

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

DAVID OGDEN,

Charging Party,

-v-

CAPITAL ELECTRIC CONSTRUCTION  
COMPANY,

Respondent.

Case # 0051011379

**ORDER**

David Ogden (Ogden) filed a complaint of discrimination based on disability against Capital Electric Construction Company (Capital Electric) with the Department of Labor and Industry. Ogden is a licensed journeyman electrician. Ogden had his right leg amputated below the knee over 25 years ago. In the interim, Ogden had surgery on his left knee. When Ogden applied for a position with Capital Electric, it required a physical exam as a condition of employment, as it did of all similar employees at that time. When the entity conducting the medical testing for Capital Electric informed Capital Electric that Ogden would need additional testing due to his preexisting condition, the additional testing was not conducted because Capital would not pay for the additional cost. As a result, Capital Electric did not hire Ogden and his complaint followed.

The Hearings Bureau (Bureau) held a contested case hearing on Ogden's complaint pursuant to § 49-2-505, MCA. Following the hearing, the Bureau issued a decision that determined Capital Electric discriminated against Ogden based on his

disability by failing to pay for the pre-employment medical testing. The decision awarded lost wages and emotional distress damages to Ogden.

Ogden filed an appeal with the Montana Human Rights Commission (Commission) contesting the amount of lost wages damages awarded. Capital Electric filed a cross appeal contesting the award of emotional distress damages. Liability was not raised on appeal. The Commission considered the matter on May 15, 2007. Thomas Towe appeared and argued on behalf of Ogden. Jason Ritchie appeared and argued on behalf of Capital Electric.

In his appeal, Ogden asserted the hearing officer's determination as to lost wages damages was clearly erroneous for three reasons. First, Ogden asserted the finding regarding the mitigation amount of \$69,871.91 was clearly erroneous because it was apparently based on an exhibit, Exhibit 21, which was never entered in the record. Ogden further argued the full testimony did not provide substantial evidence to support that number. Second, he argued that the hearing officer's finding that failed to use Mike Floyd as a comparator for wages was clearly erroneous. Third, he argued that it was clearly erroneous for the hearing officer to use his wages for the last approximately five-week period as mitigation when damages were not awarded for that time period based on using Mike Baker as a comparator.

Capital Electric argued the hearings officer's determinations on lost wages damages were not clearly erroneous, were based on substantial evidence, and contained no errors of law. Capital Electric asserted that the \$69,871.91 mitigation amount was based on adequate testimony, that it was not clearly erroneous to use Mike Baker as the only comparator because using Mike Floyd would be speculative, and that subtracting Ogden's wages for the final five weeks was not clearly erroneous because Mike Baker likely started before Ogden would have.

In its cross appeal, Capital Electric asserted the hearing officer's decision was clearly erroneous in awarding emotional distress damages to Ogden because Ogden testified at deposition and at the hearing that he was not claiming emotional distress damages. Capital Electric further asserted that emotional distress damages couldn't be based solely on demeanor. Capital Electric also argued the award of emotional distress damages violated its due process rights because it was not on notice to present evidence that Ogden had not suffered emotional distress since he said he was not claiming such damages. Finally, Capital Electric asserted the emotional distress damage award of \$15,000 was so large as to shock the conscience and therefore should be remanded for determination of an appropriate amount.

Ogden asserted he testified at hearing that he was not claiming emotional damages but he never said he did not suffer the damage of emotional distress. He argued the hearing officer's award is, therefore, not clearly erroneous because his testimony and demeanor in its entirety made clear to the hearing officer that he suffered significant emotional distress.

After careful and due consideration of the complete record, the Commission concludes the Bureau's decision in this matter as to damages is not supported by competent substantial evidence and is clearly erroneous. Particularly, the Commission determines that the use of \$69,871.91 as the mitigation amount was clearly erroneous, that it was clearly erroneous to use Mike Baker as the only wage comparator, that it was clearly erroneous to subtract the portion of Ogden's wages from a period of time past the use of Mike Baker's wages as a comparator, and that it was clearly erroneous to award Ogden emotional distress damages when he testified that he was not claiming them. Because the Commission determines the emotional distress award is clearly

erroneous rather than in error as a matter of law, the Commission does not address the due process issue raised by Capital Electric.

IT IS HEREBY ORDERED, the Bureau's decision as to damages is reversed in its entirety and the decision is remanded for further findings and conclusions on the lost wages damages award and the emotional distress damages award.

A person who has exhausted all administrative remedies available within an agency and who is aggrieved by a final agency decision in a contested case is entitled to file a petition for judicial review within 30 days after service of the final agency decision. Mont. Code Ann. § 2-4-702. The petition must be filed in the district where the petitioner resides or has the petitioner's principal place of business, or where the agency maintains its principal office.

DATED this \_\_\_\_ day of June, 2007.

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Chair Ryan C. Rusche  
Human Rights Commission

## CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail, postage prepaid, on this \_\_\_\_\_ day of June, 2007.

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Montana Human Rights Bureau