

IN THE MATTER OF: The *Human Rights Act*, R.S.N.S. 1989,
c. 214, as amended by 1991 c. 12

IN THE MATTER OF: A complaint of Dexter Halliday (“Mr. Halliday”) against
Michelin North America (Canada) Ltd. (“Michelin”)

HEARD BEFORE: Gilles Deveau, Chair, Board of Inquiry (“BOI”)

LOCATION: Bridgewater, Nova Scotia

HEARDING DATES: February 28, March 1-3, May 8-9 and June 2, 19-22, 2006

COUNSEL: Michael J. Wood, Q.C.
for Nova Scotia Human Rights Commission (“the
Commission”)

 Peter McLellan, Q.C. and Brad Proctor, McInnes Cooper
and Catherine McKeen, Senior Corporate Counsel,
Michelin, for the Respondents

Dexter Halliday alleges in a complaint before the Nova Scotia Human Rights Commission that he was discriminated against by Michelin North America (Canada) Ltd. (“Michelin”) based on a disability contrary to s. 5 (1) (d) & (o) of the Nova Scotia *Human Rights Act* [R.S.N.S. 1989, c.214] (the “*Act*”).

The Board of Inquiry heard the complaint, and decided to deny the complaint for the following reasons.

INTRODUCTION

The following documents were submitted into evidence at the hearing:

1. Commission’s Exhibit Book, recorded as Exhibit 1;
2. Respondent’s Exhibit Book, recorded as Exhibit 2;
3. Michelin “Crew 2” January-February 2001 Shift Schedule, recorded as Exhibit 3;
4. Letter from R. Zinck to D. Halliday dated October 21, 2002, recorded as Exhibit 4;
5. Dexter Halliday Loss of Income Statement, recorded as Exhibit 5;
- 6A. Dexter Halliday Crew Schedules – January 2000 to January 2001, recorded as Exhibit 6A;
- 6B. Dexter Halliday Crew Schedules – January 2000 to January 2001 - REVISED, recorded as Exhibit 6B;
7. Dexter Halliday’s notes and diary – 2000, recorded as Exhibit 7;
8. Dexter Halliday - Income Tax Returns, recorded as Exhibit 8;

9. Letter from Dexter Halliday Re: job search – February 28, 2006, recorded as Exhibit 9;
10. Dr. Dean’s charts, recorded as Exhibit 10;
11. Dexter Halliday’s Exhibit Book, recorded as Exhibit 11;
12. Employee Progress Report (“EPR”), recorded as Exhibit 12;
13. Disability Management Team meeting minutes, recorded as Exhibit 13;
14. Back By Mutual Agreement meeting minutes, recorded as Exhibit 14;
15. GAF scale, copied from DSM4, recorded as Exhibit 15;
16. Michelin’s Short Term Disability (“STD”) benefits guide, recorded as Exhibit 16;
17. Jim Morrison notes from meeting with Mr. Halliday dated September 6, 2000, Exhibit 17;
18. Jim Morrison statements dated December 8, 2004 and April 7, 2005, recorded as Exhibit 18;
19. Michelin’s Employee Assistance Program (“EAP”), recorded as Exhibit 19;
20. Dave Hartman’s notes, recorded as Exhibit 20;
21. Memo from Mr. Halliday to Dave Hartman dated July 12, 2000, recorded as Exhibit 21;
22. Notes prepared by R. Zinck regarding his meeting with Mr. Halliday, recorded as Exhibit 22.

The following appeared as witnesses providing evidence on behalf of Mr. Halliday: Mr. Halliday himself and Dr. Ghulam (G.) Mohiuddin (commonly referred to as ‘Dr. Dean’), M.D., Mr. Halliday’s family physician.

The following appeared as witnesses providing evidence on behalf of Michelin: Dr. David Lee Williams, Assistant to the Medical Director, Michelin Worldwide; James Richard (‘Jim’) Morrison, Personnel Manager - Service au personnel (‘SP’) Manager; David Sidney (‘Dave’) Hartman, Business Unit Leader (Mr. Halliday’s supervisor); Roger Vernon Zinck, Area Personnel Manager (‘APM’), Unit “R”, Michelin Bridgewater plant; Wanda Joudrey, employee, Unit “R”, Michelin Bridgewater plant and employee representative.

ISSUES

There are three issues before the Board of Inquiry:

1. Did Mr. Halliday suffer from a disability at or about the time he was terminated a Michelin employee? If so, what was his disability? And if so, did Michelin know, or ought to have known, about the disability?

This issue was the subject matter of a non-suit motion by Michelin. The BOI rejected Michelin’s motion in a decision dated June 12, 2006. The BOI determined that Mr. Halliday had established a prima facie case of disability based on anxiety and stress-related symptoms.

2. If Mr. Halliday did indeed suffer from a disability which was known, or ought to have been known to Michelin, did Michelin discriminate against Mr. Halliday or treat him adversely, thereby failing to accommodate his disability to the point of undue hardship?
3. If Michelin discriminated against Mr. Halliday, what are the appropriate remedies of which Mr. Halliday should benefit?

BACKGROUND

Dexter Halliday was terminated from his employment at Michelin on April 25, 2003. He had previously been terminated in June 2001, but that decision was successfully appealed by Mr. Halliday before the Nova Scotia Labour Standards Tribunal in September 2002, but subsequently reversed on appeal in favour of Michelin before the Nova Scotia Court of Appeal. Since being terminated by Michelin, Mr. Halliday's evidence is that he has applied for many jobs, but has been unsuccessful in returning to work. Mr. Halliday has been enrolled in a business program at the local Nova Scotia Community College since the fall of 2005.

There are significant sources of written, documentary evidence in this matter. Those most frequently and extensively referred to in the evidence before the BOI include the following documents:

1. Michelin's Record of Events compiled and recorded by Michelin staff and found at Tabs 8-14 of Exhibit 2;
2. Michelin's Medical Centre Individual Health Records featuring running or chronological notes of Mr. Halliday's visits at the Medical Centre found at Tab 25 of Exhibit 2;
3. Attending Physician's Reports ("APR's") found at Tab 26 of Exhibit 2;
4. Commission's Exhibit Book, recorded as Exhibit 1;
5. Dr. Dean's charts, recorded as Exhibit 10;
6. Mr. Halliday's own diary of work-related matters for the years 1999 and 2000, including notes he generally made during the day at work, recording work-related matters such as production and quality information.

It is useful to set out some relevant aspects of Michelin's plant operations as well as its approach to a disabled employee in the context of Mr. Halliday's disability. Michelin's stature in Nova Scotia's economy is that of a significant employer in the province with three tire plants and several hundred employees. The Michelin workplace is highly stratified and divided downwards from units (such as the rubber 'unit'), to modules ('MA-MTA'), which are further broken down into crews (typically four employees), and further down into posts, each post generally consisting of one employee. The Michelin Bridgewater plant basically runs 24 hours a day on 12 hour and 8 hour shifts, 365 days per year (except for some limited shutdowns on some holidays).

Mr. Halliday was first employed with Michelin on June 6, 1988. His employment at Michelin included a number of positions over the years, although all of these positions have been in tire manufacturing. It is important to review these various positions both to gain insights into the tire manufacturing process at Michelin as well as to examine the variety of highly skilled positions and specialized machinery at the Bridgewater plant to provide context for Michelin's obligation to accommodate Mr. Halliday's disability. There are two main areas of processing at a Michelin plant - rubber and wire. Mr. Halliday worked in the wire making section on a rotating shift. The MA-MTA module to which Mr. Halliday was regularly assigned had a 4 member crew, of which one member was the Team Leader. The Team Leader reported to the Business Unit Leader (Dave Hartman during a considerable period of time during Mr. Halliday's employment at Michelin), who reported to the Area Manager (Roger Zinck). The allocation of employees to time is broken down into shifts. Mr. Halliday's shifts generally consisted of one of three shifts on a 28 day rotation, with shifts being allocated on a monthly basis: shift A (12:00am-8:00am); shift B (8:00am – 4:00pm); and shift C (4:00pm-12:00am).

A Michelin employee who wishes to be absent from work on account of sickness requires medical proof in support of his or her claim. Such medical proof is evidenced and formalized by way of an Attending Physician's Report ("APR"). Such APR is required from any employee who is seeking sick time off in excess of two days (or 16 hours). Typically, the employee simply picks up an APR form from Michelin's Occupational Health Services (generally and popularly referred to as Michelin's Medical Centre – "Medical Centre") and brings the form to his or her family doctor for completion. Upon completion, the employee delivers it (or arranges delivery) to the Medical Centre.

There are various measures used by Michelin to deal with the absence - and return to work - of a disabled employee. The disabled Michelin employee who cannot return to work is provided with income support and treated differently depending on the number of days the employee is absent from work. First, Michelin has a short term disability plan for employees with legitimate absences, with compensation covering 66 2/3 % of the employee's regular pay. If a short term absence is two days or less, the employee does not require a doctor's medical certificate. If longer than two days, the employee's absence from work needs to be medically substantiated. Alternatively, if the employee is absent for a period greater than one year, Michelin's independent insurance carrier provides benefits at a rate of 60% of the employee's regular pay. Jim Morrison's evidence on direct examination is that the accommodation of disabled employee's at Michelin is not an isolated, atypical exercise. At any time, Michelin has 30-40 people absent from work. His assessment is that there are "very few times" when Michelin is able to place every employee in their existing or preferred positions, except that for most physical jobs the returning employee is placed with another crew or area of the plant.

Michelin monitors and formalizes a disabled employee's progress in rehabilitation and return to work capability by way of an Employee Progress Report – Occupational Health Services. It sets out the duration of the employee's "absence" and whether he or she is available to return to work and under what restrictions, e.g., light duties. Michelin has a Disability Team Management ("DMT") program consisting of an internal staff team set

up to deal with each disabled employee with regular meetings in a group setting with shop management and occupational health staff. The purpose of the exercise is to assess the work capability of a disabled employee and to determine placement options within the plant for the disabled employee. The meetings are held regularly on an 'as-needed' basis and facilitated by the Medical Centre's occupational health nurse who issues Disability Management Reports ("BMR's"). Mr. Zinck is clear in his evidence on the purpose of the DMT. It is to examine the nature of the disability of an employee off work, determine when the employee is likely to return to work on what condition or restriction, and further determine if there is a position available for him or her to return to. Specifically, Mr. Zinck states in relation to Exhibit 13 that Michelin would not consider moving Mr. Halliday to another position unless it was supported by a medical reason.

Michelin's Innocent Absenteeism Program ("IAP") is the flagship and last step in Michelin's effort at accommodating an employee's disability in anticipation of the employee's return to work. The Michelin IAP is extensively described by Mr. Morrison. He states that the IAP was introduced in 1996 and was originally intended to succeed Michelin's employee discipline procedure to cover repetitive, innocent absences considered beyond an employee's control. The policy is contained within Michelin's personnel guide which includes Michelin's Standard Operating Procedures. Michelin's intentions in launching its IAP as expressed by Mr. Morrison were rather straightforward. If Michelin employs someone, it should expect a level of attendance so that his or her job is adequately performed. According to Mr. Morrison, the employer-employee "bargain" is such that if a certain threshold of absences is reached, Michelin offers assistance, provides significant notice of its expectations, with the ultimate message that Michelin may not be the right place for them to work. The IAP is not designed to set up the employee for failure. Mr. Morrison's recollection is that only 2-3 Bridgewater employees "caught" in the IAP have ultimately been terminated over the past eight years since the introduction of the IAP. Mr. Morrison is unequivocal: Michelin is not looking for perfect attendance. Michelin's intention is that the employee caught in the IAP will see his physician and, in Mr. Morrison's words, say, "Doctor, I need help or else I will lose my job".

The IAP document is not generally given to employees. According to Mr. Morrison, there are so few employees to whom the IAP applies that it would be impractical to distribute it to all employees. Commission counsel on cross-examination makes much of the fact that the IAP document is not generally distributed to employees. Mr. Morrison's evidence is that Michelin has a significant number of written employee directives and policy and procedural manuals, such materials being continuously updated.

The IAP process is an elaborate exercise designed to deal with employee absences in a fair and progressive manner. It is well described at Exhibit 2, Tab 29. It is based on a formula. All of the following conditions must be met:

- a) absenteeism rate exceeds two times the average absenteeism rate for Michelin's three Nova Scotia plants in the previous twelve months;

- b) at least two separate occurrences of absence during the previous twelve months;
and
- c) at least four separate occurrences of absences in the previous 13-24 months.

Once an employee's absences bring him over the threshold, he/she faces several steps with progressively more severe discipline measures. Step 1 is a meeting between the Business Unit Leader (Supervisor) and the employee to present Michelin's conclusions from its observations of the employee's amount and nature of absences and is followed up with a letter confirming that the employee has brought herself/himself within the threshold of the IAP and that Michelin will be monitoring the employee's progress in reducing absences over the next three months. It also permits the employee to provide an explanation for his/her absences and asks for a commitment from the employee to improve his attendance. A letter formalizing the session is provided to the employee. Step 2 is a further counseling session with the employee's Business Unit Leader at month three and confirmed in a second letter. Step 3 is described by Mr. Morrison as very serious, indicating to Michelin that the employee caught in the IAP process "has not been attempting to fix the problem" and involves consultation with Michelin's APM and OHS. Step 4 is the opportunity for the employee to point to a further justification and substantiation of his absence. As explained by Mr. Morrison in his evidence, it is at this point that the matter is passed on to the "corporate filiaire", i.e., brought to the attention of the senior corporate development person in Canada, in contemplation of termination of the employee.

Indications Provided by Mr. Halliday to Michelin Regarding His Disability

Mr. Halliday was referred by his family physician Dr. Dean to Dr. Rob Miller (Dermatologist) as early as 1999. Dr. Miller concluded Mr. Halliday was suffering from anxiety and/or stress ("neurotic excoriations") and prescribed medication, which, according to Mr. Halliday's evidence on direct examination, could have consisted of Paxil (anti-anxiety) or Clonazepam (anti-depression), or both. Mr. Halliday is less clear about medication on cross-examination, where he states that Dr. Miller initially prescribed drugs for him in January or February 2000 but that he does not know which drugs and that "Dr. Dean would know better". Mr. Halliday was seen by Dr. Michael Fowler (Psychologist) on June 8, 14 and 27, 2000. When asked on cross-examination if he remembered having medical problems in February 2000, Mr. Halliday answers that he does not recall, except that he had "anxiety built-up" as a result of his difficult relationship with Ernie Carver, identified by Mr. Halliday as his supervisor at the time. However, Carver had not been his supervisor since about September 1999. Asked on cross-examination if he was on medication when Carver was his supervisor, Mr. Halliday answered "I don't know. It's a medical question."

Mr. Halliday was examined by Dr. Connie Ojiegbe (Psychiatrist) in July 2000 on account of "anxiety problems". She provides a diagnosis of "generalized anxiety disorder", with a

GAF test result of 70-80. She recommends a continuation of Paxil at 40mg but a continued withdrawal from Clonazepam.

Mr. Halliday remembers being on two drugs, one offsetting the other. He also acknowledges on cross-examination that he was seeking to reduce the dosage based on Dr. Dean's advice that the level of Paxil ought to come down from 40mg to 20mg. It appears from Mr. Halliday's evidence that he had no expectation that Michelin doctors had a role in his medication. He adds that at no time did he self regulate, except in 2001 when he was "fed up with Jim Morrison". Dr. Dean increased his medication during the period of March to July 2000 with the intention that the level of medication would be brought down over time to a level permitting him to safely return to work. He returned to work on July 11, 2000 in the "ER" section of the plant to which employees without a return date would typically be assigned. He remembers on cross-examination that he was on 20mg Paxil on October 22, 1999 and that his work was acceptable. Asked on cross-examination why his stress would have been increased in March 2000, he answers "my medications were increased".

The fact that Mr. Halliday claimed to be sick obviously had effects on his ability to work. Mr. Halliday's own assessment is that the unacceptably high level of medication, most significant in July 2000, was resulting in sleep difficulty. Mr. Halliday's evidence is that he was getting as little as one hour sleep per night. The sleep deprivation was most significant in a rotating shift schedule. Mr. Halliday's evidence is that Dr. Dean also concluded that a rotating shift was "the" problem, causing both sleep deprivation and maladjustment to his medication. He adds in response to his July 2000 IAP letter that he told Dave Hartman and Roger Zinck he was taking medication and had trouble adjusting to his shift, adding that "...he couldn't operate a machine because his medication was too high". He adds that he felt that the "authority" to make the connection between the illness (medication) and the occupation adjustment (shift work) lied with the Medical Centre and not with the supervisor.

Mr. Halliday formally sought a transfer out of his rotating shift schedule to the single, regular 648 shift by way of a written memo to Dave Hartman and Doug Liot (shop manager, Bridgewater) dated November 21, 2000. He explains that such a transfer was necessary on account of "medical reasons concerning my current shift schedule": Exhibit 2, Tab 20. Michelin formally denied his request by way of memo dated January 31, 2001. As part of the IAP step 2 counselling session of February 2001, Mr. Halliday's evidence is that he again stated to Dave Hartman and Roger Zinck that they should know what is required, i.e., a single, regular fixed shift. It is Mr. Halliday's evidence that Hartman replied that Michelin requires such a request to be supported with medical documents.

Mr. Zinck states that at a July 2000 meeting with Mr. Halliday, Mr. Hartman inquired of Mr. Halliday as to the source of his absences. Mr. Halliday answered that he had seen 12 doctors, was under stress and that stress was contributing to his absences. The indication from Mr. Halliday to Michelin was that he would be continuing to seek medical attention for his disability. For example, Dr. Williams states that Mr. Halliday indicates in a March 30, 2000 entry in Mr. Halliday's Individual Health Record that he "plans to see his

family physician to reduce medication”. This was considered by Dr. Williams to be the correct approach as he had observed Mr. Halliday sleeping in the Medical Center waiting room before he came in to see him. It was at this time that Dr. Williams concluded that Mr. Halliday appeared to be self-regulating his medication and appeared to need intervention. According to Dr. Williams, Mr. Halliday needed to adjust his medication and/or to seek the help of a psychiatrist.

Mr. Halliday’s indication to Michelin of his intentions about returning to work took several forms. Dr. Williams’s evidence is that Mr. Halliday provided indications that although he would rather not face his co-workers in his crew, he was resigned at July 2000 to return to work. While he was reluctant to return to work, his APRs generally indicated he was fit to return to work. Mr. Halliday does not relate as part of his evidence any comprehensive discussions with Dr. Williams or anyone at the Medical Centre regarding his health care, including his disability, his treatment or his ability to work. In cross-examination, Mr. Halliday states that he does not remember telling Dr. Williams on March 17, 2000 (recorded at Exhibit 2, Tab 25, p. 10) that he wanted a change in shift rotation. In fact, he admits on cross examination that he had no doctor’s restrictions on his work when he returned to work July 12, 2000. This assessment is contemporaneous to and consistent with an APR of July 27, 2000 where Dr. Dean states that Mr. Halliday should be able to function at work if given a fixed shift. Dr. Dean provides further details in his July 28, 2000 letter to Michelin that Mr. Halliday needed a fixed shift to regulate his medication.

There are various observations offered by Michelin employees as to the source of Mr. Halliday’s health problems. One of these was what Dr. Williams characterizes as “legal or marital” troubles. Dr. Williams observes in his May 17, 2000 entry in Mr. Halliday’s Individual Health Record that Mr. Halliday tells him about “stress/situational disturbance/anxiety” from legal troubles, but confirms that Mr. Halliday felt he could cope well with the situation. Mr. Morrison’s evidence is that at about the time of Mr. Halliday’s IAP letter of November 13, 2000, he remembers Mr. Halliday telling him he knew his “RX” work ‘well’ but did not find it challenging. Mr. Morrison felt at the time Mr. Halliday would do better at another job but certainly did not know Mr. Halliday’s medical problem.

Mr. Halliday’s Interpersonal and Relationship Issues at Work

It is clear from Mr. Halliday’s evidence that he had problems with his supervisor Ernie Carver over a number of years. The first record before the BOI of such problems is found in the Michelin “Development Progress Review” (“DPR”) record dated February 16, 1996, completed by Mr. Carver and signed by Mr. Halliday. The DPR describes Mr. Halliday as being “very quality conscious” with “high standards and expectations”. However, it is indicated that improvement is needed in attendance and that Mr. Halliday tends to get discouraged. On cross-examination, Mr. Halliday states that the DPR was not an accurate reflection of his performance but that he agreed with the five incidences and was told to “sign the DPR no matter what”. His attendance is shown to have improved as

evidenced by the February 13, 1997 DPR where Mr. Halliday is cited for only one incident of missing work over the 1996 calendar year.

The tension in Halliday's relationship with Mr. Carver is obvious from his June 4, 1999 DPR. Mr. Halliday refuses to sign the DPR where he is told to try not to get discouraged, not to be negative and not to show outbursts. Mr. Halliday explains in his evidence that he refused to sign the DPR because the DPR was completed even before he sat down with Mr. Carver. He states he never had an opportunity to provide prior "input or consultation". He did not agree "with 100% of the contents" of the DPR. In fact, Mr. Halliday writes a four page rebuttal to the DPR where he states that he is the victim of favouritism in the workplace and that any attitude problems he might have are the result of provocation. He states: "If I am out of my element by doing my job to the best of my ability, then perhaps I have chosen a wrong career. Perhaps one day, if I'm still here, I can find a place where I can do a job and get some recognition for doing my best". On cross-examination, Mr. Halliday denies Michelin's 2000 Record of Events that he was using abusive language with co-workers in 2000. But he admits he was asked to apologize and did so, saying he said he did not recall using abusive language but that he was sorry if he did so.

Dave Hartman became Mr. Halliday's new supervisor in 2000. Mr. Halliday's yearly performance review is recorded in his 2000 DPR covering the 1999 calendar year (upon having completed eight years at Michelin) was completed by Mr. Hartman in 2000. The overall assessment is poor, with respect to safety, quality, attendance and productivity levels. Mr. Halliday again does not sign the DPR. But he does not specifically remember a December 15, 1999 meeting with Dave Hartman and insists it did not take place as there is no reference to the meeting in his diary. In fact, Mr. Halliday insists DPR's were "not done in 1999 and 2000 despite the fact he missed a "fair bit" of time in 1999". Mr. Halliday's response on direct examination to attendance issues in 1999 as indicated on his DPR is somewhat ambivalent. He states: "if you miss one day, they were aiming at "0" goal, but it is also a reflection of the person who wrote it." Mr. Halliday's yearly performance review as recorded in his 2001 DPR covering the 2000 calendar year (upon having completed nine years at Michelin) was prepared by Mr. Hartman in 2001. The assessment is unequivocal: "Based on his low level of attendance, Dexter does not meet the requirement of his post". Mr. Halliday again fails to sign the DPR for a third consecutive year. Mr. Halliday's evidence at the hearing is that he had difficulty interpreting the performance results, as he does not know if the "98.2%" achievement level is reflecting the module as a whole or his own individual production quota. He also suggests that the business plan results are not particularly relevant to him as he states that its meaning is unclear ("...could mean production, manpower, resources, etc...") and is based on information held by business unit leaders.

Medical Evidence of Dr. Dean in Support of the Nature and Extent of Mr. Halliday's Disability

Dr. Dean was Mr. Halliday's family physician during most of his time with Michelin. He is now retired from medical practice. Dr. Dean makes the rather bold and unequivocal assessment in his evidence at the hearing that during all relevant time Mr. Halliday did not suffer from a medical condition. While Dr. Dean acknowledges that he used technical terminology to diagnose Mr. Halliday's condition, he insists that he did not mean to use these with great precision and purpose. Dr. Dean states that while he used the term "generalized anxiety disorder" ("GAD") to describe one of Mr. Halliday's condition, he considers the use of the term a mere "formality". In his own assessment, the source of Mr. Halliday's problems was rotating shift work maladjustment. He takes pride in his efforts to advocate on behalf of Mr. Halliday to see that he be given a single, regular shift in order that he could regulate his medication and organize his life. Dr. Dean also would provide advice to Mr. Halliday as to how he could better deal with interpersonal issues, telling him to be "careful and conscientious".

One diagnosis offered by Dr. Dean which requires particular attention is that Mr. Halliday suffered from a sleep disorder. It is particularly significant in view of the Respondent's legal submission that evidence substantiating Mr. Halliday's complaint as a sleep disorder should not be considered or at least accorded little weight by the BOI on account of the complaint not being framed as a "sleep disorder". Furthermore, the Respondent's legal submission is that Dr. Dean is not qualified to speak on sleep disorders. However, Dr. Dean chooses to be precise about the sleep disorder condition in cross-examination by the Respondent, mentioning that Mr. Halliday did not have a sleep disorder, but rather "accumulated sleep deficit" ("ASD"). He states that he arrived at the conclusion that Mr. Halliday was suffering from ASD from what Mr. Halliday was telling him. He agrees that he did not consider referring Mr. Halliday to a specialist to examine his ASD. He did not measure the amount and quality of sleep and neither asked Mr. Halliday to do so. Dr. Dean explains sleep disorder in general as not so much requiring more sleep but catching up on the sleep a person misses out on. However, he acknowledges on cross-examination that he does not have any special training in sleep disorders but that his conclusion was that sleep deficit or deprivation was Mr. Halliday's main problem caused by "rotating shift work" and "manifested as stress". For example, Dr. Dean recorded his observations in terms of noting that Mr. Halliday "complains of lack of sleep" (Exhibit 2, Tab 26, p.30 – December 19, 2000).

While there is abundant evidence in Dr. Dean's charts of treatment and medication prescribed for Mr. Halliday, Dr. Dean insists on both direct and cross examination that Mr. Halliday did not need medication. Although Dr. Dean prescribed Rivotril in February 2001 as a sedative for anxiety and tightness in his muscles, he insists that he prescribed the medication on account of Mr. Halliday "always being harassed and threatened" (Exhibit 10, p. 55). While Dr. Dean confirms that he generally prescribed medication to Mr. Halliday and even increased his Paxil (anti-depressant) from 30 mg to 40 mg in November 2000 (Exhibit 10, p.49), he states the increase in medication was simply because Paxil did not make him as drowsy. But he insisted on examination by Mr. Halliday that Paxil is known to be effective medication if there is a deficiency in hormones. However, he insisted that Paxil did not work for Mr. Halliday since he did not

have a hormone deficiency, and simply made him sleepy: "Paxil did not work. Only Clonazepam worked, but made him drowsy". He adds that the medication in general was not necessary: "It was a waste of time, not touching the source of the problem. There was not much I could do, his employer knew what the problem was, they had the solution." He adds that medication was ineffective as it merely treated the symptoms but not the cause. Dr. Dean summarizes his approach to treatment of Mr. Halliday by saying that his role was to be perceived by his patient as doing something. His role was to be - and be perceived by his patient to be - helpful. He acknowledged that he also provided psychological counselling to Mr. Halliday.

Dr. Dean also speculates that the source of Mr. Halliday's problems may have lied in adjusting to his medication. Dr. Dean is unclear whether Mr. Halliday was diligent and prudent in taking his medication. He states that he advised Mr. Halliday to take his medication only when necessary, slowly, using his own judgement (Exhibit 2, Tab 26, p. 17). Dr. Dean speculates that flu symptoms may have been side effects of medication which required adjustment (Exhibit 10, p.45). Dr. Dean also insists on examination by Mr. Halliday that the underlying sleep problem was not due to medication as medication merely had the effect of making him drowsy.

Dr. Dean explains his approach to giving notice to Michelin about his own assessment of the source of Mr. Halliday's problems. First, he states that he did not explicitly state to Michelin on Mr. Halliday's APR's that Mr. Halliday's problem was shift work because the "company did not want a diagnosis, just formality so employee gets the day off". He adds: "I did not want to interfere with the Company's internal affairs". However, despite Dr. Dean's scepticism about the likelihood that Michelin would initiate changes to deal with the rotating shift work issue, it is clear he did write a formal letter to Michelin dated July 28, 2002 where he expressed his concern that rotating shift work was the source of Mr. Halliday's problems. In addition, Dr. Dean states in his direct evidence that his motivation behind his letter was that Mr. Halliday was suffering from a "grave situation".

Dr. Dean, in a July 28, 2000 letter to Michelin, recommends that Mr. Halliday be placed on a regular shift for three months in order to regulate his medication. It is perhaps one of the key pieces of information to emerge in the constellation of health care assessments of Mr. Halliday's disability. Mr. Halliday's general evidence is that he believed his role to be one of information provider, providing up-to-date APR's to Michelin and that he felt it was up to Michelin "how they handled the information". He states on cross-examination that he was never asked by Michelin for his comments on Dr. Dean's July 28, 2000 letter. Mr. Halliday states on cross-examination that while he returned to work August 4, 2000 on Crew 2 contrary to the terms of Dr. Dean's July 28 letter, he decided not to pursue the issue of regular shift work with Michelin because "Dr. Williams manages that".

APR's subsequent to Dr. Dean's July 28, 2000 letter do not advance any restrictions or conditions on Mr. Halliday's return to work. In fact, Dr. Dean appears to have overlooked or moved beyond the terms of his July 28, 2000 letter (Tabs 26, pp. 17, 19 and Tab 25, p.12), with some exception. Dr. Dean's November 20, 2000 APR states that Mr. Halliday suffers from anxiety disorder/panic attacks and that he requires "regular

fixed schedule to correct disruption his arcadian rythym”. Also, it is Mr. Halliday’s evidence that Dr. Dean would typically ask him if he had succeeded in getting a shift change and that he always replied to him that he did not. While the August 8, 2000 APR states that “he is advised to adjust these medications accordingly to suit his shift work” (Tab 26, p. 17), Mr. Halliday states on cross examination that he did not feel he was responsible to tell Michelin of the safety aspect of medication as the Medical Centre does that.

Michelin’s Knowledge of, and Conclusions About, Mr. Halliday’s Disability

There is significant documentary evidence of Michelin’s knowledge of Mr. Halliday’s health condition as an employee. There are two primary sources providing evidence of such knowledge that were referred to extensively by both parties at the hearing: (1) Michelin’s medical centre Individual Health Record featuring running or chronological notes of Medical Centre visits found at Tab 25 of Exhibit 2 and (2) Attending Physician’s Reports found at Tab 26 of Exhibit 2.

Dr. Williams was at relevant times the key person at Michelin in employee health care in his role as an occupational physician. Dr. Williams has an impressive work history, starting with a medical degree from the University of British Columbia and family practice in Dawson Creek, British Columbia to his present position at Michelin’s international corporate headquarters in Clermont-Ferrand, France. He has a rather extensive and comprehensive background in health care. He began his medical career as a family physician in Dawson Creek, BC where he spent five years starting in 1976, then moved on to practice family medicine in the Bridgewater area from 1982 to 1991. It is during this time that he first became affiliated with Michelin on a part-time basis providing occupational medicine services to Michelin. This work consisted of offering his services along with several other local physicians for about 4-8 hours per week to assist sick or injured employees return to work at the Bridgewater plant. In 1991, he moved on to become a full-time Michelin employee in occupational medicine serving Michelin’s Bridgewater and Waterville plants. Academically, Dr. Williams followed his medical degree from UBC with a post-graduate degree from University of Alberta from 1991-1995 in occupational medicine, a designation that is certified by the Canadian Board of Occupational Medicine. In 2000, he became Associate Medical Director for Michelin North America, and then relocated with the company to France in 2002.

Dr. Williams provides extensive evidence of Michelin’s “Medical Centre” at its Bridgewater plant. Michelin provides health services to its employees through the Medical Center. The Medical Center at the Michelin Bridgewater plant generally consists of the following persons: a full-time employee occupational health (“OH”) nurse, two OH nurses contracted out on a part-time basis, one health records and service technician, one employee physician, and a second physician contracted out for services as required.

The purpose of the Medical Center is not to provide medical treatment, except perhaps for urgent or emergency medical treatment to an injured employee on the job. Michelin

receives medical information from attending physicians (and, in some cases, third parties) offering particulars of the symptoms, diagnosis and treatment plan as reported primarily by the attending physician, as well as specialists on occasion. The role of the Medical Centre is to interpret the medical information contained in a disabled employee's APR and extract from it the restrictions or adjustments to be made to accommodate the disabled employee's safe and productive return to the workforce. The necessary restriction and adjustment is determined in consultation with Michelin plant personnel. The nature of these discussions is described by Mr. Morrison, explaining that the discussion is about what Michelin can do about the employee's return to work and the extent to which the employee is likely to get better. These discussions are both convenient and regular, given the close physical proximity between the Medical Centre and Mr. Morrison's office, merely one floor separating the two units within the same building.

Dr. Williams describes Michelin's Medical Centre services as a "confidential intermediary" between an employee, the employee's attending physician and Michelin. Michelin holds employee medical information under the same protection and scrutiny as medical records in a doctor's office. Only Medical Centre employees have access to an employee's medical file. Other Michelin departments such as the personnel department can only obtain information on the employee's capability but not his disability. Other information such as diagnosis and treatment plans remains confidential and sealed off to other Michelin staff. Of course, the information held by the Medical Centre is not shared with other employees, despite the fact that it is intended that employees form a tight bond for the purpose of working in teams. Dr. Williams provides an example of the relationship between himself as Michelin physician and Mr. Halliday found in Mr. Halliday's Individual Health Record at p.7, Tab 25, Exhibit 2. In his entry for December 13, 1999, Dr. Williams writes that Mr. Halliday had "pulling across his chest". Dr. Williams explains at the hearing that this statement consists of an observation made on the basis of information provided to him directly by Mr. Halliday, not the result of a complete medical examination done for purposes of diagnosis and treatment. He also provides a further context for the use of the term "examine" as it appears in Mr. Halliday's Individual Health Record. In a December 1988 entry, Ann Brett, OH nurse, states that Mr. Halliday was "examined" by Dr. Williams. Dr. Williams explained in his evidence at the hearing that the meaning of "examine" is that the Medical Centre was anxious to determine from the plant shop if Mr. Halliday was having problems carrying out his modified duties and whether the work plan was being followed.

Dr. Williams recalls in his evidence the earliest signs that Mr. Halliday's absences were becoming significant. Mr. Halliday was calling in "sick" in 1998, with such event appearing on his 1998 Record of Events, with an entry in February 13, 1998 and initialled by Dr. Williams. But the period March to July 2000 is particularly significant. Mr. Halliday's Individual Health Record has an entry of March 17, 2000 where a note written by Dr. Williams indicates that Mr. Halliday is on Paxil and Clonazepam and is under stress, some of which is due to "legal troubles". Another entry of March 30, 2000 by way of a note written by Dr. Williams indicates that Mr. Halliday found himself wondering while driving and was on Paxil and a tranquillizer drug. Mr. Halliday

remarkably denies that these two consultations with Dr. Williams ever took place, insisting that since there is no entry in his diary of such consultations, such consultations never took place. Another entry of June 1, 2000 by way of a note written by Dr. Williams indicates that Mr. Halliday had a motor vehicle accident where he hit a telephone pole resulting in \$2200.00 in damage to his vehicle and was sent to see a psychiatrist. Again, Mr. Halliday categorically denies that this consultation with Dr. Williams ever took place, insisting that since there is no entry in his diary of such consultation and that he should not have been driving in the first place. Mr. Halliday states that it is possible that Dr. Williams was not present at the time of the alleged consultations as he was “looking after different plants” and that a nurse was typically his first contact at the Medical Centre. Asked if the reference about visiting a psychiatrist was an accurate account, Mr. Halliday replies: “you would have to ask my doctor.”

It is clear from Mr. Halliday’s evidence at the hearing that he told his superior Dave Hartman that he was under various medication during the 2000-2001 period at which time he had difficulty controlling his medication, resulting in both sleeping difficulty and lack of alertness. However, Mr. Halliday states on cross-examination that it was not up to him to tell his superiors about restrictions to his tasks caused by a medical condition. He explains that he “can’t tell Dave Hartman he can’t lift more than 10 lbs. because it is the Michelin Medical Centre that does that”. Mr. Halliday adds: “I was physically capable of working. It was shift work.”

Dr. Williams provides evidence of his ability and approach to interpreting medical information in general and, particularly, the information presented by Dr. Dean in his APR. Dr. Williams states that he is familiar with Paxil and clonazepam. He knows it as a drug that is “standard treatment” for depressive disorders and part of a relatively new family of commonly used anti-depressants that are “unlikely to be impairing an employee’s ability to work”. Dr. Williams states in a June 2000 entry at p. 9, Tab 25, Exhibit 2 of Mr. Halliday’s Individual Health Record that Mr. Halliday is still sedated despite self-regulation and is scheduled to see a psychiatrist in four weeks. He also took note of Mr. Halliday’s use of an “anxiolytic” (for relief of anxiety) – clonazepam (also known by its popular market name Rivotril). He knew of the drug as being part of the benzodiazepine family and used primarily for controlling seizures and as a short term (typically three weeks) treatment for anxiety. Dr. Williams’ evidence is that he understood that if the use of such medication was to exceed three weeks, the result may be addiction with the side effects of withdrawal being the same as the symptoms prevailing in the first instance. He describes the typical side effects as impairment of concentration, alertness and reflexes. In small doses, the drug will have the desired effect of relaxing or calming anxiety. His own conclusion from his own personal observation of Mr. Halliday’s visits at the Medical Centre and his reading of Mr. Halliday’s APR’s was that Mr. Halliday’s symptoms were brought on from the adverse effect of medication. He adds that his understanding of the effects of clonazepam is that it has 20-60 hours of accumulated time in the body and that it takes more than half a day to reduce its presence in the human body by half. Although Dr. Williams acknowledged that Michelin already had some experience in accommodating employees with a fixed shift for the purpose of

adjusting medication, such as an insulin-dependant employee with diabetes, he could see no benefit to Mr. Halliday of a regular fixed shift to adjust his medication.

Mr. Zinck's evidence is that he had a conversation with Dr. Williams about August 2000 at which time Dr. Williams indicated to him that APR's had been received on behalf of Mr. Halliday requesting a "steady shift". However, Mr. Zinck remembers that Dr. Williams told him Mr. Halliday's case was not a "must do". Unless it is a "must do", Mr. Zinck's assessment was that Michelin does not act on those requests and that only "must do's" were brought up and discussed with Mr. Morrison.

Mr. Halliday's APR's: Their Purpose and Use by Michelin

The purpose and use of APR's is addressed by Dr. Williams. He states on cross-examination by Mr. Halliday that the practical and immediate purpose of the APR is to permit a disabled employee to obtain a disability benefit. But more importantly, APR's are used by Michelin to assess an employee's disability in view of the employee's return to work. It is meant to do more than confirm whether there is sickness and extends to an assessment of the employee's capacity to return to work – to "optimize rehabilitation" from a treatment plan laid out by the Attending Physician on the APR form. More particularly, Dr. Williams states that the APRs are more than a "pass-fail" type of assessment of whether an employee is disabled from work or not. Rather, its purpose is to indicate to Michelin how the disability is affecting work and to what extent the employee will be able to return to work and under what conditions. In Dr. Williams' words, the purpose is to "optimize rehabilitation".

There is much contention in this matter as to how Mr. Halliday's health care should be addressed as between Michelin and Dr. Dean. Question 9 of the APR form contains the following question to be answered by the attending physician: "Do you wish to discuss this patient's illness/injury with the plant physician?" Mr. Halliday submits that Michelin has the obligation to contact Dr. Dean when Dr. Dean indicates "YES" to Question 9 in Mr. Halliday's August 31, 2000 APR, indicating that he would like to discuss the illness/injury with the plant physician. As to the extent to which Michelin expected and relied on the attending physician's answer to question #9 on the APR form, Dr. Williams states that he has rarely seen it filled out and adds that it is his experience that most attending physicians "do not wish to be involved" in the return to work exercise. On cross examination by Mr. Halliday, Dr. Williams says that he interprets a "YES" answer as meaning, "By the way, Williams, I am going to contact you". Dr. Williams states that it is "not often" that he has seen such a request filled out by an attending physician on an APR. On cross examination by Commission counsel as to whether Michelin "relies" on the attending physician, Dr. Williams states that Michelin "works with" the attending physician. Dr. Williams states that the "model" depends on cooperation of everybody involved. Dr. Williams' evidence is that Michelin understandably did not know the entire story in Mr. Halliday's care except for the information contained on Mr. Halliday's APRs.

Michelin potentially obtains medical information from a number of sources. For example, Dr. Williams states on cross examination by Commission counsel that it deals with outside medical practitioners, including specialists, particularly in Workers' Compensation Board ("WCB") claims in which case Michelin has the responsibility for directing the employee's care. However, it is unusual for Michelin to look to specialists in non-WCB cases. Generally, Dr. Williams states on cross examination by Commission counsel that he did not have concerns with the accuracy of Dr. Dean's APR's. Dr. Williams also states on cross examination by Mr. Halliday that although Dr. Drake invited Michelin in his November 20, 2000 APR to "contact self" for more details, Dr. Williams does not remember any further contact with Dr. Drake. Mr. Halliday asks: "If you disagreed with Dr. Drake on what is to be done, why not ask the employee to seek another opinion or specialists?" Dr. Williams' evidence on cross-examination is categorical and unequivocal: "It is not my role to impose a certain treatment on the employee or the attending physician. If there is a great disagreement between the attending physician and the employee, then I can ask the employee to go back to the attending physician, but it is not for him to replace the attending physician." Dr. Williams concludes: "You can find a variety of treatments among a variety of physicians."

Organization of Work at Michelin in the Context of Michelin's Duty to Accommodate

Michelin's shift structure contains exceptions where necessary. Michelin is required to make adjustments to its regular shift structure to accommodate employee absences. Mr. Halliday explained in his evidence that there would obviously be occasions where a crew would be reduced to three members due to the absence of one member. In such cases, the task of replacing the absent member would be determined on a case-by-case basis based on such factors as whether the production levels at that point were such that there was already sufficient supply of material in inventory to be used up at that point in time. However, he makes it clear that overtime was an option but that it was best to avoid overtime. He states that the decision on whether to seek overtime is left with the Business Unit Leader. He remembers having taken on the responsibility of Business Unit Leader at one point during his employment with Michelin.

Mr. Halliday also spent lesser amounts of time in various plant areas. One is known as the "None Conforming Area" ("NC"). The area is where product is inspected to determine if quality requirements are met. Employees typically assigned to this area included those who may have a pulled muscle as the area involves little physical exertion. The time typically spent by an employee at NC is short in duration (employees are "in and out") and is usually filled by an employee on day shift from a post where there is not enough work to keep all operators busy.

Mr. Halliday also spent some time in the Rubber Side Service "O". The area is the final end process where tires are verified, picked out for defects, where corrective measures are taken to ensure compliance with quality standards. For example, Mr. Halliday explains that if there was too much rubber on a tire, excess rubber would be taken off.

This area has 12 hour shifts and runs two shifts on the basis of 7:00am-7:00pm and 7:00pm – 7:00am.

Mr. Halliday also spent some time at Service “T” where the finished tire is placed on pallets and shipped out on trucks. He worked at loading containers one summer on the day shift Monday to Friday for about a three month period where he says the “shop had slowed down”. Other positions at Service “T” would include janitorial and other “non-production” jobs.

A particularly relevant additional assignment in the evolution of Mr. Halliday’s employment at Michelin was his assignment to the “648 MTH” heavy weight tire section for several years. The section prepares larger size tringles for heavier weight bearing vehicles. What is particularly relevant about 648 MTH is that it is a rotating shift that does not work weekends and Mr. Halliday first got a temporary transfer to that section in 1998 and became validated in the skills required to operate the post in 2000.

Mr. Morrison’s evidence is that Michelin’s workplace is very specialized and stratified. He explains that the three parts of the Michelin Bridgewater plant – RX (tringle), tire and cabling - are “very different” from each other as the type of skills is different. Mr. Morrison states Michelin has been unsuccessful in cross training its employees into different trades or posts. The rubber and wire used in the tire making process is sensitive to time and temperature. Rubber is cooked from a liquid state and has to be handled in a timely fashion. Wire is subject to corrosion from humidity and has to be handled carefully and stored for a limited time in temperature controlled areas. For example, the “RX” tringle shop consists of both heavy weight and light weight (passenger and light truck) tire manufacturing with a total of 40 employees, divided into teams and organized in crews of 3-4. It only has two employees on day shift (one in prep work, one in non-conforming work). There is one utility employee for each shift.

The business of making and selling tires is described by Mr. Morrison as complex. There are tight order and delivery targets, with the necessary inter-relationships between different Michelin plants in the North America supply chain, tire production and delivery targets with customers, with overall business sales targets fluctuating on a daily basis. The purpose of the organization of work in teams is that cross-training and team loyalty and affinity will prevail in small teams. Most teams benefit from such autonomy where members schedule their own time off and support and cover for one another.

Absenteeism at Michelin is considered by Jim Morrison to be low, at about 2% for all of its 3400 employees at the three Nova Scotia plants. If an employee is sick, Michelin first leans on the utility employee. This “utility” employee is the prized, “do-it-all” employee who can function at all ports in all areas of the shop floor, working 7:30am -4:30pm, Monday to Friday. If it is not possible to move the utility employee to cover the absence, Michelin attempts to cover the absence with voluntary overtime. The allocation of overtime work to employees is based on teamwork and is employee auto-managed. Typically, a shift employee will accept to extend his regular shift of eight hours by an extra four hour shift to cover the absent employee, and an employee in the oncoming

crew will volunteer to begin his shift four hours earlier. Overtime is compensated either by 1.5 times the employee's regular pay or through "recouped" time, whereby overtime hours are "recouped" or exchanged for time off. Although voluntary overtime is frequently used, Mr. Morrison states that it is not popular. Surprisingly, it is Mr. Morrison's evidence that employees at the Bridgewater plant value their time off and typically prefer to be compensated for overtime by way of "recouped" time as opposed to time and a half overtime pay.

There is an obvious and tangible monetary cost to Michelin for absences. Each year, Mr. Morrison estimates that Michelin pays out \$2.5 million in short term disability benefits, \$3 million in Michelin's continuation of employee benefits during periods of long term disability benefits, and \$1.8 million in overtime pay. The employee turnover rate at Michelin is considerably low, at about 1%. The average number of years of service for a Michelin employee is 22 years.

Michelin considers certain absences more problematic than others. Mr. Morrison states that planned, uninterrupted absences such as maternity leaves and rehabilitation from physical injuries are more easily dealt with than absences that are unexpected, repetitive or of short duration such as Mr. Halliday's pattern of absences. For example, by the fall of 2000, Mr. Halliday had essentially been absent 2/3 of the time. His absences had become so frequent that although Michelin had not been able to identify the true cause of Mr. Halliday's disability, it nonetheless built in a position in its yearly business plan to be filled by a student or employee from another area within the plant to deal with Mr. Halliday's frequent absences.

But the evidence does not show that Mr. Halliday's absences resulted in direct, tangible business or production loss. Mr. Morrison admits on cross-examination by Commission counsel that Michelin certainly had "very good" business results during the time Mr. Halliday was absent 2/3 of the time. Mr. Morrison is completely forthcoming on the effect of Mr. Halliday's absences on business production: "Certainly, we would not have closed the plant" as a result of those absences. Mr. Morrison identified the greatest concern for Michelin to be the resulting low employee morale caused by Mr. Halliday's absences. Mr. Morrison says of Mr. Halliday's production group: "they met their production targets, but they had other problems". Mr. Hartman states that his impression was that Michelin's lightweight tire "R" employees were seeing "no light at the end of the tunnel" and frustrated at what appeared to them to be the lack of seriousness in Mr. Halliday's reasons for being absent and his failure to apologize to fellow employees for being absent.

Mr. Halliday's Absences and Michelin's Innocent Absenteeism Program

There was extensive evidence presented at the hearing regarding the number and frequency of Mr. Halliday's absences throughout his employment at Michelin. The most relevant profile of such absences is presented by way of summary in Michelin's submission, which is set out below, and is not disputed as to its accuracy by either Mr. Halliday or Commission counsel:

PERIOD	MR. HALLIDAY'S ABSENTEEISM RATE	MICHELIN THREE PLANT AVERAGE
July 1, 1999 – June 30, 2000	28%	2.9%
August 1, 2000 – October 31, 2000	67.16%	3.18%
November 1, 2000 – January 31, 2001	43.33%	3.12%
February 1, 2001 – May 1, 2001	42.7%	3.51%

Mr. Halliday's evidence at the hearing is that he was aware that regular attendance to work was a significant requirement for Michelin and that his absences had been unacceptable to both himself and Michelin. Mr. Halliday's March – July 2000 absences from work were particularly significant in duration. Mr. Halliday also concedes on direct examination that his absenteeism was "excessive" around the time of his July 2000 IAP letter. On cross-examination, he states that he acknowledges his absenteeism was a problem at the time Michelin issued its first IAP letter in July 2000. But when asked in cross-examination if he had problems with attendance at Michelin before 2000, he answered: "according to Michelin". He acknowledged the requirement of regular attendance set out in Michelin's April 2000 Employee Guide, acknowledging that Michelin has "high standards" involving the operation of "complicated machines" where productivity, safety and quality are "important".

Mr. Halliday received his first IAP letter in July 2000. His reply is unequivocal. He formally seeks out a "separation" in light of his "excessive" absenteeism record, as evidenced by a written memo from Mr. Halliday to Roger Zinck dated July 12, 2000. On cross-examination, Mr. Halliday states that his decision to ask for a "separation" was not the first time he sought to leave Michelin and that his "separation" request was a consequence of the IAP letter, explaining that he simply availed himself of the "...option of putting his name on a list for volunteer separation, seeking a happy medium for Michelin to chose between termination and separation." He said he presented that option in the context of the "workplace", "work environment" and "the politics" in the "work environment". He adds: "There was no problem. I got along with pretty well everybody but there was an atmosphere of favouritism that was not dealt with." In addition, Mr. Halliday states that he would not have accepted a "separation" until 2001.

Although there are several references to Mr. Halliday's behaviour and emotional outbursts, there is one incident in July 2000 that stands out as being particularly significant. Mr. Halliday acknowledges that he "jokingly" said to Dave Hartman and Roger Zinck at a July 11, 2000 IAP meeting that it is surprising that Michelin is not the site of an incident like that of the post office where an employee brought an "oozie" to work. He says he was not upset that day and the conversation was relaxed, except that he could not understand ("was "surprised, but not upset") why Michelin would need to know why he was off work after he had been off work for about four months supported by APR's. He was asked by Doug Liot to apologize to fellow crew members about the

“oozie” comment, but never understood how the comment had left the meeting room with Dave Hartman and Roger Zinck and said that the majority of the people did not know from his apology what he was talking about.

There appears to another incident in the fall 2000 where it is alleged Mr. Halliday had made threats to fellow workers. This is recorded in a November 9, 2000 APR: Exhibit 2, Tab 26, p. 27. Mr. Halliday’s evidence at the hearing is as follows: “People complained I was making threats. But the work environment was the problem.” Mr. Halliday’s complaint was that such incidences were not thoroughly investigated by Michelin. There is evidence of a difficult meeting between Mr. Halliday and Mr. Morrison on September 5, 2000 concerning such threats as evidenced in Mr. Halliday’s diary. The APR concerning an intimidation incident was discussed and Mr. Halliday felt the issues were not addressed (“I can ask a question but I don’t control”), but felt that he was not the source of any problem (“I did not think I had a problem”). Mr. Halliday states that he told Mr. Morrison in a November 2000 meeting he needed a transfer to 648, such request being followed by a November 21 2000 memo addressed to Dave Hartman and Roger Zinck. Mr. Halliday did not provide medical information to Mr. Morrison as he could not give Mr. Morrison personal medical information on account of confidentiality, but insisted on cross examination that both Dr. Dean’s letter and APR’s supported his request.

Perhaps the best description of Michelin’s approach to returning absent employees to work and its allocation of new positions to its employees is provided by Jim Morrison. During the course of one year, Michelin typically accommodates over one hundred employees who are doing “transitional” work, i.e., work that is not their regular job, normally involving lighter work. There are various categories of absences, with the highest priority being given to those employees hardest to place, from employees off work on sick leave to employees whose position has been made redundant. Michelin’s policy is to place the redundant employee within the plant and keep him employed until a new position can be found. Some employees are seeking to return to work after being absent on workers’ compensation claims. Jim Morrison explained in his direct evidence that there was a two year “replacement window” thereby consisting of the maximum time within which an employee off on a WCB claim can return to his old job. Other employees are fit to return to work, but under a “preemptory medical request”. These are twofold: an employee’s return to work is subject to his doctor’s direction regarding restrictions to his normal job, e.g., he cannot lift in excess of a certain weight; or, an employee can work, but his doctor states that he has difficulty with his wrist and would benefit in the long term if he were to use his wrist less frequently.

As Mr. Morrison states categorically on direct examination, Michelin does not bump an employee for the benefit of an absent employee who is returning to work. Mr. Morrison evidence is that about the time of Mr. Halliday’s IAP letter of November 13, 2000, he met with Mr. Halliday at which time Mr. Halliday indicated to him he was discouraged with doctors and did not know what was wrong with him and requested a fixed shift. Mr. Morrison clearly remembers telling Mr. Halliday that there were no day positions except for the utility (or troubleshooter) position for which Mr. Halliday did not have the

required training. Alternatively, Mr. Halliday's request and submission was that he could have been transferred to the 648 machines (heavyweight tires) where he had cross-trained. This was deemed unacceptable by Michelin as there were no openings in that position. Such transfer would have been considered by Michelin a promotion and would have required that the position be posted. Mr. Morrison, on cross-examination by Mr. Halliday, refutes Mr. Halliday's suggestion that Michelin was insincere in its processing of Mr. Halliday's transfer request to 648. He maintains it was obvious Michelin had concluded there were no positions available. Mr. Morrison's evidence is that "things change" and that the transfer request had the effect of alerting Dave Hartman as business unit manager that such a transfer was being sought. Mr. Halliday also alleges that Michelin did not get back to him regarding his transfer request in a timely fashion. Mr. Morrison disputes this conclusion, saying that it is his belief Dave Hartman got back to Mr. Halliday verbally within 10 days, although written confirmation was only provided a month later.

Mr. Halliday's approach and attitude during the IAP process merits attention. At the initial July 11, 2000 IAP meeting, Mr. Hartman remembers Mr. Halliday as being "non-caring", "jokingly" asking, "do I need a lawyer?". Mr. Halliday further asked what he was to do about taking emergency phone calls and taking breaks to go to the bathroom. He was blaming Michelin for his stress, although he identified other stressors in his life. It was also at this time that Mr. Halliday demanded to speak with Edouard Michelin, the co-managing partner for Michelin World Wide and threatened to bring a machine gun into the plant. Mr. Hartman found Mr. Halliday's behavior and attitude so troubling and disconcerting that he adjourned the meeting to the next day. Mr. Halliday returned to his post in the shop.

There is some evidence on the issue of whether there was confusion or a "divide" caused by two streams if dealing with Mr. Halliday's absences - IAP or OHS - perhaps even being further complicated by other employee assistance services such as the EAP and the employee ombudsman. A number of support services were purportedly offered by Michelin to assist Mr. Halliday. One resource available to Mr. Halliday was the Employee Assistance Program. It consists of a confidential (Michelin does not know), externally sourced service which any Michelin employee can access by a toll free phone number 24 hours per day. Another service available to employees is the employee representative located on the shop floor. Mr. Hartman describes the role of employee representative as akin to that of ombudsman for employees hearing grievances related to the workplace. Michelin's ombudsman performs the role of employee advocate. During all relevant times, Mr. Halliday would have had the benefit of availing himself of the Michelin ombudsman services.

LAW AND ANALYSIS

At this point it is necessary to consider the legal principles applicable to Mr. Halliday's complaint. Section 5 (1) (d) & (m) of the Nova Scotia *Human Rights Act* [R.S.N.S. 1989, c.214] provides as follows:

- 5 (1) No person shall in respect of
- (d) employment
- discriminate against an individual or class of individuals on account of
- (o) physical disability or mental disability

“Physical disability or mental disability” is specifically defined in the *Act* as follows:

- 3 In this *Act*
- (a) “physical disability or mental disability” means an actual or perceived
- (i) loss or abnormality of psychological, physiological or anatomical structure or function,
- (ii) restriction or lack of ability to perform an activity,
- (iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment or impediment or reliance on a hearing-ear dog, a wheelchair or a remedial appliance or device,
- (iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (v) condition of being mentally handicapped or impaired,
- (vi) mental disorder, or
- (vii) previous dependency on drugs or alcohol [emphasis added]

The law relating to the duty to accommodate as it relates to Mr. Halliday's complaint is well established. It is clear Michelin do not dispute that it owes a duty to accommodate Mr. Halliday to the point of undue hardship. The issues underlying Michelin's duty to accommodate consist of the following:

1. What information was made available to Michelin thus enabling it to seek to accommodate Mr. Halliday?
2. What measures did Michelin undertake to accommodate Mr. Halliday?
3. Was Michelin driven to the point of undue hardship in seeking to accommodate Mr. Halliday?

The BOI also further finds that the duty to accommodate has been read into and applied in complaints under the Nova Scotia *Human Rights Act: Blanchard v. Labourers' International Union, Local 1115 and Doug Serroul and Bernie MacMaster* (2002), CHRR Doc. 02-122 (N.S. Bd. Inq.); and *MacEachern v. St. Francis Xavier University* (1994), 24 C.H.R.R. D/225 (N.S. Bd. Inq.).

The burden of proof in this matter is also not in dispute. The burden first lies with Mr. Halliday as complainant to establish on the balance of probabilities that he was the subject of discrimination by Michelin on the basis of physical or mental disability (actual or perceived) for terminating his employment in June 2001. Therefore, I must first find that Mr. Halliday was disabled at the relevant time, was treated adversely on the basis of his disability, and that there was evidence before the BOI from which it is reasonable to infer that the disability was a factor in Mr. Halliday's termination. In addition, it is necessary for the BOI to find that Michelin knew, or ought to have known, of Mr. Halliday's disability. If Mr. Halliday is able to establish discrimination on a *prima facie* basis, the burden then shifts to Michelin to show that they were justified in terminating Mr. Halliday's employment and that it fulfilled their duty to accommodate to the point of undue hardship.

The *Act* does contain provisions whereby Michelin can claim exemption from claims of discrimination under certain circumstances. Section 6 of the Act provides as follows:

- 6 Subsection (1) of Section 5 does not apply
- (a) where a denial, refusal or other form of alleged discrimination is
- (i) based upon a bona fides qualification, or
 - (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

In the leading case of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.* (1999), 35 C.H.R.R.D/257 (S.C.C.) (commonly referred to as *Meiorin*) the Supreme Court of Canada establishes a three-part test to determine whether the employer's operational requirement (claim for exemption) from the duty to accommodate is justified or *bona fides*. The Court set out the three-part test as follows:

Therefore, in order to satisfy *Meiorin*, the Respondents will have to establish (1) what the standard is designed to achieve and show that there is a rational connection between the purpose and the objective requirements of the job; (2) if the rational connection is shown, then they must show the standard was adopted in good faith and was necessary for the fulfillment of the purpose without intention to discriminate against Ms. Saunders; and (3) upon the Respondent clearing the two hurdles, they must show that they attempted to accommodate Ms. Saunders up to the point of undue hardship.

The issue of what constitutes a "mental disability" under the *Act* has been considered in a number of human rights cases. Counsel for Michelin does not dispute that mental disability is a proper ground for a discrimination claim under the *Act*.

The BOI has already held in Michelin's non-suit motion that Mr. Halliday had met the burden of a prima facie case of disability. Subsequent to the non-suit motion, the BOI heard evidence from Michelin witnesses on Mr. Halliday's disability as well as Michelin efforts to accommodate Mr. Halliday's disability. In particular, Dr. Williams's evidence was that he had observed Mr. Halliday at the Medical Centre on more than one occasion showing symptoms of sleepiness and nervousness. Upon hearing the evidence from Michelin's witnesses, the BOI again concludes that Mr. Halliday has established that he suffered at relevant times from a disability under the *Act*. It also finds that Michelin's decision to terminate Mr. Halliday was due to Mr. Halliday's excessive absences, and that such absences were related to his disability. The BOI also finds that Michelin knew, or ought to have known, that Mr. Halliday's disability to be generalized anxiety disorder as expressed by way of anxiety or anxiety-like symptom of nervousness, fidgety and drowsiness. These symptoms were clearly observed by Dr. Williams and identified by both Dr. Dean and Mr. Halliday to Dr. Williams.

Commission counsel also submits that the definition of "disability" includes both impairment and the perception of impairment as provided in the definition of "disability" under the *Act* as well as relevant jurisprudence. In *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2004] F.C.J. No. 2172 (T.D.), the Federal Court of Appeal held that the employer failed to accommodate Mr. Desormeaux's "incapacitating migraine headaches, noting that "...disability in a legal sense consists of a physical or mental impairment...which results in a functional limitation or is associated with a perception of impairment". Michelin counsel submits that *Desormeaux* supports its position that migraine headaches were found to be the basis of the complainant's disability as opposed to a basket of mere transitory ailments or the mere perception of headaches.

Counsel for Michelin submits that the nature of Mr. Halliday's disability features a basket of transitory, intermittent and temporary ailments, lead by flu-like symptoms. Specifically, it relies on the authority of *Neilson v. Sand Man Four Limited*, [1986] B.C.C.H.R.D. No. 4 (Powell) - sciatic nerve injury from fall - and *Ouimette v. Lily Cups Limited* (1990), 12 C.H.R.R.D/19 (Ont. Bd. Inq.) - flu - in support of its position that such conditions cannot constitute a "disability" under the *Act*. In *Ouimette*, it was held that it would be "...wrong to attempt to stretch the meaning of 'illness' to include the flu..." as it would take away from the "high purpose" of human rights legislation: para 67. It also relies on *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2001] 1 S.C.R. 665 in its contention that Mr. Halliday's basket of ailments consist of "normal ailments" which does not constitute a "disability" as interpreted by the Supreme Court in *Montréal (City)*. However, the BOI has already held in its decision on Michelin's non-suit motion that Mr. Halliday did not suffer from the flu but rather flu-like symptoms related to Generalized Anxiety Disorder ("GAD"). The BOI also agrees with Commission counsel and finds that a "disability" based on anxiety and stress-related symptoms do not constitute a trivial condition and clearly can constitute a disability within the meaning of the *Act*. In addition, mental illness does not have to be "severe" in order to constitute a disability under the *Act*. Certainly, mental disability is a serious disability although it is unfortunately often misunderstood.

The BOI finds Mr. Halliday to be very intelligent and conscientious. It is without hesitation that Dr. Dean frequently describes Mr. Halliday in his evidence as having above average intelligence. It is also obvious from Mr. Morrison's evidence that Mr. Halliday was resourceful and persistent in wanting to improve his quality of life. He was having trouble with his medication and trying to deal with the issue himself. Mr. Halliday felt he had much to contribute to Michelin. Mr. Halliday also had significant insights into Michelin's Bridgewater plant operations from both his training and his many years of experience as a plant employee. In particular, Mr. Halliday would have gained first-hand knowledge of the organizing of labour and materials from the time he spent at Michelin. The BOI concludes that Mr. Halliday knew that regular employee work attendance was an indispensable requirement for Michelin employees. Mr. Halliday admits that his absences were excessive around July 2000. His absenteeism rate for the relevant 2000-2001 period was not in dispute.

Unfortunately, Mr. Halliday does not show great insight into the purpose and significance of the various efforts undertaken by Michelin in assessing and dealing with his disability. Mr. Halliday's regular performance evaluations at Michelin were a concern for Michelin early in Mr. Halliday's tenure at Michelin. The BOI finds that Michelin employee evaluation process - DPR performance evaluation process - was progressive and user-friendly, providing a genuine opportunity for Mr. Halliday to provide meaningful contribution. Mr. Halliday failed to sign his 2001 DPR for a third consecutive year. Mr. Halliday's evidence at the hearing is that he has difficulty interpreting the performance results, as he does not know if the "98.2%" achievement level is reflecting the module as a whole or his own individual production quota. But the overwhelming issue regarding his performance is that the DPR unequivocally concludes that "he did not meet the requirements of the post".

It would be an oversimplification of Michelin's intentions to read too much into its labeling of an employee's disability from work as an "absence" as opposed to a "disability". In substance, the Employee Progress Reports - Occupational Health Services provide a comprehensive and timely profile of the duration of the employee's "absence" and determine whether Mr. Halliday is available to return to work and under what restrictions. It serves a coordinating function between human resources (SP), the Medical Center and production (Dave Hartman as Business Unit Leader). Moreover, Mr. Halliday could only qualify for Michelin's short term benefits if he provided proof of "disability" substantiated by APR's from his own attending physician. The role and primary preoccupation of the OHS staff at the Medical Centre is the safe and productive return to work of the disabled employee. They perform a coordinating role of matching the medical advice and treatment plan of the attending physician with Mr. Halliday's occupational skills.

The BOI finds Dr. Dean to be strategically positioned at the center of Mr. Halliday's health care. It concludes that Dr. Dean was both well-intentioned and conscientious as Mr. Halliday's attending physician. In particular, he took on the role of patient advocate for Mr. Halliday. His letter to Michelin of July 2000 is a clear example of Dr. Dean's commitment to advancing Mr. Halliday's best interests. However, the BOI finds that Dr.

Dean failed to take a purposeful approach to the return-to-work exercise. It was his obligation to provide information to Michelin in such a way that Michelin could both understand and apply in reintegrating the employee into the workplace. Such information needed to be practical, timely and comprehensive, tailored to the purpose of accommodating the employee on the road to returning to work.

Michelin required a basic level of information on Mr. Halliday's disability in order to embark and succeed in the exercise of accommodating Mr. Halliday. Put simply, it cannot begin looking for something unless it knows what it is that it is looking for. One measure of certainty required by Michelin is the nature and severity of the diagnosis. Dr. Williams was clearly Michelin's information gatekeeper pertaining to Mr. Halliday's medical care. It follows from Dr. Williams's strategic position at Michelin that by providing Dr. Williams with medical information, Mr. Halliday or Dr. Dean clearly delivered information to the key persons at Michelin. Dr. Williams own assessment from his own conversations with Mr. Halliday and first hand observations of Mr. Halliday's demeanor was that Mr. Halliday was on one occasion fidgety and agitated, on another occasion sleepy. He judged his mental status to be normal. The test for Michelin is whether Mr. Halliday was able to return to work. Based on his rather extensive professional experience as both a family physician and in-house Michelin medical director, Dr. Williams made the determination that Mr. Halliday's medication was too addictive and should only be prescribed for a maximum period of two weeks. Mr. Halliday had to wean himself off his medication and that a regular fixed shift would not be of any benefit to getting him off his medication or to regulate his medication.

It was not Michelin's role to either second guess Dr. Dean as Mr. Halliday's attending physician or substitute the diagnosis provided by Dr. Dean. Dr. Williams wisely did neither. The BOI is satisfied with Dr. Williams' academic and professional credentials along with his broad and extensive work as both a family and occupational physician. He also had been associated with Michelin in Bridgewater for over ten years. He had known Mr. Halliday since 1998 through Mr. Halliday's many visits to the Medical Centre. The BOI agrees with Michelin's submission that it was not up to itself as employer to decide when an employee was disabled. This is a private matter to be decided between Mr. Halliday and his own doctor. It was not Michelin's place to either come between an employee and his attending physician or second guess an employee's physician. As Dr. Williams stated in a rather straightforward, common sense way: "It is not my role to impose a certain treatment on the employee or the attending physician. If there is a great disagreement between the attending physician and the employee, then I can ask the employee to go back to the attending physician, but it is not for me to replace the attending physician." He then concludes: "You can find a variety of treatments among a variety of physicians." Dr. Williams clearly indicated that he was not providing medical advice or directing treatment, adding, "an employee does not need more than one treating physician". The BOI finds Dr. William took the correct approach not to wedge himself between a patient and his physician.

Mr. Halliday provides a very confusing and vague picture to Michelin of the source of his disability. First, Mr. Halliday complains that he has a conflict with his superior Ernie

Carver. Second, he wants to transfer to a regular, fixed shift, preferably at the 648 MTH module. Third, he asks to receive a severance package. He also complains that Michelin's work processes are inadequate or inappropriate, but does not provide any evidence as to his skill, knowledge or experience that would cause him to be able to make such a determination. Mr. Zinck's own conclusion is that Mr. Halliday was having issues with the way his shop was operating. Mr. Halliday didn't like the quality system, and complained of 8-9 different things about the way the shop was being run. Furthermore, Mr. Halliday challenges Mr. Morrison and Mr. Hartman as to whether Michelin will accommodate his personal needs, such as Mr. Halliday being able to receive emergency phone calls and take bathroom breaks. The BOI finds that the nature of Mr. Halliday's complaints and requests to Michelin were not effective in explaining to Michelin the source of his disability.

Furthermore, Mr. Halliday asks that he be given time to adjust his medication. He had been off work for most of the period of March to July 2000, without showing any progress in his attempt to regulate or get off his medication. But yet Dr. Dean insists in his July 28, 2000 letter to Michelin that Mr. Halliday needed a fixed shift to regulate his medication. Mr. Halliday states rather rhetorically in his cross-examination of Mr. Morrison that Dave Hartman, Doug Liot, Roger Zinck and Jim Morrison were all supposed to help him but that they instead treated him unfairly. The BOI concludes that Mr. Halliday did not improve his situation by the rather confusing and contradictory signals he was sending to Michelin as to the source of his disability. For example, while Mr. Halliday was reluctant to return to work in July 2000, his APRs generally indicated he was fit to return to work. In fact, he admits on cross examination that he had no doctor's restrictions on his work when he returned to work July 12, 2000. This assessment is contemporaneous to and consistent with an APR of July 27, 2000 where Dr. Dean states that Mr. Halliday should be able to function at work if given a fixed shift.

Mr. Halliday appears to have had serious issues with his co-workers. This is clear from Ms. Wanda Joudrey's evidence, as well as the evidence of Mr. Halliday and Dr. Dean. Mr. Halliday was complaining of a hostile work environment. Although it was not reasonable to expect Mr. Halliday to apologize or give out personal information about his medical care, he did not show great insight in his evidence of the impact that his absences may have had on his fellow employees. However, there is no indication that Mr. Halliday's absences were caused by a poisoned work environment. Mr. Morrison remembers Mr. Halliday indicating with respect to the alleged September 6, 2000 incident of harassment that he did not agree with Dr. Dean description of "harassment". Specifically, at their November 11, 2000 meeting, Mr. Morrison remembers Mr. Halliday addressing the issue of workplace harassment as identified by Dr. Dean in his APR. Mr. Halliday reassured him that nothing was wrong and smiled, saying "it's my doctor". At the July 20, 2000 meeting with Dave Hartman and Jim Morrison, it is recalled by the latter that Mr. Halliday indicated that despite having trouble relating to his co-workers, it was difficult for him to leave a job that paid exceptionally well. Therefore, the BOI has difficulty with Mr. Halliday's allegation of workplace hostilities in the summer of 2000 when he states that he would not have accepted a "separation" until 2001. It is difficult

for the BOI to accept that the work environment at work was so untenable and hostile for Mr. Halliday that he wished to stay on until 2001.

Michelin's Duty to Inquire into Mr. Halliday's Disability

Perhaps the most unsettling issue in this matter is whether Michelin had a duty to inquire about the nature of Mr. Halliday's disability. Mr. Halliday leaves no doubt in his submission that he is particularly emphatic over the fact that Michelin had ample opportunity to seek further and better medical information, particularly in view of being in receipt of 36 APR's over the 15 month period between March 14, 2000 and June 19, 2001. However, Michelin chose not to contact Dr. Dean or others seeking clarification on Mr. Halliday's disability. Commission counsel relies on the authority of *Sylvester* in support of Michelin's duty to inquire and failure to meet its duty to so inquire: *Sylvester v. British Columbia Society of Male Survivors of Sexual Abuse* (2002), 43 C.H.R.R.D/55, 2002 BCHRT 14. However, the BOI finds that the facts in *Sylvester* can be distinguished from Mr. Halliday's circumstances as the employer in *Sylvester* failed to make further inquiries and chose to terminate the employee despite having merely one "notice letter" of a "medical leave" as the basis on which to assess the employee's disability. In contrast, the BOI finds that contrary to Mr. Halliday's submission, Michelin did not lack information as it had accumulated volumes of APR's from Dr. Dean and made regular, extensive inquiries of Mr. Halliday as recorded by Dr. Williams and staff at Michelin's Medical Centre.

Commission counsel also refers to the *Gordy* decision cited as *Oak Bay Marina Limited v. British Columbia (Human Rights Tribunal)* (No. 2) 51 C.H.R.R. D/68. in its submission that it is the employer's responsibility to obtain all relevant information about the employee's disability", such information including "...the employee's current medical condition, prognosis for recovery, ability to perform duties, and capabilities for alternate work". The employer must prove it is knowledgeable in both the disability itself as well as the employee's capability given such disability. However, the BOI finds that *Gordy* can be distinguished from the facts in this present case as Dr. Williams' evidence shows significant insight into the nature and effects of anxiety and depression medication, particularly his description of the effects of anxiolytic drugs. At the critical time when Mr. Halliday was cleared to return to work by Dr. Dean, Michelin received extensive information from Dr. Dean on Mr. Halliday's ability to return to work, all of which indicated Mr. Halliday was ready to return to work, without restrictions on his own job or suggestions of alternative jobs except that a regular, fixed shift would be more suitable.

The nature and extent of a complainant's duty in the search for accommodation is extensively set out in *Central Okanagan School Board No. 23 v. Renaud* (1992), 16 CHRR D/425 (S.C.C.). The Supreme Court of Canada held that the complainant must do his or her part to facilitate the search for a reasonable accommodation. Sopinka J. specifically states at para. 44:

This does not mean that, in addition to bringing to the attention of the employer the facts relating to the discrimination, the complainant has a duty to originate a solution. While

the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley, supra. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all circumstances is turned down, the employer's duty is discharged. [emphasis added]

Commission counsel submits that Michelin has a duty to originate and fashion a solution to accommodate Mr. Halliday's return to work. Clearly, while the employee has an obligation to facilitate the implementation of the proposal, the employer has the duty to originate a solution: *Central Okanagan School Board No. 23 v. Renaud*. The accommodation exercise is such that "...all those involved are required to find a solution that adequately balances the competing interests..." and requires the party in the best position to advance a solution to take the lead: *McLoughlin v. British Columbia (Ministry of Environment, Land and Parks)*, 1999 36 C.H.R.R. D/306 (British Columbia Human Rights Tribunal).

In contrast, Michelin submits that it was Mr. Halliday who bore the obligation of "bringing the facts" of his disability to Michelin attention and not for Mr. Halliday to originate a solution. In the exercise of seeking accommodation of the employee's disability, there is a duty on the employee "to assist in securing an appropriate accommodation: *Renaud v. Central Okanagan*, para 43. It requires the employee "...to take reasonable steps to move the process forward, depending on the circumstances of the case...": *McLoughlin v. British Columbia (Ministry of Environment, Land and Parks)*. The employer will succeed if it shows that it was prevented from achieving a reasonable accommodation due the "...unreasonable action or inaction of the complainant": *Latreille v. Stream International*, para. 48; *McLoughlin v. British Columbia (Ministry of Environment, Land and Parks)*, para. 78).

The BOI concludes from the evidence that Michelin was neither unaware of, nor apathetic about, its responsibility to accommodate disabled employees. The BOI accepts Dr. Williams' uncontroverted evidence that Michelin already had the experience of accommodating employees with a fixed shift for the purpose of adjusting medication, such as an insulin-dependant employee with diabetes. But the BOI also accepts Dr. William's evidence that Mr. Halliday simply did not have a medical condition that would have been solved with a fixed shift. Mr. Morrison's evidence is that all indications from Mr. Halliday were that both himself and Dr. Dean "felt" it would be "helpful" if Mr. Halliday were to be assigned to a regular, fixed shift to help with his attendance problems. Such requirement was not mandatory or substantiated by either Dr. Dean or Mr. Halliday.

It was clearly necessary that Mr. Halliday's medical care be anchored in the cooperation of everyone involved, i.e., the employer, the employee and the attending physician. I conclude that the relationship between the three broke down at several critical points. The burden of finding accommodation to the point of undue hardship falls on the employer. As was held in *Central Okanagan School Board No. 23 v. Renaud*, the employer is in the best position to determine how the complainant can be accommodated. In the particular circumstances of the necessary cooperation between three parties - employer, the employee and the attending physician - Michelin bore the burden of leading the process within a spirit of cooperation: *McLoughlin v. British Columbia (Ministry of Environment, Land and Parks)*.

But such ideal of cooperation was never achieved despite Michelin's best efforts. The BOI finds that Michelin took the initiative by requiring detailed, standardized APR's which had the potential and intended effect of providing an overarching picture to create a seamless, directed and comprehensive profile of Mr. Halliday's disability, particularly with respect to the diagnosis, rehabilitation and treatment in view of Mr. Halliday's reintegration into Michelin's workforce. But at the very least, both practically and conceptually, there needs to be compatibility and traction between these various connected parts. On the one hand, the diagnosis and treatment presented by the attending physician and expressed in terms of restrictions or adjustments required by the employee has to link up with the reconfiguration of the workplace as identified by the employer so as to facilitate the employee's return to work. But the first part was never brought forward to effectively connect with the second part in Mr. Halliday's circumstances.

The BOI finds that both Mr. Halliday and Dr. Dean did not fulfill their obligation in the accommodation exercise on two fronts. First, he did not "bring the facts". Mr. Halliday presented himself to Michelin with anxiety-related symptoms, feeling stressed, fidgety and agitated, explaining that he could not regulate, or wean himself off of, his medication. According to both himself and Dr. Dean, he needed a stable, fixed shift to achieve this. But Mr. Halliday was essentially off work from March to July 2000, and provides no explanation of the extent to which he tried to regulate or reduce his medication during that time. Mr. Halliday's evidence is that he decided not to pursue the issue of regular shift work with Michelin beyond Dr. Dean's APR's because "Dr. Williams manages that". Mr. Halliday also states on cross examination that he did not feel he was responsible to tell Michelin of the safety aspect of medication as "...the Medical Centre does that...".

The BOI finds Dr. Dean failed to "bring the facts" to Michelin. Dr. Dean was in the unenviable and demanding position of the "prism" through which Mr. Halliday's medical care was conducted. He was in a key position to "bring the facts" to Michelin regarding the information on Mr. Halliday's disability that Michelin needed to "fashion" an accommodation solution. However, the BOI finds that Michelin received an incomplete and confusing picture of the source of Mr. Halliday's disability from Dr. Dean's APR's. Dr. Dean's APR's identified generalized anxiety disorder but prescribed medication which Dr. Dean admitted was not necessary and probably made things worse for Mr. Halliday. The BOI finds that Dr. Ojiegbe's assessment is consistent with that of Dr. Dean

to the extent that she concludes from her assessment of Mr. Halliday that he scored 70 on the GAF scale. The BOI accepts Michelin's submission that such a score indicated Mr. Halliday had a rather impressive, high level of functioning. It is difficult to assess what measures Michelin could have contemplated to accommodate anxiety symptoms that were generally identified but poorly substantiated. But most unfortunate for Mr. Halliday is Dr. Dean's evidence that he did not believe Michelin was expecting his APR's to include a diagnosis: "company did not want a diagnosis, just formality so employee gets the day off". At other times, Dr. Dean appears to provide a diagnosis of ASD, but does not substantiate such diagnosis. At no time was there any indication provided to Michelin of the severity and prolonged nature of any disability Mr. Halliday may have suffered. Mr. Halliday's obvious dissatisfaction with his existing position as substantiated by his multiple sources of complaints and persistent requests for a regular, fixed shift did not indicate to Michelin the nature of his disability.

Secondly, Mr. Halliday originated his own solution, at various times requesting a change of shift, then asking for a "separation". In other words, Mr. Halliday got it backwards. Although perhaps unintentionally, Mr. Halliday provided misguided information to Michelin by way of Dr. Dean's APR's at the back end of the exercise to "originate a solution" (e.g., separation from Michelin, transfer to 648 MTH) rather than "bringing the facts" at the front end of the accommodation exercise. For example, the BOI has great difficulty with the notion that Mr. Halliday found that he was not treated fairly and wanted a "separation", but specifically indicated in his request that he wished to stay on until 2001.

Critically, Mr. Halliday (or Dr. Dean) never did provide Michelin with a diagnosis or course of treatment consistent with, and flowing from, a diagnosis. Overall, there is no consistency in the description provided in APR's of Mr. Halliday's disability and his absences from the workplace. The BOI has determined in the non-suit motion that there was no evidence to substantiate a finding that ASD was the basis of Mr. Halliday's disability. Although there was sufficient evidence of a disability described in the complaint, the totality of the medical evidence viewed in its entirety presents a confusing picture of Mr. Halliday's disability. More importantly, the picture was unworkable to the extent Michelin was unable to give any follow through for the purpose of finding a way to accommodate Mr. Halliday. On the one hand, Dr. Dean's APR's always gave the indication to Dr. Williams of a predicted date for his return to work without restrictions as they related to Mr. Halliday's anxiety symptoms. On the other hand, Dr. Dean's evidence at the hearing is that Mr. Halliday did not suffer from GAD and that medication was useless and even worsened his condition.

Commission counsel submits that Michelin's inquiry into seeking accommodation for Mr. Halliday must be rigorous and purposeful. The duty extends beyond merely indicating that it has corporate practices in place or determining whether an employee can perform an existing job: *Metsala v. Falconbridge Ltd.* (2001), 39 C.H.R.R. D/153 (Ont. Bd. Inq.). Michelin must direct its mind in a real way to find alternative jobs for Mr. Halliday: *Comeau v. Cote* (2003), 46 C.H.R.R. D/469, 2003 BCHRT 32. However, it was held in *Comeau* that the employer failed in its duty to accommodate where the

employee's foreman deemed to be responsible for applying the employee accommodation policy neither understood the policy nor sought to have it applied.

Commission counsel refers to *Metsala v. Falconbridge Ltd.* (2001), 39 C.H.R.R. D/153, where the Board of Inquiry did not fault Falconbridge's practices but rather the application of those practices. It found that Falconbridge failed in its obligation to seek accommodation as it did not consider any accommodation measures and took the position that its search for accommodation ended at waiting for a vacant position to arise. In contrast, the BOI finds that Michelin's IAP was both a comprehensive and practical set of corporate practices, presented to Mr. Halliday in a user-friendly way by those Michelin employees whose responsibility it was to apply them. It is clear from Mr. Morrison's evidence that Michelin typically accommodates over one hundred employees who are doing "transitional" work, i.e., work that is not their regular job, normally involving lighter work. This accommodation process involves categorizing various types of absences, with the highest priority being given to those employees hardest to place, from employees off work on sick leave to employees whose position has been made redundant. However, when Michelin applied its own IAP Program through all of the Program's four steps, Mr. Halliday appeared to dismiss the opportunity for him to make a valuable contribution to the process. He downplayed a chance to explain his circumstances at the November 2000 session, saying "they should know what is required, i.e., a single, regular fixed shift".

The BOI accepts Michelin submission that it saw no need to further inquire into the nature of Mr. Halliday's disability since he was cleared to return to work by Dr. Dean without any restrictions. Unfortunately, there is no indication that Dr. Dean was making any progress over time in securing a diagnosis or embarking Mr. Halliday on a plan of treatment. This fact distinguishes Mr. Halliday's situation from that of *Desormeaux* where the employee was making progress as the level of future estimated absenteeism was well below the absenteeism level of the top 25% of bus drivers. Dr. Dean's evidence is that Mr. Halliday's medication was completely ineffective and even unnecessary. Surely, if such prescribed medication was unnecessary, such medication cannot be held up by either Mr. Halliday or Dr. Dean as substantiating a treatment plan. In the alternative that Mr. Halliday's disability was caused by his inability to control his medication, it is evident that Mr. Halliday's absences during the period of March to July 2000 did not improve Mr. Halliday's control of his medication. Dr. Dean's most frequent diagnosis in his APR's is of anxiety and nervousness caused by ASD, but no basis is provided by Dr. Dean for reaching such conclusion. But yet the clearest and most consistent request coming from either Mr. Halliday or Dr. Dean was for a regular, fixed shift. But there was no clear indication provided to Michelin by either Mr. Halliday or Dr. Dean why a regular, fixed shift was medically necessary.

The BOI finds that Dr. Williams was Michelin's "gatekeeper" of Mr. Halliday's APR's. But Dr. Williams could not come up with any restrictions from Dr. Dean's APR's that prevented Mr. Halliday from working at his regular position. He could not determine what job Mr. Halliday was unfit to do given the non-existence of restrictions. The APR's were iconic in that they were designed to offer a timely and comprehensive profile of Mr.

Halliday's diagnosis and treatment in view of Michelin's duty to "fit" him back into the workplace. But, for all practical purposes, the APR's were not providing the diagnosis and treatment plan necessary for Michelin to design a plan to Mr. Halliday's return to work. Michelin was left in the dark by Dr. Dean and Mr. Halliday as to whether it should be accommodating, and if so, what form such accommodation would take.

Michelin counsel submits legal authority to support Michelin's submission that its IAP was sufficient justification under the *Act* for Mr. Halliday's termination on the basis of his unacceptable level of absences. In the *Parisien* part of the *Desormeaux* Federal Court decision, a 30% absenteeism rate was held to be excessive thereby resulting in undue hardship for the employer. This supports Michelin's position that it is reasonable for it to expect a reasonable bargain with its employee of a certain level of attendance. Mr. Halliday absences during the critical period of time he was caught in the IAP process was clearly excessive, described by Michelin in its submission as "one of the worst record of absences at Michelin". Over the period of almost two years, Michelin's IAP allowed Mr. Halliday to dedicate his energy to seek medical treatment in the view of improving his health and return to work.

The employer's concern about workplace morale and harmony is also a relevant consideration in the undue hardship test. In *Jeppeson v. Ancaster (Town)* (No. 2), 39 C.H.R.R. D/177 (Ont. Bd. Inq.) it was held that proof of economic hardship must be "concrete and not impressionistic": para. 134. Factors which may be raised in support of the employer's claim of undue hardship may include the following: financial cost, problems with morale of other employees and interchangeability of work force and facilities: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489 Supreme Court of Canada, para. 62. In *Ontario (Human Rights Commission) v. Ford Motor Co. of Canada* [2002] O.J. No. 3688, the issue of hardship in accommodating the religious worship by employees was examined in light of the implication of absences on overtime work and it was noted at para. 84 that the notion of costs in the context of Ford's manufacturing plant shift work extended to "real costs" of resulting declines in quality and production along with employee fatigue from working back-to-back shifts. It also observed: "...routine leaves of absence would have created a significant further deterioration in employee morale".

Michelin concedes that Michelin would not have been driven out of business as a result of accommodating Mr. Halliday. The prospect of incurring significant expense to accommodate Mr. Halliday was neither foreign to Michelin nor unworkable. Michelin had paid significant disability benefits to Mr. Halliday during his frequent absences and had added a position in its budget in 2000 for purposes of replacing Mr. Halliday given that his pattern of absences had become frequent and sporadic, more difficult to manage than long-term, predictable absences. However, the BOI accepts the evidence of Mr. Morrison that employee moral and team solidarity are significant components of production level and quality at Michelin. Mr. Morrison admits the greatest concern for Michelin was the resulting low employee morale caused by Mr. Halliday's absences: "they met their production targets, but they had other problems". Mr. Hartman states that his impression was that Michelin's lightweight tire "R" employees were seeing "no light

at the end of the tunnel” and frustrated at Mr. Halliday’s failure to substantiate the nature of his absences. The BOI therefore concludes that frustration and low employee morale resulting from Mr. Halliday’s high level of absences was a real and significant concern for Michelin.

Both the Commission and Mr. Halliday point to the confusion and lack to connectedness between the various assistance offered by Michelin and submit that the variety of attention given to Mr. Halliday was ineffective and irrelevant to accommodating him back to work. The BOI disagrees. It finds the purpose and application of Michelin’s IAP to Mr. Halliday’s disability to have been collaborative, progressive and employee-friendly. In addition, the BOI finds that Michelin had various practices in place complimentary to the IAP to deal with employee absences and that it set these in motion to deal with Mr. Halliday’s absences. Michelin monitored and formalized Mr. Halliday’s progress in rehabilitation and return to work capability by way of an Employee Progress Report – Occupational Health Services, attempting to determine the duration of his absence and assessing when he would likely be available to return to work and under what restrictions. Michelin’s Disability Team Management (“DMT”) program also examined Mr. Halliday’s return to work status, assessing his work capability and exploring placement options for him within the plant. Michelin’s other programs, including its Employee Assistance Program, and employee representative, were complimentary. They each featured a common, integrated approach with the full, active participation of both medical center staff and plant personnel. Each one sought to incorporate the employee’s perspective in the return to work process while ensuring confidentiality and providing peer support.

The submissions of both the Commission and Mr. Halliday are that Michelin did not do enough to involve Mr. Halliday in the accommodation process. The Commission’s submission is that the July 11, 2000 meeting had the effect of being completely unexpected by Mr. Halliday and had the effect of provoking him. The BOI does not accept such conclusion. It would be unlikely that Mr. Halliday would not have been concerned and suspicious of the effects of being off work for 2/3 of the time in 2000. Mr. Halliday’s own evidence it that such absences were excessive. Mr. Hartman’s evidence is that the meeting to explain Mr. Halliday’s entry into the IAP track was originally set for June, but that Mr. Halliday was off work and it was not known when he would be returning to work. The BOI therefore fails to understand how the July 11, 2000 could have been interpreted by Mr. Halliday as excessive and hasty behavior on Michelin’s part. The BOI cannot fathom how Michelin could have acted in a more measured and cautious way in accommodating Mr. Halliday.

The facts in Mr. Halliday’s case are unlike those cited by Commission counsel in *Sylvester* where the employer terminated Sylvester’s employment upon receiving merely one medical note from the employee without verifying her medical condition. The facts in *Stevenson v. Canadian Security Intelligence Service* (2001), 41 C.H.R.R. D/433 (C.H.R.T.) are also distinguishable from Mr. Halliday’s situation, as the employer proceeded to dismiss the complainant within days of having received its own physician’s report that the complainant was suffering from anxiety and depression, required intensive

psychotherapy and anti-depressant medication, and should not be transferred. In contrast, Mr. Halliday benefited from Michelin's IAP process from July 2000 to November 2001 during which time he was put on notice regarding his absences and told to get the proper, necessary medical attention. He was also given significant time off to deal with his disability during this period. As Mr. Halliday admits, he was the subject of 36 attending physician reports over a period of 15 months from March 14, 2000 to June 19, 2001. In *King v. CDI Career development Institutes Ltd.* (2001), 39 C.H.R.R.D/134, 2003 BCHRT 36, the employee was terminated upon being on leave for merely two months and the employer had not requested medical reports. In *Pinner v. K. Burrill's Supermarket* (2002), 45 C.H.R.R. D/251 (N.S. Bd. Inq.), the employee was terminated after being absent from work for one week on account of a disability, thereby casting doubt as to the employer's efforts to accommodate the employee. The BOI finds that these authorities can be distinguished from the facts of this case given the period in excess of 12 months during which Michelin provided assistance and monitoring on account of Mr. Halliday's absence stemming from a disability that was supported neither by neither a diagnosis nor a treatment plan.

Commission counsel is critical of the protective "confidentiality" wall around the Medical Centre and the inaccessibility of Mr. Halliday's information to both human resources and plant personnel, including Mr. Halliday's superiors. However, the BOI does not find that any such compartmentalization had the effect of compromising Michelin's ability to discharge its duty to accommodate. In fact, the BOI accepts Mr. Morrison's evidence of the close physical proximity of the Medical Centre's offices and those of his own Personnel office, along with the collaborative and regular dealings between the two offices. Furthermore, the BOI finds that Mr. Halliday may have perpetuated and intensified the confidentiality level when he admits in his evidence that he refused to give Mr. Morrison personal medical information as he considered such request a breach of confidentiality protection. The BOI does not understand Mr. Halliday's intentions in refusing to provide such necessary information as Mr. Halliday admitted in his evidence that he understood and was satisfied that Mr. Morrison was bound by confidentiality. The BOI finds such observations by Mr. Halliday to be ineffective and unproductive in light of both Michelin's duty to originate an accommodation solution from the facts as well as the rather grave consequences of the IAP process upon Mr. Halliday.

Michelin's Duty to Fashion a Solution

The test for accommodation largely rests on the quality of the employer's efforts to identify any possible opportunity to return the employee to work to the point of undue hardship. The employer must originate and fashion a solution in order to accommodate the employer's return to work. The BOI finds that Michelin underwent a systematic and comprehensive examination of various possibilities, including both those presented by Mr. Halliday as well as others initiated by Michelin. Michelin examined and ultimately rejected Mr. Halliday's candidacy for both a fixed shift position (Mr. Halliday he did not have the required certification to work at such a position) and a position at the 648 MTH module (there were no vacant positions). Despite the fact that Michelin used a ranking of

priorities of employees returning to work and considered Mr. Halliday to be at the “bottom of the lists” of employees waiting to return to work, the BOI finds it did an extensive examination of all of the possibilities, such examination rendered awkward and difficult by the confused nature of the information provided to Michelin by both Mr. Halliday and Dr. Dean as to any restrictions Mr. Halliday had based on his disability. It is reasonable to conclude that the lack of restrictions to Mr. Halliday’s return to work as contained in Dr. Dean’s APR’s was interpreted by shop personnel as lacking the difficulty that would constitute a high priority placement.

The BOI accepts Michelin’s submission that it was extremely difficult to accommodate any employee at Michelin given that regular fixed shifts are the exception. Day shift positions at Michelin were extremely rare. Mr. Zinck’s assessment is that the only steady shift was a day shift and there were no openings on such shifts. While there were more regular shifts in some areas of the plant such as the 648 MTH and the N/C area, Michelin determined that there were no positions available and that the effect of moving Mr. Halliday into such an area would have been to “bump” an existing employee. The BOI finds that the prospect of “bumping” another employee would have caused undue hardship to Michelin.

While it is therefore tempting to conclude that accommodating a disability should be a relatively effortless task for Michelin given the large scale of Michelin’s enterprise in Nova Scotia, the BOI finds that Michelin’s workforce consists of highly skilled employees in a stratified workplace with relentless production targets. In *Desormeaux*, the employee was a bus driver with a mental disability and had presented medical evidence suggesting his attendance was likely to substantially improve. The employer had a number of positions that did not involve city driving buses and had a “spare board” to which Desormeaux could be assigned. In contrast, the BOI accepts Michelin’s evidence that employees assigned to Michelin’s Bridgewater plant are not interchangeable with one another. Although Mr. Halliday states that he once was assigned to the 648 MTH unit, the BOI accepts evidence on behalf of Michelin that Mr. Halliday could not have been transferred to the 648 MTH unit as he was clearly not qualified to work in the 648 area and would have required training which he did not have. Alternatively, the “utility” employee is a highly qualified employee who can function at all ports in all areas of the shop floor, an ability and skill that Mr. Halliday did not have. The BOI concludes that the prospect of placing Mr. Halliday into a position for which he did not have the required skills would have caused undue hardship to Michelin.

In conclusion, the BOI finds that the evidentiary threshold of what constitutes a “disability” evolves and increases with each stage reached within the complaints process. At the original stage of Mr. Halliday’s filing of his complaint, the “disability” may consist of merely a short and brief identification of an illness, e.g., stress. As the complaint process evolves and the employee bears the burden of substantiating a “disability”, a description of the disability including some details of “anxiety symptoms” should be expected. As the BOI concluded in the non-suit decision, Mr. Halliday met this test by offering Dr. Dean’s symptoms of anxiety and nervousness, such symptoms having also been observed by Dr. Williams. However, at the advanced stage of examining the

employer's duty to accommodate to the point of undue hardship, the employee has the obligation of providing a diagnosis and treatment plan to the employer. Merely identifying a disability as symptoms of "generalized anxiety disorder" without providing a diagnosis or treatment plan in support does not meet the threshold of "bringing the facts" to the employer to enable the employer to fulfill its duty to accommodate to the point of undue hardship.

CONCLUSION

The BOI therefore denies Mr. Halliday's complaint and finds in favor of Michelin that it fulfilled its obligation to accommodate Mr. Halliday's disability to the point of undue hardship. There will therefore be no order in the nature of remedies or costs in this matter.

GILLES DEVEAU, CHAIR
BOARD OF INQUIRY