

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

JIM SMITH

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

REASONS FOR DECISION

MEMBER: J. Grant Sinclair 2008 CHRT 15
2008/05/09

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I. INTRODUCTION

[1] James Smith is the complainant in this case. He is a locomotive engineer with the Canadian National Railway (CN), but has not worked in this position since 2001.

[2] Mr. Smith began working for CN as a brakeman in Edmonton in 1979. In 1981, he moved to Prince George, British Columbia, as a conductor/brakeman. In 1987, he qualified and began working as a locomotive engineer with CN.

[3] In 1989, Mr. Smith moved to Terrace, British Columbia, where he currently resides with his wife. They very much like living in Terrace. Mrs. Smith works as a library assistant for the local school board. She is qualified as a pharmacist. His children have left home.

A. Mr. Smith's Back Injury

[4] The history of events which ultimately led to Mr. Smith filing a discrimination complaint on February 28, 2002, with the Canadian Human Rights Commission began on November 17, 1997. It was on that day that he injured his back removing a "derail" (weighing about 60 lbs.) so that he could drive a locomotive out of the CN shops in Prince Rupert. As he described it, "something went in my back".

B. Mr. Smith's Return to Work Post Injury

[5] Mr. Smith went off work on November 17, 1997. He consulted with his doctor, Dr. Appleton who filed an attending physician's report with the Worker's Compensation Board (WCB) on November 20, 1997, indicating that Mr. Smith had acute lower back problems. Dr. Appleton estimated his expected return to work to be on November 27, 1997. Mr. Smith filed a claim with the WCB on November 25, 1997.

[6] During the time he was off work, Mr. Smith attended the Skeena Work Conditioning Clinic. According to the Clinic's February 18, 1998 report, Mr. Smith was fit to return to his pre-injury duties without limitations.

[7] Mr. Smith did return to work on February 27, 1998. After he returned to work, he reported problems sitting because of pain in his left leg and lower back. As a locomotive engineer, he would spend most of the time sitting when operating the engine, doing runs from Terrace to other locations on the CN northern line such as Prince George, Prince Rupert, Smithers and Kitimat.

[8] Mr. Smith went off work again on February 19, 1999. Because of his worsening condition, Dr. Appleton arranged for Mr. Smith to have back surgery, (a lumbar discectomy left L5-S1 disc) which was performed in Vancouver on March 12, 1999, by Dr. Padilla. According to Mr. Smith the surgery improved his condition. The pain he had been experiencing was considerably reduced.

[9] After his operation, Mr. Smith attempted a number of return-to-work plans developed in conjunction with WCB and CN over the period 2000 to 2004. Three of the plans were designed to return Mr. Smith to his pre-injury job of engineer. The later two plans involved retraining Mr. Smith to work as a traffic coordinator/assistant traffic coordinator in Prince George. To do this job, Mr. Smith would have to relocate from Terrace to Prince George.

[10] None of these return-to-work plans were successful. Mr. Smith stopped working as an engineer in March 2001. He has never returned to work for CN, although he remains on CN's employee roster without pay or benefits.

II. ISSUES

[11] The issues in this case as defined by Mr. Smith in his Statement of Particulars are as follows:

- (1) Did CN discriminate against Mr. Smith on the grounds of his disability and family status by failing to accommodate him with suitable employment in the Terrace area;
- (2) Did CN discriminate and/or retaliate against Mr. Smith for pursuing his complaint by misrepresenting to the WCB the suitability of the accommodations offered to him as a locomotive engineer and as a traffic coordinator in Prince George; by misrepresenting the medical difficulties he experienced while training in Prince George; and by misrepresenting his ability to complete the two traffic coordinators programs in Prince George;
- (3) Did CN discriminate and/or retaliate against Mr. Smith when it rejected his application for a CN disability retirement pension.

[12] As to Mr. Smith's claim that he should be accommodated in Terrace, this is the third legal proceeding in which Mr. Smith has raised this question. The first was pursuant to a grievance filed by Mr. Smith's Union, the Brotherhood of Locomotive Engineers on June 26, 2002. This grievance was dismissed in arbitration on July 14, 2003.

[13] The second was by way of his appeal to the Workers Compensation Appeal Tribunal heard on November 29, 2005. In its February 10, 2006 decision, WCAT also rejected Mr. Smith's contention that CN should accommodate him in Terrace.

[14] Nonetheless, Mr. Smith now brings the same issue before this Tribunal.

III. DECISION

[15] I have concluded that:

- (1) CN did accommodate Mr. Smith through the three modified return-to-work programs designed to bring Mr. Smith back to service as a locomotive engineer in Terrace. And subsequently by offering him the position of traffic/assistant coordinator in Prince George.
 - (2) CN did not discriminate or retaliate against Mr. Smith in its dealings with the WCB.
 - (3) The evidence does not support the conclusion that Mr. Smith is totally and permanently disabled from engaging in any employment. CN did not discriminate or retaliate against Mr. Smith by refusing him a disability pension.
- [16] Mr. Smith's complaint is dismissed.

IV. FINDINGS OF FACT

A. Attempts to Return Mr. Smith to his Pre-Injury Job

[17] Mr. Smith told Connie Araujo, his WCB case manager, of the difficulties he had with his return to work. She asked Dr. McDougall, a WCB Medical Advisor, to review Mr. Smith's medical evidence on file and advise her whether Mr. Smith had any permanent functional impairment which would prevent a return to work as an engineer.

[18] Dr. McDougall, in his September 29, 1999 report, noted that Mr. Smith reported that he was still having problems with sitting, which is a large part of his pre-injury job. He could not answer at this point whether Mr. Smith could return as an engineer.

[19] Dr. McDougall recommended certain restrictions for Mr. Smith, namely, avoid heavy or repetitive lifting, avoid twisting and bending and change positions from sitting to standing to walking when working.

[20] WCB arranged with the WorkAble Centre in Terrace to visit the job site to examine the physical demands associated with both the engineer and brakeman/conductor positions in CN. This was partly in response to Mr. Smith's earlier request to move to a conductor/brakeman job.

[21] Karen Chasney, a registered occupational therapist with WorkAble, visited the Terrace job site on October 7, 1999. In her October 21, 1999 report, Ms. Chasney provided a detailed description of the duties and responsibilities of both positions. She also reported on the concerns Mr. Smith expressed to her at their meeting on October 8, 1999, about returning to work as an engineer.

[22] In her report, Ms. Chasney did not support Mr. Smith moving to a conductor/brakeman position because of the high risk for re-injury. She recommended that Mr. Smith could do his pre-injury job, initially starting as an extra to build his tolerance for the job and a graduated return-to-work plan be coordinated with CN, WCB and Mr. Smith. She also suggested that Mr. Smith alternate his position between sitting and standing when driving the locomotive.

[23] In a number of WCB attending physician reports between September and November 1999, Dr. Appleton noted that Mr. Smith reported that his symptoms remained unchanged and that he continued to have problems with prolonged sitting. Dr. Appleton had doubts whether Mr. Smith could alter his position sufficiently when driving the engine as suggested in the WorkAble report.

[24] Mr. Smith returned to work on December 13, 1999, on a run from Terrace to Kitimat. He was able to make the outbound trip but could not do the return trip. Instead he took a taxi home from Kitimat to Terrace.

[25] Dr. Appleton examined Mr. Smith early in January 2000. Mr. Smith had reported a lot of pain when sitting for more than 20-30 minutes, depending on the chair. Dr.

Appleton's view was that Mr. Smith could not do the engineer's job because of the prolonged sitting.

[26] Ms. Araujo arranged for another WCB medical consultant, Dr. Naismith who examined Mr. Smith on January 28, 2000. Mr. Smith told Dr. Naismith that the main physical demands of his job were sitting and the safe operation of the locomotive. If sitting for more than 2 hours, he would develop pain in his back.

[27] Dr. Naismith did not think that Mr. Smith's injury was a medical contra-indication to any activity within his symptoms. He felt that Mr. Smith's description of his restricted sitting tolerance was biologically plausible. But his sitting tolerance and the pain he experienced could not be measured medically. He did agree with Dr. Appleton to restrict the amount of sitting to reasonable levels of comfort.

[28] The referrals to specialists continued. On February 17, 2000, Dr. F. Gouws, a WCB medical advisor, referred Mr. Smith to Dr. Wing, an orthopedic surgeon, for further medical examination. Dr. Wing examined Mr. Smith on May 5, 2000. In his medical report, Dr. Wing did not recommend any further surgery. He felt that Mr. Smith could do some type of work and suggested a modified return-to-work program. If Mr. Smith was not able to work as an engineer, an alternative occupation should be considered.

[29] In July 2000, Todd McDonald, a WCB vocational rehabilitation consultant, became involved with Mr. Smith's claim. He wanted to consider a graduated return-to-work plan (RTWP) and asked Erin Fawcett, a CN claims officer, to contact CN safety officials to determine whether it would be a safety issue for Mr. Smith to stand while operating a locomotive engine. Erin Fawcett confirmed that the CN Safety Department did not consider this to be a safety issue.

B. RTWP No. 1 - December 2000 - Locomotive Engineer

[30] Mr. McDonald asked CN to develop a graduated RTWP and CN retained Karlene Dawson, a certified kinesiologist and disability management professional, to do this. Ms. Dawson prepared a RTWP which was reviewed and agreed to by WCB and CN.

[31] In preparing this RTWP for Mr. Smith, Ms. Dawson consulted with Mr. Smith's supervisor in Terrace about the engineer's job duties; reviewed information from the WCB relating to any medical limitations or contra-indications for Mr. Smith returning to his pre-injury job; she also reviewed the October 21, 1999, WorkAble Report which outlined the physical demands of the job and its recommendations for Mr. Smith.

[32] On August 22, 2000, Ms. Dawson spoke to Mr. Smith about the return-to-work plan she was developing for him. They talked about his tolerances, how long he can sit or stand. He told her that he could drive for about two hours at one time, and currently he was doing about five hours of home exercise. He also told her that as long as he continued with his exercises his back felt not too bad.

[33] Ms. Dawson provided the RTWP to Mr. Smith on September 8, 2000. She asked him to review it and provide her with any comments or concerns. He thought it was a little too aggressive and was unsure if he was able to do it. Ms. Dawson was surprised. She thought that the information she had plus what Mr. Smith told her about his tolerances accorded with the RTWP.

[34] Mr. Smith consulted again with Dr. Wing on October 23, 2000. Ms. Araujo had sent Dr. Wing the draft RTWP for Mr. Smith and asked for his comments. Dr. Wing's view was that the plan was totally appropriate for Mr. Smith. He recommended that Mr. Smith move and change positions from time to time when he is working.

[35] The RTWP was to commence on December 12, 2000. Mr. Smith would do two trips per week in week one and week two of the plan. He would have three days off during these weeks so that he could rest and continue with his home exercises.

[36] His work week would progressively increase so that he would add a trip in each subsequent week. During this period, Mr. Smith would be the fourth person on a three-man crew, which meant that he did not have the primary responsibility for the operation of the locomotive. The plan also provided he should alternate between sitting and standing as required.

[37] Under the plan, Mr. Smith was required to keep a diary of his experience and fax it weekly to CN Occupational Health Services. He was to record his tasks, any physical symptoms and if the symptoms increased or decreased, so that the necessary modifications could be made.

[38] On December 15, 2000, Ms. Dawson wrote to Dr. Appleton, about the spasms that Mr. Smith had told her he experienced when operating the engine. She included with her letter a physical demands analysis of the engineer's job and Mr. Smith's RTWP. She asked Dr. Appleton to comment on the spasms and provide an opinion whether the spasms resulted from any underlying medical condition that would affect his position as a locomotive engineer.

[39] In his December 19, 2000 response, Dr. Appleton indicated that Mr. Smith was fit for graduated return to work as outlined and that his medical condition was stable. Dr. Appleton also suggested that Mr. Smith must be able to move around frequently, and prolonged sitting is a contra-indicator.

[40] Mr. Smith returned to work on December 12, 2000. He did the Terrace to Kitimat run on December 12, 14 and 19, alternating between sitting and standing. On December 21, he only did the outbound run.

[41] On December 28, 2000, Mr. Smith was scheduled for the Kitimat run. When he was sitting in the engine waiting to leave, he experienced intense spasms. He had to get off the engine and lay on the floor of the yard office. His wife came and took him to the hospital. He was examined, given medication and released.

[42] Mr. Smith was able to make the return run from Terrace to Kitimat on December 29. But on the Terrace/Kitimat run on January 2, 2001, he reported that his spasms were so frequent and intense that he could not make the return trip. He took a taxi back to Terrace lying on the back seat all the way. Mr. Smith was unable to complete this RTWP.

[43] On January 24, 2001, Dr. Trent Faraday, WCB medical consultant, was asked for his medical opinion as to whether there were any significant changes from January 2000 in Mr. Smith's medical condition. He replied on January 25, 2001, that there had not been any objective change in Mr. Smith's medical condition.

[44] Dr. Faraday also confirmed Mr. Smith's physical work restrictions to be:

avoid lifting greater than 30 pounds

avoid prolonged sitting

avoid excessive pushing, pulling, carrying and bending activities

have the ability to change positions from sitting, standing and walking as required

[45] Dr. Faraday concluded that Mr. Smith should complete the RTWP developed by Ms. Dawson and approved by Dr. Wing.

C. RTWP No. 2 - March 2001 - Locomotive Engineer

[46] Prior to the December 2000 RTWP, Mr. Smith had suggested to CN that he return to work as an engineer, doing yard work in the Terrace Yard. After the first RTWP failed and in response to Mr. Smith's suggestion, Ms. Dawson developed another plan. WCB was not involved in this RTWP. It was done on CN's initiative.

[47] This RTWP provided that Mr. Smith would work in the yard office, spend two hours on the yard engine and another hour in the yard office. He would work as an extra person and was to try as many duties as possible during the term of the plan.

[48] The plan was transitional, with Mr. Smith gradually increasing the hours and shifts worked in each week. Mr. Smith could take breaks as necessary, as he was working as an extra person on the crew.

[49] The RTWP was to start in March 2001, to run two to four weeks. Dr. Coppin, a CN medical advisor, wrote to Dr. Appleton enclosing the RTWP. Dr. Coppin pointed out that this RTWP provided for modified duties and was limited to local yard work which would avoid prolonged periods in the locomotive cab. He asked for Dr. Appleton's support. Dr. Appleton agreed to this plan.

[50] Dr. Appleton wrote in his clinical notes on March 6, 2001, that Mr. Smith, his Union representative and CN representatives had met and agreed to another RTWP which did not involve significant engineer's work. Dr. Appleton considered this to be a reasonable offer and had discussed this at length with Mr. Smith.

[51] Mr. Smith started on March 1, 2001. But he was not able to complete the plan. On March 28, 2001, there was a meeting in Terrace between Ms. Dawson, Mr. Smith, his Union representative Wayne Wiederspiel, and the Terrace CN Superintendent, Darren Payment. At this meeting, they discussed the fact that Mr. Smith wasn't making much progress. He had difficulty operating the locomotive and wasn't able to continue at the pace that was outlined. All agreed that the RTWP should be terminated.

[52] Mr. Smith said that he had no problem with the yard office duties. He was able to move around. But operating the yard engine caused him difficulty. He experienced pain and muscle spasms when his hours on the engine increased.

[53] After the March 28, 2001 meeting, Mr. Wiederspiel offered some suggestions to Ms. Dawson that could assist Mr. Smith to return to his pre-injury job. These included putting a rubber mat in the locomotive engine to dampen the engine vibration, removing the back of the engine cab seat so that Mr. Smith could kneel on the seat when operating the engine. He also made recommendations concerning Mr. Smith taking rest breaks. Mr. Wiederspiel asked that CN reactivate the March RTWP and include some of his suggestions.

D. RTWP No. 3 - April 2001 - Locomotive Engineer

[54] CN agreed. Ms. Dawson drafted another RTWP in consultation with Mr. Wiederspiel. The previous RTWP was modified to include rubber matting, ensuring that Mr. Smith had supportive, comfortable safety boots when working; sitting, standing or kneeling as necessary, and removing the back of the seat in the locomotive engine cab.

[55] Ms. Dawson sent a copy of this RTWP to Mr. Smith on April 26, 2001. He reviewed the plan and sent back his comments including some modifications which Ms. Dawson put into the plan.

[56] According to Ms. Dawson, at no time did Mr. Smith indicate that he was not able to carry out this RTWP. In fact, he clearly gave the impression in his communication with Ms. Dawson that he was prepared to move ahead with it.

[57] Ms. Dawson also sent a copy to Dr. Appleton on April 26, 2001, explaining the modifications and asked for his support. Dr. Appleton's response on May 22 was that he was concerned that the locomotive cab is too confined to allow Mr. Smith to vary his position. Dr. Appleton doubted whether there would be any further improvement in Mr. Smith's condition and he should look for alternate employment. Dr. Appleton rejected the plan and Mr. Smith never started it.

(i) The July 12, 2001 Meeting - Attempt to Resolve Mr. Smith's Situation

[58] On June 14, 2001, Dr. Appleton wrote to Ken Beddie, Manager of the WCB Terrace office, seeking a meeting to try to resolve Mr. Smith's situation. He had asked Ms. Araujo to arrange a meeting but she declined. Dr. Appleton said that he was quite incensed by this. Thus his letter to Ken Beddie. It was his medical opinion that Mr. Smith could not resume his engineer job as it required a lot of either standing or sitting for prolonged periods. He felt that a meeting was the only way to resolve the issue.

[59] A meeting was held on July 12, 2001 in Terrace. In attendance was Mr. Smith and Dr. Appleton; Karlene Dawson, Murray Swanson, Dr. Faraday, Dr. Vaney, all from CN; Ken Beddie, Connie Araujo and Vivien Millin, a WCB vocational rehabilitation consultant.

[60] There was discussion about the failed attempts to return Mr. Smith to his pre-injury position. Ms. Dawson advised that CN and the Union were looking for alternative work for Mr. Smith, but due to cutbacks in the area, there were no options. But if Mr. Smith was willing to relocate, CN would be able to accommodate him in a different job.

[61] On March 30, 2001, Dr. Appleton had written to Dr. Clarke, a neurologist, asking him to assess Mr. Smith. He asked Dr. Clarke if he could identify physiological or psychological causes for Mr. Smith's symptoms.

[62] Mr. Smith had seen Dr. Clarke on July 11, 2001, but had not yet sent his medical report to Dr. Appleton. They wanted to wait for Dr. Clarke's report and they also agreed that it would be useful for Mr. Smith to have a functional capacity assessment.

[63] CN was to pay for this and it was up to CN to find available facilities and arrange for the assessment.

(ii) Dr. Clarke's Assessment

[64] In his July 11, 2001 medical report, Dr. Clarke reported a number of medical findings about Mr. Smith. These included what Mr. Smith reported as his concerns, namely, back spasms that he had experienced intermittently since 1997. Mr. Smith told Dr. Clarke that his spasms occurred after sitting between 20-60 minutes, depending on the chair, or if standing between 30-60 minutes. He also told Dr. Clarke that if he did not sit or stand for a prolonged period, he had very few back spasms. His self treatment is to lie on his back on a hot pad and that works well. He also reported to Dr. Clarke that he was quite active, walking from his home to the swimming pool, swimming about 40 laps regularly and doing some yard work at home.

[65] Dr. Clarke's assessment was that Mr. Smith has a pretty normal neurological exam and does not have a lot of non-organic features. If he carefully manages his activities and does not sit or stand for prolonged periods of time, he is relatively comfortable and can function pretty well.

[66] Dr. Clarke concluded that, given his history of recurrent spasms since 1997 and the requirement of his job to sit and stand for prolonged periods, it is unlikely that he could return to his pre-injury job and would be a good candidate for retraining.

[67] In his February 14, 2002 clinical notes in reference to Dr. Clarke's assessment, Dr. Appleton noted that neither he nor Dr. Clarke are able to decipher the exact nature of Mr. Smith's muscle spasms or cause.

(iii) The CN Temporary Job Offer - July 16, 2001

[68] Both Dr. Appleton and Mr. Smith were concerned that Mr. Smith had not received any income for some time. Rob Reny, CN Senior Manager Human Resources for Western Canada, had ongoing discussions with Dan Shewchuk, Vice-Chair of the Union, about Mr. Smith's return-to-work programs and what the next steps should be.

[69] At the July 12, 2001 meeting, CN was asked if it would offer Mr. Smith short term work to alleviate some of Mr. Smith's financial problems, pending Dr. Clarke's assessment.

[70] CN offered Mr. Smith three weeks employment in the Terrace yard and Mr. Swanson told him that he was to report to work on July 16, 2001.

[71] Mr. Smith emailed Mr. Swanson later that day asking for an outline as to the proposed duties. He asked for the outline because he wanted to get Dr. Appleton's approval for the job duties. It is not clear why he needed this since Dr. Appleton was at the meeting when the temporary job was discussed.

[72] Mr. Swanson emailed Mr. Smith on July 16, 2001 with an outline of the duties. The duties included doing sedentary desk duties, doing an inventory of office and stationery supplies, driving anywhere between 20 minutes to two hours in the yard with the opportunity to get out of the vehicle and stretch during stops, and walking to assist with the inspection of trains in the yard, which walking would not exceed one kilometre.

[73] Mr. Smith did not report for work on July 16 as scheduled. Mr. Swanson called Mr. Smith on July 16 and left a message on Mr. Smith's answering machine saying that the outline had been sent to him. He also left a phone message on August 10 asking Mr. Smith to contact him about why he had not shown up for work.

[74] Initially, Mr. Smith told CN that he did not get Mr. Swanson's email until August 23. He told CN that he did not recall getting Mr. Swanson's phone messages.

[75] At the Tribunal hearing, Mr. Smith testified that he had not been honest with CN. He did receive the list of duties on his email on July 16. He did receive at least one of Mr. Swanson's phone messages. In fact, he was away on holidays with his wife and did not return until late August. Mr. Smith did not want CN to know that he went on vacation with his wife instead of reporting for work.

(iv) Mr. Smith's Functional Capacity Evaluation - October/November 2002

[76] Mr. Smith's functional capacity evaluation occurred on October 3, 8 and 21, 2002. It was done by Julie Veilleux, an occupational therapist. Ms. Veilleux tested Mr. Smith's functional capacity and his physical abilities. She also made two job site visits to review the tasks and physical demands of the locomotive engineer position.

[77] The first site visit was at the Terrace yard and included a run from Kitimat to Terrace on a locomotive engine. The second site visit was at the Thornton CN yard in Vancouver. The purpose was to look at other types of CN locomotives that CN operates.

[78] In her November 6, 2002 vocational analysis report, Ms. Veilleux concluded that there was a good match between Mr. Smith's physical abilities and the physical demands of the engineer job. Her overall conclusion, however, was that she was not able to determine with reasonable confidence whether Mr. Smith was capable of working full time as an engineer. She noted that Mr. Smith had not been able to successfully complete

three previous RTW programs. But there was no objective evidence to explain why. She proposed another RTWP to be closely monitored by medical rehabilitation professionals.

(v) Other Job Possibilities in Terrace

[79] Over the period from April, 2001 to May, 2003, there were discussions with CN about job possibilities for Mr. Smith in Terrace. Daryl Payment, Superintendent of Operations in Terrace, was asked about employing Mr. Smith in a taxi operation for the train crews. His response was that because there were a limited number of trains running in the B.C. north, it was not a feasible suggestion. Mr. Payment could not think of any other positions for Mr. Smith in Terrace.

[80] In February, 2003, Mr. Smith had talked to Judy McKenzie, a CN personnel officer, about potential employment opportunities in Terrace. He suggested that he could drive train crews around the Terrace terminal or set up a website for CN or do computer work, or set up an Operation Lifesave Program for the local schools.

[81] CN's position was that the Terrace terminal was a small location with very few offices or sedentary positions necessary to Mr. Smith's restrictions. With the downturn in economic activity in the Terrace area, the volume of traffic for CN was reduced significantly. Many of the non-running positions had been eliminated or transferred to other larger CN terminals such as Prince George, Edmonton or Vancouver.

[82] As to setting up websites, CN's websites are provided by an external service provider or CN's Information Technology group in Montreal.

[83] CN contracted with a taxi service to drive crews around the terminal. This would involve a lot of sitting. Further, it would not lead to full-time employment.

[84] The operational people in Terrace and Mr. Smith's return-to-work team, all experienced and knowledgeable about CN's operation in Terrace, had been canvassed extensively for job possibilities in Terrace. There were no opportunities in Terrace to accommodate Mr. Smith other than creating a position that was not otherwise required.

[85] CN's objective was to try to find full-time, gainful employment for Mr. Smith that would keep him employed over the long term, not create work projects. The suggestions provided by Mr. Smith regarding his employment at the Terrace location did not lend themselves to meaningful, long-term employment.

E. Mr. Smith's Appeal to WCB Review Board - Decision - March 14, 2003

[86] In January 2002, Mr. Smith appealed to the WCB Review Tribunal regarding a number of decisions that the WCB officers had made relating to his injury claim. One of the issues before the Review Tribunal was whether modified employment as a locomotive engineer was suitable for Mr. Smith. The Review Tribunal concluded in its March 14, 2003 decision on this question that Mr. Smith's pre-injury job as modified was not suitable given his compensable condition.

[87] The Tribunal concluded that the ideal job for Mr. Smith would allow him to sit, stand and walk as required. Standing while operating a locomotive is limited and there is little opportunity to walk around.

[88] The Review Tribunal awarded Mr. Smith vocational rehabilitation benefits and a loss of earnings award. It gave the option to WCB and CN to consider another position with CN or retraining him in a different vocation.

F. RTWP - June/July 2003 - Traffic Coordinator in Prince George

[89] On April 15, 2003, shortly after the WCB Review Board decision, Todd McDonald, WCB Vocational Rehabilitation Consultant in Terrace, wrote to Tom Brown, Superintendent, CN Operations at Prince George.

[90] He suggested that WCB and CN move to vocational rehabilitation for Mr. Smith within the work restrictions that the WCB medical advisor had earlier confirmed.

[91] Mr. Brown replied to Mr. McDonald on May 7, 2003, offering to train Mr. Smith as a traffic coordinator in Prince George, B.C. This would consist of technical training in Vancouver and on the job training in Prince George. He believed that the position would provide Mr. Smith with optimum employment stability. He also noted that this job is for the most part sedentary and well within Mr. Smith's work restrictions.

G. RTWP No. 4 - Traffic Coordinator - Prince George, June/July 2003

[92] Tanya Gordon, who was now the CN return to work coordinator developed another transitional return-to-work plan for Mr. Smith, this time for the position of traffic coordinator at Prince George. Ms. Gordon is a registered kinesiologist with a speciality in vocational rehabilitation and disability management.

[93] The RTWP provided for CN sponsored training sessions, both at the Thornton Yard, Vancouver, for the technical, training from June 2 to June 27, 2003, and from June 29 to July 28 at Prince George for on-site practical training.

[94] In developing this RTWP, Ms. Gordon considered a number of factors such as the WCB designated work restrictions for Mr. Smith; the physical demands and working conditions, job analysis for the traffic coordinator and Mr. Smith's October 2002 functional capacity evaluation.

(i) Duties of a Traffic Coordinator

[95] Traffic coordinators in Prince George are solely responsible for the operation of the Prince George Yard. They control the breakdown of trains entering the terminal and the building of trains exiting the terminal. They direct the yard crews in these yard operations. They are the contact for any customer issues and are the emergency contact within the Prince George terminal.

[96] The traffic coordinator works in an office setting. They may sit or stand at their desk. With the flexibility of the cell phone and portable radio, they are not required always to be at their desk. They can go outside in the yard, take a break, but must stay in radio or phone contact.

[97] The equipment used by the traffic coordinator includes a computer connected to the CN network, a portable radio, a radio at their desk, telephone, a cell phone, and a bank of monitors over the desk to monitor the yard operations via a set of cameras.

[98] The physical tasks for a traffic coordinator include entering data on the computer, reading data on a computer screen, watching the monitors and operating the radio or phone. These tasks can be done either sitting or standing.

[99] The heaviest thing a traffic coordinator may lift is a phone. It is one of the most sedentary of CN railroad jobs.

[100] Traffic coordinator is a safety critical position. They are the contact for any emergency in the yard or if a road crew within the area has an emergency. For this reason, it is critical that the traffic coordinator be accessible for the entire shift.

(ii) Mr. Smith's Concerns re: the RTWP for Traffic Coordinator

[101] Initially, Mr. Smith was not in favor of this proposal. He told Mr. McDonald that he wanted CN to consider positions in Terrace before he would consider moving to

Prince George. One of his reasons was that his wife's job was very important to her and she would not want to move.

[102] Prior to the commencement of the plan, Ms. Gordon discussed it with Mr. Smith. He had some concerns with the date that the plan was to start, that it was too rushed and that he had family commitments in June when he needed to be in Terrace. He also had concerns about how the training was to be undertaken, and that the training was to be done in Vancouver and not in Terrace.

[103] Ms. Gordon explained to Mr. Smith that the training materials and the training personnel were only available at Thornton Yard. Access to these resources was necessary.

[104] She also told Mr. Smith he would be paid the wage rate for a traffic coordinator during the training, and CN expected him to be on site for eight hours a day. Or if not in training, then at least at the gym doing his exercise program.

[105] CN would pay for his accommodation, transportation to and from Terrace and a per diem for expenses. As to his family commitments in June, Ms. Gordon adjusted the schedule so that he would be able to meet these commitments.

H. The Technical Training - Traffic Coordinator - Thornton Yard - Vancouver, June 2003

[106] Mr. Smith ultimately agreed to proceed with the RTWP although he continued to maintain that CN should accommodate him in Terrace.

[107] For its part, the Union accepted that Mr. Smith was capable of working as a traffic coordinator. The Union, however asked CN, no doubt at the urging of Mr. Smith, that Mr. Smith be given the traffic coordinator position in Terrace.

[108] CN could not agree to this. There was no operational requirement for a traffic coordinator in Terrace. The traffic coordinator in Prince George coordinated the Terrace terminal and the Edmonton traffic coordinator controlled the rail movement in the other centers outside of Prince George and Vancouver.

[109] Besides the lack of operational needs, it is not feasible for CN to have a single traffic coordinator in Terrace because it is a safety critical position and requires 24 hour/seven days/week coverage.

[110] The WCB, through Mr. McDonald, was in favour of training Mr. Smith for this position in Prince George and encouraged Mr. Smith to move forward. Ms. Gordon had provided Mr. McDonald with the RTWP and he approved it.

(i) Phase One of the RTWP - Thornton Yard, Vancouver

[111] The RTWP was divided into two phases, classroom training at Thornton Yard and practical training in Prince George.

[112] For the first week, Mr. Smith was to do six hours of training. He had ample opportunity to get up, take breaks, walk around and change position when required. He had two hours each day to access the employee fitness centre, within walking distance from the office.

[113] Mr. Smith was to start at 8:30 and finish at 2:30, increasing to eight hours per day in the second week on Tuesdays and Thursdays. This would allow him to increase his tolerances and his endurance for working a full eight-hour shift.

[114] WCB had final approval over the RTWP and the final decision as to the suitability of the position. Mr. McDonald had requested weekly reports from Ms. Gordon as to how the plan was progressing and if there were any problems that needed to be addressed by WCB.

[115] Mr. Smith started his training on June 2, 2003. On June 6, 2003, Ms. Gordon met with Mr. Smith. He told her that he did not believe he was receiving the proper training as it was not in a classroom environment. She explained that the WCB wanted to expedite his return to work, the training was otherwise given only once per year and he would receive the full training for a traffic coordinator.

[116] Mr. Smith was provided with the training modules for the traffic coordinator position and one-on-one access to a manager familiar with the materials. He was also given access to the computer systems he would be working with in the position.

[117] Mr. Smith asked to be given a chair that that could accommodate his back problems. CN offered him several chairs in the office, including a receptionist chair, a steno chair, a high back Obusforme chair, but he was not able to find one that was suitable.

[118] Mr. Smith felt that CN did not make sufficient effort to find him an appropriate chair. He even offered to accompany a CN official to a chair store. But he would only do so during working hours, not after his shift ended. In the end, he asked that CN transport his personal chair from home to Vancouver and CN did so.

[119] According to CN, the chairs that were available to him were all chairs that met or exceeded the current ergonomic standards. They all had height adjustable backs, height adjustable seat pans and height adjustable arms.

[120] His personal chair was one piece in nature, without an adjustable back, arm rests or seat pans. The only modification that Mr. Smith did was to put an Obusforme cushion support for his back. His chair did not meet any of the recommended ergonomic standards.

a) Mr. Smith's Diaries

[121] A key part of the RTWP was that Mr. Smith was to keep a daily diary to record the tasks he had completed and any symptoms he experienced before, during and after the tasks were completed. He was to inform Ms. Gordon, (she provided her direct line and her pager number) so that if Mr. Smith was having difficulty, the plan could be modified.

[122] Mr. Smith reported in his diaries that from day one, he experienced pain and back spasms as the day progressed. He dealt with this by walking around or taking medication or lying down in a meeting room. Sometimes he would return to his hotel and lie down on a heating pad which would relieve his spasms.

[123] As his training progressed, he reported that his spasms and back pain increased. By week three, he reported that his left leg was aching, and would get numb, and his gait was noticeably affected. Sometimes he would have to leave early and return to his hotel to lie down on a heating pad.

[124] Although asked to do so, Mr. Smith provided very few details about his daily tasks. Rather, he concentrated on reporting his comfort levels, the physical difficulties he was having and what he would do to relieve the pain and spasms he experienced.

[125] Mr. Smith understood that the purpose for the diaries was so that Ms. Gordon and the RTW team would know what tasks aggravated his condition. His view was that he didn't think it necessary to provide more details because Ms. Gordon knew what he was working on. She could reference his supervisor's summaries and the weekly progress reports which were discussed at the weekly meetings.

[126] Weekly meetings between Ms. Gordon, Mr. Smith and his supervisor/trainers were part of the RTWP. At the June 13, 2003 meeting, a number of issues were discussed and

a number of matters were raised by Mr. Smith. Mr. Smith felt he was progressing quite well through the training. He was beginning to understand the system and he found that the job shadowing with the traffic coordinators at Thornton Yard was quite helpful.

[127] But he felt pressured working an eight hour day. Ms. Gordon pointed out that in week two he was only working eight-hour days on the Tuesday and Thursday, and the rest of the days were six-hour days, which he had successfully completed the first week.

[128] Mr. Smith also voiced his concern about the frequency and difficulty with the back spasms he was having. Ms. Gordon told him that when he was having the back spasms or was just having a bad day overall, he could contact her and discuss options such as going to the fitness centre, going for a rest in the restroom, or going for a break to his hotel.

[129] Ms. Gordon also told him that his job tasks were well within his restrictions. He did have the opportunity to get up, walk around and change positions as required.

[130] Mr. Smith also told Ms. Gordon that he did not like having to eat out all the time. Ms. Gordon pointed out that his hotel had kitchen facilities and a fridge. Mr. Smith had the option of cooking his own meals, but he indicated that he did not like preparing meals just for one person.

[131] At this meeting, Mr. Smith said that he did not like living in a hotel. He was having difficulty sleeping. Ms. Gordon told him that CN would not transport his bed from Terrace to Vancouver.

[132] In Ms. Gordon's view, the concerns expressed by Mr. Smith confirmed the trend she was seeing over the course of developing the RTWP and during the first two weeks of training, whereby Mr. Smith would bring up barriers on a regular basis which were not related to the components of the plan.

[133] In addition, his reports of back spasms were of particular concern because of the increasing frequency and length. The traffic coordinator position was safety critical and required Mr. Smith to be available at all times during the work shift. If he left the office to lie down or return to his hotel, he would not be able to respond to an emergency.

(ii) Phase Two of the RTWP - Prince George - July 2003

[134] Mr. Smith completed the first phase of the RTWP on June 20, 2003, his last day at the Thornton Yard. At the weekly meeting on June 20, 2003, attended by Mr. Smith and the RTW team, Bruce Feltham, the manager in charge of Mr. Smith's training, reported that he believed Mr. Smith had acquired approximately 75 per cent of the skills and knowledge he needed to do the traffic coordinator job. He could acquire the rest through the hands-on experience in Prince George.

[135] Dave Radford, CN Assistant Superintendent, Transportation, in Prince George had the overall responsibility for coordinating Mr. Smith's training program in Prince George, setting up the training shifts, monitoring and managing his development in the program. He arranged for Mr. Smith's accommodations in Prince George, his transportation back and forth from Terrace, as well as his transportation in Prince George to and from his hotel to the yard office.

[136] Mr. Smith was assigned a supervisor whose role was to ensure that Mr. Smith obtained the correct training. His shifts were set up so that he would get a well-rounded overview of all that went on within the terminal, including the importance of the traffic coordinator being a 24-hour contact within the terminal.

[137] Mr. Smith's training in Prince George started on July 2, 2003. Prior to that, near the end of June, Mr. Radford met with Mr. McDonald for a site tour of the terminal. The tour

included the yard office, the traffic coordinator's work area where Mr. Smith would be working, and how the office would be renovated to accommodate him. Mr. Radford also explained the nature of the yard operations and the requirements for the position.

[138] The renovations to the office area would consist of an adjustable height work station that would allow Mr. Smith to work both from a sitting or a standing position. He would be given an ergonomic chair and the office would be enlarged to accommodate this equipment.

[139] Mr. Radford was committed to making the necessary expenditure but, because of the extensive renovations required, he wanted to wait until Mr. Smith was permanently in the job. In the interim, CN arranged to have his personal chair sent from Vancouver to Prince George.

[140] Ms. Gordon had also explained to Mr. Smith that following the successful completion of the RTWP and confirmation of the permanent position, the necessary office equipment would be purchased and the office would be retrofitted.

[141] Mr. Smith would work both weekdays and weekends. His scheduled hours were different from week to week to allow Mr. Smith to learn the different shifts and the different operating aspects of each shift.

a) Mr. Smith's Diaries

[142] As before, Mr. Smith was to provide daily diary entries. He was to record the tasks completed, whether he encountered any difficulty and record any symptoms he experienced. Again, Mr. Smith concentrated on recording his pain levels and the symptoms he had experienced. Rarely did he indicate his tasks or relate his symptoms to the tasks.

[143] On occasion, he used the diaries to express disagreement with Ms. Gordon, for example, as to his work restrictions and his compensable condition. In his July 2 diary entry, he asked Ms. Gordon to provide him with the job description and statement of duties for the traffic coordinator and its classification level and point rating.

[144] Brad Butterwick, Mr. Smith's supervisor, recorded Mr. Smith's progress at Prince George. He reported to Tanya Gordon that from July 2 to July 5, Mr. Smith arrived on time for work and, apart from observing Mr. Smith leaning on the desk, he did not observe any issues with pain or back spasms.

[145] That is, except for July 10, when Mr. Butterwick reported that he observed that Mr. Smith was shaking, sweating and was very pale. He was taken in a taxi to the local hospital emergency room, examined and released.

[146] According to Mr. Smith's diaries, in the week of July 2, he left early on one of the five shifts. In the July 10 week, he left early in three of the five shifts. For the July 17-21 week, he left early on three of the five shifts. And in the week of July 25, he left early on one of the four shifts. He reported in his diaries that on those occasions, he experienced painful spasms.

[147] At some point during this period, Terry Petry, a CN risk management officer and a member of the RTW team, asked Mr. Smith to provide more details of his tasks in his diaries. Mr. Smith's response was that he was doing the duties of a traffic coordinator. If he had to keep a minute to minute account of when he was sitting or moving around or went to the washroom etc., this would distract from the very purpose as to why he was at Prince George.

[148] Mr. Petry also asked Mr. Smith whether he was committed to relocate to Prince George. Mr. Smith's position was that he was willing to relocate his family and home to Prince George, but under duress. Duress, because he did not believe that CN had exhausted or seriously considered his request to be accommodated in Terrace.

[149] On July 22, 2003, Dr. Appleton wrote to Mr. McDonald. Mr. Petry had asked Mr. Smith for a letter from his doctor to explain the spasms. In his letter, Dr. Appleton reported that Mr. Smith told him that he developed back spasms on a regular basis. For relief, he would take medication, lie down, stretch and relax.

[150] He also said that Mr. Smith told him that the traffic coordinator position required him to sit up to 95% of the time and that he had little opportunity to move around, walk or stretch. It is true that, on paper, the physical demands and working conditions analysis for traffic coordinator showed 95% sitting and 5% standing.

[151] But this was not the case for Mr. Smith. He could sit, stand or walk around as required. In fact, in two or three of his diary entries, he recorded that he was able to move around, change positions and take walks outside.

[152] Mr. McDonald replied to Dr. Appleton on September 10, 2003. He advised Dr. Appleton that he was misinformed about the 95% sitting requirement. The traffic coordinator's job was absolutely suitable for Mr. Smith. It did not require prolonged sitting. In fact, in his experience as a vocational rehabilitation consultant, he had never seen a job that had as much flexibility to alternate between sitting, standing and walking within the office or outside.

[153] Ms. Gordon was becoming concerned about the increased frequency of his back spasms that Mr. Smith reported in his diaries and his need to lie down sometimes for up to an hour or more at a time. She was also concerned about the number of times he left work early.

[154] She told Mr. Smith that his diaries did not provide the information required. Instead of detailing the job tasks that he was doing, he had taken to basically discussing his pain levels, his discomfort and what he did for that discomfort. She reminded him that the diaries were a way to track his daily activities and what activities seemed to be causing him problems.

[155] Finally, on July 29, 2003, Dave Radford wrote to Mr. Smith advising him that, although CN believed he was capable of performing the duties of a traffic coordinator with some additional training, he had yet to demonstrate any real commitment to the job. He refused to follow instructions regarding his diary entries. He had a pattern of leaving his work area and/or leaving his work unattended for non-work related issues, with increased frequency and duration as the plan progressed. Because of these issues together with the objective observations by his supervisors in Prince George, CN terminated this RTWP. Mr. Smith returned to Terrace.

[156] On August 5, 2003, Ms. Gordon wrote a long letter to Mr. McDonald detailing the reasons why CN terminated the RTWP. She noted that Mr. Smith demonstrated the physical and mental ability to perform the traffic coordinator job. But in her view, he repeatedly placed obstacles in the way of his return to work that were not within the guidelines that WCB had provided to CN as to his physical capabilities and his compensable condition.

[157] She referred to the frequency of his back spasms and Mr. Smith's self-imposed requirement that he lie down at work. Ms. Gordon noted that the traffic coordinator

position allowed a great deal of flexibility for frequent breaks, for stretching, for short walks and for short periods to lie down. When working at his desk, Mr. Smith could perform his duties either standing or sitting. He could also walk outside for periods of time while doing non-desk duties, using a portable radio or cell phone.

[158] Ms. Gordon also referred to Mr. Smith's inability to sometimes complete his shifts. The frequency of his early departures and time taken to lie on the floor negatively affected his on-site job training. The traffic coordinator is a safety critical position requiring him to be capable of responding to any emergency situation. Mr. Smith's need to leave the office or lie on the floor for extended periods of time would preclude him from responding to emergencies.

[159] As to the level of commitment shown by Mr. Smith to the RTWP in Prince George, his supervisors noted his lack of interest and commitment to the plan. This was also reflected in his failure or refusal to provide more details in his diaries.

[160] Ms. Gordon concluded that if these concerns could be resolved, CN was willing to continue with the RTWP leading to a permanent position of traffic coordinator.

[161] Mr. Smith wrote a long response to the points raised by Ms. Gordon in his September 17, 2003 letter to Mr. McDonald. He pointed out that he did not choose his medical condition. He did experience muscle spasms and pain and could only recover with medication, heat and lying down.

[162] On the question of his diaries, Mr. Smith's response was that he did report the duties he performed, the problems he was having with the work station and driving in the yard and the levels of pain he experienced. He said that he never received any feedback or response to the problems he noted.

[163] Earlier, on August 18, 2003, Mr. Smith had written to Mr. McDonald demonstrating his commitment to relocating. He pointed that he had participated in the six week training program in Vancouver and Prince George. They had painted the exterior of their house in Terrace. He and his wife had driven around Prince George looking at real estate. Although they did not want to move, Mr. Smith believed that these actions demonstrated his determination and commitment to return to work.

I. Mr. Smith's Union Grievance, June 2002

[164] It is noteworthy that while Mr. Smith was telling CN he was willing to relocate to Prince George, although under duress, he had asked his Union to file a grievance on his behalf as early as June 11, 2001. The Union did so on June 26, 2002. In its July 9, 2003 Statement of Issue submitted for arbitration, the Union's position was that Mr. Smith must be accommodated in his home terminal of Terrace. CN's failure to do so was a breach of the collective agreement and CN's obligation under the *CHRA* to properly accommodate him. The remedy requested was that CN accommodate Mr. Smith by way of appropriate employment at the Terrace terminal.

[165] The grievance was dismissed. The issue for the arbitrator was whether CN had discharged its obligation under the *CHRA* to reasonably accommodate Mr. Smith's disability.

[166] In his July 14, 2003 ruling, Arbitrator Piché accepted CN's position that there was no work of value to CN at Terrace that could be done by Mr. Smith. The duty to accommodate to the point of undue hardship does not require CN to create a position of no productive value to it.

[167] Arbitrator Piché concluded that CN's offer of the traffic coordinator position and CN's previous efforts to return Mr. Smith to his pre-injury position as a locomotive engineer constituted reasonable accommodation.

[168] As to the potential hardship for Mr. Smith and his family in moving to Prince George, he found that the duty to accommodate does not make CN the insurer of all aspects of Mr. Smith's economic and family life. CN's obligation is limited to workplace employment accommodation.

[169] On October 1, 2003, Mr. McDonald wrote to Mr. Smith advising him that WCB would no longer provide any vocational rehabilitation benefits. The basis for his decision was that the traffic coordinator position was particularly suited for his return to work given his condition and work restrictions. In his view, the RTWP was not successful because of the barriers which Mr. Smith had raised. Accordingly, WCB would no longer be involved in any return to work process for Mr. Smith and Mr. Smith was not entitled to any projected loss of earnings.

[170] Mr. Smith asked the WCB Review Division for a review of Mr. McDonald's October 1, 2003 decision. The review officer confirmed his decision on July 12, 2004.

[171] On August 9, 2004, a WCB disability awards officer wrote to Mr. Smith advising him that the traffic coordinator job was a suitable accommodation within his work restrictions.

[172] Mr. Smith asked for a review of this decision. The review officer's decision on March 31, 2005, was that the accommodated position of traffic coordinator was suitable and available to Mr. Smith. He could earn wages comparable to his pre-injury wages. It was reasonable for him to relocate to take up this position. Mr. Smith appealed this finding to the Workers Compensation Appeal Tribunal.

J. RTWP No. 5 - Assistant Traffic Coordinator - January 2004

[173] But the accommodation saga did not end on July 29, 2003. Shortly after the arbitrator's decision, there were discussions and correspondence between Rob Reny from CN and Dave Brummund from the Union. Mr. Brummund asked Mr. Reny if CN would reinstate the RTWP for the traffic coordinator's position in Prince George. The Union's position was that Mr. Smith was capable of doing that job.

[174] CN agreed to do so, but this time for the position of assistant traffic coordinator. Ms. Gordon was asked to prepare a revised RTWP. It was to commence on January 12, 2004, to be completed on January 30, 2004. This position was designed specifically for Mr. Smith, taking into account his work restrictions. CN would pay his salary, his transportation costs to and from Terrace, his accommodation, transportation to and from work, and a daily per diem for expenses.

[175] CN also agreed that following the successful completion of his training, it would give Mr. Smith an adjustable ergonomic work station and chair, install more flexible flooring in the office and renovate the yard office to accommodate this equipment.

[176] As before, Mr. Smith was to complete daily diaries recording his completed tasks, his comfort levels and whether he encountered any difficulties.

(i) Mr. Smith's Duties and Responsibility of Assistant Traffic Coordinator

[177] Mr. Smith was to assist the traffic coordinator on duty. He would not have the primary responsibility for the position. Mr. Smith would have access to the first aid room and could leave the traffic coordinator's area when required to lie down and deal with his back symptoms.

[178] The assistant traffic coordinator is not a safety critical position. This would give Mr. Smith much greater flexibility to stand, to lie down and to walk around.

[179] At his request, CN transported his personal chair from Terrace to Prince George.

[180] Mr. Smith did not complete this RTWP. It appears from his diary entries that he worked from January 12 to January 27, 2004. He said that he had a very difficult time during this trial return to work. His diary entries are detailed, but describe the medical problems he experienced without relating them to the tasks he was doing.

[181] Although Ms. Gordon and other members of the transition team reminded Mr. Smith a number of times of the importance of the diary information, Mr. Smith acknowledged that there was little in his diaries about the tasks he was doing.

[182] Mr. Smith agreed that as assistant traffic coordinator, he could get up, move around or leave the office to lie down because the traffic coordinator would cover off his duties. He also agreed that the assistant traffic coordinator position was less demanding than the position of traffic coordinator.

[183] Mr. Smith agreed that during the course of the work as an assistant traffic coordinator, he was not asked to do anything that exceeded his work restrictions.

(ii) Termination of the Assistant Traffic Coordinator RTWP

[184] Mr. Radford observed that, at the beginning, Mr. Smith did quite well. But as time went on, the amount of time he spent on the job during his shifts began to decrease. Mr. Radford was concerned that this would interrupt his training cycle. There was a limited amount of time to get Mr. Smith trained and he was running behind schedule.

[185] On January 29, 2004, Mr. Radford received a voice mail in his office from Mr. Smith asking if he could meet him as soon as possible at a restaurant in Prince George. Mr. Radford drove there and found that Mr. Smith appeared to him to be in some pain. He asked Mr. Radford if he would accompany him to his hotel. Mr. Radford did so.

[186] Mr. Smith told Mr. Radford that he had been experiencing significant pain. At that point Mr. Radford concluded that the RTWP should be ended. The best option to assist Mr. Smith was return him to Terrace where he could be with his wife and his doctor and deal with his medical problems.

K. Another Opportunity for the Assistant Traffic Coordinator Position

[187] On February 13, 2004, following the aborted RTWP, Mr. Brummund wrote to Mr. Reny requesting that Mr. Smith be given another opportunity for the assistant traffic coordinator position. He asked that CN provide an ergonomic chair, an adjustable work station and have an occupational therapist review the work area and perhaps suggest modifications.

[188] On June 29, 2004, Mr. Reny replied to Mr. Brummund that CN would extend to Mr. Smith one final opportunity to return to work as an assistant traffic coordinator in Prince George. But, Mr. Smith had to give CN a written commitment to see the plan through to its end and to provide detailed daily diaries.

[189] Mr. Reny was concerned that there had been little progress with Mr. Smith's return to work. In this exchange, he wanted to make it very clear that CN was looking for Mr. Smith to actively participate and cooperate in any future return-to-work attempts. It was still not clear to CN that Mr. Smith was willing to relocate.

[190] CN would undertake the necessary renovations and equipment purchase upon the successful completion of the RTWP. CN would also maintain the flexibility introduced in the previous return-to-work programs, allowing Mr. Smith the opportunity to alternate

between sitting, standing and walking. As well, he would be able to lie down in the first aid room when necessary.

[191] Mr. Brummund's response to Mr. Reny's letter came on August 13, 2004. The Union wanted a precise definition of the "commitment", and how did CN contemplate Mr. Smith "seeing the RTWP through to its end".

[192] As to the diaries, the Union's position was that Mr. Smith had been completing the diaries as required, but CN had not made any adjustments for Mr. Smith's medical problems.

[193] Mr. Reny wrote back on August 20, 2004. Mr. Reny confirmed that CN would make the modifications requested upon Mr. Smith's successful completion of the return-to-work program. He noted the conclusions of the WCB and CN's Occupational Health Services that these modifications were not critical to Mr. Smith's successful completion of the training. All CN was asking was that Mr. Smith work through a basic three-week program to assess his ability to function in this workplace.

[194] Most importantly, CN offered Mr. Smith the permanent position of assistant traffic coordinator in Prince George, to take effect immediately. But Mr. Smith had to cooperate in completing the task diaries for the return to work coordinator so that any necessary modifications can be made either to his work and/or work area. CN also offered to cover Mr. Smith's relocation costs to Prince George. Mr. Reny asked for the Union's and Mr. Smith's agreement.

[195] Mr. Smith wrote to Mr. Brummund on September 1, 2004, responding to Mr. Reny's letter. He said that there was nothing new in this proposal. It was his view that no new remedies/solutions/modifications were offered by CN.

[196] Mr. Reny emailed Mr. Brummund on October 12, 2004, pointing out that CN's intent has and continues to accommodate Mr. Smith with long term, permanent employment. Nothing has changed with CN's operations in Terrace that would accomplish this for Mr. Smith in Terrace. He asked that the Union respond to CN's August 20, 2004 proposal.

[197] Mr. Reny emailed Mr. Brummund on January 11, 2005 asking for the Union's response. In his January 18, 2005 email to Mr. Brummund, Mr. Reny pointed out that CN had modified its offer in response to the specific requests from the Union. He asked again for the Union's position.

[198] In emails to Mr. Shewchuck on June 14, 2005, August 15, 2005 and September 7, 2005, Mr. Reny repeated his request.

[199] Despite these many requests by Mr. Reny asking the Union for its position to his August 20, 2004 offer, the Union has never formally replied.

L. Mr. Smith's Application for Canada Pension Plan Disability Pension

[200] On February 17, 2002, Mr. Smith applied for CPP disability benefits. The eligibility criteria require that the applicant has a disability that precludes doing any work on a regular basis, full-time, part-time or seasonal. The disability must be long term and of unknown duration.

[201] Initially, Mr. Smith was denied CPP disability benefits. The decision of the Disability Specialist on April 12, 2002, was that his file information including medical reports indicated that although he could not work at jobs that required prolonged sitting or standing, he was still able to do some type of work.

[202] Mr. Smith asked for a reconsideration of this decision. His request for reconsideration was denied on August 29, 2002, because he failed to satisfy the disability criteria.

[203] Mr. Smith then appealed to the CPP Review Tribunal which heard his appeal on March 10, 2004. At that hearing, Mr. Smith took the position that he was incapable of doing any work as of February 2002. He made oral representations to the Tribunal to this effect, as did his wife.

[204] Mr. Smith also submitted a letter from Dr. Appleton dated March 3, 2004. In his letter, after summarizing Mr. Smith's medical condition and work restrictions, Dr. Appleton stated that he considered Mr. Smith to be completely disabled from any form of meaningful employment.

[205] The impetus for this letter came from Mr. Smith. In his clinical notes for March 3, 2004, Dr. Appleton noted that he met with Mr. Smith. Mr. Smith told him that he was appealing a negative CPP disability pension decision. The hearing was scheduled for March 10 and he needed a letter of support.

[206] This opinion of Dr. Appleton should be contrasted to his opinion as expressed in his March 28, 2002 letter. There Dr. Appleton wrote "To Whom It May Concern". He described Mr. Smith's medical condition, his back surgery and his work restrictions. Dr. Appleton then went on to say that even with these restrictions, Mr. Smith would have been able to return to the work force as of June 10, 2001. This letter was written by Dr. Appleton in connection with Mr. Smith's employment insurance application.

[207] The Review Tribunal issued its decision on April 28, 2004. It concluded that Mr. Smith's disabilities rendered him incapable of doing any regular gainful employment from February 2002 when he first applied for a CPP disability pension. He was awarded a disability pension retroactive to June 2002.

[208] Mr. Smith agreed in his application for the CPP disability pension to notify CPP of any changes in his medical condition; or a return to work (full, part-time, volunteer or trial period or any rehabilitation). He did not do so.

[209] Mr. Smith did not advise CPP of his two RTWP's in June 2003 and January 2004 for which he was paid a full salary. He did not advise CPP of his November 2002 functional capacity evaluation, setting out his physical ability and functional capacity to work.

[210] Mr. Smith did not tell CN, his Union or WCB that he had applied for a CPP disability pension in February 2002. He did not tell them about Dr. Appleton's March 4, 2004 letter advising that he was disabled and could not do any meaningful work.

[211] Mr. Smith did not disclose in his CPP application or at the CPP Review Tribunal or later that he was one of the founding members of the Northwest Injured Workers Association (NIWA) which was incorporated on February 2, 2002. One of the main purposes of this organization was to provide advice and support for injured workers involved in the WCB process.

[212] Mr. Smith is very much involved as a volunteer with the NIWA. He was instrumental in its incorporation. He has organized and has spoken at a number of rallies and meetings in Terrace and at other locations in the area. He was significantly involved in seeking financial support for NIWA to fund its activities and paid positions. If his funding efforts were successful, Mr. Smith hoped to occupy one of the paid positions.

[213] Mr. Smith applied in the fall of 2002 or 2003 for the position of Workers' Advisor to the Minister of Labor. This would involve assisting WCB claimants by guiding them through the WCB process.

M. Can Mr. Smith Work or is He Permanently Disabled? - Facts to Consider

(i) September 21, 2004 letter

[214] In September 2004, Dr. Appleton wrote a letter, "To Whom It May Concern". In his letter, Dr. Appleton gave his opinion regarding CN's latest offer as set out in Mr. Reny's August 20, 2004 letter. Dr. Appleton opined that this work situation was no different from the previous assistant traffic coordinator training that Mr. Smith tried earlier.

[215] Mr. Smith agreed that Dr. Appleton's understanding of the assistant traffic coordinator in Prince George was based on what he had told him. He said that he requested this letter from Dr. Appleton and wanted Dr. Appleton's opinion as to whether he could perform the duties of an assistant traffic coordinator. It is not clear why Mr. Smith wanted this. He already had Dr. Appleton's March 3, 2004 opinion which he submitted to the CPP Review Tribunal that he was incapable of working at all.

(ii) Application for Judicial Review of the Arbitrator's Decision

[216] The Union filed a judicial review application of the arbitrator's decision which it later abandoned. The Union's counsel, Clayton Cook, had discussed this with Mr. Smith and told him that there was little or no chance of success.

[217] In a lengthy fax to Mr. Cook on June 20, 2004, Mr. Smith disputed this conclusion. After summarizing in detail the facts of his case, Mr. Smith reiterated his position which was put forward by the Union at the arbitration, that CN has a duty to accommodate him at his home terminal before alternative accommodation is even considered. He disagreed with the arbitrator's decision that the CN had made reasonable efforts to do this.

[218] Mr. Smith wanted to proceed to the judicial review. The implication is that he was capable of working at that time, certainly in Terrace. But, in his discussions with and fax to Mr. Cook, he never told him that he is receiving a CPP disability pension.

(iii) The WCAT Decision - February 2006

[219] As indicated earlier, Mr. Smith appealed to the Workers Compensation Appeal Tribunal (WCAT) a number of WCB decisions, including the March 31, 2005 decision of the review officer denying Mr. Smith a permanent disability award. The appeal was heard on November 29, 2005. Mr. Smith was represented by counsel.

[220] In its February 10, 2006 decision, WCAT confirmed the review officer's decision that Mr. Smith was not entitled to a permanent disability award based on projected loss of earnings. In coming to this conclusion, WCAT concluded:

- that the medical evidence indicates that the ideal job for Mr. Smith would allow him to sit, stand and walk around as required;
- that the assistant traffic coordinator position meets his work restrictions and provides Mr. Smith with the ideal job opportunity and the maximum flexibility to deal with his back spasms should they occur;
- that Mr. Smith is fit to undertake the assistant traffic coordinator job;
- rejected Mr. Smith's argument that WCB and CN is obliged to look for any job that Mr. Smith could do in Terrace before looking elsewhere. If CN could provide a suitable job elsewhere it makes no sense to find a job paying a minimum wage in Terrace and pay a permanent disability award for wage loss;

- that Mr. Smith does not have deep roots in Terrace noting that he had lived there for 16 years but had previously lived in Prince George for eight years. His wife is employed part-time and works below her qualifications as a pharmacist. His children have left the home. On the whole, Mr. Smith's ties to Terrace are not strong and his preference for Terrace does not entitle him to a permanent disability award;
- that CN acted in good faith in offering the two training opportunities in Prince George to Mr. Smith and then offering the permanent position to him; Mr. Smith did not act in good faith by not taking advantage of this offer;
- that his difficulties in the training were in large part of his own making. The extent of his back spasms, the degree to which they are caused by certain activities, the degree of disability caused by them and the necessity to lie down to treat them are known only by Mr. Smith's reports. They are not independently verifiable.
- that Mr. Smith has declined a job which was suitable, available and which would match his pre-injury job rate.

(iv) Dr. Appleton's 2006 Clinical Notes

[221] On February 7, 2006, Mr. Smith met with Dr. Appleton. In his clinical notes, Dr. Appleton wrote that Mr. Smith is going to arbitration with the Human Rights Commission with regard to his back pain and CN's "inability" to provide him with alternate employment. It was Dr. Appleton's understanding that CN had offered Mr. Smith alternate employment which may have suited him, out of Terrace, but Mr. Smith refused to go.

[222] After describing Mr. Smith's symptoms and his current activities, Dr. Appleton went on to write that Mr. Smith has a history of lumbar disc problems and his ongoing problem might be expected with prolonged sitting and standing. But his picture of back spasms, however, is not compatible with the above. It was Dr. Appleton's strong feeling that there is a very large emotional component here, although he does not think that Mr. Smith is malingering.

[223] Dr. Appleton concluded that he told Mr. Smith in no uncertain terms that he does not find any physiological reasons to his overall "spasming" and that he would not be able to substantiate a physical reason for this if asked.

[224] Mr. Smith met again with Dr. Appleton on May 24, 2006, a few days before the commencement of the Tribunal hearing into his complaint. In his clinical notes, Dr. Appleton wrote that Mr. Smith had concerns about Dr. Appleton's comments in his February 7, 2006 notes that Mr. Smith had been offered alternate employment out of Terrace but he had refused.

[225] Dr. Appleton corrected this by noting that his comment related to an earlier consultation during which he and Mr. Smith discussed the possibility of work outside the area, compatible with his injuries. At that time Mr. Smith told him it would be difficult to move because of his wife's job. Dr. Appleton concluded that he was not aware of any job offered by CN that would be suitable for Mr. Smith, given his injuries.

(v) Referral to Dr. Keyes, Neurologist

[226] Mr. Smith asked Dr. Appleton to refer him to another specialist about his lower back spasms. Mr. Smith had come up with the name of Dr. Keyes, a neurologist. Although Dr. Appleton did not think that Dr. Keyes would have much to offer, he did make the referral.

[227] Mr. Smith was assessed by Dr. Keyes on November 1, 2006. After his consultation with Dr. Keyes, Mr. Smith wrote him and indicated that the last time he tried to return to work, his employer offered him a computer job which involved sitting or standing at a work station. He had difficulties with this because of pain and muscle spasms.

[228] For the most of his November 9, 2006 report, Dr. Keyes provided a detailed, technical medical diagnosis for Mr. Smith. He concluded that Mr. Smith has significant disc space narrowing which will be the cause of his low back pain. He did not recommend any further surgery, but did recommend that Mr. Smith's spasms and pain be treated with medication and ongoing physiotherapy.

(vi) Mr. Smith's Application for CN Disability Retirement Benefits

[229] On May 18, 2006, Mr. Smith applied for CN disability retirement benefits. To be eligible, an employee must be totally and permanently disabled. Totally and permanently disabled means "a physical or a mental impairment that prevents an individual from engaging in any employment for which he/she is reasonably suited by virtue of his/her education, training or experience and that can reasonably be expected to last for the remainder of his/her lifetime". This was the first time Mr. Smith represented to CN that he was totally and permanently disabled.

[230] In his completed and signed application, Mr. Smith acknowledged that he was receiving CPP pension benefits. He also acknowledged that there is no basis or opportunity to accommodate him and his disability. He released CN from any obligation to accommodate him that it may otherwise have had.

[231] Dr. Appleton completed the attending physician portion of Mr. Smith's application. He wrote that Mr. Smith had lumbar disc prolapse and experienced mechanical low back pain, which was ongoing for years. Dr. Appleton reported Mr. Smith's WCB work restrictions as, limited sitting, bending, no lifting and frequent changes in position.

[232] As to whether Mr. Smith was totally and permanently disabled as per the eligibility criteria, Dr. Appleton wrote that there is no occupation available to fit these restrictions.

[233] Mr. Smith's application was not accepted by CN. Dr. Lapierre, CN's Chief Medical Officer, wrote to Mr. Smith on June 13, 2006 advising him that he did not meet the eligibility criteria. According to the available medical information, there was no indication that his medical restrictions would prevent him from working.

[234] In reaching this conclusion, Dr. Lapierre reviewed medical information in Mr. Smith's file in CN's Occupational Health Services department and the CPP Review Tribunal's decision. Dr. Lapierre took into account the February 10, 2006 WCAT decision, in particular, the findings of WCAT that the assistant traffic coordinator job is suitable and available for Mr. Smith, is within his work restrictions and the wages for that job would match his pre-injury wage rate.

[235] He also considered the August 20, 2004 job offer by CN to Mr. Smith. This offer was relevant to assess fitness for duty by comparing Mr. Smith's work restrictions with the requirements of the job.

[236] On the basis of this information Dr. Lapierre concluded that Mr. Smith is not totally disabled and thus did not meet the criteria for a CN disability pension.

[237] Dr. Lapierre said that the decision of the CPP Review Tribunal was not of much value in reaching his decision. There was no medical information in the decision that he could rely on.

[238] Dr. Lapierre did not have discussions with CN officials regarding Mr. Smith's human rights complaint. It did not figure at all in his decision to reject Mr. Smith's disability pension application.

(vii) Mr. Smith's June 29, 2006 Email Enquiry for Work with CN

[239] On June 29, 2006, Mr. Smith sent an email to David Trites, CN's Return to Work Coordinator who had replaced Tanya Gordon. This was 10 days after the commencement of the Tribunal hearing on June 19, 2006. In his email, Mr. Smith indicated that he was pleased to have heard that Mr. Trites and Lynn Chorley, (CN's Occupational Health Team Leader) were both interested in finding him some work within his capabilities, as the assistant yard coordinator position has been unsuitable. Any positions or ideas they might have, he would be very interested in. He asked that Mr. Trites or the Terrace manager let him know of any ideas they come up with.

(viii) Mr. Smith's Proposed Accommodation - September 2006

[240] When concluding his evidence in chief in September 2006, Mr. Smith was asked what he would consider to be acceptable employment at this point in time. He proposed that CN offer him the assistant traffic coordinator position in Terrace. As to what accommodations he would require to do this job in Terrace, Mr. Smith asked for the following:

a suitable chair;

a height adjustable work station;

somewhere where he could lie down and with access to an electrical outlet for his heating pad;

fatigue matting on the floor;

flexibility to leave his work station to walk or lie down as required.

[241] CN's August 20, 2004 offer, which remains open for acceptance, provides that upon completion of his training, CN will renovate the traffic coordinator's office, install a padded floor, and provide a suitable ergonomic chair and adjustable work station.

[242] Mr. Smith would also be provided with a place to lie down and he would have the flexibility to leave his work station when required. He could do this because assistant traffic coordinator was not a safety critical position and he did not have primary responsibilities of the traffic coordinator.

[243] The only difference between what CN has offered and what Mr. Smith has proposed is that one position is in Prince George and the other is in Terrace. Mr. Smith did not give any explanation as to why he thought he could do the assistant traffic coordinator in Terrace, but not in Prince George.

(ix) Mr. Smith's Human Rights Complaint and the Remedies He Requested

[244] In his February 28, 2002 complaint to the Canadian Human Rights Commission, Mr. Smith alleges that CN had discriminated against him on the grounds of disability by not accommodating his disability and by not offering him alternative employment.

[245] In paragraph 49 of his amended Statement of Particulars dated June 6, 2006, Mr. Smith asks for an order that the CN provide him with suitable accommodation in the Terrace area, either by enabling him to perform the traffic coordinator's or assistant traffic coordinator's position or by offering him alternate suitable employment.

[246] In paragraph 52A of his Statement of Particulars, Mr. Smith requests an order that CN approve his disability application and make up the pension deficiency which arose because he was unable to work and because CN failed to offer him suitable employment.

[247] At the conclusion of his evidence in September 2006, Mr. Smith was asked by the Tribunal about the inconsistency between his request to be accommodated in Terrace with suitable employment, when at the same time, he is seeking a CN disability pension on the basis that he be totally and permanently disabled from any suitable employment.

[248] Mr. Smith's response as expressed in his counsel's February 19, 2007 letter to the Tribunal is that he no longer seeks the remedy in paragraph 49 that CN provide him with suitable accommodation in Terrace.

[249] Mr. Smith explained, through his counsel, that . . . due in part to the outcome of the referral . . . to Dr. Keyes, his answer to the question is that he doesn't wish to pursue the relief as, he no longer believes he will recover enough to be able to work on a regular basis.

So, what this means is that Mr. Smith is conceding now, with the hindsight of 2007, that he has not been able to work throughout the period, pretty well the entire period that is covered by this complaint. . . . He is not conceding that he was . . . he did not believe that, he did not accept that until he was driven to that conclusion very recently. That was not his view back in 2001 or 2002. He still hoped at that time he would be able to work and, of course, there's lot of evidence that he tried.

V. REASONS FOR DECISION

A. Did CN Discriminate/Retaliate Against Mr. Smith by Rejecting his Application for a CN Disability Retirement Pension?

[250] To succeed, Mr. Smith must establish a *prima facie* case of discrimination. To do so, Mr. Smith must show that he met the eligibility criteria for the disability pension and it was refused.

[251] For a *prima facie* case of retaliation, he must show that his application was rejected because he filed his complaint with the CHRC.

[252] Dealing first with Mr. Smith's discrimination allegation, Mr. Smith's position is that he has come to the conclusion that, with the hindsight of 2007, he is not able to work on a regular basis. His reasons are based in part on his referral to Dr. Keyes.

[253] The decision as to whether Mr. Smith is totally and permanently disabled from engaging any employment must be based on objective medical evidence. The only medical evidence on this question is Dr. Appleton's March 3, 2004 letter "To Whom It May Concern" stating that he considered Mr. Smith completely disabled from any meaningful work.

[254] But the weight to be given to this opinion must be significantly discounted. There are a number of reasons for this. First, it was written at Mr. Smith's request. He told Dr. Appleton about his upcoming CPP appeal and that he needed Dr. Appleton's support.

[255] Second, Dr. Appleton, in his earlier March 28, 2002 letter, in support of Mr. Smith's employment insurance application indicated that Mr. Smith could return to work on June 10, 2001.

[256] Third, Dr. Appleton, the medical practitioner most intimately familiar with Mr. Smith's medical condition was never called to testify in this hearing. This is so even though the first week of the hearing was held in Terrace where Dr. Appleton resides. The remaining weeks of the hearing were in Vancouver. Mr. Smith's counsel indicated to the Tribunal that Dr. Appleton would be in Vancouver during one of those weeks.

[257] No explanation was given by Mr. Smith as to why Dr. Appleton did not give evidence before the Tribunal.

[258] Fourth, Dr. Appleton's clinical notes and his WCB attending physician reports were entered as exhibits on behalf of Dr. Appleton at the hearing. But in the absence of Dr. Appleton, CN was not able, through cross-examination, to test the validity of his medical opinion regarding Mr. Smith. For the same reason, Dr. Appleton's assessment that he provided in Mr. Smith's CN disability application must receive the same fate.

[259] Fifth, there are examples in the evidence which demonstrate that Dr. Appleton acted as an advocate for Mr. Smith. These include his March 28, 2002 and his March 3, 2004 letters, both of which he wrote at the instance of Mr. Smith.

[260] There is also his intervention on behalf of Mr. Smith with Mr. Beddie in calling for a face to face meeting with Dr. Appleton, Mr. Smith, CN and WCB officials to seek a resolution of Mr. Smith's work situation.

[261] Finally, the fact that none of the specialists who assessed Mr. Smith, including Dr. Wing, Dr. Clarke or Dr. Keyes offered the medical opinion that Mr. Smith was totally and permanently disabled from engaging in any employment.

[262] But, it is not just the absence of objective medical evidence. Mr. Smith's own actions over the years 2002 to 2004 belie the conclusion that he was incapable of working.

[263] At the same time that Mr. Smith was receiving a CPP disability pension from June 2002, Mr. Smith:

caused his Union to pursue to arbitration on July 9, 2003, his grievance that CN should provide him with suitable employment in Terrace;

in July 2004, discussed with Union counsel and reiterated by fax to Union counsel that the judicial review application of the arbitration should proceed and that CN had a duty to accommodate him with employment at Terrace;

pursued his WCAT appeal in November 2000, in which he took the position that WCB is obliged to find work for Mr. Smith in Terrace before looking elsewhere;

proposed at the hearing before the Tribunal in September 2006, that an acceptable accommodation would be for CN to offer him the assistant traffic coordinator position in Terrace;

in his statement of Particulars dated June 2006, asked by way of remedy that he be accommodated in Terrace with the traffic coordinator or assistant traffic coordinator position or other alternate, suitable employment. Mr. Smith only resiled from this in February 2007 when faced with the inconsistency between this remedy request and his request that CN be ordered to approve his application for a CN disability pension;

in his June 29, 2006 email to David Trite, CN's Return to Work Coordinator, advised him that he would be interested in any work within his capabilities that he or the Terrace manager might come up with;

Mr. Smith never advised CPP, as he agreed to do in his CPP application, of his trial training in July 2003 and January 2004 or of his volunteer work with NIWA;

did not tell CN, the Union counsel, or the arbitrator that he was receiving a disability pension on the basis that he was incapable of working.

[264] Clearly Mr. Smith believed he was capable of working, be it traffic coordinator, assistant traffic coordinator or any other suitable employment in Terrace.

[265] I have concluded, in the absence of any credible, objective medical evidence and on the basis of Mr. Smith's actions and the position he has taken, that Mr. Smith is not totally and permanently disabled from engaging in any employment.

[266] As to Mr. Smith's allegation that CN retaliated against him by filing his complaint with the CHRC, I accept the evidence of Dr. Lapierre that he made his decision based on objective considerations and he did not take into account Mr. Smith's human rights complaint.

B. Did CN Accommodate Mr. Smith?

[267] Mr. Smith argues that he suffered from a disability, could not return to his pre-injury job, and CN did offer a suitable work alternative. Accepting that Mr. Smith has established a *prima facie* case, the question is whether CN accommodated his disability.

[268] There are two legal principles coming out of the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.R. 970, that are relevant here. First, the Court said that the obligation to accommodate is limited by the words "reasonable" and "short of undue hardship". These limiting factors are alternative ways of expressing the same concept. What amounts to reasonable measures will vary with the facts of each case.

[269] The second principle from *Renaud* is that when seeking accommodation, the employee must accept a reasonable accommodation even though it might not be the preferred accommodation. If an employee refuses an offer for an accommodation that is reasonable in the circumstances, then the employer's duty is discharged.

[270] Consider now the circumstances in this case. At the request of the WCB, CN developed RTWP No. 1 to commence in December 2000. It was a graduated RTWP which took into account the job duties for locomotive engineer, his WCB work limitations, the 1999 WorkAble report and discussions with Mr. Smith about his tolerances and current activities.

[271] The plan was also reviewed and approved by Dr. Appleton, Dr. Wing, and by Dr. Faraday who had confirmed Mr. Smith's work restrictions. Mr. Smith did not complete this RTWP.

[272] Following up on an earlier suggestion from Mr. Smith, CN developed RTWP No. 2 to start in March 2001. This was a graduated RTWP involving lighter duties and local yard work which would avoid prolonged sitting in the locomotive engine. Both Dr. Coppin and Dr. Appleton considered this to be a reasonable plan. Mr. Smith did not complete this RTWP.

[273] RTWP No.3 was initiated by Mr. Wiederspiel from the Union, who had asked CN to reactivate the previous plan. CN agreed and modified the plan as per the Union's suggestions.

[274] Mr. Smith also reviewed the plan and suggested further modifications to Ms. Dawson. At no point did he tell Ms. Dawson that he objected to participating in this modified plan.

[275] It is clear that the goal of WCB and CN was to return Mr. Smith to his pre-injury job. Certainly Mr. Smith had doubts as to whether he could do so. Certainly Dr. Appleton had recommended that Mr. Smith avoid prolonged sitting, as had Drs. McDougall, Faraday and Wing.

[276] On the basis that the RTWPs were drafted and prescribed a graduated return-to-work program to deal specifically with this concern; that RTWP No.1 and 2 were approved not only by the WCB, but also by Mr. Smith's medical advisors and CN's advisors; and that RTWP No.3 was at the behest of Mr. Smith's Union, I have concluded

that these three RTWPs constituted reasonable accommodation within the *Renaud* principle.

[277] Over the period from April 2001 to March 2003, the operational people in Terrace and Mr. Smith's return to work team were canvassed about other potential jobs for him in Terrace. Mr. Smith had also offered suggestions to CN to personnel officers in Edmonton.

[278] The evidence is that there were no opportunities in Terrace that could accommodate Mr. Smith except creating a position not otherwise required. Mr. Smith's suggestions would not produce long term, gainful employment.

[279] In May 2003, CN, in conjunction with WCB and with the support of the Union, proposed RTWP No.4 to accommodate Mr. Smith in a traffic coordinator position in Prince George. His training took place on June/July 2003. Once again, Mr Smith did not complete the training and the plan was terminated.

[280] In January 2004, CN offered to Mr. Smith RTWP No. 5, the position of assistant traffic coordinator in Prince George. This offer was to take effect immediately. Mr. Smith had only to complete the training program. He did not take up this offer. It remains outstanding.

[281] The evidence is definitive that the assistant traffic coordinator position is the "ideal job" for Mr. Smith, given his work restrictions. It allows him to sit, stand and walk around as required. He can leave his work area to go to a designated room to lie down. The job is not safety critical.

[282] That this is the ideal job for Mr. Smith was also the opinion of the WCB Review Board in its March 14, 2003 decision. And was the opinion of WCAT in its February 10, 2006 decision. The traffic coordinator position was considered by Arbitrator Piché to be a reasonable accommodation of Mr. Smith's disability under the *CHRA*.

[283] Mr. Smith's evidence was that his back spasms which he experienced in his training, prevented him from doing the traffic coordinator job. But this is what Mr. Smith reported to Dr. Appleton, in his diaries and at the Tribunal hearing. This evidence is not objectively or independently verifiable as was pointed out by WCAT. As noted earlier, Mr. Smith had the opportunity to call Dr. Appleton or any other doctor who had assessed him. He chose not to do so.

[284] In his February 7, 2006 clinical notes, Dr. Appleton wrote that it was his feeling that there was a large emotional component with Mr. Smith's back spasms and he could not find any physiological reason for his overall spasming.

[285] On this question, I agree with the WCAT finding that the difficulties experienced by Mr. Smith during his training for traffic coordinator were, in large part, of his own making.

[286] Also to be considered is Mr. Smith's continuing insistence before WCAT and before this Tribunal, that he be accommodated as a traffic coordinator in Terrace. If he could do this job in Terrace, he could do it in Prince George. I can only conclude that Mr. Smith was not willing to relocate from Terrace to Prince George.

[287] Mr. Smith's *Renaud* obligation is to accept a reasonable accommodation. He can not expect the perfect solution. CN's offer for the traffic/assistant traffic coordinator position is a reasonable accommodation in all the circumstances. Mr. Smith has not met his *Renaud* duty. CN's duty to accommodate him is discharged.

[288] Mr. Smith has also asserted that CN has discriminated against him on the grounds of family status. His argument is that relocating to Prince George would negatively impact on Mrs. Smith. She would have to give up her job as assistant librarian in Terrace.

[289] Family status is not a ground in Mr. Smith's complaint. In his closing submissions, he did not present any jurisprudence as to whether these facts amounted to family status discrimination.

[290] Further, I agree with Arbitrator Piché's opinion that the duty to accommodate under the *CHRA* does not make an employer the insurer of all of the employee's economic and family life.

VI. CONCLUSION

[291] CN did accommodate Mr. Smith's disability. CN did not discriminate or retaliate against Mr. Smith in its dealings with WCB. CN did not discriminate or retaliate against Mr. Smith in rejecting his application for a CN disability retirement pension.

[292] Mr. Smith's complaint is dismissed.

"Signed by"

J. Grant Sinclair

OTTAWA, Ontario

May

9,

2008

PARTIES OF RECORD

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APPEARANCES:	

James Sayre	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Adrian Elmslie / Joseph H. Hunder	For the Respondent