BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011181:

DAVID LERAAS,	)	Case No. 1818-2005
	)	
Charging Party,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Charging party David Leraas filed a discrimination complaint with the Montana Department of Labor and Industry on August 11, 2004. He alleged that respondent BNSF Railway Company discriminated against him in medically disqualifying him from a conductor trainee position. Hearing examiner Terry Spear held a contested case hearing on July 18, 2005. Brian Bramblett, Meloy Trieweiler, represented David Leraas and Michelle Friend, Hedger Moyers, represented BNSF. David Leraas, Charles Garten and Dr. Michael Jarrard testified.

After the hearing, the parties designated additional evidence for the record: portions of their discovery and excerpts from depositions from Dr. Anne Millard, Dr. Ronald Peterson, Dr. Scott Ross, Jaime Holt and Dan McCaslin. The hearing examiner admitted exhibits 1-3, 5-12, 14, 16 and 104-107.[1] The hearing examiner refused exhibits 17-21, sustaining BNSF's objection that these exhibits were not timely disclosed.

[1] As the transcript reflects, some admitted exhibits were proposed by both parties, with different numbers, and referenced by the other party's number. Duplicative exhibits are reflected in both the hearing examiner's exhibit table and the transcript–the above recitation uses only the exhibit numbers under which exhibits were admitted.

After filing of the transcript of hearing, the parties filed post hearing arguments and proposed decisions and submitted the matter for decision on October 21, 2005. Copies of the Hearings Bureau's docket of this contested case proceeding accompany this decision.

II. ISSUES

The issues for this case are whether David Leraas has a disability, whether BNSF Railway Company denied him employment because of disability and, if so, whether its denial was reasonable, based upon an individualized assessment showing that his performance of the job would create a reasonable probability of substantial harm either to him or to others within the actual zone of risk for that job. A full statement of the issues appears in the final prehearing statement.

III. FINDINGS OF FACT

1. BNSF Railway Company ("BNSF") operates a railroad in 28 states, including Montana, and in 2 Canadian Provinces. It employs approximately 36,000 people. BNSF maintains a division headquarters in Billings, Montana.

2. David Leraas, who was 36 years old at the time of the hearing, works as a Culligan Water sales and service representative in Glasgow, Montana. He graduated from high school in 1987, attended Dickinson State University for two years, then quit school and returned to work in Glasgow in 1989, without earning a college degree. In 1989 he worked at the Campbell Lodge in Glasgow for approximately one year as a desk clerk. In 1990 he went to work for Select Office Systems where he performed duties which included stocking, deliveries and desk work.

3. In 1992, Leraas went to work at Culligan Water Conditioning in Glasgow as a route sales and delivery person. In 1995, he herniated a disk in his low back at L-5/S-1. At that time, surgery was not recommended and conservative treatment was pursued. Dr. Thomas Schumann, an occupational medicine physician, assigned Leraas a 50-pound lifting restriction and told him to get assistance lifting more than that amount. Leraas returned to work and told his employer that he felt great and believed he could do the work. He resumed his work for Culligan, which included lifting more than 50 pounds unassisted. Between 1995 and 2001 he did not stretch, use proper lifting techniques or otherwise change his work behavior in any way.

4. Leraas began experiencing back pain again in the summer of 2001. In August 2001, Dr. Robert Wood performed an L-5/S-1 diskectomy and laminectomy

on Leraas. In March 2002, 6 months later, Dr. Scott Ross performed a closing evaluation for purposes of Leraas' Workers Compensation claim, to determine his permanent impairment rating and his abilities to work. Dr. Ross, a board certified Occupational Medicine physician, conducted a physical examination of Leraas and reviewed his previous medical records. Leraas' medical records contained the opinions of several specialists in the fields of neurosurgery and neurology as well as the prior impairment evaluation and restriction by another Occupational Medicine physician, Dr. Schumann.

5. At that time he recommended that Leraas not lift more than 50 pounds without assistance and that he minimize repeated bending and twisting of the low back.

6. Dr. Ross assigned to Leraas a permanent lifting restriction of not more than 50 pounds and directed that any lifting of more than 50 pounds be done with assistance. The purpose of the lifting restriction was to define for Leraas, the compensation insurer and Leraas' employer what Leraas could safely do in the future. Patients often report that they can lift more than the prescribed lifting limit and sometimes do lift more, although but it is not medically advisable. While there is no tool to predict the future, Dr. Ross believed that experience and statistical analysis both indicated that if Leraas persisted in lifting more than 50 pounds, he would eventually injure his back again. Dr. Ross could not predict the likelihood of such an injury, but concluded that there was a definite risk of reinjury if Leraas exceeded the limitations. Dr. Ross strongly recommended that Leraas not exceed the limits at the time and in the future. In his professional experience, a post-surgery back is never the same–most people are not free of limitations after back surgery, due to the altered structure of the back. "Permanent" meant forever. Dr. Ross expected any other occupational medicine doctor to understand that meaning.

7. Returning to work after his surgery, Leraas resumed his route salesperson work for Culligan. On Tuesdays and Thursdays he manually loads a delivery truck with 5-gallon jugs of water weighing 40 to 44 pounds each. He makes deliveries throughout northeast Montana. He routinely unloads 5-gallon jugs from the delivery truck and carries 2 at a time (one in each hand), into the customers' buildings. He also delivers salt and water softeners, lifting objects weighing between 50 and 85 pounds. His deliveries involve getting in and out of his delivery van about 30 times each Tuesday and Thursday. Leraas also participates in recreational activities which include 4-wheeling, bowling, hunting, and woodworking.

8. Leraas now uses proper lifting techniques when lifting. He stretches before any lifting or strenuous activity. Since his surgery, Leraas' back "feels wonderful." He does not take prescription or over the counter medication for pain or back problems. He does not experience any difficulty performing tasks that involve lifting more than 50 pounds, bending or twisting. By April 2004, he had been performing lifting, bending and twisting tasks at work for approximately 2 years without difficulty, reinjury or residual back problems, and fully participating in recreational activities without difficulty or restrictions.[2]

9. On March 27, 2004, Leraas applied to become a conductor trainee with BNSF, completing an application for employment and a resume. On April 20, 2004, he attended a BNSF orientation and passed BNSF's requisite aptitude tests. That afternoon, he interviewed with human resource manager Jamie Holt, trainmaster Dan McCaslin and conductor Chuck Garten. After the interview, Leraas received a conditional offer of employment in Glasgow, Montana, as a conductor-trainee to begin May 17, 2004. The offer was contingent on a favorable pre-employment background investigation, proof of permanent employment eligibility, completion of a BNSF medical history questionnaire and successful completion of a drug screen, a physical examination and an Industrial Physical Capability Services ("IPCS") examination.

10. Leraas was excited and told his customers, family and co-workers about the BNSF job offer. He thought of the job as an opportunity to better himself.

11. A BNSF conductor or train person must safely lift or carry objects or materials weighing up to 90 pounds. Perhaps the most demanding weight-bearing duty involves changing knuckles (metal coupling devices attached to each end of a car, weighing 80 to 90 pounds), which occasionally break on the road, requiring replacement at the site of the failure. BNSF discusses the requirement of lifting an 80 to 90-pound knuckle at orientation. Pursuant to the collective bargaining agreement between the union and the railroad, on "through" freight trains there are 2-man crews. The conductor may therefore be required to change a knuckle unassisted. Knuckles can break on the road because of age, freight, weight, terrain, poor train handling, air hose failure, emergencies and slack action. Such breaks are not

---

[2] By July 2005, Leraas had been performing lifting, bending and twisting tasks at work for more than 3 years without difficulty, reinjury or residual back problems. By July 2005 he had also been participating fully in his recreational activities without difficulty or restrictions over the same time.

particularly frequent[3], but can happen at any time or location. A conductor trainee will change at least two knuckles during orientation. To change a knuckle, the employee must carry the replacement a minimum of 50 feet and a maximum of 4 or 5 railroad car lengths. Changing a knuckle is an essential function of the conductor position. Because it can become necessary to change a knuckle unassisted, BNSF cannot reasonably modify this essential job duty–to do so would sometimes require delaying a train on the road while assistance is dispatched to the site, at a substantial cost in terms of delay of the train, diversion of another worker to the site and arranging immediate transportation of that worker to the site. Other physical tasks include walking on ballast (uneven terrain along the track), as well as the physical demands of brakeman/switchman jobs as well. Each conductor must be qualified for and could be called to work those positions.

12. Leraas completed the BNSF post offer medical questionnaire, noting his back surgery in 2001 and stating that he made a full recovery. On the form Leraas was asked whether pain or soreness in his back, legs or feet had ever interfered with his work tasks or daily activities, whether he had ever had herniated disc disease in his back and whether he had ever had back pain or weakness in his legs. Leraas answered "No" to each question. Leraas testified that he thought the questions (each of which asked if he had ever had such problems) addressed his condition since returning to work after his surgery. He admitted that if the questions addressed his condition before as well as after his surgery, the answers to those questions should have been "Yes."

13. On April 28, 2004, Leraas completed the IPCS examination. The exam tested Leraas' shoulder and knees for the ability safely to perform the functions of a BNSF conductor. The exam provided objective evidence of the muscle groups necessary for the physical demands of the BNSF conductor position.

14. BNSF has found that the IPCS exam is extremely effective in verifying the fitness of prospective employees. Since implementing the exam as one of the tools in its hiring process, BNSF has noted reductions in employee back as well as knee and shoulder injuries. A by-product of having strong normally functioning shoulders and knees is fewer back injuries. BNSF conducted a comprehensive study when adopting the IPCS exam and determined that testing the knees and shoulders was adequate for determining whether an applicant could safely perform a particular job and thereby ensuring that BNSF employees experienced fewer injuries. As a result, BNSF does

[3] Over a five year period from 1998-2003, Charles Garten, a veteran conductor, could only remember changing 1 or 2 knuckles.

not include a comparable back exam for applicants. BNSF requires a minimum IPCS score of 1.3194. Leraas scored 1.96 and was recommended for a job class rating of train service.

15. On April 29, 2004, Leraas received an occupational and musculoskeletal assessment from Dr. Anne Millard at the Glasgow Clinic. BNSF considered the musculoskeletal assessment a critical element of the job-specific physical exam. Dr. Millard's assessment included a comprehensive physical examination.

16. Dr. Millard found that Leraas' flexibility in his back, rotation of his spine, strength in his lower extremities, ability to move in awkward positions, nerve function in his lower back and nerve function related to L5/S1 were all normal. The results of her musculoskeletal assessment indicated that Leraas was capable of performing the job duties of a conductor and could do so without any restrictions. Leraas reported no symptoms related to his prior back condition, no residual back pain associated with the prior back condition, no difficulty bending or twisting, and no difficulty or pain associated with lifting.

17. Dr. Millard did not observe any physical limitations or abnormalities during her exam indicating that Leraas could not safely lift more than 50 pounds. She did not have Dr. Ross' records. She did not obtain an occupational history as part of her exam and did not know that Leraas regularly lifted 80 to 100 pounds in his current employment.

18. Leraas informed Dr. Millard of the 50-pound lifting restriction he received in March 2002 due to his back surgery. Dr. Millard adopted the 50-pound lifting restriction in her occupational assessment, based upon Leraas' report. On that basis she concluded that he could safely work in any job that did not require lifting more than 50 pounds and that he should not lift more than 50 pounds without assistance. The purpose of the restriction was to prevent injury. Dr. Millard discussed the restriction with Leraas.

19. The results of Leraas' IPCS, Musculoskeletal and Occupational Assessment and his medical records from Dr. Ross were then provided to the BNSF medical department via ClinNet Solutions on April 30, 2004. ClinNet is a vendor that coordinates the medical pre-employment process for BNSF. Dr. Michael Jarrard, Medical Officer in the BNSF Medical Department, reviewed the information provided by ClinNet.

20. Dr. Jarrard relied on Dr. Ross' 2002 report (including the summary therein of prior history and treatment), which contained both a 10% whole person impairment rating and the 50-pound permanent lifting restriction. Dr. Jarrard relied on Dr. Ross's background and qualifications in occupational medicine, his familiarity with the railroad environment and his prior work on cases and care of injured employees. Dr. Jarrard also relied upon his own experience in looking at thousands of doctor's opinions over the years. He concluded that Dr. Ross' report was a reliable individualized assessment of Leraas' ability safely to work. Dr. Jarrard decided that Dr. Ross' report was more reliable than Leraas' reports to his physicians and to BNSF about his symptoms and work capacities, in part because of the discrepancies between Leraas' answers on the medical questionnaire and his documented medical history.

21. Dr. Jarrard considered lifting restrictions the best medical science could do to try to prevent deterioration from or recurrence of a significant prior injury. Even though Dr. Ross' exam was done in 2002, the condition of Leraas' post-surgical back was fixed and the 50-pound lifting restriction (first assigned in 1995 and then reassigned in 2002) was still appropriate and still permanent.

22. In his position as medical officer for BNSF, Dr. Jarrard would not remove a permanent restriction without significant findings in reports (from someone like a long-term treating physician) that would provide valid objective evidence explaining why the permanent restriction was no longer necessary. Removing permanent restrictions is a decision between the individual and the health care provider, but even if the restriction was removed, Dr. Jarrard would look at the basis for the removal.

23. BNSF also has legitimate business concerns with hiring a person with a permanent 50-pound lifting restriction to do a job that requires the ability to lift 90 pounds unassisted. Injury claims by railroad employees are governed by federal laws that impose a fault-based system. BNSF has been sued for negligent assignment by injured employees claiming that the railroad knowingly put them in jobs which exceeded their limitations.

24. Dr. Jarrard specifically evaluated Leraas' permanent 50-pound lifting restriction. He considered Leraas' restriction inconsistent with the requirements of the conductor position (train person position). Past medical history is crucial in assessing long-term prognosis and risk assessment for an individual. Dr. Jarrard noted Leraas' history of a herniated disc followed by lifting restrictions that Leraas did not observe and a subsequent more severe herniated disc requiring surgery. Considering this history, the documented 2002 restrictions and Leraas' post-surgical back condition, knowing the job of conductor and the injury patterns for workers with

prior low back diskectomies and laminectomies, Dr. Jarrard concluded that Leraas more likely than not would have a new claim, injury or reportable injury if he worked as a conductor. On this basis, Dr. Jarrard concluded that Leraas was not qualified for a conductor position due to his prior back surgery and his lifting restrictions, because there would be a reasonable probability of substantial harm to Leraas or others if BNSF hired him into that job.

25. On or about April 30, 2004, Leraas received an examinee health report from BNSF that indicated he was not qualified for the conductor position. The report stated, "Per BNSF medical, not medically qualified for train service position due to significant risks associated with previous back condition."

26. BNSF considered Leraas, with his prior back surgery and the 50-pound unassisted lifting restriction, unable safely to perform any job that involved lifting more than 50 pounds, repeated bending and repeated twisting. Within BNSF's work force, the railroad considered Leraas unable to work as a conductor, brakeman, switchman, track laborer, helper, yard helper, utility person and track laborer, as well as unable to work in any position in the maintenance of way department. As BNSF viewed him, Leraas, with his work history, training, skills and abilities, had a substantial limitation in the major life activity of working because of his prior surgery, back injuries and lifting restriction. In other words, BNSF regarded Leraas as having a physical disability.

27. On April 30, 2005, after notice that BNSF was rescinding its offer to hire him, Leraas obtained an evaluation from Dr. Ronald Peterson, an occupational specialist in Great Falls, Montana, who regularly performs post surgical evaluations of lower back surgery patients.[4] Dr. Peterson concluded that reliance on a 2-year-old restriction was not an accurate way to determine Leraas' current functional ability. When a patient's new job has essential duties inconsistent with an old restriction, Dr. Peterson obtains an updated history and current physical examination to determine applicable restrictions.

28. Dr. Peterson took a social history, medical history and occupational history and conducted a full physical exam of Leraas. He rated Leraas' current job with Culligan at a heavy physical demand level with repetitive movements of his lower back and repetitive bending and twisting associated with lifting tasks. Dr.

[4] Dr. Peterson is not board certified in occupational medicine. He performed the same examination as Dr. Ross had done in 2002.

Peterson noted that Leraas lifted 80 to 100 pounds more often in his current job than was required of a conductor with BNSF.

29. Dr. Peterson's neurological examination revealed that Leraas was muscular with no neurological deficits or evidence of residuals from his surgery. He found that Leraas had a full range of motion with his lower back, no evidence of muscle fatigue or tenderness and no indications that Leraas' current performance of his job functions caused objective evidence of abnormalities. Leraas reported no back pain, no pain shooting down his legs, no numbness in his legs or feet and no other symptoms associated with a back condition that would limit his ability to lift. Dr. Peterson's observations were consistent with Dr. Millard's observations.

30. Dr. Peterson believes that individuals who have an L-5/S-1 diskectomy and laminectomy usually heal to a point at which no restrictions are medically necessary, after surgery. His approach to Leraas' condition was consistent with his usual practice in post surgical evaluations of lower back surgery patients.

31. Dr. Peterson concluded that Leraas tolerated the heavy physical demands of his current position without objective evidence or subjective history of difficulty. Based upon Leraas' examination and history, Dr. Peterson concluded Leraas was capable of lifting and carrying 100 pounds without assistance and without reasonable probability of injury. Dr. Peterson concluded that Leraas was capable of performing all of the job duties of a conductor without presenting a risk of harm to himself or others. Dr. Peterson also concluded that both the April 28, 2004, IPCS exam and the April 29, 2004, musculoskeletal assessment confirmed his observations and opinions. Dr. Peterson approved Leraas for work without restrictions, based upon Leraas reported levels of injury and problem free activity at work from 2002 through the date of his examination.

IV. OPINION[5]

Montana law prohibits employment discrimination because of disability,[6] when the essential tasks of the job do not require a distinction based on disability. Mont. Code Ann. § 49-2-303(1)(a). Leraas contended that he had worked without injury or problems lifting 90 plus pounds unassisted on a regular basis for more than 2 years before BNSF rejected him and therefore had no actual disability. He argued that

---

[5] Statements of fact in this opinion are hereby incorporated by reference to supplement the fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

[6] All references to "disability" in this case refer to physical disability.

BNSF regarded him as disabled based on the 2002 lifting restriction. BNSF argued that the 50-pound permanent lifting restriction disqualified Leraas from working safely as a conductor trainee even though it was not an actual disability, and that BNSF only considered Leraas disqualified from heavy lifting jobs, which did not constitute regarding him as disabled.

A. Leraas Established a Prima Facie Case, with Direct Evidence

To establish his case of disability discrimination in employment, Leraas must prove that (1) he had a disability; (2) he was otherwise qualified for the job he sought and doing that job would not subject him or others to any undue risk of physical harm and (3) BNSF denied him the job because of his disability. *Reeves **at*** ¶ 21, ***citing*** *Hafner v. Conoco, Inc*. (1994), 268 Mont. 396, 886 P.2d 947, 950; ***see*** Mont. Code Ann. §§ 49-4-101 and 49-2-303(1)(a). This case involves direct evidence of disability discrimination, *Reeves v. Dairy Queen* 1998 MT 13, ¶¶ 16-17, 287 Mont. 196, 953 P.2d 703, if Leraas' lifting restriction of 50 pounds, whether actual or perceived, constituted a disability. There is no dispute that BNSF withdrew its conditional offer of employment because of Leraas' back injuries and prior surgery and the resulting assignment of the lifting restriction. If Leraas established the first 2 elements of his prima facie case, the third element case was likewise established.

A1. BNSF Regarded Leraas as Disabled

Montana law defines "disability" to include both an impairment that substantially limits one or more major life activities and a condition regarded as such an impairment. Mont. Code Ann. § 49-2-101(19)(a)(I) and (iii).

Work is a major life activity. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 428. Based upon the permanent lifting restriction Leraas received after his 2001 back surgery, he had a "back condition that either prevent[ed] him from performing heavy labor or which his employer regard[ed] as precluding heavy labor. He [was] therefore substantially limited in the major life activity of working because his impairment eliminate[d] his ability to perform a class of jobs." *Butterfield v. Sidney Pub. Sch.*, 2001 MT 177, ¶ 24, 306 Mont. 179, 32 P.3d 1243.

BNSF argued that federal case law (predating *Butterfield*) established that Leraas' lifting restriction was insufficient to constitute a disability, since that

restriction was not a substantial limitation in the major life activity of working.[7] BNSF also asserted, consistent with the apparent reasoning of the federal cases, that it only considered Leraas precluded from performing one job, instead of considering him precluded from a range or class of jobs. The reasoning of these federal cases, all affirming summary judgments in favor of employers, is inapplicable in the face of controlling Montana precedent[8] involving a full blown contested case hearing and final agency decision.

Whether an employer considered an applicant or employee substantially limited and whether the individual actually was substantially limited are both questions of fact. *Butterfield* explained that to be disabled a claimant need not be totally unable to work (or regarded by the employer as such):

> On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform *a class of jobs or* a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs . . . .

Butterfield ***at*** ¶ 23, ***quoting (and then applying)*** the EEOC interpretive guideline to 29 C.F.R. § 1630.2(j).

Butterfield is consistent with federal cases questioning and distinguishing the Circuit decisions cited by BNSF. For example, the 6th Circuit distinguished *Williams*, ***supra***, noting that whether a particular lifting restriction (25 pounds in *Williams*) substantially limited the major life activity of working had to be determined on an individual basis in comparison not with an average person but with a person having comparable training, skills and abilities to the claimant and could not be decided as a

---

[7] *Thompson v. Holy Family Hosp.* (9th Cir. 1997), 121 [miscited as 122] F.3d 537, 539-41; *McKay v. Toy. Mfg. USA Inc.* (6th Cir. 1997), 110 F.3rd 369, 373; *Williams v. CMSS Inc.* (4th Cir. 1996), 101 F.3d 346, 349; *Aucutt v. Six Flags over MidAmerica, Inc.* (8th Cir. 1996), 85 F.3d 1311, 1319; *Ray v. Glidden Co.* (5th Cir. 1996), 85 F.3rd 227 [miscited as 277], 229; *Dutcher v. Ingalls Ship Bldg* (5th Cir. 1995), 53 F.3rd 723, 727-28; *Daley v. Koch* (2nd Cir. 1989), 892 F.2nd 212, 215.

[8] Montana seeks guidance from federal cases in interpreting Montana law that lacks Montana precedent. *Harrison v. Chance* (1990) 244 Mont. 215, 797 P.2d 200, 204 (1990); *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841. If *Butterfield* is on point, it controls without reference to the federal cases.

"matter of law." *Burns v. Coca-Cola* (6th Cir. 2000), 222 F.3d 247, 255, note 3 ("It is obvious that a lifting restriction would substantially limit a manual laborer's ability to work to a far greater extent than it would limit that of an accountant, lawyer or teacher"). A federal district court, citing *Ray*, ***op. cit.***, and *Williams*, noted that these cases "seem to assume, without explanation, that only a narrow range of jobs require heavy lifting." *Valle v. City of Chicago* (N.D.E.D. Ill. 1997) 982 F.Supp. 560, 565. The *Valle* decision, in denying summary judgment, continued, "Because . . . the number of jobs in this category [jobs which require heavy physical exertion] is sufficiently broad to constitute a substantial limit on Valle's ability to work, we conclude that he has adequately alleged a disability as that term is defined by the ADA." 982 F.Supp. ***at*** 565.

Leraas, with some schooling and some training in business skills from his current employer, had a wider range of jobs that he could do with his actual or perceived limitations than Robert Butterfield had. Nonetheless, Leraas was also prevented from a wider range of jobs than Butterfield, because Leraas' limitations, according to the lifting restriction upon which BNSF relied, precluded him from doing any job involving heavy lifting, including his current job. Thus, his wider range of skills, education and experience did not remove him from application of *Butterfield*, since it broadened both the range of jobs he could do and the range of jobs he could not do, as BNSF perceived him. Indeed, despite his business training, the only alternative to his present job with Culligan that Leraas has pursued is buying the business and continuing to do work that more frequently involves heavy lifting than the conductor trainee position, but as an owner rather than an employee.

BNSF argued that it could not have regarded Leraas as disabled, because it never considered his ability to perform a class or wide range of jobs, only to perform one specific job. *Butterfield*, ***at*** ¶ 19, addressed this specificity argument [emphasis added]:

> The District contends that . . . Butterfield failed to prove that he was significantly restricted in performing a "broad range of jobs" and showed only that he could not perform the custodian's job because it required lifting more than 50 pounds. Having reviewed the record and the hearing examiner's findings, we now conclude that the District mischaracterizes Butterfield's burden and that he satisfied his burden when he proved and the hearing examiner found that he is significantly restricted in the ability to perform that class of jobs which requires heavy physical labor, or at least that his employer regarded him as so restricted.

The employer in *Butterfield* relied entirely upon a 50-pound lifting restriction, just as BNSF did in the present case (albeit the restriction in *Butterfield* was not a post-surgical restriction). The restriction was applicable to all activities, including all work activities. Therefore, when BNSF applied the lifting restriction, it necessarily regarded Leraas as incapable of performing a broad range or class of jobs. As BNSF saw him, Leraas was unable to perform any job that required heavy lifting, which was a significant restriction in performing an entire class or broad range of jobs, including most of the jobs at BNSF that the parties referenced during the hearing.

Any other analysis would result in absurdity. The limitation that prevented Leraas from working as a conductor trainee did not involve something unique to that job. A commercial airline pilot's job may require uncorrected 20/20 vision, even though most jobs (including most pilots' jobs) require only 20/20 corrected vision. *Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471. A job requiring a DOT commercial license may also have more strict requirements than most driving jobs. *Albertson's v. Kirkingburg* (1999), 527 U.S. 555. Such restrictions do not necessarily preclude an applicant from a wide range or class of jobs, because they are so specific to a particular job.

Across the board lifting restrictions, by contrast, do apply to a broad range of jobs and other life activities. Leraas' permanent lifting restriction did interfere with his ability to perform a broad class of jobs. The insistence that BNSF "only" regarded Leraas as unable to perform the conductor trainee job he applied for did not narrow the actual scope of the restriction it regarded him as having.

Every employer considers an applicant for a particular job–the job to which the application applies. If employers thereby insulated themselves from any liability for considering applicants disabled, the "regarded as" provision of the law would be useless. The Legislature does not pass meaningless laws. "*The law neither does* nor requires *useless acts*." Mont. Code Ann. § 1-3-223 (emphasis added). For these reasons, the hearing examiner found that BNSF regarded Leraas as disabled.

A2. Leraas Presented Evidence That He Was Otherwise Qualified for and Could Perform the Conductor Trainee Job Without a Reasonable Probability of Substantial Harm to Himself or Others

Despite the agreement of both parties that Leraas had no actual disability, one of the key questions in this case is whether he could safely lift 90 pounds unassisted. If he could not, BNSF justifiably withdrew its conditional employment offer.

Leraas' proved that he had been performing heavy lifting regularly since his return to his Culligan work in 2002 without problems or injuries. He also proved that a licensed physician released him to work without restrictions subsequent to BNSF's decision to withdraw its conditional employment offer. His evidence was sufficient to establish the second element of his prima facie case.

B. BNSF Showed That it Withdrew its Conditional Offer of Employment Because of a Distinction Based on Physical Disability Which the Reasonable Demands of the Conductor Trainee Position Required

Montana law, as already noted, does allow adverse employment action because of disability, when the essential tasks of the job require a disability-based distinction. Mont. Code Ann. § 49-2-303(1)(a). For complaints of illegal discrimination filed on or after July 1, 1997, subchapter 6 of the Montana Human Rights Commission's rules (Admin. R. Mont. 24.9.601 ***et seq.***) applies. Admin. R. Mont. 24.9.107(b)(ii). Admin. R. Mont. 24.9.605(1), reiterates the law that an employer can legally make a distinction based on physical disability when the reasonable demands of the position require the distinction. BNSF had the burden of proving this affirmative defense. Admin. R. Mont. 24.9.605(2) and (5).

BNSF relied upon the lifting restriction the occupational medicine specialist, Dr. Ross, placed on Leraas after his 2001 surgery. Dr. Ross credibly explained the medical reasons why a fusion increased the stress on the surrounding motion segments in the back. He also applied the data available to him regarding general risks of further injuries to persons with fusions. He placed Leraas within the entire class of persons with similar back problems and prior surgeries and applied to him the same limitations he would apply to anyone who had the same operation Leraas had, without regard to work history, activity history, subsequent successful work activities involving heavy lifting or subsequent medical approvals to engage in those activities.

At the time Dr. Ross assigned the restriction, Leraas had not returned to heavy lifting after his 2001 surgery. However, the definition of a permanent lifting restriction, as Dr. Ross clearly explained, would never under any circumstances take into account whether the individual successfully achieved unusual levels of fitness and activities for years after the surgery.

There was no direct evidence of the degree to which Leraas individually increased his particular risk of further back injury when he exceeded Dr. Ross' restrictions. He subsequently had routinely done so at work and play for two years. However, he had previously exceeded the same lifting restriction for several years,

after his initial injury, before reinjuring his back.[9] Dr. Ross applied the statistics to Leraas straightforwardly–since the class of persons with this kind of surgery is, overall, at a considerable risk of further substantial injury, he applied that risk to Leraas individually.

In some areas, Montana law allows application of a statistical analysis to ascertain an individual person's impairment. For example, under the Montana Workers' Compensation Act, impairment ratings, based on objective range of motion losses, generate minimum entitlements for injured workers (further entitlements may also accrue if a particular injured worker suffers an actual lost earning capacity). Mont. Code Ann. § 39-71-703.

In disability discrimination, by contrast, Montana law expressly rejects stereotyping based upon real or perceived disability as a basis for denying an otherwise qualified individual consideration for jobs the individual could safely perform. ***E.g.***, *Reeves*, ***op. cit. at*** ¶ 30. Thus, the law requires that to rely upon the defense of risk of harm the employer must prove that hiring the claimant to perform the job would create a reasonable probability of substantial harm, either to that claimant or to others. *Hafner v. Conoco, Inc.*, 1999 MT 69, ¶ 34, 293 Mont. 542, 977 P.2d 330. In short, the employer must perform an individualized assessment of the risk of harm in the particular situation and verify the risk before taking the adverse employment action.

At the time that BNSF decided not to hire Leraas, it knew that Leraas had prior back injuries and a particular surgical procedure. It knew that Leraas had been assigned the 50-pound unassisted lifting restriction after his initial 1995 back injury, had disregarded the restriction when he returned to work and had reinjured his back in 2001, probably from overuse. It knew that Leraas returned to the same job in 2002, with the same lifting restriction. It reasonably concluded, based upon the medical history, the employment history and the application to work as conductor trainee despite the heavier lifting required in that job, that after his return to work in 2002 Leraas had again ignored the lifting restriction and proposed to ignore it if BNSF hired him.

---

[9] Leraas argued that there was a significant difference between his conduct after he returned to work from his 1995 injury and his conduct after he returned to work from his 2001 injury–when he returned to work in 2002, he used proper lifting techniques and warm-ups, which he had not done after his earlier return to work. Since Leraas in both instances ignored the same lifting restriction, and had worked for only 2 years after his post-surgical return to work, he did not establish that this difference was significant.

BNSF could not have known (since Leraas had not yet seen Dr. Peterson) that another physician would soon release Leraas without limitations relevant to the conductor trainee position. Thus, the legal issue is whether BNSF made sufficient individualized assessment to take into account all relevant information regarding the risk of harm. The pertinent information generally would include the seriousness of Leraas' condition, his work history and his medical history.[10] *Hafner **at*** ¶ 41.

Unless BNSF independently assessed whether hiring Leraas as a conductor trainee would create a reasonable probability of substantial harm to Leraas or others, a disputable presumption arose that the safety justification was a pretext for disability discrimination. Admin. R. Mont. 24.9.606(7). "Independent assessment of the risk of substantial harm" means evaluation of the probability and severity of potential injury in the circumstances, considering all relevant information regarding Leraas' work and medical history, before withdrawing the conditional employment offer. Admin. R. Mont. 24.9.606(8).[11]

Leraas' case raises an issue addressed in *Jarrell v. Deaconess Billings Clinic* (June 18, 2003), HR No. 0021010070. In that case, an occupational medicine specialist assigned a lifting restriction to a prospective employee with a history of serious back injury and back surgery rather similar to that of Leraas. The respondent withdrew a conditional offer of employment based upon that restriction, without regard to the claimant's work history since the surgery.

It is abundantly clear that "individualized assessment" means precisely that under Montana law. Thus, the differences between *Jarrell*, *Butterfield* and the present case must be considered.

In both *Butterfield* and *Jarrell*, the employers failed to justify their exclusive reliance upon the prior surgical history and medically assigned lifting restrictions in

---

[10] Since Leraas did not contravene BNSF's evidence of the necessity of changing a "knuckle" unassisted during a "through" trip, BNSF established that it could not modify that essential job duty.

[11] Although Admin. R. Mont. 24.9.606 addresses accommodations, it is also the safety regulation by which the substantial risk of harm defense must be measured. Both Leraas and BNSF argued that Leraas did not suffer from an actual disability, disagreeing about just how limited he actually was. BNSF presented evidence (which Leraas did not contravene) that it could not accommodate Leraas' assigned lifting limitation because one of the essential duties of the conductor trainee and conductor jobs was to change out a "knuckle" (a coupling component on train cars) during a "through" trip. A "knuckle" weighs 90 pounds, and the change out had to be done without assistance when necessary during such a trip. Thus, the question here, to which the safety regulation applies, is whether Leraas could safely perform the job without accommodation.

the face of other pertinent information available to them at the times. *Butterfield* involved conflicting medical opinions about the employee's limitations when he sought to return to work he had already performed successfully despite the same restrictions. *Jarrell* involved an individual who, after her injury and surgery, retrained under a Florida state rehabilitation program, with medical approval, to work as radiological or diagnostic imaging technician, worked in the profession without injuries or problems for more than 8 years and then received a lifting restriction inconsistent with the imaging technician work she had successfully done and was applying to do with a new employer.

BNSF could not have considered other medical information, not yet in existence, in assessing Leraas' risk of harm. Under the facts of this case, BNSF was not required to go further and provide additional medical assessments. It knew that Leraas had exceeded his limitations for 2 years without injury, but it also knew that Leraas had exceeded the same lifting restriction for 6 years after his initial injury before reinjuring his back in 2001 and having the surgery. When BNSF withdrew its conditional offer of employment, Leraas had never engaged in heavy lifting at work with the approval of any doctor who had performed an individual assessment of his condition.

Had Leraas successfully performed his work at Culligan for a substantially longer period of time after his surgery and had Dr. Peterson provided him with an unrestricted work release before his application with BNSF, this might be a different case. However, under the particular facts of this case, BNSF did perform an adequate individualized assessment of Leraas, and reached a proper conclusion regarding the risks of his employment as a conductor trainee.

Leraas did not successfully contravene BNSF's proof that it performed an individualized assessment and found reasonable probability of substantial harm to Leraas or others should he work as a conductor trainee. In the absence of stronger evidence than Leraas could present, a permanent lifting restriction based upon prior back injury and surgery, which is inconsistent with performance of an essential job duty the need for which cannot be modified, does establish a reasonable probability of substantial harm to the applicant should he or she be hired into that job.

It may well be that Leraas can and will continue to exceed his lifting restriction at work without further injury. "Reasonable probability of substantial harm" does not mean inevitable occurrence of substantial harm. However, on the evidence presented in this case, BNSF met its burden of establishing the safety affirmative defense, and Leraas did not negate that evidence.

C. Leraas' After-Acquired Medical Evidence Was Admissible but Was Insufficient to Rebut BNSF's Safety Defense

After-acquired evidence of Dr. Peterson's evaluation and opinions regarding Leraas condition were properly admissible. An employer cannot use after-acquired evidence to support adverse employment action taken without that information. *Jarvenpaa v. Glacier Electric Cooperative, Inc.* (1998), 292 Mont. 118, 970 P.2d 84, 90; *Galbreath v. Golden Sunlight Mines, Inc.* (1995), 270 Mont. 19, 890 P.2d 382, 385; *Flanigan v. Prudential Fed. S&L* (1986), 221 Mont. 419, 720 P.2d 257, 264; *Swanson v. St. John's Lutheran Hospital* (1979), 182 Mont. 414, 597 P.2d 702, 706 (1979); ***see*** *Chapman v. A.I.T.* (11th Cir. 2000), 229 F.3d 1012, 1068, Note 101; *McKennon v. Nashville Banner* (1995), 513 U.S. 352, 359-60. However, the employer can use after-acquired evidence to address the propriety of such remedies as front-pay or reinstatement, or to support reasons for termination given in a termination letter, or to rebut evidence presented by the charging party. *Jarvenpaa*, 970 P.2d at 128; ***see also*** *McKennon* ***at*** 361-62. By the same reasoning, Leraas properly presented Dr. Peterson's opinions in support of his attack upon whether BNSF proved its safety defense. Nonetheless, the disagreement between the doctors, coming after BNSF's hiring decision, was not enough to contravene the safety defense under the facts of this case.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).

2. BNSF regarded Leraas as having a physical impairment that substantially limited the major life activity of working when it withdrew its conditional offer to him of employment as a conductor trainee on April 30, 2004, because of prior back injuries, surgery and permanent lifting restriction. Mont. Code Ann. § 49-2-101(19).

3. BNSF made a reasonable disability-based distinction based upon the essential tasks of the job at issue when it withdrew its conditional job offer to Leraas for the reasons stated in Conclusion 2. Mont. Code Ann. § 49-2-303)(1)(a).

4. BNSF did not engage in the discriminatory practice alleged by Leraas and the complaint must be dismissed. Mont. Code Ann. § 49-2-507.

VI. ORDER

1. The department grants judgment against charging party, **David Leraas**, and in favor of respondent, **BNSF Railway Company**, on Leraas' charges of illegal disability discrimination against him as alleged in his complaint.

2. The department dismisses the complaint.

DATED: January 4, 2006.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Hearings Bureau, Montana Department of Labor and Industry