

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

PATRICK J. EYERLEY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

SEASPAN INTERNATIONAL LIMITED

Respondent

REASONS FOR DECISION

T.D. 18/01

2001/12/21

PANEL: J. Grant Sinclair, Chairperson

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I. INTRODUCTION

[1] Patrick Eyerley, the complainant in this case, was employed as a cook/deckhand on coastal tugs operated by Seaspan International Limited from July 14, 1989 to November 1986. Seaspan is a large tug boat company operating primarily on the west coast of British Columbia, and, to some extent on the west coast of the United States.

[2] Mr. Eyerley's employment terminated on November 8, 1996, for non-culpable absenteeism. Seaspan claimed that, of the 2,662 days that Mr. Eyerley was employed with Seaspan, he worked only 458.5 days or 17.5% of the time. His absenteeism was due to various medical reasons, but was related primarily to a work related injury to his right wrist. At the time of his termination, Mr. Eyerley had been off work since July 18, 1995, on Workers' Compensation (WC). Seaspan believed, on the basis of medical reports from his doctors and the Workers' Compensation Board (WCB) medical advisors that there was no apparent prospect of him returning to work in the near future as a cook/deckhand.

[3] Mr. Eyerley's position all along has been that he could still perform his job as a cook/deckhand if Seaspan crewed him on smaller tugs with lighter gear, whereby he could avoid very heavy and strenuous work.

[4] Mr. Eyerley filed a complaint on May 7, 1998, with the Canadian Human Rights Commission alleging that Seaspan had discriminated against him by failing to accommodate his disability and terminating his employment, contrary to section 7 of the *Canadian Human Rights Act*.

II. FACTS

Patrick Eyerley

[5] Patrick Eyerley is a 48-year-old man, married with four children, who lives in Powell River, British Columbia. Powell River is about 86 miles north of Vancouver. Mr. Eyerley's first stint as a cook/deckhand with Seaspan was from May 1981 to November 1982. He returned to work at Seaspan on July 14, 1989, as a cook/deckhand. It was during this second tour of duty that Mr. Eyerley suffered the injury which is the starting point for this saga.

III. THE DUTIES OF A COOK/DECKHAND

[6] During his time at Seaspan, Mr. Eyerley crewed on a number of Seaspan coastal tugs. These were continuous, operating tugs that operated either on the inshore coast of British Columbia or on the outside west coast. The crew consisted of a Master, Mate and two cook/deckhands who lived on the tug and sailed on a two week on, two week off basis.

[7] The cook/deckhand works a 12-hour day, 6 hours on and 6 hours off (not including overtime), either on the Master's Watch or on the Mate's Watch. The Master's Watch is 6 a.m. to 12 noon and 6 p.m. to midnight. The Mate's Watch is 12 noon to 6 p.m. and midnight to 6 a.m.

[8] The cook duties of the cook/deckhand include preparing meals for the crew, cleaning and maintaining the galley. The deckhand duties are much more strenuous and demanding. A deckhand must be physically fit. The work requires considerable upper body strength, with strong hands and arms.

[9] Deckhand duties involve outside work on the tug or on the tow/barge, handling the gear on the tug when picking up, securing, and dropping off barges. Depending on the run, a tug may tow more than one barge secured one after the other and to the tug. This is done by using steel bridles which are stored on the tug and winched out and/or pulled out by hand and attached to the two collars on the front of the barge to form a "Y" off the end of the tow line. The deckhand must lift the bridles from the tug onto and secure them to the barge.

[10] The deckhand must first climb from the tug onto the barge or from barge to barge. He climbs up the barge using a fixed ladder on the barge or uses a portable ladder placed from the tug to the barge. While working, the deckhand will usually be wearing a life jacket, safety shoes and a hard hat, and carry a pipe pole for pulling the bridles onto the barge. If working at night, he would carry a headlamp. When towing at night, portable lights must be put at each end of the barge and the deckhand would carry these along with his other gear when going onto the barges. A barge can be from 8 feet to 20-30 feet high and vary in length from 200 to 500 feet. A deckhand has to walk along the side of the barge, sometimes at night, sometimes when it is wet and slippery or in rolling seas.

[11] The procedure is reversed when dropping off. The deckhand would remove the bridles from the barge and they would be winched back onto the tug. It could happen sometimes that the bridles may fall into the water. If so, the deckhand must retrieve the bridles from the water.

[12] On certain runs, such as to Port Alice, towing rail barges, deckhand work is very heavy work. In addition to attaching the barges, the rail cars, which may carry chemicals or fuel, must be blocked and secured on the barge. This involves jacking up the rail cars, separating the wheels, and blocking and chaining them down and reversing this operation on arrival.

[13] The safe operation of the vessel and the safety of the crew is a major concern for both Seaspan and its employees. Because of the safety concerns, experience and training is also required in the use of fire fighting and lifesaving equipment. Each crew member must be able to perform both tasks of firefighting and lifesaving while at sea. The safety factor plus the heavy and strenuous nature of deckhand work makes it imperative that a deckhand be fully physically capable of carrying out all these responsibilities.

[14] This is not to say that all of the work of a cook/deckhand is at all times physically demanding. The cooking and cleaning duties are much lighter. The cook/deckhand may also spend some time on watch in the wheel house, under the supervision of the Master or Mate, and otherwise assisting them. On the longer runs, once loaded, there is little heavy work for the deckhand between ports.

IV. THE SEASPAN TUG BOAT FLEET

[15] Seaspan operates ocean going tugs, coastal tugs, trainships, ship assist and yarding tugs. Except for one trip on an ocean tug. Mr. Eyerley worked exclusively as a cook/deckhand on Seaspan's coastal tugs. Seaspan's coastal tugs are grouped by class according to BHP. The classes range from Class 2 to Class 6. The Class 2 and Class 3 tugs have lighter gear and usually do inshore work. The Class 4, 5 and 6 tugs are longer, have heavier gear and operate on the West Coast and Gulf runs. It is the Class 2 and 3 tugs that Mr. Eyerley refers to as the "smaller tugs" and the Class 4 - 6 tugs that he considers to be the "larger tugs". The ship assist tugs or pusher tug work in the harbour; the yarding tugs operate in the Fraser River, its estuaries and to Howe Sound.

[16] There are no light, deckhand duties on Seaspan tugs. West coast or outside tugs carry both 1¼ inch x 60 feet steel, gulf bridles and 1½ inch x 55 feet, steel, west coast bridles. A bridle weighs between 70-100 pounds. The decklines are 2 inches x 120 feet. The gear on the smaller tugs or inshore tugs is 1 inch x 55 feet, steel, gulf bridles and there are no west coast bridles. The decklines are 1½ inch x 100 feet.

[17] However, although the deckhand work is heavier and more demanding on the larger tugs, it is more concentrated in time and less repetitive. The west coast runs are longer from port to port and tow fewer barges. On the other hand, deckhand work on the smaller tugs, is much more repetitive. The gear on the tug may be lighter, but the runs are shorter with more barges.

V. MR. EYERLEY'S INJURIES AND RECORD OF ABSENTEEISM

[18] Between 1990 and 1991, Mr. Eyerley began to develop symptoms of carpal tunnel syndrome caused by his activities as a cook/deckhand. On May 22, 1991, Mr. Eyerley was crewed on the Seaspan Wave. The Wave is a larger tug and was towing a rail barge destined for the west coast of Vancouver Island. Mr. Eyerley was climbing over one of the rail cars on the barge, slipped and fell backwards, using his hands to break his fall.

[19] When Mr. Eyerley came off the Wave on May 25, 1991, he consulted with his family doctor who diagnosed his injury as a severe wrist sprain. On the same day, Mr. Eyerley went on Workers' Compensation (WC) benefits for a right wrist strain injury. When the injury persisted, Mr. Eyerley was referred to a surgeon on June 10, 1991, who diagnosed his condition as carpal tunnel syndrome and on June 20, 1991, he was operated on for this medical condition.

[20] Seaspan was alerted to Mr. Eyerley's problems with his right wrist because of his WC claim. Seaspan was given more information in August 1991 when the WCB wrote to Dave Sutton, Manager, Marine Personnel at Seaspan, advising that Mr. Eyerley's claim for a right carpal tunnel syndrome had been accepted by the WCB and that Mr. Eyerley had undergone surgery for this condition. The WCB also noted that this injury was related to Mr. Eyerley's work duties as a cook/deckhand.

[21] There are also a number of WCB reports of injury, Seaspan accident reports and internal Seaspan personnel memos in Mr. Eyerley's personnel file, throughout 1991 and 1992, setting out the nature of the injury and the problems that Mr. Eyerley was having with his right wrist.

[22] Mr. Eyerley remained on WC for 137.5 days and was certified to return to work on October 9, 1991. He returned to work on October 20, 1991, and worked on the larger tugs until January 1, 1992, when he came off and went on WC for 12 days because of another work-related, hand injury. Mr. Eyerley returned to work on February 25, 1992, and did four trips, 3 of them on the larger tugs. He went back on WC on May 20, 1992, for 316 days, unable to work because of problems with his right wrist.

[23] It was in this period when he was off work that Mr. Eyerley was referred to Dr. David Kester, a surgeon specializing in hand and reconstructive surgery. On October 15, 1992, Dr. Kester performed a second operation on Mr. Eyerley's right wrist to correct some of the consequences of the first surgery and relieve some of the pain and swelling that he was experiencing.

[24] It is Mr. Eyerley's right wrist injury that has impacted on his ability to function as a cook/deckhand. But it should be noted that Mr. Eyerley suffered a number of other injuries, some work related, some non-work related, all of which contributed to his record of absenteeism. This was documented by Seaspan in its November 8, 1996, termination letter, as follows:

<u>DATE</u>	<u>DESCRIPTION</u>	<u>TIME LOSS</u>
November 11, 1989	Back Injury - WCB	13.5 Days
April 14, 1990	Tooth - Crown Life	11 Days
November 22, 1990	Back Injury - WCB	50.5 Days
December 3, 1990	Cracked Rib - Crown Life	No Additional Time Loss
May 23, 1991	Right Wrist - WCB	137.5 Days
January 22, 1992	Hand - WCB	12 Days
May 20, 1992	Right Wrist - WCB	316.5 Days
April 1, 1993	Right Thumb - Crown Life	118 Days
September 27, 1993	Hernia - WCB	27 Days
November 1, 1993	Hernia - Crown Life	67 Days
September 7, 1994	Right Wrist - WCB	186.5 Days
April 5, 1995	Head - WCB	21 Days
July 19, 1995	Right Wrist - WCB	195 Days
January 30, 1996	Hernia - Crown Life	170 Days
July 18, 1996 to present	Right Wrist - LTD	48 Days
September 5, 1996	Rights Wrist - WCB	56 + Days

[25] It was this attendance record and Seaspan's conclusion that Mr. Eyerley was unlikely to return to work as a cook/deckhand in the foreseeable future, that led to his termination. Seaspan's prognosis was based on the medical assessment both of Mr. Eyerley's doctors and the WCB medical staff.

VI. POST-OPERATIVE WORK RECORD AND MEDICAL EVIDENCE, 1993-1995

[26] Mr. Eyerley claims that he could have continued to work as a deckhand if crewed on the smaller tugs, working with the lighter gear. His claim is that Seaspan failed to do so and if Seaspan had obliged his request, he believes that he would be working today as a cook/deckhand at Seaspan.

[27] There was considerable medical evidence concerning Mr. Eyerley's medical condition and his ability to perform the duties of a cook/deckhand. This came from two sources, Mr. Eyerley's own medical doctors and from the WCB medical staff.

[28] Mr. Eyerley was cleared to return to work on March 30, 1993. He went off WC on March 31, 1993, but did not return to work as he suffered a non-work related injury (right thumb) that kept him from work for 118 days. He returned to work on July 28, 1993, for three tours, on the Seaspan Protector, a larger tug, the Seaspan Star, a smaller tug and the Seaspan Cutlass, a larger tug. Mr. Eyerley came off the Cutlass on October 4, 1993, because of hernia problems and was off for 94 days.

[29] According to an October 5, 1993, internal Seaspan memo, Mr. Eyerley's union, the International Longshoremen's & Warehousemen's Union, Local 400, Marine Section, had asked Dave Sutton to crew him on the smaller tugs with the lighter gear. Seaspan's position was that it would not crew around Mr Eyerley's wrist and there were no light duties at Seaspan. Seaspan would crew him on a smaller tug if available, but he could not bump others.

[30] The Master on the Cutlass at that time, Scott Mactier, told Seaspan that the gear was too heavy for Mr. Eyerley, and in his view, he should have been crewed on the smaller tugs (Class 3). However, at that time, Seaspan needed Mr. Eyerley to sail and there were no Class 3 boats available without Mr. Eyerley bumping someone.

[31] While he was off with his hernia problem, Dave Sutton wrote to Mr. Eyerley on December 2, 1993, pointing out that from the time he commenced employment with Seaspan on July 14, 1989, he had missed 784 days of work for various medical reasons. He enquired as to Mr. Eyerley's current medical status and availability for work. He concluded that it was unfortunate that Mr. Eyerley experienced so many medical problems, but Seaspan could not carry on much longer with this situation.

[32] Mr. Eyerley immediately spoke to Dave Sutton and told him that his doctor had cleared him to return to work in early January 1994. Mr. Sutton told him that there must be a major improvement in his attendance record or termination was very likely. Mr. Eyerley returned on January 11, 1994, and did four tours on the Seaspan Queen, a larger tug (Class 4) followed by a tour on the Seaspan Master, a larger tug (Class 4). Although his expressed preference was to work on the smaller tugs, Mr. Eyerley felt that, in the circumstances, he had to work where he was dispatched.

[33] Mr. Eyerley's tour on the Master ended on May 18, 1994. He met with Dr. Kester on June 9, 1994. In his reporting letter to Dr. Stephen Bond, Mr. Eyerley's family doctor, Dr. Kester noted that Mr. Eyerley experienced swelling around his wrist and numbness in his fingers and tendonitis. This was caused by the heavy work that Mr. Eyerley was doing. Dr. Kester concluded

that it may well be that the condition of Mr. Eyerley's hand would not allow him to this type of heavy work. Mr. Eyerley had told him that he was considering upgrading himself to a Mate's position which was less physical. Dr. Kester supported this.

[34] In his follow up letter of July 1, 1994, Dr. Bond reported to the WCB that Mr. Eyerley was having some problems using his injured right wrist, which were caused by the strenuous nature of his work. Although he had a good overall recovery, this small loss of function jeopardized both his job and his safety. Dr. Bond noted that he had advised Mr. Eyerley to obtain his Mate's ticket to free himself from the serious risks he is exposed to in his current work. Mr. Eyerley would need retraining for the Mate's certification and Dr. Bond suggested that the WCB might help in this regard.

[35] Mr. Eyerley returned to work on July 13, 1994, and Seaspan obliged him by crewing him on the Seaspan Valiant, a smaller tug (Class 3). He did 2 trips on the Valiant, the first for 3.5 days, the second for 9.5 days, coming off on July 27, 1994. On July 28, Mr. Eyerley consulted with Dr. Bond who reported to the WCB that Mr. Eyerley had a difficult tour of duty and experienced considerable trouble with his right forearm during these trips. Dr. Bond stressed that Mr. Eyerley must be retrained for lighter work (i.e. as a Mate) and that this should be done now.

[36] Dr. Bond assessed Mr. Eyerley again on August 8, 1994, and noted that Mr. Eyerley had suffered an injury to his right wrist which had resulted in some loss of function as well as significant discomfort. He could not do the extremely heavy work that was involved with larger tugs without risk of injury, and should restrict himself to lighter work on the smaller coastal tugs. Dr. Bond also considered it imperative that Mr. Eyerley be upgraded to the level of Mate so that he could continue in the industry, but in a less physically demanding capacity.

[37] Mr. Eyerley went back on the Valiant and sailed from August 10, 1994, to August 24, 1994. A few days later, he called Terry Lovett, Compensation Services Manager, WCB, and told him that he was having ongoing problems with his right hand. He was concerned about climbing ladders, lifting heavy cable and putting his own life or others at risk, if he dropped the cable or fell. Mr. Eyerley said that he was trying to crew on the smaller boats, where the work was lighter. But because of his concerns over future time loss and his future, he would like to take a Mate's course which would be a lot lighter work. He would be seeing his doctor, Dr. Bond, about stopping work immediately because he did not think he could carry on.

[38] On September 2, 1994, in another of the ongoing series of Physician's Progress Reports, Dr. Bond reported to the WCB that Mr. Eyerley had spent his last tours of duty on the smaller boats and handled smaller gear. However, the trips were shorter, involved a lot more manual work and his right arm was not holding up adequately.

[39] Dr. Bond recommended to Mr. Eyerley to go off work for a short time. He also pointed out that Mr. Eyerley was interested in doing some upgrading training and he had strongly encouraged him to do so. Mr. Eyerley went back on WC on September 7, 1994.

[40] Mr. Eyerley spoke again to Terry Lovett on September 22, 1994. He told him that he was concerned for his safety and that of his co-workers because of his wrist problems. If he did any

stress work, his right hand went numb and he was in pain. Even if he worked on the smaller boats with lighter gear, the work was more repetitive. He raised the question as to whether he should be retrained or go back to work.

[41] Mr. Lovett's response in early October 1994, having discussed Mr. Eyerley's case with WCB medical staff and Dr. Bond, was that there was a shared concern as to whether Mr. Eyerley should continue working as a cook/deckhand. His file was to be referred to a Vocational Rehabilitation Consultant for review and to provide assistance in helping him find more suitable work.

[42] Mr. Eyerley consulted with Dr. Bond on October 20, 1994, and he reported to the WCB that Mr. Eyerley's wrist was as before. Dr. Bond encouraged Mr. Eyerley to get his Mate's ticket so he could go back to work at sea without being hampered by his wrist problems. He felt that this would be a good solution for everyone.

[43] Mr. Eyerley's explanation for this is that he had told Dr. Bond that Seaspan wasn't willing to accommodate him by putting him on smaller boats. The Mate's alternative would allow him to continue work on the tugs, but within his medical condition. Mr. Eyerley's first choice had always been to work as cook/deckhand, but only on the smaller tugs. He believed that he could do so without any problem.

[44] It is questionable whether this is a reasonable conclusion. Mr. Eyerley had not sailed from May 18 to July 13, prior to his first tour on the Valiant, which lasted only 3.5 days. According to Dr. Kester, Mr. Eyerley's symptoms should resolve after 24-72 hours of diminished activity. Mr. Eyerley had almost two months of diminished activity. Yet after two tours on the Valiant, the first lasting only 3.5 days, he complained to Dr. Bond of considerable trouble with his right arm after a "difficult tour of duty". The most reasonable conclusion from this evidence is that Mr. Eyerley could not, without difficulty work either on the larger tugs with the heavier gear or on the smaller tugs with the lighter gear, but more repetitive work.

VII. WCB INITIAL INTERVENTION

[45] The possibility of retraining Mr. Eyerley for a Mate's position was the subject of discussions between S. Hora, the WCB and Dave Sutton in October 1994. Seaspan was not opposed to retraining Mr. Eyerley. But if he was to stay in the marine industry, Seaspan wanted input into the decision to ensure Mr. Eyerley did not end up in his current situation. This could happen because a Mate at Seaspan was a working supervisor whose duties included deckhand work.

[46] On November 15, 1994, Keith Magee, a Rehabilitation Consultant with WCB, wrote to Dave Sutton at Seaspan pointing out that Mr. Eyerley continued to have difficulty because of his carpal tunnel injuries. He also pointed out that Mr. Eyerley had been referred to vocational rehabilitation because of ongoing medical opinion suggesting a change in Mr. Eyerley's work duties.

[47] Mr. Magee pointed out that the mandate of WCB was to assist an injured worker to return to suitable employment and to achieve this through the cooperation of the employer, the worker and WCB. To this end, the WCB vocational rehabilitation process involved five sequential phases:

- 1) to assist the injured worker to return to their pre-injury job within their medical restrictions;
- 2) if unable to return to their pre-injury job, to explore job modifications or an alternative job with the accident employer;
- 3) if the accident employer cannot accommodate the worker in any way, then there would be consideration of other occupations in the same or related industry to take advantage of the worker's skills;
- 4) if no alternative job opportunity exists in the same or a related industry, then consideration would be given job opportunities in all industries, recognizing the worker's skills;
- 5) if no job opportunity is achieved in any of phases 1 to 4, consideration is given to developing new job skills through formalized retraining.

At this time, in terms of these phases, Mr. Eyerley would have been at phase 2.

[48] Mr. Magee urged Seaspan to assist the WCB in expediting Mr. Eyerley's return to work, pointing out that the greatest remunerative advantage for the employer is at phases one and two. Beyond that, the retraining costs become a significant expenditure which are charged back to the employer.

[49] Seaspan's position as told to Mr. Magee by Dave Sutton and related to Mr. Eyerley, was that deckhands are crewed to a tug for a specific tour and may or not be part of a permanent crew on a specific boat. Seaspan would consider a dispatch to a smaller tug as a courtesy, but could not give any guarantee as to selective placement.

[50] As to retraining as a Mate, Dave Sutton stressed again that a Mate at Seaspan has two roles, that of a second officer and that of a working supervisor. In the latter role, a Mate's job responsibilities, when making up or landing a tow, are similar to that of a deckhand.

[51] Mr. Magee wrote to Mr. Eyerley on November 30, 1994, and told him of Seaspan's position. He recommended that once his medical condition had plateaued that he request from Seaspan to be placed on smaller tugs. He pointed out that, Seaspan would consider his request, but would not guarantee any selective placement. As to a Mate's position, it was his understanding from Seaspan that a Mate is required to perform deckhand duties and, given Mr. Eyerley's current seniority of five years, it was unlikely that he would get a Mate's position in the near future.

[52] Mr. Magee proposed a preventative vocational rehabilitation plan for Mr. Eyerley whereby he would request to be crewed on smaller tugs, and pursue on his own, the Watchkeeping Mate Certificate. The WCB would fund his tuition, books and supplies.

[53] On January 2, 1995 Dr. Bond reported to the WCB that Mr. Eyerley could probably return to work on boats with lighter duties, but he understood the Seaspan would not give such an assurance. Seaspan would only dispatch Mr. Eyerley to smaller tugs if such work was available, and required medical certification that he be fit to work on any Seaspan vessel. Dr. Bond would not give his medical certification.

[54] On January 19, 1995, Dr. Bond wrote to Keith Magee at the WCB to update him on Mr. Eyerley's medical condition. He was able to do much of his work, but lifting very heavy gear as required on the larger tugs, resulted in swelling, pain and sensation loss in his right arm. Further, if he twisted his wrist past a certain point, as can happen when climbing on or off a barge in rolling seas, he experienced pain, causing him to weaken his grip. This could put him and others working with him at risk. Although Dr. Bond suggested that Mr. Eyerley could work on the smaller tugs, he noted that on Mr. Eyerley's last tour on a smaller tug, the frequent and repetitive work was just as bad in terms of post work swelling as was the heavy, off shore labour.

[55] Dr. Bond recommended that the most reasonable plan would be to retrain Mr. Eyerley as a Mate which would free him from most of the heavy work on the tugs and allow him to remain in the industry.

[56] At this time, the WCB was also urging Mr. Eyerley to get medical clearance to return to work. Dr. Bond, however, was not of the same mind and said so in his January 29, 1995 to Keith Magee. He told Mr. Magee that Mr. Eyerley's medical reports over the past few months basically said the same thing, namely, that Mr. Eyerley's wrist was not going to get any better. Further, a medical clearance to return to work depended upon Mr. Eyerley being in a job that he could do without incurring periods of disability. When crewed on the larger tugs he suffered problems. More recently, when he worked on the smaller tugs because of the frequent repetitive work, he also had problems with his right arm.

[57] Mr. Magee's response was that he accepted that Mr. Eyerley could not perform all aspects of his job. Mr. Magee was willing to facilitate a joint meeting of all of the involved parties including Mr. Eyerley, Dr. Bond, his Union representative, a representative from the WCB and a Seaspan representative to deal with this issue.

[58] But the WCB claims adjudicator on Mr. Eyerley's file, S. Hora, had a different view of Mr. Eyerley's situation. On March 9, 1995, she wrote to Mr. Eyerley telling him that his file had been reviewed by the WCB medical advisor, who had concluded that he could return to his normal work activities. Accordingly, his WCB benefits would stop on March 12, 1995.

[59] Mr. Eyerley's Union appealed this decision on his behalf on the grounds that he was unable to return to his normal duties. The appeal was decided over a year or later, by the Workers' Compensation Review Board on July 8, 1996. Because of the timing of the hearing, the Review Board had the advantage of more recent medical assessments. In its reasons, the Board set out in

detail Mr. Eyerley's work record and medical assessments and concluded that Mr. Eyerley had residual symptoms resulting from his compensable injury and had been left with long-term restrictions. The Board reinstated his benefits and recommended that he be assessed by Disability Awards regarding these restrictions. Seaspan received a copy of this decision.

[60] In the interval between his appeal and the decision, Mr. Eyerley had gone back to work on March 23, 1995. He was crewed on the Seaspan Foam, a smaller tug (Class 3) and a tug that he liked to work on. Unfortunately, on his second tour on the Foam, Mr. Eyerley was resting in his bunk when the Foam collided with a barge. Mr. Eyerley suffered a concussion and came off the Foam on April 6, 1995, and was off work on WC for 21 days.

[61] When Mr. Eyerley returned to work on May 11, 1995 he was dispatched on the Seaspan Lorne, a larger tug (Class 4) towing rail barges to Port Alice, and which Mr. Eyerley had told Seaspan was his second choice if he was not crewed on a smaller tug. The Lorne is considered by deckhands, including Mr. Eyerley, to be a comfortable and a good sea boat. He sailed four times on the Lorne and finished his last tour on July 18, 1995. He came off the Lorne two days early because of swelling and pain in his right arm, caused by heavy work he had to do, including jacking, blocking and chaining rail cars.

[62] Mr. Eyerley saw Dr. Bond on July 19, 1995, who reported to the WCB that Mr. Eyerley left his last tour of duty early because of swelling and numbness in his right arm. His medical opinion was that Mr. Eyerley needed time for his arm to settle down and he was not able to return to work. Mr. Eyerley called Dave Sutton on July 20, 1995, told him about his injuries and said he hoped to be back at work around the end of July. He, again, also told Mr. Sutton that he wished to work on the smaller tugs, but if that was not possible, the Lorne was a second choice. Mr. Sutton told him that if these options were not available, Mr. Eyerley would have to sail as required by Seaspan.

[63] On July 25, 1995, Dr. Bond reported to the WCB that Mr. Eyerley's wrist had settled down and that he could go back to work if light work or part-time work was available. But on the basis of what Mr. Eyerley told him, he doubted that there were any light duty jobs at sea for Mr. Eyerley.

[64] In his August 11, 1995 report to the WCB, Dr. Bond noted that Mr. Eyerley had trouble with left-side paddling of a canoe while on holidays in the previous week. He also had problems with operating his chain saw for any extended period of time. In his August 29, 1995 report to the WCB, Dr. Bond noted that Mr. Eyerley had numbness in his right hand while driving across Vancouver Island on the weekend. Although it subsided somewhat it seemed to reoccur with household work.

[65] At that point in time, Mr. Eyerley had not worked on the boats since July 18, 1995, about 1½ months. In fact he never returned to work at Seaspan.

[66] On January 6, 1996 there was a WCB team meeting between W.J. Whyte, Claims Adjudicator, Dr. D. Jarman, Medical Advisor, and Beate Beckmann, Vocational Rehabilitation consultant. The purpose of the meeting was to establish whether Mr. Eyerley had a permanent

functional impairment (PFI) and whether he could return to work. They concluded that he did not have any permanent impairment and could return to work. On January 22, 1996 Mr. Whyte wrote to Mr. Eyerley advising him, that for this reason, his WC wage loss benefits would end on January 28, 1996.

[67] Mr. Eyerley's Union appealed this decision on his behalf on February 13, 1996, claiming that he had not recovered from his 1991 compensable injury. In its June 9, 1997, decision, the Review Board decided that Mr. Eyerley was entitled to wage loss benefits and should have been assessed for a PFI as at January 28, 1996.

[68] Mr. Eyerley was assessed for a PFI on September 4, 1996, by a Dr. Jarman, WCB medical advisor. In his report, Dr. Jarman noted that Mr. Eyerley had persistent symptoms of pain and swelling in his right hand and wrist and reduced strength in his right hand. His deckhand job required him to do heavy work including pulling on heavy lines, lifting a variety of heavy objects and climbing ladders. He had returned to work on several occasions, but had great difficulty, developing pain and swelling in the hand and wrist and sometimes in the entire right arm. He also noted that Mr. Eyerley had not worked for the past year due to problems with his right hand and wrist and would like to return as a Mate on a tug boat which is less physical than deckhand work.

[69] Dr. Jarman concluded that Mr. Eyerley had a 4 % permanent functional impairment (PFI) of total disability and "long exposure to heavy repetitive work should be avoided."

[70] A PFI is the degree of impairment relative to 100 % impairment of an injured worker when compared to the worker's pre-injury function. This is measured when the injured worker's medical condition has "plateaued" i.e. has stabilised but has not returned to the pre-injury status.

[71] Mr. Eyerley received a permanent partial disability award of around \$29,000 for the long-term effect on his employability due to his loss of function. He also continued to receive wage-loss benefits, being seventy-five percent of his gross earnings at the time of his injury, tax exempt.

VIII. FURTHER WCB VOCATIONAL INTERVENTION

[72] On September 11, 1996, Ms. Beckmann called Mr. Eyerley to arrange for a vocational assessment. She also told him that she would contact Seaspan to see if there was any suitable alternative work for him there. Ms. Beckmann did call Dave Sutton at Seaspan on September 16, 1996, but he had retired and Captain Hal Blake had taken over his position. Captain Blake was on vacation and was to call her when he returned on September 23, 1996.

[73] Ms. Beckmann spoke to Captain Blake on September 27, 1996. She told him that Mr. Eyerley had been assessed with a 4 % PFI and had medical restrictions with respect to prolonged exposure to heavy, repetitive wrist activities. Ms. Beckmann also wanted to canvass whether Seaspan could provide Mr. Eyerley with suitable work within his medical restrictions.

[74] Captain Blake had not been aware of the PFI assessment, and his response was that if Mr. Eyerley could not perform the "safety related functions required on a regular basis", there was not much work at Seaspan for him. Ms. Beckmann suggested a meeting with Mr. Eyerley, his Union representative, Captain Blake and herself. Captain Blake agreed to call her back with a date and time. When Captain Blake called Ms. Beckmann to arrange a meeting she was on vacation. By the time she returned, Mr. Eyerley's employment had been terminated.

[75] The reasons given by Captain Blake for the termination in his November 8, 1996, letter to Mr. Eyerley was because of his absenteeism due to medical reasons, primarily his wrist. Further, his absenteeism over the past 3 years had gotten worse, and, based on Seaspan's review of his medical reports, it was apparent that there was no reasonable prospect that Mr. Eyerley would be able to resume the normal duties of a cook/deckhand. As to the idea that he retrain as a Mate, Captain Blake pointed out that the duties of a Mate at Seaspan are those of a working supervisor and involve the same type of physical labour as that of a deckhand. Seaspan did not have any other jobs that could accommodate Mr. Eyerley's existing injuries and his propensity to incur further injuries. He concluded the employment contract had been frustrated by Mr. Eyerley's inability to do the work and Seaspan considered his employment terminated. Mr. Eyerley's separation papers, including his Record of Employment were enclosed. In this document, Seaspan commented that Mr. Eyerley was "medically unfit for the industry".

[76] According to Captain Blake, Mr. Eyerley's personnel files included the pre-1996 medical reports, accident reports and WCB reports and decisions, internal Seaspan memos. He reviewed these materials in September/October 1996. He could not say when these reports were received by Seaspan except that they came in from time to time. Captain Blake also knew that from Ms. Beckmann that Mr. Eyerley had a 4% PFI and Dr. Jarman's assessment that prolonged exposure to heavy repetitive wrist activities should be avoided.

[77] Captain Blake testified that he did not wait for Ms. Beckmann to return because the proposed meeting was to assess whether Mr. Eyerley could have done some other job at Seaspan. At the time, a meeting seemed irrelevant because Mr. Eyerley was on WC and well on the way, from what Seaspan knew, to be retrained as a Mate.

[78] Mr. Eyerley was very surprised when he received this letter. He said that no one from Seaspan ever contacted him to discuss his medical restrictions or to discuss what job modifications could be offered to him or an alternative position so that he could stay at Seaspan.

[79] Mr. Eyerley advised Ms. Beckmann of his termination and she wrote to Captain Blake on November 21, 1996 advising him that, since Seaspan was not willing to offer Eyerley alternative employment, the WCB would develop a vocational rehabilitation plan (Phase 5) to facilitate Mr. Eyerley's return to work. Because Mr. Eyerley was no longer employed by Seaspan, the WCB could not require Seaspan to consider alternative work at Seaspan.

[80] Captain Blake's response was that it was not unwilling to accommodate Mr. Eyerley. Rather there were no jobs at Seaspan for which he was medically fit and none had been suggested. Further, Seaspan did not object to a retraining program, but not as a Mate on a tug boat at

Seaspan. He repeated that a Mate is a working supervisor whose duties involve the same physical demands and risks as a deckhand.

[81] In her January 9, 1997, letter to Captain Blake, Ms. Beckmann pointed out that because no alternative jobs had been suggested, this was the very reason why she wanted to meet with Seaspan. Ms. Beckmann further noted that, although the work of a Mate and a deckhand may be the same at Seaspan, she had information on job classifications that showed that Mr. Eyerley would be able to meet the physical demands of a Mate's job "*outside the employ of Seaspan*". She concluded that Mr. Eyerley was taking courses to upgrade his English and Math and that she would confirm WCB's sponsorship for Mr. Eyerley's to retrain for a Watchkeeping Mate's position. This would allow Mr. Eyerley to work as a Mate in the marine industry at large and not necessarily at Seaspan. At this point, Ms. Beckmann had not made any determination as to whether Mr. Eyerley could return to Seaspan.

[82] Seaspan did not take this lightly. Their legal counsel wrote to the WCB Director of Vocational Rehabilitation on January 31, 1997, asserting that "*the duties of a Mate and a deckhand are exactly the same*". Further, there was a surplus of Mates on the west coast and there were few Mate's jobs available. While Seaspan agreed with the WCB efforts to retrain Mr. Eyerley for work compatible with his injuries, the WCB should not engage in a fruitless exercise to retrain him for a position for which he had little hope of finding employment. He proposed that a meeting with the WCB be held to discuss this matter.

[83] Ms. Beckmann had concluded that a Mate's job in the industry was physically suitable for Mr. Eyerley. But the question of whether a Mate's duties on a tug boat are exactly the same as a deckhand was never resolved between Seaspan and the WCB. On this question, however, persuasive evidence was given by Captain Arnold Vingsnes, business agent for the Canadian Merchant Service Guild, which represent the officers on the Seaspan vessels. He hotly disputed that the duties of a Mate and a deckhand are exactly the same. According to Captain Vingsnes, the number one duty of a Mate is the safe and efficient navigation of the vessel. A Mate works essentially as an extension of the Master who is responsible for the overall operation of the vessel. A Mate is in a command position, he is a supervisor. At certain times, the Mate may assist the deckhand with loading, tying up and with unloading the barges at the destination port and, to that extent, he must be able to perform the duties of a deckhand.

[84] Seaspan appealed Ms. Beckmann's decision to proceed with Mr. Eyerley's retraining. The appeal was filed on January 31, 1997. The grounds were "that there was no point in retraining the Claimant as a Mate when he cannot work as a deckhand. The duties of a Mate are the same as a deckhand".

[85] Nonetheless, Seaspan pressed on for a meeting with the WCB to clarify the duties of a Mate on a Seaspan tug. A meeting was proposed for April 1997, but the WCB postponed this meeting as being premature because no final decision had yet been taken with respect to retraining Mr. Eyerley.

IX. MR. EYERLEY'S VOCATIONAL REHABILITATION PLAN

[86] That situation changed on July 22, 1997 when Ms. Beckmann provided Mr. Eyerley with a Vocational Rehabilitation Plan whereby the WCB would sponsor him for a 19-week, Watchkeeping Mate's course. This Plan anticipated that Mr. Eyerley would start the course in August 1997 and complete it by January 31, 1998. The WCB agreed to pay his room and board, transportation to and from home, tuition, books, supplies and full wage loss benefits of 75% of his pre-injury gross earnings. Mr. Eyerley was allowed an additional paid twelve weeks for job search to April 26, 1998. It appears that the initial budget was \$106,500 including all wage benefits that had been or would be paid to Mr. Eyerley.

[87] Mr. Eyerley signed a Statement of Understanding on July 22, 1997, agreeing that he had discussed and understood his Vocational Plan and would actively work towards its successful completion.

[88] As it turned out, Mr. Eyerley did not successfully complete all of the courses necessary for the Watchkeeping Mate's certification. He wrote and failed the chart work course a number of times. His Vocational Plan was extended at his request until December 31, 1998. Although it was his intention to rewrite the chart work exam as of the date of hearing, Mr. Eyerley has not done so. Seaspan estimated that it was charged about \$150,000 for Mr. Eyerley's retraining program.

[89] The Workers' Compensation Review Board decided Seaspan's appeal on March 31, 1998. The Board concluded that the WCB's decision to retrain Mr. Eyerley as a Mate was entirely appropriate and correct. According to the Board, the evidence was that Mr. Eyerley was capable of handling emergency situations and could carry out heavy activities for short periods of time. There was no medical evidence from the employer that employment as a Mate was not suitable for Mr. Eyerley.

[90] Seaspan appealed the Review Board's decision to the Workers' Compensation Board Appeal Division on April 28, 1998. The grounds for the appeal were that the Vocational Rehabilitation Consultant, Ms. Beckmann, did not follow Board policy because she did not consult the employer before finalizing the Vocational Plan; the Review Board ignored the Seaspan's evidence that Mr. Eyerley could not perform the duties of a Mate on a coastal tug; and, there was no reasonable prospect of his employment as a Mate in the near future.

[91] In its October 2, 1998 decision, the Appeal Division concluded that there had been appropriate consultation between the WCB and Seaspan on Mr. Eyerley's vocational rehabilitation plan. And there was no persuasive medical evidence from Seaspan that Mr. Eyerley would be unable to carry out the duties of a Mate, "*particularly in other than Seaspan employment*".

X. MR. EYERLEY'S MOST RECENT MEDICAL ASSESSMENTS, 1996-2000

[92] Dr. Kester examined Mr. Eyerley was on February 13, 1996, about six months after Mr. Eyerley had last worked at Seaspan. Dr. Kester reported that Mr. Eyerley was complaining of increased hand and wrist pain and discomfort brought on by the heavy work on the tugboats in June 1995. Mr. Eyerley told him that his hand would lock and clamp into position when doing repetitive, power-grip type of activities, such as holding on to ropes or climbing on to barges. He also told Dr. Kester that with rest the swelling and numbness went away over a two week period.

[93] Dr. Kester also reported that Mr. Eyerley complained of problems in his right arm when driving a car or lifting his hand above his head. He had been unable to carry out the lighter chores on his farm and carrying a bucket or a pail for more than a few feet was uncomfortable for him. And Mr. Eyerley continued to complain of discomfort with any heavy physical work that he did.

[94] Mr. Eyerley last saw Dr. Kester on February 5, 1998, regarding his right wrist and hand. At that time, there was no evidence of swelling or deformity of the wrist and Mr. Eyerley had full-range of motion of his hand and wrist. Mr. Eyerley reported that he had experienced some ongoing swelling in very heavy work situations and, on one occasion when he worked 12 hours plus per day (not at Seaspan) for three days doing heavy work, he experienced swelling in his right wrist.

[95] Dr. Kester's assessment was that Mr. Eyerley would have some ongoing swelling in extremely heavy work situations. Dr. Kester concluded that Mr. Eyerley was fully recovered from the surgeries, his hand was quite functional and no further treatment or therapy was indicated. At the time of this examination, Mr. Eyerley had not worked on the tugs for more than two years. Dr. Kester did not know this when he wrote this report. He also agreed in his evidence that Mr. Eyerley's condition would improve significantly if he took time off and ceased whatever activity caused his right arm problems.

[96] Dr. Kester's last medical report, requested by Commission Counsel, was written on December 22, 2000. It does not appear from this report that Dr. Kester saw Mr. Eyerley at that time. Dr. Kester recounted Mr. Eyerley's medical history, noting that his condition was initially chronic tendonitis caused by heavy work activity, and aggravated by his fall which eventually led to carpal tunnel release surgery. Since then he has suffered from ongoing tendonitis and has some symptoms of thoracic outlet syndrome caused by having to raise his arm over head when working as a deckhand. Mr. Eyerley's symptoms appeared to be permanent in that any type of heavy prolonged use brings them on.

[97] Dr. Kester concluded that Mr. Eyerley's condition has affected his ability to do his previous job which involved heavy physical activities. But he did feel that Mr. Eyerley could perform lighter activities such as a Mate's job or on the lighter more inshore boats. A working leather splint would help but a decrease in heavy physical activities would be most beneficial for his condition.

XI. OTHER DECKHAND WORK AT SEASPAN - SHIFT BOATS

[98] Captain Blake gave evidence as to deckhand work on Seaspan shift boats. He has been in the tug boat business on the British Columbia coast for about 47 years. He started as a deckhand in 1954, progressed to Second Mate, First Mate, Master and Senior Port Captain at Seaspan before taking over as, Personnel Manager, Marine. Captain Blake described the operations of Seaspan as they were in 1996 and as they are today. In addition to its continuous operating, ocean going tugs and coastal tugs, Seaspan operated a number of shift boats whereby the crew works an hourly shift and goes ashore at the end of the shift. Deckhands on shift tugs either have to live or have some sort of accommodation nearby to where the tugs are docked.

[99] In 1996, Seaspan had three ship assist tugs, the Seaspan Discovery, Hawk and Falcon, and two trainships, the Seaspan Doris and Seaspan Greg. The ship assist tugs are each over 3,000 BHP and over 80 feet long. They operate as ship docking tugs in the Vancouver harbour and at Roberts Bank. The Doris and the Greg are self-propelled vessels that carry rail cars and trucks to Vancouver Island. In the coastal tugs category, Seaspan operated six smaller tugs (class 3), the Victor, Valiant, Foam, Meteor, Star and Planet.

[100] Today, Seaspan continues to operate the same ship assist tugs and the Doris and Greg. The Victor and the Valiant continue to run as coastal tugs. Seaspan also has seven yarding tugs, five of which operate in the Fraser River, and two in Victoria Harbour.

A. Ship Assist Tugs

[101] Captain Blake's evidence was that a ship assist or pusher tug has a Master and one deckhand on board. They work 12 hours on and 12 hours off on shore, seven days per week, one week on, one week off. These tugs are reverse tractors, which means that they are the opposite of a tow, i.e. they pull backwards using a tow line winch on the foredeck. Basically, the pusher tug comes along side the ship, the deckhand on the tug receives the Hugo line from the ship and ties off the tug's line to it. The crew on the ship pulls the line up and attaches it to the bit on the ship. The slack on the line is taken up using the winch operated from the wheel house by the Master. Once the tug line is fast and secure, the assist tug pushes against the ship, either fore or aft, into position at the dock. There are no barges to be secured or towed or worked on in the operations of a pusher tug.

[102] The tow lines have to be very strong to withstand the engine power of the tug and the weight of the ships they are docking. The tow line on the Discovery is about 10½ inches in circumference and about 450' long. Seaspan has worked hard to reduce the weight of these lines and they are now made of spectra which is much lighter and stronger than a steel tow line. The lines will float if they fall into the water, although after a time the line can become waterlogged and heavier. If the line drops over the side, which Captain Blake says can happen, the winch on the tug sometimes brings it only to a certain point and the deckhand must pull the rest of the line aboard.

[103] Captain Blake would be very reluctant to crew Mr. Eyerley on a pusher tugs. This is because there is no Mate or second deckhand on board to help out if the deckhand gets into trouble. Because of the nature of the controls, the Master can not leave the wheel house so that the deckhand is on his own doing the deckhand work.

B. Yarding Tugs

[104] A yarding tug operates with a Master and one deckhand, who work a 12-hour shift, 7 days per week, one week on and one week off.

[105] Captain Blake agreed that the steel bridles on a yarding tug are not as heavy (being $\frac{3}{4}$ inch) as on a coastal tug. But he considered that the deckhand duties are the same and involve climbing on and off barges, putting on and taking off bridles, etc. This work is not light work and is more repetitious than on a coastal tug.

[106] In a 12-hour shift, the tug may pick up and drop off 18 to 20 barges. The tug will usually tow at least three barges at a time. The deckhand would attach the steel bridle from the tug to the head end barge. The deckhand would then move onto the next barge in turn and attach them with couplers stern to bow. The couplers are synthetic lines, which Captain Blake estimated, weigh about 75 pounds, but will float for a time if dropped into the water.

[107] Mr. Eyerley did not agree that the couplers were that heavy. And he disagreed that deckhand work on a yarding tug is physically demanding. He pointed out that if the deckhand handled 21 barges in a 12 hour shift, with three barges on each run, the deckhand would only handle the bridles seven times in that period. That is not heavy work in his view.

[108] Captain Blake's response was that yarding work in the Fraser River involves working against the tide, the wind and the currents, working at night, with the deckhand by himself and at times only in radio contact with the Master. The tug runs the river with three loaded barges, has to drop them at various points along the way and pick up empty barges on the return.

C. The Doris and Greg

[109] The Doris measures 303 feet by 56 feet and has a capacity for 19 rail cars and 42 truck trailers. The Greg is 304 feet by 55 feet and with a 10 rail cars and 28 truck trailer capacity. Both vessels go back and forth from Tilbury in the Fraser River to Nanaimo, or Swartz Bay on Vancouver Island.

[110] There are rail tracks on the vessels and they are loaded from a loading ramp. The loading ramp is equipped with rails and the rail cars are switched on and off with a switching engine. At the present time, the Greg does not carry rail cars.

[111] Seaspan bought the Doris and Greg in 1984. According to the ILWU collective agreement, all the crew on these vessels at that time were grandfathered and have tenure in their position. In the period from May-December 1996, the deckhand complement was nine for both vessels. All of them had considerably more seniority than Mr. Eyerley, by at least 10 years. Of these nine, four were grandfathered and eight of the nine deckhands suffered from some form of serious disability.

[112] According to Mr. Eyerley, the deckhand jobs on the Doris and Gregg are referred to as the "whisker jobs" because they are occupied generally by older employees of Seaspan, who, by

reason of their age and their various disabilities, can no longer do heavy work. Also, those occupying these positions are among the most senior deckhands in the company.

[113] According to Captain Blake, in addition to entitlement under the collective agreement and the possibility of grievances, if Seaspan had put Mr. Eyerley into one of these jobs and bumped a more senior deckhand, it would create other problems. In particular, what would Seaspan do with the deckhand who was bumped, who is entitled by seniority to be there and may well be someone with significant medical problems. Of the nine incumbents in 1996, today, five are still working on the Doris and Greg; and, of the other four, one is on LTD, one is on WC benefits and two are deceased.

[114] Deckhand duties on the train ships is light work and include flagging and loading the cargo; assisting the drivers backing the units onto the vessel; and chaining the rail cars. They also clean and paint the ship and do other maintenance. Once the cargo is loaded onto the trainship, there appears to be no work except cleaning and maintenance.

[115] Captain Blake explained how a deckhand position on the Doris or Greg is filled if one becomes vacant. If it is a short-term vacancy, such as short-term illness or vacation, it would be filled from the relief pool. The relief pools are employees who prefer to sail as relief and do not want to work steady on a particular boat. Whoever from that group happened to be available and qualified would be assigned to the vessel. But if a permanent deckhand position became available, according to Captain Blake, it would be filled according to seniority.

D. Seniority

[116] There was considerable evidence relating to the role seniority plays in crewing deckhands. Deckhands are unlicensed personnel governed by the ILWU collective agreement. Article 1.09(d), Seniority and Promotions, provides that for placements within the bargaining unit, where skill and efficiency are relatively equal, preference will be given to the employee with the greatest length of service with the company. This certainly suggests that seniority is the governing principle for crewing permanent employees. Captain Blake's evidence was that given time and regular attendance at work, unlicensed employees tend to end up in their preferred placement by virtue of their length of service with the company.

[117] But, said Captain Blake, seniority is not the only factor in crew assignment. Morale is another factor, particularly on a continuous operating vessel where the crew lives together, two weeks at a time in very close quarters. They have to get along and Seaspan's practise is that the crew that sails well together, stays together. If a deckhand has crewed on the same boat for approximately one year and the crew works well together and gets along, he will become part of the permanent crew on that vessel. Theoretically, if seniority governs, a senior deckhand could bump a junior deckhand off a particular boat. This is a result, however, that Seaspan tries to avoid. If pushed and the senior deckhand has union support, then Seaspan may well have to give him that placement. In those circumstances, however, Seaspan would try and arrive at a compromise such as putting the senior person on another vessel that he would accept and maintain the existing crew complement.

[118] Captain Blake agreed, that when Mr. Eyerley returned to work, Seaspan had the ability to crew him on a smaller tug as part of the permanent crew, if he had the seniority. But in addition to seniority and morale, the exigencies of crewing must be considered. The entire fleet of tugs is not available for crewing when a person becomes available for work. Seaspan could not guarantee a Class 3 tug would be there when Mr. Eyerley was. That would depend on what was coming up in the way of crew changes at that time.

[119] Seaspan has some flexibility so that a deckhand might be able to wait a few days to get a preferred placement. But this obtains where deckhand has worked on a regular, rotational basis and has some banked time (for each day worked, a deckhand is credited with 2.24 days) that would fill the gap when coming off company disability or WC benefits.

[120] But it is much more difficult when a person has worked in an irregular fashion and has no leave or banked time. Seaspan would allow an employee to go negative in their pay to some extent. But there has to be a reasonable prospect that the individual would be available to work, so that he could make up whatever was owed. If this was questionable and the employee had no other resources, Seaspan would be reluctant to put the employee into a negative pay position which would preclude waiting until his boat came in, so to speak.

E. Modifying the Duties of a Cook/Deckhand

[121] Captain Blake did not know of any way that the job of a cook/deckhand on a continuous operating tug could be modified to accommodate a person with Mr. Eyerley's disability. It had never been done in the past, nor was it ever been suggested by anyone, including the WCB, to his knowledge, in the history of Seaspan.

[122] Captain Blake agreed that Seaspan did not consult with Mr. Eyerley or his doctors or arrange for an occupational consultant to determine if there were any jobs other than cook/deckhand which he could do at Seaspan. His explanation was that it was not Seaspan's role to assess Mr. Eyerley's abilities and Seaspan had no reason to question the medical opinion of Mr. Eyerley's doctors or the WCB's medical advisors. He understood from this medical evidence that Mr. Eyerley could not do the work of a cook/deckhand and should be retrained as a Mate.

XII. FROM DECKHAND TO MATE AT SEASPAN

[123] To qualify as Watchkeeping Mate, a deckhand must have at least 24 months of sea time and pass the required courses for certificates of competency.

[124] Having acquired a Mate's ticket, Seaspan requires that the deckhand sail with one or more Masters who assess his ability to move up to a Mate's position. If the assessments are favourable, the deckhand would be promoted to Mate and is required to join the Canadian Merchant Service Guild. Once a deckhand has sailed for six months as a Mate, he goes on the seniority list for Mates. Because of the seniority in provisions of the CMSG collective agreement and the number of deckhands that have earned their Mate's ticket, it may take about five years before a deckhand

would get a permanent Mate's position at Seaspan. In the meantime, he would have to sail as a deckhand.

[125] As of December 31, 1998, when Mr. Eyerley's WC benefits ended, there were about 30 cook/deckhands who had obtained their Mate's ticket. Mr. Eyerley would have been at the bottom of the list if he had obtained his Mate's ticket at that time.

[126] Seaspan's primary concern was Mr. Eyerley's ability to function as a Mate, given his medical restrictions. This was the source of the gap between Seaspan and the WCB on this question. On the one hand, Ms. Beckmann had concluded that Mr. Eyerley could meet the physical demands of a Mate outside the employment of Seaspan. Seaspan did not oppose this. Rather, Seaspan wanted to ensure that the WCB understood that Mr. Eyerley should not be retrained as a Mate on Seaspan tugs when he could not do deckhand duties. Captain Blake explained that this is why Seaspan was anxious to meet with the WCB in the spring of 1997. To protect its position, Seaspan appealed the January 9, 1997, WCB Review Board's decision. However, the question of whether Mr. Eyerley could do Mate's duties was never resolved, except to the extent that the Appeal Division concluded that there was no medical evidence from Seaspan that Mr. Eyerley could not work as a Mate, particularly outside Seaspan employment.

XIII. EFFECT ON MR. EYERLEY AND HIS FAMILY

[127] Mr. Eyerley described the impact of this whole experience. He believed that he had given his all to the company and yet he was cast aside. There was no evidence from Seaspan that he did not perform his duties well. He has been very stressed, still is and is very disheartened. It has been very hard on himself and his family. He has found it extremely difficult to find work because of the notation in his Record of Employment. He has had to go on welfare to support his family.

XIV. THE LEGAL FRAMEWORK

A. *Prima Facie* Case and Bone Fide Occupational Requirement

[128] In order to succeed, the complainant, Mr. Eyerley, must demonstrate a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, is complete and sufficient to justify the verdict in the complainant's favour in the absence of an answer from the respondent⁽¹⁾. Once the complainant establishes a *prima facie* case of discrimination, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy alleged to be discriminatory, has a bona fide occupational requirement (BFOR).

[129] Recently, the Supreme Court of Canada, in two cases, *British Columbia (Public Service Employees Relations Commission) v. British Columbia Government and Service Employees'*

Union, (Meiorin)⁽²⁾ and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Counsel of Human Rights), (Grismer)*⁽³⁾, reconsidered its approach to the question of bona fide occupational requirement.

[130] In *Meiorin*, the first of the two cases decided by the Supreme Court, the Court abandoned what it described as the *conventional approach* to human rights legislation and replaced it with the *unified approach*. Under the unified approach, once the complainant has shown a *prima facie* case, the respondent must prove that the discriminatory standard is a BFOR. To do so, the respondent must satisfy the following three step test proposed by the Court:

- 1) that it adopted the standard or policy for a purpose or goal rationally connected to performance of the job;
- 2) that it adopted the standard or policy in good faith, and in the belief that it is necessary for the fulfillment of the purpose or goal; and
- 3) the standard is reasonably necessary to the accomplishment of its purpose or goal. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship upon the employer.

B. Is There a *Prima Facie* Case?

[131] Seaspan argued that there is no *prima facie* case of discrimination. Seaspan did not refuse to continue to employ Mr. Eyerley because of his disability. Rather, because of his non-culpable absenteeism, his employment contract came to an end by operation of law, i.e. frustration. Seaspan relied on a number of cases for this proposition.⁽⁴⁾ Three of these cases involved wrongful dismissal actions and the principle of frustration was invoked as a defense. The issue in the fourth case, *Marshall*, was whether an employee was entitled to a redundancy payment under specific redundancy legislation and whether his employment had come to end because his lengthy illness.

[132] None of these cases involved any consideration of human rights legislation. This case does involve human rights legislation, specifically, section 7 of the *Act*. Under section 7, it is a discriminatory practice to refuse to employ or continue to employ any individual on a prohibited ground, in this case, disability. The facts are that as of November 8, 1996, Seaspan refused to continue to employ Mr. Eyerley. It sent him a letter advising him that his employment was terminated and enclosed his separation papers. It may be that Seaspan considered that it had a just cause and legal basis for this action. But in my view, that does not alter the conclusion that it refused to employ Mr. Eyerley any longer.

[133] As the Supreme Court has stated on numerous occasions, the words of the *Act* are to be given a purposive interpretation that will best ensure its objective of non-discrimination, rather than seeking an interpretation that will minimize or enfeeble its proper impact. In my opinion, the wording of section 7, contemplates the scenario of frustration of contract and operation of

law in the employment context. Otherwise, an employee with a non-culpable record of absenteeism caused by an identifiable disability would fall outside the scrutiny and the protection of the *Act*.

[134] It is noteworthy that a review of the arbitral jurisprudence cited in argument by Seaspan shows that the concept of non-culpable absenteeism does not operate freely. It is constrained by human rights legislation.

[135] This was certainly the conclusion reached in *Re. Air B.C. Ltd. and C.A.L.D.A.*⁽⁵⁾, an arbitral decision cited and approved of in a number of subsequent cases, including in a decision of the British Columbia Court of Appeal.⁽⁶⁾

[136] In *Air B.C.*, Arbitrator D.C. McPhillips did not accept the argument that human rights legislation put an end to the doctrine of non-culpable absenteeism. He agreed that an employer has the right to its part of the employment bargain, namely, the employee's performance of the work. *But, where the employment rule impacts negatively on a disabled person the correct approach for an arbitrator is to consider whether this employee could be accommodated to the point of undue hardship.*

[137] The result of Seaspan's argument would be that an employer would have no obligation at all to accommodate a disabled *complainant* under human rights legislation, who has a record of non-culpable absenteeism; but an employer would have such an obligation vis-à-vis a disabled *grievor* under a collective agreement or under labour law legislation. In my opinion, there is no basis in law or logic for this different result.

[138] I have concluded for all these reasons that the complainant, Mr. Eyerley, has made out a *prima facie* case of discrimination.

C. BFOR - Duty to Accommodate

(i) Steps One and Two

[139] The standard or rule that Seaspan applied in this case was that an employee must have reasonable record of attendance on the job. It is obvious, having regard to this standard, that there is a rational connection between the purpose of this workplace rule and the requirements of the job. There is also no argument that the standard was adopted in good faith by Seaspan for a legitimate, work related purpose. Accordingly, the first two steps of the three-step test for a BFOR have been satisfied by Seaspan.

(ii) Step Three

[140] The next question whether this workplace standard is reasonably necessary for Seaspan to accomplish its purpose or goal. Seaspan must show that it was impossible to accommodate Mr. Eyerley without experiencing undue hardship. The term *undue hardship* is not defined in the *Act*. However, the Supreme Court has provided a number of criteria, which, although not exhaustive, can be used to flesh out its meaning.

[141] In *Central Okanagan School District No. 23 v. Renaud* ⁽⁷⁾, Sopinka, J. noted that undue implies that some hardship is acceptable; it is only undue hardship that satisfies this test. In *Central Dairy Pool v. Alberta (Human Rights Commission)* ⁽⁸⁾, other relevant factors considered by the Supreme Court include, financial cost, interchangeability of the workforce and facilities, the provisions of the collective agreement, substantial interference with the rights and morale of other employees, and employee safety. Excessive cost may justify a refusal to accommodate those with disabilities, but there must not be too low a value put on accommodating disability. Otherwise it would be too easy to use increased cost as a reason for refusing to accord the disabled equal treatment. ⁽⁹⁾ The provisions of a collective agreement cannot absolve the employer of its duty to accommodate, although substantial departure from its terms is a factor to be considered for undue hardship. ⁽¹⁰⁾

[142] The Court in *Renaud* also pointed out that the search for accommodation is a multi-party enquiry. Together with the employer and the union, the complainant must assist in securing appropriate accommodation. And, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant will be considered. The complainant, however, is not required to originate a solution. He/she may be in a good position to make suggestions, but it is the employer who is in the best position to determine how a complainant can be accommodated without undue interference in the operation of the employer's business. ⁽¹¹⁾

[143] In both *Meiorin* and *Grismer*, the Supreme Court noted that there is *both a procedural and substantive aspect to the accommodation inquiry. Procedural in the sense that the employer must consider all viable forms of accommodation. Substantive in the sense of assessing the reasonableness of the accommodation offered or the employer's reason for not offering any accommodation.* ⁽¹²⁾

[144] Finally, as the Supreme Court said, courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing, the employer should, in appropriate cases, consider different ways to perform the job while still accomplishing the employer's legitimate work-related objectives. *The skills, capabilities and potential contributions of the individual claimant must be respected as much as possible. Employers, courts and tribunals should be innovative, yet practical, when considering how this may be done in particular circumstances.* ⁽¹³⁾

XV. DECISION

[145] It now remains to apply these various legal principles to the facts of this case to determine whether Seaspan has established a BFOR. It is incumbent on Seaspan to show that it had considered and reasonably rejected all viable forms of accommodation. This is to be assessed on the facts at the time Mr. Eyerley's employment was terminated. ⁽¹⁴⁾

[146] In 1991, Mr. Eyerley was off work for 137.5 days because of the injury to his right wrist. In 1992, Mr. Eyerley was off work for 316.5 days for the same reason. Dave Sutton was well aware through a series of WCB injury reports, Seaspan accident investigation reports and

internal Seaspan personnel memos, that Mr. Eyerley suffered from carpal tunnel syndrome resulting from his duties as a cook/deckhand and that he continued to have problems with his right wrist that affected his ability to work in this job.

[147] The evidence is also that in October 1993, Mr. Eyerley's union on his behalf asked Dave Sutton, because of the difficulties Mr. Eyerley was having crewing on the larger tugs, to crew him on the smaller tugs with the lighter gear. Mr. Sutton's response was that Seaspan would not crew around Mr. Eyerley's wrist. Mr. Eyerley would be dispatched on smaller tugs if available, but he would not bump others to accommodate Mr. Eyerley. He must be fit to sail on any Seaspan boat.

[148] In October 1993, after Mr. Eyerley came off the Cutlass early because he could not handle the work, Scott Mactier, the Master on the Cutlass at that time, told Seaspan that Mr. Eyerley should be crewed on the smaller tugs. He could not handle the heavier gear because of his wrist injury.

[149] In December 1993, Dave Sutton wrote to Mr. Eyerley pointing out that he had missed 784 days of work since starting with Seaspan in July 1988. Understandingly, Mr. Sutton was concerned about this amount of absenteeism.

[150] But when he and Mr. Eyerley discussed this letter, there is no evidence that Mr. Sutton enquired as to the severity of Mr. Eyerley's medical condition or how it affected his ability to work as a cook/deckhand. There is no evidence that he reviewed whatever medical assessments, WCB reports, or accident reports were in Mr. Eyerley's personnel file or communicated with Mr. Eyerley's doctors. He did not oblige Mr. Eyerley's request to crew only on the smaller tugs. Rather, he made Mr. Eyerley aware that there must be a major improvement in the new year or a termination of his employment would be highly probable.

[151] In November 1994, Dave Sutton had discussions with Mr. Magee, a WCB vocational rehabilitation consultant. Not only was the question of retraining Mr. Eyerley as a Mate raised in the discussion, but also the question of crewing Mr. Eyerley on smaller tugs. Mr. Magee invited Mr. Sutton to consider a Phase 2 accommodation. But rather than pursue any further investigation into crewing Mr. Eyerley on a smaller tug, Mr. Sutton reiterated his previous position that Seaspan would consider but not guarantee such a request.

[152] Mr. Sutton did not consider any other deckhand work possibilities at Seaspan such as on the trainships or shift tugs. Whether such work was available or whether Mr. Eyerley could do this type of deckhand work or whether Seaspan could offer it, given collective agreement or other operational constraints, is not the question. The relevant point is that Seaspan did not even contemplate these as alternatives.

[153] When Captain Blake arrived on the scene in June 1996 to replace Dave Sutton, Mr. Eyerley had been off work on WC for almost one year. Captain Blake only became involved in Mr. Eyerley's situation when Ms. Beckmann called him in September 1996 to arrange a meeting to discuss if there was any suitable alternative work. Ms. Beckmann also told Captain Blake that Mr. Eyerley had been assessed with a 4% PFI in his right wrist.

[154] Captain Blake did try to arrange a meeting with Ms. Beckmann but she was on vacation. By the time she returned, Mr. Eyerley's employment had been terminated. Captain Blake's evidence was that he did not wait to meet with Ms. Beckmann, because it was irrelevant. In his view, there were no jobs at Seaspan for which Mr. Eyerley was medically fit and none had been suggested. But Captain Blake was not qualified to make that medical determination. And the purpose of the meeting was to investigate exactly that, whether there was any suitable alternative work for Mr. Eyerley at Seaspan.

[155] Nor was it Mr. Eyerley's obligation to come up with any suitable suggestions. As the Supreme Court said in *Renaud*, the complainant is not required to originate a solution. It is the employer who is best situated to determine accommodation without undue interference in its workplace operation.

[156] Captain Blake also explained that from what Seaspan knew at that time, Mr. Eyerley was well on his way to be retrained as a Mate. There was no need to consider alternative jobs. But this was not the case in November 1996. The WCB did not make any formal decision to retrain Mr. Eyerley as a Mate until July 1997. The earliest indication that the WCB was moving in this direction was in January 1997, when Ms. Beckmann advised Captain Blake that because no alternative work was available at Seaspan, she was investigating sponsoring Mr. Eyerley for his Mate's ticket.

[157] Although the sponsorship was not yet confirmed, Seaspan appealed this decision. It believed that Mr. Eyerley was not capable, because of his medical restrictions, of doing a Mate's job at Seaspan. But it is questionable how this appeal protected Seaspan's interest. Mr. Eyerley was no longer employed by Seaspan and Seaspan had no obligation to hire him as a Mate if he so qualified.

[158] Seaspan argued that Mr. Eyerley had been accommodated because he was retrained as a Mate, which was paid for at considerable expense by Seaspan. Seaspan further argued that, on the question of accommodation, this Tribunal should defer to the expertise of the WCB, whose mandate is the accommodation and return to work of injured or disabled employees. In this regard, the WCB considered that retraining Mr. Eyerley was the most appropriate accommodation.

[159] I do not agree. It is the employer's duty to consider all viable forms of accommodation. In this case, retraining Mr. Eyerley was imposed on Seaspan. It did not come willingly to this result. Also, the WCB may well not have chosen this course of action if it had had the opportunity to explore suitable alternatives with Seaspan. But it was precluded from doing so by Mr. Eyerley's termination.

[160] As was the case with Mr. Sutton, Captain Blake did not consider any other possible deckhand work for Mr. Eyerley.

[161] For all of the foregoing reasons, I have concluded that Seaspan did not accommodate Mr. Eyerley to the point of undue hardship, in terms of satisfying the requirements in Step three and, thus, has not made out a BFOR. Accordingly, I find that Mr. Eyerley's complaint is

substantiated.

XVI. REMEDY

[162] In my opinion, Mr. Eyerley should not receive any compensation for lost wages. He has not worked at Seaspan since July 18, 1995, and was on vocational rehabilitation benefits until December 31, 1998. The Commission argued that Mr. Eyerley should receive compensation from January 1, 1999, to date. But there is no evidence that Mr. Eyerley was medically fit to resume his job as a cook/deckhand at that time. And it is too speculative and remote to conclude that he should be compensated for lost wages he would have earned had Seaspan accommodated him in an alternative position. For the same reasons, I do not make any order with respect to Mr. Eyerley's claim to be reimbursed for medical and dental expenses.

[163] Nor do I consider it appropriate that Mr. Eyerley be reinstated as an employee with Seaspan and be given the first available permanent Mate's position, particularly without going through the normal Seaspan assessment. Mr. Eyerley has not obtained his Mate's ticket. He may never obtain it. Further, Mr. Eyerley has not sailed on a Seaspan tug for over six years. As a Mate, he would be required to do deckhand duties from time to time, and as noted below, the evidence is that he cannot perform such duties it is my view that he cannot perform such duties on a coastal tug.

[164] From the evidence, there are four possibilities which involve deckhand work. First, there is the cook/deckhand job on the smaller, coastal tugs. But I am not satisfied on the evidence that this position is within Mr. Eyerley's medical restrictions even if he was crewed permanently on a smaller tug. On the last occasion that Mr. Eyerley worked on a smaller tug, the Valiant, he experienced considerable problems with his right arm and, as Dr. Bond put it, he had a "difficult tour of duty". This was so because, though the gear was lighter, the work was much more repetitious and his right arm did not hold up adequately. Mr. Eyerley himself reported to Terry Lovett at the WCB that after he came off the Valiant, he had ongoing problems with his right hand and was concerned about putting himself and other crew members at risk. Further, from at least 1994 onward, his doctors, WC medical advisors and rehabilitation consultants had serious concerns about Mr. Eyerley resuming his cook/deckhand duties.

[165] In 1996, six months after he last worked at Seaspan, Mr. Eyerley complained of problems with his right arm driving for a period of time or lifting his hand above his head. It was uncomfortable to do lighter chores on his farm. In 1998, the last time he saw Dr. Kester, he reported he had some arm swelling when doing heavy work for long periods of time. Dr. Kester's opinion was that he should cease activities that caused this problem.

[166] My conclusion is the same with respect to working as a deckhand on a yarding tug. I accept Captain Blake's evidence that although the gear is lighter than on the coastal tugs, the deckhand work is the same. Further, there is only a Master and one deckhand on board and the Master must remain in the wheelhouse. Because of the nature of the work, the number of crew

and Mr. Eyerley's medical restrictions, I do not consider this to be a suitable alternative for Mr. Eyerley.

[167] There is no question that Mr. Eyerley could do the work of a deckhand on the trainships, the so-called "whisker jobs". However, the evidence is that these jobs are grandfathered and historically have been reserved for those deckhands that, by reason of age or disability, are unable to do heavier deckhand work. These jobs are occupied by deckhands with the most seniority and when vacancies come up they are filled by the individuals with the most seniority. Although I am not bound by the seniority provisions of the collective agreement, I am not willing to place Mr. Eyerley into the first available position of deckhand on the Doris or Greg.

[168] It would be ironic if Seaspan was precluded from putting an aging employee with many years of seniority and with a serious disability into a deckhand position in order to accommodate Mr. Eyerley. The "whisker jobs", in my view, serve a very useful purpose at Seaspan, which should be recognized and maintained, namely that of accommodating deckhands with a long record of service with Seaspan who are in the twilight of their employment years.

[169] Finally, there is the position of deckhand on a ship assist tug. The evidence of Captain Blake is that Seaspan has three ship assist tugs that operate on a shift basis in the Vancouver harbor or proximity and which do not go to sea. These are large tugs with a Master and a deckhand. Captain Blake described the deckhand duties as basically handling tow lines which are made of a synthetic material and are much lighter than the steel bridles. The deckhand does not have to leave the tug to climb onto barges or do any of the tying up or letting go or any of the heavy work that is involved on the coastal or yarding tugs. The safety or risk factors do not seem to be much of a consideration. The evidence is that there is a strong probability that Mr. Eyerley could perform the duties of a deckhand on a ship assist tug.

XVII. ORDER

[170] Having concluded that Mr. Eyerley's complaint has been substantiated and considering all the evidence, I order as follows:

- 1) Seaspan shall arrange at its expense for Mr. Eyerley to be examined by a competent medical authority to assess his medical fitness and degree of impairment. Seaspan shall also arrange at its expense for a vocational assessment of the duties of a deckhand on a ship assist tug.

- 2) If the medical assessment and the vocational assessment determine that Mr. Eyerley can perform the duties of a deckhand on a ship assist tug, Seaspan shall offer him the first, permanent deckhand position that becomes available on any of the Seaspan shift assist tugs. If none is available, then he shall be offered a relief position until a permanent position becomes vacant. This shall be done without regard for seniority, but no deckhand who already occupies such a position shall be removed from that position in favor of Mr. Eyerley.

3) If Mr. Eyerley does not cooperate with respect to the medical assessment or is offered and declines the position of a deckhand on a Seaspan ship assist tug, Seaspan shall have no further obligation to him.

4) Mr. Eyerley is awarded the sum of \$5,000 under section 53(3)(b) of the *Act* for suffering in respect of feelings or self-respect. This sum shall be payable forthwith and is independent of paragraph three of this order.

5) I remain seized and retain jurisdiction to deal with any difficulties that may arise with respect to the implementation of this order.

J. Grant Sinclair, Chairperson

OTTAWA, Ontario

December 21, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

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APPEARANCES:

Patrick J. Eyerley On his own behalf

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Michael Hunter and Gavin A. Marshall For Seaspans International Limited

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3. [1999] 3 S.C.R. 868

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5. (1995) 50 L.A.C. (4th) 93

6. *U.S.W.A. Local 7884 v. Fording 284 Coal Ltd.* (1999), 179 D.L.R. (4th) 284

7. [1992] 2 S.C.R. 970, 984

8. [1990] 2 S.C.R. 489, 520-21

9. *Grismer*, supra, para. 41; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 87-94

10. *Renaud*, supra at p. 587, para. c.

11. *Renaud*, supra, at pp. 592-3

12. *Meiorin*, supra, at para. 66; *Grismer*, supra, at para. 42

13. *Meiorin*, supra, at para. 64

14. *Compagnie minière Québec Cartier v. United Steelworkers of America, Local 6869*, [1995] 2 S.C.R. 1095