BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011379:

DAVID OGDEN,	)	Case No. 275-2006
	)	
Charging Party,	)	
	)	
vs.	)	
	)	
CAPITAL ELECTRIC,	)	
	)	
Respondent.	)	

and IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011377:

DAVID OGDEN,	)	Case No. 268-2006
	)	
Charging Party,	)	
	)	
vs.	)	
	)	
DEACONESS BILLINGS CLINIC,	)	
	)	
Respondent.	)	

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FINAL AGENCY DECISION

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I. PROCEDURE AND PRELIMINARY MATTERS

On January 10, 2005, charging party David Ogden filed two complaints charging illegal discrimination with the Montana Department of Labor and Industry. In Case No. 268-2006, HR No. 0051011377, Ogden charged that respondent Deaconess Billings Clinic discriminated against him in employment because of disability. In Case No. 275-2006, HR No. 0051011379, Ogden charged that respondent Capital Electric discriminated against him in employment because of disability. After completing investigations of the two complaints, the department's Human Rights Bureau issued final investigative reports and requested that the department's Hearings Bureau commence contested case proceedings on both cases.

The parties stipulated to extend department proceedings for more than one year after complaint filings. Hearing Examiner Terry Spear consolidated the cases and held a contested case hearing on both cases on May 9-11 and June 2, 2006. Thomas E. Towe, Towe, Ball, Enright, Mackey & Sommerfeld, PLLP, represented Ogden. Shane P. Coleman and Jason S. Ritchie, Holland & Hart LLP, represented Capital Electric. Edward J. Butler, Sherman & Howard, LLC, represented Deaconess Billings Clinic. The transcript of hearing records the witnesses who testified and the exhibits admitted or refused.

After the filing of the transcript of hearing, the parties filed post-hearing arguments and submitted the matters for decision. Copies of the Hearings Bureau's dockets of these contested case proceedings accompany this decision.

II. ISSUES

The key issues in these consolidated cases are whether respondents (or either of them) took adverse employment actions against Ogden because he had an actual or perceived disability, and, if so, what reasonable measures the department should order to rectify any harm Ogden suffered as a result and to correct and prevent similar discriminatory practices hereafter. A full statement of the issues appears in the final prehearing statement.

III. FINDINGS OF FACT

1. Charging party David Ogden is a licensed journeyman electrician with nearly 20 years of experience as an electrician. He lost his right leg below the knee in an industrial accident more than 25 years ago, while working in an oil field job. Ogden subsequently trained and became qualified as a journeyman electrician. He has worked as an electrician for nearly 20 years, with some other interim business endeavors that did not develop into career opportunities.

2. Ogden's amputation resulted in limitations upon his range of safe activities while wearing his prosthesis, precluding oil field work and generally, some types of climbing and running (except in an extreme emergency), as well as operation of most heavy equipment. His limitations also make it impossible for him safely to perform some specific job duties associated with particular electrician positions, primarily heavy overhead lifting and climbing power poles.

3. If Ogden could afford specialty prostheses, he probably could safely perform specific electrician job duties currently impossible for him. One such specialty prosthesis might allow him safely to climb power poles and work as an electrical lineman, for example. With other such speciality prostheses, Ogden might be able to operate a far greater range of heavy equipment. He cannot afford such specialty prostheses.

4. Ogden can ambulate well with crutches, but prefers not to do so in public. His self-consciousness, together with his pain and fatigue from working, substantially limit his normal life activities after work.

5. Over the years of working as an electrician, Ogden has been able to work far more than eight hours a day, and has been able satisfactorily to perform a range of heavy work. He has never requested and has never received any formal accommodation for his electrician work. He removes and adjusts the prosthesis as needed during work breaks, to refit it with the stump when weight-bearing changes the shape of the stump. He also removes the prosthesis as needed during work to dry accumulating moisture that could contribute to sores on the stump. Ogden also modifies how he does particular tasks (*i.e.*, lying down to do work near ground level, rather than squatting or kneeling). Over the years, his employers have been satisfied with his work and have not restricted him from taking breaks as needed to deal with his prosthesis or from modifying his performance of particular tasks.

6. Ogden is a member in good standing with the International Brotherhood of Electrical Workers (IBEW). Over the years, he has obtained electrician employment through the union, whether through his home local or through locals in other areas. Local members have preference for job openings over non-local members, but non-local members have rights and privileges of membership, including the right to register with any local's Union Hall for job openings referred to the union by contractors and other employers in the area. Non-local members who register by signing up on any local's out-of-work union books are considered "travelers" and can accept work only after local members registered on the out-of-work books are given the opportunity. Ogden has been able to obtain substantial amounts of work by signing up as a traveler with locals other than his home local.

7. Ogden is not a member of IBEW Local 532, in Billings, Montana, but he has followed the local's procedures to register for work as a traveler. He has obtained work through Local 532 over the years.

8. Ogden often works several electrician jobs per year, sometimes in multiple states. When he learns of suitable long term electrician openings in which he is interested, he registers with the appropriate local, keeping or finding other work unless and until the openings materialize and he is assigned by the local to fill one of them.

9. As a direct result of his heavy work, Ogden has experienced significant pain problems and routine limitations upon his activities away from work. After a work day, Ogden typically must deal with pain, fatigue and the necessity for removing his prosthesis, for stump care and recuperation until the next day's work.

10. Ogden has also had surgery on his left knee, resulting in a knee that has physiological abnormalities and occasional functional problems. With limited interruptions for treatment of his left knee and recuperation from left knee problems

and for repair of his prosthesis or minor medical or home care because of wear and tear on his stump, Ogden has sustained self-supporting employment.

11. Ogden has sometimes had, but did not have at the time of hearing, a disability license for his vehicle, allowing him to use disabled parking spaces. Pragmatically, he is willing to use any legal entitlement he may have to improve his living conditions and prospects. He does not consider himself "disabled," as he understands the term.

12. Ogden has persevered over the years, enduring the significant pain problems, the routine limitations upon his activities away from work, the physical wear and tear on his stump, the extra strain on the rest of his body and the resulting fatigue. He does suffer from physical impairments (his amputation and his damaged left knee) which substantially limit major life activities–his ability to engage in a full and normal life for recreational, social and personal activities–as a result of the hard work he does for a living. He is not substantially limited in the major life activity of working, because he, unlike others with similar impairments, is not 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. Ogden does perform a class or broad range of electrician jobs compared to persons without his limitations and with comparable qualifications. Most people with the same physical limitations as Ogden probably would not be able to endure the hardships necessary to perform that class or broad range of electrician jobs.

13. Respondent Capital Electric sells professional electrical contracting services and goods to customers requiring such services. Capital Electric bids on electrical work on large commercial construction projects, including construction of power generating plants. At all times relevant to this action, Capital Electric had bid and obtained electrical work as one of the subcontractors of NewMech Companies, Inc., the general contractor at the Hardin Generating Station Project outside of Hardin, Bighorn County, Montana. Pursuant to the contract, Capital Electric employed electricians who worked on the generating plant project.

14. NewMech is a subsidiary of Montana Dakota Resources (MDU). NewMech and Capital Electric are not related or affiliated business entities.

15. NewMech and its subcontractors, including Capital Electric, entered into a project labor agreement with local unions, including IBEW Local 532, to hire union labor for the work on the generating plant project. All electricians hired for the generating plant project were hired through Local 532. The electricians were paid pursuant to the union pay scale.

16. When new electricians were needed on the generating plant project, Capital Electric notified Local 532, which provided candidates.

17. Pursuant to the agreements with the unions and the contracts between NewMech and its subcontractors, including Capital Electric, NewMech required that all the candidates receiving conditional employment offers undergo "Drug, Physical and Job Assessment Testing" before hire. NewMech paid the cost of this testing. Capital Electric and the other subcontractors agreed, as a condition of selling their services to NewMech, to hire the workers whom the testing entity certified as medically qualified to work on the generating plant project.

18. At the beginning of the project, respondent Deaconess Billings Clinic performed the requisite testing for the subcontractors, at NewMech's expense, through Deaconess' Occupational Health & Wellness department. Deaconess is a large health care provider, on a Montana scale.

19. Deaconess did not share medical information with NewMech or its subcontractors, including Capital Electric. Deaconess only advised whether the candidate for the particular position was medically qualified for it.

20. Upon certification of medical qualification, the candidate received a safety orientation from NewMech. For electricians hired on the project, the candidate then became a Capital Electric employee working on the generating plant project.

21. In August 2004, Capital Electric "leased" Travis Johnson, a safety coordinator working for Capital Electric in Kansas City, to NewMech for the generating plant project. NewMech did not have a safety coordinator in its employ who was available for the project. NewMech and Capital Electric agreed that Johnson, still paid by Capital Electric, would work as NewMech's safety coordinator on the project, with NewMech paying Capital Electric for the use of Capital Electric's loaned employee. Johnson's duties as NewMech's project safety coordinator included acting as NewMech's liaison with Deaconess regarding medical qualification of conditional hires before they became employees of NewMech or its subcontractors on the project.

22. In September 2004, Ogden registered with Local 532, knowing that the generating plant project had electrician openings coming.

23. On September 22, 2004, Local 532 was notified of two openings for journeyman electricians for "short call" placement at the generating plant project. A "short call" may only last one eight-hour shift and cannot last more than 14 shifts. The local received the standard notification, which included reiteration of the requirement in the project labor agreement that all applicants must complete NewMech's Drug, Physical and Job Assessment Testing.

24. In response to the September 22, 2004, notification, the local referred Ogden and Gale A. Shepherd as candidates for the openings.

25. On or about September 24, 2004, Ogden received a call from the local that Capital Electric had a position available for him. Ogden told the local he wanted the job and was cleared for employment by Capital Electric. He was informed of the time and date for his Deaconess Drug, Physical and Job Assessment Testing.

26. Ogden cooperated with Deaconess, provided medical records when requested, and otherwise made himself available for all evaluations requested. However, he minimized his left knee problems, understating the number of medical procedures on that knee. He did this both because he tends to understate the degree of difficulty his physical limitations cause him and because he wanted the job.

27. On September 28, 2004, Deaconess commenced Ogden's physical examination. However, Deaconess did not allow Ogden to attempt the strength and flexibility portion of the exam. After obtaining and reviewing his medical records, Deaconess decided that a functional capacity evaluation was needed to determine if Ogden could safely complete the pre-employment screening and safely perform the job for which Capital Electric would be hiring him.

28. Deaconess contacted Johnson to confirm that it would be paid for the recommended functional capacity evaluation of Ogden. Johnson checked first with NewMech management and verified that NewMech would not pay for the evaluation. Johnson then contacted Capital Electric management and verified that Capital Electric would not pay for the evaluation.[1]

29. Deaconess, with no one agreeing to pay for the functional capacity evaluation, never performed it. As a direct result, Deaconess never completed Ogden's pre-employment screening. Because Ogden was never certified as medically qualified for the job, he was not hired.

30. Ogden did not again attempt to obtain a job on the generating plant project for approximately a year. Given the refusals of NewMech and Capital Electric to pay for the recommended evaluation, Ogden could not have obtained medical certification to work on the generating plant project so long as Deaconess was providing the pre-employment screenings. Although Ogden may not have known all the details involved in the failure to certify his medical qualification for the job, he did know that until somebody paid for the additional tests, Deaconess would not complete his pre-employment screening. It was reasonable for Ogden to seek work elsewhere, which he did.

31. In October 2005, Local 532 received notice of another job opening at the generating plant project. The local referred Ogden to fill the job. Because he had

[1] Deaconess did not tell Capital Electric what the proposed functional capacities evaluation would cost. Capital Electric had not paid for any testing of applicants, and decided it would continue to treat all candidates "the same" by not paying for any testing of Ogden.

pursued a union grievance over the 2004 failure to hire him, which had been resolved, Ogden believed he might now have a chance to get a job on the project. Ogden accepted the referral.

32. St. Vincent's Healthcare, in Billings, Montana, was now providing the pre-employment screenings for candidates on generating plant project jobs. Capital Electric cleared Ogden for employment, subject to his passing the pre-employment screening. St. Vincent's completed Ogden's pre-employment physical examination, which he passed. However, Ogden failed the drug test, because his sample lacked Creatinine, a substance found in all human urine.

33. Ogden, who sometimes smokes marijuana for pain relief, refused to take a second drug test. Capital Electric will not hire an individual who has failed a pre-employment drug screen until he completes the "Navigator" program, a drug education and prevention program. There was no evidence that Ogden has undertaken that program since failing the drug test.

34. Even though Ogden had a substantial job history of success in electrician jobs, and even though St. Vincent's passed Ogden without recommending a functional capacities evaluation a year later, it was medically reasonable for Deaconess, given Ogden's abnormalities in his left knee, his right leg below knee amputation and his medical history, to make the recommendation for a functional capacities evaluation. On the present record, Ogden would have passed the functional capacities evaluation and the rest of the pre-employment screening had Deaconess performed it.

35. Had Ogden successfully completed the functional capacities evaluation and the pre-employment screening, Capital Electric would have hired him for the "short call." All electrician jobs are not interchangeable, however, the substantial evidence of record supports a finding that Ogden, had he been hired by Capital Electric in September 2004, would have successfully worked for Capital Electric for as long as work would have been available. He would have successfully completed work on the "short call." He would then have been able to apply for openings for long term positions on the generating plant project, and more likely than not would have obtained a long term position.

36. Deaconess certified Shepherd as medically qualified for the second "short call position" in September 2004. Capital Electric hired Shepherd, who worked until October 8, 2004 and earned a total of $2,022.77.

37. Capital Electric employed Mike Baker, a traveler on the out-of-work books of Local 532, as an electrician on the generating plant project beginning October 13, 2004, and ending on August 25, 2005. Baker earned a total of $72,341.48 in wages and union benefits, while working for Capital Electric.

38. Had Ogden commenced work for Capital Electric when Shepherd did, and worked first on the "short call" and then on the "long call" (as Baker did), he would have earned $74,364.25 in wages and benefits.

39. After he did not get the "short call" job with Capital Electric in 2004, Ogden took an electrician job through Local Union 532 with Midland Electric, beginning on October 11, 2004. This was a "long call," meaning it would last more than 14 shifts. Ogden worked at Midland Electric until November 1, 2004. On November 15, 2004, M.J. Electric, Inc., hired Ogden for an electrician job that lasted until January 18, 2005. Ogden next worked for Valley Electric as an electrician from February 11, 2005 until June 30, 2005. He then worked for Newtron, Inc., as an electrician from July 11, 2005 until September 11, 2005. During this entire time, Ogden earned $69,871.91 in wages and union benefits, in these electrician jobs.

40. Ogden lost $4,492.34 because he did not work at the generating plant project in September 2004 through September 2005.

41. Ogden is entitled to prejudgment interest on his lost earnings. It has been 501 days since the last earning date for Baker. Therefore, Ogden's prejudgment interest totals $841.24 ($4,492.34 times .1 divided by 2 is $224.62, which is the prejudgment interest during the year of work on the generating plant project, at 10% simple interest per year, plus $4,492.34 times .1 divided by 365 times 501, which is $616.62, the prejudgment interest since the last day Baker worked on the project).

42. As a result of the refusal of Capital Electric to pay for the functional capacities evaluation, Ogden also suffered emotional distress. Although he did not testify to suffering any emotional distress, the hearing examiner observed his anger and resentment at being denied the opportunity to land a steady long term job in one location. Ogden does not particularly seek respect for the substantial effort he regularly makes to maintain his professional employment, but he has earned it. He deservedly takes pride in his ability to work through his limitations and earn his living as an electrician. Capital Electric did cause him severe emotional distress by denying him the chance to work, and he is entitled to recover the sum of $15,000.00 for that emotional distress, despite his proud refusal to state that he suffered it.

IV. OPINION[2]

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

Montana law prohibits employment discrimination because of disability,[3] when the essential tasks of the job do not require a distinction based on disability. Mont. Code Ann. § 49-2-303(1)(a). To prove disability discrimination in employment, Ogden had to present credible evidence that (1) he had a disability; (2) he was 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) respondents in either or both cases denied him the job because of his disability. *Reeves v. Dairy Queen*, 1998 MT 13, ¶ 21, 287 Mont. 196, 953 P.2d 703; *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947, 950.
"Disability" includes three kinds of problems: (1) an impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) a condition regarded as such an impairment. Mont. Code Ann. § 49-2-101(19)(a).

Work is a major life activity. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 428. Sometimes a physical condition "prevents [the claimant] from performing heavy labor or . . . [the claimant's] employer regards [the condition] as precluding heavy labor." *Butterfield v. Sidney Public Schools*, 2001 MT 177, ¶ 24, 306 Mont. 179, 32 P.3d 1243. If either is true, the claimant is "substantially limited in the major life activity of working because his impairment eliminates his ability to perform a class of jobs." ***Id.*** The limitation is either real or perceived, but either way, it constitutes a disability under the statute.

Ogden proved that he successfully works as an electrician, despite his below knee amputation and the medical and post-surgical problems with his other knee, and has done so for decades. He proved that he has no actual disability relevant to this case because neither his below the knee amputation nor his problems with his other knee substantially limits his working. Although Ogden may have substantial limitations in other major life activities, he is not actually substantially limited in work, which is the major life activity at issue here. Thus, the only issue is whether either respondent regarded Ogden as disabled.

For Deaconess, the issue is whether recommending a limited functional capacity evaluation constituted regarding Ogden as disabled. Under the facts of that case, that recommendation did not constitute regarding Ogden as disabled. For Capital Electric, the issue is whether refusing to pay for the limited functional capacity evaluation constituted regarding Ogden as disabled. Under the facts of that case, refusing to pay for the evaluation did constitute regarding Ogden as disabled.

A. Case No. 268-2006, HR No. 0051011377

Ogden did not prove that Deaconess regarded him as disabled in recommending a limited functional capacities evaluation to determine if he could safely complete the pre-employment screening. "Disability" includes a physical condition regarded as an impairment substantially limiting a major life activity, Mont. Code Ann. § 49-2-101(19)(a)(i) and (iii), and work is a major life activity, *Martinell*, ***op. cit.*** However,

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

making further inquiry into a candidate's conditions that might limit his ability to complete a pre-employment screening for a skilled heavy labor position without undue risk of harm does not constitute regarding that candidate as substantially limited in any major life activity. Proof that Deaconess recommended that it perform a limited functional capacity evaluation of Ogden does not establish a *prima facie* case against Deaconess.

If Deaconess made its recommendation knowing either that the employer would refuse to pay for the evaluation, or that the evalation was prohibitively expensive, the outcome might be different. Ogden did not establish those facts.

Had the evidence shown that Deaconess unreasonably made the recommendation even though there was no undue risk of harm to Ogden in completing the pre-employment screening without the limited functional capacities test, the outcome would be different. Ogden did not prove these facts, either. It is not determinative that St. Vincent's did complete pre-employment screening of Ogden a year later and certify him for electrician employment on the generating plant project without recommending the limited functional capacities evaluation. Different health care professionals can exercise different degrees of caution about screening requirements without necessarily thereby establishing ***per se*** that either is motivated by illegal discriminatory animus. In addition, it is not clear from the evidence whether the union grievance and its resolution resulted in any change in NewMech's directions to its health care screener (now a different entity) regarding how to approach recommendations for additional testing.

To the extent that Ogden also argued that Deaconess and Capital Electric colluded to deny him a job because of perceived disability, he failed to prove such collusion.

For all these reasons, Ogden failed to prove that Deaconess regarded him as disabled when it made the recommendation for the limited functional capacities evaluation as a perquisite for completion of his pre-employment screening.

B. Case No. 275-2006, HR No. 0051011379

B1. Capital Electric Regarded Ogden as Disabled

As already repeatedly noted, "disability" includes a condition regarded as an impairment that substantially limits a major life activity, Mont. Code Ann. § 49-2-101(19)(a)(iii), and work is a major life activity, *Martinell*, ***op. cit.***

It is unlawful for an employer to require an employee or applicant for employment to pay the cost of a medical examination as a condition of employment. Mont. Code Ann. § 39-2-301.[4] Capital Electric, in substance, required Ogden to pay for

[4] Ogden argued that Mont. Code Ann. § 39-2-207 also applied, although on its face it appears to relate only to drug and alcohol testing.

the limited functional capacities evaluation when it refused to pay it. Capital Electric refused to pay with actual knowledge that unless Ogden himself paid the cost of the evaluation, he would not be certified for project employment–NewMech had already refused to pay. Capital Electric also had actual knowledge that it would be hiring Ogden if he obtained certification.

Capital Electric argued that any additional testing recommended by Deaconess, including a limited functional capacities evaluation, "was for the benefit of the employee and not a condition of employment." Capital Electric's Proposed Findings of Fact, Conclusions of Law and Order, Jul. 28, 2006, p. 13. Capital Electric also argued that this "benefit" for Ogden was required by NewMech, not by Capital Electric. In essence, Capital Electric argued that it, the prospective employer, was not required to pay for testing which was "not a condition of the employment." Mont. Code Ann. § 39-2-301.

Capital Electric's arguments were unpersuasive. The contract between NewMech and (among others) Capital Electric required Capital Electric to hire any provisionally accepted candidate who received medical clearance. Neither Ogden nor any of the other candidates were direct participants in this contractual agreement. When Deaconess asked who would pay for Ogden's additional tests, NewMech and Capital Electric each had to take the time to consider and to decide how to answer Deaconess' inquiry, which the contract did not address.

Ogden neither requested nor agreed to any of the testing–instead, he was confronted with a situation where unless he undertook the pre-employment screening, he would not receive medical qualification to work on the generating plant project. Then, without any request or agreement on his part, he was told that additional testing was necessary and that the prospective employer would not pay for it.

Not every applicant was presented with this choice between the devil and the deep blue sea–pay for additional testing that the agent for the employer required, or refuse to pay and lose the job. That dilemma clearly was not for his "benefit." Deaconess' recommendation was for the benefit of Capital Electric, the prospective employer, and NewMech, the general contractor, as well as for Deaconess' own benefit. If Deaconess had recommended to Ogden that he obtain testing, because he might have a medical problem that needed attention, advising Ogden that the testing was not part of the pre-employment screening process, which would continue whether or not he got the additional testing, that would have been a recommendation for Ogden's benefit.

The actual result in this case was that Ogden had to either pay for the additional testing or lose the short call electrician job. Capital Electric, acting as the prospective employer, made the decision that led to that result. Montana law prohibits making Ogden pay for the additional testing. Federal law also appears to prohibit it.[5]

[5] The Americans with Disabilities Act provides that a post-offer pre-employment medical examination is proper if all entering employees are subjected to the same examination regardless of whether they may have any disability. 42 U.S.C. § 12112(d)(3)(A).

The fact that Capital Electric illegally required Ogden to pay for the limited functional capacities evaluation necessary for him to get the electrician job[6] does not itself establish illegal discrimination. The reason Capital Electric singled Ogden out for illegal treatment–the physical conditions that led Deaconess Billings Clinic to recommend the limited fuctional capacities evaluation–can, as a matter of fact, render that "singling out" as illegal discrimination.

Both respondents argued that there are federal cases interpreting federal laws prohibiting disability discrimination to mean that activity restrictions arguably similar to those about which Deaconess was concerned, in Ogden's instance, do not substantially limit working.[7] Capital Electric asserted, consistent with the apparent reasoning of those federal cases and an isolated holding in *Hafner*, that at most Ogden was regarded as unable to perform 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. The reasoning of the federal cases the respondents cited on this point, most of them affirming summary judgments for employers, is inapplicable in the face of controlling Montana precedent.[8] *Butterfield* (interpreting and clarifying *Hafner* and other applicable authority), which involves a fully adjudicated contested case hearing, provides such precedent.

Whether an employer considered an applicant or employee substantially limited is a question 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

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[6] Nothing in this decision establishes that Capital Electric committed a misdemeanor pursuant to Mont. Code Ann. § 39-23-301(4). The department has no jurisdiction to make such a decision, and the statute of limitations on any such charge may already have run. For purposes of this case and this case only, it is more likely than not that Capital Electric violated Mont. Code Ann. § 39-23-301(1). It does not follow that, beyond a reasonable doubt, Capital Electric committed the misdemeanor offense.

[7] *Toyota Motor Mfg., Ky. v. Williams* (2002), 534 U.S. 184, 197-98; *Sutton v. United Air Lines* (1999), 527 U.S. 471, 488-89; *Murphy v. U.P.S.* (1999), 527 U.S. 516, 521; *Albertson's v. Kirkingburg* (1999), 527 U.S. 555, 565-66; *E.E.O.C. v. U.P.S.* (9th Cir., 2002), 306 F.3d 794, 799; ***see also***, *Thompson v. Holy Family Hosp.* (9th Cir. 1997), 121 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, 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 Montana has controlling precedent, no such guidance is needed.

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 respondents' federal cases. For an easy 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, fn. 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.

The present case is actually stronger than any of the summary judgment cases. In treating all candidates "equally" by refusing to pay additional test costs for any candidate, Capital Electric effectively decided that any candidate with a conditional offer of employment with Capital Electric and with a condition requiring additional testing for medical qualification for the job provisionally offered (meaning Ogden in this case) either had to pay for the additional testing or lose the job. The number of jobs to which this decision by Capital Electric applied, including but not limited to electrician jobs, was a broad class of jobs–not only the class of Capital Electric's jobs at this project but the class of all jobs on the project for which pre-employment screening was required. Ogden could not get any such jobs without medical qualification, which would require that he pay for the additional recommended testing.

Any other prospective employer applying the same testing and same rationale as Capital Electric applied would preclude Ogden from hire in the same way. Clearly Capital Electric viewed Ogden as a candidate with a condition that Capital Electric regarded as an impairment, and that impairment, as Capital Electric viewed it, in fact substantially limited his ability to work.

Capital Electric argued that NewMech and Deaconess were the entities involved in the medical certification program, and that it was (in effect) an innocent bystander. However, Capital Electric was the entity that would hire Ogden, pursuant to its contract with NewMech, the general contractor on the generating plant project, if and when he obtained medical certification. Capital Electric may not have been paying for the pre-employment screening, but Capital Electric was contractually bound by NewMech not to hire without the resultant medical certification. Thus, it was Capital Electric that failed and refused, when it refused to pay for the limited functional capacity evaluation and

accepted Ogden's loss of the job unless he paid for it, to consider Ogden's individual ability to perform the job safely.

Capital Electric's argument that it did not regard Ogden as disabled, because it only considered his ability to perform a specific job, is addressed by *Butterfield*, ¶ 19 [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. Capital Electric relied entirely upon Ogden's need (according to Deaconess) for additional testing, and required him to pay for that testing. Since Capital Electric could not require Ogden to pay for any of the testing, its perception of him as needing the extra testing, for which it would not pay, meant it regarded him as precluded from all of the jobs for which pre-employment screening, including the extra testing, were, according to Deaconess, required unless and until he complied with the illegal requirement that he pay for the testing.

The precise "condition" involved for Ogden was a below knee amputation in one leg and multiple surgical procedures (with some documented continuing problems) in the other knee, which, taken all together by Deaconess, required the additional testing for clearance to complete the screening itself.[9] The net result, again, was that Capital Electric viewed Ogden as someone with a condition that precluded his hire for any job at the generating plant project unless and until Ogden paid for additional testing. By requiring that Ogden assume an illegal burden to continue the screening process, Capital Electric regarded him as substantially limited in the major life activity of working unless and until he paid for and passed the limited functional capacities test. Capital Electric singled him out and treated him differently because of a physical condition that it regarded as limiting his capacity safely to work. The individualized assessment necessary to determine whether he was so limited could not legally be done at Ogden's expense. Refusing to hire him unless he purchased and passed the limited functional capacities evaluation, an individualized assessment, was regarding him as disabled. In short, when an employer requires pre-employment post-offer screening as a condition of employment, under Montana law refusal to pay for additional testing medically recommended as necessary (because of a physical condition) to be sure

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[9] Capital Electric also argued (along with Deaconess) that it was Ogden's efforts to conceal how many surgical procedures he had endured on his left knee that led to the recommendation for the limited functional capacities evaluation. The credible evidence does not support this interpretation. It is more likely than not that even if Ogden had been forthcoming about all of the prior procedures on his left knee, Deaconess would still have recommended the limited functional capacities evaluation.

completion of the pre-employment screening is safe is regarding the candidate as disabled.

Any other analysis would result in absurdity. The possible limitation that, without completion of the pre-employment screening, prevented Ogden from working in the short call electrician job on the generating plant project did not involve something unique to that job. A commercial airline pilot's job requires uncorrected 20/20 vision, though most jobs (including most pilots' jobs) require only 20/20 corrected vision. *Sutton*, ***op. cit.*** A truck driving job requiring a DOT commercial license does not preclude the driver from a broad class of driving jobs. *Albertson's*, ***op. cit.*** 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. But when Capital Electric declined to pay for Ogden's additional testing, it regarded him as unable to perform any job for which such additional testing would be required as part of screening before hire, because it refused to pay for such additional testing. Eliminating that broad range or class of jobs–i.e., all the jobs on the generating plant project which required the same pre-employment screening, for a man whose work experience and qualifications were largely for electrician jobs–did constitute regarding him as having a substantial limitation upon his ability to work.

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. Regarding Ogden as unable to perform the short call electrician job unless he paid for the additional testing recommended meant regarding him as unable to perform every job for which the same screening and same additional testing would be required.

For all of these reasons, the hearing examiner finds that Capital Electric regarded Ogden as disabled.

B.2. Relief Accorded

The relief the department may award to a charging party subjected to illegal discrimination include any reasonable measure to rectify any resulting harm he suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. S.D. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.[10] The harm that Ogden suffered includes lost wages and benefits (back pay), prejudgment interest on those losses and emotional distress, all resulting from the illegal disability discrimination by Capital Electric.

B.2(a). Back Pay

[10] The Montana Supreme Court has approved the use of analogous federal cases in interpreting application of the Montana Human Rights Act. ***E.g.***, *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841.

By proving that disability discrimination prevented him from gaining employment with Capital Electric, Ogden established an entitlement to recover lost wages and benefits. *Albermarle Paper Co.*, ***at*** 417-23. He must prove the amount of wages that he lost, but not with unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Mich. Dept. Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award). In this instance, the evidence establishes amounts of wages and benefits lost for a period of a year after Capital Electric failed and refused to hire Ogden because he could not and Capital Electric would not pay for the limited functional capacities evaluation recommended by Deaconess.

After the end of that year, Ogden's failure to pass a drug screening ended his lost wages due to the disability discrimination. Mike Baker, a reasonable comparator for what Ogden could have earned, began his employment in October 2004 [11] and ended his employment in late August 2005. It was soon thereafter, in October 2005, that Ogden (fresh off other jobs and medically cleared vis-a-vis his lower extremities) failed the drug screening. Had he been hired by Capital Electric and sought further work after his employment (using Baker as the comparator) with Capital Electric ended, he would similarly have failed the same drug test, for the same reason.

If, as the respondents contended, Mike Baker would have been ahead of Ogden on the call lists of the union in October 2004, then Ogden might have been without work after his short call ended until a later long call opening. In that case, Ogden might have worked longer on a later long call and might have passed a later drug test. But Ogden did not offer substantial and credible evidence of any other reasonable comparator for whom later dates would apply, so any other calculation of his lost wages would be speculative, rather than simply difficult to calculate.

B.2(b). Prejudgment Interest

Prejudgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, 779 P.2d ***at*** 523. Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times an appropriate rate of interest. ***E.g.***, *Reed v. Mineta* (10th Cir. 2006), 438 F.3d 1063. The appropriate rate is 10% annual simple interest, as is applicable to tort losses capable of being made certain by calculation, only without the requirement of a written demand to trigger commencement of the interest accrual, which has not been required in Human Rights Act cases. Mont. Code Ann. § 27-1-210. The appropriate calculations are described in the findings.

B.2(c). Emotional Distress

Reasonable measures to rectify the harm Ogden suffered because of disability discrimination includes an award for his emotional distress. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601. The evidence supports an award of

[11] There is no evidence that Ogden did or would have failed a drug test in October 2004.

$15,000.00, under the legal standard in *Vortex Fishing Sys. v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836, for all the reasons stated in the findings.

The freedom from unlawful 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. The Human Rights Act demonstrates that Montana does not expect any person to endure harm, including emotional distress, resulting from violation of a fundamental human right. *Johnson v. Hale* (9th Cir. 1991), 940 F.2d 1192; ***cited in*** *Vortex* ***at*** ¶33 ***and*** *Vainio*; *Campbell v. Choteau B&S House* (1993), HR No. 8901003828. Although Ogden's personality–the self-same personality that sustains his remarkable efforts to continue supporting himself through heavy labor–make it impossible for him to admit to something as soft as "emotional distress," the term includes Ogden's resentment, frustration and anger (revealed by his testimony and his demeanor during his testimony), caused by Capital Electric's violation of his fundamental right to be free from unlawful disability discrimination. That emotional distress, although he balks at the use of the phrase, is reasonably compensated with the award herein.

B.2(d). Affirmative Relief

Upon a finding of illegal discrimination, the law requires an order imposing affirmative relief that enjoins any further discriminatory acts and the department may further prescribe any appropriate conditions on the respondents' future conduct relevant to the discrimination found. Mont. Code Ann. § 49-2-506(1)(a). On these facts, the affirmative relief imposed is appropriate.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over both these cases. Mont. Code Ann. § 49-2-509(7).

2. Capital Electric unlawfully discriminated against David Ogden in employment because of disability by requiring yet refusing to pay for a limited functional capacities evaluation recommended by Deaconess Billings Clinic as a prerequisite for the completion of pre-employment screening. Mont. Code Ann. § 49-2-303(1)(a).

3. Ogden suffered harm as a result of the unlawful discrimination by Capital Electric, due to loss of earnings (including benefits) of $4,492.34 from September 2004 through August 25, 2005, plus prejudgment interest on his lost earnings in the amount of $841.24 to the date of this decision, and emotional distress for which he is entitled to recover $15,000.00. Mont. Code Ann. § 49-2-506(1)(b).

4. The department must order Capital Electric to refrain from engaging in such discriminatory conduct and should prescribe conditions on the corporation's future conduct relevant to this discriminatory practice. Mont. Code Ann. § 49-2-506(1) and (1)(a) through (1)(c).

5. The preponderance of the evidence does not support the allegations of David Ogden that Deaconess Billings Clinic unlawfully discriminated against him by

recommending a limited functional capacities evaluation as a prerequisite for completion of Ogden's pre-employment screening. Mont. Code Ann. § 49-2-303(1)(a).

6. The department must dismiss Ogden's complaint against Deaconess Billings Clinic. Mont. Code Ann. § 49-2-509(3)(c).

VI. ORDER

1. In Case No. 275-2006, HR No. 0051011379, judgment is in favor of charging party **David Ogden** and against respondent **Capital Electric** on the charges that the respondent discriminated against him in employment because of disability.

2. The department orders respondent **Capital Electric** to make immediate payment to charging party **David Ogden** of the sum of $20,333.58, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past lost earnings of $4,492.34 for September 2004 through August 25, 2005. Interest accrues on this judgment as a matter of law.

3. The department permanently enjoins respondent **Capital Electric** from illegally discriminating against candidates for employment in Montana by requiring and refusing to pay for additional testing of candidates during any required pre-employment screening when such testing is recommended by a medical provider that is conducting the pre-employment screening.

4. The department orders respondent **Capital Electric**, within 60 days after this decision becomes final, to confer with and follow the directions of the Human Rights Bureau to obtain proposed training of **its management personnel regarding illegal employment discrimination because of disability, of 4-6 hours for each person trained, for those management personnel (if any) that the Human Rights Bureau finds are likely to be involved in business matters in Montana on behalf of this respondent in the foreseeable future.**

5. In Case No. 268-2006, HR No. 0051011377, judgment is in favor of respondent **Deaconess Billings Clinic** and against charging party **David Ogden** on the charges that the respondent discriminated against him in employment because of disability.

6. The department dismisses the discrimination complaint of charging party **David Ogden** against respondent **Deaconess Billings Clinic**.

Dated: January 10, 2007.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner

David Ogden.FAD.tsp