BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0081012948:

KEVIN TRUMBLE,	)	Case No. 923-2009
	)	
Charging Party,	)	
vs.	)	**HEARING OFFICER DECISION**
	)	**AND NOTICE OF ISSUANCE OF**
GLACIER WELL SERVICE, INC.,	)	**ADMINISTRATIVE DECISION, AS REVISED ON HRC REMAND**
	)	
Respondent.	)	

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This document sets forth the original decision herein, with the revisions that the Hearing Officer has now made to comply with the Human Rights Commission's Order on Remand. Simultaneously with this revised decision, a separate document titled, "On Remand from HRC: Revisions to the Hearing Officer Decision," also issues containing only the changes made to the original Hearing Office Decision. The portions of this decision that differ from the original decision are additions and changes to "II. Issues" [adding the second paragraph]; "III. Findings" [revising Finding Nos. 19, 40, 41, 44, 46, 49, 50, and 52, dividing Finding No. 19 into three subparts, and deleting Finding Nos. 42, 45, 48, and 51, retaining the original numbering for other findings]; "IV. Discussion," subsection "1. Liability" [replacing the last two paragraphs in this section of the original decision with the five final paragraphs of this section herein]; "IV. Discussion," subsection "2. Damages" [replacing all but the first four paragraphs of the original decision with the six following paragraphs herein]; "V. Conclusions of Law" [replacing Conclusions 2 and 3 in the original decision with the revisions herein]; and "VI. Order" [replacing Paragraphs 2 and 3 in the original decision with Paragraphs 2 and 3 herein]. Finally, the Hearing Officer corrected the misspelling of Aldrich's last name as "Aldridge" wherever that error occurred.

I. PROCEDURE AND PRELIMINARY MATTERS

On April 11, 2008, Kevin Trumble filed a complaint with the department charging that Glacier Well Service, Inc. (the corporation), his former employer, discriminated against him in employment because of disability. The department issued notice of hearing on December 4, 2008.

After continuances for good cause, the contested case hearing took place on July 6-7, 2009, in Cut Bank, Montana. Trumble attended with his counsel,

Philip A. Hohenlohe, Hohenlohe, Jones, PLLP. The corporation attended through its designated representative, Dave Withers, owner and chief executive officer, with its counsel, Thane Johnson, Johnson, Berg, McEvoy & Bostock, PLLP.

Kevin Trumble, Brad Postma, Phillip Gladue, Tawnia Evans, Brandon Aldrich, Lloyal Kennedy, Cody Radasa, Dave Brown, Doug Withers, Sue Grimm, and Dave Withers testified in person and under oath. The transcript of the deposition testimony of Dr. Stuart Hall was admitted into evidence in lieu of the doctor's live testimony. The transcript of Dr. Hall's deposition was unsealed and admitted into the public record. Exhibits 1-6, 9-14, 16-18, and 105 were admitted into evidence, with Exhibits 10-14 and 16 confidential and sealed pursuant to the protective order. Deposition exhibits duplicative of sealed hearing exhibits (which have the same exhibit numbers) are also still sealed pursuant to the protective order.

On August 13, 2009, while post hearing briefing was still proceeding, the corporation filed a transcription of the digital recordings of the hearing. Thereafter, on August 24, 2009, the last post hearing brief was filed. After a telephone conference with the parties, the Hearing Officer issued his September 30, 2009 order, designating the copy of the transcription filed with the Hearings Bureau as the official transcript of the testimony at hearing, at which time the case was ready for decision. The Hearings Bureau file docket accompanies this decision.

Proceedings after the original decision, leading to this revised decision, are matters of record.

II. ISSUES

The key issues in this case are whether the corporation discriminated against Trumble, subjecting him to disability discrimination by refusing to continue an accommodation initially provided to him when he was promoted to rig operator, and if so, what reasonable measures the department should order to rectify the resulting harm to Trumble and what, in addition to enjoining such conduct in the future, should the department order to correct and prevent similar discriminatory practices in the future.

On remand, the issue submitted is reconsideration of damages, in light of the eight findings of fact the Commission modified and the conclusions of law the Commission revised and reversed, to determine (a) Trumble's recovery of lost wages and bonuses, with prejudgment interest, for a period reasonably designed to ensure that Trumble is made whole (considering inclusion of lost future earnings within the remedy), and (b) the remedy for his severe emotional distress.

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III. FINDINGS OF FACT

1. Kevin Trumble has a learning disorder that limits his ability to read and write. He was initially diagnosed with learning disabilities in elementary school and received services under an Individual Education Program throughout his schooling. He showed borderline intelligence, difficulty filtering noise, difficulties in math, and severe deficits in language. Even though he received special education services, he struggled throughout school, and was called "stupid" and "retarded" by others. He completed the eleventh grade but did not graduate from high school.

2. Trumble's disorder has more recently been described as "generalized cerebral dysfunction," meaning that he has substantial cognitive defects in essentially all areas of cognitive functioning. It is likely that his cognitive dysfunction is caused by a combination of a congenital disorder or disorders and other lifetime impacts such as multiple traumatic brain injuries. Trumble's overall intellectual functioning is in the borderline range. He is substantially limited in his ability to concentrate and remember information. His immediate recall and his delayed recall of both verbal and visual material are severely impaired. He is substantially limited in his language skills generally, and specifically in his ability to read and write. His expressive language defects are obvious upon observation of or interaction with him, and include articulation problems, spelling errors, and difficulty reading basic sentences. He cannot read or write except at the most basic level, and it is not reasonable to expect him to complete job-related paperwork unaided. Requiring him to do so frustrates and upsets him.

3. Trumble's communication difficulties are striking and readily apparent from interaction with or observation of him. He has difficulty pronouncing words. He stumbles over words. He mixes up words. When listening, he watches speakers closely, as if lip reading, trying to understand what is being said. His wife Tawnia Evans, testified without contradiction and consistent with the Hearing Officer's observations of Trumble at hearing, that he speaks at the same level as a young child. In addition, he is deeply concerned that he not be perceived as impaired, and is very sensitive about treatment he considers belittling. When he is having difficulty understanding, his sensitivity increases greatly. During the course of the hearing, his sensitivity about what he perceives as denigration or ridicule of him manifested in his testimony and in his demeanor while testifying.

4. Trumble is not malingering nor is he exaggerating the limitations caused by his disability. Given his substantial deficits in all areas of cognitive function, it is remarkable, and a testament to his persistence and strong work ethic, that he has been able to work in the competitive job market for as long as he has.

5. Glacier Well Service, Inc. (the corporation), is a business corporation incorporated under the laws of Montana, with its principal place of business situated within the Blackfeet Indian Reservation. The corporation is in the business of servicing oil and natural gas wells and been in operation for 29 years. Sixty to seventy percent of the corporation's business is done within the reservation and includes work on wells operating under tribal leases.[1]

6. The corporation normally has twelve to twenty employees operating up to four service rigs consisting of a crew of five employees per rig. A full strength crew has a fourth hand, a floor hand, a derrick hand, a rig operator, and a tool pusher.

7. The fourth hand and floor hand operate power tongs and rod wrenches, and make and break tubing connections. The derrick hand takes each connection made or broken by the two "hands" and sets it aside or stacks it in the rig or derrick. The rig operator supervises the floor hands and derrick hand and is responsible for making sure that the well is being fixed properly and that the work is done safely. Finally, the tool pusher supervises the rig operator and the rest of the crew.

8. The rig operator position also involves completing paperwork. The paperwork consists of counting the rods and tubing that has come out of a well hole and writing it down. It also requires writing down the kind of pump that was pulled from the well. The rig operator also records the tubing tally, does time sheets for his crew, and keeps track of and records the work events of the day.

9. The rig operator's paperwork is a small part of the job, but is critical to the corporation's business. The paperwork documents the work done and the hours worked. It is the source of the corporation's billing to its customers.

10. The labor market, for the corporation, consists of available workers in and around Cut Bank and the Blackfeet Indian Reservation. Hiring and retaining reliable and capable workers is a constant and critical problem for the corporation, given the low population base of the area and the demands of the work. Over the years, Dave Withers (for purposes of this case, chief executive and owner of the corporation) has met a number of workers who perform crew member work more or less capably, but who typically will leave their jobs with little or no warning, for reasons unrelated to the work. These workers have been employed repeatedly over the years, and will probably be again employed in the future because of the difficulty staffing the crews, despite the likelihood that their employment will be intermittent.

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[1] As a matter of happenstance, Trumble's work for the corporation was as frequently on rigs outside of as inside of the reservation.

11. The typical day for the corporation's employees begins at 6:45 a.m. when all of the employees meet at the shop. There is a crew meeting with Dave Withers where any issue involving employment or work may be discussed. The crews then receive their assignments and head to the field.

12. Withers customarily greets employees as they arrive at work in the morning. He addresses employment issues at this time, with either a group or an individual meeting depending upon the situation. He also touches base with employees out in the field daily. Addressing employment issues is important to Withers because his employees are the fuel for his business. As already noted, staffing the corporation's crews is a constant struggle. Withers tries to be an accessible and fair boss.

13. Brandon Aldrich, who later supervised Trumble when they were both working for the corporation, began working in the oil field at Kipling Energy, under his father Jim, in July of 2001. Aldrich and Trumble first met after Aldrich started work for his father as a floor hand. Trumble was working on the same crew as a derrick hand. Aldrich's formal education only extended through eighth grade. He began working for the corporation in 2005 and became a rig operator in early 2006.

14. Before working for the corporation, Trumble had worked at various jobs over the years, including several jobs on oil rigs that lasted 8-9 years in total. He sometimes worked as a rig operator during that time. When he worked as a rig operator, he was able to stop the rig if necessary, take notes, and take them home to his wife who helped him complete the paperwork. Even with this accommodation, Trumble found the paperwork difficult and frustrating and did not like being responsible for completing it.

15. From his work with Trumble before they both worked for the corporation, Aldrich knew of Trumble's difficulties with paperwork. Aldrich had taken over as rig operator on their prior job together because of Trumble's paperwork problems.

16. Trumble began working for the corporation in 2006 as a floor hand, making $14.00 per hour, and $21.00 per hour overtime. Aldrich was the rig operator for the crew to which Trumble was assigned, and thus was Trumble's immediate supervisor. Doug Withers, Dave Wither's son, was the tool pusher for that crew. Trumble believed that Aldrich had the power to fire him as well as the power to direct his day to day duties on the job.

17. In February 2007, the corporation promoted Trumble to derrick hand. Phil Gladue became the crew's floor hand. The derrick hand position, immediately below that of rig operator, involved more responsibility and more pay.

18. In early August 2007, Aldrich approached Trumble about becoming the crew's rig operator. Aldrich at that time had the chance to become the crew's tool pusher, as soon as a new rig operator was found. Trumble initially refused the offer because he was concerned about his ability to complete the required paperwork. He reminded Aldrich that he could not read or write very well. Aldrich told Trumble that he would help him do the paperwork.

19(a). The job of tool pusher required Aldrich to leave the site to obtain materials, making it impracticable at best for Aldrich always to assist Trumble with the paperwork. Aldrich probably did not truly grasp how difficult Trumble found the paperwork. Nonetheless, he led Trumble to believe that Dave Withers was aware of Trumble's limited reading and writing ability and had approved Aldrich helping Trumble do the paperwork if Trumble accepted the rig operator position. Dave Withers was not, in fact, aware of Trumble's limited reading and writing ability. However, since Aldrich was Trumble's immediate supervisor at the time and would be Trumble's immediate supervisor on the job if Trumble took the rig operator position, Aldrich reasonably appeared to Trumble to have the authority to promise to help Trumble with the paperwork, as an inducement for Trumble to take the job.

19(b). During the first month after Trumble assumed the rig operator duties, Aldrich wrote up the daily reports based on the information Trumble provided. The paperwork composed approximately 2% of the job and Glacier Well needed to know the daily tally of materials and equipment used at each drill site for client billing purposes. Trumble competently tracked the hours worked and number of rods, tubes, and types of pumps used each day on the drill rig site he supervised. Trumble was unable to write the information down on the company's standardized reporting form due to his disability, and needed a literate person to assist him. The relevant essential function of the rig operator's job is accounting for the human resources, equipment and materials used at the drill site each day, which Trumble performed capably. The assistance of a literate employee to commit Trumble's knowledge to paper was a reasonable accommodation, with which Trumble could and did perform this essential job function.

19(c). Completion of the paperwork went smoothly between late August and early October 2007, although it remained difficult and stressful for Trumble. Because the rig operator's daily written reports constituted about 2% of the job, taking from 9 to 14 minutes each day, the assistance promised and provided by Aldrich was a successful accommodation for Trumble's disability. Only when Aldrich balked at continuing to assist Trumble with the daily paperwork did insurmountable problems arise. Trumble performed his duties as rig operator very well, with the single exception that he found the written part of the reporting to be "frustratingly

impossible." He was able to keep accurate track of the equipment and materials used each day but lacked the capacity to complete the daily reports on his own. But for Aldrich's willful refusal either to continue himself, or to train another employee to assist Trumble, the few minutes of writing assistance each workday, provided by another Glacier Well employee, constituted a realistic reasonable accommodation for Trumble's known disability.

20. Tawnia Evans, Trumble's wife, knew that Trumble did not want the rig operator position. She had seen him struggle as a rig operator in previous work, when she had helped him with the paperwork. She nonetheless encouraged him to take the position, because the promotion would result in more income for the family.

21. With both his spouse and his boss urging him to reconsider, Trumble accepted the position of rig operator on August 28, 2007, with Aldrich moving up to become the tool pusher for the crew. Trumble accepted the offer in reliance upon Aldrich's promise to help him do the paperwork. In September 2007, Trumble's pay was raised to $16 per hour and $24 per hour for overtime.

22. For the first few months, Trumble had no problems as a rig operator. Immediately from the start of Trumble's assignment to the rig operator job, Aldrich did work with Trumble to do the paperwork. Aldrich's unstated goal was to get Trumble to the point where he could do all of the paperwork. As early as the second and twelfth days as rig operator, August 29, 2007 and September 10, 2007, Trumble was doing some of the paperwork, with Aldrich's guidance.

23. Initially, in the field or in the "doghouse" (the crew shack), Aldrich would stand next to Trumble and tell him what words to write. The paperwork was, in this sense, a joint effort between Aldrich and Trumble. Aldrich provided the necessary literacy and knowledge of how to fill out the paperwork, Trumble knew what had happened during the day, and together they completed the daily reports. The "daily reports" consisted of a single form, identifying the pump pulled from the well and itemizing the work events and times of the day work was performed. There is no evidence that Trumble ever prepared any of the rest of the paperwork (such as time sheets), with or without assistance.

24. After the initial period, Aldrich began to provide less help with daily reports; he told Trumble that if he could run the rig, he could also do the daily reports. Trumble tried to complete the daily reports, but found it frustratingly impossible. He complained that Aldrich was supposed to do the daily reports. Aldrich responded that Trumble needed to learn how to do it. Dave Withers was not privy to these exchanges.

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25. From October 1, 2007, through the middle of November 2007, most of the handwriting was Trumble's, but Aldrich continued to provide the knowledge necessary to complete the daily reports, although his assistance became increasingly begrudging. Cody Radasa, who hired on as a floor hand on the crew and became the derrick hand in September 2007, observed Aldrich helping Trumble with the daily reports on a daily basis, literally spelling words for Trumble.

26. Aldrich is an excellent, driven, intelligent oil field worker. He is a "hard-charger" who expects things to be done in a professional manner. Aldrich did not intend to single out employees to shame them or to call them names, but to motivate them. He did use the profanity typical to the oil field industry. He also insisted that the workers on his crew to meet his standards and his expectations. His insistence that Trumble do the daily reports on his own grew more intense.

27. Trumble then told Dave Withers that he was having difficulties with the paperwork and needed Aldrich to continue to help him with it. This was Withers' first notice of the accommodation Aldrich had promised Trumble. Withers told Trumble that he had to learn how to do the daily reports, because it came with the job, but that Aldrich could teach someone else how to do the daily reports, to help Trumble if Aldrich was not around.

28. Trumble told Aldrich about this conversation. Aldrich responded that Trumble was solely responsible for doing the daily reports and that he would not show anyone else how to do it. Trumble was afraid to have further communication with Withers about the paperwork because he thought Aldrich was threatening to get him fired.

29. Thereafter, Trumble did the best he could with the daily reports, leaving some parts blank. The parts that he was able to complete took him a long time, and he spent a lot more time worrying about the daily reports than other rig operators would. Trumble fell behind in the daily reports. Aldrich reluctantly continued to help with the daily reports and to complete other necessary paperwork, with both men frustrated and impatient at the process.

30. Aldrich's testimony was not credible that he was never verbally abusive toward Trumble, never called Trumble names like stupid, retarded, and ignorant, never yelled at Trumble and did not repeatedly tell Trumble that he had to learn how to do the daily reports or he would lose his job. One coworker (Gladue) and one former employer of Trumble, Brad Postma, who worked for a company that contracted for the corporation's services while Trumble was a rig operator for the corporation, both testified that they observed such behavior toward Trumble by Aldrich.

31. Trumble knows that his comprehension and cognitive functioning are impaired, in comparison with most people. He has compensated for it by working harder and concentrating to the best of his ability.

32. Aldrich's frustration sometimes resulted in conduct (body language, gestures, expressions, tone, and volume of voice) as well as comments that indicated to Trumble that Aldrich thought less of him because Trumble needed so much help with the daily reports. Trumble found Aldrich's conduct and comments belittling and abusive.

33. Trumble accepted what he felt was abuse rather than jeopardize his job, although it upset him. He broke down and cried in front of his wife and children more than once. Trying to complete the daily reports continued to frustrate and upset him, with the added aggravating factor of Aldrich's reactions to his difficulties. The stress Trumble experienced in his rig operator job became extreme as a result.

34. From the middle of November until the end of Trumble's employment, most of the daily reports were completed by someone other than Trumble. During that time, Trumble was only writing in the words that repeated from report to report, writing in items that were the same every day, the ones that Trumble knew how to do. Withers also gave his rig operators a cheat sheet, from which Trumble could copy words that he recognized but could not spell. Trumble never did the time sheets or the tallies of the tubing (pipe) pulled from the particular well upon which the crew was working.

35. On January 22, 2008, Trumble's rig was working on a tubing leak. Trumble and the crew failed to find the damaged pipe. Trumble took the next step in the process of locating the problem, by requesting a test truck. Utilizing the test truck causes delay and extra cost. Aldrich went to the site, visually inspected the pipes pulled from the hole, and almost immediately found the leak. Aldrich lectured the entire crew, warning them that they had two weeks to "pull it together" or he would find new hands and make a new crew. In Gladue's presence, Trumble told Aldrich that if he wasn't hollering at them they could get their job done.

36. Trumble operated the rig the next day, January 23, 2008, from 7:00 a.m. to 6:00 p.m. At the end of that shift, in the "doghouse," Aldrich came in and told Trumble that he could do all the paperwork or "go home," tossing the paperwork toward Trumble. Upset once again, Trumble believed that Aldrich was giving him an ultimatum to do all of the paperwork by himself – not only the daily reports, but also other paperwork such as time sheets and tubing tallies that he had not previously been required to do. He left work that day believing his employment was terminated, because he knew he could not do all of the paperwork by himself.

37. The next morning, January 24, 2008, Trumble did not return to work. He gave his keys to Gladue and told Gladue that he could no longer do the job because of the problems with the paperwork. Gladue turned in Trumble's keys to Withers. Withers then called Trumble's home phone number and spoke with his wife, asking her to have Trumble call Withers. Trumble never talked to Withers about quitting or why he quit.

38. Trumble never specifically told Withers either that he had a learning disability or that he was essentially unable to read. Trumble never told Withers of any name-calling problems in the field. Trumble liked Withers. Withers never made any changes to Trumble's employment, and never criticized Trumble's work or paperwork while he was rig operator.

39. During the time Trumble worked for the corporation, there were never any disciplinary actions against him. Trumble adequately performed his jobs as floor hand, derrick hand and rig operator (except for the problems with timely completion of the daily reports). "Adequately" in this context means that Trumble's continued employment with the corporation, but for his problems with timely completing the daily reports, was assured, given his satisfactory performance and the constant problems the corporation had with hiring and retaining reliable and capable workers.

40. The accommodation of having other workers assist with the paperwork would have been workable as a permanent accommodation whenever Aldrich's responsibilities as the tool pusher delayed or prevented him from assisting Trumble. Such an accommodation would have reduced Aldrich's frustration with the additional work of assisting Trumble. Relying upon other crew members, whose reliability for paperwork was, at best, untested, and whose longevity on the job was always uncertain, would sometimes have required Aldrich's involvement, but it would have been a viable long term accommodation that would not have posed an undue hardship for the employer.

41. Had Trumble talked to Dave Withers instead of quitting his rig operator job, Withers would have arranged continued assistance with the daily reports for Trumble, through other crew members. However, Aldrich, his immediate supervisor, had effectively discouraged him from going to Dave Withers for help. Since the assistance of other crew members would have been a viable permanent reasonable accommodation, the onus for the failure to pursue that accommodation rested upon Glacier Well rather than Trumble.

42. [Deleted in its entirety.]

43. The only reason Withers did not fashion a temporary accommodation of continuing assistance with the daily reports was that Trumble, convinced that he was

being fired and unwilling to continue to endure what he considered to be abuse by Aldrich, quit without giving Withers the opportunity. Trumble's decision to quit was reasonable, given his perception of the situation. However, as a result of his decision to quit, the corporation did not have the opportunity to address and correct the situation, which it would have had, but for the conduct of Aldrich in trying to force Trumble to do paperwork that Trumble lacked the capacity to do.

44. Had Aldrich done what Withers suggested to Trumble and assigned to other crew members the task of assisting Trumble with the daily reports, while Aldrich continued to complete the other paperwork for Trumble, Trumble could have continued his employment. The nature of the work and limited geographical area in which Glacier Wells worked, together with fluctuations in its work and the stress and difficulties for Trumble in doing the paperwork even with assistance, make it too speculative to project Trumble's continued employment beyond two years after he quit his job.

45. [Deleted in its entirety.]

46. With the viable accommodation that should have been offered to him by his relatively small and relatively local employer, Trumble would have continued to work, although not without stress and struggle, with his continued employment and earnings subject to the vicissitudes of the economy, changes in his circumstances, injuries, etc. It is reasonable to calculate his lost wages and bonuses, at the rate he last earned them while he worked as the rig operator, for a period of two years from his quit date. Because that two-year period has already run, it is not reasonable to include future damages in the award.

47. Subsequent to ending his employment with the corporation, Trumble made diligent efforts to find employment, but did not find a job. Devastated by the treatment he received from Aldrich and his departure from his work, Trumble slipped into a suicidal depression. He applied for Social Security Disability Insurance ("SSDI") benefits and was declared eligible in July 2008. He now subsists on the disability benefits and the other "safety net" programs that provide minimal medical coverage, food stamp assistance, etc., to replace the support for his family and for himself that he had been able to provide working in the oil fields. Trumble's anxiety and depression, magnified by the loss of his self-support through work and his forced return to reliance upon various kinds of disability benefits, ultimately drove him to resume taking mood stabilizing prescription medication for his bipolar disorder.

48. [Deleted in its entirety.]

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49. At the time his employment with the corporation ended, Trumble was earning $17.00 per hour regular pay, and $25.50 per hour for overtime. Shortly after Trumble's employment ended, the corporation raised the pay rates for rig operators to $18.25 per hour, with time-and-a-half for overtime, which would have been a 7.35% increase in Trumble's pay rate. According to the corporation's payroll records (Exhibit 6), from the second week in September 2007 (when his pay rate was increased to reflect his rig operator position) through January 23, 2008, a period of 20 weeks, Trumble worked 830 hours of regular time and 170.5 hours of overtime. In addition, he received bonuses during those same 20 weeks of work that totaled $1,391.27. Those 20 weeks of work thus earned him a total of $19,849.02 in wages and bonuses [830 times $17.00 plus 170.5 times $25.50 plus $1,391.27], so that he averaged $992.45 per week [$19,849.02 divided by 20]. Beginning the last week in January 2008, Trumble would have earned $1,065.40 per week [$992.45 times 1.0735], which would be $2,130.80 in wages for regular and overtime hours and bonuses for each successive 2-week pay period. After the pay period ending on February 4, 2008 (during which Trumble would have earned an additional 12/14ths of $2,130.80, or $1,826.40), Trumble lost $2,130.80 every two weeks. Following the February 4, 2008, pay period through the end of the two years following his departure from his job (through January 23, 2010), there have been 51.36 two week pay periods (719 days[2] divided by 14), for a total loss of wages and bonuses to the end of that two years of $111,264.29 [$2,130.80 times 51.36 plus $1,826.40]. Trumble has not been able to earn wages since he quit his job, due to the deterioration of his emotional condition, and thus there is no offset for residual earning capacity.

50. Prejudgment interest on Trumble's lost wages and bonuses accrue as a matter of law, at 10% simple per year. For the initial pay period after he quit his job, interest accrued beginning February 5, 2008 and ending August 18, 2010 (the date of this revised decision), on Trumble's loss of $1,826.40. For those 66.07 pay periods (925 days divided by 14), prejudgment interest is $462.84 [$1,826.40 times .1 divided by 365 times 14 times 66.07]. For subsequent lost wages and bonuses, interest accrues on $2,130.80 for a total of one less pay period for each successive pay date, through the last regular pay date within the two years during which additional wages and bonuses were lost. In other words, the prejudgment interest on losses during each of those full regular pay periods is the amount lost per pay period, times the daily interest rate as a decimal, times 14 (number of days in each pay period), times the sum of the number of pay periods coming after each pay period (for which loss occurs) up to the date of this revised decision [65.07 + 64.07 . . . +

[2] In this and following calculations, the Hearing Officer has noted that 2008 was a Leap Year.

15.07 + 14.07, the sum of which is 2,049.55]. Thus, the prejudgment interest accruing on the losses from these full pay periods is $16,750.83 [$2,130.80 times .1 divided by 365 days times 14 times 2,049.55]. For the final partial pay period within the two years of loss, Trumble lost 64% of two weeks' wages and bonuses (***cf.*** Finding 49, ***supra***), which was $1,363.71, for 13.07 pay periods, or 183 days, for which the prejudgment interest was $68.37 [$1,363.71 times .1 divided by 365 days times 183 days]. The total prejudgment interest is thus $17,282.04 [$462.84 plus $16,750.83 plus $68.37].

51. [Deleted in its entirety.]

52. The corporation is liable for the emotional distress that Trumble experienced. The loss of his livelihood had a deep emotional effect on Trumble and his self esteem. Since the corporation was able reasonably to provide a permanent accommodation, the devastating impact upon Trumble, which contributed significantly to his subsequent decompensation and decline after he lost his livelihood, is compensable and occurred over a period of months while he worked as the rig operator, due to the hostile work environment, and after he had no choice but to leave that job, when his fragile ability to cope with the demands of his job had been shattered by both the hostile environment and the insistence that he do what he was unable to do without any accommodation. The reasonable value of that emotional distress is $50,000.00.

53. The corporation has no written employment discrimination policy and there is no evidence that the corporation has any type of employment discrimination policy or procedure whatsoever, formal or informal.

54. In addition to a mandatory injunction, the department should, to address the risk of recurrence of the illegal conduct involved in this case, order the corporation (1) to provide, at its expense, appropriate training of Dave Withers regarding disability discrimination and (2) to prepare and submit policies and notices regarding disability accommodation to the Human Rights Bureau for review, thereafter adopting and posting them, with any revisions or additions as HRB may direct, providing any reports HRB may require on its compliance with the order implementing this finding.

IV. DISCUSSION[3]

1. Liability

The Montana Human Rights Act prohibits employers from discriminating against a person in a term, condition, or privilege of employment because of

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

disability.[4] Mont. Code Ann. § 49-2-303(1)(a). A disability is a physical or mental impairment that substantially limits one or more of a person's major life activities. Mont. Code Ann. § 49-2-101(19)(a)(i). Major life activities include, for examples, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and writing. *McDonald v. Mont. D. E. Q.*, ¶39, 2009 MT 209, 351 Mont. 243, 214 P.3d 749. Disability discrimination includes failure to make reasonable accommodations for an otherwise qualified person with a disability. *McDonald*, ¶40; Mont. Code Ann. § 49-2-101(19)(b).

Trumble unquestionably suffers from a disability. His immediate supervisor, Aldrich, offered Trumble an accommodation for that disability, so that Trumble could take the rig operator position. Dave Withers did not authorize the offer of accommodation at that time. However, the corporation is estopped to deny responsibility for providing the accommodation, on a trial basis, since Aldrich, with ostensible authority from the corporation, offered it.[5] Mont. Code Ann. § 28-10-403.

When a principal's conduct makes it possible for its agent to inflict injury upon a third person who dealt with him in good faith under his apparent authority, the principal is estopped from denying the agent's apparent authority. ***See, e.g.***, *Lindblom v. Employers' Liability Assur. Corp.* (1930), 88 Mont. 488, 295 Pac. 1007.

Ostensible agency cannot ordinarily be established by evidence of what the ostensible agent (Aldrich) said to the relying party (Trumble) about the agency relationship. Mont. Code Ann. § 28-10-405(2). In this case, Aldrich was Trumble's supervisor, an actual agent of the corporation for defining the scope of Trumble's work. Ostensible authority can be created by the principal's omissions as well as acts. ***E.g.***, *Northwest Polymeric, Inc. v. Farmers State Bank* (1988), 236 Mont. 175; 768 P.2d 873 , 875, ***citing*** 3 Am. Jur. 2d Agency § 79. The corporation did nothing to give notice to Trumble that Aldrich lacked actual authority to offer Trumble assistance in doing the paperwork required of the rig operator. Trumble had previously worked as a rig operator for another employer, with his wife's help in doing the paperwork. He reasonably relied upon Aldrich's offer to provide similar help with the paperwork, since Aldrich was his boss and would be his boss should he become the rig operator. The corporation cannot stand upon Withers' ignorance of the offer of the accommodation, on at least a trial basis. Aldrich already had the apparent authority

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[4] The Hearing Officer's February 17, 2009, order denying the corporation's motion to dismiss this proceeding for lack of subject matter jurisdiction stands, there being no basis in fact or law to reconsider it.

[5] Trumble argued that Withers knew of the accommodation, while the corporation denied that the accommodation was offered at all. As a result, the parties did not directly address ostensible authority and equitable estoppel, discussed in the three paragraphs following this footnote.

to make the offer, not because he told Trumble he had the authority, but because his position as Trumble's present and future supervisor clothed him with that apparent authority.

Trumble took the job in reasonable reliance upon the offered accommodation, knowledge of which is imputed to the corporation. Aldrich made the offer to induce Trumble to take the rig operator's job, which Trumble did do. By doing so, Trumble began an attempt to do a job that he could not do without the assistance Aldrich offered to him. Thus, the corporation is estopped from denying the accommodation, again, on at least a trial basis. ***E.g.***, *Selley v. Liberty NW. Ins.*, ¶¶9-10, 2000 MT 76, 299 Mont. 127, 998 P.2d 156 (setting forth the elements of equitable estoppel, which are met here).

Withers, by proposing that Aldrich prepare other crew members and require them to assist Trumble, may have ratified Aldrich's offer of the original accommodation. The Hearing Officer has not developed this "ratification" approach, because Withers still had very incomplete knowledge of the original offer and of Trumble's disability when he made the proposal. If Wither's proposal was a ratification of Aldrich's original offer of accommodation, that ratification created the same legal situation as was created by Aldrich's offer with ostensible authority, leading to the same ultimate result.

The department follows the Montana Rules of Evidence in making contested case fact determinations. "Notice of Hearing," Dec. 4, 2008, p. 2; ***also see*** Admin. R. Mont. 24.8.704 and 24.8.746. Applying the Rules, the procedural framework for department discrimination cases is the same procedural framework applicable in district court trials. In district court trials, the burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence during the trial is upon the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. § 26-1-401. Except where there is specific law to the contrary, the burden of persuasion always remains upon the party advancing the particular claim for relief or defense at issue. ***E.g.***, Mont. Code Ann. § 26-1-401; *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862; *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813; 818; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212. In civil cases, a preponderance of the evidence – enough to persuade the fact finder about what is more likely than not true – is required. Mont. Code Ann. § 26-1-403(1). When the record contains conflicting evidence of what is true, the fact finder must decide the credibility and the weight of the evidence. *Stewart v. Fisher* (1989), 235 Mont. 432, 767 P.2d 1321, 1323; *Wheeler v. City of Bozeman* (1989), 232 Mont. 433, 757 P2d 345, 347; *Anderson v. Jacqueth* (1983), 205 Mont. 493, 668 P.2d 1063, 1064;. In this regard, the standard for

deciding facts is still the preponderance of evidence standard. ***Cf.***, *Pannoni v. Bd. of Trustees*, ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance – "more likely than not" – standard, in the course of arguing that on the particular issue involved a lighter "plausibility" standard should apply).

Although Aldrich denied offering to do the paperwork, to induce Trumble to take the rig operator job, he did provide that accommodation, at first willingly and then grudgingly. Aldrich would not have gone as far as he did in helping Trumble unless he had actually offered the accommodation. A witness false in one part of his testimony is to be distrusted in other parts. Mont. Code Ann. § 26-1-303(3). Aldrich denied verbal abuse of Trumble, but Trumble's testimony about such abuse was corroborated, not just by Gladue, whose credibility was suspect, but also by Postma, who had no motive to shade his testimony in favor of Trumble. Trumble often misunderstood communications, but the evidence that Aldrich was not telling the truth about the verbal abuse was credible and substantial. Being false about that part of his testimony, his denial that he made the accommodation offer was not credible. Distrust of his denial of offering the accommodation, together with the weight and credence his subsequent conduct lent to the testimony that he made the offer, constituted a preponderance of the evidence, making it more likely than not that Aldrich did offer an accommodation to Trumble, on behalf of the corporation.

The accommodation offered to Trumble worked, and would have continued to work with the addition of training for other members of the rig crew to assist Trumble with the paperwork when Aldrich was not available. Trumble did have a disability and the corporation had promised the accommodation of providing help with the paperwork. The corporation had a duty to follow through with that accommodation if it was reasonable (it was) and if with it Trumble could perform the essential job functions of his job (he could). Mont. Code Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.606(2). An accommodation is unreasonable if it imposes an undue hardship on the business operation. Admin. R. Mont. 24.9.606(1) and (4). An undue hardship means an action requiring significant difficulty or extraordinary cost when considered in light of the nature and expense of the accommodation as well as the overall financial resources and type of operations of the corporation. Admin. R. Mont. 24.9.606(5).

The refined accommodation that Withers proposed would have worked, without an undue hardship on Glacier Well's operations, but it was never tried. Aldrich did not follow through with it and Withers did not assure that it was actually tried. With no policy to address disability discrimination, or any discrimination issues, for that matter, Trumble's failure to talk to Withers again did not provide the corporation with a defense for its failure to implement the refined accommodation

Withers proposed. When Trumble quit because he could not do the paperwork alone, as he reasonably believed Aldrich was demanding, the corporation engaged in illegal disability discrimination for its failure to try Withers' refinement of the accommodation Aldrich promised to Trumble. Mont. Code Ann. § 49-2-303(1)(a).

Unlawful discrimination also includes subjecting an employee to harassment in the workplace on the basis of his disability. Admin. R. Mont. 24.9.604(3)(b). To establish a claim for hostile work environment harassment, an employee must prove membership in a protected class and unwelcome harassment because of that class membership, so severe or pervasive that it altered his employment conditions and created an abusive working environment. *Campbell v. Garden City P&H,* ¶¶15-19, 2004 MT 213, 322 Mont. 434, 97 P.2d 546. The employee also must show he perceived the work environment to be hostile and abusive, and that a reasonable person in his shoes would also have perceived the environment as hostile and abusive. *Campbell*, ¶19.

Clearly, Trumble was a member of a protected class because of his disability, and he endured months of unwelcome frustration and verbal abuse at his job with Glacier Well because of that disability. The verbal abuse was so severe and pervasive that it altered his employment conditions and created a hostile working environment, causing him to experience excruciating emotional distress and ultimately to quit his job. Not only did he perceive the work environment to be hostile and abusive, any reasonable person subjected to the same treatment would have perceived the environment as hostile and abusive. Trumble proved the necessary elements of the hostile work environment claim.

2. Damages

The department may order any reasonable measure to rectify harm Trumble suffered as a result of illegal discrimination. 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.

> A hearings officer may order any reasonable measures to rectify any harm suffered as a result of illegal discrimination. [Mont. Code Ann. §] 49-2-506(1)(b) . . . . Remedies provided by Montana's Human Rights Act seek to return an employee who is a victim of discrimination to the position that they would have occupied absent the discrimination. Vortex, [*Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836], ¶27.

Mercer v. McGee, ¶25, 2008 MT 374, 346 Mont. 484, 197 P.3d 961; ***see also*** *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.[6]

By proving discrimination, Trumble established a presumptive entitlement to lost wages. *Albermarle Paper Company*, ***at*** 417-23. Trumble must prove the amount of wages he lost, but not with an unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Sys. Co.* (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626 (fact that back pay is difficult to calculate does not justify denying award).

Trumble is entitled to recover lost wages and bonuses, with prejudgment interest, for a period reasonably designed to ensure that Trumble is made whole. In addition, he is also entitled to recover for the excruciating emotional distress he suffered during October 2007 through January 2008, from the hostile working environment Aldrich created, and thereafter suffered due to loss of his livelihood when he left his job because his supervisor demanded that he now do that which he could not do – complete paperwork without the modified reasonable accommodation available without undue hardship to the corporation.

As already noted, the purpose of the remedies provided by Montana's Human Rights Act is to return employees who are victims of discrimination to the position they would have occupied without the discrimination. *Vortex*, ¶27. As time passes since Trumble quit his job, an ever increasing number of uncertainties come into play in determining the value of what he lost. It is uncertain whether Glacier Well, a small and fairly "local" enterprise, would have continued to operate at a level that sustained Trumble's employment after the original hearing, particularly in light of the continued future economic difficulties that have impacted virtually all employers, large as well as small. It is uncertain whether Trumble would have remained healthy and able to work, assuming the work would still have been available.

The Montana Legislature has limited recovery of lost wages and fringe benefits resulting from wrongful discharge from employment to not more than four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). Although the Wrongful Discharge from Employment Act does not apply to Human Rights Act cases, its limitation upon maximum pecuniary recovery is a useful measure of what is reasonable to remedy comparable pecuniary harm under the Montana Human Rights Act, particularly beyond the date of hearing. Therefore, the Hearing Officer, having

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[6] Analogous federal cases can be used in interpreting the Montana Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841.

considered how far to extend past pecuniary damages as well as whether to include prospective pecuniary damages, starts with the practice already used by the Hearings Bureau in these cases – using the WDEA's four year maximum and deciding whether to shorten the time or use the full four years, with or without "augmented" pecuniary damages based upon "reasonability" factors pertaining to certainty of continued losses, such as the degree of stability and job security realistically available through the particular employer, the attractiveness of the job in the market, the peculiar situation of the charging party, etc.

The practice of using the WDEA's maximum recovery period has been in use in the Hearings Bureau for at least 10 years. *Houle v. Great Falls Native American Center*, HRC Nos. 0009008982, 0009008954, 9901008915, 0009008964 (June 12, 2000); *Wombold v. Cascade S.D. No. 3*, HRC Case Nos. 0021010079 and 0021010078 (July 18, 2003); *Chebul v. Montana Standard/Lee Newspapers*, HRB #0061011788, Case No. 114-2007 (March 15, 2007); *Feit v. BNSF Ry. Co.*, (August 5, 2010), HRB #0091013577, Case No. 475-2010. In each of those cases, with larger and more stable employers, as well as (in some instances) better job security and greater financial return for the lost jobs in the particular markets, the full four years was used, with augmentation in some of the cases. In the present case, the Hearing Officer has found that two years of lost wages and bonuses is a reasonable measure to make Trumble whole for his pecuniary losses.

Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a *per se* invasion of a legally protected interest, and a person who suffers emotional distress due to violation of such a fundamental human right is entitled to a remedy. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Campbell v. Choteau Bar and S. H.* (March 9, 1993), HRC #8901003828. In this case, the extreme emotional distress generated by the hostile work environment and the eventual loss of livelihood is remedied by the substantial award for emotional distress set forth in the findings.

The emotional damage to Trumble was greater than that suffered by charging parties who may have subjected to what could be characterized as more outrageous conduct, ***e.g.***, *Smith v. Cynergy Adv., Inc.* (March 26, 2010), HRB #0091013593, Case No. 655-2010 (Smith's humiliation at unwelcome physical sexual contact by her supervisor, including having her top torn off her, and her subsequent anguish, compounded by being discharged for resisting the unlawful sexual advances, justified a $40,000.00 emotional distress award). The measure of emotional distress is the suffering of the charging party, not how egregious the illegal discrimination may have been. Similarly, although Trumble's financial consequences were not as large as those suffered by the charging party in *Feit*, Trumble's emotional distress was so much greater and so much more debilitating than that suffered by Feit, that it is

reasonable to award him twice as large a recovery for his emotional distress as was merited by Feit's distress (Feit was awarded $25,000.00).

3. Affirmative Relief

The law requires an order enjoining the corporation from discriminating against other disabled employees. Mont. Code Ann. § 49-2-506(1). In addition, the order may also prescribe conditions on the corporation's future conduct that are relevant to accommodation of employees with disabilities and require both any reasonable measures to correct the discriminatory conduct and a report on the manner of compliance. Mont. Code Ann. § 49-2-506(1)(a), (b) and (c). The appropriate order is reflected in the findings and the conclusions herein.

V. CONCLUSIONS OF LAW

1. The department has jurisdiction. Mont. Code Ann. § 49-2-512(1).

2. Trumble was an otherwise qualified individual with a disability who with a reasonable accommodation could perform the essential functions of his rig operator job. The corporation illegally discriminated against him because of disability when it stopped providing the accommodation it promised and failed and refused to try an alternative reasonable accommodation that was possible and when it subjected him to a hostile work environment that caused him extreme emotional distress. Refusal to accommodate, with the hostile work environment, forced him to quit his job.

3. Trumble is entitled to recover $111,264.29 in lost wages and bonuses, $17,282.04 for prejudgment interest on those losses, and $50,000.00 for emotional distress resulting from the corporation's illegal disability discrimination.

4. The department must order the corporation to refrain from engaging in the discriminatory conduct and should prescribe conditions on its future conduct relevant to the type of discriminatory practice found and require the reasonable measures detailed in the findings and in the order to correct the discriminatory practice.

VI. ORDER

1. Judgment is granted in favor of Kevin Trumble and against Glacier Well Service, Inc., on Trumble's charges of illegal disability discrimination against him as alleged in his complaint and stated in the final prehearing order herein.

2. Glacier Well Service, Inc., is ordered immediately to pay to Kevin Trumble the sum of $178,546.33, representing $111,264.29 in lost wages and bonuses, $17,282.04 for prejudgment interest on the lost wages and bonuses, and $50,000.00 for emotional distress. Post judgment interest accrues by operation of law.

3. The department permanently enjoins Glacier Well Service, Inc. from discriminating against any person with a disability by failing (a) to provide reasonable accommodation and (b) to prevent its employees from subjecting such a person to a hostile work environment because of the disability, both as required by law.

4. Within 20 days of the entry of this order, Glacier Well Service, Inc., shall (1) consult with the department's Human Rights Bureau and identify appropriate disability discrimination training for Dave Withers, thereafter providing that training at its expense at the earliest availability of the training; (2) prepare and provide to the Human Rights Bureau for its review policies and notices regarding disability accommodation thereafter adopting and posting them, with such revisions or additions as the Human Rights Bureau may direct, and (3) provide to the Human Rights Bureau any reports it may require (at the time or times it requires) on Glacier Well Service, Inc.'s compliance with this paragraph of this order.

5. All documents and information sealed in accord with prior orders or ruling of the Hearing Officer remain sealed unless and until modified by further order of a tribunal exercising jurisdiction over the sealing.

Dated: August 18th, 2010.

/s/ TERRY SPEAR

Terry Spear, Hearing Officer

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Philip A. Hohenlohe, Hohenlohe, Jones, PLLP, attorney for Kevin Trumble, and Thane Johnson, Johnson, Berg, McEvoy & Bostock, PLLP, attorney for Glacier Well Service, Inc.:

The decision of the Hearing Officer on remand, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(c).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission c/o Katherine Kountz
Human Rights Bureau, Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. Unless the transcript the parties have stipulated is the official record is complete for all appeal issues, the appealing party or parties must arrange for the preparation of transcription of the rest of the record of the hearing at their expense. Contact Shawndelle Kurka, (406) 444-3870 immediately to arrange for transcription of the record. The transcript stipulated as the official record is in the contested case file.