BEFORE THE HUMAN RIGHTS COMMISSION

OF THE STATE OF MONTANA

	(	Human Rights Act Case No. 9601007219
Bruce Morrill,	(	
	(	
Charging Party,	(	*Findings of Fact, Conclusions of*
	(	*Law and Proposed Order*
versus	(	
	(	
Decker Coal Company,	(	
	(	
Respondent.	(	

I. Procedure and Preliminary Matters

Bruce Morrill filed a complaint with the Montana Human Rights Commission on August 7, 1995, alleging that Decker Coal Company discriminated against him on the basis of his disability)degenerative disc disease(when it refused accommodation for his disability on or about June 15, 1995 until he returned to work.

The hearing convened on September 17, 1998, in Billings, Montana, in the third floor main conference room, Federal Building. Morrill attended with counsel, Thomas E. Towe, Towe, Ball, Enright, Mackey & Enright. Decker's designated representative, Bob Burnaugh, attended with counsel, Glenn Summers, Decker Coal Company.[1]

Bruce Morrill, Mona Anthony, Bonnie Morrill, George Busse, Robert Burnaugh, Ken McKenzie and Don Reynolds testified during the hearing. Dr. Robert Schultz and

[1] Summers was admitted *pro hac vice*, on Towe's motion.

Dr. Thomas Schumann testified by video depositions. The hearing examiner admitted Exhibits 1-25, 27-37, 40, 43[2], 45, 46, B-F, I-MM, OO, SS-TT, VV-WW and ZZ-CCC without objection. The hearing examiner admitted exhibits 39, 40, G, H, RR and UU over relevance objections. The hearing examiner refused exhibit 26 on foundation, authenticity and relevance objections. The hearing ended on September 18, 1998. Morrill filed his final brief on December 7, 1998. Decker filed a letter responding to that brief on December 14, 1998, and the record closed.

II. Issues

[2] Exhibits 44a, 44b and 44c were demonstrative, neither offered nor admitted.

A full statement of issues appears in the prehearing order)September 11, 1998(. The key issue is whether Decker discriminated against Morrill because of his disability by failing to perform an individualized analysis of the possible accommodation.[3]

III. Findings of Fact

I

1. Morrill worked for Decker, or related companies, from 1975 until 1993. After a number of years with back pain, Morrill experienced increased pain in the spring of 1993, while he was operating heavy equipment)driving large trucks(. He experienced the increased pain beginning with one particularly bumpy drive in a large truck. Because of the pain, he consulted Dr. Robert Schultz, an orthopedic surgeon at the Billings Clinic, in July of 1993. Dr. Schultz diagnosed lumbar radicular syndrome and degenerative disk disease. Exhibit 1; testimony of Morrill and Schultz.

2. On July 9, 1993, Dr. Schultz wrote a letter for Morrill, restricting his work activities to "moderate" and precluding truck driving. Morrill gave the letter to Ken McKenzie, his supervisor at the time. Decker than transferred Morrill to the job of plant laborer at the coal processing plant. Morrill had previously worked as a plant laborer for a period of weeks in 1978. Within a month of Morrill's transfer to plant laborer, Decker's physician, Dr. Michael Strahan, confirmed Dr. Schultz' limitations with even greater specificity, limiting Morrill to 15 pounds lifting and no repetitive bending and stooping. Dr. Strahan's report went directly to Decker. Exhibits B and C; testimony of Morrill.

3. Dr. Strahan recommended either the shop laborer or the tool room clerk job for Morrill. Decker had modified the latter job to include operation of a heavy tractor. Decker instead kept Morrill in the plant laborer position, asking Dr. Strahan to advise if that job was too heavy for Morrill. Dr. Strahan responded that the plant laborer job was well within Morrill's limitations. Exhibits 3, 24 and C.

4. The coal plant crushes, stores, reclaims and loads coal onto trains. Cleanup is a critical function at the plant, because coal dust can burn and explode. The plant laborer cleaned up spills of coal dust, by shovel or by operation of a bobcat

[3] At hearing, Decker admitted Morrill's disability, defending on accommodation.

loader. The plant laborer also shoveled coal piles that built up from spills in the processing and loading of the coal. In winter, the plant laborer shoveled snow on plant sidewalks and access areas. The plant laborer also washed down areas of the plant with a fire hose or garden hose, including dragging the hose up and down beltways in order to wash them down. The plant laborer checked train car doors and closed them when necessary, for loading. The plant laborer carried 30-pound coal samples to the lab for analyses. The plant laborer cleaned plant facilities, including sweeping floors and emptying garbage cans. The plant laborer filled in as plant oiler, a job that included replacing grease barrels as needed. The plant laborer also assisted with mechanical repair projects as needed. Exhibit 20; testimony of Morrill.

5. Decker made some modifications to the job duties in order to accommodate Morrill, once he began the job. Morrill's restrictions precluded operation of vibrating equipment, so Decker eliminated the operation of the bobcat loader to clean up spills. Decker also eliminated the requirement of assisting with mechanical repair projects)an infrequent part of the job that might require lifting more than 15 pounds(. Decker also allowed Morrill always to use a garden hose rather than the heavier fire hose when washing down areas in the plant. With these modifications, Morrill still was carrying a 30-pound coal sample bucket to the lab, but he was able to perform this task without any problems. With these modifications, Morrill was still replacing grease barrels weighing 110 pounds, but by using the available 2-wheel cart and another employee to assist)the common practice(, he was able to perform this task without any problems. Exhibit 20, testimony of Morrill.

6. Morrill worked as a laborer in the coal processing plant at Decker from September of 1993 until June 15, 1995, with these modifications. In December 1993, Morrill reviewed with Dr. Schultz his condition and his job. Schultz approved Morrill's job as something Morrill should be able to continue to do. Schultz limited Morrill from operation of heavy equipment or "vibrating type" activities, restricted Morrill from repetitive bending, stooping or lifting more than 50 pounds and indicated Morrill could continue to perform his current job. Morrill performed as a plant laborer to Decker's satisfaction from September 1993 until June 15, 1995. Exhibits 30, D and YY; Uncontested Fact No. 1, Final Prehearing Order; testimony of Morrill and Schultz.

7. On March 20, 1995, Morrill again saw Dr. Schultz. Morrill had continued to have intermittent back pain, while continuing to perform his job duties without interruption. He did want to know about workers' compensation insurance coverage of his back problems, since his onset of the increased back pain in 1993 came during and after one particularly bumpy drive for Decker. Schultz equivocated about filing a compensation claim, leaving the decision to Morrill. Morrill decided to file a claim. He talked to Don Reynolds, Decker's safety supervisor, about filing a claim. Reynolds provided the forms, and on March 31, 1995, Morrill filed a claim on the 1993 occurrence. Although the claim form does not give an injury date, the attached hand-written description of the incident refers to the particularly bumpy trip while driving. Morrill had not driven such equipment since 1993. Morrill did not claim any lost wages, because he had not lost any. Reynolds thought Morrill was interested in filing a claim in 1995 because his work was bothering his back in 1995. On April 3, 1995, Reynolds signed the employer's first report of accident according to this understanding. Both the claim for compensation and the employer's first report reference Dr. Schultz as the treating physician. Exhibits D, E and F; testimony of Morrill, Schultz and Reynolds.

8. Dr. Thomas Schumann, an occupational medicine specialist at the Billings Clinic, evaluated Morrill on May 26, 1995. Dr. Schumann recommended, as temporary restrictions, virtually the same restrictions Dr. Schultz had assigned in December of 1993. Schumann recommended no repetitive bending/twisting of the back)with a note "limit shoveling"(, no repetitive lifting of over 25 pounds and no occasional lifting of over 50 pounds, and avoidance of operation of vibrating equipment. Dr. Schumann also referred Morrill for physical therapy. Exhibits I and J; testimony of Morrill and Schumann.

9. On June 15, 1995, Decker notified Morrill that he could not continue to work as a plant laborer with Dr. Schumann's restrictions. Testimony of Morrill, McKenzie, Busse.

10. Before removing Morrill from his job, Decker did not consult with him to find out if he believed he could continue to perform his job safely. Decker did not consult with Dr. Schultz, Dr. Schumann or Dr. Strahan to find out if they believed Morrill could continue to perform his job safely. Decker did not prepare a formal job

description of Morrill's job. When Decker later finished the formal job description, it still did not specify the amount of time spent shoveling. That amount could vary from almost no shoveling to several hours, in interrupted sessions, during a day. Exhibits 20 and 27, testimony of Morrill, Burnaugh, McKenzie, Busse and Reynolds.

11. On June 23, 1995, Morrill returned to Dr. Schumann. Decker had sent him paperwork regarding disability benefits through Decker for disability causally unrelated to work. Don Reynolds had called Morrill about those disability benefits. Morrill told Dr. Schumann that he had been unable to get back to work for a week. Dr. Schumann considered Morrill's physical therapy now to be a full-time referral, because Morrill was not working. Dr. Schumann called Decker and spoke to Reynolds, confirming that Decker would not return Morrill to work, out of concerns about his ability to perform the job duties safely. Dr. Schumann decided, with Reynolds, that a period of work-hardening and then a comparison of functional capacities)Morrill's actual capacities versus the job requirements(would be appropriate. Dr. Schumann reported Morrill's condition as "unable to work at this time." Exhibits K and P; testimony of Morrill, Schumann and Reynolds.

12. On June 30, 1995, Morrill submitted a disability claim to Decker's disability insurer. Morrill again identified the 1993 particularly bumpy drive as the cause of his back problems. Exhibit M; testimony of Morrill.

13. On July 6, 1995, Morrill saw Dr. Schumann again. Dr. Schumann considered Morrill improved by physical therapy, but wanted Morrill to continue for two more weeks before evaluating his functional capacities. Dr. Schumann still considered Morrill to be off work while completing rehabilitation work)physical therapy(. Exhibit L; testimony of Morrill and Schumann.

14. On July 20, 1995, Morrill saw Dr. Schumann again. Dr. Schumann released Morrill to return to work with the same limitations under which Morrill worked in 1993 through 1995. Dr. Schumann remained concerned about shoveling work, because of the repetitive twisting and bending involved. He wanted more physical therapy and more evaluation while Morrill worked within the limitations. Morrill took the report to Decker and gave it to Burnaugh. Burnaugh told Morrill that Burnaugh and Reynolds would discuss the situation and "get back to" Morrill. Exhibit O; testimony of Morrill and Schumann.

15. After receiving the July 20, 1995, work release from Dr. Schumann, Decker did not consult with Morrill to find out if Morrill believed that he could now perform his job safely. Decker did not consult with Dr. Schultz, Dr. Schumann or Dr. Strahan to find out if they believed Morrill could now perform his job safely. Decker was in the process of preparing a formal job description of Morrill's job, but Decker did not have a completed formal job description or analysis. Decker did not return Morrill to work after receiving Dr. Schumann's July 20, 1995, work release. Exhibits 20 and 27, testimony of Morrill, Burnaugh, McKenzie, Busse and Reynolds.

16. From July 20 through the end of 1995, Decker, through its agents, continued to tell Morrill that it would "get back to him." In November 1995, at the request of Decker's workers' compensation insurer, Morrill saw Dr. James Ferries, a Sheridan, Wyoming, orthopedic surgeon. Morrill also saw Dr. Schumann again in November 1995. Both doctors assigned the same limitations under which Morrill worked successfully in 1993, 1994 and 1995. However, Dr. Schumann recommended a four-day regime of measured exercise, to ascertain if Morrill could safely perform the tasks he performed from 1993 through 1995. Exhibits S, U and AAA; testimony of Morrill and Schumann.

17. On November 21, 1995, Decker representatives Burnaugh, Reynolds and Busse met with Dr. Schumann regarding Morrill. Dr. Schumann reported, in his office notes for that meeting, that Decker did not feel Morrill could safely return to work as a laborer based on past history, absent more objective evidence of improvement. Exhibit AAA)see also Exhibit 13(; testimony of Schumann.

18. Morrill followed directions and arrived at the physical therapist's office on December 5, 1995, to begin that regime of measured exercise)functional capacity evaluation and work hardening(. When he arrived, he found it was cancelled. Because Decker's insurer was denying liability for any injury resulting from the 1993 particularly bumpy drive, the insurer refused to authorize the program that Dr. Schumann had recommended. Testimony of Morrill and Mona Anthony.

19. Mona Anthony was the office coordinator for the care provider to administer the program recommended by Dr. Schumann. When the workers' compensation insurer, and then Morrill's health insurer, both refused to authorize the program, she consulted with Decker. She did this because Dr. Schumann)whom

she also contacted(wondered if the employer would accept Morrill's report of his condition instead of the objective results for the program. Anthony followed up on Dr. Schumann's curiosity. If the employer either would pay for the program or accept Morrill's subjective report, the situation would be resolved. Anthony was unable to get authorization from Decker. Exhibit 5; testimony of Anthony.

20. Decker did not agree to pay for a program to determine objectively whether Morrill could safely perform his job. Dr. Schumann did not want to decide without objective data whether Morrill could safely perform his job. The workers' compensation carrier was denying liability for the 1993 injury claim and refusing to pay for the program. Testimony of Anthony and Schumann.

21. In August 1995, Morrill filed his discrimination claim against Decker. In his claim, Morrill asserted that he still had the same limitations applicable in 1993-95, could still do his job, but that Decker refused to permit him to return to work. Decker had notice of this assertion when it received the complaint. Decker had this notice throughout the subsequent investigation of this complaint. Exhibits R, W, X , Y, AA, BB and DD.

22. In March 1996, the workers' compensation insurer accepted liability for Morrill's condition, treating it as an occupational disease. Exhibits SS and TT.

23. In August 1996, Decker requested additional information from the workers' compensation insurer regarding Morrill's capacity to return to his job. At that time, Decker requested information about why no objective capacity testing had been performed and about whether such testing would be performed. Exhibit FF and testimony of Burnaugh.

24. In September 1996, Dr. Schumann requested objective capacity testing for Morrill. Since the workers' compensation insurer had now accepted liability for his condition, that testing was performed. It confirmed that Morrill still had the same restrictions with which he had successfully worked in 1993-95. Exhibits GG, HH, II, WW and ZZ.

25. Bob Burnaugh was the member of Decker management responsible for dealing with Morrill's disability and the issues it presented. He testified about Decker's position on Morrill's return to work. From June 1995 until Decker returned

Morrill to work in November 1996, what Decker needed to return Morrill to work were objective test results on Morrill's capacity to work safely. Dr. Schumann was influenced by Decker's concern that Morrill might injure himself if he continued to work in his current job. Dr. Schumann suggested objective capacity testing to address Decker's concern. Decker in turn relied upon Dr. Schumann's suggestion as identifying a necessary prerequisite for Morrill's safe return to work. Testimony of Burnaugh and Schumann.

26. Decker was willing to pay for capacity testing of a disabled employee, if no other means of paying for the testing was available. However, Decker never told Morrill of its willingness, and Morrill had no other means of discovering that willingness. At any time from December 1995 on, Morrill could have obtained the testing he ultimately got, had Decker expressed its willingness to pay for the testing. Because Decker did not inform Morrill of its willingness, Morrill never asked, and the individualized analysis of his capacity remained unperformed until shortly before Morrill returned to work. Testimony of Morrill and Burnaugh.

27. Morrill returned to work at Decker on November 18, 1996. After his return to the plant laborer position, Decker modified the task of carrying coal samples to the lab. That task now involves a 1-pound bag rather than a 30-pound bucket. The job is otherwise the same, in terms of physical demands, as it was in 1993-95. Uncontested Fact No. 2, Final Prehearing Order; testimony of Morrill.

28. Morrill lost earnings of $49,627.82 from June 1995 through his return to Decker in November of 1996, a period of 520 days. He earned $1,241.00 from other employment during that same period, for a net loss of earnings of $48,386.82. During that same period, he lost $8,746.00 in "gain sharing")bonus(money. During that same time period he made a number of trips to Billings to see health care providers and lawyers regarding his problems, including his workers' compensation claim. From January 1996 until Morrill returned to work, a period of 321 days)61.7% of the total period of lost earnings(, Morrill lost $29,854.67 in earnings and $5,396.28 in bonus money. Prejudgment interest)calculated according to the formula used in Exhibit KK, with a net loss of $35,250.95 and a beginning date of January 1, 1996(through [February 22] is $9,619.26 [{$9.658 per day x 322 x .5} + {$9.658 x 830 days}]. Morrill did not prove that he incurred a particular amount of money incurred in

travel expenses, interest on loans, telephone bills and postage, attributable to his discrimination claim. Exhibit KK; testimony of Morrill.

29. Morrill suffered emotional distress, for which he is entitled to recover $3,000.00, because he did not return to work sooner. From December 1995, when he and his family interrupted their other plans to make a special trip to Billings, Montana for the cancelled testing, until Morrill returned to work, the continued uncertainty, shame, frustration and fear caused emotional distress. Had Decker notified Morrill of its willingness to pay for the testing, that emotional distress would not have occurred. Testimony of Morrill and Bonnie Morrill.

IV. Opinion

Montana law prohibits employers from discriminating against employees based on disability. §49-2-303)1()a(MCA. Discrimination because of disability includes failure to make reasonable accommodation. An accommodation is not reasonable if it involves either undue hardship to the employer or danger to the health or safety of any person, including the claimant. §49-2-101)19()b(MCA.

Decker admitted, at hearing, that Morrill was disabled. Decker did not assert an undue hardship in accommodating Decker. Decker defended Morrill's claim solely on the basis that until it verified his safety from additional injury if he returned to his job, it could not accommodate him. Morrill established his prima facie case, by direct evidence. Decker took adverse employment action, interrupting his continued employment, because of his disability. Decker defended its action solely on the basis that although under the Human Rights Act it is unlawful to discriminate, in hiring or employment, against a person because of physical disability, there is no discrimination when the particular employment may subject the person with a disability to physical harm. ***See, e.g.***, ***Reeves v. Dairy Queen***, 287 Mont. 196, 953 P.2d 703, 707-8)1998(.

Risk of harm is an affirmative defense, and Decker carries the burden of proof. 24.9.605 and 606 A.R.M. Montana requires an employer who asserts the affirmative defense of safety to perform an independent assessment to determine the

reasonable probability that substantial harm would result from accommodation of the disability. 24.9.606)7(and)8(A.R.M. Montana also follows the guidelines established by the Equal Employment Opportunity Commission under the Americans with Disabilities Act)ADA(regarding reasonable accommodation, inclusive of the safety defense. 24.9.605)4(A.R.M.

The defense that the claimant would constitute a direct threat to his own health and safety involves factors including the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will recur and the imminence of potential harm. 29 C.F.R. 1630.2)r(. The federal Guidance to this regulation emphasizes the necessity for a high probability of substantial harm. A high steel worker with an inner ear problem that destroys his sense of balance may be at too great a risk despite reasonable accommodations, for example, but the stress of a job which could trigger recurrent mental problems)for an employee with a past history of disabling periodic mental problems(might not be a justifiable basis for termination "for the employee's own good." This defense requires expert testimony, and the trier of fact can elect to disregard that testimony. ADA Technical Assistance Manual §IX.

Decker attempted an individualized assessment of the risk of harm involved for Morrill in performing his job in June 1995. Decker's individualized assessment lacked only one ingredient. Decker concluded that a functional capacities evaluation was necessary to verify that Morrill could do his job, particularly the shoveling involved. Decker obtained verification of this conclusion from Dr. Schumann. With medical verification of the risk, Decker reasonably refused to return Morrill to work.

This defense applied only until the end of December 1995. Decker at that time knew or reasonably should have known that no functional capacities testing was available to Morrill because no insurer would pay for it. Decker, by its own evidence, was willing to pay for such testing for a disabled employee unable to obtain the testing otherwise. Decker did not tell Morrill of its willingness. Morrill had no other means of finding out about Decker's willingness. The employer who requires verification of safety and stands willing to pay for the testing to provide

such verification has an obligation to make the disabled employee aware of this willingness. Otherwise, the individualized assessment of safety risk becomes meaningless. It becomes an absolute barrier to employment because of financial limitations, not substantial risk of harm.

From January 1996 until November 1996, Morrill was ready to work, eager to work and able to work. Decker refused to return him to work until objective testing verified his ability to work safely. Had the workers' compensation insurer not ultimately accepted liability for his occupational disease claim, Morrill might never have been able to provide the objective test results, even though Decker admitted it would, in these precise circumstances, provide assistance to obtain those very test results. Decker was not justified in refusing to return Morrill to work without test results that Decker could have obtained in December 1995 and should have obtained in December 1995.

Concerning the time from June through December 1995, an accusation under the ADA of failure to make a reasonable accommodation covers far more territory than accusations of retaliatory discharge or other misconduct. The potential burden upon an employer to satisfy ADA strictures is considerable. The federal regulations provide suggested procedures for compliance with the reasonable accommodation requirement, following the statute itself. 42 U.S.C. §12111)9()b(.

A suggested procedure for engaging in reasonable accommodation)from Guidance 29, C.F.R. 1630.9(instructs that the employer should:

1. analyze the particular job involved and determine its purpose and essential functions;

2. consult with the individual with a disability to ascertain the precise job-related limitations imposed by an individual's disability and how those limitations could be overcome with reasonable accommodation;

3. in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

4. consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employer and employee.

Similarly, the ADA Technical Assistance Manual provides the factors used to determine whether a particular job function)which an employee with a disability is unable to perform in the normal fashion(is an essential function. An employee precluded from performing essential functions by a disability is at much more risk of discharge, so this is a critical factor. For an extreme example, a job in a warehouse, unloading product from trucks and putting it in the appropriate place, could be analyzed to *not* require lifting, if use of a dolly or hand-truck would permit an employee with a bad back to transport the product from the truck to the warehouse without lifting. According, again, to Guidance, 29 C.F.R. 1630.2)n(, factors to be used to resolve a controversy about whether a particular job function is "essential" are:

1. Whether the position exists to perform a specific function)for example, a position of proofreader cannot be modified to accommodate a blind person(;

2. The number of other employees available to perform the specific job function or among whom the job function can be distributed)the trier of fact can consider evidence of peak demand periods for the particular function(;

3. The degree of skill or expertise required to perform the specific task; and

4. The amount of time spent performing the specific task generally.

Decker reasonably relied upon medical advice it received that Morrill was at risk of further injury if he engaged in the kind of twisting and bending involved in shoveling. Decker also acted reasonably in precluding Morrill from returning to work until verification that he could safely perform his job with his existing limitations. Peak demands for shoveling, in light of the medical information provided from June through December 1995, appeared to present a substantial risk of additional harm.

Six months is a long time for a disabled employee to await medical verification of his ability to work. Still, Decker reasonably relied upon its compensation insurer and the physicians to process Morrill's evaluation within that period. At the end of the six months, Decker failed to ascertain the reasons for the delay in evaluation and to proffer assistance in obtaining the evaluation. Someone at Decker told Mona Anthony that Decker would not pay for the evaluation. This statement, according to Decker's evidence at hearing, was untrue. Decker *would* pay for such an evaluation. But this mix-up, left uninvestigated by Decker, precluded Morrill's return to work for an additional ten and a half months. Decker illegally discriminated against Morrill by both causing and allowing this delay.

Decker interposed a damage defense of receipt by Morrill of workers' compensation and private disability benefits. Montana's collateral source laws apply to tort recoveries for wrongful death or personal injury, when that tort recovery is $50,000.00 or more. §§27-1-307 and 27-1-308 MCA. The commission has not previously decided whether the collateral source reduction laws apply to Human Rights Act awards. Here, the amount of the award falls short of the threshold required by the statutes. No reduction of the award by reason of collateral source payments is proper.

Pre-judgment interest is properly part of an award to compensate for lost income. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523)1989(; *Foss v. J.B. Junk*, Case No. SE84-2345)Montana Human Rights Commission, 1987(. Interest on both the lost wages and lost bonus payments is proper.

The power and duty to award money for emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596)Mont. 1993(. Staats' testimony proved her distress. Once a claimant proves violation of civil rights statutes, the claimant can recover for emotional harm that occurred as a result of the respondent's unlawful conduct.[4] The claimant's testimony alone can establish

---

[4] *Carey v. Piphus*, 435 U.S. 247, 264, at footnote 20)1978(; *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225)D.C. Cir. 1984(; *Seaton v. Sky Realty Company*, 491 F.2d 634)7th Cir. 1974(; *Brown v. Trustees of Boston Univ.*, 674 F.Supp. 393)D.C.Mass. 1987(; *Portland v. Bur. Labor & Industry*, 61 Or.Ap. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475)1984(; *Hy-Vee Food Stores v. Iowa Civ.Rights*

compensable emotional harm from a civil rights violation, *Johnson v. Hale*, 942 F.2d 1192)9th Cir. 1991(. The trier of fact can infer that the emotional harm did result from the illegal discrimination.[5]

V. Conclusions of Law

1 The Commision has jurisdiction over this case. §49-2-509)7(MCA.

2 Respondent Decker Coal Company unlawfully discriminated in employment by refusing charging party Bruce Morrill accommodation for his physical disability from January 1, 1996 until he returned to work November 18, 1996. §49-2-303)a(MCA.

3 Pursuant to §49-2-506)1()b(MCA, Morrill is entitled to the sum of $29,854.67 for lost wages and $5,396.28 for lost bonus payments. Prejudgment interest is $9,619.26. Morrill is also entitled to the sum of $3,000.00 for emotional distress.

4 Affirmative relief is necessary in this case. §49-2-506)1()a(MCA. Decker must refrain from engaging in any further unlawful discriminatory practices. Within 60 days of the entry of this order, Decker must submit to the Human Rights Bureau a proposed procedure to notify disabled workers of the means by which they may request Decker's assistance in obtaining evaluations not otherwise available and required by Decker to determine whether reasonable accommodation of the disability is feasible. Within 60 days after the Human Rights Bureau approves)with or without suggested modifications(the proposed policy, Decker must file written proof with the Human Rights Bureau that it has adopted and published the policy)with any suggested modifications(. Decker must also comply with any additional conditions the Human Rights Bureau places upon its continued activity as an employer, or at once cease doing business in Montana as an employer.

5 For purposes of §49-2-505)4(, MCA, Morrill is the prevailing party.

VI. Proposed Order

Comm., 453 N.W.2d 512, 525)Iowa, 1990(.

[5] *Carter*, ***supra***; *Seaton*, ***supra***; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass. App. Ct. 172)1985(; *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253, 261-262, ***rev. denied***, 287 Ore. 129)1979(; *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314)1970(.

1 Judgment is found in favor of Bruce Morrill and against Decker Coal Company on the charge of illegal discrimination in employment because of disability.

2 Bruce Morrill is awarded $47,870.21 from Decker Coal Company.

3 Decker Coal Company is enjoined from further discriminatory acts and ordered to comply with the provisions of Conclusion of Law No. 4.

Dated: February 25, 1999.

_____

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry