 1999. In part, the Complainant took issue with specific content in her complaint form, which had been prepared by Commission staff and signed by her.

10. I found that the written complaint was ambiguous in relation to the nature of her disability and respecting the relevant period of time over which the Respondent had allegedly failed to accommodate her and allowed her to amend her complaint accordingly.

11. In *Nova Scotia (Environment) v. Wakeham,* 2015 NSCA 114, issued December 22, 2015, the Court of Appeal determined that the complaint of discrimination, as referred through the Commission process to this Board, only referenced physical disability. The Court held that this Board had no authority to amend the complaint to include mental disability and, therefore, the complaint can only relate to physical disability.

12. With respect to the relevant time period in the complaint to assess whether the Complainant had been accommodated, the Court of Appeal concluded that there was no ambiguity in opening statements in the complaint about the date on which the alleged discrimination had begun. The Court of Appeal held that the complaint relates to alleged discrimination beginning on February 21, 2012.

13. In accordance with the Court of Appeal's ruling, my findings in relation to the complaint have been limited to physical disability and to events surrounding the Complainant's return to work in February 2012.

Result

14. For the reasons that follow, I have concluded that the Complainant was discriminated against on the basis of her physical disability in the context of her employment by the Respondent when she returned to work in February 2012.

Overview of the Structure of These Reasons

15. These reasons are structured in the same order as the components of the legal test to establish discrimination. After reviewing the applicable legal test, I address the issue of whether the Complainant has established a *prima facie* case of discrimination. The second section of this decision considers the Respondent's defence.

16. In relation to the Complainant's *prima facie* case, the Respondent submits that the Complainant does not suffer from a physical disability. The Respondent alleges that the Complainant has somatization, which it asserts is a psychological condition whereby a person presents physical symptoms in order to express emotional issues. The Respondent submits that, as the Court of Appeal has found that mental disability was not complained of in the original complaint, the Complainant cannot establish a *prima facie* case of discrimination on the grounds of disability. The Respondent submits that the complaint must be dismissed on this basis. As a result, whether the Complainant had a physical disability at the time that she returned to work with the Respondent in February 2012 is a key issue.

17. Because the first issue is whether the Complainant has a physical disability, the medical evidence and conflicting expert opinions are reviewed in these reasons first, rather than beginning with the Complainant's evidence respecting her alleged experiences.

18. The second section of these reasons, which addresses the Respondent's defence, includes a more detailed account of the relevant facts in this case. This reflects the defences advanced by the Respondent.

19. In part, the Respondent asserts that it took reasonable steps to accommodate the Complainant for many years. The Respondent relies on events prior to February 20, 2012 in support of its position that the Complainant returned to work in February 2012 with no realistic chance of success. The Respondent asserts that there was no accommodation that would have helped the Complainant continue in active employment with the Respondent.

20. This defence is also heavily dependent on the medical evidence in this case. Thus, the medical evidence was carefully reviewed and considered in relation to several key issues in this case.

21. The Respondent presented the medical evidence available to it dating back to the Complainant's first motor vehicle accident in 1999. No party objected to the Respondent including this evidence. The Complainant and Commission provided additional medical documentation over this same period. All parties presented evidence respecting the issue of accommodation since 1999. In my view, evidence pre-dating the Complainant's return to work on February 20, 2012 had relevance as background.

22. The Respondent has requested that I find that it had accommodated the Complainant prior to her return in February 20, 2012. I have made a finding in this regard. However, in accordance with the Court of Appeal's ruling, any findings made in relation to this earlier time period are factual and for the limited purpose of having a clear and accurate picture of what the circumstances were for both parties when the Complainant returned to work on February 20, 2012.

23. I have not included all of the evidence, the submissions or my conclusions respecting disputed facts or arguments that I considered to be without merit or upon which I placed limited relevance or weight. For example, the Respondent submits that the Complainant returned to work on several occasions when she should not have, because she did not want to apply for long-term disability. Long-term disability provided reduced financial support to the Complainant. The evidence was that on each such occasion the

Complainant's physicians put her back to work. It was acknowledged at the hearing that this medical advice was accepted by the Respondent's witnesses at the time. There was no direct evidence to support the Respondent's allegation. Accordingly, I did not consider this submission to have a sufficient evidentiary basis and, therefore, do not intend to address it in detail in these reasons. In summary, I have only included the submissions of the parties that were required to be addressed and only included the facts that are necessary to understand the conclusions I reached.

History of the Proceedings

24. Before addressing the merits, some explanation of the history of this proceeding is in order. The complaint was filed with the Commission in September 2012. The Commission referred this matter to a Board of Inquiry for further determination and I was appointed in May 2013.

25. I was advised at the first Case Management Conference on June 20, 2013 by the Complainant that she required accommodation to permit her full participation in this proceeding. For example, to facilitate her participation at the hearing, accommodations were implemented which included allowing her to take breaks when she needed, permitting her to sit, stand, or walk as needed while the hearing was in progress and the lighting in the room was lowered. There were also a number of case management conferences held to explain procedural matters, in part, because at different periods of time the Complainant was self-represented.

26. Hearing dates to address the merits of the complaint were scheduled numerous times but were adjourned at the request of the parties, for various reasons. Accordingly, the hearing was delayed in its commencement until late June 2016. Reasons for adjournment included the Complainant retaining counsel, the preliminary hearing before this Board respecting the Complainant's request to amend her complaint and three more appearances before the Court of Appeal. The Court of Appeal decision was issued December 22, 2015. It was not reasonable for the hearing to proceed until that decision

was rendered as it determined the parameters of liability and remedy respecting the complaint.

27. While the appeal was pending, a number of preliminary matters were addressed. These included issues respecting disclosure and a ruling was issued respecting the place of hearing: *Wakeham v. Nova Scotia (Environment)*, 2015 CanLII 77693 (NS HRC).

28. Hearing dates were set in anticipation of the Court of Appeal decision for early January 2016. Complainant counsel had to withdraw at that time, leading to a further adjournment. The parties' schedules only permitted the hearing to begin on June 27, 2016. The evidence and submissions continued to be received as schedules permitted over the next several months. I heard evidence over 18 days. Submissions concluded on November 15, 2016.

Test for Discrimination

29. The adjudication of a human rights complaint is framed on the basis of the following legal analysis. First, the complainant must establish a *prima facie* case of discrimination. This means that there must be sufficient evidence presented by the complainant to prove that discrimination occurred based on a first impression or initial examination of the evidence, "on its face", until proven otherwise, without an answer from the respondent (its defence) in response to the allegations. The complainant must do this on a balance of probabilities (that it is more likely than not that discrimination occurred).

30. If a *prima facie* case of discrimination is proven by the complainant, the respondent must establish, on a balance of probabilities, that either, 1) a statutory exemption under human rights legislation applies; or, 2) there exists a non-discriminatory justification for its policy or practice and that it took reasonable steps to accommodate the complainant up to the point of undue hardship: *Moore v. British Columbia (Education),* 2012 SCC 61 ("*Moore*"); *Ont. Human Rights Comm. v. Simpsons-Sears Ltd.,* [1985] 2 S.C.R. 536, 1985 CanLII 18 (SCC) ("*Simpsons-Sears*"); *British Columbia (Public Service Employees Relations*

Commission) v. British Columbia Government Service Employees' Union, [1999] 3 S.C.R. 3, 1999 CanLII 652 (SCC) ("*Meiorin*").

31. Discrimination is defined in section 4 of the *Act* as follows:

> For the purposes of this Act, a person discriminates when the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

32. Broken into its components, the definition of discrimination first requires that the Complainant establish, as the first element of her *prima facie* case, that she has a protected characteristic under the *Act.* In this case, the Complainant asserts that she has a physical disability, which is a protected characteristic in the legislation.

33. The Complainant must then prove that the Respondent has made a distinction in her regard (whether intentional or not) that is based upon that characteristic. The distinction must have imposed a burden, obligation or disadvantage on the Complainant, or upon her as a member of a class of individuals with the same characteristic, that is not imposed upon others in the workplace.

34. The third element of a *prima facie* case requires that there be a connection between the distinction or disadvantage that is experienced by the Complainant and the enumerated ground of discrimination, physical disability, in this case. The Complainant must establish that the characteristic itself was a factor in her suffering a burden. Not every differential treatment or disadvantage experienced by an employee in a workplace is discriminatory. For a distinction to be "based on" a complainant's disability, courts have not required a

causal relationship, but have rather required that there be a "factor" or "connection": *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.,* 2015 SCC 39. A complainant need only show that discrimination was a factor, even if it was a small factor in what occurred. In other words, an employer's actions can result from other factors, such as good business decisions, but they will be considered discriminatory as long as discrimination is one factor.

35. As explained by the Supreme Court of Canada in *Simpsons-Sears,* at p. 28, "A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor in the absence of an answer from the respondent".

36. I turn now to the Respondent's defence. By way of analogy, the Ontario Court of Appeal likened the defence of discrimination cases to medical malpractice cases, quoting Justice Sopinka in *Snell v. Farrell* [1990] 2 SCR 311, where he wrote at p. 328-329, "...the facts lie particularly within the knowledge of the defendant... very little affirmative evidence on the part of the Plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary". The Ontario Court of Appeal in *Peel Law Association v. Pieters,* 2013 ONCA 396 ("*Peel Law*") commented on this evidentiary shift at para 65: "Since a *prima facie* case involves evidence that, if believed, would establish the claim, a respondent faced with a *prima facie* case at the end of the claimant's case must call evidence to avoid an adverse finding". If it appears that a complainant has established a *prima facie* case of discrimination, the evidentiary burden shifts to the respondent to demonstrate that the complainant can no longer show on a balance of probabilities that discrimination was a factor in what occurred.

37. There is a practical reason for this shift in the evidentiary burden. As explained by the Ontario Court of Appeal at para 72 of *Peel Law*, respondents in human rights cases are "uniquely positioned to know why" they adopted a policy or made a decision that they did. As a result:

> The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.

And at para 73:

> In discrimination cases... the law, while maintaining the burden of proof on the applicant, provides respondents with good reason to call evidence. Relatively little 'affirmative evidence' is required before the inference of discrimination is permitted. And the standard of proof requires only that the inference be more probable than not. Once there is evidence to support a *prima facie* case, the respondent faces the tactical choice: explain or risk losing.

38. A respondent must provide a non-discriminatory explanation for its actions that are alleged to be discriminatory. The justification provided by a respondent needs to persuade the Board that the *prima facie* case presented by the complainant is no longer established on the balance of probabilities, based on the completeness of the evidence.

39. An inference of discrimination can be drawn when it is more probable from the evidence than the actual explanations offered by the respondent. To be persuasive, a respondent's explanation must be "credible on all of the evidence": *Shaw v. Phipps*, 2012 ONCA 155 at p. 13.

40. If the respondent made a distinction based upon a physical disability, it matters not whether it was intentional or not. In other words, a subjective intention by a respondent to discriminate or to make a distinction based on physical disability is not a requirement of the legal test. Accordingly, a respondent who alleges that there was a lack of intention to discriminate does not provide a valid defence to the issue of whether or not there has been a violation of the *Act*.

41. At all times, the burden of proof remains on the complainant. If the Respondent provides a non-discriminatory explanation that is likely to be accepted over the Complainant's *prima facie* case, the complainant needs to demonstrate that the respondent's explanation is a pretext or is untrue.

42. The above test was well summarized by the Supreme Court of Canada in *Moore* at para 33:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Act*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

I. Has the Complainant Established a *Prima Facie* Case of Discrimination?

A. Does the Complainant Have a Physical Disability?

(i) Overview of the Medical Evidence

43. Given the extent of medical evidence presented, it will be helpful to begin with an overview of the medical evidence before considering that evidence in detail.

44. The Complainant called her family doctor, Dr. Lorraine Lewis and her psychologist, Ms. Milner-Clerk to testify respecting her medical history. The medical records of both of the Complainant's health care providers were submitted as evidence.

45. Dr. Lewis has been the Complainant's family physician for many years, pre-dating her motor vehicle accidents. Dr. Lewis testified that the Complainant suffers from both physical and mental disabilities. I will return to the medical records and testimony of Dr. Lewis in detail given that her opinion is disputed.

46. Ms. Milner-Clerk has been the Complainant's treating psychologist for many years, as well, since her first motor vehicle accident. Because she is a psychologist and this complaint can only proceed on the basis of physical disability, Ms. Milner-Clerk is not qualified to express an expert opinion respecting whether the Complainant has a physical disability. However, it was apparent from her evidence that she proceeded to treat the Complainant's psychological issues on the basis that the Complainant's disabilities included a physical disability. Her diagnosis includes that the Complainant suffers from chronic pain in the shoulder and neck.

47. When employees of the Respondent are unable to work for medical reasons, the Respondent requires that it be provided with medical information from the employee's health care provider. The Respondent also requires that it be provided with medical information before the employee returns to work after an extended absence. The Respondent does so through the use of certain forms that it has developed for this purpose.

48. The Respondent provided documentary evidence consisting of all of the medical forms that were filled out respecting the Complainant's past absences. These forms were completed primarily by Dr. Lewis and occasionally by Dr. Watson, who covered Dr. Lewis's practice when she was unavailable. These forms date back to June of 1998 and extend to March of 2012, when the Complainant stopped actively working for the Respondent for medical reasons. As indicated, this evidence is relevant to the issue of whether the Complainant had a physical disability in February 2012. It was also submitted in support of the Respondent's position that it had accommodated the Complainant in relation to her disability over many years, that she could not successfully

return to work and that no further accommodation offered by the Respondent would have made a difference.

49. The Respondent relied upon its pre-hearing submissions as part of its closing submissions. At page 8 of its pre-hearing submissions, the Respondent explained its position respecting this evidence:

> The Department of Environment required that Ms. Wakeham fill out a Certification by Attending Physican Form ("Form 444") on each occasion she used sick leave. The form allows for an employee and her doctor to clearly explain any disability or illness the employee may be suffering from. Further, Wakeham and her Doctor were required to fill out Fitness to Work Assessment on each occasion that Wakeham returned to work from short-term illness leave. This form provided an opportunity for Wakeham and her Doctor to clearly explain Wakeham's medical condition and resulting limitations that she may have as well as ensuring the employer that it was safe for Ms. Wakeham to return to the workplace. The employer would not allow Wakeham to return to work until these forms were completed. These forms were filled out on a multitude of occasions, and provided an opportunity for Ms. Wakeham's medical team to inform her employer on what she needed in order to perform her job tasks. On each occasion, the DOE complied with the limitations set out in the forms.
>
> ...
>
> However, on each occasion of her return to work, the DOE provided Ms. Wakeham with a letter based on the Fitness to Work Assessment that outlined the accommodations that she and her Doctor indicated were required, and also informed Ms. Wakeham that she was to inform her manager if she came across any workplace issues.
>
> ...
>
> ...The DOE constantly and consistently inquired into the accommodation needs of Ms. Wakeham through the use of Form 444s....

50. Almost 40 Fitness to Work and Certification by Attending Physician forms were submitted by the Respondent into evidence. Many contained requests for accommodation of the Complainant's functional limitations in the workplace. Counsel for the Respondent submitted during closing arguments that these requests for accommodation concerning the Complainant were presented to the employer as genuine musculoskeletal problems and that the employer responded accordingly. It is, therefore, not in issue that, at the time of these accommodation requests, the Respondent responded on the basis that the Complainant had a physical disability.

51. After the Complainant stopped working for the Respondent in March of 2012, the Respondent arranged for the Complainant to be assessed by two independent medical experts. According to an email dated March 28, 2012, written by the Respondent's Occupational Health and Safety Consultant, Gail McClare, the Complainant was informed that she would not be qualifying for short-term disability based on the medical documentation that had been received by the Respondent to date. The Complainant was advised by Ms. McClare that independent medical examinations would be required and that there would be both a physical and psychiatric component to these independent medical examinations. To clarify, Ms. McClare is an employee of the Respondent.

52. Dr. P. Scott Theriault conducted a psychiatric assessment of the Complainant on May 2, 2012 at Ms. McClare's request. His examination led to the preparation of a report dated May 10, 2012. As well, Dr. Kevin Bourke performed a physical assessment of the Complainant on June 1, 2012. Dr. Bourke is a general practitioner who has practiced as an occupational health physician for the majority of his career. He wrote a report dated June 15, 2012. Both of these reports were submitted into evidence by the Respondent. The Respondent did not call either physician to testify.

53. By way of overview, both independent medical expert reports concluded that the Complainant had medical conditions, one of a psychological nature and the other relating to physical issues, that impacted her ability to work on a regular and consistent basis.

Both reports expressed reservations about the Complainant's ability to return successfully to work.

(ii) How Did the Issue of Whether the Complainant Has a Physical Disability Arise?

54. In the fall of 2015, the Respondent obtained a medical report from Dr. Edvin Koshi. Dr. Edvin Koshi is a specialist in physical medicine and rehabilitation pain medicine.

55. Dr. Koshi was qualified as an expert and his impressive resume was placed into evidence. Dr. Koshi is a Fellow of the Royal College of Physicans and Surgeons of Canada in the area of physical medicine and rehabilitation. He is a Fellow in Pain Management with related teaching, research and attending staff roles at Dalhousie University, including acting as the Medical Director of the Halifax Spine and Pain Institute. He is a Fellow of the World Institute of Pain and Interventional Pain Practice and a Fellow of the American Academy of Disability Evaluating Physicians, certified in "evaluation of disability and impairment rating". He is also both a Certified Independent Medical Examiner and certified as a Functional Capacity Evaluator. These latter certifications were obtained from the American Board of Independent Medical Examiners and the American Academy of Disability Evaluating Physicians, respectively.

56. Dr. Koshi conducted research as a member of the Pain Management Unit at Dalhousie University from 2006 to 2010. He held a cross appointment between the Department of Physical Medicine and Rehabilitation and the Department of Neurosurgery at Dalhousie University over the same time period. From 2006 to the time of the hearing, he has been an Assistant Professor of Physical Medicine and Rehabilitation at Dalhousie University. More recently, his teaching has included international instruction, including as an instructor and examiner for the World Institute of Pain. He is currently the Chair of the Canadian Section of the World Institute of Pain and a member of its education committee and has helped to organize international educational events.

57. Dr. Koshi frequently presents on various topics relevant to his area of expertise. I note that in contrast to Dr. Koshi's teaching-related activities and presentations, he has a limited number of publications, the most recent being in 2007.

58. Dr. Koshi testified that the majority of his referrals come from family doctors requesting assessments of patients with chronic pain injuries and disabilities. He assesses whether the patient can go back to work and, if so, what accommodations would be appropriate. He also works closely with a number of "return to work" clinics around the province and refers patients to these clinics. Dr. Koshi also obtains referrals from WCB for which he is paid by WCB.

59. Dr. Koshi testified that the preparation of independent medical reports comprises a significant portion of his practice. He testified that he has provided evidence as an expert in physiatry in relation to a limited number of legal proceedings. The Respondent submits that Dr. Koshi's expert medical opinion should be preferred over the opinion of Dr. Lewis, as a family physician.

60. Under cross-examination, Dr. Koshi testified that he was unaware of the outcome of those cases in which he had been retained as an expert and did not know if the opinions of other physicians were accepted over his own. Counsel for the Commission provided two cases where Dr. Koshi's expert opinion had not been preferred over that of other medical experts. In my view, this Board is required to make its own assessment of Dr. Koshi's expert opinion.

61. Dr. Koshi's report dated November 7, 2015 is based upon a file review of the Complainant's health records. As background, Dr. Koshi testified that he is trained to conduct functional evaluation tests himself and that it is better to have the tests done by himself rather than reading tests conducted by an occupational therapist. In assessing the ability of a patient to return to work, he compares a jobsite analysis and a functional evaluation test to see if they match. In this case, Dr. Koshi did not interview, examine or conduct functional evaluation tests of the Complainant. I note that there was no functional

evaluation by an occupational therapist or job site analysis respecting the Complainant's functional limitations as of February 2012 within the documents he reviewed.

62. Dr. Koshi's expert report and testimony disputes the evidence and the conclusions expressed by the Complainant's family doctor, Dr. Lewis, the psychiatric report of Dr. Theriault and the occupational health report of Dr. Bourke to the effect that the Complainant is disabled. At page 14 of his report, Dr. Koshi concluded that, as a result of his analysis, "The bottom line is that from his area of specialty, namely psychiatry, Dr. Theriault was not able to provide any diagnosis that could render Ms. Wakeham as disabled." With respect to Dr. Bourke's opinion, Dr. Koshi concluded, on the same page of his report, that, "After analyzing Dr. Bourke's diagnosis, I am also unable to determine any basis for disability." Dr. Koshi was of the further opinon that there was no medical diagnosis to support Dr. Lewis's conclusion that the Complainant was disabled. He concluded that the Complainant was a professional patient who simply suffered from job dissatisfaction.

63. Dr. Koshi was asked by the Respondent to provide an expert opinion respecting the following question in his report: "When in your opinion did Sandra Wakeham become completely disabled from working?" The key findings Dr. Koshi identifies are as follows:

> Based on the area of my specialty (rehabilitation of musculoskeletal and brain injuries), I find no medical reason in this file review to support the view that Ms. Wakeham is disabled from working in her occupation.
>
> ...
>
> Two Independent Medical Examination reports that I was given for review contradict each other and do not (sic) present any evidence to conclude that Ms. Wakeham is disabled.
>
> ...
>
> It seems that no medical practitioner has been able to determine any anatomical diagnosis that could represent medical restriction based on risk for returning to work as a secretary or receptionist.

...

In fact, no anatomical diagnosis (no organic cause for her symptoms) has been found to explain the myriad of her symptoms, which are best explained by, and very typical of, somatization.

64. Dr. Koshi testified that, in his opinion, the Complainant has somatization. Dr. Koshi calls somatization a "syndrome" at page 12 of his report. He defines somatization as:

> ... the tendency of an individual to communicate psychological and interpersonal problems in the form of bodily symptoms for which they seek medical help. Symptoms have no pathophysiological explanation (they are called medically unexplained symptoms).

65. Dr. Koshi concluded that the Complainant is not disabled at all.

(iii) Overview of the Parties' Positions

66. To recap, Dr. Koshi's report of November 7, 2015 is relied upon by the Respondent in two contexts. First, as indicated above, the Respondent takes the position that the Complainant has somatization. The Respondent asks this Board to find that somatization is a mental disability. The Respondent submits that all of the Complainant's symptoms and impairments arise from mental disability, and, therefore, I ought to dismiss her complaint on the basis of the Court of Appeal's determination that her complaint can only relate to a physical disability.

67. Secondly, the Respondent highlights Dr. Koshi's conclusion that the Complainant is not disabled and that no accommodations of the Complainant would have been effective. The Respondent submits that there was nothing that could have been done to accommodate the Complainant, thus the complaint ought to be dismissed.

68. Counsel for the Respondent submits that support can be found for Dr. Koshi's opinion in the evidence of other health care providers. Counsel submits that the Complainant's psychologist, Ms. Milner-Clerk, agreed on cross-examination that the Complainant's disability is mental in nature. Respondent counsel also submits that, when Dr. Lewis was cross-examined on this point, she did not disagree with Dr. Koshi's opinion that the Complainant has somatization. Counsel highlights, as well, that both Dr. Theriault and Dr. Bourke reference the possibility of somatization in their reports.

69. Counsel for the Respondent submits that the best evidence of the nature of the Complainant's disability is that of Drs. Koshi, Lewis and Milner-Clerk on the basis that they testified at the hearing. Respondent counsel submits that I ought to prefer their evidence over the content of the independent medical reports that it submitted into evidence, given the absence of testimony by Drs. Bourke and Theriault and the inability of the parties to subject their opinions to cross-examination.

70. Counsel for the Commission submits that the testimony of Dr. Lewis confirms that the Complainant suffers from a physical disability. Commission Counsel submits that Dr. Lewis's opinion ought to be preferred over that of Dr. Koshi, as he only conducted a file review and did not examine the Complainant. Commission counsel submits that Dr. Bourke's independent medical examination report found that the Complainant has a physical disability and confirms Dr. Lewis's conclusion on this key issue.

71. Counsel for the Commission submits that the independent medical examination reports of Dr. Bourke and Dr. Theriault were obtained by the Respondent and that the Respondent ought to have called these physicians to testify. Counsel suggests that in abandoning Dr. Bourke's conclusions and those of Dr. Theriault, the Respondent is, in effect, "throwing its experts under the bus". Commission counsel submits that I ought to place weight upon Dr. Bourke's conclusions, even though he did not testify.

(iv) The Medical Evidence in Detail

a) Dr. Lewis's File

72. Dr. Lewis's medical file dated back to 1996 and concluded with a written opinion that she provided to the Compainant's former counsel, dated September 25, 2015. As indicated, in evidence, as well, were over 40 various forms providing medical information from Dr. Lewis and Dr. Watson to the Respondent between 1999 and 2012. Given its relevance, the evidence from each form is summarized in the approximately 40 paragraphs that follow.

73. A Certification by Attending Physician was completed by Dr. Lewis on February 18, 1999 after Ms. Wakeham's first motor vehicle accident on Feb 14, 1999. The form requested that the physician identify a "diagnostic category" of illness resulting in work limitations. These were noted by Dr. Lewis to be "musculoskeletal" and "whiplash injury". The report indicated that the Complainant could not sit for more than 10 minutes and could not lift or bend.

74. A Certification by Attending Physician completed by Dr. Lewis on March 18, 1999 shows the same diagnosis of musculoskeletal diagnostic category and whiplash injury. The Complainant is noted to have an impairment that she cannot sit for more than 60 minutes and cannot do repetitive motions with her right arm.

75. A Certification by Attending Physician completed by Dr. Lewis on July 26, 2000 references a diagnosis of whiplash injury with neuropraxia and a continuing reference to "musculoskeletal". Dr. Lewis commented that the Complainant cannot sit for long periods of time or do repetitive movements with her right arm and leg and noted that she has continued physiotherapy and has been referred to specialists.

76. On June 14, 2001 Dr. Lewis completed a Certification by Attending Physician advising the Respondent of a psychological condition that had been ongoing for years, but was at that time in a stage of acute exacerbation.

77. Dr. Lewis completed a further Certification by Attending Physician on July 30, 2001, at which point she recorded both psychological issues and musculoskeletal problems. The latter were described as weakness and swelling in the right arm and hand. The report noted that impairments included decreased concentration and problems completing tasks.

78. An Attending Physician Statement for long-term disability was completed for the Complainant in August of 2001. The Complainant had ceased work due to her condition. The primary diagnosis was chronic pain and disability, post motor vehicle accident, along with depression. The Complainant was being treated for "Adjustment Disorder with Depressed Mood" at the time. However, other medical conditions were described: cervical spine disc herniation, low back pain, right arm pain, weakness and discoloration. Ms. Wakeham was receiving medication, physiotherapy, psychotherapy and massage therapy.

79. The form listed 10 physical functions that were generic in nature, such as, standing, sitting, walking, pushing and pulling. Of these, the Complainant's ability to stand, sit, walk and drive were noted to be of limited duration. Squatting, climbing and driving were limited in frequency. Lifting, carrying, pushing and pulling were completely contraindicated.

80. On September 26, 2001, Dr. Lewis completed a further Certification by Attending Physician. She diagnosed multi-level spinal strain, with right arm and right leg pain. She checked the box on the form for "musculoskeletal". Ms. Wakeham was noted to be impaired in that she could not do repetitive movements with her right arm, right hand or those involving her neck/back. A further Certification by Attending Physician completed by Dr. Lewis on October 31, 2001 identified the Complainant's injury as musculoskeletal.

81. A Certification by Attending Physician completed by Dr. Lewis on March 4, 2005 noted both a musculoskeletal and neurological diagnostic category resulting in work limitations. Impairments included decreased use of arms and sitting time. Also, Ms. Wakeham was noted as irritable and had decreased concentration due to dealing with pain. Dr. Lewis described it as an "acute exacerbation of chronic problems." Dr. Lewis noted that Ms. Wakeham should only work part time.

82. A Certification by Attending Physician of July 11, 2005 notes that Ms. Wakeham is unable to sit, stand or converse for more than a few minutes.

83. Dr. Lewis completed a Certification by Attending Physician on August 2, 2005 in which she identified illness resulting in work limitations on the basis of musculoskeletal, neurological and psychological conditions. Dr. Lewis reported "chronic pain" and "decreased functioning recently". She again identified that Ms. Wakeham is unable to sit, stand or converse for more than a few minutes. Dr. Lewis remarked that the Complainant has an exacerbation of a chronic problem.

84. A Certification by Attending Physician completed by Dr. Klein on behalf of Dr. Lewis, dated October 11, 2005, diagnosed chronic pain syndrome, related to the posterior neck, with the right side being worse than the left. The form noted ongoing pain exacerbated by every day activity. There is a specific reference that the pain is related to Ms. Wakeham "sitting at desk/computer at work".

85. There is no specific reference to the Complainant's second motor vehicle accident in these forms. A Certification by Attending Physician of December 5, 2005 completed by Dr. Lewis continues to reference musculoskeletal and neurological problems. The form also notes another factor of "degenerative disc disease" in the neck.

86. A new form, a "Fitness for Work Assessment" form, was completed on May 26, 2006 by Dr. Lewis. The Respondent indicated that it required that a Fitness for Work Assessment form be submitted before an employee was permitted to return from a medical or

disability-related leave. This is the first time such a form appears in the Respondent's medical documentation. The Complainant would have been returning to work in May 2006.

87. Dr. Lewis identified that Ms. Wakeham has a significant medical condition impacting her ability to meet the physical, psychological and mental demands of her position. Dr. Lewis specifically noted that Ms. Wakeham's "physical condition fluctuates and employee needs flexibility in physical work demands to compensate."

88. The Fitness for Work Assessment form asks the following questions of the physician:

2. (a) Does the employee have any significant physical, psychological or mental impairments at this time?
   Yes ☐ No ☐

   (b) If yes, please expand:

   (c) Do you think the impairment is: Permanent ☐ Temporary ☐

   (d) If temporary, how long do you think the impairment will last:

3. (a) Do you recommend any specific work restrictions?
   Yes ☐ No ☐

   (b) If yes, please list type and recommended duration:

4. (a) Do you anticipate anything that would prevent this employee from attending work on a consistent basis and/or meeting the physical, psychological or mental demands of the job description?
   Yes ☐ No ☐

   (b) If yes, please elaborate:

89. On this May 26, 2006 Fitness for Work Assessment form, Ms. Wakeham was noted to have significant impairments related to chronic neck complaints, strain and neuralgia. The impairments were described as permanent. Work restrictions were recommended and described as an "ongoing need to vary tasks and limit posturing that worsens neck/shoulder pain." The form asked Dr. Lewis to identify anything that would prevent the Complainant from attending work on a consistent basis. Dr. Lewis wrote "prolonged posturing and poorly aligned workstation could aggravate chronic problem." The end date for modified or alternate duties was then noted as "indefinite".

90. On March 9, 2007, a Certification by Attending Physician was completed by Dr. Watson. It noted musculoskeletal injury involving back and shoulder pain. The form further identified "pain on movement, diminished ability to lift, push, pull", which are described as "ongoing issues following MVAs".

91. A Certification by Attending Physician dated April 30, 2009 completed by Dr. Lewis identified the Complainant's issue at that time as being a psychological condition with decreased concentration and decreased ability to focus. The report noted that Ms. Wakeham was unable to multi-task.

92. A Fitness for Work Assessment form was completed on July 29, 2009 by Dr. Lewis. The form appears to have been revised to include a section entitled "Current Functional Abilities". The areas of reduced functional ability that Dr. Lewis was asked to identify as relevant were the Complainant's ability to sit, stand, walk, bend or twist, operate machinery, lift, carry, climb, reach, push or pull, write or type and kneel. The form requested Dr. Lewis to identify the length of time that the Complainant could perform areas of reduced functional ability.

93. Dr. Lewis identified that Ms. Wakeham had limitations in terms of her ability to sit, stand, walk, lift, carry, reach, push, pull and kneel. The diagnosis was anxiety with panic and depression and musculoskeletal pains, strains and myofascial symptoms in the shoulders and hips. The end date for modified or alternate duties was "indefinite". A related

Certification by Attending Physician was also completed on July 29, 2009 with a diagnosis of musculoskeletal and psychological condition. The impairments included an inability to concentrate, poor memory and an inability to focus.

94. A month later, on August 30, 2009, Dr. Lewis was asked to complete another Fitness for Work Assessment form. Dr. Lewis identified the same ongoing functional limitabilities with the addition of writing and typing. Ms. Wakeham's medical condition was identified as "chronic pain" with decreased concentration, loss of speech fluency and irritability. These were indicated to be significant impairments related to an exacerbated chronic condition. Dr. Lewis described the Complainant's impairment related to chronic pain as being permanent. She noted that she expected improvements in months, but that the chronic condition would last for years. Dr. Lewis specified an end date for modified duties of October 30, 2009.

95. In March of 2010, the Complainant fell and struck her head. She sustained injuries including symptoms of a seizure and required hospitalization for five days. Dr. Lewis subsequently completed another Certification by Attending Physician on April 6, 2010. Her condition was diagnosed as neurological in nature. Dr. Lewis specified post-concussion syndrome with vertigo, drowsiness and decreased focus. Other factors were identified as pre-injury vertigo and head and neck syndrome. At that point, Dr. Lewis indicated that Ms. Wakeham required a graduated return to work. A subsequent Certification by Attending Physician dated April 21, 2010 likewise indicated post-concussion syndrome with vertigo.

96. On May 27, 2010, Dr. Lewis completed another Fitness for Work Assessment form respecting the Complainant's return to work on May 20, 2010. Dr. Lewis identified that the medical condition Ms. Wakeham had which impacted her ability to work was "unchanged from previous". Dr. Lewis recommended work restrictions "as before" for the Complainant's neck and shoulder, noting permanent chronic shoulder, back and neck strain. She checked off limitations in the sections of the form requesting identification of

reduced functional ability. These included not bending, twisting, lifting, reaching or pushing/pulling.

97. On July 5, 2010, Dr. Lewis completed another Certification by Attending Physician noting a diagnosis of acute worsening chronic pain syndrome. Both a musculoskeletal and psychological condition were noted.

98. Dr. Lewis prepared a further Fitness for Work Assessment form on August 23, 2010 in anticipation of the Complainant's return to work on August 31, 2010. Dr. Lewis indicated that modified duties should continue until December 31, 2010. Dr. Lewis also completed a related Certification by Attending Physician. Her diagnosis at the time was myofascial pain symptoms, anxiety and depression with a diagnosis of musculoskeletal and psychological condition. Ms. Wakeham's impairment was described as "very scattered, poor concentration". The issues included right shoulder loss of function and right wrist. A number of reduced areas of functional ability were identified, including an inability to sit, stand, walk, bend, or twist, lift, carry, climb, reach, push, pull, write or type. In particular, Dr. Lewis instructed that Ms. Wakeham not twist at all, that she not lift or carry more than two pounds, that she do only limited reaching, especially with her right shoulder, and that writing and typing be limited to two hours, consistent with the requirement that she not sit for more than two hours.

99. A further Certification by Attending Physician was completed by Dr. Lewis on October 7, 2010. The diagnosis was ongoing musculoskeletal and psychological conditions.

100. On January 5, 2011, Dr. Lewis prepared a Fitness for Work Assessment form in relation to the Complainant's expected return to work date of January 8, 2011. She recommended modified duties be in place "for an indefinite basis". Dr. Lewis identified that Ms. Wakeham had a chronic derangement of her neck and shoulder girdle. She wrote that posturing at work aggravates the problem. Dr. Lewis noted that Ms. Wakeham was also depressed and unable to multitask. Dr. Lewis stated that the Complainant does not

tolerate a lot of background noise and distress. Her impairments were described as significant and permanent.

101. The “areas of reduced functionability” indentified in the chart portion of the form were an inability to sit, stand, walk, bend or twist, lift, carry, reach, push or pull. Dr. Lewis recommended that Ms. Wakeham be restricted from poor ergonomics with desks, loud areas and multi-tasking. She wrote under “type and recommended duration” the words “previous forms”. She also wrote that with job modifications, “Ms. Wakeham should do well”.

102. The Complainant went off work again in April 2011. On April 18, 2011, Dr. Lewis issued a Certification by Attending Physician with a musculoskeletal diagnosis of myofascial pain syndrome. The impairment was described as “unable to focus, posturing aggravating pain syndrome”. Dr. Lewis wrote that Ms. Wakeham needed a modified work space. The medical condition was described as an “on-going problem for years”. On that occasion, Dr. Lewis remarked that Ms. Wakeham had an “exacerbation of chronic condition”.

103. A Certification by Attending Physician dated May 24, 2011 completed by Dr. Lewis identified a musculoskeletal diagnosis. Ms. Wakeham is noted to not be able to sit or lift her arms repetitively. Dr. Lewis wrote that Ms. Wakeham had an acute exacerbation of a chronic problem.

104. The next Fitness for Work Assessment form completed by Dr. Lewis is dated June 7, 2011 and proposes a return to work date of September 1, 2011. The medical condition impacting Ms. Wakeham’s ability to attend work and meet the demands of her position was again described as chronic pain syndrome. At that time, the impairment was significant, “lasting three to four months”. The Complainant was described as requiring specific work restrictions and accommodation. Dr. Lewis wrote that the Complainant had on-going problems with “repetitive strain and repetitive use”. Current areas of reduced functional ability were checked off related to sitting, bending, twisting, lifting, carrying,

climbing, reaching, pushing, pulling, writing, typing and kneeling. The end date for modified duties was stated to be unknown.

105. On August 31, 2011, Dr. Lewis provided an updated Fitness for Work Assessment form with respect to the Complainant's return to work on September 1, 2011. Dr. Lewis indicated that the Complainant had chronic pain syndrome, with impairments of on-going neck and shoulder weakness. On this occasion, Dr. Lewis again indicated that she thought that the impairment was permanent. Dr. Lewis recommended work restrictions, namely limited time sitting and typing. Dr. Lewis noted that the Complainant needs to "get up and move around at work". The specific areas noted on the chart related to functionality included that the Complainant's sitting be limited to less than 60 minutes, that she lift or carry five pounds only infrequently, that she reach, push and pull infrequently and that her writing and typing be limited by posturing. The Complainant's hours of work were to be limited to four hours. No date was specified for modified duties to end.

106. The Complainant returned to work for a brief period in September 2011 and then returned to medical leave until February 20, 2012. After the Complainant went back on medical leave in September 2011, Ms. Wakeham was seen by Dr. Matthew Watson, who was covering Dr. Lewis's practice. On October 5, 2011 and November 7, 2011 Dr. Watson diagnosed a psychological condition with impairments of anxiety, stress, poor concentration and memory. He recommended that she be re-assessed by January 1, 2012.

107. Ms. Wakeham was next seen by Dr. Lewis on January 9, 2012. A Certification by Attending Physician was completed that day. Dr. Lewis's diagnosis was adjustment disorder and chronic pain/cervical strain. Dr. Lewis checked both musculoskeletal and psychological conditions as the diagnostic categories of Ms. Wakeham's illness on the form. Dr. Lewis noted impaired concentration and that Ms. Wakeham would need a graduated return to work. Dr. Lewis remarked that Ms. Wakeham was seeing an osteopath and psychologist on a regular basis.

108. Dr. Lewis completed a Certification by Attending Physician dated February 14, 2012 respecting the Complainant's return to work on February 20, 2012. That Certification records a diagnosis of musculoskeletal and psychological conditions, described as chronic right neck and shoulder pain and depression. Dr. Lewis identified that Ms. Wakeham required work accommodation with respect to posturing, noise, stress and work environment. She noted that "other factors" included the Complainant's ongoing problems with being able to focus in a noisy and stressful work environment. She also noted that Ms. Wakeham was functioning well independently. Dr. Lewis also remarked that Ms. Wakeham should be eased back to work with reduced work hours the first two weeks.

109. On February 14, 2012, Dr. Lewis prepared a Fitness for Work Assessment form for the Respondent. She identified chronic musculoskeletal pain and strain and depression, which were identified as significant impairments. She noted that Ms. Wakeham was much improved "at present" and that her outlook was very positive.

110. Dr. Lewis continued to identify areas of reduced functional ability in the chart portion of the form. These included sitting for 30 minutes, bending or twisting restricted to 10 minutes an hour, occasional lifting and carrying, occasional reaching, pushing and pulling. As well, Dr. Lewis noted as work restrictions that the Complainant was to perform limited lifting and reaching with her right arm. Dr. Lewis stated that the Complainant needed various positions to work. She also wrote, "a quiet, less distracting work environment would greatly benefit if able to accommodate". This was the last Fitness for Work Assessment form completed by Dr. Lewis prior to Ms. Wakeham's return to work for the Respondent on February 20, 2012.

111. Two further Certifications by Attending Physician were submitted into evidence that were completed by Dr. Watson after Ms. Wakeham ceased attending active work duties for the Respondent on March 9, 2012. The first was completed on March 15, 2012. Dr. Watson diagnosed a psychological condition with anxiety and stress. Dr. Watson placed the Complainant off work until she would be able to see Dr. Lewis on April 18, 2012. He

noted that Ms. Wakeham had been having difficulty with anxiety for the past several months.

112. Dr. Watson saw the Complainant again on March 20, 2012. At that time, he diagnosed "musculoskeletal and psychological condition". He noted the impairment to be "excessive pain with shoulder/arm movements, such as stamping/opening mail; burning pain to lumber spine with sitting".

113. Commission counsel submits that the above-referenced documentary evidence clearly and conclusively establishes that the Complainant had disabilities for years leading up to and including the period of time relevant to her complaint of discrimination. Counsel submits that the foregoing evidence establishes that the Complainant's disabilities included physical disability.

b) Other Documentary Evidence

114. Commission counsel submits that the Respondent knew at all material times that the Complainant's disability is permanent and affects her performance in the workplace. Counsel relies upon an e-mail dated November 2, 2010 from Gail McClare, the Occupational Health and Safety Consultant, to Norma Bennett, the Respondent's District Manager, in which Ms. McClare wrote:

> As you know, I met yesterday with Sandra and her health care provider. We discussed the ongoing problems Sandra has been having at work. The medical evidence is stating that because of Sandra's second car accident, she sustained what appears to be a permanent disability, which affects her performance in the workplace. The health care provider advised me that Sandra can work effectively in a quiet location, where she has the ability to pace herself and with minimal distractions. When there is activity around her, it stimulates her brain, causing a sensory

overload, which results especially in a loss of concentration, memory difficulties, and her ability to process information is slower.

115. In contemplation of the Complainant's return in January 2011, Ms. McClare further wrote, "Please advise if you will be able to accommodation Sandra in a quiet location, doing all aspects of her job, with the exception of responding to the counter? There are no other restrictions".

116. Commission counsel also places reliance on a letter that was prepared by Norma Bennett, in consultation with Ms. McClare, and given to Ms. Wakeham, dated February 20, 2012. This letter was identified as a "Return to Work/Accommodation Plan". Similar letters, called "accommodation letters", were given in more recent years to the Complainant each time she returned to work from a medical leave. Commission counsel submits that this letter is clear evidence that the Respondent knew that Ms. Wakeham had a disability. Counsel submits that the Respondent would not offer to accommodate Ms. Wakeham if she did not have a disability. Commission counsel highlights that the letter confirms that an accommodation plan has been agreed upon by Ms. Wakeham and the Respondent based on the medical documentation from Dr. Lewis. The accommodations that were identified by Ms. Bennett in her letter of February 20, 2012 include restricted sitting, bending, lifting, carrying, reaching, and pushing, which are all physical limitations.

117. Commission counsel similarly relies upon the Respondent's letter of February 21, 2012 that notified Ms. Wakeham that she was being placed on an attendance management plan. This letter was written by Ms. Bennett. The letter contains a list of the specific accommodations that were made by the Respondent since 2008. These accommodations include placing Ms. Wakeham in a secretary position in 2008 rather than a Clerk II position, several ergonomic assessments of her workstation over the past three years and changes to her cubicle and workflow to accommodate her medical needs. The letter lists the purchase of ergonomic chairs, a specific keyboard, footstool and larger monitor, a wireless headset, higher walls built into her cubicle to decrease noise and distraction and

noise reduction headphones. The letter states that the Complainant was placed in a corner cubicle to limit distractions and noise, that her work was segmented to allow for concentration and that additional training was provided on data entry. The letter also states that adjustments were made to the Complainant's schedule to enable her to obtain treatments.

118. Also relied upon is a medical report from Dr. Lewis that was requested by the Complainant's former legal counsel for purposes of this hearing. Her report of September 8, 2015 states as follows:

> 1. A list of all chronic conditions that have limited Ms. Wakeham's capacity for work between February 14, 1999 and the present: shoulder and arm pain (burning neuralgia type), discoloration of the right arm with cold, white skin and weakness. Adjustment disorder with depression and anxiety and possible PTSD, and Cognitive difficulties, Burning pain behind her eyes. As well as Concussion with post-concussion syndrome in 2010.
>
> 2. On March 10, 2012, she was suffering from anxiety, pain, cognitive difficulties.
>
> 3. She has been completely disabled since 2012 and has had two Independent Medical Evaluations that support this. She has been advised not to return to work.
>
> 4. (a) I cannot say what the present would have been if there had been accommodations for Ms. Wakeham.
>
> (b) Failure to accommodate certainly caused more anxiety, stress and pain which resulted in more time away from work over the years. It materially contributed to complete disability in 2012.

5. Present Medical Status: Ms. Wakeham is doing better since leaving work, but her arm continues to bother her, she has trouble with memory and maintaining a conversation. She remains completely disabled.

6. She has no chance of recovering to return to employment in the future.

c) Dr. Lewis's Testimony

119. Dr. Lewis testified that she has been a practicing family physician since 1987. She was qualified on the basis of her background as an expert in family medicine.

120. Dr. Lewis testified that she followed the "SOAP" approach in her care of the Complainant. "SOAP" stands for Subjective (the patient's history), Objective (the physician's observations), the Assessment (the diagnosis/belief of the physician) and the Plan. Dr. Lewis testified that, for years, doctors have used this approach in medical practice.

121. In February of 2012, it was Dr. Lewis's diagnosis that the Complainant had chronic right neck and shoulder pain and depression. Dr. Lewis identified these as both musculoskeletal and psychological conditions.

122. Dr. Lewis testified about her completion of the Certification by Attending Physician on February 14, 2012, which put the Complainant back to work. Dr. Lewis testified that she recommended accommodations at work related to posturing, noise, stress and work environment due to the Complainant's reduced functional ability. The Complainant was to only sit for 30 minutes, not bend or twist more than 10 minutes an hour, and lift, carry, reach, push and pull only occasionally. Dr. Lewis testified that she determined how long patients, such as the Complainant, can sit, for example, by observation during her examination and from finding out what the patient can do at home.

123. Dr. Lewis believed that, without the surrounding noise and the distractions of the workplace, the Complainant was functioning much better. In her opinion, the Complainant

looked “well, happy and engaged”. The Complainant’s depression was much improved. In her opinion, it was time for the Complainant to return to work.

124. With respect to the Complainant’s functional limitations, Dr. Lewis also wrote on the form, “problems focusing in noisy, stressful work environments, functioning well independently”. Dr. Lewis testified that she wrote on the form “quiet, less distracting work environment would greatly benefit” because the Complainant had ongoing problems dealing with the work environment in the office.

125. Dr. Lewis was shown the accommodation letter that Norma Bennett wrote, dated February 20, 2012 to the Complainant, which purported to confirm the Respondent’s agreement to an accommodation plan based on the medical information from Dr. Lewis. Dr. Lewis testified that the content of the letter of February 20, 2012 was not consistent with her recommendations that the Complainant needed a quiet, less stressful work environment. The letter only referenced issues with sitting, bending, lifting, carrying, reaching and pulling. It did not address the recommendation, “a quiet, less distracting work environment would greatly benefit if able to accommodate”.

126. Dr. Lewis also testified that she intended that the restrictions she identified on all of the medical forms she submitted would be taken to be cumulative by the Respondent. Dr. Lewis testified that, based on the many years of medical documentation that she had provided to the Respondent, she believed that she had conveyed to the Respondent that the Complainant had improved when she was being returned to work and that she could improve, but that the Complainant would have a continuing problem with repetitive movement.

d) The Independent Medical Examinations

127. Commission counsel also relies upon the two independent medical examinations from Dr. Theriault and Dr. Bourke obtained by the Respondent after the Complainant ceased active duties in March 2012. Commission counsel points out that these reports were

obtained close in time to the events surrounding the Complainant's departure from work in March 2012 and are, therefore, reliable evidence respecting the Complainant's disabilities when she left.

128. Dr. Theriault's independent psychiatric report of May 11, 2012 records his diagnostic impression as follows:

> Axis I
> Cognitive disorder not otherwise specified
> Depressive disorder not otherwise specified
> Query somatoform disorder NOS
> Axis II
> No diagnosis
> Axis III
> Chronic pain
> Axis IV
> Moderate stressors, primarily related to work, recent separation
> Axis V
> Current GAF of 50

129. Dr. Theriault concluded that Ms. Wakeham has cognitive dysfunction. He concluded that "these cognitive difficulties with concentration, memory, and focus constitute the primary psychological condition impacting Ms. Wakeham's ability to attend work on a regular and consistent basis". Dr. Theriault further commented that:

> If she performed in her day to day work duties as she did on her mental status examination with me, she would be completely unable to attend to any of the cognitive requirements of her job... Ms. Wakeham, in my opinion, has significant cognitive difficulties. These would substantially impair her ability to perform most tasks of the Clerk III position which require any degree of attention or concentration.

130. The independent medical report of June 15, 2012 prepared by Dr. Kevin Bourke contains the following diagnoses:

1. Whiplash-Associated Disorder (WAD)
   - Cervical spine and right shoulder girdle
   - Grade I/II
   - Now a chronic/daily pain state
2. Greater occipital nerve irritation/entrapment
3. Autonomic dysfunction right hand NYD
   - Some features consistent with Chronic Regional Pain Syndrome (CRPS)
   - Radiation, autonomic changes, "glove" distribution of symptoms
   - Many typical features absent (e.g. – Allodynia, Hypesthesiae, Diaphoresis)
4. Chronic daily nausea NYD
5. Vitiligo – likely autoimmune/idiopathic
6. Ganglion cyst, right volar wrist
7. Lipoma, right AC joint
8. Consider somatization disorder for some symptoms?

131. Dr. Bourke concluded that the Complainant has a medical condition that impacts her ability to attend work on a regular and consistent basis. He opined that the Complainant's medical condition had impacted her ability to meet the physical and/or psychological demands of her position as a Clerk III. He wrote that her condition at the time of this examination would prevent her from successfully performing some or all of her tasks as a Clerk III. Dr. Bourke concluded that these impairments were likely permanent in nature.

132. Dr. Bourke recommended that certain medical restrictions and limitations be implemented in the Complainant's workplace. These included: no work at or above shoulder level; no repetitive upper extremity tasks; no upper extremity tasks requiring more than 5kg of force and then only intermittently; sedentary and light office tasks only; must be able to

vary physical posture at her own pace; and, no ladders, climbing, or working at heights. Dr. Bourke described the Complainant as having a chronic medical condition that may require frequent removal from the workplace for medical care.

e) Dr. Koshi's Evidence

133. Dr. Koshi's report of November 7, 2015 and his testimony were consistent. Accordingly, these reasons focus on the content of his written report.

134. As indicated, based on his area of specialization, namely rehabilitation of musculoskeletal and brain injuries, Dr. Koshi found no medical reason based on his file review to support the conclusion that the Complainant is disabled from working in her occupation. His file review included a review of the documentary evidence contained in the Certifications by Attending Physician and Fitness for Return to Work forms described in the preceding paragraphs of these reasons, the independent medical examinations of Dr. Theriault and Dr. Bourke and the Complainant's medical chart, which included Dr. Lewis's notes and the reports of other physicians, such as specialists to whom the Complainant was referred.

135. As indicated, Dr. Koshi concluded that no anatomical diagnosis has been found to explain the Complainant's "myriad" of symptoms. Dr. Koshi concludes that these symptoms are best explained by and are very typical of somatization. Dr. Koshi testified that the Complainant's disabilities were "all in her heart and soul". Dr. Koshi did not suggest that the Complainant was insincere or malingering.

136. Dr. Koshi defined somatization as "the tendency of an individual to communicate psychological and interpersonal problems in the form of bodily symptoms, for which they seek medical help". Dr. Koshi indicated that individuals with somatization often have numerous medical problems with many different organ systems within the body. They undergo diagnostic tests and imaging studies that are usually negative or consistent with

findings common to the general population. In his report, Dr. Koshi notes that such individuals are "even willing to undergo painful or risky tests and procedures in order to receive sympathy and special attention given to those who are truly ill". Dr. Koshi stated that persons with somatization have difficulty accepting that their symptoms have a psychological or psychiatric basis. It is considered "more socially acceptable to perceive their difficulties as physical problems". They are referred from physician to physician until "somebody finds something".

137. Dr. Koshi notes in his report that the Complainant has been seen by many specialists. Dr. Koshi concludes that, in the absence of a better diagnosis, the Complainant has been labelled with what he describes as "non-specific terms" rather than a diagnosis. These terms include "chronic pain syndrome", "strain and sprain", "environmental sensitivity", "post-concussion syndrome", "whiplash injury", etc. Dr. Koshi opined that conditions such as chronic whiplash, chronic fatigue syndrome, post-concussion syndrome, post-traumatic stress disorder, fibromyalgia and irritable bowel syndrome have symptoms but no physical findings.

138. Dr. Koshi specifies that individuals with somatization often receive numerous treatments and report benefit, yet continue to complain of pain and disability. Dr. Koshi wrote, "There is a psychological need to stay in the medical system. They become a professional patient".

139. I turn to Dr. Koshi's testimony that the two independent medical reports that he reviewed do not present evidence to support the view that the Complainant is disabled.

140. Dr. Koshi interpreted three conclusions in Dr. Theriault's report of May 2, 2012: 1) that the Complainant's cognitive problems did not appear to be secondary to depression; 2) that treatment of depression would not resolve the issue; and 3) that the Complainant's cognitive problems did not appear to be a function of anxiety. From this, Dr. Koshi concluded, "In other words, Dr. Theriault is telling us that, from his area of specialty, namely, psychiatry, there is no basis for disability".

141. Dr. Koshi disputes Dr. Theriault's conclusion that the Complainant had problems with cognition that prevented her from returning to work and disagrees with his diagnosis of post-concussion syndrome, arising from the incident when the Complainant struck her head. Dr. Koshi asserts that post-concussion syndrome is not the area of Dr. Theriault's specialty. Dr. Koshi says that the Complainant had symptoms that are expected after an episode of seizure. He testified that one cannot diagnose concussion based on symptoms that are attributed to seizure in the first place. Dr. Koshi further concludes that, on the basis of the data in medical literature, "a single and uncomplicated mild traumatic brain injury is associated with full recovery at three months". On this basis, Dr. Koshi concluded that Dr. Theriault was not able to provide any diagnoses that would lead the Complainant to be disabled on the basis of cognitive difficulties.

142. Dr. Theriault suggested in his report that the Complainant be referred to a program that specializes in somatization. Dr. Koshi highlights that this suggestion matches his own conclusion that the Complainant has somatization.

143. As explained above, Dr. Koshi also concluded that he could not determine any basis for disability after analyzing Dr. Bourke's diagnosis.

144. Dr. Bourke diagnosed Whiplash Associated Disorder (WAD) Grade I/II. Dr. Koshi states that this is not an anatomical diagnosis. Dr. Koshi wrote that this simply means that the head moved forward and backwards during the motor vehicle accident and that this movement may or may not cause damage. Dr. Koshi points out that Dr. Bourke does not indicate exactly what was damaged. Dr. Koshi further explains that this type of problem resolves in a short period of time in the majority of patients, often without treatment.

145. Dr. Koshi rejects Dr. Bourke's diagnosis of "chronic daily pain state". Dr. Koshi states that this is not an anatomical diagnosis, but rather simply means that a patient has complained of pain for more than three months. Dr. Koshi wrote, "One does not need to be a medical practitioner to figure this out". Dr. Koshi notes that Dr. Bourke does not

indicate what causes the pain, whereas an anatomical diagnosis points to an anatomical structure that causes the patient's pain.

146. In Dr. Koshi's opinion, chronic pain is not a diagnosis that would justify disability in any event. In his view, for a person to have no pain is unusual. Dr. Koshi cited various studies that indicate that many people live with pain. To illustrate, he referenced the following research:

> A gallop poll in 2011 found that 31% of US adults have chronic neck or back pain, 26% have knee or leg pain, and 18% have some other chronic pain. 47% of adults had at least one of these chronic pain problems. Just over 50% adult Americans have chronic pain. Another study found that 1/5 of the adult population reporting widespread pain, 1/3 reporting shoulder pain, and 1/2 reporting lower back pain in a one-month period. People live a good and productive life despite pain. Pain is not a basis for disability. (emphasis added)

147. Dr. Koshi notes that Dr. Bourke diagnosed greater occipital nerve irritation/entrapment which causes headaches. Dr. Koshi opines that headaches are common in patients with somatization. He concludes that headaches are not a basis for disability, as headaches are very common in the general population.

148. Dr. Bourke diagnosed autonomic dysfunction of the right hand, with the additional comment, "not yet diagnosed". Dr. Koshi is of the opinion that this diagnosis is not a feature of "complex regional pain syndrome" and "does not follow the neuroanatomy". He comments that this "cannot be explained by organic pathology". It is his opinion that this diagnosis is common in individuals with somatization.

149. Lastly, Dr. Koshi comments on Dr. Bourke's diagnosis of "chronic daily nausea, not yet diagnosed". Dr. Koshi's statement is, "I don't think any comment is needed here".

150. The above assessments of Dr. Bourke's report by Dr. Koshi form the basis of his conclusion that there is nothing in Dr. Bourke's report to support the existence of disability.

151. Further, Dr. Koshi concluded that Dr. Theriault's diagnosis and Dr. Bourke's findings contradicted each other. Dr. Koshi explained his conclusion on this basis:

> Dr. Theriault's diagnosis would not be in keeping with the myriad of physical (organic) diagnoses that Dr. Bourke listed in his Independent Medical Examination report of July 1, 2012. In other words, the two independent medical examinations, which seemed to be the basis for declaring Ms. Wakeham disabled, contradict each other.

152. Dr. Koshi next provided an opinion respecting Dr. Lewis's conclusion that the Complainant had "chronic pain syndrome". Dr. Koshi states, "... this is not an anatomical diagnosis. This is simply an abnormal behavior". Dr. Koshi defines chronic pain syndrome as "the experience of pain that appears in function and behavior to a degree that is disproportionate to the injury". Dr. Koshi refers to this as "pain behavior".

153. In general, Dr. Koshi disputes what he calls controversial and ambiguous pain syndromes. This includes chronic pain syndrome. Dr. Koshi quotes from Barsky and Borus, Functional Somatic Syndromes, Ann Intern Med., 1999, as support for these two conclusions:

- These syndromes generally lack characteristic clinical presentations or distinct symptom complexes. They all have remarkably similar symptoms that share two important characteristics: they are diffused, non-specific and ambiguous and are very prevalent in healthy, non-patient populations.

- Symptoms common to the Functional Somatic Syndromes include fatigue, weakness, sleep difficulties, headache, muscle aches and joint pain, problems with memory, attention and concentration, nausea and other gastrointestinal symptoms, anxiety, depression, irritability, palpitations and racing heart, shortness of breath, dizziness or light headedness, sore throat and dry mouth. All of these symptoms have a high incidence in general population.

154. Dr. Koshi further quotes from Barsky, Somatization and Medicalization in the Era of Managed Care, JAMA (1995):

- Fatigue, headache, back aches, stiffness, rashes, upper respiratory symptoms, diarrhea, and dizziness are common plays and are only rarely caused by serious disease. 86-95% of the general population experiences at least one symptom in given 2-4 week intervals, and the typical adult has at least one somatic symptom every 4-6 days. Studies have shown that 75-95% of these symptoms are managed outside the health care system and do not result in any medical consultation.

- Convinced that they are physically ill, somatizers characteristically deny that any psycho-social factors influence their symptoms, remain unreassured after appropriate examination has revealed no serious disease, resist physiatrist's referral, and are often refractory to conservation, palliative, and supportive medical management.

- Somatizing patients are disproportionately high users of medical services, laboratory investigations, and surgical procedures.

155. Dr. Koshi makes specific reference to the fact that the Complainant had been diagnosed in the past as having environmental illness. Dr. Koshi identifies environmental illness as another controversial diagnosis which is included in somatization syndromes. I infer from

his report and testimony that the previous diagnosis of environmental illness also confirms to Dr. Koshi that there is nothing physically wrong with the Complainant.

156. Dr. Koshi concludes that he is not able to identify any medical condition that would represent medical restriction based on risk related to the Complainant returning to the position of secretary or receptionist. Dr. Koshi defines medical restriction as arising when the physician believes that there is a risk of tissue damage or risk of loss of tissue integrity from performing a specific task.

157. With respect to Dr. Lewis's reports to the effect that the Complainant should not perform repetitive motions with her right arm and should sit for only limited periods of time, he wrote:

> ... (T)hese are not medical restrictions based on risk (what Ms. Wakeham should not do). They simply represent limitations, which are based on Ms. Wakeham's subjective complaints to Dr. Lewis. Otherwise, there is no way for Dr. Lewis to determine for how long an individual with chronic pain, but no anatomical diagnosis to explain it, should sit/stand or how many repetitive movements should be done.

158. With respect to the limitations that were identified by Dr. Bourke, such as Dr. Bourke's conclusion that the Complainant should not work at above shoulder level or perform repetitive movements of the upper extremity or do upper extremity tasks requiring more than 5 kg of force, Dr. Koshi concludes that non-specific right shoulder pain does not represent a medical restriction based on risk for performing these activities. He states that Dr. Bourke was unable to diagnose any anatomical shoulder pathologies to justify these limitations, such as rotator cuff tear, tendonitis or any other articular shoulder pathologies. Dr. Koshi questioned: "I do not know how he was able to determine that Ms. Wakeham should not lift more than 5 kg. I wonder why not 3 kg, or 7 kg?"

159. In relation to ergonomic recommendations respecting the worksite, Dr. Koshi concludes that, as Ms. Wakeham had somatization, "...it is unlikely that ergonomic implementation would have changed anything". He further noted that research does not support that ergonomics have any impact on pain and disability. He provided various examples of research from the medical literature to this effect. This includes a quote from Melbourne, AMA Guidelines to the Evaluation of Disease and Injury Causation 2nd edition, 2013, that "There is insufficient evidence to relate neck pain to the following: heavy physical work, neck posture, prolonged sedentary position."

160. Dr. Koshi concludes that, on the basis of the medical literature, "social barriers, such as job dissatisfaction, affect prognosis for returning to work more than physical barriers such as pain". Dr. Koshi concludes that Ms. Wakeham presents with job dissatisfaction. In support of this conclusion, Dr. Koshi references a quote from Dr. Lewis's report of January 18, 1997. The Complainant is reported to have stated that she "is looking forward to being laid off in summer because she gets no enjoyment out of work". Dr. Koshi quotes from additional literature related to disability and job dissatisfaction including the conclusion that, "Job dissatisfaction seems to be the strongest independent variable for disability."

161. Dr. Koshi was also asked by the Respondent to offer an opinion on the question of whether it was reasonable for Dr. Lewis to continue to send Ms. Wakeham back to work. Dr. Koshi expressed the view that it was appropriate for Dr. Lewis to send the Complainant back to work on the basis that employment can be a distraction and provide pain relief.

f) Dr. Lewis's Response to Dr. Koshi's Report

162. Dr. Lewis testified that she disagrees with Dr. Koshi's opinion that there is no medical diagnosis to support her conclusion that the Complainant was disabled. Dr. Lewis testified that, in her practice, she is guided by what the patient tells her about their

symptomology. She further testified that, "if you cannot find an organic cause, as a physician, you still have a pain system that you are trying to treat".

163. Dr. Lewis was referred to the paragraph in Dr. Koshi's report referenced above, which I will repeat for case of reference:

> Dr. Lewis issued numerous reports advising that Ms. Wakeham should not perform repetitive motions with the right arm, should sit for certain periods of time, etc. However, these are not medical restrictions based on risk (what Ms. Wakeham should not do). They simply represent limitations, which are based on Ms. Wakeham's subjective complaints to Dr. Lewis. Otherwise, there is no way for Dr. Lewis to determine for how long an individual with chronic pain, but no anatomical diagnosis to explain it, should sit/stand or how many repetitive movements should be done.

Dr. Lewis agreed that the information she provided to the Respondent that indicated that the Complainant should not do repetitive motions with her right hand or could only sit for certain periods of time was based on her questions of the Complainant. She also testified that they were based on her examinations of the Complainant.

164. Dr. Lewis testified that she can diagnose somatization in patients, but that she does not tend to make that diagnosis when she suspects it. She testified that, if you do not believe what a patient tells you because you think that it is all in their head, you could easily make a medical error. Dr. Lewis had not diagnosed the Complainant with somatization. Dr. Lewis also maintains that, in employing the "SOAP" methodology in her medical practice, which includes the subjective assessment of the patient, she is practicing in conformity with established medical practice.

165. Dr. Lewis was referred to the following comment in Dr. Koshi's report:

> They are referred from one medical practitioner to another, until "somebody finds something", usually a conditions [sic] that have symptoms but no physical findings such as chronic whiplash, chronic fatigue syndrome, post concussion syndrome, post-traumatic stress disorder, fibromyalgia, irritable bowel syndrome, etc.

166. Dr. Lewis testified that she believed that Dr. Koshi was referring to things like post-traumatic stress disorder, where patients report complaints about symptoms like pain, confusion and nightmares. However, on physical examination, the physician does not find anything specific. Dr. Lewis commented that from his report, it appeared that Dr. Koshi did not believe in post-traumatic stress disorder.

167. Dr. Lewis was asked about Dr. Koshi's comment in his report that, "The family physician notes continuously mentioned 'Chronic Pain Syndrome.' Again, this is not an anatomical diagnosis. This is simply abnormal behavior." Dr. Lewis responded that other physicians have different opinions about chronic pain than Dr. Koshi. She testified that some physicians do not believe in the idea of chronic pain syndrome. She also testified that conditions like chronic pain syndrome are treated with drugs and modalities. Some patients improve and go back to leading full, productive lives. She testified that Dr. Koshi teaches this in his teaching role as a physiatrist.

168. Dr. Lewis disagreed with Dr. Koshi's conclusion that, because the Complainant has somatization, it is unlikely that ergonomic implementations in her workplace would have changed anything. Dr. Lewis testified that, as a family physician, she has found that ergonomics in the workplace can have an impact on pain and disability.

169. Dr. Lewis acknowledged that the Complainant had been seen by a number of specialists. She testified that, in most instances, these were at her referral. She also testified that for a period of time, she had a locum covering her practice. When she returned, she was "a

little horrified" at how many specialists the locum had referred the Complainant to for overlapping problems.

170. Dr. Lewis testified that, in her experience, the Complainant did not convey a need to be seen as ill or injured. Dr. Lewis testified that the Complainant never wanted to be ill and was always excited when she was feeling better. Dr. Lewis testified that it was her impression that the Complainant did not receive a lot of sympathy for being ill. She offered that the Complainant was not in her office every week as some patients are. She opined that Dr. Koshi's characterization of a "professional patient" does not apply to the Complainant.

171. With respect to Dr. Koshi's conclusion that Ms. Wakeham presents with job dissatisfaction, Dr. Lewis commented, "I do not know where he got job dissatisfaction from in relation to Ms. Wakeham". Dr. Lewis expressed the opinion that she is "not sure that applies to this case".

172. Dr. Lewis expressed the opinion that Dr. Koshi's summary of Dr. Bourke's findings does not match Dr. Bourke's report. Dr. Lewis noted that Dr. Bourke examined the Complainant, but that Dr. Koshi did not. Dr. Lewis pointed out that other physicians who examined the Complainant were of the opinion that she could not work.

173. Dr. Lewis was asked if she would defer to the opinion of a physiatrist. She responded, "It's hard to know". Dr. Lewis acknowledged that she would use a physiatrist if she could access such advice.

174. Counsel for the Respondent suggested to Dr. Lewis that independent medical examinations are sought because an employer is trying to obtain an opinion that is independent of any relationship with the patient. Dr. Lewis denied giving testimony as an advocate for the Complainant and testified that her intent was to be objective.

175. Dr. Lewis also testified to potential problems that could affect the objectivity or reliability of a non-treating physician's opinion. Dr. Lewis testified that an independent medical examination gives a snapshot of that day's evaluation of the patient, the implication being that this would be less reliable than an opinion based on multiple examinations. Dr. Lewis also questioned whether independent medical examinations are truly objective, given that the physician is chosen by the employer, or, for example, by WCB, and may be employed or paid by them. She implied that being reliant on an employer for compensation for the preparation of a medical examination may also theoretically compromise their objectivity.

(v) Further Submissions of the Parties Respecting the Medical Evidence

176. Counsel for the Respondent suggested that the difficulty with any evidence offered by the Complainant's physicians is that they have a therapeutic relationship with the Complainant; hence, they may act as an advocate for the Complainant.

177. Counsel for the Respondent submits that Dr. Koshi is truly objective and that Dr. Koshi's conclusion that he was "unable to identify any medical condition that would represent medical restriction based on risk for returning to the positon of secretary or receptionist" should be preferred. The Respondent relies upon Dr. Koshi's definition of "restriction" in his report on page 16:

> Please note that 'restriction' is defined as something a person should not do as it may delay recovery and cause injury or illness to recur, or endanger that person or others. Restriction is something a person can do (eg: as shown in FCE) but should not do.
>
> ...
>
> A medical restriction is placed on the performance of a physical task or activity when the physician believes there is *risk* of tissue damage or loss of tissue integrity, if the individual performs that specific task or activity.

> This determination is based on the medical diagnosis (which is based on history and physical examination), the available medical literature and the physician's clinical experience. (emphasis added)

178. Counsel for the Respondent submits that Dr. Koshi correctly defines a restriction as something a person should not do because it will cause physical harm to the person. The Respondent asserts that what the Complainant had instead were "limitations" and that, as defined by Dr. Koshi, limitations are things that a person thinks they cannot do.

179. Counsel for the Respondent submits that the accommodations that the family physician requested were not based on actual restrictions, but were based on the Complainant's subjective impressions of her limitations. They were not based on what the Complainant could or could not do. Respondent counsel asserts that any requests for accommodations from the Complainant were never based on an anatomical finding or a true physical restriction. Counsel asserts that Dr. Lewis was offering suggestions for accommodation as a placebo, that, in effect, the family doctor was telling the Complainant to work through the pain and that going to work would be good for her. Essentially, the crux of the Respondent's position on this issue is that the accommodation requests were all "smoke and mirrors."

180. Counsel for the Respondent acknowledged that, at the time of the events in issue in this complaint, the Respondent did not know that the requests for accommodation were all "smoke and mirrors." The Respondent believed that it had valid requests that the Complainant be accommodated in the years over which she made attempts to return to work, prior to her last return in February 2012. Similarly, when the Complainant returned to work in February 2012, the Respondent believed that it should seek out information respecting any need for accommodation vis-à-vis attending physician forms. However, the Respondent submits that, on the facts, the Complainant did not have a physical disability at the time material to this complaint.

181. Counsel for the Commission submits that the definition of disability under the *Act* does not require there to be a medical diagnosis in order for a disability to exist. Specifically, section 3 (l) of the *Act* provides the following definition of physical disability or mental disability:

> 3(l) "physical disability or mental disability" means an actual or perceived
>
> (i) loss or abnormality of psychological, physiological or anatomical structure or function,
>
> (ii) restriction or lack of ability to perform an activity,
>
> (iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,
>
> (iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (v) condition of being mentally impaired,
>
> (vi) mental disorder, or
>
> (vii) dependency on drugs or alcohol....
>
> ...

182. Counsel for the Commission emphasizes that the definition of disability in the *Act* includes, in subparagraph (ii) above, a "restriction or lack of ability to perform an activity". Commission counsel submits the Complainant need not show that she has an organic disease of some type in order to meet the definition of physical disability in the *Act.* The Complainant need only establish that she has a functional restriction or lack of ability to perform an activity. Counsel submits that the Complainant's physician made it very clear

that the Complainant had physical restrictions when she planned to return to work in February 2012.

183. Commission counsel submits that Dr. Koshi's definition of restriction is out of sync with the jurisprudence on this issue, including decisions of the Supreme Court of Canada. Counsel references *Tran v. Canada Revenue Agency,* 2010 CHRT 31 (CanLII) as an example.

184. Commission counsel submits that, at the relevant time, it was not in dispute that the Complainant suffered from a physical disability. Counsel submits that the Respondent never took the position that the Complainant had somatization at the time, and, while counsel clarified that she was not suggesting that the Respondent had waived its right to argue that there was no disability, counsel submits that it appears on the evidence that the Respondent thought that the Complainant had a disability.

185. Counsel for the Commission submits that the Respondent's actions should be assessed based on the medical evidence that the Respondent had at the time. Counsel submits that there was consistent evidence from the family physician, Dr. Lewis, that the Complainant had chronic pain. Counsel submits that Dr. Lewis's evidence respecting the Complainant's disabilities was unchanged on cross-examination. Counsel submits that Dr. Lewis's evidence was confirmed by Dr. Bourke's diagnosis of "Whiplash-Associated Disorder", described in his report as involving cervical spine and right shoulder girdle, "now a chronic/daily pain state", as well as occipital nerve irritation and autonomic dysfunction of the right hand.

186. Commission counsel submits that the evidence of Dr. Lewis, Dr. Theriault and Dr. Bourke that the Complainant suffered from chronic pain is very consistent and that Dr. Theriault also diagnosed chronic pain when he did his independent medical assessment for the employer in May 2012. Counsel submits that the evidence that the Complainant suffered from chronic pain is overwhelming.

187. Commission counsel submits that when Dr. Koshi testified that "it was all in her heart and soul", he meant that it was "all in her head". Commission counsel submits, however, that Dr. Koshi cannot rule out that the Complainant feels pain. Counsel emphasized that Dr. Koshi did not testify to this effect and could not give evidence that Ms. Wakeham is not in pain, only that he could not find an organic cause from his review of her file.

188. Commission counsel submits that Dr. Koshi simply does not believe in chronic pain and that Dr. Koshi holds views that are not held by the other medical experts. Counsel submits that clearly, Dr. Lewis, Dr. Theriault, and Dr. Bourke do not agree with Dr. Koshi and believe that chronic pain is a legitimate physical disability.

189. Counsel submits that Dr. Koshi was incorrect to refer to Ms. Wakeham as a professional patient. Counsel submits that it is surprising that Dr. Koshi would testify that Ms. Wakeham has a psychological need to stay in the medical system when he has never spoken to her. Counsel submits that Dr. Koshi should not be relying upon a note from the family physician's chart in 1997 to support his conclusion that Ms. Wakeham's "disability" in 2012 is primarily that of job dissatisfaction.

190. Commission counsel acknowledged that Ms. Wakeham made a comment during her testimony that the workplace was, "like a goddamn concentration camp" and that this would indicate job dissatisfaction. However, counsel submits that this is not the information that Dr. Koshi based his report upon when he reached the conclusion that the Complainant was dissatisfied with her job. Counsel for the Commission submits that the evidence is that Ms. Wakeham actually loved her job, but did not enjoy being in physical pain from being required to perform repetitive tasks by reason of the Respondent's failure to accommodate her functional limitations.

(vi) Analysis: Was the Complainant Perceived to Have a Physical Disability?

191. At the time of the events involved in this complaint, the vast majority of the information the Respondent had came from the Complainant's family physician, Dr. Lewis. Dr. Theriault and Dr. Bourke's reports had not yet been obtained by the Respondent when

the Complainant returned to work in February 2012. Dr. Koshi's report did not come into existence until three and a half years later.

192. In my view, the Respondent's actions and the issue of whether or not discrimination occurred is required to be determined on the basis of what the individuals involved in this matter knew, believed or perceived at the time the events occurred. Fairness requires that the test of discrimination be applied to factual "reality" as that was perceived by the parties at the time.

193. This is also required by the *Act*. The definition of discrimination in section 4 of the *Act* provides that even the perception that certain characteristics exist can lead to a finding of discrimination. Section 4 states:

> For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic (emphasis added)...

Accordingly, the definition of physical disability and mental disability in the *Act* includes both an actual or perceived restriction or lack of ability to perform an activity. There are historical, policy-based reasons for including "perception" in the definition of discrimination. These reasons are detailed in case law that I will not include in these reasons, as the parties did not refer to legal authorities in their submissions on this point.

194. The Respondent has acknowledged that its actions over many years in attempting to accommodate the Complainant were based on its belief that the Complainant had a physical disability arising from her two motor vehicle accidents. The Respondent has acknowledged that it perceived that the Complainant had a physical disability when she returned to work in February 2012. On this basis, I have no difficulty in finding that the Complainant was perceived by the Respondent to have the protected characteristic of physical disability. However, had this not been acknowledged by the Respondent, I would have made a finding to this effect based on the evidence.

195. Considered as a collective body of evidence, it is more likely than not that the medical forms obtained by the Respondent led it to believe that the Complainant had both physical and mental disabilities over a long time period that did not completely resolve. The Respondent acted upon this information and conducted itself as if the Complainant had both physical and mental disabilities.

196. For example, the letter that Ms. Bennett wrote to the Complainant placing her on an attendance management plan is clear evidence that the Respondent believed that Ms. Wakeham had a disability, as the letter includes a list of the Respondent's attempts to accommodate the Complainant's medical issues since 2008. Many, if not most of these accommodations, appear to relate to physical disability.

197. As a perceived disability will suffice for purposes of the *Act*, it would not normally be necessary to determine whether the Complainant was actually physically disabled. However, the Respondent submits that the Complainant did not, in reality, have a physical disability, but rather had somatization. Key components of the Respondent's defence are dependent upon the factual premise that the Complainant has somatization. As well, the Commission and the Complainant take the position that the Complainant has a physical disability. Accordingly, I will address the medical evidence further to determine whether the Complainant did, in fact, have a physical disability or whether she had somatization.

(vii) Analysis: Did the Complainant Have a Physical Disability or Somatization?

198. Primarily, there is a dispute on the evidence between Drs. Lewis and Bourke, who concluded that the Complainant had a physical disability, and Dr. Koshi, who concluded that the Complainant had somatization and is not disabled at all. I am, therefore, required to determine whose opinion I accept and to what extent, by determining how much weight to place upon the conflicting evidence in this regard.

199. For the reasons below, I conclude that the Complainant has established, as part of her *prima facie* case, that she has a physical disability. I am not persuaded on the basis of the evidence that the Complainant's physical symptoms and restrictions are the result of somatization. If I am incorrect, I conclude, in the alternative, that somatization may play a role in her medical picture. However, it does not account for all of her symptoms or dislodge the probability of the existence of physical disability.

200. This finding is, in part, based upon my conclusion that I should not place much weight upon the evidence of Dr. Koshi. I prefer the evidence of Dr. Lewis.

201. Dr. Lewis is a credible witness. I found her to be balanced in her opinions. She was respectful of differing views and offered reasonable rationales for having reached the conclusions that she did about the Complainant's health. This includes her reasons for declining, in this case, to diagnose the Complainant as having somatization, which are reasonable. To be clear, her evidence was not definitively to the effect that she would have diagnosed that the Complainant had somatization but for those reasons, or that if she had, somatization would account for all of her symptoms.

202. I accept Dr. Lewis's evidence that the Complainant has a physical disability of chronic right neck and shoulder pain of a musculoskeletal nature as confirmed on the Certification by Attending Physician form that Dr. Lewis completed on February 14, 2012 in anticipation of the Complainant's return to work on February 20, 2012. Dr. Lewis also confirmed that the Complainant suffered from depression at that time. Both disabilities were identified by Dr. Lewis as requiring accommodations at work. The significant amount of medical evidence from Dr. Lewis, pre-dating the Complainant's return to work in February 2012, provides context for and corroboration of the Complainant's assertion that her disabilities, including the physical aspects of those disabilities, had been continuing for years since her motor vehicle accidents in 1999 and 2005. I accept Dr. Lewis's opinion to this same effect and place significant weight upon it.

203. I acknowledge that the Respondent has concerns respecting the objectivity of Dr. Lewis's evidence as the Complainant's treating physician for many years. There are situations where physicians become their patient's advocate to an extent that their conclusions may be seriously challenged based on subjectivity and blanket acceptance of whatever information the patient provides respecting their symptomatology. However, Dr. Lewis impressed me as a witness who held to her views based upon her own conclusions, her own experience and what she considers to be sound medical practice.

204. I also acknowledge the Respondent's concern that Dr. Lewis was required to rely fairly heavily upon the Complainant's subjective reports respecting her health. However, the SOAP approach is accepted traditional medical practice. SOAP requires that subjective information be gathered from the patient. While it includes obtaining subjective information from the patient, it requires objective assessment by the physician. The patient may be entirely wrong.

205. It is apparent from Dr. Lewis's testimony that what the Complainant reported to her subjectively made sense objectively to Dr. Lewis. It is also my assessment, based on Dr. Lewis's demeanor and testimony, that she would not knowingly allow herself to be used by a patient. Dr. Lewis did not doubt the sincerity or integrity of the Complainant in listening to her accounts of her symptomatology. Dr. Lewis had known the Complainant for many years. It was reasonable for her to form her own opinion respecting the reliability of the information she received from the Complainant and to proceed on the basis that the Complainant had a legitimate pain syndrome that required treatment. Further, while Dr. Lewis accepted information from the Complainant respecting the Complainant's subjective understanding of her symptomology, she also drew upon her own observations of the Complainant during their office visits and her physical examinations of the Complainant. She made her own assessment. I had no sense from observing the questioning of Dr. Lewis by the Complainant, or otherwise at the hearing, that the Complainant was "driving the bus", so to speak respecting Dr. Lewis's conclusions about her health. I do not believe that Dr. Lewis allowed the Complainant to form her medical opinion.

206. Further, there is currently no scientific means to measure pain so as to fully understand the nature and extent of pain experienced by another person. This construct by necessity requires the objective assessment by the physician of the subjective reporting by a patient.

207. Dr. Lewis sought other expert opinions. She referred the Complainant for treatment from other healthcare professionals and to specialists for further assessment. I have not detailed those referrals in these reasons. However, they were objectively reasonable and not excessive. Dr. Lewis herself expressed concern over over-lapping referrals that were made by her replacement while she was temporarily away from her practice.

208. The existence of physical disabilities was also corroborated after the fact by the independent medical report of Dr. Bourke. His diagnoses included "whiplash-associated disorder involving the cervical spine" and "right shoulder girdle, grade 1/11", which Dr. Bourke described as "now a chronic daily pain state".

209. Dr. Theriault's diagnoses included cognitive disorder and depressive disorder "not otherwise specified", but also corroborated the existence of chronic pain.

210. I have placed weight on the evidence offered through the medical reports of Drs. Bourke and Theriault to the effect that the Complainant suffers from disabilities that include the physical disability of chronic pain. I agree with the Respondent that it would have been preferable to have heard their testimony. However, this Board has been granted significant flexibility in the *Act* in relation to what it may consider as evidence. Specifically, section 7 of the *Boards of Inquiry Regulations* permits the Board to consider evidence that would not be admissible in a court of law. In this regard, medical reports have been relied upon by this Board in the past where the physicians themselves have not been called as witnesses: *Nova Scotia Liquor Corporation. v. Nova Scotia (Board of Inquiry)* 2016 NSCA 28, paras 66-68.

211. Ms. Milner-Clerk, the psychologist, also confirmed that the Complainant suffered from chronic pain as part of her overall health status. The majority of the medical evidence, therefore, supports this finding.

212. As well, the Complainant gave evidence respecting her subjective understanding of her own disabilities and her experience of chronic pain. Based on my assessment of her as a witness, I do not doubt that she has chronic pain. I believe that her chronic pain fluctuates, but impacts her health significantly.

213. To some extent, the fact that the Complainant is in receipt of long-term disability also corroborates that she suffers from a physical disability. The Complainant applied for long-term disability benefits in March 2012. Her application for these benefits was in evidence. The application confirms that both the Complainant and Dr. Lewis identified that the Complainant's disability involved both physical and mental elements. The long-term disability insurer was satisfied on the basis of the information it received that the Complainant was disabled and qualified her for long-term disability benefits.

214. Dr. Koshi's opinion that the Complainant has somatization does not go so far as to assert that the Complainant does not experience pain. His evidence, therefore, does not fully contradict the medical conclusions of Drs. Lewis and Bourke that the Complainant has chronic pain.

215. Dr. Koshi does not believe that the Complainant has a physical disability for two reasons:1) because no underlying anatomical cause has been found for the Complainant's chronic pain; and 2) because Dr. Koshi does not accept that chronic pain, without an identifiable underlying cause, is a physical disability. Chronic pain is, in his view, a dubious diagnosis to begin with.

216. Does the fact that there may be no underlying anatomical cause for the Complainant's chronic pain mean that she does not have chronic pain? The Complainant had two motor vehicle accidents, one in 1999, that was subsequently followed by a three-year absence

from work, and a second in 2005. She has been described as having a long and complicated medical history by Dr. Theriault. I expect that most physicians would describe her case as such.

217. A long, complicated medical history can make it difficult to identify the cause of chronic symptoms. Medical science has its limits. The medical profession has its limits. There is a difference between a conclusion that no underlying anatomical cause exists for the Complainant's symptoms and a conclusion that no anatomical cause has been found for these symptoms. Dr. Koshi cannot with fairness state conclusively that there is no underlying anatomical cause for the Complainant's symptoms in this case. He did not examine the Complainant to try to find an underlying cause. Dr. Koshi acknowledged in his testimony that, with respect to testing, "it's a good idea to be able to do it myself". Dr. Koshi did not have an opportunity to conduct any tests of the Complainant. He simply reviewed her extensive medical dossier. If, in his opinion, none of the previous physicians identified the cause of the Complainant's chronic pain, that does not necessarily mean that there is no cause for her pain, or that her pain is not real. All that Dr. Koshi can fairly testify to is his opinion that no anatomical cause for chronic pain has been found.

218. In any event, I am not persuaded that there is no underlying anatomical cause for the Complainant's chronic pain on examination of the evidence. When the Complainant was examined by Dr. Bourke in 2012, he found that the Complainant had three physical medical conditions that impacted her ability to work. The first, whiplash disorder involving the cervical spine and right shoulder girdle, was the most active and limiting. Dr. Koshi disputes Dr. Bourke's diagnosis of whiplash associated disorder because Dr. Bourke did not record in the diagnosis section of his report exactly what was damaged. However, Dr. Bourke recorded physical findings in his report, specifically current restrictions in movement and pain in relation to areas of the Complainant's body. Dr. Bourke made observations during his examination of the Complainant's active ranges of motion in her shoulders and lumbar spine and noted that her symptoms were "reportedly exacerbated by even minimal repetitive or strenuous use of the upper extremeities and/or neck". Dr. Bourke appears to have not doubted this information.

219. Dr. Lewis pointed out in her testimony that she found color differences between the Complainant's right and left arm and hands. Dr. Lewis noted that Dr. Bourke likewise found a colour difference between the Complainant's right arm and her left when he first examined her. This is recorded in the initial examination section of Dr. Bourke's report.

220. Dr. Koshi discounts Dr. Bourke's diagnois of whiplash associated disorder on the basis that whiplash associated disorder resolves in a short period of time in the majority of individuals, often without treatment. That may well be the case for the majority of patients. However, it does not lead to the conclusion that such injuries resolve in a short period of time for everyone and that they did in the Complainant's case.

221. Dr. Bourke also diagnosed greater occipital nerve irritation/entrapment. Dr. Koshi disputes that headaches are disabling. His comment is not a basis to dispute Dr. Bourke's underlying diagnosis. Further, while Dr. Koshi concludes that headaches are common in the general population and are not a basis for disability, he does not relate this opinion to the Complainant's personal experience.

222. Dr. Koshi questions how Dr. Bourke could make a diagnosis of autonomic dysfunction of the right hand and then describe this as "not yet diagnosed". The probable explanation is that Dr. Bourke was recording that he diagnosed a dysfunction of the right hand. He was being careful to state in his report that the underlying reason was not yet diagnosed, nothing more. Dr. Bouke recommended follow up. In my view, Dr. Koshi is unfairly dismissive of Dr. Bourke's finding.

223. After having the Complainant perform various movements during his examination, Dr. Bourke subsequently observed that the Complainant's right hand became, as noted in his report, "violaceous, dramatically different from the left without postural or other external cause". He found by examination that the right hand was significantly cooler than the left. The Complainant had reported to Dr. Bourke earlier in the assessment that her right hand would turn purple and cold. Dr. Bourke had originally noted in his report that that there was no documentation in the Complainant's medical records of assessment showing such

an exacerbation. I infer from this that Dr. Bourke wondered about lack of documentation of direct observation and assessment of this symptom until he witnessed the changes to the Complainant's right hand himself. Having then observed this event, he recommended specific assessment and included it in his diagnosis. I do not see a basis for Dr. Koshi to discount that this occurred or to question Dr. Bourke's inclusion of this in his diagnosis.

224. Dr. Bourke was not able to follow up with the Complainant because she had become agitated, nauseous and left his office. He recommended that, "Given the lack of documentation around her right upper extremity autonomic changes, specific assessment by a physician skilled in CRPS (chronic-regional pain syndrome) might be worthwhile". I believe that Dr. Bourke was saying that he could not diagnose the cause of what he observed, but that someone with more specific expertise might be able to do so.

225. Dr. Koshi is likewise dismissive of Dr. Bourke's diagnosis of "chronic daily pain state", stating "One does not need to be a medical practitioner to figure this out". Dr. Koshi is dismissive because in his view, "an anatomical diagnosis pinpoints an anatomical structure that causes the pain". In my view, this is a definition of an anatomical diagnosis. This is a restricted definition of diagnosis.

226. Dr. Koshi's, at times, unnecessary criticism of Dr. Bourke extends to Dr. Bourke's notation that the Complainant had chronic daily nausea that was not yet diagnosed. Dr. Koshi wrote, "I don't think any comment is needed here". Comments of this nature are consistent with an attempt to not only disagree with Dr. Bourke but to discredit the medical judgement in his report.

227. Dr. Koshi opines that chronic pain "is not a diagnosis to justify disability". He states that "pain is not a basis for disability". This is a broad generalization. It is inconsistent with other medical opinions in evidence that significant chronic pain can, in some people, be disabling, depending on the extent and nature of the pain. Dr. Koshi's generalization does not address the evidence that chronically experienced pain has been disabling at times for the Complainant.

228. Leaving aside the issue of chronic pain, Dr. Koshi also appears to have assumed that, because Dr. Theriault mentioned post-concussion syndrome, his diagnosis is that the Complainant's cognitive difficulties are related to post-concussion syndrome. This does not appear to be an accurate reflection of what Dr. Theriault wrote in his report.

229. Dr. Theriault did not conclude that the cognitive difficulties were post-concussion syndrome. There are notations in the documentary evidence dating back for years prior to the Complainant's concussion in 2010 of symptoms such as poor concentration and problems completing tasks and sentences. The Certification by Attending Physician form of June 25, 2001 is an example. This confirms that the Complainant's cognitive difficulties pre-dated any post-concussion syndrome.

230. Dr. Koshi's assertion that Dr. Theriault is wrong to diagnose post-concussion syndrome also appears questionable. Dr. Koshi states that the Complainant had symptoms to be expected after a seizure and that one cannot diagnose concussion based on symptoms that are attributed to seizures in the first place. The Discharge Summary Report that Dr. Lewis prepared of March 29, 2010 records that the Complainant's "neurological exam was consistent with a concussion, scalp laceration". Dr. Koshi had this document available for his review. He does not explain why he concludes that the complainant had a seizure and fell when it appears that she fell for an unknown reason, struck her head and had symptoms of seizure as a result.

231. Dr. Theriault concluded that the Complainant's cognitive difficulties did not appear to be secondary to depression or a function of anxiety. Dr. Koshi interprets Dr. Theriault's report and concludes that Dr. Theriault is really saying that on the basis of psychiatry there is no basis for disability. In my view, all that Dr. Theriault was saying in this regard was that the Complainant's cognitive difficulties were caused by or related to something other than depression or anxiety.

232. Dr. Theriault concluded that the Complainant is disabled. Dr. Koshi does not reconcile his interpretation of Dr. Theriault's report, namely, that on the basis of psychiatry there is no basis for disability, with Dr. Theriault's contrary conclusion. In my view, Dr. Theriault's contrary conclusion is best explained by his assessment of the extent of the Complainant's cognitive difficulties.

233. I turn to Dr. Koshi's conclusion that the Complainant has job dissatisfaction. He is of the view that job dissatisfaction effected her prognosis for return to work more than pain. At the time he prepared his report, his sole basis for this conclusion is a comment taken from Dr. Lewis's file from a 1997 report, namely that the Complainant was looking forward to being laid off in the summer because she gets no enjoyment out of work. Respondent counsel also referenced the Complainant's criticism of the workplace during the hearing that "the place was like a concentration camp". However, Dr. Koshi did not have that information at the time he wrote his report.

234. The Complainant's negative comment about the workplace was made in a hearing after she perceived that the employment relationship had failed. There is no evidence of any pattern of the Complainant being reluctant to return to work after 1997 when she attempted to return to work. Dr. Lewis testified that the Complainant usually had a positive attitude about going back to work. The psychologist's letter of November 1, 2010, notes that the Complainant "is very motivated to return to regular full-time duties". Dr. Koshi had this report, but did not take this observation into account in his report. There is more evidence that the Complainant wanted to return to work than evidence that she did not. I cannot accept Dr. Koshi's opinion that the Complainant had job dissatisfaction to an extent that it affected her progress for return to work more than pain.

235. I turn to Dr. Koshi's conclusion that the two independent medical examination reports contradict one another. I have carefully reviewed these reports. I cannot identify a basis for concluding that the two reports contradict one another in any significant way. These reports were prepared by two different types of health care providers. They were asked to assess two different things, one psychiatric and the other physical. It is not surprising that

they focus on different issues and symptoms. Dr. Koshi does not acknowledge this construct and, therefore, his conclusion that these reports contradict one another appears disingenuous. I infer that his opinion that these reports contradict one another was voiced to lessen confidence in the accuracy of both of these reports, in support of his own views.

236. Dr. Koshi describes the Complainant as someone who "presents with numerous non-specific and ill-defined complaints that are common in the general population". Dr. Koshi does not acknowledge that the Complainant also presents with consistent reports of physical pain in the cervical spine and shoulder. He does not acknowledge that cognitive difficulties may play a role in her subjective descriptions of her symptoms or be an ongoing problem. He discounts that, during his examination, Dr. Bourke observed what appears to have been a noticeable physical change in the Complainant's right hand, consistent with her reports that this was an ongoing physical problem. Dr. Koshi suggests that autonomic dysfunction of the right hand is common in patients with somatization. However, he offered no medical authority beyond his own opinion in support of this.

237. Dr. Koshi writes that people live productive lives despite being in pain. He cites studies that found that many people have some type of chronic pain and continue to work. As a generalized statement, I am prepared to accept that it is true. Arguably, for those periods of time when the Complainant did attend work, she fell into the same category as the individuals canvassed in the studies cited by Dr. Koshi. However, there is no evidence that all people who suffer from chronic pain are able to work.

238. While not stated directly in his evidence, it is apparent that Dr. Koshi does not believe that chronic pain syndrome, strain and sprain, environmental sensitivity, post-concussion syndrome and whiplash injury are diagnoses. He refers to controversial and ambiguous pain syndromes and quotes from the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition's definition of "unrateable pain" which "...includes controversial and ambiguous pain syndromes that cannot be related to a well-established medical condition and are not widely accepted by physicians as having a

well-defined pathophysiological basis such as 'chronic pain syndrome', 'fibromyalgia', and 'myofascial pain syndrome'". Dr. Koshi refers to the use of these words as "labelling the Complainant with non-specific terms".

239. The suggestion that the Complainant has been labelled with non-specific terms would, by inference, include the following diagnoses reached by physicians other than Dr. Lewis and Dr. Bourke in the medical documentation that was reviewed by Dr. Koshi:

- Dr. Short's diagnosis that the Complainant suffered a cervical lumbosacral "muscle strain or sprain" related to that accident in a report dated August 31, 2000;
- A report by Dr. King of November 30, 2000, which notes "myofascial pain syndrome";
- A report of "chronic pain syndrome" pre-dating the second motor vehicle accident dated October 11, 2005;
- A report by Dr. Kanalac of July 31, 2006 who diagnosed "cervical strain, whiplash associated disorder" Grade 1, trapezius strain, lumbar strain, and mechanical lower back pain also following the second MVA.

240. Dr. Koshi does not acknowledge that other physicians do recognize these terms as a diagnosis. On the evidence before me, I cannot conclude that these diagnoses are "not widely accepted by physicians" as quoted by Dr. Koshi. This contributes to an impression of advocacy by Dr. Koshi in the expression of his opinion.

241. It is Dr. Koshi's opinion that medical research does not show that ergonomics in the workplace has any impact on pain and disability. He cites three studies to support his assertion. However, other physicians have different opinions, including Dr. Lewis. I find it difficult to accept that there are no medical studies supporting the benefits of ergonomics in the workplace to help address pain and disability. A more balanced report would acknowledge that different opinions exist.

242. Dr. Koshi diagnosed the Complainant with somatization based upon his conclusion that the Complainant has many or most of the signs of somatization. A component of the diagnosis of somatization is that the patient seeks medical help. Dr. Koshi notes that the Complainant has seen a lot of specialists. However, Dr. Koshi is not aware of the circumstances of those referrals.

243. Dr. Lewis testified that the Complainant was not in her office all the time and was not, in her opinion, a professional patient. There is no evidence that the Complainant requested or insisted that she see all or most of the specialists to whom she was referred; rather, most referrals were made by Dr. Lewis or her locum, Dr. Watson. Dr. Lewis recalled one occasion where the Complainant wished to have a further neurological assessment because she was concerned that perhaps she required surgery. I conclude that there is no evidence that the Complainant was excessively seeking out medical tests and procedures; rather, on most occasions she responded to requests that she attend specialist appointments.

244. A further component of somatization is that the person seeks sympathy. Dr. Lewis testified that she did not believe that the Complainant received much sympathy because of her symptoms. Dr. Lewis had ongoing discussions with the Complainant for years respecting familial and work relationships in the context of addressing the Complainant's psychological difficulties. Much of the evidence related to familial relationships suggested turmoil and limited support, rather than sympathy.

245. Dr. Koshi did not speak to the Complainant. He therefore did not have an opportunity to gather relevant information respecting all of the criteria for a diagnosis of somatization. He appears to have assumed that the Complainant was regularly pursuing additional tests, procedures and specialist appointments.

246. Dr. Koshi's conclusion that the Complainant's symptoms are best explained by somatization is also based on the number of symptoms she has experienced. I agree that the Complainant has reported a number of symptoms, both physical and mental and that this is consistent with somatization.

247. I also agree that there is medical evidence that the Complainant may have somatization. Dr. Bourke suggested that somatization should be considered to determine whether it was a factor for some of her symptoms. Dr. Theriault suggested exploration of a possible somatization disorder.

248. Ms. Milner-Clerk testified that she did not feel that the Complainant met the criteria for somatization because she believed that the Complainant was being honest with her. She also did not perceive the Complainant as someone who frequently changed medical providers, looking for validation. At the relevant time, the DSM 4 criteria for diagnosing somatization required that the patient frequently change doctors. Ms. Milner-Clerk agreed with counsel for the Respondent on cross-examination that, based on the DSM5 criteria (which no longer requires that the patient frequently change doctors), somatization could be a factor. However, Ms. Milner-Clerk also testified that a person could have somatic symptom disorder but still have cognitive and physical difficulties.

249. I am prepared to conclude that somatization may be a factor in the Complainant's health picture and may explain some of her symptoms. However, when the medical evidence is considered in its totality, there is insufficient evidence to conclude that the Complainant has somatization to such an extent that she has no physical disability at all. I am unable to accept Dr. Koshi's diagnosis of somatization as a basis to negate all of the Complainant's symptoms and functional limitations.

250. I also do not accept Dr. Koshi's conclusion that the Complainant has no condition that would represent medical restriction based on risk for returning to the position of secretary or receptionist. This opinion is based on his definition of medical restriction, which he believes requires a risk of tissue damage or risk of loss of tissue integrity. The definition

of physical disability in the *Act* includes a restriction or lack of ability to perform an activity and does not require an anatomical diagnosis or a risk of tissue damage or loss of tissue integrity. Dr. Koshi's definition of restriction is simply not the definition of restriction that is found in the *Act*.

251. There is a further logical difficulty with Dr. Koshi's opinion that the Complainant has somatization. Dr. Koshi does not conclude that the Complainant has a mental disability. Dr. Koshi calls somatization a "syndrome". The closest that Dr. Koshi comes to tying somatization to mental disability is his statement in his report that, "The development of this syndrome is linked to psychiatric conditions and personality disorders". Dr. Koshi does not clearly acknowledge that somatization is a mental disability. His opinion, therefore, extends beyond the position taken by the Respondent that somatization is a mental disability.

252. The Respondent submits that I may make a finding that somatization is a mental disability, as it is included as such in the DSM5, and proceed to dismiss the complaint on this basis, without this corroboration by Dr. Koshi. I agree that I can make a finding that somatization is a mental disability based on the Respondent's undisputed representation that it is included in the DSM5. However, in terms of assessing Dr. Koshi's expert opinion, Dr. Koshi's position that the Complainant does not have a mental disability detracts from the logical cohesion of his report. If somatization is a mental disability in the DSM5, I would expect Dr. Koshi to clearly conclude that somatization is a mental disability. He does not. It is his conclusion that the Complainant is not disabled. This suggests that Dr. Koshi's intent is to establish his point that the Complainant is not disabled, rather than the more balanced and reasonable conclusion urged by the Respondent, that the Complainant has a mental disability, namely somatization.

253. In summary, I have carefully considered the Respondent's position that I ought to place more weight upon the opinion of Dr. Koshi as a specialist in physiatry than the medical evidence offered by Dr. Lewis as a family physician and Dr. Bourke as a general practitioner, notwithstanding his experience as an occupational health physician. As a

general proposition, I agree that it is appropriate to place more weight on the opinion of a specialist.

254. However, Dr. Koshi's conclusions are not all well explained. His report is, in several respects, not logical, balanced or objective. Dr. Koshi appears to have strongly held opinions and does not acknowledge that other physicians hold contrary views. Because of these concerns, I decline to accept Dr. Koshi's opinion that the Complainant has no physical disability or mental disability that prevented her from working in her occupation at the time relevant to this complaint. Dr. Lewis's evidence is more balanced and is based on a more detailed understanding of the facts that comprise the Complainant's medical history. As well, her opinion is essentially confirmed by Dr. Bourke's report.

255. Given these evidentiary findings, I decline to dismiss the complaint based on Dr. Koshi's conclusion that the Complainant has somatization. I have found that the Complainant was perceived to have a physical disability by the Respondent at all material times. I also find that she did, in fact, have a physical disability, namely chronic pain.

256. Before leaving this issue, it is necessary to address one further submission made by the Respondent. Respondent counsel made closing submissions to the effect that chronic pain is a mental illness. Counsel submitted that I ought not to accept the Commission's submission that pain is enough to be a physical disability. Respondent counsel submits that the Commission is suggesting that a mental illness can become a physical disability.

257. I was of the understanding that the parties had agreed that chronic pain is a physical disability. However, given these submissions, it appears that the Respondent disputes this. The Respondent did not lead evidence to establish that pain is only a mental disability and is not physical in whole or in part. In short, there is no evidence before me respecting what pain is.

258. Chronic pain has been treated as both a mental and physical disability in case law. In *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur,* [2003] 2 SCR 504; 2003 SCC 54 ("*Martin*"), the parties proceeded on the basis that chronic pain is a physical disability. The Court accepted this characterization. This was on the basis of medical reports submitted into evidence that characterized chronic pain as a physical disability. At paragraph 90 the Court commented:

> ... the medical experts recognize that chronic pain syndrome is partially psychological in nature, resulting as it does from many factors both physical and mental.... Although the parties have argued the s.15(1) case on the basis that chronic pain is a "physical disability", the wide spread perception that it is primarily, or even entirely, psychosomatic may have played a significant role in reinforcing negative assumptions concerning this condition.

259. I also note that the Court recognized the "very real needs of the many workers who are in fact impaired by chronic pain" [headnote]. At paragraph 90, the Court recognized the existence of "...inaccurate negative assumptions towards chronic pain sufferers widely held by employers, compensation officials and the medical profession itself". Thus, the Supreme Court of Canada had no difficulty recognizing that chronic pain can be a legitimate physical disability. I conclude that I can, likewise, characterize chronic pain as a physical disability that has psychological components.

260. Lastly, "physical disability", as defined in the *Act,* allows for the inclusion of chronic pain. It is true that aspects of the definition of physical disability in the *Act* invite a specific diagnosis or the identification of a physical or anatomical part of the human body in accordance with Dr. Koshi's approach. For example, section 4 of the *Act* includes "...a loss... of... physiological or anatomical structure or function". However as noted above, the *Act* also recognizes "an actual or perceived...restriction or lack of ability to perform an activity" within the definition of physical (or for that matter mental) disability. A condition

that results in actual or perceived restriction or lack of ability to perform an activity is all that is required to fall within the definition of physical disability in the *Act*. Chronic pain, therefore, does not need to be caused by the loss or impairment of any physiological or anatomical structure in the human body. Chronic pain is a physical disability where it restricts or creates a lack of ability to perform an activity.

261. Here, the Complainant's chronic pain has restricted and limited her ability to function in the workplace. The Respondent itself takes the position that the Complainant's functional limitations precluded her ability to work.

262. For the reasons stated above, I find that the Complainant's experience of pain, specifically chronic pain, is a physical disability, causing her to have physical functional limitations (as well as mental limitations) which required accommodation at work. In short, the Complainant has established that she has a protected characteristic under the *Act*.

B. Did the Complainant Suffer an Adverse Impact?

263. The next component of the test for a *prima facie* case of discrimination requires that the Complainant establish that she experienced an adverse impact in relation to her employment. As a reminder, an adverse impact has been defined in the *Act* as "...burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other(s)".

(i) The Complainant and Commission's Position

264. The Complainant alleges that she suffered an adverse impact in several ways. First, she alleges that she was both unable to meet the employer's requirements respecting performance of her job (such as regular attendance and performing all of her duties) without accommodation of her physical disability and that she was required to work without proper accommodations being implemented by the Respondent. The Complainant

further alleges that the Respondent's failure to fully implement the accommodations she required exacerbated her symptoms and that, as a result, she left the Respondent's employ on medical leave on March 9, 2012 and has not been able to work since.

265. The Complainant specified in her written complaint that she was required by the Respondent to do mail duties, although she had advised the Respondent that she ought not to for medical reasons. The Commission submitted at the hearing that mail duties were an example of how the Complainant believed that she had not been accommodated by the Respondent and that the information on the complaint form was not an exhaustive identification of all specific allegations and examples in this regard. The Commission submits that, since the Complainant alleged that she had been required to work without accommodation in her complaint, additional examples based on the evidence may be considered by this Board.

266. As a further example, the Commission submits that the Respondent obtained information from Dr. Lewis in contemplation of the Complainant's return to work in February 2012 respecting what limitations required accommodation. The Commission submits that the Respondent did not implement accommodations to address all of Dr. Lewis's identified workplace restrictions and required the Complainant to work without all requested types of accommodation in place.

267. The Complainant submits that being placed on an attendance management plan by the Respondent upon her return to work in February 2012 also constitutes an adverse impact. The Commission, likewise, submits that it was very upsetting for the Complainant to be told that she had an attendance problem and was being placed on an attendance management program because the point of the attendance management program, as applied to the Complainant, was to place her job in jeopardy. The Complainant alleges that the application of the attendance management plan to her by the Respondent caused her to have an anxiety-based reaction and worsened the symptoms of her disabilities which also caused her to be unable to continue working as of March 9, 2012.

(ii) The Respondent's Position

268. The Respondent does not deny that, in theory, if a disabled employee is unable to perform their duties without accommodation, a failure to implement accommodations, if proven, constitutes an adverse impact. The Respondent does not suggest that, if the Respondent's handling of the Complainant's return to work led to an exacerbation of the Complainant's disability and to her inability to work, these would not constitute adverse impacts. However, the Respondent disputes that the Complainant has proven these allegations.

269. The Respondent submits that there is no evidence that the Complainant was told to do mail duties or that she could not do mail duties. The Respondent submits that the writing of receipts and the stamping and handling of mail was never identified in any of the medical documentation it received. The Respondent submits that all it saw in the documentation were requests that the Complainant not do repetitive duties. The Respondent relies on Dr. Lewis's testimony at the hearing that, when she listed "pushing" as a work restriction, she was not referring to pressing down on paper. The Respondent submits that there is nothing inherently repetitive about writing receipts or stamping mail unless you make it so by performing a number of these tasks in a row.

270. The Respondent pointed out that the only specific allegation on the complaint form concerning its alleged failure to implement accommodations related to whether the Complainant was required to continue with her mail duties. However, the Respondent did not argue that the Complainant was required to be held to the one example of mail duties on the complaint form, nor did it provide any authority to this effect.

271. In my view, as long as the scope of the complaint is respected, the Complainant and Commission may rely upon relevant examples arising from the evidence in addition to the allegation respecting mail duties specifically described on the complaint form. I reach this conclusion based on the legal authorities referenced by the parties in relation to the Complainant's preliminary request that her complaint be amended. [I will also note that

the Complainant offered more than one example in her written complaint. She also alleged that she should have been placed in a more suitable position].

272. In the Respondent's pre-hearing submissions, the Respondent frames the Complainant's allegation that she was required to work without proper accommodations as a complaint by the Complainant that she was "forced" to do certain tasks. The Respondent submits that the Complainant was being accommodated in the workplace. The Respondent submits that its accommodation of the Complainant included giving the Complainant the ability to define her own boundaries as to when and to what extent she performed tasks, took breaks or avoided repetition. The Respondent submits that it did not require that tasks be done in a repetitive manner, only that the Complainant complete the tasks related to her position. The Respondent submits that the Complainant had control over when she performed her tasks and only needed to ensure that she was not doing tasks in a repetitive manner.

273. The Respondent submits that it did not discriminate against the Complainant because it did not presume what she could or could not do and did not assume that she had functional limitations that prevented her from doing any of the tasks associated with her position. Instead, the Respondent submits it properly allowed itself to be guided by what the Complainant's physicians said was required and allowed the Complainant to "define her own boundaries" in this respect. The Respondent relies on the decision in *Quebec (Commission des droits de la personnne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personnne et des droits de la jeunesse) v. Boisbriand (City)* 2000 SCC 27 as support for its position that it did not discriminate against the Complainant because it did not presume that she had functional limitations that prevented her from doing her job.

274. The Respondent also submits that, if the Complainant suffered an adverse impact, it is because she failed to follow limits set by her physician. As an example, the Respondent points to evidence that the Complainant processed a significant number of receipts and did an excessive amount of mail duties on March 5, 2012.

275. The Respondent also disputes whether mail duties caused the Complainant to suffer an adverse impact because the Respondent does not accept that mail duties caused the Complainant to have symptoms. The Respondent submits that the evidence shows that the Complainant did not leave work immediately after she wrote a large number of receipts and handled a large amount of mail on March 5, 2012. The Complainant continued to work until March 9, 2012. The Respondent submits that when the Complainant left the workplace on March 9, 2012, it was because her tailbone was hurting her.

276. The key submissions advanced by the Respondent on this issue of adverse impact are based on the premise that the Complainant was being accommodated by the Respondent when she returned to work in February 2012. In effect, the Respondent submits that there was no burden, disadvantage or adverse impact experienced by the Complainant for which it is legally responsible. The Respondent submits that it did its part and that the Complainant is at fault if the Complainant worked without proper accommodation after her return.

277. The Respondent disputes whether the Complainant suffered an adverse impact as a result of being placed on an attendance management program when she returned to work. The Respondent submits that being placed on an attendance management plan cannot, on its own, constitute an adverse impact. The Respondent submits that it is not discriminatory to start an employee on an attendance management program or to tell an employee that their attendance is poor and that they need to improve. The Respondent submits that it is consistent with the law to inform an employee that they have an attendance problem and that employers are in fact obligated to tell employees this. In this regard, the Respondent relies upon a Nova Scotia human rights decision, *Munro v. IMP Aerospace Components,* 2014 CAN LII 41257 (NS HRC) *("Munro")*. *Munro* in turn relies upon *Sluzar v. City of Burnaby (No. 3),* 2010 BCHRT 19 *("Sluzar")* and other decisions cited by *Sluzar*. The Respondent submits that, if the standard is that an employer cannot tell an employee that they are on an attendance management plan because the

information would be upsetting to the employee, employers would not be able to have attendance management programs at all.

278. The Respondent further submits that it did not terminate the Complainant, therefore, there was no adverse impact upon the Complainant by reason of the attendance management plan.

279. In its pre-hearing submissions, the Respondent asked that the attendance management issue be treated as a separate complaint. No reason was offered to support this request. In my view, my jurisdiction extends only to one complaint and that complaint concerns allegations of both being required to work without accommodation and respecting the application of the attendance management plan.

(iii) Did the Complainant Suffer an Adverse Impact by Being Required to Work Without Proper Accommodations?

a) Approach to Issue

280. The issue of whether the Complainant suffered adverse treatment or was disadvantaged by being required to work without proper accommodation overlaps the broader issue of whether the Respondent accommodated the Complainant. This issue is addressed in the context of adverse impact here and again, below, in relation to the Respondent's defence, as the Respondent asserts that it did accommodate the Complainant. Given this overlap, portions of these reasons respecting adverse effect or treatment have relevance to the later issue of accommodation and vice versa. However, at this point in the analysis, I am considering the submissions advanced by the Commission, the Complainant and the Respondent specifically on the issue of adverse impact as it relates to the Complainant's allegation that, as a disabled person, she suffered an adverse impact by reason of being required to work without all required accommodations.

281. In this regard, the Complainant submitted through pre-hearing submissions (filed by her former counsel) that an employee who has a disability, who is unable to perform job duties because of that disability and is not reasonably accommodated, is disadvantaged and suffers an adverse impact or burden compared to other employees and that this triggers the duty to accommodate. These submissions reference *Kerr v. Boehringer Ingelheim (Canada) (No. 4),* 2009 BCHRT 196 at para 441 ("*Kerr*"), subsequently upheld in *Boehringer Ingelheim (Canada) Ltd./Ltee. v. Kerr,* 2011 BCCA 266. The proposition that an adverse impact arises in these circumstances was not disputed by the Respondent. Accordingly, I have proceeded to address the issue of adverse impact on the basis of the positions taken by the parties. However, it is important to highlight that I am not concluding that a failure to accommodate alone demonstrates *prima facie* discrimination, and, that it is recognized that there is a sequence in which the issues should be considered.

282. These last points were the subject of comment in *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111,* 2010 BCCA 447 ("*Coast Mountain*"). I was referred to *Coast Mountain* in relation to a different issue in the course of submissions. This case was not referenced by any party as raising an issue in relation to adverse treatment. However, *Coast Mountain* comments upon whether a lack of accommodation is an adverse treatment, as well as the sequence in which the issues are to be determined. In view of the comments in *Coast Mountain*, it is prudent to clarify the approach taken to this issue.

283. At para 66 of *Coast Mountain*, the British Columbia Court of Appeal held:

> In my view, a failure to accommodate is not a matter that demonstrates *prima facie* discrimination. Rather, once *prima facie* discrimination has been demonstrated, issues of accommodation are considered in determining whether the discrimination is justified on the basis of *bona fide* occupational requirement. It may be that accommodation will ameliorate the effects of adverse treatment, but a

> lack of accommodation does not, without more, support a finding of adverse treatment.

284. It is settled law in this province that an adverse impact falls upon an employee who has a disability where, by reason of her disability, she is unable to meet the requirements of her position without accommodation. Accordingly, it is not a lack of accommodation alone that leads to a finding of adverse treatment but rather the experience of being expected to work with a disability when the employee cannot participate effectively and equally within the workplace because of disability, without accommodation. An example of a case which illustrates this is referenced in *Kerr*: *Gardiner v. Ministry of Attorney General* 2003 BCHRT 41 (CanLII). At paras 152-154 the tribunal held:

> [151] In essence, the Complainant asserts that he has a disability which gave rise to a duty to accommodate. The Respondent argues that there is no positive duty to accommodate, and in particular, that the duty to accommodate was not triggered during the relevant periods as there was no adverse treatment or impact resulting from the Complainant's disability. The Respondent argues that the Complainant was treated similarly to all other disabled employees and so cannot assert that he was adversely affected as a result of his disability. I do not agree.
>
> [152] While the duty to accommodate arises as a defence to a *prima facie* case of discrimination, the obligation is on an employer to reasonably accommodate an employee's disability where the employee requires accommodation to perform the requirements of his job or to otherwise maintain his employment, and where the employer is aware or ought reasonably to have been aware of the employee's disability and resultant need for accommodation.
>
> [153] An adverse impact results where an employee, by virtue of his disability, is unable to perform the requirements of his job without some

> form of accommodation by the employer. The employer's obligation is to provide reasonable accommodation, and to meet it, an employer must make efforts, to the point of undue hardship, to ensure that their disabled employee does not suffer discrimination in relation to other employees. It is not enough to treat all disabled employees similarly. What is necessary is to treat all employees without discrimination based on disability.
>
> An adverse impact could also arise when the disabled employee's health is negatively impacted by reason of having to work without accommodation by the employer.

285. I am required to address the issues in the manner which they were presented by the parties. In my view, the parties are, in any event, correct in their theoretical agreement that an adverse impact can result when a disabled employee is unable to perform their job without accommodation. Accordingly, there is some overlay in these reasons on this issue of alleged failure to accommodate, as between the issue of adverse impact and the Respondent's defence to the allegation that it did not accommodate the Complainant.

b) Did the Employer Implement Physician-Recommended Accommodations?

286. To recap, when the Complainant returned to work in February 2012, the diagnosis on the medical forms provided by Dr. Lewis was "chronic right neck and shoulder pain" and "depression". She indicated that specific work limitations would be required upon the Complainant's return to work and wrote, "work accommodation posturing, noise, stress, work environment". Under the section of the form entitled "Other Factors", Dr. Lewis wrote "ongoing problems focusing in noisy, stressful work environment". Dr. Lewis also requested reduced hours with an ease back to working full hours. Areas of reduced functional ability as of February 14, 2012 included limited sitting for 30 minutes, limited bending for 10 minutes an hour and "occasional" lifting, carrying, reaching and pushing or pulling. As well, Dr. Lewis wrote "limited lifting, reaching with right arm, needs various

positions to work, quiet less distracting work environment would greatly benefit if able to accommodate".

287. As per the Respondent's practice to confirm the accommodation plan with the employee by letter, Norma Bennett wrote an accommodation letter to the Complainant dated February 20, 2012. Accommodation letters were primarily developed by Norma Bennett, as the Complainant's supervisor, and Gail McClare, as the occupational health consultant. Ms. Bennett wrote that "an accommodation plan has been agreed upon by you and the employer to facilitate and support you in the workplace".

288. The reference to agreement in the accommodation letter implies that the Complainant and the Respondent had a discussion or meeting respecting what accommodations should be put in place. Laura Forrest testified that, on some occasions when the complainant returned to work, discussions took place. However, there is no evidence of prior discussion with the Complainant before her return in February 2012. The Complainant had simply provided the Respondent's medical forms to Dr. Lewis for completion. Dr. Lewis completed the forms and provided them to the Respondent. The evidence was that the Complainant and Dr. Lewis usually did not discuss what Dr. Lewis wrote on the forms and that the Complainant was not always present when Dr. Lewis completed the forms.

289. Ms. Bennett wrote that the Complainant was "to work 4 hours each day until March 5, 2012, when you can resume your regular hours/duties" (emphasis added). The accommodations identified in Ms. Bennet's letter were no sitting longer than 30 minutes, no bending more than 10 minutes per hour, and limited lifting, carrying, reaching and pushing, which were to be done occasionally. The accommodation letter also states, "During your accommodation, you will receive your regular pay for the hours that you work and STI benefits for the remaining hours" (emphasis added).

290. As I read this letter, the accommodation plan was in effect until March 5, 2012. The Complainant was returning to her regular front desk duties as a clerk as of March 5, 2012. The Complainant's regular duties included waiting on customers in a busy, fast-

paced office that serviced the public. Her regular duties included mail duties, which required preparation of receipts and receipts for walk-ins. [The Respondent offered evidence that the extent to which the Complainant actually stamped receipts or did mail duties was very limited. This will be addressed at a later point in these reasons.] There is no evidence to suggest that it was clarified to the Complainant that when her regular duties resumed on March 5, 2012, the accommodations respecting her physical movements were to continue, and if so, for how long, or that her regular duties were modified beyond March 5, 2012.

291. Dr. Lewis did not check off on the form whether the Complainant's condition was permanent or temporary. Dr. Lewis testified that she could not recall why she did not check either box. However, the word "chronic" appears twice on the forms completed on February 14, 2012. The Complainant was returning from an extended absence dating back to June 2011, except for a short period of return in September. Prior medical forms had repeatedly indicated that the Complainant's disability was chronic.

292. By my reading of the medical forms, Dr. Lewis wanted the Complainant's hours reduced until March 5, 2012, but conveyed that her right neck and shoulder pain and depression were chronic, that there were ongoing problems focusing in a noisy, stressful work environment, and that the Complainant required ongoing accommodation for posturing, noise, stress and work environment. It was Dr. Lewis's testimony that, if the Respondent was able to accommodate the Complainant, the Complainant would be able to attend work consistently and meet the demands of the position. For a patient with chronic symptoms, Dr. Lewis's expectation must have been that accommodations beyond the ease back to work would continue.

293. As the Complainant's problems were chronic, it is not reasonable on the facts for the Respondent to presume that accommodations would only be required for two weeks; rather, it ought to have been apparent that the accommodations with respect to her duties and environment would be ongoing until they were no longer medically necessary, and, would, perhaps, be indefinite. I conclude that the Respondent misinterpreted the available

medical information and required the Complainant to resume her regular duties as of March 5, 2012.

294. It would have been reasonable for the Respondent to seek clarification if it was uncertain whether the Complainant's impairments were permanent or temporary. If the Respondent believed that there was an ambiguity in the information it received respecting duration of the work accommodations required or otherwise, it took no immediate steps to clarify the ambiguity. The Respondent did not obtain clarification from Dr. Lewis.

295. There was nothing in the accommodation letter to specifically address accommodation of the Complainant's need to have various positions to work, referenced as "posturing". It may be that Gail McClare and Norma Bennett believed that "posturing" was covered by the direction that there be no sitting longer than 30 minutes, no bending for more than 10 minutes in one hour, or by prior ergonomic changes that had been made to the Complainant's work cubicle. The Respondent had certain pre-existing accommodations in place and the Complainant was returned to a cubicle to which ergonomic adjustments had been made previously. However, in my view, this should have been clarified with Dr. Lewis. The physical restriction with respect to posturing was not related to specific job tasks and did not lead to specific instruction to the Complainant respecting how she was to perform her tasks, with consideration given to the issue of whether she could perform all of her tasks with whatever postural changes were required.

296. The accommodation letter acknowledges that the Complainant should only reach occasionally. Dr. Lewis emphasized that there should be limited reaching with her right arm. The Complainant's dominant hand is her right hand. The duties of her position involved receiving documents and samples from clients and handling papers. How can the requirement that there be only occasional reaching be accommodated given the Complainant's regular duties? In my view, the Respondent should reasonably have questioned how and to what extent Dr. Lewis's restrictions were to apply to the physical requirements of the Complainant's position. There is no evidence that the Respondent

conducted an analysis to detail the frequency and extent that reaching was required to meet the requirements of being a clerk in that office.

297. With respect to pace of work, which could increase the repetition of tasks, the Respondent provided evidence that, in the past, the clerks who worked in the office were expected to work together and take mail duties or other duties upon themselves to help the Complainant and accommodate her on a practical, day by day basis. However, there was no documentation of any official direction given in this respect when the Complainant returned to work in February 2012. Norma Bennett did not suggest that she actively supervised the other employees to ensure that this occurred.

298. Instead, the evidence was that other clerks also required accommodation. Accordingly, there was increased workload for the remainder of the clerks. I infer from the casualness of the arrangements and the lack of any specific reference to this issue in the accommodation letter in February 2012 that the Complainant's duties were not altered as an accommodation when she returned in 2012.

299. Significantly, there is nothing in the accommodation letter to address the request that there be "a quiet or less distracting work environment" or which addresses noise and stress, which is also emphasized on the medical forms as an ongoing problem. Laura Forrest testified that, if the functional limitations on a medical form did not find their way into the accommodation letter, they would not be taken into account.

300. With respect to noise, the Respondent referenced the availability of noise dampening headphones and suggested that the Complainant did not use them. However, the expectation that this equipment would be used by the Complainant to assist with noise reduction was not recognized and included in the accommodation letter.

301. Laura Forrest was questioned under cross-examination about the fact that there was nothing in the accommodation letter of February 20, 2012 to address a noisy work environment. Her response was that the Respondent needed and had requested an

independent medical examination at this point in time and was waiting for one. She testified that while the Respondent waited for an independent medical examination, the employee would be expected to perform her job, as per the accommodation letter, in the interim. She acknowledged that the Complainant returned to work with only the accommodations set out in the accommodation letter and did so until she left work in March 2012.

302. As indicated, Dr. Lewis testified that the accommodation letter was not consistent with her recommendations. In her testimony, Norma Bennet acknowledged that this was the case.

303. I find, as fact, that the Respondent had in its possession knowledge and information respecting the Complainant's need for accommodation and knew or ought to have known that both movement and lack of movement was an issue for the Complainant. The Respondent did not seek expert analysis of the movement or lack of movement required by the tasks of her position. The Respondent did not seek clarification from Dr. Lewis respecting her impairments and her job duties to determine what accommodations should be made to the Complainant's job duties. The Respondent's implementation of the described accommodations consisted of informing the Complainant that she was not to do certain things in a generalized fashion, such as she was only to reach occasionally. The Respondent did not give the Complainant specific direction about how she was actually to perform her duties, nor did it officially alter those duties or officially direct staff respecting pace and content of tasks. The request for accommodation respecting noise, stress and a quiet environment was not recognized in the accommodation letter. There is also no evidence that the Respondent turned its mind to whether the Complainant could do her job with all the restrictions needed and whether, as a result, the Complainant should be returned to a different position that better suited her needs.

304. The Respondent submitted that no adverse impact related to its failure to implement accommodations related to noise and distraction could be relied upon as these are accommodations for mental disability and the complaint is limited to physical disability.

305. Commission counsel submits that hearing noise is physical in nature and involves a physical accommodation.

306. The Respondent's submission is based on the premise that impairments and functional restrictions must arise in relation to either a physical or mental disability and that each accommodation can only be directed to one impairment or type of impairment. In my view, and with respect, this submission is premised on an artificial assumption that issues of physical and mental health and functionality can be neatly boxed, segregated and labelled as one or the other. Sometimes disabilities, because of their nature, cannot be neatly boxed. The same can be said about functional limitations. As well, an accommodation for a functional limitation that is mental in nature can still have relevance as an accommodation of a functional limitation related to physical disability. If someone with chronic pain is trying to return to work and deal with working with pain, having additional distractions such as a noisy, stressful environment is reasonably contraindicated. Such restrictions are reasonable to request as accommodations for chronic pain and were requested in this case. That noise and distraction may amplify cognitive difficulties and depression does not diminish their relevance to working with chronic pain and related physical limitations. There is nothing in Dr. Lewis's recommendations to indicate that noise was purely related to mental disability.

307. I conclude that the content of the accommodation letter is not a reasonable interpretation of the medical forms that were submitted at the time. The letter does not include all of the accommodations specifically requested by the Complainant's physician and does not identify accommodations intended to address all of the functional limitations she identified. To the extent that the accommodation letter adopts basic information respecting functional limitations from the physician and indicates agreement that these restrictions should be accommodated, it does not indicate what these restrictions mean for the Complainant in practice when she is trying to perform her job.

308. Commission counsel and the Complainant also submit that there was a failure to accommodate in this case because each Certification by Attending Physician or Fitness to Work form issued by Dr. Lewis was considered on its own, without reference to prior medical forms. They submit that the Respondent proceeded on the basis that "the slate" of medical information respecting the Complainant was wiped clean every time it received a Certification by Attending Physician Form.

309. Laura Forrest testified that any prior accommodations would not be carried forward. This was the case even if an employee's condition or symptoms remained consistent from absence to absence. Ms. Forrest explained that the reason for this was to ensure that the Respondent had up-to-date medical information and up-to-date information respecting any required accommodations.

310. It was put to Ms. Forrest in cross-examination that this practice could lead to errors or an incomplete picture of the Complainant's health and need for accommodation. Laura Forrest testified that she "would have" explained to the Complainant that any information on a previous return to work form would be "wiped out". She testified that she had this discussion with the Complainant in 2009 or 2011.

311. Ms. Forrest was unable to testify with certainty respecting when this discussion allegedly took place. If it was discussed with the Complainant in 2009 or 2011, there is no evidence that the Complainant understood this in 2012. Given her cognitive issues, it would have been reasonable to take steps to ensure that the Complainant understood this in advance of her return in 2012.

312. There is nothing on the Certification by Attending Physician form to alert a physician to this practice. It was suggested to Laura Forrest in cross-examination that a physician would not know that any information they had provided previously would be "wiped out" by a new form. Laura Forrest responded that "she did not know".

313. Dr. Lewis did not understand that none of the information that she had provided previously would be considered. She testified that it was her experience that employers did not lift work restrictions unless a physician confirmed that this was advisable.

314. I am unable to accept the premise that the Respondent's knowledge of the Complainant's need for accommodation should only be based upon the medical forms that it received in February 2012. To proceed on this basis is to belie information in the possession of the Respondent respecting chronic conditions. The Respondent had in its possession a significant amount of information related to ongoing physical impairments. The medical forms it had since August 2009 contained information that was clearly relevant to the issue of what accommodations would be necessary to support the ability of the Complainant to work when she returned in 2012:

- A form dated August 31, 2009 lists areas of reduced physical functioning that included reaching, pushing, pulling, writing, or typing and notes "acute exacerbation chronic condition".
- A form dated May 27, 2010 states reaching is very limited and push/pull is limited and recommends specific work restrictions "as before for neck/shoulder".
- A form dated July 5, 2010 diagnoses "acute worsening chronic pain syndrome".
- An August 23, 2010 form states no twisting at all, reaching, pushing, pulling are limited, especially the right shoulder and arm and write/type is limited to 2 hours.
- A form dated October 7, 2010 notes impairment as a loss of use of both hands, decreased hearing and decreased tolerance of motion.
- A form of January 5, 2011 identified reaching, push, pull as areas of reduced functional ability. Physician remarks include "has chronic derangement of neck and shoulder girdle. Posturing at work aggravates the problem. Also depressed. Unable to multi task. Does not tolerate a lot of background noise and distress" and "restricted from poor ergonomics at

- desks, loud areas, multi-tasking" and refers the Respondent to "previous forms" and a letter from the Complainant's osteopath.
- A form dated April 18, 2011 states "posturing aggravating pain syndrome needs modified work space" and "exacerbation of chronic condition".
- The form of May 24, 2011 states "cannot sit, lift arms for repetitive times" and "acute exacerbation chronic problem".
- The form of June 7, 2011 limits sitting, reaching, pushing, pulling, writing and typing. There is also reference to "ongoing problems with repetitive strain, repetitive use. Needs accommodation on return to work".
- The form of August 31, 2011 requests limited time sitting and typing and requires infrequent reaching, pushing and pulling.

315. In general, the historical medical documentation that pre-dates the Complainant's return to work in February 2012 makes it clear that there were periods when the Complainant had limited capability to stand, walk, bend or lift. There are multiple references to her inability to do repetitive motions with her right shoulder, arm, or hand. These physical limitations are relevant to her duties as a clerk. As well, there are references in the medical forms to decreased ability to concentrate or to handle noise and distraction, which are also requirements of her position. The latter appear to relate to both the Complainant's experience of chronic pain and her cognitive difficulties. In my view, the documentary evidence is consistent with all of these factors being in play at different times and provides persuasive evidence that they often overlapped. The Respondent, in my view, should have recognized the chronic, repetitive nature of the Complainant's functional limitations rather than considering only the medical forms it received in February 2012.

316. I conclude that, in part, because of the Respondent's practice to only consider the most recent medical forms, several of the accommodations that had been put in place when the Complainant returned to work in January 2011 were not put back in place. These include moving her to a quieter location and relieving her of mail duties.

317. The above factual findings demonstrate that the Complainant had a disability which made her unable to perform all of her job duties without accommodation. While some accommodations were made, not all the accommodations requested were implemented and accommodations were not developed for some of the functional limitations identified by the Complainant's physician. She was required to work as a disabled employee without all proper accommodations in place and was unable to work. This constitutes an adverse impact for the purpose of satisfying the Complainant's burden of establishing a *prima facie* case of discrimination.

c) Did the Complainant Not Follow Medical Limitations?

318. The Respondent submits that it accommodated the Complainant but that the Complainant did not follow the medical limits set by her physician. I agree with the Respondent that an employee has a duty to facilitate the implementation of accommodations: *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970 ("*Renaud*"). A finding of adverse impact cannot be made for purposes of a complainant's *prima facie* case if it is caused by the complainant.

319. As an example of the Complainant not following medical limitations, the Respondent pointed out that, when the Complainant returned in 2012, she would still have had access to noise dampening earphones that had been provided to her earlier. The Respondent submits that it was up to her to wear them. I am not persuaded by this example. It appears that there was a practical issue with the use of the earphones. The Complainant testified that she could not wear the telephone headset needed to answer her phone and the earphones at the same time.

320. The Respondent also relies upon evidence that Norma Bennett collected respecting the number of receipts that were prepared and the amount of mail that was handled by the Complainant among the clerks in the office. The Respondent produced a chart that indicates that on March 5, 2012, the Complainant stamped a large number of receipts

and handled a significant amount of mail. For example, she wrote 23 of 25 receipts written that day.

321. The Complainant testified that she did not recall writing a large number of receipts on one day. She testified that, if she did write that many receipts, she believes that it would have made her ill. She could not recall anything about why she did this at the time of the hearing.

322. The Complainant testified that mail duties involved stamping mail and writing receipts in a repetitive manner and that a fair amount of force was required to write receipts each time because of the number of copies and thickness of the paperwork. She appeared to have a consistent appreciation of the fact that she ought not to be writing receipts, particularly in a repetitive manner. Because the Complainant believes very strongly that doing this would make her sick, I have some difficulty in accepting the premise that she took it upon herself to write so many receipts and handle so much mail in one day.

323. One of the other clerks, Karen Daigle, testified that, generally, the Complainant would not have written many receipts. She thought that, if the Complainant did that many receipts in one day, it would have been because that work was either given to her specifically to do, no one else was there to do it, or the other clerks did not want to do that work. She noted that at that time of year there was usually an increase in the number of receipts because of spring renewals. However, she had no specific recollection of why this occurred on March 5.

324. Another clerk, Susan Gallant, testified that she understood that the Complainant was not supposed to write receipts and do mail as a result of historic discussions with other staff. It was her impression that the other staff did their part and would write receipts for the Complainant.

325. Norma Bennett did not offer any explanation respecting why the Complainant would have written so many receipts or handled so much mail in one day and did not appear to have been aware that this occurred until she had this information collected for purposes of this hearing. Norma Bennett believed that the work was rotated among the clerks unless an employee required an accommodation because there was a task she could not do. Ms. Bennett testified that, if one person could not write receipts, that was communicated to all the clerks.

326. Ms. Bennett also testified that she did not know that the Complainant should not write receipts. She did not suggest that she had informed the clerks at the time of the Complainant's return that the Complainant should not write receipts or do mail duties.

327. In comparison, when the Complainant returned to work in January 2011 after a medical absence, Norma Bennett sent an e-mail to staff advising them that the Complainant would not be responsible for certain front desk duties, which included mail handling. She also specified that the Complainant would not be accepting requests for work assistance from other members of staff. No similar message was conveyed when the Complainant returned in February 2012.

328. Norma Bennett also testified that she quite frequently received complaints about whether the work was being divided equally at the front desk. As a result, she created front desk duty logs to address complaints about workload. At the time the Complainant returned to work, she had the clerks filling out these logs because of a complaint from one of the other staff.

329. This evidence suggests that leaving work division to be determined by the clerks themselves did not always lead to fairness or the perception of fairness regarding the division of work. This evidence also suggests that the work likely was not being performed by the clerks in a manner consistent with Ms. Bennett's expectations respecting rotation of duties at the time the Complainant returned to work.

330. Apart from this significant example, the Respondent generally suggested through the testimony of Laura Forrest and Norma Bennett that there was a general issue with the Complainant not complying with physical limits recommended by her doctor, such as how long she sat or avoided repetitious movements.

331. Norma Bennett testified that the Complainant did not necessarily follow accommodations put in place for her. She referenced February 20, 2010 as standing out in her mind. She testified that on that date, the office moved to new premises on Damascus Road. Each clerk was given boxes to unpack at their station. Ms. Bennett testified that the Complainant was not supposed to be bending, reaching, pulling and pushing and that they had a talk with her about not getting under her desk. However, in a short time, the Complainant was impacted (Ms. Bennett believed that she had been under her desk hooking up wires) and had to go home for a few days. Ms. Bennett also testified that the Complainant never shied away from doing her work and, when she was able to concentrate, always did her work "at 110%".

332. Laura Forrest testified that, when an employee returned to work, there was a return to work meeting and management would make it clear to the employee that they needed to be aware of their own bodies and not do more than what they were supposed to do. The accommodation letter specified that the Complainant was to advise Ms. Bennett immediately if she experienced any difficulties in the workplace. Norma Bennett testified that her door was always open and that staff were told to bring concerns to her. However, both Laura Forrest and Norma Bennett testified that there was no supervision of the Complainant by Ms. Bennett in this regard. For example, Ms. Bennett did not watch the Complainant. She would not point out to her that she had been sitting for two hours and needed to get up and move around.

333. With respect to the excessive involvement of the Complainant in writing receipts and dealing with the mail on March 5, 2012, there is insufficient evidence as to why and how this occurred. The Respondent provided documentary evidence that one of the clerks out of five working in the reception area was off work on short-term illness at the time.

334. March 5, 2012 is the date that the Complainant was to return to her fulltime hours and regular duties. Perhaps she took it upon herself to do that work that day because she understood that these functions were part of her regular duties. Perhaps she was asked to do it by staff to help out or was pressured. Perhaps she was placed in a position where she was required to do so. In my view, the circumstances suggest that she did it as an obligation, perceived or otherwise.

335. There is insufficient evidence to support a finding that the Complainant had no reason to believe that this work was expected of her by the Respondent and did it anyway. There is no evidence that in February 2012 the Respondent specifically advised the Complainant that she should not do these duties when she returned to work. In fact, the Respondent took the position that it was not informed that the Complainant should not do these activities. The Respondent took the position that all it knew was that the Complainant should not do repetitive motions and that it did not know that this included mail duties, stamping and writing receipts. The Respondent did not acknowledge that these tasks were repetitive unless they were done one right after the other.

336. If I am incorrect and the Complainant did take it upon herself to write receipts and to handle mail, although she understood that she should not, this would be evidence that the Complainant did not follow her physician's limits on one or two days after her return to work in February 2012. Ms. Bennett's example relates to moving day in February 2010.

337. I also have some difficulty reconciling the Respondent's allegation that the Complainant did not follow the limits set by her physician with its response to its obligation to accommodate the Complainant. In my view, if the Complainant did her work in a manner that did not comply with the limits set by her physician, this is likely because she was left to interpret and apply those restrictions. As stated previously, there was no translation of those limits to the various functions she was required to perform in her position by an occupational therapist. Some of her limitations were general and open to interpretation. A functional analysis of her job could have analyzed the frequency and nature of the

motions inherent in her job tasks and the force required. Left to self-assess, the Complainant would not necessarily appreciate or "tally" how often she made certain movements to perform her tasks or how much reaching, for example, was involved. This is particularly so given her cognitive difficulties with focus and multi-tasking.

338. In my view, the Respondent's submission shifts an unfair burden upon the Complainant. The Complainant is not an expert in occupational functional analysis. Given the Complainant's cognitive difficulties, the Respondent's submission is more than what is reasonable to ask of this Complainant.

339. The Respondent's submission, if accepted, would shift the burden that is upon an employer to determine what changes need to occur in the workplace as accommodations to the shoulders of the Complainant. The Complainant did her part by providing what she understood was the medical information required by the Respondent. The physicians, for the most part, completed the forms the Respondent provided. It is the Respondent's obligation, as the employer, to determine what the accommodations will be. There is no legal obligation on the employee to come up with the accommodation "solution". The employer best understands the employee's tasks and its operations and "is in the best position" to ascertain how to accommodate those functional limitations: *Renaud.* The Respondent's submission that the Complainant was empowered to define her own boundaries is not persuasive given all the circumstances. The Complainant appears to have been left to a significant degree to her own devices.

340. I do not doubt that there may have been occasions when the Complainant was not perfectly compliant with restrictions due to her own actions. This could have occurred due to inattention on her part, particularly given her difficulty focusing, as a response to feeling pressure to do her job, or because she wanted to please the employer, customers and co-workers. However, I am not prepared to make a general finding on the basis of the available evidence that the Complainant did not comply with limits set by her physician to such an extent that this dislodges my earlier finding that the Respondent did not make accommodations for all of her limitations.

d) Did the Respondent Know or Should It Reasonably Have Known That the Complainant Should Not Write Receipts?

341. The Respondent had information from Dr. Lewis in June 2011 from the Certification by Attending Physician and the Fitness for Work Assessment forms that the Complainant could not lift her arms for repetitive motions and had "ongoing problems with repetitive strain and repetitive use" for which she required accommodation. Similar information was on earlier medical forms.

342. The Respondent denies that it was ever informed by the Complainant or her physicians that she should not write receipts. Norma Bennett testified under cross-examination by the Complainant that she was not aware that stamping mail or receipts caused the Complainant a problem. She testified that she did not have concerns about the Complainant working at the front desk as long as the Complainant followed the accommodations.

343. I have already found that the Complainant's tasks involved her often using her right arm, hand and shoulder. How often and for what tasks was not identified by the Respondent for the purpose of developing accommodations. I agree with Respondent counsel's submission that to assess what repetitive motion means, one needs practical parameters. In my view, if the Respondent did not recognize that the Complainant's physical limitations would make it difficult for her to prepare receipts and handle mail, it is because the Respondent did not complete its obligation to inquire and determine what accommodations were required via an analysis of the Complainant's job tasks to identify their functional components.

344. Quite apart from this, the evidence suggests that the Respondent did know or should have known that the Complainant could not write receipts. When the Complainant returned to work in January 2011, which is the last period that she had been able to work consistently, Norma Bennett removed her front desk duties such as dealing with

clients, responding to incoming calls and mail duties on the basis of the medical information provided at that time.

345. An e-mail from Gail McClare to Norma Bennett and others dated January 24, 2011 was in evidence. In that e-mail, Ms. McClare wrote that she had been in contact with the Complainant's healthcare provider. She wrote, "I stated to her, that just last week Sandra informed me that she can only write one receipt, without a break, I informed her (and to Sandra as well) that when responding to the front desk, it may be necessary to write more than one receipt".

346. Norma Bennett was cross-examined about this document. She stated that for her, in all the conversations and with all the medical forms, there was never a discussion about writing receipts. She testified, "I just don't recall that".

347. On the basis of the e-mail of January 24, 2011, I am persuaded that the Respondent had been advised in January 2011 that the Complainant should not be writing receipts in a repetitious manner and, therefore, had that information in its possession in advance of the Complainant's return to work in February 2012. In my view, if the Respondent did not understand what avoiding repetitious movements meant, it ought to have made further inquiries in this respect.

e) Did the Complainant Perform Contraindicated Tasks?

348. The Respondent submits that the evidence that Norma Bennett collected shows that the Complainant did not, in fact, prepare receipts or handle mail once she returned to work in February except for February 24, March 5 and 6, 2012.

349. As indicated, Ms. Bennett had an employee review the total number of receipts and mail count to prepare a chart of how many times the Complainant did these duties. Specifically, that chart shows that the Complainant did three receipts on February 24,

twenty-three on March 5, 2012 and one on March 6, 2012. A mail count of 24 was noted for the Complainant on March 5, 2012. Otherwise the chart indicates that the Complainant did not write receipts or do the mail on the other days she worked until she left on March 9, 2012.

350. As noted above, the Complainant also had been asked to complete a front desk duty log because of the concerns around the fair division of work among staff. The Complainant's record only references mail duties on March 6. The Complainant did not recall filling out the log and thought that it looked inaccurate given how busy the office is and the limited number of tasks noted.

351. The employee who created the chart was not called to give evidence to establish its accuracy. Ms. Bennett believes that the chart is accurate and testified that she reviewed the information. There is, however, no opportunity for cross-examination of the person who actually prepared the chart and no verification was available based on original business records.

352. I am prepared to find as fact that on a number of days the Complainant did not write receipts and that on a few days she did. However, the impact of this finding is tempered by the circumstances. In my view, to focus on the number of receipts that the Complainant wrote or did not write during February 20 to March 9 is to miss "the forest for the trees". Mail and receipt duties were the focus of the Complainant, who is a lay person. There is a broader medical picture here involving the pace of the work in such a busy office, the quantity of physical motion, and the environment of stress, noise and distraction, and its impact on the Complainant's chronic pain and cognitive difficulties.

353. At one point during the Complainant's cross-examination of Ms. Bennett, the Complainant asked Ms. Bennett if she thought that the Complainant was capable of doing her job at Damascus Road. Ms. Bennett responded, "We conferred with your physician. I think you could if you paced yourself, but towards the end I don't think that you could." The Complainant's health problems and accommodation issues were more extensive and

complex than simply whether the Complainant could write receipts. If the Complainant did not write any receipts, that would not remove the issues related to accommodation in this case. It would not negate the fact that a broader failure to accommodate had an adverse impact upon the Complainant.

(iv) Did the Failure to Implement Recommended Accommodations Aggravate the Complainant's Symptoms?

354. The Complainant submits that working without accommodation led to an aggravation of her symptoms which she submits constitutes an adverse impact.

355. The Respondent denies that any aggravation of symptoms occurred. Primarily, the Respondent relies upon its assertion that the Complainant had somatization in this regard. The Respondent submits that it is not possible for job tasks to exacerbate somatization. The Respondent submits that the Complainant could have done repetitive tasks and any prohibited job function and not have exacerbated her situation because none of it was real.

356. The Respondent's position invites a conclusion based on a different set of facts than what occurred here. I have found that the Complainant did not have somatization, at least not to a degree that would explain all her symptoms and restrictions, and that she did have a physical disability, chronic pain. Accordingly, the Respondent's submission (that it is not possible for job tasks to exacerbate a condition like somatization) is not relevant on the facts of this case.

357. The Respondent also submits that the Complainant is required to prove on a balance of probabilities that her tasks aggravated her disability and that she has not done so.

358. The evidence of Dr. Lewis is that the failure of the Respondent to accommodate the Complainant's injuries aggravated her injuries. Repetition and aggravation of chronic condition is repeatedly identified by Dr. Lewis as an issue in the Complainant's medical

forms. As an example, the May 2011 Certification by Attending Physician completed by Dr. Lewis when the Complainant left work for a medical absence states both "cannot sit, lift arms for repetitive motions" and "acute exacerbation of chronic problem". The February 2012 medical form confirms continuation of chronic musculoskeletal pain and strain and recommends limited lifting and reaching with the right arm and a requirement for various positions to work, which maintains the relevance of the risk that work duties could aggravate her condition.

359. The evidence that some physical aspects of her job aggravated the Complainant's symptoms seems more likely than not to be correct given the pattern of the Complainant's returns to work followed by periods of short-term disability.

360. Drs. Bourke and Theriault were not asked to specifically comment in their reports on the issue of whether the tasks performed by the Complainant aggravated her injuries and/or her symptoms. However, Dr. Bourke's evidence is consistent with this conclusion to the degree that his report acknowledges that the Complainant relayed in her history that performing repetitive tasks had made her symptoms worse. He does not appear to disagree with her.

361. Dr. Koshi was not asked to give an opinion on the issue of whether being required to perform repetitive tasks would aggravate the Complainant's injuries, although he did provide an opinion that the Complainant could not have been accommodated. There is nothing in his report to say that performing repetitive tasks would or would not aggravate her symptoms, likely because his conclusion is that her symptoms are "all in her head".

362. In summary, the Respondent offered no medical evidence to counter the medical evidence of Dr. Lewis that the Respondent's failure to fully and effectively accommodate the Complainant aggravated her symptoms. This is enough to establish that the duties the Complainant was asked to perform and the aspects of her work environment that were not in accord with her need for accommodation aggravated her symptoms when she returned to work in February 2012. I find that the Complainant's physical disability was

aggravated by the failure of the Respondent to implement all accommodations and that she suffered an adverse impact as a result for purposes of establishing a *prima facie* case of discrimination.

(v) Did the Failure to Accommodate Lead to the Complainant Being Unable to Work?

363. The next issue is whether the aggravation of her symptoms led to the Complainant being unable to work. This is further alleged by the Complainant to be an adverse impact.

364. The Respondent submits that writing receipts and doing mail duties did not put the Complainant off work because writing receipts did not cause symptoms. Counsel for the Respondent points out that the Complainant continued to work after she wrote multiple receipts and handled a significant amount of mail on March 5, 2012. The Respondent asserts that the Complainant left work on March 9, 2012 for other reasons, namely that her tailbone was bothering her.

365. On March 9, 2012, the Complainant was found on the floor of the washroom at work on her hands and knees being sick to her stomach. She was driven home. The Complainant testified that she left work because she was "sick of being sick" and because "her tailbone hurt". She described feeling a burning in her stomach, that her throat was closing in, that she was afraid and that she "felt that her mind was going".

366. The Complainant had been working without all required accommodations since February 20, 2012. I have found that this likely aggravated her symptoms.

367. Since her return to work, the Complainant had been advised that she would need to schedule medical appointments outside of regular work hours. The Complainant believed that this meant she could not have osteopathy treatment that was, at that time, scheduled during the day each Tuesday. The evidence is that the Complainant was highly stressed about her ability to remain well if she could not attend treatments. The Complainant also

understood that her need to attend medical appointments was of significant concern to the Respondent.

368. She appears to have been correct. Norma Bennett sent an e-mail to Laura Forrest on March 14, 2012 that stated,

> Since she has returned to full hours on March 5th, she has been out twice on medical appointments on Tuesdays (full day) – no prior notice.

The e-mail also states,

> ...in the past, she has missed a great deal of time for medical leave. Often, these medical appointments were not deemed an accommodation/requirement from her Doctor in order for her to return to work successfully.

369. As indicated, the Complainant became too ill to work on March 9, 2012. Notably, she was scheduled to have a meeting to discuss the scheduling of medical appointments with Ms. Bennett later that same day.

370. The Complainant was asked under cross-examination if her departure from work on March 9, 2012 could be related to one particular reason and whether it was related to writing receipts. She testified that "she did not know". She also stated, "it was all the causes".

371. When Dr. Watson completed medical forms for the Complainant on March 15, 2012 and March 20, 2012, he identified anxiety and stress as her impairments, noting that for the past several months she had experienced difficulty with anxiety. On March 20, 2012, Dr. Watson described her impairment as "excessive pain with shoulder/arm movements such as stamping/opening mail" and "burning pain to lumbar spine with sitting". He wrote that

the Complainant could not meet the physical and emotional demands of her current position and needed to be seen by Dr. Lewis.

372. The form completed by Dr. Watson provides medical evidence that writing receipts and doing mail duties was part of the reason that the Complainant was off work. I recognize that this may have been based upon the subjective reporting of the Complainant. However, Dr. Watson had access to the Complainant's file and had treated her before. If he believed that what she reported was not relevant to her ability to remain at work or was otherwise unreasonable, he presumably would have addressed this issue in a more questioning manner in his completion of the form.

373. As the Complainant was found on the washroom floor, it seems probable that she hurt her tailbone in the process of becoming ill. In any event, the evidence does not support a finding that she left work for that reason alone. The Complainant's testimony respecting her impressions of her health and Dr. Watson's notes are consistent with the greater probability that the underlying cause of her becoming ill in the washroom is related to the injuries that she sustained in her motor vehicle accidents, her stress at work, and that her disability is the primary reason that she left work on that day. Norma Bennett, who attended to the Complainant in the washroom, described the episode as "related to car accident" in notes that she made at the time. Her e-mail of March 14, 2012, indicates that the Complainant told her that her episode was a result of not being able to attend treatment. This e-mail provides further corroboration that the Complainant became unable to work because of work-related requirements that aggravated her symptoms.

374. Further, there is no medical evidence of any significant injury to the Complainant's tailbone that would cause her to be unable to work. There is mention of the Complainant's tailbone being sore in the records of Ms. Milner-Clerk. On March 13, 2012, the Complainant saw Ms. Milner-Clerk and told her about her episode at work. This included mention of her tailbone. However, other symptoms consistent with her usual functional limitations were also mentioned as well. Ms. Milner-Clerk's notes also reference "stamping and receipt writing" and "pain in breastbone, wrist and arm".

375. Nothing respecting the Complainant's tailbone was noted by either of the two independent medical examiners. Their reports are consistent with the conclusion that the Complainant's inability to work arises from her injuries related to her motor vehicle accidents and her concussion. Further, I have considered the conclusions that are reached in these reports respecting the Complainant's ability to work. These reports are consistent with a finding that working without proper accommodation would likely aggravate the Complainant's symptoms and lead to her inability to work.

376. Finally, the evidence shows that the Complainant applied for, and was granted, long-term disability on the basis of an inability to work due to chronic disability, not due to hurting her tailbone.

377. Based on all the evidence, I find it more probable than not that the Complainant's experience at work following her return on February 20, 2012 led to an aggravation of her physical and mental disabilities which, in turn, led to her being unable to remain at work and that her inability to continue working was not solely due to her having hurt her tailbone on March 9, 2012. In my view, the primary reason was the aggravation of her physical and mental disabilities.

378. I find that an aggravation of disability, caused by a lack of accommodation, leading to an inability to work constitutes an adverse impact. As a result of being unable to work, the Complainant was left without any income for a period of time. I find that the Complainant has established that, in this respect as well, she suffered an adverse impact by reason of not being able to continue working after March 9, 2012.

(vi) Did the Complainant Suffer an Adverse Impact by Reason of the Attendance Management Program?

a) Evidence Regarding Attendance Management Plan

379. The Complainant testified that when she returned to work February 20, 2012 she was advised that she would be required to attend a meeting later that week. She was, therefore, surprised to be called into an unexpected meeting with management on her first or second day back to work.

380. The meeting was attended by Norma Bennett and Laura Forrest. Laura Forrest testified that the purpose of the meeting was to advise the Complainant that she was being placed on an attendance management plan and that she was being asked to have an independent medical examination.

381. Norma Bennett and Laura Forrest testified that the meeting was held on February 21, 2012. Based on the documentary evidence, it was not clear whether the meeting was held on February 20 or 21, 2012. There is a discrepancy between the attendance management letter, which is dated February 21, 2012, and notes of the meeting taken by Norma Bennett, that are dated February 20, 2012. Ms. Bennett testified that the notes were dated incorrectly and that the date should have been recorded as February 21, 2012. A subsequent entry in Ms. Bennett's notes, that appears on the same page as the notes she alleges were made on February 21, 2012, is dated separately and is dated February 21, 2012.

382. Laura Forrest recalled that the meeting was held on February 21, but she also recalled that the meeting was held on the first day that the Complainant returned to work.

383. Ms. Forrest's recollection, that the meeting was held on the first day the Complainant returned to work, and the February 20 date recorded in the notes taken by Ms. Bennett, suggest that the meeting took place the first day that the Complainant returned to work on February 20, 2012. If not, it took place the next day on February 21, 2012.

384. The Complainant asked at the meeting if she should have a Union representative present. Ms. Bennett's notes of the meeting indicate that Laura Forrest advised her that she could, but that it was not necessary, as it was not a disciplinary meeting.

385. Laura Forrest testified that she asked the Complainant's Union representative if she wanted to attend because Ms. Forrest thought it would be helpful to the Complainant to have Union representation present. Ms. Forrest testified that the Union representative said that she was unavailable and did not see the need to attend the meeting. On cross-examination, Ms. Forrest testified that the meeting was not something that the Union representative *wanted* to attend.

386. The Union representative was not called to give evidence. Ms. Forrest's evidence concerning what the Union representative said is, therefore, hearsay. The Union had, in 2006, advanced a grievance on behalf of the Complainant alleging that the Respondent was not accommodating the Complainant.

387. Ms. Bennett's notes respecting what was said appear to contradict the testimony of Ms. Forrest. They do not record Ms. Forrest advising the Complainant that she had spoken to the Union representative and what the Union's position was. Instead, they record the Complainant being told that she could have a Union representative present if she wished, but that it was not necessary. In a unionized workplace such as this, the attendance of a Union representative would be a significant matter. If Ms. Forrest said to the Complainant that the Union representative did not want to attend, or that the representative did not think it was necessary, I would expect that would be recorded in the notes. I cannot accept Ms. Forrest's testimony that the Union representative was asked to attend but did not wish to attend. Her evidence is simply not in keeping with the circumstances. In my view, Ms. Forrest's testimony implicitly recognizes that the meeting should have been held with a Union representative present.

388. At the meeting, the Complainant was given the attendance management letter of February 21, 2012. This letter had been prepared in advance of her return to work in January 2012, as the Complainant had, at one point, been expected to return then. The letter advised the Complainant that her attendance was less than 45% for 2009-2010 and less than 25% for 2010-2011. A colour coded chart was included with the letter which listed all her absences for the last three years. The letter states, "Although all your absences are medically supported, your excessive absenteeism level is unacceptable".

389. The letter references operational impacts. These were that the Respondent had to hire additional staff when the Complainant was unable to work during the office's busy period over certain months in the year and that the Complainant's absences placed additional pressure on co-workers who had to assist with overflow. Ms. Forrest testified on cross-examination that the burden was financial. She also referenced operational problems related to the time it took to obtain a replacement and train them. Ms. Forrest clarified on cross-examination that temporary or casual employees were hired. She acknowledged that the financial burdens she identified were "regular costs of doing business".

390. Ms. Bennett likewise testified that there were operational impacts upon the Respondent. She testified that the Respondent was not able to permanently fill the Complainant's position with someone else. She also made a vague reference to the existence of statutory time limits for certain services to clients. However, no detail or evidence in support of this alleged problem was provided.

391. No details respecting the costs incurred by the Respondent were provided by the Respondent's witnesses, nor was any direct documentary evidence offered to corroborate financial or operational burdens. In my view, there is a lack of evidence that financial or operational issues were an issue of significance for the Respondent. The Respondent is a large employer. These burdens, as decribed, would not amount to undue hardship to this Respondent.

392. As indicated, the attendance management letter describes the various accommodations of the Complainant undertaken by the Respondent since 2008. Norma Bennett's notes record that she pointed out to the Complainant that the Respondent had "gone above and beyond to accommodate you to get you back to work". This point appears to have been re-stated again at the meeting. Ms. Bennett subsequently wrote in her notes:

> We feel that we have done everything we can and if your attendance does not improve we will have to take further action up to and including termination.

I find as fact that the Respondent's belief, that it had already done everything it could to accommodate the Complainant, was stated twice to the Complainant during the meeting.

393. The Complainant testified that Ms. Bennett threw a piece of the letter at her and was hostile. Ms. Bennett denied that any paper was thrown. The Complainant has mental disabilities that impact, to some extent, her memory and recall. The Complainant may perceive that a paper was presented to her "aggressively" by Ms. Bennett. Perhaps it was. However, having had an opportunity to observe Ms. Bennett as a witness, I do not believe that Ms. Bennett threw the attendance management letter at the Complainant.

394. The Complainant testified that she raised the issue of stamping receipts at this meeting and brought up the fact that she had previously been reprimanded for not writing receipts. Ms. Bennett did not recall the Complainant raising any issue respecting writing receipts and handling mail during this meeting. Likewise, Ms. Forrest testified that she did not recall this. She also did not remember the Complainant being reprimanded. She testified that the Complainant had not received any disciplinary letters.

395. By reprimanded, I understood the Complainant to believe that she had been strongly counselled that she would have to write receipts. I note that this had been explained to her at one point, as confirmed by the e-mail from Ms. McClare to Ms. Bennett of January

24, 2011. I find it was reasonable for the Complainant to perceive that she had been "directed" by the Respondent that she was expected to write more than one receipt.

396. Ms. Bennett's notes record a verbal exchange between the Complainant and Ms. Bennett. This happened after Ms. Bennett asserted with an apparent air of certainty that the Respondent had gone above and beyond to accommodate the Complainant. The Complainant responded that she was not accommodated for background noise on her last return to work. Ms. Bennett stated that the Complainant was provided with noise dampening earmuffs that she refused to wear and that the Complainant was not at the workplace long enough to make a valid assessment, as she had only been at work 10% of the time. In fact, after the Complainant returned to work in January from short-term illness, she only missed two days of work in January. She missed three days in February 2011 before she began her vacation. Ms. Bennett's retort to the Complainant suggests that the tone of the meeting held a note of polite aggressiveness.

397. The attendance management letter stated that an independent medical examination was required "to identify if there is anything further that the employer can do to support you to ensure that you are able to achieve regular and consistent attendance in the immediate future." This written statement appears to conflict with Ms. Bennett's oral statements to the Complainant that they "had gone above and beyond to accommodate you to get back to work."

398. Ms. Bennett's notes indicate that Ms. Forrest explained to the Complainant that an independent medical examination would determine her work abilities and accommodations as the examiner would speak with her physician and review all of her health information to undertake a "full assessment". It is at this point that the Respondent stopped proceeding on the basis of each of its medical forms taken alone and sought an overall picture of the Complainant's health and disabilities by requesting an independent medical examination. (I note for the record that one independent medical report based on certain documentation had been requested from Dr. Burnstein on February 1, 2008 when Dr. Burnstein was asked whether the Complainant was capable of working in the role of

receptionist at the Sunnyside Mall by Ms. McClare. Dr. Burnstein's report was not in evidence).

399. The Complainant was not under a legal obligation to attend an independent medical examination under the collective agreement applicable to the workplace. She agreed to attend following the meeting.

400. Ms. Forrest was asked under cross-examination why the Respondent did not ask the Complainant to attend an independent medical examination in January 2012. Ms. Forrest responded that they did not want to send a letter to the Complainant about an issue like the attendance management plan.

401. On the evidence, there is no reason why the Respondent could not have requested an independent medical examination earlier, without placing the Complainant on an attendance management plan. From this, I infer that obtaining an independent medical examination prior to the Complainant's return to work was not the Respondent's priority, rather, its priority became placing the Complainant on an attendance management plan when she returned.

402. Ms. Forrest testified that the attendance management letter was a template letter. The letter includes the statement, "Please be advised that continued excessive innocent absenteeism could lead to further action, up to and including termination of employment." Ms. Forrest testified that this statement was always included in the template letter.

403. The Commission correctly pointed out that there was no specific target for attendance in the attendance management letter. The letter states "While we are willing to continue to work with you to help you achieve success and improved attendance in the workplace, it is expected that your attendance improve substantially upon your return from STI leave on February 20, 2012 and that you will take the necessary steps to attend work on a regular and consistent basis."

404. Laura Forrest testified on cross-examination that the employer was looking for improvement in attendance and that if the Complainant improved her attendance to 50% she would continue to be supported. She also testified that 25% absenteeism was excessive absenteeism.

405. The notes taken by Ms. Bennett at the meeting indicate that Ms. Forrest advised the Complainant that her attendance "needed to be at 90%- where she was in 2008".

406. Ms. Forrest testified that the Complainant was "quite upset" when she read the statement in the letter that "continued excessive innocent absenteeism could lead to further action, up to and including termination". Ms. Forrest testified that she explained to the Complainant that "she needed to be aware of that, if we continued down the route of attendance management". She also testified that she stated, "but it is not an imminent" thing, rather the letter is the "first step in the process" and that they needed to look at an independent medical report.

407. The Respondent's attendance management policy was in evidence. There are template letters attached to that policy. These relate only to the Respondent obtaining medical information for absences for medical reasons. The policy requires a formal attendance interview when regular attendance at work is compromised, where the employee is asked whether there is a medical reason for the employee's absences from work. The policy requires that a letter be sent to the employee to summarize the meeting and that the employee is required to give a package to their physician. The policy also states, "Should an employee not achieve and maintain a regular and consistent attendance, this may ultimately jeopardize continued employment." The policy does not differentiate between medical or disability-related absences, culpable absences or absences for other reasons.

408. Ms. Bennett's notes of the meeting indicate that Ms. Forrest explained to the Complainant that the Respondent was acknowledging that the Complainant had medical issues, but the Complainant had to show up for work. Ms. Forrest testified that the end

purpose of the policy is to get the employee to work but also to address management's needs if it gets to the point of undue hardship or frustration of contract.

409. It is also apparent from Ms. Bennett's notes of the meeting that Ms. Forrest discussed options with the Complainant. Ms. Bennett's notes record that these options included that she show up for work (the Respondent would assist where it can, many accommodations having already been made), that the Complainant apply to go on LTD, that she find work in another field outside of government where her injuries do not affect her job, and lastly, that she retire.

410. Ms. Forrest confirmed that the options were discussed as described. However, she testified that she did not recall stating that the Complainant should find work "outside government". She thought that she would have said "outside the department" in which the Complainant worked. On cross-examination, she maintained that she did not recall what was said.

411. Ms. Forrest had also testified that if an employee could not be accommodated in their current position, the Respondent's approach was to look elsewhere for a position within the same workplace, then within the relevant department, then within all government departments. She had testified that this had been the Respondent's practice since she began to work for the Respondent in 2007.

412. In my view, if Ms. Forrest had outlined that there were different efforts the Respondent could make to find the Complainant an alternate position within the Respondent's employ, it is more likely than not that this would have been recorded in Ms. Bennett's notes. It would very much have been in the Respondent's interests for Ms. Bennett to record this. Ms. Bennett testified that she believed her notes were accurate. I find as fact that Ms. Forrest made the statement at the meeting that the Complainant could find work in a field outside of government where her injuries did not affect her job or retire.

413. These particular options, namely, working outside of government and retiring, appear to have had some immediate effect upon the Complainant. Ms. Bennett's notes indicate that the Complainant then asked questions about civil service benefits upon retirement. Ms. Forrest offered to ensure that she received this information. I find that the Complainant most likely perceived pressure by her employer to leave or retire, which, of course, would end her employment. The Complainant had also heard Ms. Bennett's comments to the effect that "we feel we have done everything we can".

414. What does not appear in Ms. Bennett's notes is any reference to the fact that Ms. Bennett and Ms. Forrest also discussed the issue of the Complainant's attendance at medical appointments at the attendance management conference. The Complainant was advised to schedule appointments outside of regular work hours. Ms. Bennett believed that the Complainant was taking medical appointments during the work day and was concerned. As indicated, she subsequently scheduled a meeting to further discuss this issue with the Complainant on March 9, 2012, which was the last day the Complainant attended work.

415. Subsequent to the attendance management conference, the Complainant became very stressed about attending medical appointments, including weekly treatments with her osteopath. She stopped seeing her osteopath each Tuesday. This is confirmed by Ms. Bennett's e-mail to Ms. Forrest on March 14, 2012. This e-mail was written about the episode when the Complainant became quite ill at work on March 9, 2012. The e-mail includes the following statements:

> During Sandra's episode on Friday, she indicated that she is unable to attend her sessions with her Osteopath as we have indicated that she is to attend work and schedule her medical appointments outside of work hours. She indicated that her episode is a result of not being able to attend her weekly sessions (every Tuesday-full day) with her Osteopath.

> I was unaware that she had weekly meetings with her Osteopath on Tuesdays, nor was I aware that she was not attending. Since she has returned to full hours on March 5th, she has been out twice on medical appointments on Tuesdays (full day)-no prior notice.
>
> I have some concern with Sandra's perception that she is unable to attend her treatment and remain well because we are not allowing her to attend medical appointments during work hours. I realize that the conversation we had with Sandra included advising her to schedule appointments after hours and on her EDO where possible, as in the past she has missed a great deal of time for medical leave. Often, these medical appointments were not deemed an accommodation/requirement from her Doctor in order for her to return to work successfully.

416. I find that the Complainant reasonably became hesitant to attend all of her appointments, with specific reference to osteopathy treatments on Tuesdays, which she stopped attending, because of the position the Respondent took respecting her attendance at medical appointments and the concurrent application of the attendance management plan to her. The Complainant perceived that this led to her having the health episode on March 9, 2012. As noted above, absences to attend medical appointments were counted as absences by the attendance management policy. I find as fact that the Complainant experienced a high degree of stress as a result of this rule within the attendance management policy being applied to her individual situation and that this contributed to her health episode on March 9, 2012.

417. I return to the fact that Ms. Bennett's e-mail to Ms. Forrest of March 14, 2012 indicates that she was not aware that the Complainant was not attending medical appointments. Ms. Bennett wrote, "Since she has returned to full hours on March 5th, she has been out twice on medical appointments on Tuesdays (full day)-no prior notice". These two statements are inherently contradictory. Further, March 5, 2012 was a Monday. March 9, 2012 was a Friday. Ms. Bennett writes that the Complainant has been out twice for full

days on Tuesdays since March 5, 2012. As this is impossible, her statement is inaccurate.

418. In the e-mail, Ms. Bennett states that the Complainant provided "no prior notice". On Wednesday March 7, 2012, the Complainant sent an e-mail to Ms. Bennett advising her that she would be out of the office on Thursday, March 8, for medical appointments. I find it improbable that the Complainant would provide notice respecting the absence on March 8, 2012 and not do so in relation to Tuesday, March 6, 2012. I do not accept that the Complainant failed to appear at work on two days that week, without notice.

419. Ms. Bennett states in her e-mail that she was unaware that the Complainant had weekly meetings with her osteopath on Tuesdays. She then complains that the Complainant has been out of the office on medical appointments on Tuesdays.

420. This e-mail was prepared by Ms. Bennett shortly after the Complainant became unable to work. The statements made by Ms. Bennett suggest pre-formed beliefs that the Complainant was abusing her use of medical appointments. I do not believe that the meeting of March 9, 2012 was scheduled by Ms. Bennett for the purpose of encouraging the Complainant to attend her medical appointments. Ms. Bennett became aware of the Complainant's perception that her health was negatively impacted by reason of being unable to attend her treatments when Ms. Bennett was advised of this by the Complainant during her episode in the bathroom on March 9, 2012. It was at this point that Ms. Bennett became concerned about the Complainant attending medical appointments. Before that, Ms. Bennett was concerned about the Complainant attending work.

421. From this, I draw the conclusion that the meeting of March 9, 2012 was likely to be a stressful experience for the Complainant and would have led to further counselling of the Complainant respecting her need to attend work. I believe that Ms. Bennett's intention changed after the Complainant attributed the episode in the washroom to her inability to attend osteopath treatment. However, by that point, the "harm had been done" in that the

Complainant correctly believed that her medical appointments would not be accommodated under the attendance management plan, placing her job at additional risk because of her chronic condition. The Complainant perceived that her health was worse as a result and it did worsen. By March 9, 2012, she was no longer able to work.

b) Analysis

422. The Respondent submits that placing an employee on an attendance management plan does not constitute an adverse impact or treatment on the basis of *Sluzar* and *Munro.* In *Sluzar*, the British Columbia Human Rights Tribunal found that attendance management letters given to Mr. Sluzar did not constitute an adverse impact. One of the reasons for this finding was that the attendance management letters simply required Mr. Sluzar to provide medical notes for absences. The letters did not outline any other consequence for Mr. Sluzar, such as potential termination. *Sluzar* held that "it is not adverse treatment for an employer to alert an employee that their level of absenteeism is of concern, and to advise the employee of the potential consequences if their attendance does not improve. In fact, an employer is legally obligated to provide such a warning prior to taking any action that would have an adverse impact on an employee."

423. In *Munro*, the Complainant advanced numerous allegations of discrimination, including a complaint that being placed on an attendance management plan was discrimination. None were considered to be well-founded by the Board. The Board accepted evidence that no employee had ever been terminated on the basis of the attendance management plan. The complainant in that case acknowledged that it was within the employer's right to institute such a program and the Board in *Munro* held that the innocent absenteeism program itself was not discriminatory.

424. One of the cases referenced in *Sluzar* is *Horn v. Norampac (No.2),* 2009 BCHRT 243 ("*Horn*"). This was a case where an attendance management letter stated, "...if your attendance does not improve and there is no chronic medical condition to support it, your employment will be at risk" (emphasis added). The complainant's attendance immediately

improved because he did not have a continuing disability or a chronic condition. No action was taken by the employer on the letter. The facts in *Horn* are different than in this case because Mr. Horn did not have a chronic disability and his attendance could immediately improve. As well, the attendance management policy in *Horn* must have incorporated some form of accommodation for persons with chronic conditions, given the wording of the letter.

425. I agree that an attendance management program, as a standard in a workplace, is not systemically discriminatory if, as a standard, it is adopted in good faith for a purpose rationally connected to operational needs in a workplace and if it is "reasonably necessary", as that has been defined in the case law respecting the issue of undue hardship to the employer: *Meiorin*. This is well supported by the case law relied upon by the Respondent, including *Hydro-Quebec v. Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale* 2000, 2008 SCC 43 *("Hydro-Quebec").* I agree that it is not an adverse impact or inherently discriminatory to tell an employee that they have an attendance problem that is negatively impacting the employer's operations, to inform them of an attendance management program and to place them on such a program. It is also clear, based on the case law, that the fact an employee experiences stress from being informed that they are being placed on an attendance management program does not constitute an adverse impact.

426. However, the proposition that being placed on an attendance management plan is not in and of itself an adverse impact must be considered in the context of the facts of this case in relation to the manner this attendance management plan was applied to this Complainant.

427. The Respondent had in its possession medical forms provided during the Complainant's absence on short-term disability from September 2011 until her return in February 2012. The October 5, 2011 Certification by Attending Physician completed by Dr. Watson noted "stress, anxiety" and "feeling overwhelmed by multiple stressful life circumstances". The form completed by Dr. Watson on November 7, 2011 continued to note "stress and

anxiety". The January 9, 2012 form completed by Dr. Lewis notes that the Complainant is seeing a psychologist on a regular basis. As has been highlighted, the form Dr. Lewis filled out on February 14, 2012 diagnosed depression and noted under "Impairment" that work accommodations were needed for "stress" and "work environment". Dr. Lewis also wrote "ongoing problems focusing in noisy, stressful work environment".

428. The attendance management plan was presented to the Complainant upon her return from a lengthy absence. She had just been informed of what the employer was prepared to do to accommodate her. She was, at the time, adjusting to her return to work and was expected to review a number of procedures respecting her tasks. Ms. Bennett had assigned another staff person to work with the Complainant in this regard. The Complainant was also facing the human challenges of returning a busy office and to her relationships with her managers and her co-workers. Ms. Bennett was dealing with complaints about workload from the staff in the office at the time. It would have been reasonable for the Complainant to have had some initial concerns about workplace dynamics.

429. The Complainant had an unreasonably limited period of time to adjust to the circumstances associated with her transition back to work before she was informed that she was required to attend a meeting with her manager, Norma Bennett, and the human resources consultant, Laura Forrest, and was presented with the attendance management letter.

430. It is not disputed that this was a stressful meeting for the Complainant. Yet, the attendance management program was imposed by the Respondent on the Complainant when she was under a physician's direction to avoid stress and was particularly vulnerable. At the time, she was not well enough to work fulltime hours. The Complainant's ease back to work was medically supported by Dr. Lewis and was part of the work restriction requested by Dr. Lewis. While the meeting occurred during the hours the Complainant worked for the Respondent, the timing of a meeting of this nature is inconsistent with the concept of an "ease back" to work.

431. In my view, accommodating the Complainant's depression and stress included not adding to it unnecessarily. Placing the Complainant on an attendance management plan as soon as she returned to work constituted additional and unnecessary stress that was contraindicated by her physician. In short, the "message" should not have been delivered on the first or the second day of her return.

432. There is no evidence that it was reasonably necessary to advise the Complainant that she was being placed on an attendance management plan on February 20, 2012 or on February 21, 2012. I conclude that placing the Complainant on an attendance management program in this manner, in these circumstances, constitutes a further occasion of the Respondent failing to comply with the accommodation requests of the Complainant's physician that were intended to enable the Complainant to return to work successfully and, therefore, as a source of significant stress, constitutes an adverse impact.

433. I have a further concern about the manner in which the meeting was held with the Complainant. Given the reasonable likelihood that she would find the meeting upsetting and the likelihood that she would wish to consult with the Union, the meeting should have been held when the Complainant could have had a Union representative or support person with her. This was implicitly recognized by Ms. Forrest. There is no reliable evidence of any reason why the meeting was conducted without affording the Complainant a support person. Proceeding in this manner was not in keeping with her physician-recommended accommodations respecting minimizing stress. On the evidence, I conclude that the absence of a support person added to the stressfulness of the meeting unnecessarily and, to some degree, constitutes an adverse impact upon the Complainant in all the circumstances.

434. The content of the attendance management letter and the manner in which it was explained at the meeting, as described above, reinforces my conclusions that the attendance management program, as applied to the Complainant, constitutes an adverse impact. In particular, the content of the attendance management letter and what was

stated to the Complainant made it clear that, if the Complainant's attendance did not improve dramatically in the immediate future, she would be terminated for innocent absenteeism. I acknowledge that the Complainant was not terminated. However, in my view, this was highly likely to occur.

435. In this regard, I note the lack of any express standard for attendance in the policy. Counsel for the Respondent submits that Laura Forrest's testimony was that the employer was looking for any improvement in attendance. However, this is not consistent with Ms. Bennett's notes at the time respecting what Ms. Forrest stated. I find it more likely than not that Ms. Forrest advised the Complainant that her attendance would need to improve to 90%.

436. The attendance management letter also indicates that the Complainant's attendance needed to improve "in the immediate future" and "upon her return from short term illness". I find as fact that the Respondent imposed a work-related standard of a 90% attendance rate upon the Complainant effective immediately upon her return to work.

437. In my view, it was unrealistic to impose standards of this nature under the umbrella of an attendance management program upon an employee who has a chronic disability. It should have been apparent to everyone at that meeting that the Complainant was not going to be able to immediately improve her attendance. She had only just begun her ease back to work, as recommended by her physician, and, therefore, she could not immediately meet that standard without placing her health in jeopardy. The Respondent gave no recognition to her period of ease back in the attendance management letter. Even if I infer that the Respondent intended that the Complainant complete her ease back to work, which is likely, it remains unrealistic for the Respondent to have assumed that her attendance could be brought up to 90% "in the immediate future", given that her disability was chronic. The Complainant was not given a reasonable timeframe by the Respondent to improve.

438. It is not as if the Complainant was returning to work following a lengthy absence with no need for accommodation; nor is it the case that what she needed for accommodation had been implemented and was well settled. Her need for accommodation was not completely settled, which is why the Respondent required an independent medical examination. Further, not all her recommended accommodations had been implemented.

439. I find that the Respondent was insisting that the Complainant meet arbitrary and unrealistic standards, standards that were not adjusted for her individual circumstances as a chronically disabled person. In doing so, the Respondent magnified the message to the Complainant in the attendance management letter respecting job loss. Job loss grew from a possibility to a probability that would likely occur in the relatively near future.

440. It is reasonable that a template letter includes a message about job loss to cover off that possibility. However, I do not accept that this letter is a standardized attendance management letter that is given to all employees placed on the plan. The letter was written specifically about the Complainant. Further, there is no evidence that the attendance management policy included a relevant template letter of this nature. In my view, the Respondent cannot, in fairness, distance itself from the pointedness of the inclusion of this statement in this letter on these facts.

441. My conclusion that the Respondent intended to convey to the Complainant that her job was in jeopardy is reinforced by what else was discussed with her at that meeting. I refer here to the discussion that the Complainant's options included retirement or going to work somewhere else outside of government where her injuries would not affect her job. Both of these options would involve the Complainant's voluntary resignation from employment with the Respondent and discontinue the Respondent's duty to accommodate her. These two options imply that the Respondent considered it a requirement that the Complainant be able to work as if she was not disabled and that her injuries could be better accommodated elsewhere. The Complainant's reaction in requesting information respecting retirement confirms that the Complainant was influenced to consider voluntary termination of her employment, at least initially.

442. That the Respondent raised the issue of retirement or the option of the Complainant working in another field outside of government further reinforces the probability that the Respondent was looking for some way to end the employment relationship. The Complainant's employment status changed from not being an issue to being "in issue", with a high probability that her employment would be terminated. That she experienced a real and material risk that this would happen is an adverse impact. This risk was a burden or disadvantage imposed upon her by the attendance management plan that would not be placed upon all employees who are placed on an attendance management plan.

443. For these reasons, I conclude that placing this Complainant on the attendance management plan in the manner undertaken by the Respondent imposed a disadvantage or burden and was an adverse impact on this Complainant. It was impossible for her to achieve the standard imposed upon her respecting attendance. I find that it is more probable than not that she was going to be terminated and that it was reasonable for the Complainant to perceive that this was the case. In this regard, I have also placed weight upon the evidence of Ms. Bennett's conviction that the Respondent had done everything it could already to accommodate the Complainant, notwithstanding statements to the contrary in the attendance management letter and the Respondent's decision to obtain an independent medical report. I will emphasize that this finding is based upon the specific facts of this case.

444. In this regard, I have carefully considered the Respondent's submission that there can be no adverse impact on these facts because it did not terminate the Complainant's employment. This is not a situation where a reference to possible termination is included in an attendance management letter or policy where there is appropriate accommodation in place and no predominant likelihood of termination in the near future.

445. Adverse impacts are dependent on the facts and varied in nature. A delay by an employer in inquiring into the need for accommodation can have an adverse impact on an employee's health and ability to participate fully in the workplace: *Sears v. Honda of*

Canada Mfg., 2014 HRTO 45. Similarly, a refusal to return an employee to work on a timely basis can be an adverse impact: *Kerr*. On the facts of this case, there need not have been an actual termination of the Complainant's employment to create an adverse impact. A pending termination is sufficient, if it is more probable than not to occur. I have found that this termination was likely to occur.

446. On these facts, and given the Complainant's functional limitations, it was reasonable for the Complainant to perceive that she was going to lose her job sooner rather than later. It was reasonable and likely for her to experience aggravated stress and anxiety at a level that is to be distinguished from the "normal" stress an employee may experience by reason of being placed on an attendance management plan.

447. Further, the Respondent's manner of applying an attendance management policy adversely and differentially affected the Complainant, as compared to employees who do not have chronic or episodic disability. The attendance management policy does not differentiate between the various reasons an employee is absent. It does not distinguish between culpable absences and "innocent" absences beyond the employee's control, such as those due to chronic disability. [I will address the issue of whether the attendance management policy itself is discriminatory because it does not differentiate between absences in the section of these reasons that considers the Respondent's defence. The issue here is whether aspects of the attendance management plan constitute an adverse impact].

448. The Respondent gave the Complainant a chart at the attendance management meeting that counted every absence due to disability as if it were a culpable absence. All absences for medical reasons, whether general illness or short-term illness, were included, even though nearly all of these absences were caused by her chronic disability. Recorded absences included those days that the Complainant worked part-days when she was in an ease back to work ordered by her physician and included her leave to attend medical appointments and treatment. Ms. Bennett reinforced the Respondent's

concern over the Complainant's attendance at medical appointments during work hours at the attendance management meeting.

449. I find that, 1) the requirement that ease back days be counted as full days of absence; and, 2) the requirement that time taken to attend medical appointments be counted against the Complainant's attendance, constitute disadvantages and adverse impacts upon the Complainant, as she required ease back days and time off work to attend osteopathy treatments as accommodations. These were all counted as days that could lead to the Complainant's termination or hasten the day of its arrival ahead of other employees who do not have a chronic disability. These aspects of the attendance management plan, as it was applied to the Complainant, caused the Complainant significant stress, beyond any normal stress associated with being placed on an attendance management plan, reasonably caused her to stop attending some of her appointments and contributed to her health episode on March 9, 2012, which involved an exacerbation of her chronic pain and related physical limitations. In my view, these constitute adverse impacts.

450. For these reasons, I conclude that the Complainant suffered an adverse impact, as it is defined in the *Act,* in several ways related to the manner in which the attendance management plan was presented and applied to her by the Respondent.

(vii) Was the Complainant's Disability a Factor in the Adverse Impact?

451. The third element of a *prima facie* case of discrimination requires the Complainant to establish that her physical disability was a factor in the adverse impacts she experienced. The Commission submits that there is no issue that the Complainant's disability was a factor in relation to the adverse impacts associated with being required to work without proper accommodations, leading to aggravation of her symptoms and inability to work, or in relation to the application of the attendance management program and the burdens it imposed upon her.

452. With respect to this third element, the Respondent relies upon its submissions respecting the first two elements. The Respondent's submission is this: Because the Complainant does not have a physical disability (the first element) and because she did not suffer an adverse impact by reason of physical disability (the second element), there is no connection between the two to assess. The Respondent did not address the issue of whether the Complainant has satisfied the third element of a *prima facie* case in the alternative.

453. In relation to the attendance management plan, the Respondent did not suggest that the Complainant's disability was not a factor.

454. It cannot be suggested that there is any real issue in this respect in relation to any of the adverse impacts in issue. The Complainant has met the burden of establishing the third element of the test for a *prima facie* case of discrimination.

(viii) Conclusion Respecting *Prima Facie* Case

455. For the above reasons, I am satisfied that the Complainant's disabilities included physical disability. I find that the Complainant has established that the Respondent failed to conduct an adequate and individualized assessment of the Complainant's need for accommodation when she returned to work in February 2012, that she was required to work without complete and reasonable accommodations in place, and, that doing so likely caused an aggravation of her injuries and symptomatology, which caused or contributed to her to becoming unable to work as of March 9, 2012. The Respondent's conduct towards the Complainant caused her to suffer adverse impacts or constituted adverse impacts themselves. Her physical disability was a factor in what occurred. According, I conclude that the Complainant has established a *prima facie* case of discrimination on the basis of the Respondent's actions towards her.

456. With respect to the attendance management plan, I have found that the Complainant has established that the Respondent's attendance management plan, which constitutes a standard in the workplace, led to an adverse impact upon the Complainant in several ways, based on the features of that plan and its application to her. This includes the Respondent's timing and manner of presentation of the attendance management plan to the Complainant given her health status and the likelihood of her termination. Her physical disability is without question a factor in relation to this policy. I conclude that the Complainant has established a *prima facie* case of discrimination on the basis of the Respondent's imposition of the attendance management plan upon her without regard for her chronic disability.

II. Respondent's Case in Response

457. The Respondent denies that it failed to accommodate the Complainant and submits that there is a non-discriminatory justification for both its conduct towards the Complainant and the application of its attendance management policy to the Complainant. I will address the accommodation issue first and then the attendance management policy.

A. Did the Respondent Fulfill its Duty to Accommodate?

(i) Did the Respondent Fulfill its Duty Based on The Medical Evidence?

458. The Respondent asserts that it fulfilled its duty to accommodate the Complainant based on the medical evidence. That submission was addressed previously in the context of whether there was an adverse impact. Those reasons should be taken as having application here. I found that the Respondent failed to accommodate the Complainant by failing to identify and implement any or sufficient accommodations for certain impairments and restrictions in the workplace when her physician recommended there be such accommodation. More generally, the Respondent failed to accommodate the Complainant to the point of undue hardship on the basis of the medical evidence when she returned to work in February 2012.

(ii) Did the Respondent Fulfill its Duty Based on the Availability of Long-Term Disability Insurance?

459. The Respondent submits that it accommodated the Complainant as she is in receipt of long term disability insurance which is a benefit under the collective agreement. The Respondent suggests that this is the only form of accommodation that is required in circumstances where an employee is no longer able to work. The Respondent relies on *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'Hopital general de Montreal,* [2007] 1. S.C. R. 161, 2007 SCC 4 ("*McGill University*"), in this regard.

460. In *McGill University,* a clause in a collective agreement that permitted termination of a unionized employee after a three-year absence was found to be properly considered by the arbitrator in assessing whether the employer had met its duty to accommodate. However, the clause was not determinative of that issue in and of itself. The Court held that the clause was a factor to consider in assessing the duty to accommodate, and, because an individualized assessment is required, the clause did not definitively determine what accommodation the employee is entitled to receive.

461. Likewise, in my view, the availability of long-term disability as a benefit in a collective agreement may be considered in assessing an employer's obligation to accommodate an employee who becomes unable to work, but it is not a complete defence and does not, on its own, define the Respondent's duty to accommodate in this case.

462. Further, the Respondent's submission incorrectly applies *McGill University* to the facts of this case. The clause in the collective agreement in *McGill University* was specifically distinguished by the Court from health insurance and disability benefits at para 19 of that decision. The Court expressly stated at para 17: "It is quite true that employee benefits cannot be invoked as a substitute for the duty to accommodate."

463. As well, long-term disability benefits as a form of accommodation were not immediately available to the Complainant when she became unable to continue working on March 9, 2012. Long-term disability only retroactively became available to the Complainant months later. From March 10, 2012, until that time, she was without income or other financial support, such as short-term disability, from the Respondent.

464. In this regard, an e-mail from Norma Bennett copied to Gail McClare and Laura Forrest of March 16, 2012 indicates that Ms. Bennett advised the Complainant that she could not take vacation time while off on medical/illness. She was further advised that her short-term disability was exhausted, and, depending on why she had been put off work by her doctor, she could be without pay.

465. There was evidence that, in relation to each medical absence, Gail McClare reviewed the medical evidence to determine whether the Complainant qualified for short-term illness disability and that this depended on whether the medical condition underlying the request for short-term disability was a continuation of a previous condition or a new condition, there being a limited number of days of short-term illness available for each underlying medical condition. An e-mail from Gail McClare to Norma Bennett, Laura Forrest and others dated March 28, 2012 indicates that Ms. McClare contacted the Complainant on that date to advise her that she would not be qualifying for short term illness based on the medical documentation received to-date. The Complainant responded that she was going to be meeting with her union representative. Ms. McClare's email records that the Complainant stated her belief to Ms. McClare that, "once Elizabeth gets involved she will have her STI benefits re-instated." The e-mail further records Ms. McClare's response: "I assured her, that the medical documentation has remained consistent."

466. It may well be that the Respondent correctly applied its rules respecting vacation time and short-term illness and that it had no discretion or flexibility in this regard from a legal perspective, such that the Complainant was not entitled to financial support. Regardless, it is not in dispute that the Complainant was left without financial support when she went off work and that long-term disability only became available retroactively. I accept, based

on her testimony and the medical evidence, that being off work without any income was very stressful and upsetting for the Complainant and elevated her anxiety.

467. The ultimate availability of long-term disability benefits cannot act as a defence to any prior failures of the Respondent to accommodate the Complainant, nor be a substitute for the Respondent's duty to accommodate the Complainant. That it was retroactively paid to the Complainant does not erase the fact that she was not in receipt of income or other financial support for a prolonged period and that this led to further stress and anxiety. The availability of long term disability, therefore, provides no basis to change the outcome of the findings in these reasons.

B. Was There a Non-Discriminatory Justification for the Respondent's Conduct Towards the Complainant?

468. The Respondent must demonstrate that there was a non-discriminatory justification for its conduct towards the Complainant. In this regard, the Respondent asserts that this is not a case where the issue is whether it accommodated the Complainant to the point of undue hardship. The Respondent did not offer evidence or make submissions in this regard. Rather, the Respondent submits that it was impossible to accommodate the Complainant because she has somatization. This was the primary non-discriminatory justification offered by the Respondent.

469. The Respondent also made related submissions that did not allege "impossibility" of accommodation based on somatization but nonetheless alleged that the Complainant could not be accommodated. These submissions were based on the Respondent's previous efforts to accommodate the Complainant.

(i) Was it Impossible to Accommodate the Complainant Because she had Somatization?

470. The Respondent submits that the Complainant's condition, somatization, is impossible to accommodate because she is not, in fact, disabled and because accommodations for somatization are not effective.

471. As indicated, the Respondent made a similar argument in the context of whether the Complainant suffered an aggravation of her symptoms as an adverse impact. I have declined to find on the evidence that the Complainant has somatization and have found that she does have a physical disability. The Respondent's submission that accommodation was impossible because the Complainant has somatization must fail, as it does not apply to the facts of this case.

472. Even presuming that the Complainant has somatization to some extent, I have found that she still has a physical disability. Somatization does not account for all of her disabilities and related functional impairments. While Dr. Koshi testified that "it was all in her head," to the Complainant and to her attending physician, her functional limitations were very real.

473. Further, had I found that the Complainant had somatization, I would not have been prepared to make a finding that somatization is impossible to accommodate. I cannot accept Dr. Koshi's conclusion that this is the case based on the evidence presented in support of this position.

474. In this regard, on November 10, 2015, Respondent counsel asked Dr. Koshi, "What accommodation, if any, could have been put in place to allow Ms. Wakeham to work successfully?" In an addendum to his file review dated November 2015, Dr. Koshi wrote:

> I do not believe that work accommodations are the key to Ms. Wakeham's successful return to work. In the answer to question #2 of my File [sic]

> review, I presented literature from American Medical Association publication, Burton 2004, Carroll 2008 and Nachemson 1994. This literature indicates that work ergonomics are not associated with improvement of pain or successful return to work. Instead, the successful return to work depends on psychological barriers. Psychological barriers are best addressed by a psychiatrist. Social barriers (such as job dissatisfaction) require social solutions, not medical ones (work accommodations). Furthermore...., individuals with somatization do not respond to medical interventions (work accommodations included).

475. In my view, Dr. Koshi's statement that he does not believe that work accommodations are the key to Ms. Wakeham's successful return to work is a deflection of the Respondent's question. I have considered his logic in the remainder of his comments. Implicitly, Dr. Koshi appears to define accommodations primarily as ergonomics. Ergonomics is only one potential form of accommodation that can be implemented in a workplace.

476. Dr. Koshi calls somatization a psychological barrier and implies that it ought to be treated by a psychiatrist. Drs. Bourke and Theriault recommended that a diagnosis of somatization be explored, presumably because some treatment is available. If some treatment is available, it is reasonable to expect that some accommodation may be recommended.

477. In this regard, I return to the Respondent's submission that somatization is a mental disability. As a mental disability, some accommodation of this mental disability may be possible. For example, an employee diagnosed with and being treated for somatization, who is returning to work, may require time off to attend counselling, or require behavioural support or perhaps an extended period of graduated return to work. Logically, Dr. Koshi should have responded that accommodations based on psychiatric recommendations could perhaps be implemented or be explored.

478. In my view, the Respondent cannot completely negate its duty to accommodate by asserting that accommodation is impossible without sufficiently persuasive evidence to this effect. I am not persuaded that it was impossible to accommodate the Complainant because she had somatization.

(ii) Could the Complainant's Disability Not be Accommodated?

a) Positions of the Parties

479. The Respondent submits that the Complainant's disability could not be accommodated, in any event, on the basis that it took many steps to accommodate her over the years leading up to her return in February 2012. The Respondent submits that none of these accommodations were sufficient to enable her successful return to work. Further, the Respondent submits that the Complainant returned to work when it was very unlikely this would be successful. To be clear, the Respondent does not suggest that, by some point in time, it had accommodated the Complainant to the point of undue hardship.

480. In this regard, the Respondent submitted extensive evidence respecting its efforts to accommodate the Complainant dating back to the early 2000's, when the Complainant worked as a receptionist and the office was located in the Sunnyside Mall in Bedford. The Respondent traced its efforts to accommodate the Complainant from then until February 2012.

481. The Commission submits that the Respondent's approach to this issue is incorrect in law. The Commission submits that the Respondent cannot point to the past and assert that it should be taken to have previously accommodated the Complainant when she returned to work in February 2012 and that this establishes that it was unable to do so after her return. The Commission submits that the fact that prior accommodations had not proven successful does not mean that the Complainant returned to work without reasonable chance of success and does not negate the Respondent's obligation to try to identify and implement accommodations that could be successful. The Commission submits that the

Respondent remained under a duty to accommodate the Complainant when she returned to work in February 2012 and quite simply failed to accommodate her.

482. The Commission submits that the Nova Scotia Court of Appeal's ruling made it clear that the complaint was limited in time to beginning in February 2012. The Commission submits that the effect of the Court of Appeal's ruling is that the Respondent cannot rely on past accommodations as proof that it accommodated the Complainant beginning in February 2012.

483. As well, the Commission took the position that this evidence is not relevant, in any event, to the issue of whether the Complainant was accommodated in February 2012. Counsel submits that this is particularly so because the Respondent did not carry accommodations forward, but rather considered each return to work separately. However, the Commission did not object to the admissibility of this historical evidence on the basis that it was relevant background.

484. Undue hardship (and presumably the duty to accommodate, more generally) is to be assessed globally, beginning with the employee's first absence: *McGill University*. In my view, evidence of prior accommodation would be relevant in accordance with *McGill University* respecting the issue of undue hardship, if that were being argued in this case.

485. While undue hardship is not asserted by the Respondent, I am prepared to consider the Respondent's prior efforts to accommodate the Complainant as relevant background in keeping with the "spirit" of the global assessment approach taken to the assessment of undue hardship in *McGill University*. While I make factual findings in response to the Respondent's submissions on this evidence, I make no finding of liability based on events that pre-date February 2012. In general, the relevance of this evidence is also tempered by my finding that the Respondent considered each return to work separately. This evidence also does not negate my earlier finding that the Respondent failed to fully accommodate the Complainant when she returned in February 2012. However, it is

relevant to the Respondent's submissions that the Complainant's disability could not, in any event, be accommodated when she returned.

486. Before addressing the Respondent's historical evidence, I will acknowledge that much of the evidence offered by the Respondent respecting its prior accommodation of the Complainant was disputed by the Complainant. She alleges that she was not accommodated by the Respondent for many years and felt that she was "harassed" by her former supervisor over her need to attend medical appointments. However, I will not detail the conflicting evidence in this regard. It is extensive, it is of tempered relevance, and it cannot form a basis for a finding of liability for discrimination in accordance with the Court of Appeal's earlier decision. It also does not affect my overall conclusion in response to the Respondent's submissions on this point. Accordingly, I will summarize the Complainant's accommodation by the Respondent prior to February 2012 on the basis, primarily, of the documentary evidence provided by the Respondent and make factual findings on that basis.

b) The Evidence

487. At the time of the Complainant's first motor vehicle accident in 1999, the Complainant was in the position of receptionist and was responsible for dealing with every member of the public that visited the Sunnyside office. The evidence was that she worked in a very high-paced job and was required to process applications from members of the public, to write receipts, handle mail and deal with telephone inquiries, as well as to provide other clerical support.

488. The Complainant's first motor vehicle accident occurred on February 14, 1999. On March 9, 1999, she had not yet returned to work according to a note in Dr. Lewis's file. (Parenthetically, the note records that the Complainant "reports some fears around the issues of returning to work yet feels that people are criticizing her for not returning".) A further note records that she was medically cleared to return to work on April 12, 1999. She returned to work in her regular role as receptionist.

489. The Respondent had an ergonomic assessment conducted of the whole office, which included all administrative staff, in May 1999. The assessment stated that, "It is anticipated that the functional layout of the whole area should be modified to improve staff health outcomes". The assessment notes that the Complainant was not available at work at the time of the assessment and that with respect to the Complainant, "a different approach from that used with other staff members will be required (i.e. that we will not be able to adjust a few components to make things better)". The report recommends a more detailed task analysis to develop a layout for the functions performed at reception with input from the Complainant. There is no documentary evidence that this more detailed task analysis was conducted. It appears that the Complainant continued to work as a receptionist without this being done.

490. In June 2000, management expressed concern about the Complainant exceeding her allowance for medical appointments and subsequently obtained an independent medical report from Dr. Burnstein. I note that his report specifically referenced work attendance. Dr. Burnstein questioned whether the Complainant required what he considered excessive physiotherapy, beyond 2-3 months. He expressed the view that, "Physiotherapy does not need to interfere with work attendance". It appears that this report was requested by the Respondent to assess the Complainant's need to attend physiotherapy appointments as opposed to identifying any accommodations required.

491. The Complainant was then off work on short-term illness followed by long-term disability for about three years, from 2001 to 2004. I note that the Respondent accommodated the Complainant's three-year absence from work.

492. Here, I will digress from the Respondent's documentary evidence. Ms. Milner-Clerk provided a letter from her file dated July 16, 2001 that confirmed that she was treating the Complainant at the time for a relapse of depression. Ms. Milner-Clerk reported that the Complainant described stress arising from her perception of unfair treatment by her former supervisor who she stated took issue with her need to attend appointments to address the physical problems arising from her first motor vehicle accident.

493. An accommodation letter of March 26, 2004, prepared in relation to her return to work in 2004, advised the Complainant to take all appointments on scheduled days off or after hours. It states that an ergonomic chair will be purchased for her. The accommodation letter acknowledges that she can only sit for 20 minutes and must therefore stand for 30 seconds for relief. The letter states, "It is our expectation that during this standing period you will continue to perform the required aspects of your job other than the lifting restriction identified". The Complainant's hours of work were adjusted for the initial 6 weeks of her return to work at that time.

494. An April 2004 report from Gail McClare recommends that the Complainant's desk be extended "to provide more room for desk work such as writing out customer receipts". This is consistent with the Complainant's evidence that, while in the position of receptionist, she continued to be required to write receipts.

495. The Complainant asserted in her written complaint of discrimination that she applied for other positions that would have better suited her functional limitations. She alleged that she was not given these positions. She did not specify the date of these applications in her written complaint. The Complainant testified at the hearing that, in particular, she applied for and was unsuccessful in obtaining a secretarial position which she applied for because it involved a more moderate pace. She indicated that she communicated to the Respondent that she was requesting this as an accommodation.

496. The Complainant applied for the position of Secretary 1 in September 2005. She was awarded an acting position in this role in January 2006, but not the permanent position. Because of the Court of Appeal's ruling that the complaint can only relate to events beginning in February 2012, I will not make any determination of liability respecting discrimination on the basis of the Complainant's allegations respecting her application for this position.

497. The Respondent relies upon the fact that it placed the Complainant in the secretarial position on an acting basis in January 2006. The Respondent asserts that the secretarial

position permitted the Complainant to work in a less busy area of the office that was quieter, less stressful and required much less physical activity. In other words, the Respondent relies upon the fact that it placed the Complainant in a different position in 2006 as an accommodation. However, I note that the Complainant worked in the receptionist position from 1999 to 2006.

498. After she applied for and was initially denied the secretarial position on a permanent basis, the Complainant filed a grievance in March 2006. The Union also requested that the Complainant be placed in the position of Secretary I. This request was denied. The Union filed a grievance on the Complainant's behalf, alleging that the Respondent had failed to accommodate the Complainant. In response to the grievances, the Respondent took the position that the Complainant should return to her position as a receptionist.

499. The grievances led the Respondent to have a job site and functional analysis conducted of the receptionist and secretary positions at the Sunnyside location in April 2007. It also had an ergonomic assessment conducted of the Complainant's position as receptionist at the Sunnyside mall in August 2007.

500. The April assessments noted the pace of work of the receptionist to be "high and internal" and assessed mobility requirements based on frequency and weight. It appears that a fair degree of mobility was required. In comparison, the pace of the secretarial position was described as "medium". However, this position appears to have required a fair measure of mobility, as well. The August ergonomic report respecting the receptionist position recommended various ergonomic adjustments. Several of those were implemented in 2007.

501. The Union offered to resolve the grievances based on a negotiated settlement whereby the Complainant would be given the secretarial position on a permanent basis without a requirement of posting, with the support of the Union. The Union wrote the Respondent in November 2007 to highlight that Dr. Lewis had provided a note in October 2006, "indicating that Ms. [Wakeham] required job accommodation for her neck and shoulder

ailment(s)". Dr. Lewis is reported as stating that the Complainant needed a job with "lower repetitive need (sic) and shoulder movements.'" The Union representative wrote:

> "The adjustments and on-going support have not been implemented nor are they likely to be done (an office move within the year is anticipated). It seems clear they wouldn't even be successful in light of other circumstances."

502. Dr. Lewis wrote a further note on January 28, 2008 respecting the Complainant's position at work. Dr. Lewis concluded that the Complainant "...is able to maintain the secretary's position mainly because of the moderate pace as opposed to the high-volume pace at the receptionist desk."

503. In February 2008, Ms. McClare requested an independent medical report from Dr. Burnstein, to be conducted by reviewing documentation, to determine whether there was medical evidence that would prevent the Complainant from returning to her position as a receptionist (now classified as a Clerk II) in the reception area. According to the letter to Dr. Burnstein, in part, Ms. McClare requested his opinion because Dr. Lewis's letter did not provide any specific information about the Complainant's medical limitations and restrictions in the Clerk II position (as opposed to the Secretary role). To be clear, at the time, the Complainant was in the acting secretarial position. Ms. McClare's focus was on whether the Complainant could do the receptionist job.

504. The grievances were resolved in October 2008 by placing the Complainant in the permanent secretarial position. This position was also re-classified (due to other circumstances) to Clerk III. In the context of this hearing, the Respondent submits that the Complainant was permanently placed in the Secretary I position in 2008 as an accommodation measure.

505. While the Respondent eventually changed the Complainant's position and classification, it required two grievances for this to happen and a significant period of time elapsed. During this time, the Respondent maintained that the Complainant should return to her position as the receptionist.

506. I recognize that the Complainant was in a secretarial position as of January 2006 and continued to work in that position subsequently for an extended period, which was an accommodation by the Respondent. Attendance records show that the Complainant's use of short-term illness benefits was quite minimal between 2006 and 2008.

507. In August 2009, the Complainant was given an accommodation letter in anticipation of a return to work in August, following a period of short-term illness. In the course of testimony at the hearing, it was pointed out by Commission counsel that the accommodations in the letter did not entirely match the information provided by the Complainant's physician respecting her functional limitations upon her return to work. I will not detail that evidence. The point is that the accommodation letter in August 2009 contained errors. The Complainant subsequently had an extended period of short-term illness through the fall of 2009, returning to work in October 2009.

508. The office moved to the Damascus location at the end of February 2010. The Complainant only worked there for about a month when she required another medical leave, for approximately two months, beginning in March of 2010. This was a result of the occasion when the Complainant fell and struck her head. She was hospitalized and then off work on short-term illness. She was allowed to return to work on May 20, 2010. However, it appears that this was too early, as she went off work again for another week. The Complainant worked for a month and then was off work due to chronic pain from July to September 2010.

509. When the Complainant worked in March 2010 and returned to work in June and September 2010, it was to the Damascus location. At the Damascus location, there was no receptionist position. Instead, the clerks were seated in cubicles around the reception

area and were to take turns dealing with the public. The Complainant testified that all the clerks became receptionists.

510. While the work of serving the public was to be rotated among the clerks, there was no official arrangement in this respect. It was left to the clerks themselves to do this. There is no evidence that the Complainant's duties were modified. As one of the clerks, she would have been expected to perform receptionist duties.

511. After her return in September 2010, the Complainant worked as one of the clerks for approximately a month at the Damascus location before she had to go off work on disability leave again. The Complainant was off work on short-term illness from October 2010 until January 2011.

512. When she returned in January, the Complainant was moved to a desk away from the reception area which was in a quieter area. The Respondent had ergonomic changes made to her work cubicle in the reception area and selected a cubicle that it believed would have less distractions. The Respondent's witnesses testified that the glass walls of her cubicle were raised to lessen distraction. The Complainant was then returned to the reception area. She was given the noise dampening earphones. As well, when the Complainant returned in January 2011, staff were directed to not go to the Complainant for assistance with tasks. She was relieved of front desk inquiries and handling mail. The Complainant essentially worked for four months and then, apart from a brief return in September 2011, did not return until February 20, 2012.

c) The Analysis

513. I am satisfied that the Respondent made various efforts to accommodate the Complainant prior to February 2012. The Respondent submits that it was unable to accommodate the Complainant's disability when she returned to work in February 2012 based on its prior efforts to do so.

514. The legal test is whether the Respondent accommodated the Complainant to the point of undue hardship. The Respondent did not offer evidence or make submissions respecting any undue hardship caused to it. It offered limited evidence of financial and operational burden through the testimony of Norma Bennett and Laura Forrest. The Respondent did not assert that these burdens amounted to undue hardship in law. I find that the Respondent did not accommodate the Complainant to the point of undue hardship and that this issue can be disposed of on this basis. However, I will address the position taken by the Respondent.

515. By way of general comment, the fact that an employer has tried an accommodation and it failed does not end its duty. The fact that an employer tries several or many accommodations and they fail does not necessarily end its duty to accommodate, depending on the facts. The duty to accommodate can only logically end when there is nothing further that can be done or when whatever remains to be done constitutes an undue hardship to the employer. I find that the Respondent's efforts to accommodate the Complainant prior to February 2012 do not demonstrate that the Respondent previously met its duty to accommodate the Complainant to the point of undue hardship or that nothing further could have been done.

516. The Complainant appears to have worked for an extended period after her first motor vehicle accident without individualized accommodation and was then off work for three years. Many of the accommodations subsequently made, such as ergonomic changes, were implemented quite a while after her motor vehicle accidents and in an incremental fashion. The Respondent had a request for accommodation from the Complainant's family doctor that she work in a secretarial position with a slower pace and resisted providing that position to her on a secure basis for a prolonged period, even though the medical forms it had received identified that the Complainant had chronic pain and that her absences from work were related to exacerbation of a chronic problem. The evidence is also clear that the move to the Damascus location in 2010 led to a much improved office

layout and to a number of ergonomic changes to the worksite, including the Complainant's cubicle. However, after the move to the Damascus location in 2010, no functional analysis of the Complainant's tasks as a Clerk III was conducted. This was the case even though the Clerk III's were acting as receptionists and the Complainant continued to have difficulty successfully returning to work.

517. As a result of taking a global view of the evidence, I conclude that the Respondent has not always implemented recommended accommodations in the past, nor has it implemented accommodations in a timely manner.

518. In particular, I was struck by Laura Forrest's testimony respecting the Respondent's practice (that was in place by at least 2007), whereby the Respondent first does whatever it can to accommodate an employee in her current position. When that is unsuccessful, other positions within the same office are considered. If that does not provide a solution, the inquiry is expanded to the rest of the department. If that is unsuccessful, other positions in government are considered. There was evidence that other employees, who required accommodation and could not be accommodated in the office, had received transfers to other departments.

519. After the office moved to the Damascus location, this practice was not implemented for the Complainant. The Complainant had tried unsuccessfully to return to work at the Damascus location in June 2010, briefly in September 2010, in January 2011 and briefly in September 2011. Norma Bennett testified that this step in the accommodation process did not happen because "it had not reached that point yet". In other words, after the move to Damascus, the Respondent did not consider placing the Complainant in another position, but only considered her accommodation in her existing position. However, it also did not update the information available to it by way of a new functional analysis of the tasks of a Clerk III, even though these positions included receptionist duties.

520. Given that the Respondent is a large employer, in my view, the duty of accommodation required the Respondent to consider whether there was some other position that would have better suited the Complainant. It should have considered whether it could authorize staff transfers or obtain the Union's agreement to same. On the basis of Ms. Bennett's evidence, I find that the Respondent did not consider that the situation had developed to that point. There is no evidence that it undertook this inquiry and assessment in the years leading up to her return in February 2012, or specifically in relation to the Complainant's return to work in February 2012.

521. On these facts, the Respondent has not persuaded me that it made sufficient efforts to accommodate the Complainant prior to her return, that it could not accommodate the Complainant, or that no further accommodation was possible with or without undue hardship, when she returned in February 2012. I cannot conclude that the Respondent should be relieved of its duty to accommodate the Complainant on February 20, 2012 because its efforts to do so prior to February 20, 2012 had failed.

522. As well, as previously determined, the Respondent had not reached the point where nothing further could have been done in February 2012 because it did not develop accommodations to address all of the functional limitations identified by the Complainant's physician when she returned to work in February 2012. The Respondent also failed to consider what accommodations were required based on a comprehensive review of all of the medical information in its possession. The Respondent did not accommodate the Complainant to the point of undue hardship.

C. Is the Respondent Relieved of its Duty to Accommodate Because the Complainant was Unable to Work?

523. The Respondent submits that it should be relieved of its duty to accommodate the Complainant because the Complainant returned to work on February 20, 2012 when there was no realistic chance of her successful return to work because she was unable

to work. Accordingly, it is relevant to consider the medical evidence respecting the Complainant's ability to work at that time.

524. Dr. Theriault concludes in his report of May 10, 2012, "With respect solely to psychological functioning, in my opinion Ms. Wakeham would have limitations in doing any of the cognitive demands of her current employment". He also states, "With respect to her cognitive issues I do not see anything that could successfully allow Ms. Wakeham to perform the basic functions of her job, even with accommodation."

525. Dr. Theriault suggests that the Complainant be referred to a program that specializes in somatization as a treatment option. However, despite Dr. Theriault's comments about the inability to accommodate the Complainant's cognitive difficulties in her current position, Dr. Theriault did not close the door on the issue of accommodation. He wrote, "My only other suggestion would be a neuropsychological assessment with a PhD level neuropsychologist to help define Ms. Wakeham's cognitive strengths and weaknesses; this may allow accommodation, but is not treatment per se". I conclude that Dr. Theriault thought that there was a possibility that there could be accommodation of the Complainant's cognitive difficulties if her cognitive strengths and weaknesses were known. It is also apparent that Dr. Theriault's conclusions are based on the assumption that the complainant would be working in her current role.

526. Dr. Bourke's report indicates that he saw the Complainant on June 1, 2012. He had been provided with a copy of the job description for a Clerk III by Gail McClare. When asked about her ability to work in her current position, he recommended various limitations. However, he indicated that, even with these accommodations, he had concerns about the Complainant's ability to attend work on a consistent and regular basis.

527. Dr. Bourke's list of accommodations included the potential for the Respondent to accommodate the Complainant's frequent removal from the workplace for medical care. Dr. Bourke wrote, "This condition will not result in a safety issue, but may preclude the performance of her usual job duties for days or weeks at a time." What is not in evidence

is what degree of absenteeism the Respondent could tolerate within its duty to accommodate.

528. When asked what the employer could do to facilitate her return to work on a regular and consistent basis in the foreseeable future, Dr. Bourke wrote, "The likelihood of this employee's return to even part-time in her previous role(s) is exceedingly small in my opinion. I have no recommendations in this regard."

529. Presumably, Dr. Bourke meant that he had no further recommendations beyond the medical restrictions that he had just recommended. Again, his opinion, that the Complainant is highly unlikely to be able to return to even part-time work, is based on the premise that the Complainant would return to her role as a Clerk III at the office. Dr. Bourke then recommended the trial use of sympathetic blocks or attendance at a formal chronic pain program (which he notes was recommended by neurosurgery in January 2006) and assessment of the Complainant's right arm by a physician skilled in chronic regional pain syndrome.

530. The independent medical reports were written after the Complainant was unable to work as of March 10, 2012. It could be inferred from those reports that the Complainant was unlikely to be unable to successfully return to work when she returned on February 20, 2012. However, the medical evidence at the time was that the Complainant was able to work when she returned to work in February 2012. Dr. Lewis testified and recorded in her notes at the time that the Complainant was functioning well independently. She stood by her position that the Complainant should have returned to work in February 2012 during her testimony. I place significant weight upon her direct evidence. The Respondent's submission implicitly asks that I draw an inference based on medical reports that were prepared after the Complainant could no longer work. I am unable to conclude, based on the persuasiveness of Dr. Lewis's evidence to the effect that the Complainant could work with accommodations, that the Complainant was unable to work when she returned to work in February 2012 and that the Respondent should, therefore, be relieved of its duty to accommodate the Complainant.

531. Dr. Lewis confirmed in her written report of September 9, 2015 that the Complainant has been completely disabled since March of 2012 and has been advised not to return to work. Dr. Lewis also stated in her report that she cannot say what the present would have been if there had been accommodation of the Complainant. It is possible that the Complainant may have been unable to return to work successfully, had she been fully accommodated in her position. Even if she had been offered another more suitable position and accommodations had been developed around that other position, it is possible that she would not have been able to work beyond March 9, 2012. However, these theoretical events did not have an opportunity to play out to their conclusion because the Complainant was not fully accommodated by the Respondent. This issue must be determined on the basis of the best medical evidence and the factual findings made in this case, not supposition.

532. Those facts include that the Complainant returned to regular duties and that her chronic pain became worse. The Complainant also experienced other adverse impacts upon her return that caused her stress and anxiety and exacerbated her psychological and physical impairments and limitations. On the facts in evidence, she became unable to continue working.

533. I also have some difficulty with what I perceive to be circular reasoning or a "catch 22" in the Respondent's position. The Respondent did not implement accommodations to address all of the functional limitations, restrictions or impairments identified by the Complainant's physician when she returned to work in February 2012. The Complainant was unable to work without those accommodations. The Respondent now asserts that it is relieved of its obligation to accommodate because the Complainant cannot work. In other words, the Respondent appears to be relying upon the consequences of its own actions as a defence.

534. Further, when the Respondent submits that the Complainant was unable to work, what the Respondent is stating in legal terms is that the employment contract has been frustrated and that it was relieved of any further obligation to try to accommodate the

Complainant. However, the Respondent takes this position with the benefit of hindsight. The Respondent did not have the independent medical opinions upon which it now relies to establish that the Complainant was no longer able to work when the Complainant returned to work on February 20, 2012. As well, Dr. Koshi supported Dr. Lewis's decision to send the Complainant back to work. Accordingly, the medical evidence of both Dr. Lewis and Dr. Koshi supports the conclusion that the Complainant was well enough to return to work with accommodation on February 20, 2012.

535. At some point after the Complainant returned, her condition worsened. This is because the Respondent had not met its duty to accommodate the Complainant to the point of undue hardship. However, on these facts, it is not the case that the employment contract was frustrated as of February 20, 2012, such that the Respondent was relieved of its obligation to try to accommodate the Complainant.

536. Before leaving this issue, I acknowledge the Respondent's submission that *Hydro-Quebec* is a similar case and that consistent with that decision, I should make a finding that the employment contract was frustrated. In *Hydro-Quebec*, the Court found no conflict between the duty to accommodate and the law of frustration of contract in an employment context based on an inability of the employee to be able to return to work in the foreseeable future. On the facts of the *Hydro-Quebec* case, any recommended accommodations that had not yet been implemented were unreasonable and were almost certainly to be ineffectual. The medical evidence of the employer's own physician was clear in advance that the employee could not work in the foreseeable future. That is not the case here.

537. *Hydro-Quebec* can further be distinguished on the basis that, in *Hydro-Quebec,* the employer had met, or almost met, its duty to accommodate the employee to the point of undue hardship. The accommodations said to be required were so unreasonable and impractical that they were found by the Court to cause undue hardship.

538. There is no evidence in this case that further accommodations that were available to be implemented, such as a detailed functional analysis of available positions and an employee transfer to a quieter and less stressful job, constituted undue hardship to this employer.

539. From February 20, 2012 until March 9, 2012, the Respondent had not met its duty to accommodate the Complainant to the point of undue hardship. The fact that the Complainant subsequently has remained on long-term disability and is almost certainly unable to return to work in the future does not alter the facts of what occurred during the period relevant to the complaint.

540. For the reasons above, I find that the Respondent has failed to justify its conduct towards the Complainant on the basis of a non-discriminatory explanation for its actions and that the Complainant's physical disability was a factor in the Respondent's conduct.

D. Did the Respondent and Complainant Meet Their Procedural Obligations in the Accommodation Process?

541. The Respondent asserts that there is both a procedural and a substantive component to the duty to accommodate. The Respondent submits that the procedural aspect of the accommodation process requires the participation of not just the employer but the physician and the disabled employee. I agree.

542. The Respondent submits that it fulfilled its duty to inquire but that the Complainant failed to participate. In this regard, the Respondent submits that the Complainant failed to properly inform the Respondent of the functional limitations that arose from her chronic pain. The Respondent relies upon *Halliday v. Michelin North America (Canada) Ltd.,* [2006] NSHRBI No. 6 ("*Halliday*"), as authority for the proposition that the employee bears the obligation of "bringing the facts" of her disability to the employer.

543. In *Halliday*, the Board of Inquiry found (at p 30) that, "...at no time was there any indication provided to Michelin of the severity and prolonged nature of the disability Mr. Halliday may have suffered". In my view, *Halliday* may be distinguished on its facts.

544. The evidence is overwhelming that the Complainant provided information to the Respondent that she obtained from her physicians respecting her functional limitations on each occasion that she returned to work based on the forms that she was asked to have completed by the Respondent. She followed her employer's instructions. This is not a case where there is evidence that the Complainant failed to ensure that the Respondent was informed of the severity and prolonged nature of her disability. The Complainant did not fail to cooperate with specific requests by the Respondent that she participate in the process and she did not refuse to provide information to the Respondent. She did not refuse to attend independent medical examinations. She is not an expert in functional analysis, nor is she a medical expert. I do not find that the Complainant failed to participate in the accommodation process on these facts. The Respondent knew that the Complainant had cognitive difficulties. It is not reasonable for the Respondent to expect the Complainant, as a layperson, or as a person with a mental disability, to inform the Respondent of the functional limitations that arose from her chronic pain more than she did.

545. In part, the Respondent suggests that the Complainant's physicians provided at times confusing and conflicting information. This is because some of the medical forms referenced both physical and mental difficulties, while others referenced only mental difficulties. The most notable example occurred in the period June 2011 to February 20, 2012. The Complainant left work for physical reasons, namely, being unable to lift her arms for repetitive movements in June 2011. During this absence, the two Certification by Attending Physician forms completed by Dr. Watson diagnosed "psychological condition". Dr. Lewis's subsequent forms in January 2012 and February 14, 2012 referenced both physical and mental conditions again.

546. In my view, the evidence that the Complainant had ongoing physical and mental disabilities that affected her functionality at different times and sometimes at the same time is substantial and clear. That different problems flared up at different times in an individual who has both physical and mental disabilities should not be perceived as conflicting. If it was perceived as confusing or conflicting, the Respondent was under a duty to inquire to have the confusion resolved.

547. In this regard, Norma Bennett testified that she found the information provided by the medical forms lacked sufficient detail. She found the use of these medical forms frustrating. In my view, reliance on forms can be limiting and these medical forms requested fairly generic information respecting functional restrictions. It was also reasonable for the Respondent to have questions because, based on my view of the forms, at times the physicians did not always fill the forms out as fully as they could have. However, this is not a case where the Respondent did not have a sufficient factual basis to conclude that further inquiry was advisable or required.

548. Ms. Bennett testified that Gail McClare made inquiries of the Complainant's physicians to clarify ambiguities. There was some documentary evidence that, years earlier, Ms. McClare attempted to clarify an issue with Dr. Lewis. There was also documentary evidence that she contacted the osteopath in relation to the Complainant's return in January 2011. However, there is no evidence of clarification on several occasions when that step seemed advisable, based on a historic review of the medical evidence. There was no evidence of any inquiry of this nature in relation to the Complainant's return in February 2012. I conclude that Ms. Bennett's evidence that the Respondent took steps to clarify ambiguities in the medical forms was over-stated. I note that the Respondent did not call Ms. McClare to testify in this regard. I infer that, if Ms. McClare had additional evidence to provide, she would have been called as a witness by the Respondent.

549. The Complainant asked Ms. Bennett whether Ms. Bennett thought the Complainant was capable of doing her job at the Damascus location. Ms. Bennett testified that towards the end she did not think the Complainant could. These doubts should have led to further inquiry by the Respondent.

550. If the Respondent believed that it was not properly informed or believed that it had inadequate, conflicting or difficult to understand information, it was incumbent upon it to identify this to the Complainant and her physicians and to indicate that it required additional information or clarification. The Complainant cannot be blamed for failing to read the minds of the Respondent's witnesses. The same can be said of the Complainant's physicians.

551. An example of this is the Respondent's position that it did not know that references in the medical forms to repetitive duties, which were contraindicated, meant that the Complainant should not do mail duties or write receipts. In my view, it would have been reasonable for the Respondent to require clarification of what repetitive duties meant. If it did not know what would fall within repetitive duties, it should have made inquiries to better determine what duties were repetitive and what "repetitive" meant for this Complainant.

552. The Respondent relied upon its forms, even when it had questions, and waited to be officially informed by the Complainant's physicians. The Respondent was not as proactive as it could have been or as proactive as it had been in the past. It had taken steps to obtain particularized information about the Complainant's limitations via an occupational assessment, inclusive of a functional analysis of both the Complainant's tasks and the job site in 2007, when the Respondent wished to assess the Complainant's ability to work as the receptionist at Sunnyside mall. After several unsuccessful returns to work at the Damascus location as a Clerk III, the Respondent should have considered the advisability of obtaining this type of analysis for her Damascus position and location. This information could have been shared with the Complainant's physician, with a request for a more particularized assessment or explanation of the Complainant's restrictions, or similarly

incorporated into an independent medical examination of the Complainant prior to her return to work in February 2012. As potential examples of further inquiry, these steps are not required in every situation, but on these facts, a more proactive engagement and participation by the employer in developing accommodations was warranted.

553. In summary, the Respondent attributes blame to the Complainant and her physicians. However, the Respondent failed to meet its duty to make the inquiries it required to develop the accommodations it bears the responsibility to make within the tri-partite consultation. Without this information, it was not well positioned to make informed decisions respecting what accommodations would be appropriate for the Complainant, given her individual needs.

E. Is the Respondent's Attendance Management Plan Discriminatory?

554. Often an attendance management policy is considered in the context of whether it is systemically discriminatory. *Coast Mountain* involved an attendance management program that was, in key respects, very similar to the Respondent's attendance management policy. The British Columbia Court of Appeal held that the attendance management plan was systemically discriminatory because it placed employees with significant absenteeism for chronic disabilities at risk of loss of employment if their absences, including absences due to disability and partial day absences while on a gradual return to work, exceeded the average absences of all employees. The program did not differentiate between disability-related absences and culpable absences. The program in *Coast Mountain* also did not incorporate any measures to permit accommodation of persons with disabilities.

555. Systemic discrimination was not included in the complaint. I make no specific finding in this regard.

556. The Commission and Complainant submit that the Respondent's attendance management plan is discriminatory as it was applied to the Complainant as an individual. The Complainant relies on *British Columbia (Superintendent of Motor Vehicles) v. British*

Columbia (Council of Human Rights), [1999] 3 S.C.R. 868, CanLII 646, *("British Columbia (Superintendent of Motor Vehicles)")*, at para 19. There the Supreme Court of Canada held that:

> Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplanted by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics.

557. In this case, the Respondent's attendance management plan incorporated no clear provisions to allow for accommodation of employees with chronic disabilities. On the basis of *Coast Mountain* and *British Columbia (Superintendent of Motor Vehicles)*, the Respondent's attendance management plan has the characteristics of a discriminatory standard in the workplace. The policy did not differentiate between absences due to disability, including days of ease back to work, as recommended by the Complainant's physician, and days required for medical leave to attend appointments or treatment, and absences that were culpable or within the Complainant's control.

558. In addition to the plan's shared features with the plan in *Coast Mountain*, I find that the Respondent's attendance management policy is an arbitrary workplace standard in several other respects that also led to discriminatory impacts. It affords the employer complete discretion over what constitutes regular or acceptable attendance. The policy contains no reasonably objective standard of acceptable attendance or any specified standard in this regard, for that matter. There is no objective criteria respecting the timing of its application (the trigger for its application) or with respect to the time an employee is given to improve their attendance. The policy was applied in an arbitrary manner by the Respondent in the timing of its application to the Complainant and with respect to the length of time the Complainant was given by the Respondent to improve. These arbitrary

aspects of the policy gave the Respondent complete discretion as to how it would apply the policy. Armed with this discretion, it arrived at the selected requirement that the Complainant maintain regular and consistent attendance 90% of the time in the immediate future, with no individualized adjustment of the policy to address her need for accommodation. Days of absence for chronic disability, days required for ease back to work and time off required for medical treatment was not accommodated in any respect by the policy itself or in the Respondent's application of the plan to the Complainant. The arbitrariness of these decisions and the lack of evidence that the Complainant's chronic disability was taken into account in these imposed standards persuades me that the policy was applied in a discriminatory manner to the Complainant.

559. I find that the Respondent's attendance management plan, on its face, discriminated against the Complainant as a person with a chronic disability, as compared to other employees and other disabled employees whose disability is not chronic in nature, and that it was applied to the Complainant in a discriminatory manner.

F. Is There a Non-Discriminatory Justification for the Attendance Management Plan?

560. The Respondent is required to establish that the attendance management policy as a discriminatory standard is a *bona fide* occupational requirement or has a *bona fide* and reasonable justification: *British Columbia (Superintendent of Motor Vehicles).* The onus is upon the Respondent to show that 1) it adopted the standard for a purpose or goal rationally connected to the function being performed; 2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and 3) the standard is reasonably necessary to accomplish its purpose or goal, because the Respondent cannot accommodate persons with chronic physical disabilities without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost: *Meiorin*.

561. The Respondent submits that it adopted the standard for a purpose rationally connected to the performance of the job and that the standard was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work purpose. It makes this submission on the basis that attendance management plans in other decided cases have met the first two parts of the test. The Respondent did not provide evidence at the hearing respecting the adoption of its attendance management policy to address these issues on an evidentiary basis.

562. In relation to these issues, the Respondent previously submitted in its pre-hearing brief that:

> Regular attendance at work is critical for the performance of any job. The attendance management policy ensures that the employer and the employee work together to improve the employee's attendance. The policy in general ensures that employees are not unduly terminated for innocent absenteeism without first being given an opportunity to improve.

563. I have found that this particular policy does not recognize that there is an obligation to accommodate persons with chronic disabilities. What is absent is any evidence that this policy, complete with its lack of accommodation of chronic disabilities, was adopted for a purpose rationally connected to the performance of the job and that this standard, as written, was adopted in a good faith belief that it was reasonably necessary to the fulfillment of that legitimate work purpose.

564. Leaving aside these evidentiary issues, in my view, the Respondent cannot meet the third step of the analysis in *Meiorin*. The Respondent is required to demonstrate that its attendance management plan is "reasonably necessary to accomplish its purpose or goal". In *Meiorin,* the Court held at para 55 that, "a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary." I return to the Court's comment in *British Columbia (Superintendent of Motor Vehicles),* at para 19:

> Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards.

In this case, there is no suggestion that this policy accommodates persons with chronic disability through individualized assessment to the point of undue hardship. There is no evidence that it would be an undue hardship to the Respondent to have its attendance management policy accommodate persons with chronic physical disabilities.

565. The requirement that an employer provide evidence in support of an assertion of undue hardship was recognized in *Coast Mountain*. In that case, the only evidence the employer provided respecting the issue of *bona fide* work requirement was related to the significant cost of absenteeism in its workplace generally. There was no evidence of the cost to the employer of accommodating employees by not including days of disability-related absences in the policy. At para 97, the Court held:

> ...(T)he Employer had failed to discharge the burden of showing that it was not possible to further accommodate employees with disabilities without causing itself undue hardship. It follows that the Employer did not establish a *bona fide* occupational requirement for the aspects of the Program that cause adverse treatment to its employees with disabilities. Hence the Employer failed to justify the *prima facie* discrimination under section 13(4) of the Code.

566. Based on the lack of evidence of undue hardship to the Respondent in this case by reason of the cost of accommodation of persons with disabilities in its attendance management plan or due to other reasons, I conclude that the Respondent's attendance management policy fails at the third step of the analysis in *Meiorin.* Accordingly, the

567. Respondent has failed to justify the *prima facie* discrimination that occurred in this case in relation to its attendance management plan.

568. Before leaving this issue, I wish to return to the Respondent's submission in its written submissions that its duty to accommodate ends, "when the employee is no longer able to fulfill the basic obligations of the employment contract; meaning the employer cannot be expected to continue to accommodate an employee where the employee has not, and cannot show that they are able to sustain regular attendance". This submission was advanced in relation to the Respondent's duty to accommodate but is intended to "save" the part of the Respondent's attendance management plan that permits the Respondent to terminate an employee for excessive absenteeism.

569. The Respondent's submission, in my view, overly focuses the analysis on the inability of the employee to work in the foreseeable future. The Respondent submits that when an employee is unable to work in the forseeable future, it is not discriminatory to terminate the employee's employment: *Hydro-Quebec*.

570. However, *Hydro-Quebec* and *Meiorin* both maintain the foundational premise that there is a duty to accommodate upon the employer and not simply a contractual duty upon the employee to have regular attendance. This is reflected in the Court's comments in *Hydro-Quebec,* at para 17:

> However, in a case involving chronic absenteeism, if the employer shows that, <u>despite measures taken to accommodate the employee</u>, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship. (emphasis added)

571. Based on a full reading of the decision, *Hydro-Quebec* does not stand for the blanket statement that, as long as an employee cannot work for the foreseeable future, the employer is relieved of any duty to accommodate the employee. One must consider the

circumstances. For example, an employee who qualifies for long term disability without an ascertainable return date at the outset would, at the time of qualification for these benefits, "be unable to return to work in the foreseeable future". However, it is not the case that such an employee no longer has to be accommodated by the employer. Employers are required to maintain the employee's status as such, their entitlement to a position and to benefits while on long-term disability and to consider their return to work and potential need for further accommodation until it is determined that the employee will not be able to return to work. In each case, before it is clear that the employee is unable to work in the foreseeable future, it is still necessary to consider what accommodation is required by the circumstances.

572. This principle is recognized in *Hydro-Quebec.* Para 18 begins with the words, "Thus, the test for undue hardship is not total unfitness for work in the foreseeable future" (emphasis added). At para 18, the Court emphasizes that the inability to work is based on the underlying assumption that the employer has tried to accommodate the employee: "...if an employee with such an illness remains unable to work for the foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory". The Court emphasized in the preceding paragraph, para 17, that the duty of accommodation extends to the point of undue hardship. In *Hydro-Quebec*, the employer had met that standard.

573. In my view, when the Court in *Hydro-Quebec* made the statement, "even though the employer has tried to accommodate the employee", the Court did not intend to lessen the legal obligation upon employers to accommodate employees. The Court did not intend to excuse employers from their obligation to accommodate to the point of undue hardship, if *post facto* the employee later becomes unable to work in the foreseeable future. Here, the Respondent had not met its duty to fully accommodate the Complainant when she presented herself to work on February 20, 2012. On these facts, the Respondent's application of a discriminatory attendance management policy cannot be justified *post*

facto on the basis that the Complainant subsequently became unable to work for the foreseeable future.

G. Conclusion Regarding the Respondent's Defence

574. To successfully defend the Complainant's *prima facie* case, the Respondent must offer sufficient persuasive proof to establish that it has a non-discriminatory justification for its conduct towards the Complainant and for its attendance management plan. There is no issue that the Complainant's physical disability was a factor in relation to the Respondent's conduct and in relation to the application of its attendance management plan.

575. The Respondent's evidence and submissions have not persuaded me that the Complainant no longer has established her *prima facie* case on a balance of probabilities. I find that the Respondent discriminated against the Complainant on the basis of physical disability in the context of her employment in relation to both its conduct and its attendance management plan.

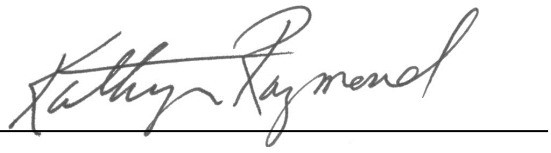
III. Reservation of Jurisdiction

576. The parties were advised on May 15, 2017 that I would issue my decision in its entirety on June 30, 2017, or, if there was no objection, I would bi-furcate my reasons and provide reasons respecting the merits of the complaint in advance. No objection was raised.

577. I am reserving my jurisdiction to complete my decision under the *Act* to provide a ruling to address the issue of remedy, including all related issues raised by the parties. These include, but are not limited to, the Complainant's request for various types of damages and the parties' submissions respecting the legal characterization of liability in human rights cases, causation, apportionment, as well as issues related to the Complainant's

receipt of long-term disability. Additional reasons will follow under separate cover by June 30, 2017 to provide the conclusion of this decision in final form and any required Order.

Dated at Halifax Regional Municipality, Nova Scotia, this 9th day of June, 2017.



Kathryn A. Raymond, Q.C.

Nova Scotia Human Rights Board of Inquiry