STATE OF WISCONSIN | PERSONNEL COMMISSION

MICHAEL VAN ZUTPHEN,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

90-0141-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of handicap discrimination. A hearing was held on April 25 and 26, 1996, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the final brief was filed on November 4, 1996.

FINDINGS OF FACT

1. Prior to his first employment by respondent, complainant was involved in three accidents which resulted in physical injury to him. As the result of the 1964 accident, complainant suffered a broken left leg. As the result of the 1965 accident, complainant suffered a break in the same area of his left leg. As the result of the 1966 accident, complainant suffered a crushed left ankle and a break in his left leg but below his knee this time. This 1966 injury left complainant's left leg two to three inches shorter than his right leg and required his ankle to be fused. After this 1966 injury, complainant walked with a noticeable limp.

2. From 1984 through 1989, complainant was hired by respondent during the highway construction season as a limited term employee (LTE) in an Engineering Aide 2 position in District 6. The Aide 2 level was the lowest classification level of the LTE positions respondent filled during the construction season. From 1984 through 1987, complainant was assigned to the sign shop. During 1988 and 1989, complainant was assigned to the construction unit and his regular LTE Engineering Aide 2 duties primarily consisted of running chain for survey crews, pounding stakes, gathering and carrying materials samples, carrying and setting level rods for survey elevations, running aggregate (stone) sieve tests, assisting with bridge inspections, and measuring

for curbs and gutters. During 1988, complainant was assigned for three weeks to the District 6 Planning Section and received his assignments during this period of time from Hunter Johnson. Complainant was hired for the 1989 LTE position by George McLeod, Chief Materials and Construction Engineer for District 6.

3. In May of 1989, complainant injured his left leg while working when a structure collapsed. Complainant was not absent from work as the result of this injury.

4. On August 9, 1989, complainant twisted his left knee while working. Complainant was absent from work due to this injury from August 11 through 18, 1989. When complainant returned to work on August 21, 1989, he was placed on light duty status. It is respondent's practice to provide alternate duties for employees receiving worker's compensation benefits as soon as they are released to return to light duty employment because respondent prefers to have employees performing some kind of function even if it amounts to make-work rather than to have employees sitting at home until they can resume their regular duties.

5. On October 6, 1989, complainant sustained another injury to his left knee at work and was absent from work due to this injury from October 6 through November 3, 1989. When complainant returned to work on November 6, he was placed on light duty status until November 14, 1989, the last day of his LTE appointment. Complainant sustained this injury while engaged in work activities which he was told not to perform by his supervisors because they were inconsistent with his light duty restrictions.

6. Prior to his assignment to light duty status in 1989, complainant told his supervisor Lynn Peterson, a District 6 Construction Supervisor, of his specific work restrictions, including standing for only limited amounts of time; walking on flat, not sloped, surfaces; and having the opportunity to sit when he felt it necessary. These restrictions were communicated to other appropriate District 6 staff by Mr. Peterson. Typical light duty restrictions for a DOT construction employee with a knee injury would include no climbing, walking on uneven surfaces, twisting, bending, or lifting.

7. During his periods of light duty work in 1989, complainant was assigned to conduct nuclear testing of blacktop in the "gravel shack," to scale work, and to note-taking for the survey crew. The scale and note-taking assignments were "make-work" assignments which would not have been assigned to a position had not complainant been restricted to light duty. When the survey crew chief overseeing complainant's performance of certain of these duties observed and reported in November of 1989 that

complainant was engaging in activities inconsistent with his light duty restrictions, complainant was re-assigned to do office work until November 14, 1989.

8. On August 10, 1989, complainant reported his August 9 injury to his employer, and, on August 11, 1989, respondent completed an "Employer's First Report of Injury or Disease" form. This form initiates a Worker's Compensation claim. Complainant received Worker's Compensation benefits for the period of August 9, 1989 through November 14, 1989, to replace wages and other benefits lost due to his absence from work and to compensate him for unreimbursed medical expenses. As of November 14, 1989, complainant was still in a healing period and his light duty restrictions had not been lifted by his physician.

9. Respondent received the following notes from C. Samuelson, complainant's primary care physician, during the fall of 1989:

> [undated] Mike Van Zutphen is under my care for traumatic synovitis left knee and he is excused from work 8-11-89 till re-examine in 1-2 weeks
>
> [undated] Mike Van Zutphen is under my care for a traumatic synovitis of left knee and he may return to light duty 8-21-89
>
> [undated] Mike Van Zutphen is under my care for traumatic residuals of left knee and he should be excused from work for 10-6 to 10-14-89. He will be re-seen on 10-13-89.
>
> [undated] Mike Van Zutphen is under my care for traumatic residuals to his left knee and he should be may return to work 10-23-89
>
> 10-28-89 Mike Van Zutphen is still under my care for residuals of a left knee injury and he may return to work 10-30-89
>
> 10-28-89 Mike Van Zutphen is still disabled from residuals of his knee injury and should be excused from work this week until 11-6-89
>
> [undated] Michael Van Zutphen is still under my care for an injury to his left knee. He has been referred to Dr. DeCesare for a consult. He will return to light duty for part time 11-6-89 depending on condition of knee.

Respondent did not receive any other communication from any of complainant's physicians during 1989.

10. Complainant had been referred to orthopedic surgeon William DeCesare by Dr. Samuelson. Dr. DeCesare examined complainant for the first time in 1989 on

November 7 and his treatment notes resulting from that examination state as follows, in pertinent part:

> Michael is here with difficulty with his left knee. He has been working part-time for the State of Wisconsin doing construction type of work. He has had trouble with his knee as the summer has gone on with increased aching. He has been off work approximately a week in August and was followed by Doctor Samuelson. He subsequently had to go off work in October for a week. He has discontinued work at this point and has been doing light duty or essentially desk work. His job is seasonal. He usually collects unemployment during the winter.
>
> He describes aching in his knee when on it all day. The sitting job has caused some back discomfort, but he has been able to continue with that.
>
> On exam the left knee has a slight effusion. There is no sign of recurrence of his infection. His range of motion is as previously noted, 5 to approximately 95 degrees with crepitus and obvious clinical degenerative arthritis. He has varus deformity as also previously noted.
>
> Repeat x-rays taken late this summer by Doctor Samuelson show significant degenerative arthritis.
>
> As I have explained to Michael, he has been through most of the medical treatment with anti-inflammatory medications by Doctor Samuelson most of which have made him sick and have not helped. Medical attention to his knee at this time might include cortocosteroid injection which he would prefer not doing at this time.
>
> His social situation is obviously of more concern to him on this date. I feel he will have continued problems with his knee. Construction work is probably not ideal for it and I would place him on some restriction in this regard. I would suggest he continue the light work for one week at which time he will be laid off and on unemployment through the winter. During this time period as I understand it, he has an attorney involved and he would like to retrain for a different job. I have told him I certainly can verify that he has disability with his knee which will make construction work difficult for him in the future.

11. In February of 1990, complainant contacted Mr. Peterson to inquire about LTE employment for the 1990 construction season. At this time, it was not known what, if any, LTE Aide 2 positions would be available. Complainant indicated to Mr. Peterson that he was applying for and was capable of performing the duties he had previously performed as an Aide 2 prior to his 1989 injuries. Mr. Peterson advised complainant that he needed a writing from his physician releasing him from light duty.

12. Complainant had an appointment with Dr. DeCesare on February 16, 1990. The treatment notes for this appointment state as follows, in pertinent part:

> He is having continued difficulty with his knee. He is also having difficulty convincing apparently whoever he works for that he has problems. A letter will be sent to him.

13. Dr. DeCesare; in a letter dated February 16, 1990, and addressed "to whom it may concern" with a copy to Attorney Russell Falkenberg, stated as follows:

> Mr. Michael Vanzutphen has been treated by myself with difficulty with his left knee since 1985. Prior to that he had a severe injury to his knee and leg which involved fractures above and below the knee, subsequent infection in the knee and a significant deformity resulting from that. He has been followed regularly since then with continued problems with his knee.
>
> From a medical standpoint he is developing post-traumatic progressive degenerative arthritis which will significantly affect his ability to work. He is now age 40. I anticipate as time progresses his ability to be on his feet and his working capacity will diminish and this should be a serious consideration in his job situation.
>
> If there are any specific questions regarding this, please contact me.

According to Dr. DeCesare, complainant advised him that the purpose of this letter was to verify that complainant had problems with his left leg and knee which constituted a significant disability, not to outline work restrictions or to release complainant from light duty work restrictions.

14. Complainant did not provide a copy of this letter to Mr. Peterson or anyone else at District 6.

15. In March of 1990, complainant contacted Mr. Peterson by phone regarding LTE employment for the 1990 construction season and Mr. Peterson again advised complainant that he needed a writing from complainant's physician releasing him from light duty. Complainant also contacted the Planning Section by phone on the same day and was advised by Jim Forseth, who, along with Hunter Johnson, was responsible for hiring LTEs for the construction season, that there were no LTE positions available at that time but that complainant should call back in a month.

16. Complainant called Mr. Forseth back within four to five weeks of their March conversation and Mr. Forseth advised complainant that an LTE position had opened up and been filed since their last conversation but there were no openings at that time. This LTE position primarily involved the performance of traffic counting duties. These duties in 1990 required lifting, carrying, positioning, and chaining 50-

pound counters on even and uneven surfaces; positioning and tacking down heavy hoses on even and uneven surfaces; and significant computer-related responsibilities including data processing and testing of new software systems. Complainant had no relevant computer training or experience. The successful candidate for this position had training and experience working with computers. Mr. Forseth had never met complainant in person and had no knowledge of complainant's health condition or previous experience working for the Planning Section at the time the hiring decision for this LTE position was made. The Planning Section followed their standard procedure in recruiting for and filling this LTE position, and in handling complainant's inquiry. This standard recruitment procedure is to request a list of candidates from the Administrative Services Section which obtains a list of eligible candidates from the local Job Service office. Complainant's name was not on the list received by the Planning Section for this LTE position.

17. Complainant was examined by Dr. DeCesare on March 30, 1990, solely for the purpose of conducting a Worker's Compensation examination, i.e., of determining the extent of complainant's disability. The treatment notes for this examination state as follows:

> The patient is in for evaluation of the left knee for disability rating. He was injured in June of 1985. He had subsequent surgical procedures and staph infection.
>
> The left knee has a varus deformity of 10 degrees. He has pseudolaxity medically. There is not other instability. He has 1 to 100 degrees motion. He has marked crepitus. He has two inch leg length discrepancy.
>
> X-rays show progressive degenerative arthritis.
>
> A WC-16 form will be sent to him, to the person who requested it from the Department of Transportation and Pamela Louther from The State Compensation Department at his request.

The WC-16 form completed by Dr. DeCesare on April 7, 1990, indicated complainant had a 15% permanent partial disability.

18. In a letter to complainant dated April 16, 1990, Dr. DeCesare stated as follows:

> I have reviewed your record again in lieu of our conversation of 4/13/90.

> There are a couple of points regarding this. Your major disability is from your 1960s injury. In review of your records, both your injury of 1985 and the injury of 1989 from a workman's compensation stand-point would be a temporary aggravation of a pre-existing condition without permanent worsening of the previous problem.
>
> There is no way that these records can be changed or in any way made to say anything else. This unfortunately does not help your position in this workman's compensation case.

19. Complainant was examined by Dr. DeCesare on April 27, 1990, and the treatment notes for this examination state as follows:

> The left knee is much worse in the last few weeks without any injury. I did speak with him on the phone about this. He has been on some anti-inflammatory medicine which his stomach is not tolerating.
>
> His left knee does not have an effusion. He has obvious degenerative changes and I find no other explanation for his discomfort.

20. On May 23, 1990, complainant underwent an independent medical examination by physician Clyde Warner. Dr. Warner's written evaluation included the following:

> DIAGNOSIS: Multiple injuries left lower extremity, beginning in the 1960's with staph infection of the left knee followed by multiple traumas to the left lower extremity, including a fracture of the proximal tibia and two fractures of the femur with resultant shortening and muscle atrophy without rehabilitation. With regard to the diagnosis of 8-9-89, it is my opinion that the patient had an aggravation of a preexisting problem with recurrent synovitis. I feel that the temporary aggravation has disappeared completely and his present symptoms are secondary to old problems in the knee, as noted above. I do not feel that his current symptoms and findings were precipitated, aggravated or accelerated by the injury of 8-9-89.
>
> SPECIFIC INTERROGATIVES: The patient's present medical condition is as above. Preexisting problems are as noted above.
>
> I feel that the patient has reached maximum medical improvement and a healing plateau from the injury of 8-9-89. I have no recommendations for treatment of that injury, but feel that the patient should be on strengthening exercises for the left lower extremity secondary to multiple old injuries to the leg.

> It is my opinion that the patient has no permanent disability secondary to the 8-9-89 injury, but has considerable disability to the left lower extremity from previous problems.

This evaluation was requested by respondent to assess complainant's Worker's Compensation claim. Dr. Warner was not asked by respondent to provide an opinion regarding complainant's work restrictions or ability to perform typical Aide 2 duties. Dr. Warner's report was received by respondent on June 18, 1990.

21. In a letter dated November 11, 1992, Dr. DeCesare stated as follows:

> Mr. Van Zutphen has been followed by me for a long period of time with difficulties with his left knee. I think you are well aware that he has post traumatic degenerative arthritis in this knee. I do not anticipate that this will improve. I anticipate that he will have further problems with it.
>
> However, this gentleman is certainly employable. He can be on his feet perhaps 50% of the time, walking long distances should obviously be avoided, or climbing at unprotected heights should be avoided. Repetitive bending or stair climbing should be avoided as well. If there are specific questions or job descriptions that could be considered I would be happy to review them.

This was the first time Dr. DeCesare had been asked to specify any work restrictions for complainant. If he had been asked in 1990, Dr. DeCesare would have placed complainant on similar but somewhat less restrictive limitations than those specified in this 1992 letter.

22. During the 1990 construction season, there were few Engineering Aide 2 level duties required to be completed and these primarily involved standing, walking on uneven surfaces, lifting, bending, and twisting. The LTE Engineering Aides who were hired were more skilled than complainant and could perform these Aide 2 duties as well as higher level duties that complainant was not sufficiently skilled to perform.

23. It is respondent's policy not to permit an employee with light duty restrictions to return to their regular duties unless respondent receives a written release from these restrictions from the physician who imposed them.

24. Between November 7, 1989, and May 10, 1990, Dr. DeCesare was not asked to and did not review any job descriptions nor render any opinion relating to complainant's ability to perform any specific job. Dr. DeCesare did not advise complainant nor anyone else in 1990 that, in his opinion, complainant was "fit."

25. On or around March 9, 1993, David Zeman, an orthopedic surgeon, conducted an independent medical examination of complainant. This examination was requested by respondent for purposes related to this complaint. Dr. Zeman was asked by respondent to provide his opinion relating to complainant's then-current physical condition and what restrictions, if any, existed in regard to complainant's ability to work due to the condition of his knee. After reviewing the evaluations by Dr. Samuelson, Dr. DeCesare, and Dr. Warner, it was Dr. Zeman's opinion that "Dr. Warner's opinion regarding permanency is the most credible one. Clearly, Mr. Van Zutphen has significant permanent residual disability in his leg, but it is not related to his injury of 1989."

26. There was at least one other 1989 construction LTE who applied for but was not hired for the 1990 construction season.

CONCLUSIONS OF LAW

This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

Complainant has the burden as to all matters except that respondent has the burden of proof as to the issue of whether there was a reasonable accommodation available with respect to complainant's handicap.

Complainant was a handicapped individual within the meaning of §111.22(8), Stats.

Complainant did not sustain his burden of proving that respondent discriminated against him on the basis of handicap in regard to the subject hiring decisions.

Complainant did not sustain his burden of proving that respondent had a duty of accommodation.

Respondent did show that there was no reasonable accommodation available with respect to complainant's handicap.

OPINION

There are two issues under consideration here:

> 1. Whether all or part of complainant's claim is barred by the exclusivity provision of the Worker's Compensation Act (WCA), §102.03(2), Stats.
>
> 2. Whether respondent discriminated against complainant on the basis of handicap with respect to the decision not to hire him for an LTE position in 1990.

In *Harris v. DHSS*, 84-0109, 85-01115-PC-ER, 2-11-88, the Commission set forth the following method of analysis for a typical handicap discrimination case:

1. Whether the complainant is a handicapped individual;

2. Whether the employer discriminated against complainant because of the handicap;

3. If so, whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a), Stats.;

4. If the employer has succeeded in establishing its discrimination is covered by this exception, whether the employer failed to reasonably accommodate the complainant's handicap.

It is not clear from the evidence in the record nor from the arguments advanced by complainant what the handicap which he claims as the basis for this charge of discrimination is. In the record, complainant identifies a leg shortening in 1966, an ankle fusion in 1966, progressive degenerative arthritis in his knee, and temporary injuries to his knee which he sustained on the job in 1989. In his charge of discrimination, complainant refers only to his knee but does not specify whether he is referring to the progressive degenerative arthritis or to the temporary injuries in 1989. In his responses to respondent's interrogatories (Respondent's Exhibit 1, Interrogatory 41), complainant identifies as his claimed handicap the fact that "[p]hysically, my left leg is shorter than my right leg."

If the claimed handicap is the temporary 1989 knee injuries, this claim would be precluded by the WCA since it is undisputed here that complainant applied for and received WCA benefits relating to these injuries (Finding of Fact 8, above). *See Schachtner v. DILHR*, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct.App. 1988). Complainant contends in his posthearing briefs that the issue of WCA preclusion is not before the Commission. However, the parties' agreement that this issue was before the Commission and that the hearing of this matter would be a plenary hearing to address both this issue and the merits of this complaint is incorporated into the report of the September 12, 1994, prehearing conference; the report of the December 19, 1994, prehearing conference; and the hearing examiner's notes relating to the informal status conference of April 12, 1996. As a result, this contention by complainant is puzzling.

If the claimed handicap is the leg shortening or the ankle fusion, complainant has failed to show that either one of these conditions constitutes a handicap within the

meaning of the Fair Employment Act. The definition of handicap is set forth at §111.21(8), Stats., as follows:

> "Handicapped individual" means an individual who:
>
> (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
>
> (b) has a record of such an impairment; or
>
> (c) is perceived as having such an impairment.

Complainant acknowledged in his own testimony that he was fully able to perform his Aide 2 duties despite his leg shortening and ankle fusion. It would have to be concluded from this testimony that the record shows that this leg shortening and ankle fusion did not limit complainant's capacity to work at his Aide 2 position. In addition, the record is devoid of evidence relating to how such leg shortening or ankle fusion made complainant's achievement unusually difficult, i.e., imposed a substantial limitation on life's normal functions or a substantial limitation on one or more of complainant's major life activities. Furthermore, the record does not support a conclusion that those involved in the subject hiring decisions who were acquainted with complainant, i.e., Mr. Peterson, Ms. Fleming, and Mr. Johnson, perceived complainant to be handicapped as the result of his leg shortening or ankle fusion. Although all were aware that complainant walked with a limp and it is apparent from the record that this limp resulted from the leg shortening and ankle fusion, none of these supervisors had observed that this limp interfered to any extent with complainant's performance of his Aide 2 duties and, in fact, complainant was hired for several seasons after his supervisors were aware of his limp. Mr. Forseth, the other decision-maker here, could not have perceived complainant to be handicapped as the result of observing his limp since he had never met complainant prior to making the subject hiring decision.

Finally, if the claimed handicap relates to complainant's progressive degenerative arthritis in his left knee which resulted from earlier injuries, there is ample evidence in the record to show that this condition constituted a handicap during the time period that the subject hiring decisions were made. (*See, e.g.,* Findings of Fact 10, 13, 17, 19, above).

As a result, complainant has sustained his burden of showing that he is handicapped or perceived to be handicapped only in regard to the progressive degenerative arthritis in his left knee.

Under the *Harris* analysis, the next question is whether the complainant has shown that he was discriminated against on the basis of his handicap.

In regard to the position in the planning unit for which Mr. Forseth and Mr. Hunter made the decision to hire Mr. Blumer, complainant's allegation of discrimination fails in several key aspects: complainant has failed to show that either Mr. Forseth or Mr. Hunter was aware or had reason to be aware of complainant's handicap of progressive degenerative arthritis in his left knee; complainant has failed to show that the recruitment process utilized by the planning unit for this position, which resulted in his name not being on the interview list, deviated in any manner from the planning unit's standard practice; and complainant has failed to show that he had the requisite qualifications for the position or that his qualifications were comparable to or superior to those of the successful candidate (*See* Finding of Fact, 16, above). Complainant has failed to show that he was discriminated against on the basis of his handicap in regard to the position in the planning unit.

It is not clear what complainant is contending in regard to the LTE positions filled in 1990 in the construction unit, i.e., it is not clear whether complainant is contending that he was "fit" and capable of performing the Aide 2 duties he had performed during the 1988 and 1989 seasons prior to his on-the-job injuries, or whether complainant is contending that he was not "fit" to perform these duties and respondent failed in its duty of accommodating his handicap.

A great deal of the controversy relating to the construction unit positions relates to whether or not complainant provided to respondent a medical release from his light duty restrictions. Complainant points to Dr. DeCesare's letter of February 16, 1990 (*See* Finding of Fact 13, above) as such a release and contends that he hand-delivered it to Mr. Peterson prior to the date the hiring decisions were made. However, complainant's failure to advance this contention until hearing despite opportunities to do so in his charge of discrimination, during the investigation, and during discovery, together with the fact that the letter was clearly not written as a release from light duty or characterized as such by Dr. DeCesare, militate against a conclusion that it was prepared as a release or provided to Mr. Peterson or anyone else in the construction unit during the time period relevant to the subject hiring decisions.

No matter what his theory is in regard to the construction unit positions, the record clearly shows that complainant was rejected for employment in 1990 because of his failure to provide the required and requested release, not because of his handicap. Moreoever, if complainant is contending that he was fit in 1990 and able to resume performing the Aide 2 duties he had performed in the construction unit during 1988 and 1989 prior to his on-the-job injuries, the record shows that there was insufficient need in the construction unit in 1990 for the performance of this level of Aide duties to justify a full-time position or even a significant part of a full-time position i.e., the record does not show that there was a position available which complainant was qualified to perform. In addition, the medical evidence of record does not support a conclusion that complainant was capable of performing these Aide 2 level duties in 1990 even if a position had in fact been available (*See*, *e.g.*, Findings of Fact 10 and 13, above), i.e., the record shows that complainant was qualified for and capable of performing only the lowest level Aide duties and that these duties during the 1990 construction season primarily involved standing, walking on uneven surfaces, lifting, bending, and twisting, movements which the medical evidence indicates would have been problematical for complainant in 1990.

In the alternative, if complainant is contending that he was not fit and respondent failed to properly accommodate him, the record shows that this contention would be inconsistent with complainant's testimony that he informed Mr. Peterson that he was applying for and was capable of performing the duties he had previously performed as an Aide 2 prior to his 1989 injuries (*See* Finding of Fact 11, above). Furthermore, the record shows that the only light duty position for which complainant would have been qualified during the 1990 construction season would have been a "make-work" position, i.e., a position created for complainant consisting of duties which were not required to be performed. It is concluded on this basis that respondent shown that no reasonable accommodation would have been available for complainant during the 1990 construction season.

Complainant has failed to show that the decision-makers were aware of his handicap, has failed to show that he satisfied the requirements for rehire to an LTE Engineering Aide 2 position by providing a written release from light duty restrictions to respondent, and has failed to show that a position was filled in either the planning or construction unit during 1990 for which he was qualified. Even though complainant failed to show that respondent had a duty of accommodation, i.e., complainant failed to show that the decision-makers were or should have been aware of his handicap, or that

complainant made a request for accommodation, the record shows that no reasonable accommodation would have been available for complainant during the 1990 season.

The parties have taken issue with several of the hearing examiner's evidentiary rulings. The hearing examiner, during the course of the hearing, instructed the parties to state and argue any objections they had to her rulings in their posthearing briefs.

Complainant's only reference to an evidentiary ruling in his posthearing brief relates to the "report of Dr. Warner." In this regard, complainant argues that such report is not admissible under §908.045, Stats., because "the Respondent has not established that Dr. Warner was not available." However, Dr. Warner's report was one of complainant's exhibits (Exhibit CF-2), not one of respondent's; was identified by complainant himself in his testimony; and was received into the record upon motion of complainant, not respondent.

Complainant's only reference to an evidentiary ruling in his posthearing reply brief is as follows: "It is perfectly clear that pursuant to 804.07 of the WISCONSIN STATUTES that Exhibits R11A and R11B are not admissable (sic), unless the Respondent meets the notice requirement, as well as the unavailability issue." Section 804.07, Stats., relates to the use of depositions in court proceedings. Exhibits R11A and R11B are not depositions but the independent medical examination reports of Dr. David Zeman (See Finding of Fact 25, above). These reports were identified in the record as being requested by respondent DOT and as being maintained in a DOT file. As a result, complainant has offered no pertinent argument relating to his apparent contention that Dr. Zeman's reports should not have been received into the record at hearing. It should be noted in this regard that these exhibits were properly filed with the Commission in accordance with the notice provisions of §PC 4.02, Wis. Adm. Code. It should further be noted that, if complainant is contending that Exhibits R11A and R11B should be considered hearsay, exceptions to the hearsay rule exist for health care provider records and for public records and reports and, in regard to each of these exceptions, the availability of the declarant is immaterial. See §§908.03(6m) and (8), Stats. Finally, it should be noted that Commission proceedings are generally not subject to the rules of evidence and significant discretion is invested in the hearing examiner. The Commission concludes that the complainant failed to show that the hearing examiner erred in admitting Exhibits R11A and R11B into the hearing record.

Respondent takes issue with the hearing examiner's ruling that complainant's answers to interrogatories would be admitted only for purposes of impeachment. The Commission agrees with respondent that §§804.08(2) and 908.01(4)(b), Stats., appear

to support respondent's contention that all of complainant's answers to interrogatories here were properly admissible and none should have been excluded from the hearing record. As a result, all of Exhibit R1 is now considered part of this hearing record.

In his arguments, complainant makes frequent reference to the findings and conclusions of the Initial Determination of the Commission's Equal Rights Officer as being dispositive of factual or legal issues now before the Commission. However, a Commission hearing is a de novo proceeding and the Commission's decision here is based on the evidence which became part of the hearing record and the posthearing arguments of the parties.

ORDER

This complaint is dismissed.

Dated: December 20, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM:lrm
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows·

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2 The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis Stats

2/3/95