

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 against Michelin North
America (Canada) Ltd. (“Michelin”)**

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

LOCATION: **Bridgewater, Nova Scotia**

DATE HEARD: **February 28, March 1-3, May 8-9 and June 2, 2006**

COUNSEL: **Michael J. Wood, Q.C.
for the 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**

AND IN THE MATTER OF THE RESPONDENT’S MOTION FOR NON-SUIT

Dexter Halliday alleges in a complaint dated July 4, 2003 and brought 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]. A motion for non-suit was made by the Respondent on May 9, 2006 and argued on June 2, 2006. The Board decided to deny the Respondent’s motion, for the following reasons.

The following documents were submitted into evidence at the hearing:

1. Commission’s Exhibit Book, recorded as Exhibit 1-C;
2. Michelin’s Exhibit Book, recorded as Exhibit 2-R;
3. Michelin “Crew 2” - January-February 2001 Shift Schedule, recorded as Exhibit 3-R;
4. Michelin “Crew 2” - 2002 Shift Schedule, recorded as Exhibit 4-R;
5. Dexter Halliday Loss of Income Statement, recorded as Exhibit 5-C;
6. Dexter Halliday Crew Schedules – January 2000 to January 2001, recorded as Exhibit 6-C;
7. Dexter Halliday’s notes and diary – 2000, recorded as Exhibit 7-C;
8. Dexter Halliday Income Tax Returns – recorded as Exhibit 8-C;
9. Letter from Dexter Halliday – February 28, 2006, recorded as Exhibit 9-C;
10. Dr. Dean’s physician’s charts, recorded as Exhibit C1, recorded as Exhibit 10-C.
11. Dexter Halliday’s Exhibition Book, recorded as Exhibit 11-DH.

However, for the purposes of the non-suit motion, the following evidence is particularly relevant and variously cited by Counsel for each the Commission, Mr. Halliday and Michelin: Attending Physician's Reports ("APR's"), particularly those of Dr. G. Mohiuddin ("Dr. Dean"), Mr. Halliday's family physician, found at Tab 26 of Exhibit 2-R (Michelin's employee record); Commission's Exhibit Book, recorded as Exhibit 1-C; and Dr. Dean's charts, recorded as Exhibit 10-C.

ISSUES

Michelin has asked the Board to rule on a non-suit motion made to the Tribunal on May 9, which it sets out as follows:

1. Is the scope of Mr. Halliday's July 4, 2003 complaint consistent with the evidence introduced before the Board of Inquiry;
2. What is the legal test on a motion of this nature; and
3. Has the Commission or Mr. Halliday proven a *prima facie* case of discrimination.

1. Legal test for non-suit motion

It is Michelin's submission that a motion for non-suit is within the scope of authority of this Board of Inquiry. There are two related issues arising from the legal test of non-suit:

- a. Does the motion for non-suit require Michelin as applicant to make an election that in the event that its motion is unsuccessful, it is precluded from calling evidence; and
- b. What is the legal test to be applied on a non-suit motion?

a. Does a motion for non-suit require Michelin as applicant to make an election that in the event of its motion is unsuccessful, it is precluded from calling evidence

Michelin's counsel relies on the authority of *McCara v. Nova Scotia (Department of Fisheries)*, [1993] N.S.H.R.B.I.D. No. 3 (Hall) for its submission that an election is not required. Specifically, it refers to the following from *McCara*: "...it would not be fair to put the Respondent to an election when balancing the advantages to the Complainant with the risk to the Respondent". In *Gerin v. IMP Group Limited*, [1994] N.S. H.R.B.I.D. No. 4 (Wildsmith), the same determination was made by the Board of Inquiry as to the Respondent's obligation to make an election at paragraph 3: "After some discussion I indicated that I would, as requested by the Respondents, hear the motion without requiring the Respondents to elect first as to whether they would be calling evidence and without precluding the Respondents from giving evidence if their motion failed."

The Board has no difficulty based on well-established authority in concluding that Michelin is not obligated to make an election thereby precluding it from calling evidence in the event of its motion is unsuccessful: *McCara v. Nova Scotia (Department of Fisheries)*, [1993] N.S.H.R.B.I.D. No. 3 (Hall); *Gerin v. IMP Group Limited*, [1994] N.S. H.R.B.I.D. No. 4 (Wildsmith).

b. What is the legal test to be applied in a non-suit motion?

Michelin’s counsel submits that the legal test to be applied in a motion for non-suit is the *prima facie* case on the authority of *Gerin* and *McCara*. That is, there must be some evidence providing “some reasonable basis” for the Board of Inquiry to reach a finding in the Complainant’s favour. The evidence must be “sufficient” and “appreciable”. It also submits that the applicable test or a *prima facie* case is set out in the Supreme Court of Canada decision in *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 558:

A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant’s favour in the absence of an answer from the Respondent-Employer. [emphasis added].

Commission counsel also submits that the legal test is set out in *Gerin*, adding that the finding of a *prima facie* case in favour of the Complainant does not necessarily mean that the Board will conclude that the complaint is successful as this is determined upon hearing all of the evidence, not just the evidence of the Complainant and the Commission. In particular, it cites *Gerin* at para. 45:

The purpose of the motion for non-suit is to dispose of clearly unmeritorious cases – ones in which no reasonable person could on the basis of the evidence presented by the complainants, and bearing in mind the legal elements, find that the case against each of the respondents had been made out...” [emphasis added].

2. What should be the scope of a complaint under the *Human Rights Act*?

There is a measure of consensus across the submissions of each of the Respondent, the Commission and Mr. Halliday that the disability described by Mr. Halliday in his complaint is in the nature of “anxiety”. The Commission further submits that it can also be “inferred” from the complaint that one aspect of Mr. Halliday’s disability was his inability to regulate his medication, resulting in poor sleep.

However, it is Michelin’s submission that the scope of Mr. Halliday’s complaint pertains strictly to an anxiety condition, and that any evidence before the Board with respect to “accumulated sleep disorder” should not be considered by the Board as being outside the scope of the complaint. It further submits that a complaint should contain all of the “essential elements”: *Neush v. Ontario (Ministry of Transportation)*, [2002] O.H.R.B.I.D. No. 11 (Ontario Board of Inquiry), referring to the decision in *Ontario Human Rights Commission v. Ontario Ministry of Education* at para. 51.

Michelin's submission is that Mr. Halliday's complaint on the basis of "anxiety" is inconsistent with the medical evidence of "accumulated sleep disorder" lead by the Complainant and the Commission. It would therefore be "unfair" for the Board to proceed on the basis of a disability ("accumulated sleep disorder") that is neither part of the formal complaint made by Mr. Halliday, nor the subject of the Commission's investigation in view of determining whether to establish a Board of Inquiry.

Commission counsel submits that the Board should be guided by observations contained in *Toneguzzo v. Kimberley-Clark Inc.* (No. 3) (2005), CHRR Doc. 05-653, 2005 HRT0 45 that a Board of Inquiry should not accept that the 'subject matter of the complaint' should be restricted to the 'specific factual allegations' contained in the original complaint form, or that the complaint form itself serves a similar purpose to that of pleadings in a civil action." The Board ought to determine the "substance" of the complaint: *Welch v. Eggloff* (No. 2) (1998), 34 C.H.R.R. D/483 (B.C.H.R.T.)

3. What constitutes a "disability" under the *Human Rights Act*?

Mr. McLellan acknowledges that the Nova Scotia *Human Rights Act* prohibits discrimination on the basis of "physical disability or mental disability". He submits that the *prima facie* case of discrimination on the basis of a disability has been variously described in the following authorities as placing the onus on the complainant to prove on a balance of probabilities that he had a disability as defined under the Act and that his employment was terminated by his employer on account of such disability: *Bobbitt v. Royal Canadian Legion, Armstrong Memorial Branch 19*, [2003] N.S.H.R.B.I.D. No. 4 (Trainor); *Pinner v. K. Burrill's Supermarket Limited*, [2003] N.S.H.R.B.I.D. No. 1 (Nathanson).

Mr. Wood states that the definition of disability is a functional one that relates to a complainant's capacity to carry out certain functions and does not require that a complaint include a label or an explicit diagnosis of a disability. He adds that the symptom, not the cause (or diagnosis) related to a disability is sufficient to constitute a disability under the *Act*. He points to the precise wording of the *Act*, which provides at s. 3 (1) that a "disability" is a "real or perceived" (i) loss or abnormality of psychological, physiological or anatomical structure or function; (ii) restriction or lack of ability to perform an activity, (v) condition of being mentally handicapped or impaired, (vi) mental disorder.

Mr. Wood refers to a number of cases where a human rights tribunal has upheld a complaint on the basis of a mental or psychological disability. These include anxiety and depression (*Stevenson v. Canadian Security Intelligence Service* (2001), 41 C.H.R.R. D/433 (C.H.R.T.), post-traumatic stress disorder, anxiety and depression (*Parisien v. Ottawa-Carleton Regional Transit Comm.* (No. 2) (2003), 46 C.H.R.R. D/34, 2003 CHRT 10) and mental disability (*Mellon v. Canada (Human Resources Development)* (No. 2) (2006), CHRR Doc. 05-242, 2006 HRT 3). In fact, Mr. McLellan does not deny

that “anxiety disorder” is a condition that is recognized under the definition of “disability” under the *Act*.

Mr. Wood again relies on the authority of *Mellon* to further argue that “...disability in a legal sense is a physical or mental impairment which results in a functional limitation or is associated with a perception of impairment. A particularly pertinent observation in *Mellon* is found at paras. 81-82:

A disability may exist even without proof of physical limitations or the presence of an ailment. Although the Supreme Court is reminding us that an overreliance on medical information is not necessary in order to establish that a disability does or does not exist, there needs to be more than just a bare statement that one suffers from a disability to meet the test. There has to be evidence that the disability is there. The evidence can be drawn from the medical information and from the context in which the impugned act occurred.

The Commission further submits that the issue of diagnosis comes into play and is considered with respect to the issue of whether the employer has reasonably accommodated the employee’s disability. In contrast, Mr. McLellan argues that the “diagnosis” of “generalized anxiety disorder” as it appears in many of Dr. Dean’s APR’s as well as his July 28, 2000 letter appears to have been used by Dr. Dean so that he could conveniently use a recognized MSI billing code. Mr. McLellan submits that in reality, Mr. Halliday did not have “generalized anxiety disorder”: the medical evidence says one thing, Mr. Halliday’s complaint says something else.

4. Has Mr. Halliday made a *prima facie* case of discrimination that he had a disability when he was terminated as a Michelin employee?

Michelin submits that all of the evidence before the Board, and most particularly that of Dr. Dean, is that Mr. Halliday did not suffer from “anxiety” and that it is not expected that any of Michelin’s evidence on direct will include evidence on Mr. Halliday’s disability. Perhaps in the alternative, Mr. McLellan also states that there is at best “interspersed” and “passing reference” to medical evidence on anxiety disorder. Mr. McLellan extensively refers to Dr. Dean’s evidence where he states that he did not make a diagnosis that Mr. Halliday suffered from an anxiety disorder but that Mr. Halliday’s anxiety was a symptom, not a diagnosis. The following is a sampling of statements from Dr. Dean’s evidence on cross-examination by Mr. McLellan:

1. “And there was absolutely no history of any physical, mental psychiatric or emotional disorder with Dexter Halliday I knew of”. (pp. 21 and 22 of the transcript of Dr. Dean’s evidence before the Board)
2. “But I have used terminology, phrases, descriptions such as generalized anxiety disorder, obsessive-compulsive behaviour, anxiety, depression. I should emphasize with all clarity that these are absolutely non-relevant. He didn’t have any of these. They were nothing to do with his present condition.” (p. 23 of the transcript of Dr. Dean’s evidence before the Board)

3. “I have used generalized anxiety, etc. And this is the same thing. When, for example, there was no code as it relates to rotating shift cause and effect, what he was, there was no such a code in that coding book.” (p. 23 of the transcript of Dr. Dean’s evidence before the Board)

4. “I think his diagnosis was he didn’t have any emotional psychiatric, physical problems. His diagnosis was that he was deprived of sleep and he had cumulative sleep deficit and as a result of shift work, rotating shift work...” (p. 66 of the transcript of Dr. Dean’s evidence before the Board)

5. “This was all a waste of time. He didn’t need any of these medications. He didn’t have any of these conditions. We were not touching the main core of the problem. That was work and shift work and all this thing. ” (p. 79 of the transcript of Dr. Dean’s evidence before the Board)

In addition, Mr. MacLellan submits that the Board has not heard evidence regarding the degrees of severity of “generalized anxiety disorder” or that Dr. Dean has any expertise or specialization in “generalized anxiety disorder”. He also states that the Board has all of the evidence it will ever hear in the matter of Mr. Halliday’s disability as the Commission and the Complainant have completed their case.

Mr. Wood on behalf of the Commission states that the Board likely has not heard all of the evidence regarding Mr. Halliday’s disability as there is potentially medical evidence that will be coming out during cross-examination of Michelin’s medical witnesses.

In contrast to Michelin’s view that Dr. Dean’s evidence does not support Mr. Halliday’s complaint of anxiety disorder, Mr. Wood submits on behalf of the Commission that it is not abandoning Dr. Dean’s evidence. He takes us back to relevant parts of Dr. Dean’s evidence in which anxiety is identified as being part of Mr. Halliday’s disability, including the following:

1. Q. Now the stomach complaint, dizziness, headaches, tiredness, did you come to any conclusion as to what was causing those?

A. I think the stress. Well, I would say it was all part of the work-related anxiety, anticipatory anxiety. (p. 105 of the transcript of Dr. Dean’s evidence before the Board)

2. “Well, generalized anxiety disorder again is a symptom complex. He didn’t have any psychiatric disease. It was all...well, it’s a term...I would say he’s suffering from anxiety, tension, stress...stress-related. (p. 175 of the transcript of Dr. Dean’s evidence before the Board)

3. “Well , as mentioned, he did have anxiety and stress-related, as these are symptoms, and that he was an ongoing problem with his work-related, which is here. (p. 62 of the transcript of Dr. Dean’s evidence before the Board)

Mr. Halliday’s own submission is that Dr. Dean’s APR’s contain multiple references to “anxiety” and “stress”. However, Mr. Halliday submits that Michelin never contacted him or Dr. Dean for further information so that they could address the problem. He also

submits that he was seen by specialists referred by Dr. Dean. Specifically, Mr. Halliday was seen by Dr. C. Ojiegbe (Psychiatrist) and Dr. M. Fowler (Psychologist), both with the South Shore Mental Health Centre. Dr. Ojiegbe, in her July 4, 2000 report, provides a diagnosis of generalized anxiety disorder. Dr. R. Miller (Dermatologist), in his October 19, 1999 assessment of Mr. Halliday, provides a diagnosis of “neurotic excoriations” and “obsessive-compulsive”. In summary, Mr. Halliday submits that while Michelin received 36 APR’s over a 15 month period from March 14, 2000 to June 19, 2001 indicating that he was suffering from anxiety disorder, Michelin chose not to act on, or give effect to, this information.

5. Analysis and Finding

The Board has no difficulty in determining that the legal test in this non-suit motion is that of a *prima facie* case. As is set out in *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears*, the allegations made and particularly set out in the complaint must be “complete and sufficient”. The non-suit motion is a useful instrument to dispose of the “clearly unmeritorious cases”: *Gerin* at para. 45.

While the Commission submits that the Board should be guided by observations contained in *Toneguzzo*, and generally that the scope of a complaint in a human rights complaint is not as stringent as pleadings in a civil trial, the Board finds that there are two broad observations flowing out of *Toneguzzo*. While the ‘subject matter of the complaint’ should not be restricted to the ‘specific factual allegations’ contained in the original complaint, the hearing of the complaint should not be a “moving target” for Michelin. The Board accepts the Commission’s general submission, which essentially matches that of Michelin, that “the complaint clearly alleges that the disability suffered by Mr. Halliday was a result of anxiety”.

The Board also has no problem concluding that “anxiety disorder” is a disability under the *Act*. “Anxiety disorder” has been accepted as a disability in a number of cases, including the following: anxiety and depression (*Stevenson v. Canadian Security Intelligence Service* (2001), 41 C.H.R.R. D/433 (C.H.R.T.)); and post-traumatic stress disorder, anxiety and depression (*Parisien v. Ottawa-Carleton Regional Transit Comm.* (No. 2) (2003), 46 C.H.R.R. D/34, 2003 CHRT 10). In fact, Mr. McLellan does not deny that “anxiety disorder” is a condition that is recognized under the definition of “disability” under the *Act*.

The core of Michelin’s submission is that there is an inherent contradiction or confusion in what it considers two competing notions of Mr. Halliday’s disability that have come before the Board: “generalized anxiety disorder” and “accumulated sleep disorder”. Dr. Dean’s evidence that Mr. Halliday suffered from a sleep disorder requires particular attention. It is particularly significant in view of Michelin’s submission that evidence substantiating Mr. Halliday’s complaint as a sleep disorder should not be considered or at least accorded little weight by the Tribunal on account of the complaint not be framed as a “sleep disorder”. Furthermore, Michelin submission is that Dr. Dean is not qualified to

speak on sleep disorders. Dr. Dean states that he arrived at the conclusion that Mr. Halliday was suffering from “accumulated sleep deficit” from what Mr. Halliday was telling him. He agrees that he did not consider referring Mr. Halliday to a specialist to examine his “accumulated sleep deficit”. He did not measure the amount and quality of sleep and did not ask 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”. He recorded his observations in terms of noting that Mr. Halliday “complained of lack of sleep” (Exhibit 2R, Tab 26, p.30 – December 19, 2000).

The Board rejects that “accumulated sleep disorder” can be inferred from the wording of Mr. Halliday’s complaint. Any disability known as “accumulated sleep disorder” does not appear in Mr. Halliday’s complaint. The effect of expanding or shifting such a complaint in the nature of “anxiety” to that of “accumulated sleep disorder” would be to change the essential elements of the complaint and constitute a “moving target” for Michelin and would result in a serious prejudice to Michelin as is cautioned in *Usher v. Jenner Chevrolet Oldsmobile Ltd.* (2000), 37 C.H.R.R. D/116, 2000 BCHRT 2. The source of the prejudice to Michelin is that the bulk of the evidence of “accumulated sleep disorder” by each of the Commission or Mr. Halliday lies in Dr. Dean’s evidence at the hearing. There is precious little evidence of “accumulated sleep disorder” in Dr. Dean’s APR’s, except for a reference to “lack of sleep” (December 19, 2000 and February 5, 2001 APR’s) and “sleep disorder” (February 28, 2001 APR). Dr. Drake’s evidence contained in his November 2000 APR of “circadian rhythm” relates to sleep disorder and is problematic as there is no evidence of Dr. Drake’s expertise in the area. While Dr. Drake’s November 2000 APR refers to a condition in the nature of “accumulated sleep disorder”, it is rather isolated and not picked up by Dr. Dean so that Michelin may have had the opportunity to have been “complete and sufficient” understanding of such sleep disorder and given the requisite consideration of such disability. The Board agrees that it would be unfair to Michelin to include “accumulated sleep disorder” as part of the disability described in Mr. Halliday’s complaint.

Indeed, Michelin submits – and the Board generally accepts – that the “confused nature of the medical evidence” is particularly relevant to the issue of accommodation. That is, there is obviously some confusion between two medical conditions: “accumulated sleep disorder” and “generalized anxiety disorder” as presented in the evidence of both the Commission and Mr. Halliday. There is also confusion inherent in the contrast between Dr. Dean’s evidence in his APR’s that Mr. Halliday was suffering from “generalized anxiety disorder” and his evidence at the hearing that Mr. Halliday did not have “generalized anxiety disorder”. However, while the Board recognized that this “confusion will be a matter of considerable importance with respect to the issue of whether Michelin accommodated Mr. Halliday, the Board does not make a determination on this issue at this time as it is not directly relevant to the matter of the non-suit motion. Also, while the Board recognizes Mr. McLellan’s submission that Dr. Dean’s evidence characterizes Mr. Halliday’s anxiety condition as a symptom or symptoms is particularly

problematic with respect to Michelin's obligation to accommodate, I will not determine how the proper identity and formulation of the disability affects Michelin's obligation to accommodate the disability at this time for the purposes of this non-suit motion.

In anticipation of an application by either the Complainant and/or the Commission that the complaint be amended to include "accumulated sleep disorder", Michelin put forth its position that such application should be rejected. However, neither the Complainant nor the Commission have expressed any intention of having the complaint amended. As neither the Complainant nor the Commission have sought to have Mr. Halliday's complaint amended, the Board chooses not to amend the complaint. In view of the observations in *Welsh* that the Board should determine the substance of the complaint and that the complaint contain the "essential elements" of Mr. Halliday's disability (*Neush*), the Board has no difficulty determining that Mr. Halliday's disability as set out in his complaint is in the nature of anxiety.

The Board now turns its attention to the issue of anxiety. While it is clear that Dr. Dean's evidence at the hearing was controversial – "unexpected" in the words of Mr. McLellan, "surprising" as described by Mr. Wood – it did not categorically and unequivocally deny that "anxiety" played a part in Mr. Halliday's disability. With respect, to submit that Dr. Dean denies that anxiety constitutes a part of Mr. Halliday's disability would not be a complete representation of the medical evidence. I accept the Commission's submission that Dr. Dean's evidence, as "surprising" as it was, does offer an assessment of Mr. Halliday's condition as featuring a collection of symptoms. Dr. Dean variously describes Mr. Halliday's disability in his APR's as "stress", "tension" and "obsessive-compulsive" disorder, the latter disability being described by Dr. Dean as manifested in Mr. Halliday as picking at his face. Dr. Dean also uses the term "neurotic" to describe the diagnosis of Dr. Miller, dermatologist, where the latter prescribed tranquillizers.

The Board finds that it would be too simplistic and narrow to look no further than some parts of Dr. Dean's evidence at the hearing that there was nothing wrong with Mr. Halliday and conclude that Mr. Halliday did not have a disability. A symptom is clearly explained by Dr. Dean at the hearing as being the "effect", while a diagnosis is the "cause". He provides a useful example of a fever (symptom), which may be related to various causes (pneumonia being one such cause). While Dr. Dean rather emphatically states that Mr. Halliday merely had symptoms of an anxiety condition and did not need the medication which he prescribed for him, he does offer the following observations on Mr. Halliday's disability, indicating that "...he's suffering from anxiety, tension, stress...stress-related..." (p. 175 of the transcript of Dr. Dean's evidence before the Board) and "...he did have anxiety and stress-related, as these are symptoms"...(p. 62 of the transcript of Dr. Dean's evidence before the Board). Dr. Dean also states on direct examination that he prescribed Paxil to stop Mr. Halliday from picking at his face from stress, anxiety and depression.

Several specialists have made a contribution to Mr. Halliday's care. Mr. Halliday was seen by Dr. M. Fowler, then by Dr. C. Ojiegbe. Michelin takes the position that the medical evidence other than that of Dr. Dean must be viewed through the prism of Dr. Dean's evidence that Mr. Halliday was never diagnosed with anxiety disorder and that they reported symptoms of anxiety to Dr. Dean without providing a clear diagnosis. Alternatively, Michelin's counsel submits that the medical evidence other than that of Dr. Dean, standing alone, provide precious little medical evidence of an anxiety disorder. It adds that Dr. Ojiegbe's evidence standing alone provides "some" evidence, but not sufficient evidence. Even though Dr. Miller's 1999 assessment is based on his expertise as a dermatologist and came early, the Board finds that Dr. Ojiegbe's July 4, 2000 report providing a diagnosis of generalized anxiety disorder along with Dr. Miller's October 19, 1999 assessment with a diagnosis of "neurotic excoriations" and "obsessive-compulsive" both add some weight to the submission of the Commission and Mr. Halliday that Mr. Halliday's disability was in the nature of an anxiety disorder.

Mr. Halliday is forthcoming in his oral evidence in identifying the nature and extent of his disability by stating that he was referred by Dr. Dean to specialists. Dr. Miller concluded Mr. Halliday was suffering from anxiety and/or stress and prescribed medication, which could have consisted of Paxil (anti-anxiety) or Clonazepam (anti-depression), or both. Mr. Halliday is less clear about his medication on cross-examination, where he states that Dr. Miller initially prescribed drugs for him in January or February 2000 but that he did not know which drugs and that "Dr. Dean would know better". Asked on cross-examination if he remembered having medical problems in February 2000, he answers that he did not recall, but that he had "anxiety built-up" as a result of his difficult relationship with a co-worker.

The Board finds that the evidence of a symptom or symptoms can constitute evidence of a disability for the purposes of making a *prima facie* case of disability. The Board concludes that the definition of "disability" under the *Act* does not require a diagnosis and may be determined on the basis of a symptom or symptoms that provide sufficient evidence of the essential elements of the disability. The Board finds that a disability in the nature of anxiety can be drawn from the medical evidence of Dr. Dean, and, to a lesser extent, the evidence of Drs. Miller and Ojiegbe, and that of Mr. Halliday. The Board finds that the Commission and Mr. Halliday have made a *prima facie* case that meets the test set out in *Mellon* and have shown more than a "bare statement" that Mr. Halliday had a disability. Mr. Halliday's complaint does not constitute an unmeritorious case: *Gerin* at para. 45. It is therefore clear from the evidence that Mr. Halliday was suffering from a disability, with symptoms related to anxiety, such disability contained in his complaint and such symptoms being sufficiently and completely explained in the evidence of Dr. Dean at the hearing. While the evidence of anxiety is also part of the evidence of other physicians, the Board does not place significant weight on these as these medical practitioners have not been presented in evidence at the hearing and thus not subjected to cross-examination by Michelin. Mr. Halliday's evidence is also considered, although his evidence is inherently subjective. The Board finds that the reference to anxiety in the complaint as well as the evidence lead by both the

Commission and Mr. Halliday is “complete and sufficient” for the purposes of proving a *prima facie* case of disability.

The Board therefore rejects Michelin’s motion for non-suit.

GILLES DEVEAU, CHAIR
BOARD OF INQUIRY