IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT, S. C. 1976- 77, C. 33, as amended:

AND IN THE MATTER OF A HEARING BEFORE A HUMAN RIGHTS TRIBUNAL APPOINTED UNDER SECTION 39 OF THE CANADIAN HUMAN RIGHTS ACT.

BETWEEN:

EDWIN ERICKSON COMPLAINANT

AND:

CANADIAN PACIFIC EXPRESS AND TRANSPORT LTD. RESPONDENT

TRIBUNAL: NORMAN FETTERLY

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> TD 9/ 86

Decision rendered December 9, 1986

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DECISION OF THE TRIBUNAL

APPEARANCES: RENE DUVAL Counsel for the Complainant
N. MULLINS, Q. C. and R. M. McLearn Counsel for the Respondent

(Version française à suivre/ French version to follow)

>INTRODUCTION The Complainant, Erickson, suffers a hearing loss and has worn a hearing aid since 1978. He is an experienced truck driver and is the holder of a Class 1 Driver's Licence issued by the Superintendent of Motor Vehicles of British Columbia. He was the holder of a Class 1 Driver's Licence on the 1st day of September, 1981 when he commenced employment with the Respondent, Canadian Pacific Express and Transport Ltd. His licence entitles Erickson to drive heavy duty trucks on the highways of the Province.

Mr. Erickson was hired by the Respondent to drive tractor - trailer units in the Nanaimo area where he hauled hog fuel and chips for the company. Mr. Erickson was on a probationary basis for his first 65 compensable days in accordance with the Collective Agreement between the Respondent Company and his Union.

On the 2nd of November, 1981, Mr. Erickson's employment with the Respondent Company was terminated. No reasons for his dismissal were given to Mr. Erickson at that time. Upon written request from Mr. Erickson the General Manager of the Company, Mr. G. E. D. Lloyd wrote to him on November 13th, 1981 advising the reason for his dismissal in the following words:

"Your hearing does not meet our standards for a highway driver. Because of having a serious hearing defect, you are required to use a hearing aid. We do not permit the use of hearing aids for highway drivers."

After his dismissal by the Respondent Company Erickson went to the Human Rights Commission in Vancouver for assistance and was informed by the Commission that before it could assist him, he must go through his Union grievance procedures pursuant to the Collective Agreement with the Respondent Company.

Accordingly a grievance was filed by the Union on Mr. Erickson's behalf. In due course the matter was referred to a single Arbitrator appointed under the provisions of the Canada Labour Code. A hearing took place in Montreal on May 11th, 1982. Mr. Erickson apparently was not notified and was not present at that hearing. He was represented by the officials of his Union.

The Arbitrator, Mr. Weatherill, dismissed Erickson's grievance and made no order reinstating him or reimbursing him for wages.

The award of the Arbitrator and his reasons were filed in the Federal Court of Canada pursuant to Sub- section 159(1) of the Canada Labour Code.

In his reasons the Arbitrator, Mr. Weatherill found as a fact that Erickson was a probationer by virtue of Article 11.6 of the Collective Agreement. Article 11.6 to quote Mr. Weatherill "gives a broad discretion to the employer", and it was his conclusion that "the Company's decision was in the exercise of its discretion which it has under that Article".

Earlier in his reasons Mr. Weatherill states and I quote: "Thus, the Arbitrator's role is not to determine whether or not the decision was "correct", but rather whether or not it was a decision made within the scope of the discretion accorded by Article 11.6."

On the question of Mr. Erickson's hearing capabilities, Mr. Weaterill expressly refrained from making any finding of fact and states "I make no findings of fact on the grievor's actual medical condition. Since the Union was not prepared, at the hearing to offer medical evidence to refute that of the Company. In my view, the matter does not require any findings of fact in this connection, apart from the very general one - which is not in doubt that the grievor does suffer from a degree of hearing impairment."

PRELIMINARY OBJECTION - RES JUDICATA

A preliminary objection taken by Counsel for the Respondent Company was that the matter before this Tribunal is Res Judicata in that Mr. Erickson brought the same issue, and sought the same remedies, i. e. reinstatement and reimbursement of lost wages, to an Arbitrator appointed under the Canada Labour Code whose decision in favour of the Company resulted in Erickson's claim being dismissed. The Arbitrator's Award has the force and effect of a Judgment of Federal Court of Canada upon being filed with the Court pursuant to Sub- section 159(1) of the Canada Labour Code.

The Arbitrator's Award was indeed filed with the Federal Court of Canada and therefore has the force and effect of a final Judgment of that Court. The question then for this Tribunal is whether the Award of the Arbitrator dealt with the same issues of fact and law as are before this Tribunal so as to render the matter "res judicata".

Mr. Mullins argues that the principles giving rise to a defence of "res judicata" or estoppel in law are present in this case and those principles are set forth in Halsbury, Vol. 16, 4th Edition, paragraph 1503 as follows:

"Estoppel of record or quasi record, also known as estoppel per rem judicatam, arises:

(1) where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter and the same issue comes in question in subsequent proceedings between the same parties (this is sometimes known as cause of action estoppel)...."

(2) ... where the first determination was by a Court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the parties (this is sometimes known as issue estoppel)...."

(3) .... in some cases where an issue of fact effecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a Judgment in rem of a tribunal have jurisdiction to determine that status, and the same issue comes directly in question in subsequent criminal proceedings between any parties whatever."

As I understand Counsel's position, the first of these principles is applicable in these proceedings.. the whole legal rights and obligations of the parties having been concluded by the earlier Award. Mr. Mullins submits the fact that proceedings were begun under the Human Rights Act, then at a later date grievance proceedings were begun under the Labour Code doesn't matter, "it's whoever gets to the wire first which establishes the final Judgment". Mr. Mullins relies on paragraph 1519 of Halsbury (supra) in support of his position on this issue. Paragraph 1519 reads as follows:

"The fact that the Judgment is given after the proceedings in which it was relied on were begun does not prevent its taking effect as a res judicata giving rise to an estoppel."

The elements of the first principle enunciated by Halsbury are , in Mr. Mullins' submission present in this case and are as follows:

(a) the parties are the same - namely the Respondent Company and Erickson;

(b) The same issues of law and fact are in question, namely, the legality of Erickson's dismissal by the Respondent Company based on his hearing deficiency and involving like remedies under the relevant legislation;

(c) there was a final determination of the issue of fact by a tribunal having jurisdiction in the matter and whose decision has the force and effect of a Judgment of the Court.

The third submission in support of the defence of res judicata presents no difficulty. The evidence supports the conclusion that there was a final determination having the force and effect of a Judgment of the Federal Court of Canada in respect to the matters in issue in the Arbitration, and I so find.

Mr. Mullins submits that the parties to the arbitration proceedings, namely the Complainant Erickson and the Respondent Company are identical, as in fact they are. He does not accede to the argument put forth by Mr. Duval, Counsel for the Complainant, which is, that owing to the nature of the Human Rights legislation, it's contents and purpose there is implicitly a third party involved, i. e. the general public as represented by the Human Rights Commission.

It is with respect to his second submission that Counsel for the Respondent Company directed most of his remarks and with which he was chiefly concerned. As I understand his position on this point, it can be summarized as follows:

1. The Complainant is seeking from this Tribunal the very same remedies, viz. reinstatement of his job and loss of wages as he did in the Arbitration proceedings, similar relief being provided under the Canada Labour Code as that provided in the Human Rights Act.

2. The Complainant Erickson alleged that he was "illegally" terminated when he failed to meet the Company Is standards regarding his hearing capability. His present complaint is, in Counsel's words "exactly the same complaint that he is making here, he was dismissed because of his hearing deficiency". Counsel draws the conclusion that the issue in this complaint and in the Arbitration proceedings are identical.

3. The fact that Erickson first complained to the Human Rights Commission and subsequently availed himself of a grievance procedure under his Collective Agreement does not present estoppel being involved in the second proceedings.

4. Finally Counsel for the Respondent Company relies on the provisions of Section 33 of the Human Rights Act which reads:

"33. Subject to Section 32, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that:

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available: or

(b) the complaint (i) is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act...."

and concludes from the above that the Act itself contemplates there are remedies provided in other Federal Statutes that ought to be pursued and were in fact pursued by the Complainant at the suggestion and with the encouragement of the Human Rights Commission. Counsel argues that this fact in itself is a bar in law to these proceedings inasmuch as "the other proceedings" resulted in an adverse decision having the force and effect of a Judgment of the Federal Court.

Mr. Mullins canvassed a number of judicial decisions dealing with the principles of res judicata and its application to specific cases. I do not consider it necessary to refer to those cases at this point except to observe there appears to be no decision of a higher Court dealing with the doctrine of res judicata as it applies to the particular circumstances here or which brings into play overlapping Federal Legislation dealing with human rights and with labour relations.

In response to the preliminary objections of Counsel for the Respondent Company, Mr. Duval, Counsel for the Complainant and for the Human Rights Commission made the following submissions:

1. This Tribunal had no jurisdiction to entertain the defence of res judicata since the Commission itself has legislative authority under Section 33 of the Act to exercise its discretion as to which procedure should be fol lowed by a person seeking redress under this Act or under other Federal legislation. According to Counsel "once a Tribunal has been appointed it has no authority to scrutinize the Commission's discretion, which Counsel argued was exercised by the Commission in deciding that the Respondent's case was not properly and completely dealt with by the Arbitrator. He refers to a decision of the Tribunal in local 916, Energy and Chemical Workers (Complainant) and Atomic Energy of Canada Limited (February 24, 1984). In that case the

Tribunal dealt with a preliminary objection by the Respondent Company based on the argument that if the Respondent's complaint was with merit, it could and should have been processed through the collective bargaining procedure and under the Canada Labour Code. The Tribunal in that matter was asked to dismiss or dispose of the complaint summarily under Sections 33(b)(111), 36(2)(a) and 36(3)(b) of the Human Rights Act. It was argued that the Human Rights Commission by appointing a Tribunal had exceeded its jurisdiction in not insisting that the matter was more appropriately dealt with under the Canada Labour Code. This argument did not succeed and the decision of the Tribunal in dismissing it is of little assistance in the present case except perhaps by way of contrast to the preliminary objection raised here of res judicata.

2. It is argued that the parties are not the same inasmuch as the Commission was not a party to the Arbitration but is a party to these proceedings. Counsel relies in part on Section 40(1) and (2) of the Act which reads as follows: "40(1) A Tribunal shall, after due notice to the Commission, the Complainant, the person against whom the complainant was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through Counsel, of appearing before the Tribunal, presenting evidence and making representations to it.

40(2) The Commission, in appearing before a Tribunal, presenting evidence and making representations to it, shall adopt such position, as, in its opinion, is in the public interest, having regard to the nature of the complaint being inquired into."

He argues that these provisions make the Commission a party to these proceedings as representing the public interest.

3. Counsel for the Complainant submits that the issues are not the same and he refers to the reasons of the Arbitrator, Mr. Weatherill and quotes from them as follows:

"Thus, the Arbitrator's role is not to determine whether or not the decision was "correct", but rather, whether or not it was a decision made within the scope of the discretion accorded by Article 11.6."

He points out that Article 11.6 is encompassed in a Collective Agreement which does not include the grounds of discrimination listed in Section 3 of the Human Rights Act. He agrees with the finding of the Arbitrator that the decision of the Respondent Company in dismissing Mr. Erickson was not done in bad faith and concedes that this is not an issue in these proceedings.

Mr. Duval summarizes his position in regard to the question decided by the Arbitrator and to be decided by this Tribunal as follows:

"This Arbitrator, who did not address this issue, was only concerned with the way that the decision was made by the Company, and the issue that they addressed was whether or not it did comply with the Collective Agreement provisions. It was not whether or not, whether it complied with the Canadian Human Rights Act... So, the issues are not the same."

4. Counsel's final point is that the Canadian Human Rights Act has precedence over any other Act of Parliament where there is conflict or overlapping. He cites the decision of the Supreme Court of Canada in Bhinder and the Canadian Human Rights Commission vs. the Canadian National Railway Company et al reported in (1986) 7 C. H. R. R. D. 3093. That case concerned itself primarily with the test to be applied in determining whether under Section 14(a) of the Human Rights Act an employer could rely on a bona fide occupational requirement as defence to a complaint of discrimination. There are other decisions which, in my opinion, are more pertinent to the supremacy of the Human Rights Act over other Federal legislation about which I will have more to say later.

I have attempted to deal in detail with Counsels' submissions as I consider the point raised by Mr. Mullins an important one and one which this Tribunal ought, within the limits of its competence, to deal with thoroughly so as, perhaps, to assist in future proceedings under the Act. Accordingly, I have reviewed the authorities on this question and with the benefit of the Submissions by both learned Counsel, come to my decision.

DECISION ON PRELIMINARY OBJECTION OF RES JUDICATA

In my opinion the defence of res judicata does not apply to these proceedings. I have carefully considered the submissions of Counsel and while a number of arguments on either side would seem to merit consideration there are, it seems to me, only two questions which need to be answered. The first is whether the question to be decided in these proceedings is the same as was contested in the first proceeding. The second question is whether the parties to the arbitration proceeding are the same persons as are parties to these proceedings. If the answer to either of the foregoing questions is in the negative, then the defence of res judicata fails.

These two questions form part of the six constituents of res judicata by way of estoppel according to the leading authority on the subject, Spencer, Bower and Turner 1969 second Edition at pages 18 and 19, where the learned authors set out the necessary constituents. I think it useful to quote the entire paragraph as follows:

"The Necessary Constituents of Estoppel per rem judicatam

19. Any party who is desirous of setting up res judicata by way of Estoppel, whether he is relying on such res judicata as a bar to his opponent's claim, or as the foundation of his own, and who has taken the preliminary steps required in order to qualify him for that purpose, must establish all the constituent elements of an estoppel of this description, as already indicated in the general proposition enunciated at the commencement of this chapter. That is to say, the burden is on him of establishing (except as to any of them which may be expressly or impliedly admitted) each and every of the following:

(i) that the alleged judicial decision was what in law is deemed such;

(ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;

(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;

(iv) that the judicial decision was final;

(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;

(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive in rem.

It is two items (v) and (vi) to which I have addressed my considerations, bearing in mind that the burden of establishing each and every of the constituents is on the party desirous of setting up the defence of res judicata.

I cannot agree that the question before the Arbitrator in the proceedings before him is the same as the question before this Tribunal. It is true as Counsel has argued that there is identity of subject matter, namely, the Respondent's hearing loss. But the question remains unresolved because there must be, in my opinion, not only identity of subject matter in a physical sense but identity of subject matter in a juridical sense. According to the author of the Second Edition of Spencer, Bower and Turner, these two aspects of the matter are now better regarded as one. The "Physical Identity" of the res or subject matter, is relevant but only as part of the larger question. Whatever the determination which is found to have been made in the arbitration proceedings the same question must arise in these proceedings before the defence of estoppel can succeed. See Spencer, Bower and Turner (Supra) paragraphs 206 and 207.

Can it be successfully argued that the Arbitrator in the proceedings under the Canada Labour Code was called upon to decide the same question as this Tribunal? I think not. The Arbitrator, Mr. Weatherill studiously avoided making any finding of fact as to the Respondent Erickson's medical condition. His decision was confined to the resolution of a dispute under the Collective Agreement through the procedures provided in the Canada Labour Code and the ratio of his decision is in my opinion contained in these words:

"Thus, the Arbitrator's role is not to determine whether or not the decision was "correct", but rather whether or not it was a decision made within the scope of the discretion accorded by Article 11.6", which leads him to conclude that the Company's decision was in the exercise of its discretion which it has under that Article.

By contrast this Tribunal's task is to determine whether the complainant has, as a result of his dismissal by the Respondent Company for the reasons given in the letter from Mr. Lloyd, been discriminated against.

While the Canada Labour Code and the Human Rights Act do to a remarkable extent provide for similar consequential remedies, they are not in my opinion, conceived for the same purpose or directed towards the same goals. The Code broadly concerns itself with conditions of employment, the process of Collective bargaining and the provision of machinery for the resolution of industrial disputes. The purpose of the Human Rights Act as set forth in Section 2(a) is as follows:

"(a) Every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of Society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap."

Mr. Justice Lamar in Insurance Corporation of British Columbia vs. Robert C. Heerspink and Director of Human Rights [1982] 2 S. C. R. page 145 in describing the Human Rights Code of British Columbia, has this to say at pages 157 and 158;

"When the subject matter of the law is said to be the comprehensive statement of the "Human Rights" of the people living in that jurisdiction then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the code or in some other enactment, it is intended that the Code supercede all other laws when conflict arises.

As a result, the legal proposition "Generalia specialibus non derogant" cannot be applied to such a code. Indeed the Human Rights Code, when in conflict with "particular and specific legislation" is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law." The Supreme Court of Canada in a later decision has reaffirmed the principle enunciated by Mr. Justice Lamar. In Winnipeg School Division vs. Doreen Maude Craton [1985] 6 C. H. R. R. D/ 3014 Mr. Justice McIntyre is in accord with the views expressed by Lamar J. in the Heerspink case (Supra) and quotes with approval Monnin C. J. M. where he said:

"Human Rights Legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the Human Rights Legislation must govern."

The fact that the remedies provided for in the Canada Labour Code resemble the remedies provided in the Human Rights Act does not in my opinion render the question to be decided by this Tribunal the same or identical question that was before the Arbitrator. This Tribunal must concern itself with an alleged infringement of a right conferred on every individual within the ambit of the Act to "have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have... without being hindered in or prevented from doing so by discriminatory practices based on..... disability". Surely, this is not the same question before the Arbitrator in the former proceedings who merely found that the Respondent Company had properly exercised its discretion under the provisions of the Collective Agreement.

While I have no hesitation in finding that the question to be decided by this Tribunal is not the same question as that which was decided by the Arbitrator in the former proceedings, I have more difficulty with regard to the sixth constituent of estoppel per rem judicatem, namely:

"(vi) That the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised or their privies, or that the decision was conclusive in rem".

Having found that the burden of proving the fifth constituent of estoppel per rem judicatem has not been proven by the Complainant Company it is not strictly speaking necessary for me to make any findings as to the parties. My comments therefore in that connection are not necessary to the decision on this preliminary objection. It might be useful however to point out that the tenor of the Human Rights Act would seem to support the proposition that the Human Rights Commission has status in these proceedings and has an interest in the result which goes beyond merely representing the Complainant. It is also interesting to note that in the Bhinder and Canadian National Railway Company decision of the Supreme Court of Canada in which Judgment was rendered on December 17th, 1985 under Number 17694 the Human Rights Commission appears as a party in the style of cause in those proceedings. The Human Rights Commission was represented by Counsel who presumably played an active role in those proceedings. The Appellant, Bhinder, was represented by his own Counsel in the same proceedings. There seems to be a strong inference that the Human Rights Commission by virtue of the nature of the proceedings and those provisions of the Act which entitle it to participate in proceedings before a Tribunal or before a Court is in fact a party separate and distinct from the Complainant. See Section 40(1) and 40(2) of the Human Rights Act.

While Counsel for the Complainant Company made much of the fact that under Section 33(a) of the Human Rights Act, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the commission that "(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust a grievance or review procedures otherwise reasonably available;.....". That argument does not, it seems to me, pertain to the defence of res judicata.

It would be difficult to imagine Parliament in enacting that provision intended to close the door on an individual seeking to exercise his or her right to a hearing under the Human Rights Act. In my opinion the Section in question simply provides an alternate procedure for dealing with complaints in the expectation that those procedures may provide a more appropriate vehicle for the hearing of the complaint or grievance. It does not follow, in my opinion, that by directing a Complainant to exhaust those grievance or review procedures the Commission has barred itself from participating in the proceedings or foreclosed the alleged victim from availing himself or herself of asserting the rights afforded under the Act.

THE EVIDENCE

The evidence consisted of the testimony of Mr. Erickson and of a Mr. D. R. Bellaire who holds a Master's Degree in Audiology from Northwestern University. There were in addition a number of documents including, inter alia, audiological assessments and publications containing guidelines for Physicians in determining fitness to drive a motor vehicle. No witnesses were called by the Respondent Company which relied to a large extent on the guidelines for Physicians and on evidence elicited during cross- examination of Mr. Bellaire with particular reference to the audiological assessments or audiograms.

Mr. Erickson presented himself as a physically strong, intelligent and forthright individual of 48 years who encountered no apparent difficulty in hearing and responding to questions put to him by Counsel while wearing his hearing aid. It is perhaps worth noting that Commission Counsel's accent which was fairly strong did not appear to present any difficulties to Mr. Erickson.

Mr. Erickson worked for C. P. Transport from March, 1963 to about March, 1973 when he left to go into business for himself. While so employed by C. P. Transport he drove a tractor- trailer unit both on long distance hauls and around town. Sometime between 1978 and 1979 Mr. Erickson developed a hearing problem which led him to obtain a mechanical hearing aid or device. He worked as a truck driver after developing this condition for several different Companies and says that he encountered no problems as far as his driving ability was concerned. He produced a number of letters from officials of the Companies he worked for testifying as to his competence as a truck driver and expressing the opinion that his hearing did not affect his work performance or his driving ability. One such letter dated November 5th, 1981 from a Mr. Flint of Johnston Terminals Ltd. of Nanaimo will serve to indicate the general tenor of the several letters entered as exhibits:

"November 5, 1981 TO WHOM IT MAY CONCERN Mr. Edward Erickson has worked for me on and off for two or three years. He is an excellent worker and a professional trailer driver. If this driver has a hearing defect, it has not affected his work performance or his driving ability.

Yours truly

Johnston Terminals Ltd.

Nanaimo, B. C.

Lorence R. Flint Terminal Operations Manager LRF/ db"

In 1981 Mr. Erickson was working as a truck driver for Reg Dorman Trucking in Nanaimo when it lost a contract to C P. Transport Ltd. which it had for hauling Hog fuel and chips. It became known that Dorman truck drivers who had been laid off might obtain employment from C. P. Transport on application to that Company. Accordingly, Mr. Erickson applied to C. P. Transport for work as a truck driver, was accepted and commenced his employment on September 8th, 1981. At that time he held as he still does a Class 1 British Columbia Driver's licence entitling him to drive heavy duty trucks and equipment on the highways of the Province.

According to Mr. Erickson's evidence he was not asked to submit to audiological testing of his hearing at any time between being hired and commencing work on September 8th, 1981 and November 2nd, 1981 when he was dismissed by the Respondent Company. He did submit to a medical examination approximately one month after starting work with the Company but no details of that examination were provided by either side to this Tribunal.

Mr. Erickson testified that when employed by C. P. Transport Ltd. on the previous occasion between 1963 and 1973 he had been involved in three accidents; one where his load shifted causing the truck to fall over on its side; a second one when under slippery conditions his truck

and trailer unit got tangled up; and a third one where in icy conditions he was unable to stop quickly enough to avoid bumping into the rear of the car ahead. These accidents occurred over a ten year period and prior to the development of his hearing loss. He says that he has not been involved in any trucking accident since 1978/ 79 when he developed his hearing loss.

He stated that he had had many audiological tests and the results of these tests were produced on cross- examination and entered as exhibits.

During the short time he was employed by the Respondent Company, C. P. Transport Ltd. between September 8th, 1981 and November 2nd, 1981, Mr. Erickson was not restricted in any way in his driving activities.

After being dismissed by the Respondent Company on November 2nd, 1981, Mr. Erickson became unemployed and received U. I. C. benefits until April, 1982 when he went fishing commercially. He fished until September of 1982 then went back on U. I. C. and remained unemployed and receiving benefits until April of 1983 when he again went fishing commercially. During this period he also worked part time for Reg Dorman Trucking. He continued to fish commercially until August of 1983 when he went to work as a heavy duty mechanic for Frank Beban Logging and has continued in their employ up until the present. He currently makes $19.00 per hour as a heavy duty mechanic with Frank Beban Logging. The work requires him to travel some 200 miles from his home into the bush where the Company has its logging operation. He works six weeks away from home in the bush and comes out for ten days. He is married with a family and says he does not particularly wish to spend that much time away from home. He says that he prefers steady employment with a Company such as the Respondent as against the uncertainties which surround employment in the logging industry affected as it is by labour disruptions, weather conditions, economic fluctuations and so forth. He says that while the remuneration may not be as good the conditions are more favourable working for C. P. Transport and he mentioned a better Pension Plan, seniority and less time off as being important factors in his thinking.

With regard to his hearing aid Mr. Erickson stated that he has two such devices, one obtained through a private source and the other better quality one which he obtained through the Ministry of Health. He keeps the orginal poorer quality aid as a spare. Both hearing aids are battery powered and Mr. Erickson says that he carries spare batteries in his pocket at all times. When the batteries wear down a noticeable noise in his ear warns him of that fact. He says he experienced discomfort initially when he first used a hearing device in 1977- 78 and that it took about three weeks for his ear to adjust to the ear mold and since then he has suffered no discomfort. He says he wears his hearing aid continuously during the day and has never felt the need to turn it off even when working in a noisy environment. He hunts with a 7mm Magnum and a 300 Savage Rifle which he owns. He wears his hearing aid while hunting and has, he says, experienced no discomfort while firing these weapons.

In cross- examination Mr. Erickson produced at Counsel's request the results of audiological testing extending over a period of several years from 1979 to 1985.

The first of the audiograms produced is dated September 4th, 1979, the second is dated December 11th, 1981, the third is dated December 3rd, 1982, the fourth is dated February 15th, 1983 and the fifth and final audiogram is dated October 3rd, 1985. The audiograms were all duly entered as exhibits. Mr. Erickson's current Driver's licence was issued February 20th, 1984 and according to Mr. Erickson, he was not required to submit to a hearing test prior to the issuance of his licence since the issuing authority had access to audiograms already on file with the Ministry of Health.

Mr. Erickson denied encountering any difficulty in communicating with fellow employees in the workplace except if the person to whom he was conversing failed to articulate properly.

He said that he could adjust the volume of his hearing aid by turning a small dial and that he maintains the volume at what he described as a moderate level at all times and even while riding in the cab of his truck.

He said that he has a loss of hearing in both ears but that he only wears his hearing aid in one ear because his loss was not so severe as to require that he wear an aid in both ears.

When asked during cross- examination regarding the circumstances of his dismissal he stated a Mr. Kinnaird had told him the bad news and when he asked him why he was being terminated Mr. Kinnaird was not able to tell him. He then wrote a letter to Mr. Lloyd, the General Manager of C. P. Transport at Nanaimo, who replied by letter dated November 13th, 1986 in which the reasons for his dismissal were as stated in that letter. The letter of November 13th, 1986 from Mr. Lloyd was referred to in the Introduction.

Mr. Erickson was questioned in detail on the type of unit he drove while employed by the Respondent Company, the procedures he followed in loading and unloading his unit, the physical layout at the place where he unloaded including manoeuvres of his truck and the amount and nature of the vehicular traffic present. He identified from photos produced to him a tractor-trailer unit similar to the one assigned to and driven by him. He loaded his unit by positioning it under a hopper that loaded chips into his trailer in a relatively short space of time. It was necessary for him to climb onto a platform or onto the truck in order to observe the loading operation. He agreed that during such operations there were at certain locations logging trucks, lumber trucks and forklifts present in the loading area.

In unloading or dumping the trailer unit it was not uncommon practice for him to back the trailer unit onto a ramp and after unhooking the tractor unit the trailer on the ramp would be mechanically tipped so as to allow the chips to escape and flow out from the rear of the unit as depicted in the photograph Respondent's Exhibit Number 9. Mr. Erickson said the responsibility for unloading the trailer by these mechanical means fell on the person who operated the dumping mechanism. He said he made eight or nine trips a day hauling loads and that the unloading operation took four or five minutes to accomplish. At times there would be 14 or 15 trucks lined up waiting to dump and he would then wait his turn. After loading his unit it was his responsibility to climb up to the top of it and pull a tarpaulin over the chips to prevent them from blowing away while driving on the highway. He could accomplish this task in three or four minutes.

Mr. Erickson in answer to questions by Counsel for the Respondent Company stated that he had started driving when he was 15 years old, had worked his way up from farm tractors through pickups and delivery trucks to logging trucks and dump trucks. He obtained his Class 1 licence or its equivalent in 1961 or 1962 having successfully passed the prescribed written and practical tests. The licence entitles him to drive large highway truck units within the Province.

The Class 1 licence presently held by Mr. Erickson does not entitle him to drive taxi cabs or passenger buses. Restriction Number 24 on the licence form requires that the holder drive with an approved hearing aid but interestingly this restriction is not applicable to Mr. Erickson's Class 1 licence. It is his understanding that the licence which he holds legally entitles him to drive commercial vehicles including heavy duty trucks on the highways of the Province.

With regard to income earned by Mr. Erickson the evidence was that in 1981 his total earnings for that year were $15,081.76; and for 1982 they were $16,127.24; and for 1983 his gross earnings were $12,683.40; and for 1984 his earnings were $35,722.00; and for 1985 his earnings for that year amounted to $35,757.77 for a total of $115,372.01, according to my calculations.

There was some evidence as to relative benefits as between the C. P. Transport Pension Plan and the I. W. A. Union Pension Plan but no precise figures were mentioned. Mr. Erickson was of the belief that the C. P. Transport Pension Plan was more attractive. He was also of the opinion that notwithstanding adverse economic conditions in this Province recently, he would have been more secure in his work if he had remained with the Respondent Company after being hired by it in September of 1981. He believes that the seniority provisions in the Collective Agreement would have protected his job during those years.

He was questioned in detail by Counsel for the Respondent Company concerning the 7mm magnum and the 300 Savage rifles with which he hunts. In summary, it seems that the 7mm magnum makes a loud bang when fired but that the noise does not bother him to the extent that he has to turn off his hearing aid.

The next witness was Mr. David Bellaire who presently resides in Evanston, Illinois and who was for a period of time employed by the Ministry of Health of this Province. Mr. Bellaire joined the Ministry in 1977 for a brief period of four months to assist in the formation of the B. C. Speech and Hearing Program. He then left to assume a Faculty position at Northwestern University from which Institution he holds a Master's Degree in Audiology. He returned in June, 1979 when he rejoined the Ministry of Health of the Province and continued as a clinical and coordinating Audiologist for the various Health districts that he served. He also maintained an appointment at the University of British Columbia as a clinical adjunct to Faculty members. In 1984 he returned to the United States and conducted some private consultations in organizations concerned with rehabilitative medicine. Mr. Bellaire's academic career progressed from an undergraduate degree from the State University of New York in 1974 to attending Northwestern University and its medical school from which he received a Master's Degree in Audiology with concentration on auditory neurophysiology and biomedical engineering, relative to biomedical development of auditory prosthetics, or hearing aids.

He has completed all but his dissertation in auditory neurophysiology leading to a Doctorate. He has published 16 to 18 papers in the areas of auditory neurophysiology and hearing aid design and application. He has been a Faculty member at Northwestern University Medical School and a lecturer with full Faculty privileges where he has conducted extensive research, teaching and publication. He has also been the recipient of the Presidential award for outstanding research and services for the handicapped on two occasions. In 1984 he returned to the United States where he conducted private consultations with agencies and organizations involved in rehabilitative medicine. He secured his M. B. A. from Northwestern University in June of 1986.

In his evidence to which I will refer in detail and at some length, Mr. Bellaire described his field of expertise as the science of hearing and its associated disorders. He made it clear that his expertise relates to the non- medical diagnosis of a hearing loss and a non- medical remediation of that hearing loss through various aids and appliances.

(a) Hearing

He was asked to explain how we hear sounds. A sound, according to Mr. Bellaire is measured in decibels. A decibel is not a physical measurement, but rather, it is a logarithmetic relationship between two pressures or powers which can be physically defined relative to sound. The pressures are defined in dynes per centimetre squared.

The Human hearing system is not equally sensitive to all sound pressures or powers and is in fact responsive only to a certain limited range of sounds. Mr. Bellaire's evidence continued as to how we hear sounds and he described it as a physical disturbance in the air much like a ripple one would see in a pond. The sound may have different frequencies or pitch and also varying intensities. There are some sounds which are beyond the Human hearing capacity. A low frequency sound such as a Motor hum, typically has a very broadened wave length and the wave lengths are measured in cycles per second or hertz. Sounds are presented to us at a variety of intensities, thus every frequency that we are exposed to may also present itself with a variety of intensity factors according to Mr. Bellaire.

He stated that hearing loss takes a number of forms. It may typically refer to either a loss of hearing sensitivity, or hearing, or ability to detect the presence of a sound of any specific frequency. It may also refer to a loss of discrimination or clarity of sound. In his words "the person hears the volume of speech or other sounds, but is unable to appropriately distinguish that sound from an alternative sound. So, those are the two primary dimensions that we classically refer to in hearing".

He stated that an electronic device known as an Audiometer is used to measure hearing sensitivity and actually qualify the characteristics of the human Auditory system. This instrument is capable of generating various pure sounds or signals as well as a variety of different types of noise.

He stated that for the purposes of setting licensing standards for drivers and in an effort to quantify a hearing loss decibels are used. Where decibels are used to define the magnitude or quantum of the hearing loss what is looked at is the relationship between a person's hearing

sensitivity, i. e. their ability to detect a sound, and that ability expressed by comparison with a normal hearing individual based on internationally recognized standards. According to Mr. Bellaire testing of a vast number of human subjects has established recognized norms and at a specific pitch or frequency a normal hearing person hears at 0 decibels. As one progresses up the scale from say 0 to 25 decibels one still falls within the normal hearing range for a specific frequency. As one progresses further up from 25 to 40 decibels at that frequency one encounters what can be described as a mild impairement and so on up the scale until one encounters a profound or severe hearing loss.

(b) Hearing Aids (see also page 61 - 62)

Mr. Bellaire described hearing aids and what they do at some length and I think it would be useful to quote from his testimony verbatim commencing at page 137 of the Transcript. "Q Could you please describe what does a hearing aid? A What does it do? Q Yes. A As the name implies, it's an aid to hearing. It is typically provided to an individual who suffers from a loss of hearing sensitivity, the cause of which may be any number of things. It's primary purpose, from a generic standpoint, is to make sound louder.

Traditionally, hearing aids have been amplifiers, and amplifiers alone. They have been designed to take a broad spectrum of sound, pipe it into a person's ear at increased amplitude in an effort to overcome a loss of sensitivity, or a loss of hearing ability that the person demonstrates.

A lot of problems arise when one applies a traditional hearing aid to many forms of hearing loss, and that has given rise, the impetus to us in the biomedical sciences to look at tailoring, and specific development of pitch selective amplification devices for hearing aids. These are hearing aids which take a certain spectrum or range of pitches or sounds, and boost them by varying magnitudes to suit the specific needs of the individual.

There are a number of protective features that canbe installed in some hearing aids that protect an individual from over- exposure to loud sounds. The standard argument that we still hear in the field which is totally fallacious, as far as I'm concerned, is that a person who has a hearing aid can't function in a noisy environment, because the ambient or outside noise is brought into the hearing aid and magnified or amplified to the same extent that warning sounds, or speech, or other important cues are amplified or magnified. That is true for standard or traditional hearing aids. It is not true for various instruments which incorporate a number of output controls or input controls, or other forms of technical apparatus, structures which are designed to prevent over-exposure.

So hearing aids can do more than just amplify sound, that's what I'm attempting to demonstrate to you.

Q You mean that some hearing aids are capable of trapping undesirable levels of sound?

A That is correct. We have a great concern when we apply hearing aids to a damaged ear, that we don't present the individual with an increased risk of further damage to his hearing system as an consequence of over- exposure to noise. We don't want an individual wearing a hearing aid

who has a loudness tolerance, or loudness discomfort problem to be exposed to an explosion that's already too loud for anyone."

With respect to undesirable sounds once again referring to the testimony of Mr. Bellaire at page 139 of the Transcript, as follows:

Q But, you said that those kinds cut out undesirable sound. Are they eliminated or reduced in sound wave and still audible?

A If I follow your question correctly, there are certain kinds of hearing aids, and I'm not suggesting that they are all of this type, I just use this as an example, which, when exposed to high intensity inputs, will cut the amount of amplification that they provide to that input to zero.

So, it is as though the individual is being exposed by their hearing aid to no greater intensity than you or I would be exposed if we entered that same situation.

Q And has this sound, would it have reached a sort of level to be audible?

A It should be audible. It would be audible if it was a high intensity sound. We want it to be appropriately audible. We don't wish to make that sound necessarily louder, however. If it's already more than audible, more than sufficiently loud for the hearing impaired listener, why expose him to further amplication.

Q So, if it's audible, it won't be amplified by the device? A It may be amplified to a lesser extent. There are a number of electronic criteria that we install or set within an instrument of this type to preclude the presentation to the human ear of sounds which are potentially injurious to that damaged ear." Again, Mr. Bellaire was questioned as to the design of hearing aids and whether the use of such a device impairs the ability to locate the source of sounds. Again referring to Mr. Bellaire's evidence at page 141 of the Transcript we read as follows:

"As I mentioned earlier, hearing aids can be tailored or designed to meet the specific needs of the listener. They can be designed so as to amplify selective sounds to varying degrees of magnitude, depending upon the input or the output characteristics of that hearing aid.

Q Now, does the use of a hearing aid impair the ability to locate the source of the sounds?

A It may not augment, but I doubt that it impairs. It depends on the application, the degree of hearing loss, and so forth, but I sincerely doubt that you'll ever find that it impairs localization capacity."

He was then asked by Commission Counsel if an electronic device such as a hearing aid is subject to failure and he agreed that it was. He stated however that if an individual is provided with an appropriately designed instrument that is adequately maintained and if that individual is properly instructed with respect to its use and makes appropriate adjustments to the device then its failure should be noticed immediately. When asked how an individual user might recognize

that his device was defective or that the battery was failing, Mr. Bellaire said and I quote from page 143 of the Transcript:

"A There is a number of means by which the individual should recognize failure or defect in a hearing aid. It's very similar to how you would recognize a failure in your own hearing. You would notice a hearing loss, a decreased proficiency to hear, and communicate, and you may notice a number of noises or other alterations within the hearing aid. You may notice a deterioration in the qualify of sound, and the discriminatory, or discrimination capacity that you have for that sound. You may notice a number of sounds, such as chirping sounds, and other sounds, to indicate that the battery is no longer providing sufficient current to activate the hearing aid."

According to Mr. Bellaire if the hearing aid is properly fitted to the individual's needs there would be no reason for the person to turn it off and that where this does occur it is usually attributable to an appropriately designed or poorly fitted device.

Mr. Bellaire can find no professional literature which would support the proposition that hearing aid users are more prone to car or truck accidents than other persons.

(c) Audiograms

Mr. Bellaire tested the Complainant Mr. Erickson on several occasions and in particular on December 11th, 1981 and again on December 3rd, 1982. The results of these testings are evidenced in Audiogram dated December 11th, 1981 and marked Respondent's Exhibit 11 and Audiogram dated December 3rd, 1982 and marked Respondent's Exhibit 4. There were three other audiograms presented in evidence which were the results of testing by other persons. I intend to make reference to all five audiograms and to reproduce the Exhibits themselves as these graphs and test results form an important part of the evidence.

According to Mr. Bellaire, he first met Mr. Erickson in the late fall of 1980 at which time Mr. Erickson was expressing a concern about the servicing and supplies for his hearing aid. At that time Mr. Bellaire was responsible for the opening and development of a clinic servicing the central Vancouver Island Health District and located in Nanaimo. Mr. Erickson resided in Nanaimo and as a consequence his file had been transferred from Victoria and came to Mr. Bellaire's attention through normal channels. According to Mr. Bellaire, the next meeting with Mr. Erickson was in 1981 at which time he conducted an audiological evaluation and the results of this examination are evidenced in the Audiogram dated December 11th, 1981 and marked Respondent's Exhibit R- 11. Mr. Bellaire described in detail how he completed the audiogram which he described as a re- evaluation indicating that Mr. Erickson had been seen by a B. C. Ministry of Health Clinic previously. After describing in detail how he completed the graph, Mr. Bellaire concluded that Mr. Erickson's hearing sensitivity in an aided condition would be referred to as border line normal.

Mr. Erickson was again examined on October 3rd, 1985 and the results of that examination are incorporated in the Audiogram marked Respondent's exhibit Number 6. According to Mr. Bellaire the data which was obtained in October of 1985 is not clinically or statistically

significantly different from the data which he obtained in December of 1982 and what slight differences there are, are normal and can be attributed to variations in the examiner's attentiveness, more often, however, in the attentiveness and responsiveness of the subject. Many extraneous factors may effect the subject's responses to the testing, including the state of his health at that time, tiredness, excessive caffeine, etc. In other words, according to Mr. Bellaire, slight variations are normal and are to be expected.

With the exception of one audiogram done in February of 1983 marked Respondent's Exhibit 5, all other testing performed on Mr. Erickson and incorporated in audiograms to which he, Mr. Bellaire, had been referred to contained no significant variations. These variations were what one might expect to see in stable hearing. When asked to comment on the results of the examination conducted in February of 1983, Mr. Bellaire commented as follows, at page 159 of the Transcript:

".... The only comment that I wish to make is that there are apparent deteriorations at certain pitches or frequencies in the 1983 record when referenced to the December 1982 record. This was rather surprising to me, in that this gentleman had demonstrated a history, at least since he had been seen by the Ministry of Health, which dated back to 178 or 179, of stable hearing sensitivity or hearing detection ability.

All of a sudden we're presented with evidence to suggest that his hearing sensitivity in the right ear, to a slightly greater extent than the left, has deteriorated. I find no clinical evidence to support that deterioration, and based on evidence that I have with respect to the manner in which this examination was conducted, I perhaps would be suspicious of the validity of that test. According to Mr. Bellaire whatever deterioration is demonstrated in the 1983 audiogram, is not reflected in the October, 1985 audiogram. He stated that two things might account for the discrepancy. One being a fluctuation in Mr. Erickson's hearing for which there was not sufficient data on which to base a clinical judgment or possibly a bad cold resulted in a slight hearing impairment. He concluded as follows:

"In light of an absent history, however, and by that I mean that in all of the evidence that I secured from his managing ear, nose and throat surgeon, this man has a clinically clean ear. He has not had a history of ear pathology, or fluctuating hearing loss. So that would lead me to belive that based upon some of the evidence that I see from this charge, and some of the anecdotal evidence that I have in association with this record, to believe that these data are perhaps not accurately reflective of this man's true hearing capacity at that time.

Q You mean the February '83-- A That is correct." In order to understand and evaluate Mr. Bellaire's evidence it is necessary to reproduce the several audiograms to which he referred during his testimony. I therefore reproduce the audiograms in chronological order on the next page commencing with the Audiogram dated September 4th, 1979 and concluding with the Audiogram dated October 3rd, 1985.

The Exhibit Numbers are noted on the top right hand corner of each Audiogram reproduced. The uppermost section of the audiologic assessment identifies the individual by name, age, sex, etc. and containing the date on which the assessment was done. There is also in the last line the

words "re- eval" which indicates that the individual had been previously tested and the report is therefore a

(5 Figures dated: September 4th, 1979 December 11th, 1981 December 3rd, 1982 February 15th, 1983 October 3rd, 1985)

re- evaluation. As you come down on the right hand side of the chart there are reference levels specified. According to Mr. Bellaire these are rigorous internationally accepted calibration standards to which the testing equipment was routinely subjected to make sure that the data that was collected validly represented the person's actual hearing capacities. The word "audiometer" simply indicates the kind of instrument that was used. In the box entitled "responses" is indicated how valid and reliable the subject who is being tested is. If for example the examiner felt that a patient was trying to feign a hearing loss it would indicate other than consistent and rapid responses.

The actual graph to the left and in more centralized location is what is referred to as "an audiogram". There are numbers on both axes. Across the top are the frequencies in hertz from 125 to 8,000. These frequencies according to Mr. Bellaire are tested on a routine basis specially during re- evaluations.

The numbers representing frequency in hertz refer to different pitches and 125 for example would be a low pitched fog horn type of sound ranging up to 8,000 which would be like a high pitched bird whistle. According to Mr. Bellaire the frequencies which are important for the perception and understanding of speech fall in the range of from about 500 to about 3,000 hertz with 500 representing vowel sounds and the higher frequencies to around 3,000 consistent with a sibilant and fricative speech sounds.

Down the scale on the left side of the graph where it says "hearing threshold level in decibels" the numbers refer to a measure of the intensity magnitude or volume of sound. The farther down on the chart on the left hand side the louder each of these pitches or sounds must be before an individual is barely able to respond to it.

The markings on the chart refer to the individual sensitivity or ability to respond to various pitches at various intensities. A circle represents the right ear and a cross or "X" mark represents the left ear. For example a circle appears at the 40 decibel level at a frequency of 250 hertz. It would indicate that that individual barely responded in a consistent fashion to stimulus or signals presented to him at that pitch. This is designated as his threshold.

As one goes across the chart one sees an arrow mark falling at frequency pitches from 250 through 4,000 hertz. These refer to bone conduction measurement and is an alternative measurement of hearing sensitivity. Above all of these arrow or hash marks are a series of "s's" connected by a dotted line. These refer to what is called "sound field of measurements". These are readings taken while the subject is wearing his or her hearing aid allowing the subject to set the volume at a comfortable level while the examiner has hearing sensitivity in an aided capacity. These marks represent more sensitive hearing.

To the right of the graph and in a box marked "PTA" there is inserted on the two reports conducted by Mr. Bellaire dated December 11th, 1981 and December 3rd, 1982, respectively, decibel readings for the right and left ears. There does not appear to be any figures inserted in the audiograms of September 4th, 1979, February 2nd, 1983 or October 3rd, 1985.

Further down in the lower section of the chart or audiological record there are measurements related to hearing detection or sensitivity and to perception clarity and understandability of speech. These findings appear opposite the words "speech audiometry". On the left hand side are the materials and measurements used by the examiner to obtain the results in the next two columns pertaining to the right and left ears. The testing for the right and left ears for speech thresholds is recorded in decibels and according to Mr. Bellaire the examiner makes sure that the data collected is consistent with the individual's hearing detection as measured through other means. This is a measure of reliability and below those figures opposite "speech discrimination" is contained very important information concerning speech perception. The examiner presents the subject with a number of monosyllabic or single syllable words that are phonetically balanced. This means that the words are constructed to represent their occurrence in the English language as normally experienced. These are presented to the individual to determine how well he or she can discriminate or understand fine differences as between words like "bee" and "pea", "me" and "kneel" and so forth.

As indicated earlier Mr. Bellaire was of the opinion, after reviewing the different audiological records filed with the Tribunal, that the data recorded therein was, with one exception, consistent with his findings as recorded in the two assessments of December 11th, 1981 and December 3rd, 1982. In commenting on his findings as they apply to. Mr. Erickson he stated that at the frequency of 250 hertz and 40 decibels Mr. Erickson barely responded in a consistent fashion to a stimulus or signal presented to him at that pitch which indicated that this was his hearing threshold for the right ear and similarly for the left ear a hearing threshold of 45 decibels at that frequency. In an aided capacity the "s" marks on the chart indicate a more sensitive level of hearing and Mr. Bellaire described his sensitivity as "borderline normal" in an aided condition. With respect to the measurements related to sensitivity and perception and understandability of speech Mr. Bellaire's findings with respect to the both ears correspond to a speech reception threshold at 52 decibels. According to Mr. Bellaire, Mr. Erickson demonstrated a surprisingly good performance giving his loss in hearing sensitivity. He states as follows at page 155 of the Transcript:

"in spite of that, that degree of hearing impairment, we can present this individual with speech at a magnitude, and in a situation where even with a hearing loss, he is perceiving or understanding extremely well, as reflected by his 96 and 100 per cent scores in the left and right ears respectively."

Under cross- examination Mr. Bellaire was questioned regarding the audiological assessment of December 11th, 1981 which he conducted on Mr. Erickson. He indicated that the markings on the graph, the circles and the x's for the right and left ears are marked in 5 decibel increments and defined threshold as the lowest intensity point at which the patient consistently responds with at least a 50% response rate to a specific sound.

With regard to Mr. Erickson's speech reception threshold Bellaire had reported a 52 dB HL. With respect to dB masking this is a test which is designed to determine whether there is any significant disparity between sensory or neuro- performance of the two ears and in Mr. Erickson's case no significant disparity was indicated.

Mr. Bellaire was questioned regarding noises in the cab of a truck masking sound and the questions and responses are recorded at pages 217 and 218 of the Transcript and are reproduced here:

"You used masking here, and I think you used it in your evidence yesterday, and I think, I believe, this morning too. Noises in the cab of a truck masking sound?

A That's correct.

Q Did you do any testing, was there any testing revealed on this Exhibit R- 11, in which you ran masking sounds, and then determined Mr. Erickson's ability to hear under those conditions?

A On this audiometric record, no there is not. However, on a record that was also completed on December 11th, which I presume you have a copy of, although it's yet to be entered as an exhibit, there is what is called a hearing aid worksheet, and this is an extensive -- I'd be pleased to show it to you, it's a worksheet which allows us to attest to assess Mr. Erickson's performance with his hearing aid in a variety of simulated conditions, several of which involve the presence of simulated background noises.

Q What did you find?

A I found that at a normal conversational level on December 11th, 1981, in the presence of his hearing aid, and in the presence of an equally intense background of noise -

Q I'm sorry, in the presence of his hearing aid you mean wearing his hearing aid?

A Wearing his hearing aid, and in the presence of an equally intense background of noise, he was able to respond to a normal conversational stimulus without other cues, without visual cues, without contactual information, with an 80 per cent or better accuracy level."

According to Mr. Bellaire he established an ideal unaided performance level where Mr. Erickson was presented material consisting of single syllable words at an unrealistically high 82 decibel level and in which he performed with 100% accuracy in his right ear and 96% accuracy in his left ear. Mr. Bellaire testified that he then prepared, designed and fitted a hearing aid which allowed him to maximize Mr. Erickson's communicative efficiency so as to come close to that score on equivalent test or tests of equivalent difficulty. According to Mr. Bellaire, Mr. Erickson performed 88 to 90% accuracy in the absence of any background of noise and at 80% accuracy in the presence of an equally intense background of noise wearing the hearing aid.

Notwithstanding the poor quality of the Audiograms submitted in evidence it was possible to summarize the results for the tests conducted at various times both by Mr. Bellaire and others

with respect to Mr. Erickson's hearing. A summary of the results as recorded on the graphs appears on the next page:

500 hz 1000 hz 2000 hz Average Sept. 4th, 1979 (Exhibit R- 2) - Right ear 40 55 60 51 - Left ear 35 60 65 53

Dec. 11th, 1981 (Exhibit R- 11) - Right ear 50 55 60 55 - Left ear 45 70 60 58

Dec. 3rd, 1982 (Exhibit R- 4) - Right ear 50 55 55 53 - Left ear 50 75 60 61

Feb. 15th, 1983 (Exhibit R- 5) - Right ear 45 70 65 60 - Left ear 50 75 70 65

Oct. 3rd, 1985 (Exhibit R- 6) - Right ear 50 60 60 56 - Left ear 50 60 60 56

It should be noted that the highest hearing loss appears in the graph which accompanies the Audiogram of February 15th, 1983 (Exhibit R- 5). The results of this testing were viewed with some suspicion by Mr. Bellaire. Apparently the testing was conducted by a Mr. Eric Rueben at the request of the Respondent Company. The average loss for the right ear taken from the test results as shown above equal 55 decibels. For the left ear the average decibel reading is 58. If one disregards the test of February 15th, 1983 an average decibel reading for the right ear is 53.7 and for the left ear is 57 expressed in decibels.

With respect to the results of the testing done on October 3rd, 1985, Counsel for the Respondent questioned Mr. Bellaire as to why the readings for both ears were the same at all three ranges, i. e. the decibel level was 50 at 500 hertz for both ears; 1000 hertz at 60 decibels for both ears and at 2000 hertz at the 60 decibel level for both ears and commented on the fact that the readings for both ears were the same as opposed to a disparity between the two ears recorded in previous tests. Mr. Bellaire explained that the similarities in the readings for both ears in the October 3rd, 1985 test was not common but not unusual and that it could be explained by factors he previously mentioned and that changes in one direction or another of 10 decibels is not terribly significant between evaluations. Questioned further in that regard at page 228 of the Transcript the following question and answer appears.

"Q Are you saying that when hearing is lost, it can come back?

A I'm not saying that. I'm saying that there aresome test retest reliability factors which impact on individuals ability to respond to a test condition. An individual might be examined at 8: 30 in the morning on one day, and six months later might come in and be examined at 4: 00 o'clock in the afternoon after having worked a fairly rough day. Fatigue factors, attention factors, and other human related factors will always impact to a certain extent the subjective performance of an individual."

Mr. Bellaire was questioned extensively on the functioning of hearing aids at the present stage of development, their effectiveness and their characteristics. His evidence in that respect can be summarized as follows:

1. Hearing aids can and are designed so as to selectively increase the intensity of sound at varying cycles or hertz given a moderate hearing loss. For example according to Mr. Bellaire it is possible to provide to an ear frequency specific amplification at 2,000 cycles with negligible amplification at 1,000 cycles and below and this can be done in one instrument for several different frequencies.

2. The instrument can reduce or increase frequencies selectively and by what is described as a frequency specific gain control" designed into Mr. Erickson's hearing aid the instrument amplifies specific pitches or frequencies to meet his specific needs.

3. Mr. Erickson's instrument provides him with some acoustic gain or amplification boost in all three frequencies at 500, 1000 and 2000 hertz. When he turns the volume up or down it affects all three frequencies equally within some limits.

4. Every hearing aid, including Mr. Erickson's, is designed and contains what is described as a "peak clipping device" which suppresses automatically sudden bursts of sound or loud noises from being amplified. Mr. Erickson's aid possesses a further refinement which is described as "input percussion". This feature cuts in long before the saturation point or limits of the amplifier is reached thus precluding sudden unwelcome intrusions of loud sounds such as the sound of a gunshot from being amplified by the aid thus causing injury or damage to the ear. The device in a matter of milliseconds reduces the gain or the volume that the amplifier provides.

(d) Guidelines for Physicians

Counsel for the Respondent Company produced and filed as Exhibits publications of the British Columbia Medical Association dated 1978 and 1982 respectively and entitled "Guide for Physicians in Determining Fitness to Drive a Motor Vehicle". These publications were printed and distributed. by the Motor Vehicle Department as a service to British Columbia Physicians. Apparently, the Guide for Physicians contained in the two publications mentioned have not been formally adopted and/ or promulgated by the Government of British Columbia, but the publications, Exhibits R- 12 and R- 13 do contain this notation "The Superintendent of Motor Vehicles has agreed to accept the standards recommended in this guide in determining whether an applicant for a driver's licence is medically fit to drive". In the 1978 publication, Exhibit R-12, hearing is dealt with at page 15 under Paragraph 3.0 to 3.3 inclusive. In the 1982 publication hearing is dealt with at page 15 under Paragraph 3.0 to 3.3 inclusive in a more extensive manner than in the earlier publication.

Mr. Bellaire was questioned with regard to statements appearing in both the 1978 and 1982 guides with respect to hearing. It appeared that Mr. Bellaire who was employed by the Ministry of Health and charged with the responsibility of conducting audiological testing of individuals seeking a licence or renewal of a licence who were referred to him by Motor Vehicle's Branch applied certain standards incorporated in a directive from Mr. G. David Zinc, Director of Speech and Hearing, dated April 10th, 1980, marked Exhibit C- 12. This memorandum or directive sets out the corrected hearing loss standard for the driver of a heavy commercial vehicle at no greater than 40 decibels averaged at 500, 1000 and 2000 hertz in one ear.

With regard to hearing aids it is stated at paragraph 3.3, page 2 of the Memorandum as follows:

"It is felt that the quality and reliability of hearing aids have been improved to the point where a properly selected and fitted aid can now be used to bring the hearing of a professional driver up to the minimum level required for safety."

These were the standards Mr. Bellaire used in approving Mr. Erickson's suitability to drive heavy commercial transport vehicles when he tested him on December 11th, 1981. At which time he more than met those standards for a corrected hearing loss.

The 1978 Guideline for Physicians contains no recommendation for corrected hearing loss but does set standards for an unaided hearing loss and states in paragraph 3.2 as follows:

"An average loss of more than 40 decibels in both ears is significant if the applicant is driving a heavy commercial transport vehicle".

Both the 1978 and 1982 Guidelines for Physicians contains statements questioning the value of a hearing aid in improving the hearing of the driver of a noisy transport or commercial vehicle and conclude "that passenger bus drivers and heavy commercial transport drivers (Class 1, 2, 3 or 4 licences) should not have to depend on a hearing aid to bring their hearing up to a safe level". See paragraph 3.3 of the 1982 Guide for Physicians.

According to Mr. Bellaire the 1978 Guide for Physicians relied on 1964 I. S. O. Standards which are not recognized by the American Council of Otolaryngology, or the Canadian Council of Otolaryngology, and is an outdated standard. When questioned concerning the value of audiometers in determining exact degree of hearing loss and in particular with reference to Paragraph 3.1 of the 1978 Guide for Physicians the following questions and answers appear at pages 250 and 252 of the Transcript.

"Q Now, paragraph 3.1 talks about how audiograms should be done, and the last sentence says;

"The audiometers used by the Provincial Public Health Service are suitable for screening purposes only, and are not satisfactory for determining the exact degree of hearing loss."

What do you have to say about that?

A Not a great deal. I mean, this is obviously, we're now starting to talk about the political impact, or the political beliefs of physicians versus audiologists, as you observed in opthomology versus optometry. I take great exception to that. Certainly, every national and other provincial body has recognized the existence of the Provincial Public Health Service, and in this instance they are referring to the Provincial Public Health Service, Public Health Nurse screening audiometers. They are not referring to the Ministry of Health Clinics; the Ministry of Health Clinics were not well- established beyond a pilot program stage until 1978 or '79."

It is worthy to note that the criticism contained in the 1978 Guide for Physicians is somewhat modified in the 1982 publication where no mention is made as to the reliability of audiometers. It

should be noted as well that the 1982 Guide for Physicians has increased the level of hearing loss permissible for the drivers of heavy commercial vehicles from the 40 decibel average loss recommended in, 1978 to hearing loss of not greater than 55 decibels, averaged at 500, 1000 and 2000 hertz, in the better ear. See Paragraph 3.1.3 of the 1982 Guide for Physicians. These levels in both cases refer to permissible levels without the assistance of a hearing device.

In commenting on the 1978 Guide for Physicians, Paragraph 3.3 Mr. Bellaire was questioned by Counsel after quoting that Paragraph as follows:

"..... You had that handbook, why do you keep talking about it being permissible to drive with a hearing aid when the manual says otherwise?

A I will not respond to a question that repeatedly asks me about a 1978 standard. What I have said to you earlier still applies, Mr. Mullins. I was privy to a 1981 standard, which permitted, which in my estimation -- not in my estimation, but as far as the evidence demonstrated to me, suggested that the B. C. Medical Association had been updated and further educated on the impact and technology of hearing aids, their appropriateness, their reliability, and their usability in a variety of situations. That is why the standard was revised. It did not reflect the 1978 standard. It was on that basis that I made the recommendations and on the basis that I cleared Mr. Erickson."

According to Mr. Bellaire changes in the Guide for Physicians reflect the uncertainty that the Medical Community has had with respect to the efficacious use of hearing aids. He agrees that Mr. Erickson barely met the uncorrected hearing loss standards in the 1982 Guide for Physicians. The 1981 standards permitted the use of a hearing aid and Mr. Erickson more than met the 40 decibel standard then in effect.

The 1978 and 1982 Guide for Physicians contained comments regarding the role of hearing in driving. The 1978 comment as contained in Paragraph 3.0 reads as follows:

"A loss of hearing acuity is usually well compensated for since most people who are hard of hearing are quite conscious of their disability and tend to be more cautious and alert and to make more use of their rear- view mirrow than the average nonhandicapped driver. There is some evidence, however, that total deafness is associated with an increased accident risk."

The 1982 Guide paragraph 3.0 reads as follows:

"Although there is still relatively little scientific information available about the effect of impaired hearing on driving safety, two recent American studies do appear to show that loss of hearing is associated with an increased accident risk. Unfortunately there is still no data available to show how great the hearing loss must be before a detectable increase in accidents occurs."

After reading that paragraph to Mr. Bellaire, Counsel asked him if he had obtained the recent American Studies referred to. Mr. Bellaire commented that. he had extensively reviewed one of the studies referred to and his conclusion was that there was no data presented to show how great the hearing loss must be before a detectable increase in accidents would occur. He differentiated

between profound deafness and hearing impairement and stated that there is a significant difference between a hearing loss of moderate degree and a hearing loss of severe or profound degree.

He stated the fact that Mr. Erickson does not experience a localization problem is clinically surprising. Two hearing aids would restore or enhance the localization capacity that individuals with normal hearing realize. However, Mr. Bellaire was unable to demonstrate a clinical necessity on the basis of communication grounds in Mr. Erickson's case.

(e) Noise levels

With regard to noise exposure in the cab of a truck the maximum permissible consistent exposure as established by the Worker's Compensation Board is 90 decibels for an 8 hour period. Referring to the 1982 test with a 50 plus 32 hour total of 82 decibel effect Mr. Bellaire agreed that each increase in decibels is more significant than a mathematical difference between that figure and the 90 decibel figure established by the Worker's Compensation Board since it is based on a logarithmetic scale. However, according to Mr. Bellaire any person whether hearing impaired or not could be in trouble with that intensity of noise on a continuous level without a break for an 8 hour period. Mr. Bellaire stated "Mr. Erickson is being exposed to no greater intensity in the cab of a truck than a normal hearing operator for all practical purposes". At page 269 of the Transcript Mr. Bellaire was questioned regarding noise levels as they might be in the cab of a truck and the questions and answers are reproduced here as follows:

"Q Are you saying if the sound in the cab was only 10 decibels, let's say, not 90, but 10, that that's not added on to the 82?

A If Mr. Erickson were exposed to a cab with 10 decibels of noise, and he wore his hearing aid, a rough approximation would say that the noise would be entering his ear at 42 decibels. He's got 30 dB of power, think of it that way, 30 dB of magnitude that's added on top of what comes in into his hearing aid, up to a specific limit, beyond which the amplifier compresses, and does not provide that degree of amplification.

Q Oh, I see, we come back to this compression factor of the hearing aid?

A Yes, it is input dependent, and so as the input increases beyond a prescribed level, the magnitude of amplification provided by that instrument reduces the zero point.

So, by the time we reach 90 or 95 decibels, which is not atypical in certain situations for the cab of a truck, he is being exposed in his ear to virtually no greater intensity than that exposed to a normal hearing listener."

Much of Mr. Bellaire's evidence relative to the efficacy of hearing aids contradicts statements contained in the 1982 Guide for Physicians. In that regard the entire Paragraph 3.3 entitled "Hearing Aids" is here reproduced.

"Hearing Aids are of little or no help to the driver of a large passenger bus or heavy truck. The ambient noise level, which frequently reaches 80 to 100 decibels in a diesel powered vehicle, is amplified by the hearing aid just as much as the sounds the driver should be able to hear and continues to mask these sounds if the driver's hearing is impaired.

There is also the strong possibility that the operator of a noisy vehicle will become so irritated and fatigued by the constant amplification of the noise around him that he will render his hearing aid ineffective by reducing the volume or turning it off altogether.

Although hearing aids are much more reliable now than they used to be there is also no absolute assurance that they will always function at full efficiency or that the operator will always have fresh batteries available when they are needed.

For these reasons it is felt that passenger bus drivers and heavy commercial transport drivers (Class 1, 2, 3 or 4 licences) shoud not have to depend on a hearing aid to bring their hearing up to a safe level."

On that basis the Tribunal questioned Mr. Bellaire in detail with regard to Paragraph 3.3 of the Guide for Physicians dated 1978 and the following questions and responses appear at Page 277 at the Transcript:

"Under --- page 15, paragraph 3.3, there is some comments there about hearing aids, and I would like to ask you for your comments on that, Mr. Bellaire?

A Well, I guess if I accept what Mr. Mullins says, and what this document states, during the brief review time I've had, this document was prepared by physicians, many of whom may not have the level of expertise and knowledge with respect to the electroacoustic design of a hearing aid that others might have. Consequently, I find the first statement under hearing aids, Section 3.3, to be potentially untrue in many circumstances.

I think it's a rather blatant and unfair statement to state that hearing aids are of little or no help to the driver of a large passenger bus or heavy truck. I think that is true for a standard hearing aid, which I referred to yesterday, which is a conventional amplifier that does not possess some of the output or input control characteristics that we've discussed at some length this morning.

That is a blanket statement which is inappropriately inserted, I belive. "The ambient noise level which frequently reaches 80 to 100 decibels in a diesel powered vehicle is amplified by the hearing aid just as much as the sounds the driver should be able to hear, and continues to mask the sounds if the driver's hearing is impaired."

If the hearing aid possesses the compression control, or other specific forms of output or input control which I've alluded to during this discussion, that statement is blatantly false.

"There is also the strong possibility that the operator of a noisy vehicle will become so irritated and fatigued by the constant amplification of the noise around him that he will render his hearing aid ineffective by reducing the volume or turning it off altogether."

That is a very true statement applied largely to inappropriately prescribed and fitted hearing aids. A properly fitted hearing aid meeting the needs of the patient, and possessing suitable output and input controls, should not present the well adjusted user with those problems.

"Although hearing aids are much more reliable now than they used to be...."

I agree with that; ".... there is also no absolute assurance that they will always function at full efficiency, or that the operator will always have fresh batteries available when they are needed."

I totally agree with that. I suggest that it be required that the operator carry a spare hearing aid and/ or spare batteries.

"For these reasons, it is felt that passenger bus drivers and heavy commercial transport drivers should not have to depend on a hearing aid to bring their hearing up to a safe level."

I don't believe that most of the reasons are valid, and so, therefore, I cannot support that statement."

Mr. Bellaire agreed that the high noise level in the cab of most commercial transport vehicles tends to mask many extraneous warning sounds, such as emergency vehicle sirens, even when ear protectors are worn to selectively attenuate lower frequency vehicle sounds, both for normal hearing and for hearing impaired operators. He agrees also that hearing does contribute to safe driving based on anecdotal evidence and he supports the statement that persons driving heavy commercial transport vehicles should not have a hearing loss greater than 55 decibels averaged at 500, 1000 and 2000 hertz in their better ear. He comments that within a truck cab characterized by the noise levels that were discussed a warning sound would have to be 55 decibels or greater for it to be meaningful to an individual with normal hearing.

In conclusion Mr. Bellaire commented that during the course of the hearing before the Tribunal Mr. Erickson's hearing ability has been remedied and is better than the average hearing impaired individual.

ASSESSING AND EVALUATING THE EVIDENCE

Assessing the evidence with regard to the standards imposed by the Provincial Government on drivers suffering from some degree of hearing impairment imposes difficulties. It would seem that. in practise the audiological testing of individuals is referred by the Superintendent of Motor Vehicles to the Ministry of Health which decides through its qualified field representatives, as Mr. Bellaire was, whether or not that individual. meets the then current standards. In December of 1981, when Mr. Bellaire tested Mr. Erickson, the standards then in force as evidenced by the directive of Mr. Zinc dated April 10th, 1980, and marked Exhibit C- 12 permitted the use of an approved hearing aid. Mr. Erickson more than met the standard of a hearing level not exceeding 40 decibels in his better responding ear in an aided or corrected condition. According to Mr. Bellaire's assessment in December of 1981, Mr. Erickson was at 30 decibels and below.

It would be useful to refer in more detail to Mr. Zinc's directive. Under the heading "The Role of Hearing in Driving" there appears this statement:

"3.0 There are still very few scientific studies on the role of hearing and driving safety, although some studies that have been done do appear to show that driving safety begins to suffer at some level of hearing loss. There are, unfortunately, no data available to show how great the loss must be before a noticeable increase in accidents occurs."

There appears under the heading "Recommended Hearing Standards" the following statements (inter alia):

"3.12 Passenger Transport and Heavy Commercial Vehicle Operators (Class 1, 2, 3, 4) While some loss of hearing is acceptable in a professional driver, it is felt that, in the interest of safety, a totally deaf person should not drive a passenger transport or a heavy commercial vehicle."

"The very high noise level in the cab of many commercial transport vehicles tends to mask most extraneous warning sounds such as emergency vehicle sirens, even when ear protection devices are used to selectively attenuate the lower frequency vehicle sounds. Commercial vehicle driver trainers and many commercial drivers feel quite strongly, however, that good hearing does contribute to driving safety, since the first warning of a potentially dangerous vehicle malfunction can often be heard before it can be detected in any other way.

The driver of a heavy commercial transport vehicle should therefore not have a corrected hearing loss greater than 40 decibels, averaged at 500, 1000, 2000 and 3000 hz in one ear."

There is under the heading of "Hearing Aids" the following statement: "3.3 It is felt that the quality and reliability of hearing aids have been improved to the point where a properly selected and fitted aid can now be used to bring the hearing of a professional driver up to the minimum level required for safety."

There was no evidence either way as to whether this directive is still in force or has been superseded, amended or revoked by Ministry of Health Officials. One is entitled to assume, however, that it is still effective and this assumption is reinforced by the fact that Mr. Erickson is authorized under his 1984 Class 1 licence to drive heavy duty commercial vehicles on the highways of the Province not withstanding the fact that he admittedly suffers from a moderate hearing loss. It is interesting to note that the 1980 Directive from Mr. Zinc does not set out mininum standards for an unaided hearing loss as does the revised 1982 Guide for Physicians, supra.

The 1982 Guide for Physicians revised standard for an uncorrected hearing loss not exceeding 55 decibels has never been formally adopted, promulgated or enacted legislatively by the Government of the Province. In any case, Mr. Erickson meets that standard if one averages the testings conducted from September 4th, 1979 through October 3rd, 1985 in which the average loss for the better hearing right ear is 55 decibels. If one disregards the suspect test of February 15th, 1983 the average reading for the right ear during those years is 53.7 decibels. The most recent test conducted on October 3rd, 1985 shows an uncorrected hearing loss in the right ear of

56 decibels and an uncorrected hearing loss of 56 decibels in the left ear as well. Allowing for the slight permissible differences in testing results referred to by Mr. Bellaire in his evidence it appears that Mr. Erickson does in fact meet the 55 decibel standard referred to in the 1982 Guide for Physicians.

It was argued that the Respondent Company relied upon the Guidelines for Physicians published in 1978 and 1982 as setting a "standard" for persons such as the Complainant Mr. Erickson. While admitting that the Guides for Physicians do not have the force of law, not having been adopted or incorporated legislatively, Counsel argues that they do bear the stamp of approval of the Superintendent of Motor Vehicles and should be given due weight in view of the fact that they are offered by the Medical Profession. He inferred moreover that these standards were the standards which were in force at the time Mr. Erickson was hired by the Respondent Company and that the Company was complying with those standards when it discharged him. It is worth noting in this regard that in his letter of November 13th, 1981 to Mr. Erickson, Mr. Lloyd makes no mention of the "standards" referred to in the 1978 Guide for Physicians. In fact Mr. Lloyd states "your hearing does not meet our standards for a highway driver". The underlining is mine.

Counsel questions whether there was authority under the Motor Vehicle Act for the Superintendent to make regulations governing the fitness of an applicant for a licence to drive a motor vehicle. Section 24.2 of the Motor Vehicle Act states:

"Section 242 - The applicant shall submit himself to the examinations as to his fitness and ability to drive or operate motor vehicles of relevant category that are specified by the Superintendent".

The underlining is mine. Counsel for the Respondent discounts the directive of April 10th, 1980 from David Zinc marked Exhibit "C- 12" which authorizes the use of hearing aids by a professional driver as being "internal memorandum" made without authority. I cannot accept this interpretation of Section 242 of the Motor Vehicle Act which in my opinion specifically authorizes the Superintendent to require applicants to submit to examinations as to fitness. Apparently this in fact is what has occurred and the examination and testing as to fitness where hearing is involved is delegated to the Ministry of Health.

While the Guides for Physicians should be recognized as a useful and important contribution to safe driving there does not appear to be evidence of a clinical or statistical nature based on research to support some of the conclusions therein contained. Much of the material in the 1978 and 1982 Guides is of an "impressionistic character". In the Ontario Human Rights Commission vs. Etobicoke, 132 D. L. R. (3 D) McIntyre J. in dealing with evidence as to the aging process and a requirement in a Collective Agreement for retirement at the age of 60 makes these comments at page 23:

"I am by no means entirely certain what may be characterized as "scientific evidence". I am far from saying that in all cases some "scientific evidence" will be necessary. It seems to me, however, that in cases such as this, statistical and medical evidence based on observation and research on the question of aging if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is a "young man’s game". My review of the evidence leads me to agree with the

Board of Inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were, in my view, properly described as "impressionistic" and were of insufficient weight".

Whether or not the conclusions contained in the 1978 and 1982 Guides for Physicians is of an impressionistic character the fact of the matter is that the Superintendent of Motor Vehicles while paying lip service to the Guides for Physicians appears to rely on the Ministry of Health and the expertise of its personnel to decide whether or not applicants with a hearing impairment should be issued a licence to drive on the highways of the Province. I think the facts established by the evidence can be summarized as follows:

1. The Complainant wears a better quality hearing aid issued by the Ministry of Health continuously while working and carries a poorer quality hearing aid and spare batteries with him at all times.

2. The Complainant hold a current driver's licence issued February 20th, 1984 entitling him to drive heavy duty commercial vehicles on the highways of the Province and his licence does not require him to wear a hearing aid while doing so.

3. He is a competent, experienced heavy duty truck driver with no history of accidents relating to his hearing loss.

4. He has a moderate hearing loss which is correctable by the wearing of his hearing aid to a 30 decibel level and in this condition his hearing can be described as "borderline normal".

5. The Respondent Company did not test him with respect to his hearing loss prior to dismissing him on November 12th, 1981 for the reasons given in Mr. Lloyd's letter of November 13th, 1981.

6. The Complainant underwent audiological testing between September 4th, 1979 through to October 3rd, 1985 and the average hearing loss expressed in decibels over the 500 to 2,000 frequency range (including the suspect assessment of February 15th, 1983) is 55 decibels which meets the standard in the 1982 Guide for Physicians.

7. There was no evidence that Mr. Erickson is not physically equal to the demands of a heavy duty commercial truck driver or that he was not equal to demands of the work assigned to him by the Respondent Company.

8. Mr. Bellaire is a qualified expert in his chosen field of audiology. 9. Mr. Erickson was examined and tested by Mr. Bellaire on two occasions, December 11th, 1981, shortly after his dismissal by the Respondent Company and again on December 3rd, 1982.

10. The data obtained on the most recent testing of October 3rd, 1982 is not clinically or statistically significantly different from the data which Mr. Bellaire obtained in December of 1982.

11. The audiogram done on February 15th, 1983 at the request of the Respondent Company indicating a marked deterioriation in Mr. Erickson's hearing sensitivity in his right ear is not supported by clinical evidence and the validity of the test is suspect.

12. With the exception of the February 15th, 1983 assessment the September 4th, 1979 and October 3rd, 1985 assessments are consistent with Mr. Bellaire's findings on December 11th, 1981 and on December 3rd, 1982.

13. Mr. Erickson demonstrated a surprisingly good performance with respect to sensitivity, perception and understandability of speech notwithstanding his loss in hearing sensitivity.

14. Mr. Erickson while wearing his hearing aid was able to respond to a normal conversation level in the presence of an equally intense simulated background of noise at 80% accuracy.

15. The average loss for the right or better ear over a five year period from September, 1979 to October, 1985, including the February 15th, 1983 test results, expressed in decibels is 55. If one disregards the February 15th, 1983 test the average decibel reading for the right ear is 53.7.

16. Modern hearing aids properly designed and fitted contain features which can:

(a) permit amplification at different frequencies, (b) reduce or increase frequencies selectively, (c) provide amplification or gain in all frequencies at 500, 1,000 and 2,000 hertz,

(d) automatically supresses sudden undesirable bursts of sound.

17. There is no scientific evidence to support the assumption that there is a relationship between a moderate hearing loss and increase risk of accident.

18. Mr. Erickson while wearing his hearing aid is being exposed to no greater intensity of noise in the cab of a diesel powered heavy duty truck than is a normal hearing operator for all practical purpose.

19. It is not true that modern hearing aids are of little or of no assistance to the driver of a heavy duty diesel powered truck because of the ambient noise level in the cab of a truck.

20. Mr. Erickson was discharged by the Respondent Company for the reasons given in Mr. Lloyd's letter of November 13th, 1981 and the reasons expressed in that letter constitute a blanket policy which prevents anyone who wears a hearing aid from being employed as a truck driver by the Respondent Company (see pages 395 and 396 of the Transcript).

21. Mr. Erickson's loss of earnings taken over the entire period as agreed to by Counsel amounted to $464.14.

22. Mr. Erickson wishes to be reinstated as a truck driver with the Respondent Company at the first available opportunity.

23. The Guides for Physicians 1978 and 1982 while useful as Guides do not have legislative authority.

24. The Superintendent of Motor Vehicles has delegated to the Ministry of Health the task of the testing, evaluating and approving or disapproving of applicants for Class 1 driver's licence, persons who have impaired hearing.

25. Insofar as it is possible to ascertain from the evidence the directive of Mr. Zinc of 1980 authorizes the use of hearing aids by the holders of Class 1 driver's licences is still in force.

26. Finally, there is no evidence that a person with a moderate hearing loss wearing an approved hearing aid is at greater risk in driving diesel powered heavy duty commercial vehicles than is a person with normal hearing.

THE HUMAN RIGHT'S ACT - DISCRIMINATION

The purpose of the Canadian Human Right's act is outlined in Section 2. The Act is designed to extend the laws of Canada to give effect to the principle set forth in clause (a) which reads as follows:

"(a) Every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of Society without being hindered in or prevented from doing so by discriminatory practises based on race, nation or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted;"

The Act is aimed at the elimination of discriminatory practises. See McIntyre, J. in Bhinder and The Canadian National Railway (1985)(2) S. C. R. at page 561.

Section 3 lists the prohibited grounds of discrimination in these words: "3.1 For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

3.2 Where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex."

The Complaint here is brought under Section 7 and Section 10 of the Act which are reproduced here:

"7. It is a discriminatory practice, directly or indirectly, > - 91 (a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

"10. It is a discriminatory practice for an employer or an employee organization

(a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

Section 20 of the Act defines "disability" as follows: "Disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. The Tribunal in Paul S. Carson et al and Air Canada (1985)(6) C. H. R. R. D/ 2848 referred to decisions in the U. K. and in the United States where the words "discriminate" and "discrimination" were considered. In the House of Lords decision in Post Office vs. Krouch [1974] 1 A. L. E. R. 229 at page 238 it is stated:

"Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by some reason of the discrimination he is worse off than someone else in a comparable position against whom there has been no discrimination. It may not make much difference which meaning is taken but I prefer the latter as the more natural meaning of the word, and as the most appropriate in the present case."

In the U. S. decision, Mr. Justice Burton in considering the meaning of the words when referring to the general ordinances of the City of Dayton, Ohio, stated:

"" Discriminate" means to make a distinction in favour of or against the person or thing on the basis of a group, class or category to which the person belongs, rather than according to actual merit. "Discrimination" means the act of making a distinction in favour of or against a person or thing based on the group, class or category to which that person or thing belongs rather than on individual merit."

See Courtner vs. The National Cash Registry Company, 262 N. E. Second 586 (1970).

The Tribunal in Carson and Air Canada summed it up in these words: "Therefore, discrimination presumes a distinction between persons on a basis not related to merit".

In discussing the Ontario Human Rights Code Mr. Justice McIntyre of the Supreme Court of Canada in Ontario Human Rights Commission and O'Malley and Simpsons- Sears Ltd. [1985] (2) R. C. S. at page 547 makes the following observation:

"It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or a group of persons obligations, penalties or restrictive conditions not imposed on other members of the Community, it is discriminatory."

In Bhinder and The Canadian National Railway Company, supra, Mr. Justice McIntyre adopted the reasoning expressed in O'Malley and concluded that the definitions of discriminatory practice in the Canadian Human Right's Act, Sections 7 and 10 extend to both unintentional and adverse effect discrimination.

With regard to the onus of proof, the onus is upon the Complainant to establish a prima facie case of discrimination and then the onus of proof shifts to the Respondent to justify its actions. See the decision of the Review Tribunal in Carson and Air Canada, supra, at page 13. The standard of proof that the Complainant must meet is proof "on the balance of probabilities" being the same burden of proof that a party in a Civil action must meet. Again referring to the decision of the Review Tribunal in Carson and Air Canada, supra, at page 13, the Tribunal makes the following observation:

"Where the Complainant was refused employment or the employment was terminated, pursuant to a standard policy that makes a distinction between employees or applicants expressly on the basis of age, the Complainant will find it easy to meet the onus of proving a prima facie case of discrimination."

In this case the Complainant, Erickson was discharged from his employment because he did not meet the standards of the Respondent Company. Counsel for the Respondent Company agreed that the Company's policy is as expressed by the letter from Mr. Lloyd to the Complainant dated November 13th, 1981, "that they do not employ drivers who must wear a hearing aid". That policy is a blanket policy which prevents anyone who wears a hearing aid from being employed as a truck driver by the Respondent Company. See pages 395 and 396 of the Transcript.

I find therefore that the Complainant has established a prima facie case of discrimination based on its refusal to continue to employ Mr. Erickson on a prohibited ground of discrimination.

THE HUMAN RIGHT'S ACT - BONA FIDE OCCUPATIONAL REQUIREMENT

The employer who practises discrimination on prohibited grounds may bring itself within the exception provided in Section 14 which reads as follows:

"14. It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement."

In Air Canada vs. Carson [1985] 1 F. C. page 209 the Court applies the two pronged test which American Courts adopted in Arritt vs. Grisell, 567 F. 2nd 267 (4th circuit, 1977) and Smallwood vs. United Airlines Inc. 661 F. 2nd 303 (4th circuit, 1981) as follows:

"(1) that the bona fide occupational requirement imposed is reasonably necessary to the essence of its business and

(2) that the employer has reasonable cause, i. e. a factual basis for believing that all persons within the class would be unable to perform the job safely, or that it would be impractical to deal with persons over the age limit on an individualized basis."

Counsel for the Respondent Company in his submission with regard to this issue relied upon the Guidelines for Physicians published in 1978 and 1982 as setting a "standard" for persons such as the Complainant.

While admitting, at the same time, that the Guides for Physicians do not have the force of law, having never been adopted or incorporated legislatively. He infers that these standards were the standards which were in force at the time that Mr. Erickson was hired by the Respondent Company and that the Company in discharging him was complying with those standards. Counsel relies on the 40 decibel standard contained in the 1978 Guide for Physicians. There is no evidence however that the Respondent Company in fact relied on those standards. Mr. Lloyds' letter of November 13th, 1981 refers to "our standards" whatever they might have been. In addition no testing of Mr. Erickson's hearing was conducted at the time.

In any case the Superintendent of Motor Vehicles through the Ministry of Health and its officials, such as Mr. Zinc, set the standard then in force for the licensing of individuals with a hearing loss. Mr. Erickson more than met those standards for a corrected hearing loss of 40 decibels in his right or better hearing ear on September 1st, 1981 and on November 4th, 1981 when he was discharged by the Respondent Company.

In my opinion the 1980 Directive from Mr. Zinc is still in force based on the fact Mr. Erickson was issued a Class 1 Licence as recently as February 20th, 1984 by the Superintendent of Motor Vehicles and has been retested by a Ministry of Health audiologist as recently as October 3rd, 1985. Even if this were not the case and if one accepts the unaided hearing standard of 55 decibels over the 500, 1000 and 2000 hz range referred to in the 1982 Guide for Physicians as being the current standard, Mr. Erickson also meets that standard.

With regard to the matter of safety, Counsel for the Respondent Company relies again on the Guidelines for Physicians. The Guidelines refer in detail to a relationship between hearing loss and accidents, noise levels in the cab of heavy commercial transport vehicles, the efficacy or otherwise of hearing aids and the physical demands upon the driver of heavy duty commercial vehicles. He concludes that what he describes as "standards imposed or established by the Government of British Columbia and ultra vires the Statute or not establish a bona fide occupational requirement for commercial truck drivers both on the basis of the profound knowledge of the medical professional of British Columbia".

As mentioned earlier while the Guides for Physicians should be. recognized as a useful and important contribution to safe driving there does not appear to be evidence of a clinical or statistical nature to support some of the conclusions therein contained.

There has been no evidence led by the Respondent in actual observations, experience or statistical data of its own which would indicate that persons with a moderate degree of hearing impairment, such as Mr. Erickson has, are at risk either to themselves, their fellow employees or

the general public. His hearing is corrected with the aid of a hearing device. Mr. Erickson's corrected hearing is borderline normal. The high level of sound in the cab of a diesel truck adversely affects individuals with normal hearing and I accept the evidence of Mr. Bellaire that while wearing his hearing aid Mr. Erickson is not at any greater risk than anyone else in those circumstances.

According to Mr. Bellaire there was no evidence of deterioriation in Mr. Erickson's hearing ability as between the December, 1982 data and the October, 1985 data and he has not had a history of ear pathology or fluxuating hearing loss.

What constitutes a bona fide occupational qualification or requirement was discussed by McIntyre J. in Etibocoke supra at page 19 as follows:

"To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of a job without injuring the employee, his fellow employees and the general public."

"The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned." There is no question the Respondent Company acted honestly, in good faith and in the sincerely held belief that its policy with regard to hearing aids was imposed in the interests of the adequate performance of the work involved..... and not for ulterior or extraneous reasons..... In my opinion, however, it failed to meet the second part of the test formulated by McIntyre J. and a consideration of the evidence and of the nature of the employment concerned in this case leads me to the conclusion that the Respondent Company has failed to bring itself within the exception contained in Section 14(a) of the Act.

It should be noted again that no attempt was made by the Respondent Company to test Mr. Erickson on an individual basis with regard to his hearing and in that regard see Rodger and C. N. R. (1985) 6 C. H. R. R. D/ 2899 at page 30 where Sidney Lederman Q. C. quotes with approval Tarnopolsky Discrimination and the Law, 1982 where the author states as follows:

"Anti- discrimination legislation does not compel employers or those who provide accommodation, services and facilities to disregard the disabilities of handicapped individuals or to make substantial modifications in order to allow disabled persons to participate. It does, however, require that persons with a handicap should receive individualized assessment and treatment and "reasonable accommodation" to such a person's handicap." The underlining is mine. Sydney N. Lederman, Q. C. in David C. Rodgers and Canadian National Railways (1985) 6 C. H. R. R. D/ 2899 was dealing with an employee who suffered from epilepsy. In his concluding remarks Mr. Lederman made the following observation:

"The importance of assessing each individual case on its own terms cannot be emphasised enough, especially given the need to overcome prejudicial generalizations about conditions such as epilepsy".

In that case the employee's complaint was dismissed because of the absence of reliable information on the risk of recurrence of seizures and given the public safety element in his position which reduced the acceptable level of risk. In his concluding remarks Mr. Lederman makes the following observation which is pertinent:

"Although Society cannot permit any substantial threat to public safety, it cannot condone hasty assumptions about the capabilities of the handicapped. Employers must insure that in imposing BFORs they are relying upon the most authoritative and up to date medical and statistical information available and adapted to the circumstances of each individual case."

Although the onus on the Respondent Company is less where the safety of fellow employees or the general public is involved (see Bhinder and C. N. R. supra at page 82) it has not, in my opinion, satisfied that onus in the circumstances of this case.

THE DECISION OF TRIBUNAL

Counsel for the Complainant claimed on behalf of Mr. Erickson loss of salary, back seniority, the next available job with the Respondent Company and what he described as "moral damages".

Section 41(3) of the Act provides as follows: "In addition to any Order that the Tribunal may make pursuant to Subsection (2) if the Tribunal finds that

(b) the victim of the discriminatory practice has suffered in respect of feelings or self- respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding $5,000.00 as the Tribunal may determine."

In this case Mr. Erickson was inconvenienced to some extent and no doubt suffered embarrassment and frustration as the result of his precipitous dismissal without reasons being given at the time. Accordingly, I award him the sum of one thousand Dollars ($ 1,000.00) as compensation in respect of feelings or self- respect.

With regard to compensation for loss of wages, the Tribunal has authority under Section 41(2)(c) to order the employer to compensate for any and all wages that Mr. Erickson was deprived of and any expenses incurred by him as a result of the discriminatory practice. In that connection I questioned Counsel for the Complainant closely the conclusion of the hearing as to precisely what was being sought in Mr. Erickson's case for compensation for loss of wages and the Counsel indicated that he was prepared to accept the figures supplied by Counsel for the Respondent Company as to what Mr. Erickson would have earned had he continued his employment with the Company as compared to what he in fact earned during the relevant period. The gross amount that Mr. Erickson would have earned with C. P. Transport was $115,836.31. The figure supplied by Mr. Erickson through his tax returns for the relevant period totalled $115,372.17 and there was a difference of $464.14 and it was my understanding that Counsel

agreed this was the amount for which Mr. Erickson should be compensated. Accordingly I order that the sum of $464.14 be paid by way of compensation for lost wages by the Respondent Company to Mr. Erickson. There was no claim of any substance for expenses and my understanding is that Mr. Erickson is not requesting reimbursement of whatever expenses he might have incurred in that connection.

Finally, with regard to reinstatement, I ORDER, pursuant to Section 41(2)(b) of the Human Rights Act of Canada, that Canadian Pacific Express and Transport Ltd. re- employ and reinstate the Complainant, Edwin Erickson, on the first reasonable occasion and make available to him all the rights, opportunities or privileges, including seniority rights and other benefits, which he would have acquired during the intervening period of time pursuant to the Collective Agreement or Agreements then on November 4th, 1981 or subsequently in force between the Company and the Union.

I FURTHER ORDER that the Complainant Edwin Erickson be permitted to wear a hearing aid approved by the Ministry of Health of the Province of British Columbia, in the course of his employment as a heavy duty truck operator with the Respondent Company.

DATED this 28th day of November, 1986.

Norman Fetterly, Tribunal