BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011229:

LOUIS M. MELE,	)	Case No. 2186-2005
	)	
Charging Party,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Charging party Louis M. Mele filed a discrimination complaint with the Montana Department of Labor and Industry on September 17, 2004. He alleged that respondent BNSF Railway Company discriminated against him on the basis of perceived disability (L4-L5 diskectomy) when it disqualified him for a shop craft laborer position on or about May 13, 2004. Hearing examiner Terry Spear held a contested case hearing on August 15-16, 2005. Brian Bramblett, Meloy Trieweiler, represented Mele and Michelle Friend, Hedger Moyers, represented BNSF. Mele, Tom Lambrecht and Dr. Michael Jarrard testified at hearing. The deposition testimony of Dr. Anne Millard and Dr. Michael Schabacker was also made part of the evidentiary record by agreement of the parties, due to the unavailability of those witnesses at hearing. The hearing examiner admitted exhibits 1-10, 18-34, 107-108 and 114. The hearing examiner refused exhibits 12-17 and 113, sustaining objections of untimely disclosure (including production) for each of these exhibits.

After the filing of the transcript of hearing, the parties filed post hearing arguments and proposed decisions and submitted the matter for decision on November 28, 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 Louis M. Mele has a disability, whether BNSF Railway Company denied him employment because of that 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.

2. Louis M. Mele, who was 48 years old at the time of the hearing, has worked with Page Whitham Land and Cattle in Glasgow, Montana, as a ranch hand and a welder fabricator from 1996 through the present. In this position, he works on the irrigation system, farming and cutting crops, feeding approximately 5,000 to 7,000 head of cattle, building fences and gates and performing mechanical and welding service, repairs and maintenance on ranch equipment. In his ranch hand work, he lifts up to 50 pounds unassisted and rarely up to 100 pounds. When building gates in particular, heavy lifting is more frequently necessary.

3. Mele graduated from high school in Price, Utah, in 1974 and has no college degree. He worked for Cypress Plateau Mining from 1975 to 1995, initially as a laborer, then as a mechanic and then for the last 15 years as a maintenance foreman, a supervisory position. He performed maintenance, service and repairs on electrical and diesel mining equipment. As a maintenance foreman, Mele was responsible for making sure that the equipment was in good running order (including making repairs), that ventilation and clean up were maintained and that the production crews complied with and enforced all safety laws. He was responsible for holding weekly safety meetings. In 1995, Mele worked as a mechanic/welder for Martell Construction in Big Fork, Montana, as shop and site mechanic and welder. He performed mechanical and welding repairs on dump trucks, track hoes, front-end loaders, bobcats and forklifts. He was self-directed in his work and was in charge of determining how to get the mechanical projects done. All of Mele's transferable work skills, like all of his jobs, involve performing medium to heavy labor, as opposed to performing purely supervisory or managerial work.

4. Mele has no difficulty walking, seeing, speaking, hearing, communicating, lifting, doing activities of daily living or performing his job of ranch hand. He does not consider himself disabled.

5. In March 2003, Mele suffered a work related injury, rupturing a disk in his back. Dr. Fred McMurray surgically repaired Mele's injuries on April 11, 2003, performing a left L4-5 laminotomy, partial medial facetectomy and L4/L5 diskectomy. Following surgery Mele had physical therapy for approximately 2 and ½ months, learning stretching and strengthening exercises for his back. He attended back school and learned about the spine, its function and what to do to reduce the risk of future back injury. He now incorporates what he learned about proper body mechanics in lifting and about stretching and exercising into his work and daily life.

6. Dr. McMurray was pleased with the outcome of Mele's back surgery. He concluded that Mele was doing extremely well during follow-up visits in April and May 2003. Dr. McMurray released Mele to work light duty on June 1, 2003 and to full duty with no limitations on July 1, 2003.

7. In August 2003, Dr. Michael Schabacker evaluated Mele, with regard to the workers' compensation claim. Dr. Schabacker's professional opinion was that most people who have an L4/L5 diskectomy recover to a point where no restrictions are necessary following surgery. He found Mele's recovery remarkable and very favorable with little pain following surgery. Dr. Schabacker also considered the use of proper body mechanics important to recovery after back surgery and believed that Mele was doing all the things necessary to protect himself and improve the outcome of his surgery. Dr. Schabacker believed that use of proper body mechanics would reduce the risk of a subsequent injury to Mele's back. Dr. Schabacker gave Mele an impairment rating of 5% whole person, and cautioned him that lifting between 75 to 100 pounds should be done only infrequently and preferably with assistance. Nonetheless, agreeing with Dr. McMurray's assessment, Dr. Schabacker released Mele to full duty. Based on his assessment and evaluation, Dr. Schabacker concluded that Mele could return to medium to heavy duty work without a substantial risk of harm to himself or others and placed no specific permanent or temporary work restrictions on Mele.

8. The ranch work that Mele performs is categorized as medium to heavy physical labor. Mele is required to twist, bend, stoop, squat, crouch, kneel, crawl, stand, walk, sit, climb and balance on an occasional to frequent basis while performing his job duties. Mele's job duties also require that he lift and carry items weighing between 20 and 100 pounds and perform pushing and pulling tasks on a

varied basis. Mele has performed irrigation, feeding, branding, planting, harvesting, maintenance, fence building and gate building duties without accommodation or difficulty since he returned to work in July 2003. The irrigation tasks performed by Mele since he returned to work in 2003 include bending, squatting, and lifting up to 90 pounds.

9. Since returning to full duty work in 2003, Mele has operated two and four wheel tractors, front-end loaders, a motor grader, a swather, a bobcat and silage trucks at the ranch. Operating tractors involves carrying objects weighing up to 30 pounds, twisting and climbing on and off equipment. Operating a motor grader involves climbing on and off equipment and can require lifting up to 100 pounds and using various hand tools if it is necessary to replace a bit. Operating a silage truck involves twisting and driving over uneven ground.

10. Since returning to full duty work in 2003, Mele has performed welding and mechanical maintenance and repairs on the equipment he operates. These tasks involve welding, service work, oil changes, greasing various fittings, maintaining gear boxes, using wrenches, filter wrenches, ratchets and other hand tools. While doing this work, Mele must contort his body, move in awkward positions on the floor, lift, bend, push and pull. Mele has also washed ranch equipment and machinery with a high-power pressure washer, a task that involves holding onto equipment, pushing and bending.

11. Since returning to full duty work in 2003, Mele has built fences using railroad ties, steel posts, barbed wire and wooden planks. Building fences with railroad ties and wooden planks involves lifting items weighing between 40 and 150 pounds, using a steel bar to tamp dirt, pushing and pulling and operating hand tools such as impact wrenches.

12. Since returning to full duty work in 2003, Mele has also built steel gates. Building steel gates involves lifting heavy 2-7/8" and 1-3/8" steel pipe which comes in 20 to 32 foot lengths. The lengths are brought into the shop where Mele cuts them into various lengths necessary to build the gate. Building the gate involves lifting the pipe, welding, drilling, moving in awkward positions, bending, stooping, lifting, and twisting.

13. Since returning to full duty work in 2003, Mele has fed cattle, which involves lifting up to 90 pounds, shoveling, working in awkward positions, kneeling and stooping for extended periods of time during the winter. He has also Branded cattle, which involves working hands on with the cattle, pushing, pulling and lifting

and is a "physical job." Mele has performed planting and harvesting duties which involve lifting bags of seed weighing between 60 and 80 pounds and loading hoppers and planters.

14. Since returning to full duty work in 2003, Mele has required no accommodations for any of these tasks and has not suffered any problems as a result of performing these tasks.

15. Mele performs the stretches he learned during physical therapy every other morning. He also does 100 sit-ups, 30 push ups and other exercises he learned during physical therapy every other morning. He tries to walk two to three miles per day in addition to the walking he does at work. Mele has lost 50 pounds since his back injury and had lost 25 to 30 pounds by April of 2004. He likes to hunt, fish, bowl and golf and has no difficulty participating in those recreational activities which involve lifting, bending, twisting, stooping, and walking. Mele follows an exercise routine to keep his back strong and to ensure he doesn't suffer a subsequent back injury. When performing physical tasks he is careful to incorporate the body mechanics and lifting techniques he learned in back school and physical therapy to prevent reinjury as well.

16. Mele applied to BNSF for a job as a mechanical laborer (also variously and interchangeably called shop craft laborer). Mele had reviewed the position description and thought he was capable of performing the various job duties. He wanted to work for BNSF because the job had a future with opportunities for advancement, paid good wages, had good benefits and he was familiar with and liked the mechanical aspects of the job. Mele attended an interview and orientation on April 6, 2004, completed BNSF's requisite aptitude tests and interviewed. After an interview on April 6, 2004, in which he scored in the acceptable range, he was given a conditional offer of employment as a mechanical laborer in Havre, Montana, contingent on a favorable background investigation, proof of his employment, completion of the medical questionnaire and successful completion of a drug screen and physical and ICPS examinations.

17. The job conditionally offered to Mele required many skills and abilities and included keeping work areas clean (which requires sweeping and shoveling as well as other labor), operating industrial maintenance equipment such as pressure washers and operating specialized off-highway motor vehicles such as cranes and "trackmobiles" (vehicles that run on the railroad tracks). The job further required the ability to maintain a high level of muscular exertion for an extended period of time

involving hands, arms, back or legs, and to lift or carry objects or materials weighing up to 50 pounds.

18. As a general rule mechanical laborers are not required to lift anything more than 50 pounds. Mechanical assistance such as forklifts, cranes and other tools can be used to move or lift items within the shop if an employee does not feel he can do so safely. As a policy employees are required to seek assistance from another individual or through mechanical tools to lift or move anything that cannot be moved safely by one person. BNSF has a mandatory stretching policy and teaches proper body mechanics as part of it new employee orientation. The use of proper body mechanics when performing physical tasks reduces that risk of a back injury. However, the 50-pound lifting is not an absolute weight limit and heavier weights must sometimes be lifted safely. The job includes hostler or hostler helper which involves moving, fueling, sanding and servicing locomotives. At times, mechanical laborers are also required to supply a knuckle to trains outside of the shop area. Knuckles are metal pieces which are attached to each end of a car, weighing 70 to 90 pounds. The mechanical laborer could be required to repair or replace a knuckle unassisted should one break.

19. Mele attended an Industrial Physical Capabilities Services exam, BNSF's strength test, on April 21, 2004, in Sidney, Montana. He did not have difficulty completing the IPCS examination and it did not bother his back. The IPCS tested Mele's shoulders and legs to determine whether he had the strength and range of motion necessary to safely perform the essential job functions of a particular craft with BNSF. Mele passed his IPCS exam and was recommended for the mechanical laborer position based on the exam results.

20. BNSF did a comprehensive study to determine what was necessary to pass the IPCS exam which involved incumbent testing, individual job reviews and comparison of those jobs with other industries who use IPCS as an applicant review process. BNSF has found that the IPCS has helped reduce knee, shoulder and back injuries. Passing an IPCS examination is a good indication that the applicant has the functional capacity safely to perform the job sought. Only .22 percent of 3,175 new BNSF employees who passed the IPCS exam between 1999 and 2002 suffered knee, back or shoulder injuries after being hired.

21. Mele attended a physical examination at the Glasgow Clinic, conducted by Dr. Anne Millard, on April 28, 2004. Dr. Millard evaluates applicants at BNSF's request to make sure each applicant is capable of performing the activities required by the job for which they've applied. She also reviews any medical concerns to

determine if the applicant has any limitations or problems that could affect their ability to work for BNSF. The musculoskeletal assessment she performed evaluated Mele's ability to move in all directions, his ability to walk, his basic strength and his basic coordination. She made objective observations of his ability to perform the requested activities. Mele's abilities to bend his spine forward, to bend his spine laterally, to rotate his spine and to hyper-extend his spine were all normal. Dr. Millard also observed that the nerves in Mele's lower back were working appropriately and that he had normal strength in his legs. Based on the results of the musculoskeletal assessment Dr. Millard concluded that Mele was capable of performing the job duties of a mechanical laborer without restrictions.

22. Dr. Millard noted that Mele was at risk of long term degenerative disc disease with long-term physical activity and that future injury was possible. Her assessment was a snapshot of Mele's condition at that time. She expected that the results of her musculoskeletal examination and occupational assessment would be reviewed by an occupational medicine doctor.

23. In the new hire process, ClinNet (now known as ADP), a vendor providing services to BNSF, coordinates the medical process with potential employees, referring them to doctor visits, gathering medical records and setting up tests. In addition, ClinNet has nurses who typically follow up on positive responses on the medical questionnaire to determine the history and current issues of the applicant, if necessary, as well as verifying whether there are any difficulties with work or activities. In many cases, the vendor makes the determination based on the records and resources provided and reviewed. In a smaller number of cases, the information is forwarded to Dr. Michael Jarrard, Medical Officer in the BNSF Medical Department, for his review and determination as to whether the applicant is qualified at the time, whether more information is needed or whether additional time is needed. Dr. Jarrard typically reviews medium to heavy labor jobs with applicants who have had prior back injuries, because of his knowledge of back injuries in occupational medicine and with the railroad.

24. Dr. Jarrard is a board certified occupational medicine physician and has a master's degree in public health with 23 years experience in occupational medicine including work at the air force, GM and BNSF specifically since 1998. He is familiar with the requirements and duties of the mechanical laborer position.

25. Dr. Jarrard reviewed Mele's medical records, including the conclusions and findings by Dr. Millard, the medical questionnaires, ClinNet records, ICPS exam, the

medical records of Dr. McMurray, including operative report and clinical notes, the medical records of Dr. Schabacker, and the report of the imaging scan.

26. On April 29, 2004 after review and assessment of the relevant information, Dr. Jarrard determined that Mele was not medically qualified for the mechanical laborer position due to significant risk of additional back injury. As a result, BNSF informed Mele that he was not qualified for the shop craft laborer position due to significant risks of additional injuries due to his "recent back fusion."

27. Mele sent a letter to Art Freeman in which he informed BNSF he had a diskectomy, not a fusion, asked for the results of his IPCS exam and asked BNSF to reconsider. Subsequently, he received a response from Dr. Jarrard that indicated:

> Your medical records demonstrate that you had an L4-L5 diskectomy in 2003. . . There is a significant risk of aggravation or reoccurrence of your back problems while doing shop craft labor work. Unfortunately, you are not qualified for a position as a shop craft laborer due to a significant risk of a serious health risk recurring.

28. Dr. Jarrard never spoke with Mele about the reason for his disqualification nor did he produce Mele's strength test results. Mele e-mailed Dr. Jarrard and requested information regarding other positions he would be qualified for with the railroad and requested his IPCS results again. Dr. Jarrard never responded.

29. Discouraged, Mele went to see Dr. Fred McMurray on June 22, 2004, because he had some questions he wanted to ask regarding the job with BNSF. He talked to Dr. McMurray about the work he was doing at the ranch, about how his back felt, and discussed with him the mechanical laborer position for which he had applied. Dr. McMurray again placed no restrictions on Mele, and did not express any concerns about Mele performing the mechanical laborer position for which he had applied. Dr. McMurray's note from that visit recognizes that Mele was doing extremely well, had lost 30 pounds, was very physically fit and was physically able to perform medium to heavy labor.

30. Dr. Jarrard mistakenly put "back fusion" on the notice (Exhibit 5) that Mele was not qualified for the mechanical laborer job. The forms for Dr. Millard's examination were specifically prepared based on Mele's history of a 2003 discectomy at L4-5, and Dr. Jarrard relied on her assessment of risk regarding the possible other degenerative disc disease with long-term physical activity, disagreeing with her

conclusion that Mele was not at risk of reinjury to the L4-5 level. Dr. Jarrard relied on Dr. McMurray's records, although not his conclusions, and relied upon the report of imaging scans. Dr. Jarrard further relied on Dr. Schabacker's records, but only some of his conclusions (the cautions about heavy lifting in the 75 to 100 pound range and about avoiding flexion and rotation of the back, particularly with lifting). Dr. Jarrard was aware that Mele had been released to full duty and that he was doing farm/ranch type work from the medical records and knew it was of a physical nature.

31. BNSF does not have a formal policy that it follows when reviewing an applicant's physical qualifications, to ensure an individualized assessment takes place before adverse employment action is taken based on a physical condition. BNSF relies upon the sole discretion and expertise of Dr. Jarrard to decide whether an applicant can safely perform a particular job.

32. Dr. Jarrard testified that he only assessed Mele for the mechanical laborer job in concluding that Mele would be at a risk of serious injury when performing tasks that involved bending, twisting, lifting, stooping, squatting and crouching. Within BNSF's work force, Dr. Jarrard necessarily considered Mele unable to work in any job involving those activities. The only positions for which Mele would have been physically qualified were dispatcher, clerk, yard master and first line supervisor. With the limitations assigned by Dr. Jarrard, Mele was disqualified from all of the medium and heavy labor positions with the railroad, which included maintenance of way positions, machinist positions, signal person positions, train person positions and car repair persons. As BNSF viewed him, Mele, with his work history, training, skills and abilities, had a substantial limitation in the major life activity of working because of his prior surgery and back injury. In other words, BNSF regarded Mele as having a physical disability.

33. Dr. Jarrard also testified that, based on his experience and knowledge of back injuries, progression and recoveries from surgery, there is "good evidence" that even when someone returns to heavy work successfully after a medical release, the recurrence of a herniation at the same level occurs at a much higher rate in the first year or two after surgery. Dr. Jarrard testified that although he does not have any set time frames, he generally looks at one year or more from a full-duty release as necessary before the applicant may be safe (depending upon all of the other factors) to perform heavy duty work. None of the physicians who actually examined Mele assigned such a time-based limitation upon his work activities after his full release to return to work at his ranch job.

34. Dr. Jarrard testified that although Mele, based on the work that he was performing, probably could physically do the work of mechanical laborer, there was a significant risk of a reherniation at the same level, as well as of a flare-up or back spasm or some other back injury at a different level of Mele's back. According to Dr. Jarrard, these significant risks would decrease over time–the longer a person has gone after back surgery with activity and without problems, the better predictor it is. Dr. Jarrard testified that although Mele had done well after his back surgery, he was still within the critical time period for reherniation or recurrence at the time in April 2004 when Dr. Jarrard assessed his information (about eight months after the full duty release). Dr. Jarrard testified that a "window of recovery" for a potential employer to assess the probability of harm to an individual or to co-workers from employment was necessary. None of the physicians who actually examined Mele reached this conclusion. None of the physicians who actually examined Mele applied such a conclusion to preclude Mele from returning to his job of injury until such a "window of recovery" passed.[1]

35. Dr. Jarrard also testified that if Mele were to reapply, with no additional medical conditions or problems, showing a sustained activity level after more time had passed, Dr. Jarrard might approve him, considering the length of time that had passed and the lack of recurrence.

36. BNSF did not share any of the opinions expressed by Dr. Jarrard in his testimony (findings 32-35) with Mele prior to this proceeding. BNSF did not document any of those opinions in its records regarding Mele's application and rejection.

37. Since April 2004, Mele has applied for a car man position, a maintenance of way position, a maintenance of way welding position and a mechanical laborer position with BNSF. BNSF declined his application for each position. He continued to apply for positions with BNSF because he was not satisfied with Dr. Jarrard's response to his request for reconsideration and he was never provided answers whether he was disqualified from all jobs with BNSF.

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[1] According to Dr. Jarrard's testimony, an injured worker would not satisfy the "window of recovery" until after he worked for a year or 2 at heavy labor. This catch-22 definition meant that until some other employer put Mele into a heavy labor position during this "high risk" period, Mele could never satisfy Dr. Jarrard's requirement. It is also noteworthy that the length of the "window of recovery" is also extremely elastic, covering "a year or 2." How such a subjective standard could be fairly and individually applied to applicants is entirely unclear.

38. Mele earns $2,000 per month at Page Whitham Land and Cattle. His employer contributes 3 percent, or approximately $720.00, to his retirement annually. Mechanical laborers with a similar seniority date to that of Mele had he been hired earned an average of $3,004.07 per month.[2] BNSF contributes Railroad Retirement Taxes in the amount of 18.8% ($564.77 per month) for each employee in the craft for which Mele applied for and was conditionally offered a position with BNSF.

39. Mele is entitled to be hired by BNSF as a mechanical laborer. It is not reasonable to expect BNSF, after hiring Mele, to advance his seniority date in derogation of BNSF's union agreements. Seniority determines availability and work options for railroad employees. Therefore, because his seniority will not be based upon his original proposed hire date, Mele will lose future income even after the railroad hires him. His income loss will result from having less seniority than employees hired after May 1, 2004, until the date the railroad hires him. It is not reasonable to expect BNSF, after hiring Mele, to calculate and make up the difference between his earnings with a seniority date retroactive to his conditional hire and his earnings with his actual hire date. It is reasonable to enhance Mele's liquidated front pay, unless and until BNSF does hire him, in part to rectify this loss.

40. It is reasonable to order BNSF to pay to Mele the past wages he lost and will lose, until the date of his actual hire as a mechanical laborer, as a result of the discriminatory withdrawal of the 2004 conditional offer of employment. It is not reasonable, with the evidence provided, to project his losses beyond that date, or to extend recovery of his pre-hire losses more than 4 years beyond May 1, 2004, except by enlarging his recovery during the 4 years.

41. Beginning on May 1, 2004, through the date of this decision and thereafter until BNSF hires him, Mele has lost and will lose $1,004.07 per month in wages and the Railroad Retirement Tax contributions that would have been made on his behalf. It is reasonable to convert these contributions to SSI contributions on Mele's behalf, based upon monthly recovery, until his hire or the end of the 4-year period if he is not hired.

42. BNSF currently owes Mele $20,502.11 in lost wages (20.419 months times $1004.07 per month). Prejudgment interest on that amount to date at 10%

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[2] Mechanical laborers also receive monthly benefits, including medical, prescription, life, accidental death, dental and vision insurance. Mele did not prove he suffered any harm resulting from the absence of this coverage to date (*i.e.*, incurred expenses as a result of not having the benefits).

per annum is $1,509.61 (180.419 months [19 months for last wages for May 2004, plus 18 months for June 2004, *etc.*, plus 1 month for November 2005, plus .419 month for December 2005[3]] times .1 divided by 12 times $1004.07 per month).

43. Because of the passage of time since BNSF withdrew its conditional offer of employment to Mele, it is reasonable for BNSF to repeat the screening and testing it undertook after making that conditional offer, for the limited purpose of assuring that Mele has not subsequently suffered a new injury or problem, NOT for the purpose of supporting its prior discriminatory decision with "new" information that was known or available to be known at the time of the conditional offer or new rationales applied to information known or available at the time of the conditional offer, as a precondition to hiring Mele.

44. Unless and until BNSF hires him, Mele will continue to lose future wages at approximately the same monthly rate for whatever period of time he would have been willing and able to continue in the employ of the railroad.[4] If the railroad elects not to hire Mele pursuant to this decision, then his future losses will continue, and include lost fringe benefit coverage (which undoubtedly will cost him money in the future), lost wages and benefits in future employment with the railroad. These losses are reasonably worth $20,000.00 per year for 4 years, enhancing the monetary value of the immediate losses during the period before any hire by BNSF for losses in reduced wages, benefits and opportunities thereafter (due to reduced seniority if BNSF ultimately hires Mele, and reduced future earnings beyond 4 years if it does not). It is reasonable to award Mele that amount, payable on each of the first four anniversaries of this decision, as liquidated front pay, or a proportion of that amount for any part of a year falling between the decision or the most recent past anniversary date and the date of hire, due upon the date of hire.

45. Mele suffered some emotional distress as a result of the discriminatory withdrawal of the conditional hire. The reasonable value of that emotional distress is $7,500.00.

46. The railroad has a practice of performing an occupational medicine review of the documents generated during the application process, including the screening and testing done after a conditional offer of employment, for applicants with a history of back injuries, problems and/or surgeries. BNSF cannot, in accord with

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[3] The current month is incomplete, and the interest has not begun to accrue.

[4] The variables involved in future earning losses are virtually infinite, including changes of career plans, illness, injury and disciplinary separation.

Montana law, consider that occupational medicine document review as the sole determinant in taking adverse employment actions against job applicants, when all individualized assessments of the actual risks for the particular applicant by treating or prior evaluating physicians do not support the adverse employment actions. If BNSF decides to reject an applicant following the occupational medicine document review, based upon the occupational medicine specialist's conclusion that a further healing period after recovery from back surgery is necessary to confirm the contrary opinions of the treating or prior evaluating physicians, then BNSF must document the objective bases for the rejection, share them with the applicant in writing and allow the applicant a reasonable time to submit additional contrary medical information, which BNSF must then weigh and consider BEFORE finalizing the rejection by withdrawing the conditional offer of employment. If BNSF follows this procedure and still rejects the applicant, it must retain, for possible administrative review, all of the results of the rejected applicant's individualized assessment and all additional contrary medical information submitted. It must also document in writing to the rejected applicant all factors considered in its final decision.

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). Mele contended that he had, since his full release to return to his ranch job, worked without injury or problems lifting more than 90 pounds unassisted on a regular basis and performing tasks that involved bending, twisting, lifting, stooping, squatting and crouching, with the approval of his physicians, for approximately 8 months before BNSF rejected him and therefore had no actual disability. He argued that BNSF regarded him as disabled in concluding that he could not safely perform the same kinds of tasks he was already performing with the approval of his physicians. BNSF argued that although Mele apparently did have the approval of his physicians and had been doing work involving similar physical demands to that of the mechanical laborer, Mele could not safely perform the work because it was too soon after his release to return to work, and there was too great a risk of another injury. BNSF also argued that although Mele could not safely work as a mechanical laborer, he did not have an actual disability and BNSF only considered him disqualified from that one job, which did not constitute regarding him as disabled.

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[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.

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

To prove disability discrimination in employment, Mele had to present credible evidence 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. ***E.g.***, *Reeves v. Dairy Queen*, 1998 MT 13, ¶ 21, 287 Mont. 196, 953 P.2d 703, ***citing*** *Hafner v. Conoco, Inc*. (1994), 268 Mont. 396, 886 P.2d 947, 950; ***see also*** Mont. Code Ann. §§ 49-4-101 and 49-2-303(1)(a).

A1. BNSF Regarded Mele 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. Dr. Jarrard (but not Mele's own physicians) found that Mele had limitations that "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 the restrictions Dr. Jarrard applied to Mele did not constitute a substantial limitation in the major life activity of working.[7] BNSF also asserted, consistent with the apparent reasoning of the federal cases, and a holding in *Hafner*, that it only considered Mele precluded from performing one job, instead of considering him precluded from a range or class of jobs. "[A]n employer does not necessarily regard an employee as disabled simply by finding the employee incapable of satisfying the demands of a particular job." *Hafner*, 866 P.2d. ***at*** 951. BNSF argued that *Butterfield* was distinguishable since Mele, unlike Bob Butterfield, did return to his job of injury.

[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.

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 fully adjudicated 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 "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

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[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.

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. The restrictions Dr. Jarrard placed upon Mele have a comparable impact upon his employment as the lifting restrictions had in these cases.

BNSF appeared to argue that although it regarded Mele as unable to perform these tasks, that fact could not, as a matter of law, make *Butterfield* applicable, because the ranch that employed Mele did not share BNSF's view of Mele's limitations. Mele did return to his job of injury. However, had his employer applied the same analysis as BNSF applied, it would not have allowed him to return to that job. Thus, based upon how BNSF regarded Mele, he could not work any job that required the kind of heavy labor tasks involved in the mechanical laborer job, including the job of injury, which he had been working for 8 months when BNSF withdrew its conditional offer of employment.

BNSF also argued that it could not have regarded Mele 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, while BNSF relied upon the danger of reinjury or new injury that Dr. Jarrard found in and performing tasks that involved bending, twisting, lifting, stooping, squatting and crouching within a year or 2 after Mele's surgery. Obviously these restrictions upon Mele's activities were just as applicable as Bob Butterfield's lifting restriction, being applicable to all activities, including all work activities. Therefore, when BNSF applied these restrictions, it necessarily regarded Mele as incapable of performing all jobs requiring these activities, which clearly constituted a broad range or class of jobs for Mele, including his current job and most of the jobs at BNSF that the parties referenced during the hearing.

Any other analysis would result in absurdity. The limitation that prevented Mele from working as a mechanical laborer 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 restrictions upon bending, twisting, lifting, stooping, squatting and crouching, by contrast, do apply to a broad range of jobs and other life activities. Mele's restrictions, as imposed by Dr. Jarrard, did interfere with his ability to perform a broad class of jobs. The insistence that BNSF "only" regarded Mele as unable to perform the job he applied for did not narrow the actual scope of the restrictions BNSF 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 finds that BNSF regarded Mele as disabled.

BNSF did not effectively argue another issue that Dr. Jarrard's testimony could conceivably have raised–temporary restrictions are often not disabilities. Under the federal regulations, temporary, non-chronic limitations "are *usually* not disabilities." 29 C.F.R., Part 1630 App., §1630.2(j) (emphasis added). Many kinds of temporary conditions, ranging from pregnancy-related limitations to carpal tunnel syndrome, are not disabilities for purposes of discrimination laws.[9] Each case necessarily turns on its own facts, and even if BNSF had not virtually conceded this issue by not timely raising it, these particular "temporary" restrictions did constitute a disability.

Montana follows federal interpretations (and decisions from other states) that temporary restrictions can rise to a substantial limitation to working when they interfere for long enough so that the worker has trouble securing, retaining or advancing in employment. *Reeves*, ***op. cit. at*** ¶¶ 29-29; *Martinell*, ***op. cit.*** In *Martinell*,

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[9] ***E.g.***, *Heintzelman v. Runyon* (8th Cir. 1997), 120 F.3d 143, 145; *Sanders v. Arneson Products* (9th Cir. 1996), 91 F.3d 1351, 1354, ***cert. den.*** (1997) 520 U.S. 1116.

the Court approved an analysis that "transitory and insubstantial" conditions (like influenza or a cold) were not disabilities. ***Id. at*** 429-30. According to Jarrard's analysis, Mele was not a prospect for hire for a year or 2, somewhat less than the 3 years of limitations that cost Bonnie Martinell potential promotions and ultimately her job. ***Id. at*** 425. Paul Adamson was unable to work for 6 months during each post-surgical recovery after his 2 rotator cuff tear repairs (½ to ¼ the time that Dr. Jarrard testified Mele could not safely work for BNSF)–too brief a time to be a disability. *Adamson v. Pondera County*, 2004 MT 27, ¶ 27, 319 Mont. 378, 84 P.3d 1048. In addition, Adamson did not suffer any lost promotions or loss of his job. ***Id. at*** ¶ 28. The conclusion reached in *Martinell*, rather than that reached in *Adamson*, applies here.

Short term limitations during post-surgical recovery are not ordinarily a disability under Montana law. However, perceived limitations assigned by the prospective employer, in the face of contrary prior medical opinions by the surgeon and prior evaluating physicians, which are projected to last for at least 1 year (not counting the post-surgical recovery before release to work) and which both result in denial of a specific job opportunity and preclude the claimant from a broad range or class of jobs, do constitute a perceived disability.

Even if BNSF had timely raised the temporary nature of the limitations assigned by Dr. Jarrard, the hearing examiner would still find that BNSF regarded Mele as disabled.

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

Despite the agreement of both parties that Mele had no actual disability, one of the key questions in this case is whether he could safely perform work activities involving bending, twisting, lifting, stooping, squatting and crouching. If he could not, BNSF justifiably withdrew its conditional employment offer.

Mele proved that he had been performing these activities regularly for 8 months since his return to his ranch work without problems or injuries. He also proved that both his surgeon and the physician who evaluated him for workers' compensation purposes released him to perform that work 8 months before BNSF made him a conditional offer of employment. He proved that he passed every aspect of BNSF's pre-employment post conditional offer testing and screening except

Dr. Jarrard's review of all the pertinent documents. His evidence was sufficient to establish the second element of his prima facie case.

A3. Mele Proved that BNSF denied him the job because of his disability

This case involves direct evidence of disability discrimination, *Reeves* ***op. cit. at*** ¶¶ 16-17. There is no dispute that BNSF withdrew its conditional offer of employment because of the restrictions Dr. Jarrard concluded were applicable as a result of Mele's injury and back surgery. Mele established the third element of his prima facie case, with direct evidence.

B. BNSF Did Not Establish That it Withdrew its Conditional Offer of Employment Because of a Distinction Based on Physical Disability Which the Reasonable Demands of the Mechanical Laborer 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 entirely upon Dr. Jarrard's conclusion about the safety of employing Mele in a job requiring bending, twisting, lifting, stooping, squatting and crouching within 1 or 2 years after his full release to return to work. According to his testimony, Dr. Jarrard based this conclusion upon his experience, expertise and research.[10] Despite medical clearances from Mele's surgeon and the workers' compensation physician, Dr. Jarrard's paper evaluation of the same injury, with no different information regarding Mele's condition aside from Dr. Jarrard's more conservative conclusions, denied Mele an opportunity to perform a job entirely within the limitations his actual doctors had assigned.

[10] The hearing examiner considered both Dr. Jarrard's initial misstatement regarding Mele's condition ("back fusion"), and the absence of any notice by BNSF to Mele regarding the "temporary" nature of the disqualification, but found that Dr. Jarrard did apply the analysis of a temporary high risk of reinjury and did make an honest mistake in his initial misstatement.

There was no direct evidence of the degree to which Mele individually increased his particular risk of further back injury when he exceeded Dr. Jarrard's limitations. Dr. Jarrard simply applied the statistics to Mele straightforwardly–since the class of persons with this kind of surgery is, overall, at an enhanced risk of further substantial injury when performing heavy work within a year or 2 of full release to return to work, Mele faced that enhanced risk.

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* (1999) ***op. cit. at*** ¶ 34. In short, the employer must perform an individualized assessment of the risk of harm to the particular employee in the particular situation and verify the risk before taking adverse employment action.

At the time that BNSF decided not to hire Mele, it knew of his back injury and particular surgical procedure. It knew he had returned initially to light duty, had no indication that he had exceeded those restrictions, and knew that he had subsequently returned to work as heavy as that of mechanical laborer and performed that work without injury or problem for 8 months. It knew that Mele's doctors had approved his return to that work. It was not reasonable for BNSF to disregard the work history and medical releases in favor of a more conservative evaluation, done entirely on paper and relying *in toto* upon statistical analysis.

The legal issue is whether BNSF did a sufficient individualized assessment to take into account all relevant information regarding the risk of harm. The pertinent information generally would include the seriousness of Mele's condition, his work history and his medical history.[11] *Hafner* (1999) ***at*** ¶ 41.

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[11] Mele did not challenge the necessity of bending, twisting, lifting, stooping, squatting and crouching in performing the mechanical laborer job, nor did he argue that BNSF could modify these

"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 Mele's work and medical history, before withdrawing the conditional employment offer. Admin. R. Mont. 24.9.606(8).[12] "Individualized assessment" means precisely that under Montana law. Failure of BNSF to assess individually whether hiring Mele as a mechanical laborer involved a reasonable probability of substantial harm to Mele or others gives rise to a disputable presumption that the safety justification was a pretext for disability discrimination. Admin. R. Mont. 24.9.606(7).

Mele's 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 a more serious back injury and back surgery than that sustained by Mele. The respondent withdrew a conditional offer of employment based upon that restriction, without regard to the claimant's work and medical history (aside from the fact of the surgery itself) since the surgery. The applicability of *Jarrell* to the present case must be considered.

In *Jarrell*, the employer failed to justify its exclusive reliance upon the limitations assigned to the claimant after a conditional job offer. Kathy Jarrell, 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, applied for the same job with the respondent, got a conditional offer of employment and then received a lifting restriction inconsistent with the work she had successfully done and was applying to do with a new employer.

In the present case, Mele returned to work after his injury and surgery, to the same job and employer he had when he was injured, with the blessings of both his surgeon and the worker's compensation physician who evaluated his limitations. After 8 months, with no new problems and no conflicting medical information, he applied for a job with BNSF and, after he got a conditional offer of employment, was assigned a lifting restriction inconsistent with the work he had successfully done and

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essential job duties. Thus, the analysis asks whether, without accommodation, Mele could safely perform the job.

[12] 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 Mele and BNSF argued that Mele did not suffer from an actual disability, disagreeing about just how limited he actually was. The question here, to which the safety regulation applies, is as stated in footnote 7.

was applying to do with the new employer. Both Kathy Jarrell and Louis Mele were told they could not do heavy work (identical or substantially similar to the work they were already successfully performing), based on no new condition, symptom, problem, injury or abnormality, but based exclusively upon an occupational medicine paper evaluation of the statistical risks involved.

Under the facts of this case, BNSF was presented with a claimant who had obtained medical releases to return to his job of injury and safely performed that job for 8 months. Those releases clearly qualified him safely to work as a mechanical laborer for the railroad. Instead of hiring Mele based upon his qualifications and the individualized assessment it had obtained, BNSF got another medical opinion disqualifying Mele. The additional opinion was from a highly qualified physician, to be sure, but one who never saw the claimant and based his opinion entirely upon statistical risks.[13]

Had Mele previously reinjured his back in his ranch work, or had there been conflicting work releases (some with limitations inconsistent with the ranch worker and mechanical laborer jobs) at the time of his application with BNSF, this might be a different case. Had BNSF documented at the time the temporary nature of the limitation applied by Dr. Jarrard, given Mele an explanation of that temporary limitation and an opportunity to provide further information, and also not have refused his subsequent applications for 4 other positions, this might be a different case.[14] However, under the particular facts of this case, BNSF's individualized assessment of Mele did not support its withdrawal of the conditional offer of hire. BNSF did not credibly prove an individualized reasonable probability of substantial harm to Mele, a fully qualified applicant, or others should he work as a mechanical laborer.

It may well be that Mele will suffer another back injury, whether doing ranch work or railroad work. There is a certain risk of injury in any work, and heavy labor carries a higher risk of bodily injury than sedentary work. Absence of a "reasonable probability of substantial harm" does not eliminate all risks of substantial harm.

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[13] BNSF also argued that Dr. Millard noted a risk of degenerative disk disease over time. It was not clear how substantial that risk was, how it compared to the risk of persons engaging in heavy labor who did not have prior back surgery or over what time frame the risk applied. BNSF failed to prove that this "risk" established its safety defense.

[14] The record is unclear about when and what reasons these subsequent applications were refused. Although the evidence did not establish that BNSF probably rejected Mele the 4 additional times because of his perceived disability, those rejections buttressed the presumption that BNSF's safety defense was pretextual and not worthy of credence.

However, on the evidence presented in this case, BNSF did not meet its burden of establishing the safety affirmative defense.

C. The Department Should Order Reasonable Measures to Rectify the Harm Mele Suffered and Must Impose Affirmative Relief

The department may order any reasonable measure to rectify any harm Mele suffered as a result of illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding damages in an employment discrimination case is to make the victim whole. ***E.g.***, *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; ***see also*** *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

Mele lost wages and will lose wages until BNSF hires him. By proving discrimination, Mele established a presumptive entitlement to an award of back pay. *Dolan*, ***supra***; *Albermarle Paper Co.*, ***supra at*** 417-23. Mele also proved with reasonable accuracy the wages he lost and will lose because of the railroad's discrimination. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607 ***and*** *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984), 747 F.2d 885, 889. The back pay award should redress (reasonably, under the Montana statute) the harm that Mele suffered to date. ***Cf.***, *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626. Mele may also recover for losses in future earnings if and only if the evidence establishes that future losses are likely to occur because of the discriminatory acts. *Martinell*, ***op. cit.***, 886 P.2d ***at*** 439. The hearing examiner calculated the lost wages to a future date of hire in accord with these authorities.

Prejudgment interest on lost income is a proper part of the damages award. *P. W. Berry, Inc.*, ***supra***, 779 P.2d ***at*** 523; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029, 1033; ***see also,*** *Foss v. J.B. Junk* (H.R.C. 1987), HR No. SE84-2345. The hearing examiner has likewise calculated that interest.

Mele also lost the contributions to the railroad retirement fund on his behalf. Reasonably, a required contribution to SSI on Mele's behalf, based upon the lost wages paid by BNSF, must suffice. The hearing examiner lacks the necessary factual information and perhaps also the authority to dictate to the railroad retirement system that it must deem Mele a retroactive employee of BNSF for benefits earned, for purposes of required BNSF contributions. If BNSF does not quickly hire Mele, this loss will grow larger. The reasonable remedy for this loss is in "front loading" the periodic front pay award.

For future relief from a discriminatory refusal to employ, the preferred remedy is reinstatement. *Cassino v. Reichhold Chem. Inc.* (9th Cir. 1987), 817 F.2d 1338, 1346. When an order for reinstatement or hire is not an option, front pay can be awarded. *Fortino v. Quazar Co.* (7th Cir. 1991), 950 F.2d 389, 398. "Front pay" is an award for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when placement in the lost job is not feasible – it is usually temporary to permit the victim to reestablish his "rightful place" in the actual job market. *Martinell*, ***op. cit.***; *Rasmussen v. Hearing Aid Inst.*, (H.R.C. 1992) HR Case #8801003988, ***approved***, *H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 635; *Sellers v. Delgado Com. College* (5th Cir. 1988), 839 F.2d 1132; *Shore v. Fed. Ex. Co.* (6th Cir. 1985), 777 F.2d 1155, 1158.

Front pay is appropriate if it is impossible or inappropriate to order the railroad to employ Mele, or to employ him at once. One reason to award front pay is if hostility or antagonism between the parties makes such an order impracticable. *Cassino*, ***supra at*** 1347 (front pay award based on "some hostility" proper even though plaintiff and defendant were still friends); *Thorne v. City of El Segundo* (9th Cir. 1986), 802 F.2d 1131, 1137; *E.E.O.C. v. Pacific Press Publ. Assoc.* (N.D. Cal.), 482 F.Supp. 1291, 1320 (when effective employment relationship cannot be reestablished, front pay is appropriate), ***aff.*** (9th Cir. 1982), 676 F.2d 1272. However, the absence of antagonism does not preclude front pay if requiring the railroad to hire Mele is otherwise not realistic or even possible for other reasons.

It would be preferable that the railroad hire Mele with a retroactive seniority date of May 1, 2004. However, the record does not establish that the railroad can do so, and it is therefore unreasonable to require such "retroactive" hiring. Lesser seniority will affect Mele throughout his future employment with the railroad. The greatest impact will be the initial impact, when his earnings are at their probable lowest and the greatest number of other employees hired after May 1, 2004, and before Mele's hiring will still be working for the railroad. Normal attrition over the years will reduce the impact of his lesser seniority as some of those other employees leave work with the railroad for various reasons. The amount of income lost per year due to lower seniority, even in the first four years, may well be less than the front pay awarded, but the loss will continue after the first four years. "Front loading" this award for four years and then ceasing it is a reasonable measure to compensate Mele (the duration of whose career with the railroad remains uncertain, as it is for all employees) for that loss.

If the railroad elects not to hire Mele at all, "front loading" is reasonable to address losses that Mele might suffer, but which become more difficult to quantify further into the future. If the railroad delays hiring Mele, he will continue to lose at

least $12,050.00 a year in wages, based upon his present actual earnings, which he will recover under this decision. Enhancing that recovery during any future time that BNSF does not hire Mele in the first four years after this decision, for loss of seniority after any subsequent hire, loss of benefits before such a hire and loss of wages and benefits beyond the four years is reasonable. It reasonably addresses the statutory requirement to rectify any harm resulting from the discrimination, while providing an incentive to BNSF to hire Mele as soon as possible.

Ascertaining future lost wages is necessarily an exercise in reasoned speculation. The hearing examiner cannot hold Mele to an unrealistic standard of proof (***see*** *Horn*, ***op. cit.***), yet there must be credible and substantial evidence to support a finding that future lost wages extend into the distant future. The facts here do include evidence of Mele's intent to stay with the railroad, which is credible in light of the labor market in Havre and the higher pay from BNSF. Nevertheless, there is obviously some turnover for railroad employees. The railroad may face financial problems in the future that could result in changes to its retention and pay practices. Mele may no longer elect to stay in the Havre area. His career goals also may change over the years.

Montana law gives weight to these kinds of concerns about long-range prognostication of future wage loss. In the Montana Wrongful Discharge from Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no comparable statutory limitation applicable to human rights complaints, but clearly the legislature wants future lost wages awards to be carefully considered before extending them far into the future. Four years of "front loaded" front pay in addition to back pay is reasonable and supported by the credible and substantial evidence of record. More front pay after the "front loaded" four years awarded is not sufficiently supported and would be unreasonably speculative.

It is reasonable for BNSF to repeat the screening and testing it undertook after making that conditional offer, for the limited purpose of verifying that Mele has not subsequently suffered a new injury or problem. In the unlikely event that BNSF concludes Mele has suffered a new injury or problem in the interim, BNSF will still be responsible for the damages awarded by this decision. After all, it is impossible to do more than speculate about a new injury or condition would have likewise developed had the railroad hired him in May 2004. If Mele disputes the propriety of any new rejection by BNSF, he can pursue the remedies provided under the Human Rights Act anew.

Mele also sought recovery for his emotional distress. The department can require any reasonable measure to rectify "any harm, pecuniary or otherwise" suffered because of the discrimination. Mont. Code Ann. § 49-2-506(1)(b). Emotional distress damages are within the scope of the statute. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601.

Ten years ago, Montana adopted a uniform standard of proof for emotional distress damages. *Sacco v. High Country Ind. Press, Inc.*, (1995) 271 Mont. 209, 896 P.2d 411. Four years ago, the Court held that emotional distress recoveries for illegal discrimination under the Montana Human Rights Act follow federal case law, rather than *Sacco*. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

In *Vortex*, the Court affirmed an award of $2,500.00 for emotional distress damages resulting from Ben Foss' loss of his job. Much of that emotional distress stemmed from financial problems due to loss of an existing income. Mele did not lose an existing income because of the illegal discrimination–he lost a substantially higher income.

Mele's emotional distress was obviously more severe than that of the plaintiffs in the case of *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; ***cited in*** *Vortex* ***at*** ¶33. In *Johnson*, the plaintiffs suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. Those plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. There was no evidence of any recourse to professional treatment or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the appeals court increased their awards from $125.00 to $3,500.00 each for the overt racial discrimination.

Mele suffered emotional distress as a result of BNSF withdrawing its conditional offer despite his qualifications, and wrongfully telling him he was medically disqualified without explaining the "temporary" nature of the purported basis for that disqualification. Montana law expressly recognizes that freedom from illegal discrimination is a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. Like the plaintiffs in *Johnson*, Mele presumptively suffered emotional distress resulting from this invasion of a legally protected interest. The Human Rights Act demonstrates that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Johnson*; *Vainio*, ***op. cit.***; *Campbell v. Choteau Bar and Steak House* (H.R.C. 1993),

HR No. 8901003828. In addition, Mele's repeated reapplications with BNSF and the actual financial losses he suffered (unlike the plaintiffs in *Johnson*) adequately establish greater emotional distress. The evidence of his emotional distress is sufficient to merit an award of $7,500.00.

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. It is proper and reasonable to enjoin BNSF from similar conduct in the future, and require it to adopt a policy, for Montana hiring decisions, to document future treatment of similar persons. Mont. Code Ann. § 49-2-506(1)(a) and (b).

V. CONCLUSIONS OF LAW

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

2. BNSF regarded Mele 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 mechanical laborer on April 29, 2004, because of Mele's back injury, surgery and perceived limitations. Mont. Code Ann. § 49-2-101(19).

3. BNSF illegally discriminated against Mele because of disability when it made a disability-based distinction that was not reasonably based upon the essential tasks of the job at issue in withdrawing its conditional job offer to Mele for the reasons stated in Conclusion 2. Mont. Code Ann. § 49-2-303)(1)(a).

4. The department should require the reasonable measures detailed in the findings and opinion to rectify the harm, pecuniary and otherwise, Mele suffered. Mont. Code Ann. § 49-2-506(1)(b).

5. The department must order BNSF to refrain from engaging in the discriminatory conduct and should prescribe conditions on BNSF's future conduct relevant to the type of discriminatory practice found, require the reasonable measures detailed in the findings and opinion to correct the discriminatory practice. Mont. Code Ann. § 49-2-506(1)(a) and (b).

VI. ORDER

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

2. BNSF must

(a) immediately pay Mele the sum of $29,511.72, making the appropriate employer contributions to SSI on his behalf for the back pay in this award ($20,502.11) and

(b) upon satisfaction of the remaining conditions for his employment (the tests and screening performed after his original conditional offer of employment), hire Mele as soon as practicable in the position for which it extended the conditional offer of employment, paying him front pay of

(i) that proportion of $20,000.00 represented by the number of days his date of hire is after this decision to 1 calendar year (number of days his date of hire is after this decision divided by 365 times $20,000.00), making the appropriate employer contributions to SSI on his behalf for the front pay, if his date of hire is within 1 calendar year after this decision, due on his date of hire, OR

(ii) on each anniversary date of this decision before he is hired, up through the 4th anniversary date, $20,000.00 and, should BNSF hire Mele before the 4th anniversary date of this decision, proportionate front pay due on the date of hire, in accord with subparagraph (i) above, based on the number of days from the last anniversary date of this decision before his hire to the date of his hire, instead of the number of days his date of hire is after this decision, to 1 calendar year, due on his date of hire, making the appropriate employer contributions to SSI on his behalf for all front pay, as paid.

3. The department permanently enjoins BNSF against withdrawing conditional offers of employment made to qualified applicants who, following back surgery and prior to the application for employment with BNSF that led to the conditional offers, were assigned either no limitations or limitations upon their work activities by each applicant's surgeons and treating or evaluating physicians that were consistent with the essential tasks of the job conditionally offered, because of conditions known to each applicant's surgeons and treating or evaluating physicians that BNSF regarded as limiting the ability of each applicant to perform the essential job duties of the job conditionally offered, based solely or primarily upon an occupational medicine evaluation of the statistical risks involved.

4. The department enjoins and requires BNSF, within 60 days after this decision becomes final, to submit to the Human Rights Bureau proposed policies to

comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment, and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them. The policies adopted must also provide that if BNSF decides to reject an applicant following the occupational medicine document review, based upon the occupational medicine conclusion that a further healing period after recovery from back surgery is necessary to confirm the contrary opinions of the treating or prior evaluating physicians, then BNSF must document the objective bases for the rejection, share them with the applicant in writing and allow the applicant a reasonable time to submit additional contrary medical information, which BNSF must then weigh and consider BEFORE finalizing the rejection by withdrawing the conditional offer of employment. If BNSF follows this procedure and still rejects the applicant, it must retain, for possible administrative review, all of the results of the rejected applicant's individualized assessment and all additional contrary medical information submitted. It must also document in writing to the rejected applicant all factors considered in its final decision.

DATED: January 13, 2006.

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

Louis Mele FAD