

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

TERRY ROD,
Charging Party/Appellee,

HRB CASE NO. 0180038

-v-

FINAL AGENCY DECISION

BNSF RAILWAY COMPANY,
Respondent/Appellant.

Charging Party, Terry Rod, filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of disability. Following an informal investigation, the Department determined that reasonable cause supported Rod's allegations. The case went before the Office of Administrative Hearings of the Department of Labor & Industry (OAH), which held a contested case hearing, pursuant to Mont. Code Ann. § 49-2-505.

The *Hearing Officer Decision and Notice of Issuance of Administrative Decision dated November 27, 2019* found that BNSF illegally discriminated against Rod by failing to provide a reasonable accommodation for Rod's disability. The Hearing Officer ordered affirmative relief and awarded Rod front pay, back pay, and emotional distress damages.

Both Rod and BNSF appealed to the Commission. The Commission heard the appeal on March 20, 2020 via conference call. The Commission affirmed in part, reversed in part, and remanded the case to OAH for further proceedings consistent with its opinion. *Commission Remand Order dated June 17, 2020*.

After proceedings before OAH on remand, the *Hearing Officer Decision on Remand and Notice of Issuance of Administrative Decision dated January 29, 2021* again entered judgment in

favor of Rod, ordered affirmative relief, and awarded Rod front pay, back pay, and emotional distress damages in accordance with the Commission's directives.

On February 11, 2021, BNSF appealed to the Commission. The Commission considered the matter on May 20, 2021 via conference call. Kathryn Kohn Troidahl, attorney, appeared and presented oral argument on behalf of Rod. Ben Rechtfertig, attorney, appeared and presented oral argument on behalf of BNSF.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3). The commission reviews conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. The commission reviews findings of fact to determine whether substantial evidence exists to support the particular finding. Admin. R. Mont. 24.9.123(4)(b); *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance." *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305.

Certain discretionary rulings by the Hearing Officer, such as rulings on pretrial motions and witness testimony, are reviewed for an abuse of discretion. *State v. McOmber*, 2007 MT 340,

¶ 10, 340 Mont. 262, 173 P.3d 690; *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 323, 815 P.2d 1153, 1154 (1991).

BACKGROUND

Rod began working for BNSF in 1994 as a Machinist, and he worked primarily at the Glendive Diesel Shop (GDS). Rod's position was unionized and subject to a collective bargaining agreement (CBA). Rod was later diagnosed with hereditary spastic paraparesis, a condition that affects his lower extremities. In 2007, BNSF staff expressed safety concerns over Rod's balance and gait, and BNSF required health evaluations and work analysis to determine what work Rod could safely perform. After the evaluations and job analysis, BNSF released Rod to work a modified Machinist position. Rod was still classified as a Machinist and primarily worked ordering parts, doing inventory, and performing other sedentary administrative work.

Rod was always classified as a Machinist, and his physical condition was periodically re-evaluated by medical providers. After re-evaluations of Rod's condition in 2013 and 2014, BNSF approved Rod to continue working in the modified Machinist position. Rod also bid on the Machinist position when required, and he was always awarded a Machinist position. Rod was unofficially known by his coworkers as "Shop Support," and later as the "Warehouse Coordinator."

In 2016 and 2017, BNSF furloughed a majority of the employees at the GDS. BNSF rearranged the workforce to cover the essential work of the Shop, and many job duties previously performed at the GDS were cut. In May 2017, Rod bid on three different positions: Machinist Lead Relief, Machinist Lead, and Machinist. Rod was awarded a Machinist position; however, on May 8, 2017, BNSF informed Rod that he was being removed from service and placed on medical leave due to his disability.

DISCUSSION

Before the Commission, BNSF argues that the Hearing Officer erred in two respects. First, the Hearing Officer's August 28, 2020 Order declining to reopen the record or take judicial notice of the closing of the GDS was error. Second, the Hearing Officer's Decision dated January 29, 2021 awarding Rod front pay until age 65 was also error because the GDS closed on July 7, 2020 and is now defunct. BNSF contends that the Hearing Officer also ignored BNSF's evidence on essential issues, misapprehended the effect of the evidence as a whole, misapplied the law to facts, and ultimately erred as a matter of law in awarding additional damages to Rod until age 65 and miscalculating front pay.

In response to BNSF's first contention, Rod argues that the Hearing Officer properly denied BNSF's request to reopen the record or take judicial notice of the closure of the GDS on July 7, 2020, almost two years after the evidentiary record in this case closed. Rod contended that BNSF's characterization of the effect of the shop closure on Rod is misleading and factually erroneous.

Rod additionally responds that the *Hearing Officer's Decision on Remand dated January 29, 2021* correctly followed the Commission's June 17, 2020 *Remand Order* by recalculating Rod's front pay damages based on the evidentiary record from the three-day contested case hearing on October 2-4, 2018. The Hearing Officer specifically found that Rod's front pay award to age 65 was neither speculative nor a windfall; instead, his expectation that he would work for BNSF until age 65 was based on substantial evidence, including his seniority in a union protected job, medical records, his own testimony, the testimony of his wife and co-workers, the testimony of his treating physicians, and un rebutted expert witness testimony.

Both parties stipulated that the Hearing Officer erred in calculating Rod's front pay damages based on 26 pay periods. See, Addendum A. The correct number of pay periods per year was 24.

I. The Hearing Officer's August 28, 2020 Order declining to reopen the record or take judicial notice of the GDS shop closure.

Certain discretionary rulings by the Hearing Officer, such as rulings on pretrial motions and witness testimony, are reviewed for an abuse of discretion. *State v. McOmber*, 2007 MT 340, ¶ 10, 340 Mont. 262, 173 P.3d 690; *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 323, 815 P.2d 1153, 1154 (1991). The Commission found no abuse of discretion in the Hearing Officer's August 28, 2020 order declining to reopen the record and declining to take judicial notice of the July 7, 2020 closure of the GDS. The Commission affirmed the Hearing Officer's August 28, 2020 order.

II. Damages.

A. Calculation of wages is based on 24 pay periods, not 26.

Based on the stipulation of the parties, the Commission unanimously found that Hearing Officer erred in using 26 pay periods per year in the calculation of Rod's damages. See, Addendum A. The correct number of pay periods per year is 24.

B. The length of time for the calculation of front pay.

"The commission reviews damage awards to determine if they are clearly erroneous. A party asserting that a damage award is clearly erroneous shall specifically cite the portions of the record supporting that claim." Admin. R. Mont. 24.9.123(4)(c).

After careful consideration of the complete record and the argument presented by the parties, the Commission found substantial evidence to affirm the Hearing Officer's findings in the *Remand Order dated January 29, 2021* that Rod should get front pay for 12.84 years until age 65.

Since the Commission determined, over BNSF's objection, that the award of front pay to Rod for 12.84 years until age 65 is correct, and that the correct number of pay periods per year is 24 (as stipulated by the parties), the Commission modified the front pay damage award to the amount stipulated by the parties under these findings, \$348,458.81.¹

ORDER

IT IS HEREBY ORDERED that the hearing officer decision is AFFIRMED, with the following modifications.

1. The Hearing Officer erred when she used 26 pay periods per year as the basis for Rod's front pay damages calculations. See, Addendum A. The correct number of pay periods is 24 per year.

2. The August 28, 2020 Order declining to reopen the record or take judicial notice of the July 7, 2020 closure of the GDS is affirmed.

2. The Hearing Officer's Decision on Remand dated January 28, 2021 that Rod is entitled to front pay until for 12.84 years, until age 65, is affirmed.

3. Given the findings by the Commission that Rod is entitled to front pay for 12.84 years, until age 65, and that the correct number of pay periods per year is 24, the award of front pay damages is modified to be the amount stipulated by the parties, \$ 348,458.81.

¹ Commissioner Almy disagreed with the formula that the Hearing Officer used in calculating front pay. He believes that the proper method to use is the present value of an income stream for 12.84 years at a discount rate of 2.25%, which totals approximately \$465,2320.92, instead of the present value of a lump sum which the Hearing Officer used which resulted in approximately \$406,604.69. He indicated that the difference of approximately \$56,000 when adjusted, should be awarded to Rod to make him whole. He also questioned whether, if the Commission were to adopt the present value of an income stream formula and re-calculate Rod's front pay, the discount rate of 2.25% should be used. It was the 10-year Treasury rate at the time of the Hearing Officer's calculation. However, the current 10-year Treasury rate is 1.675%. He could make a case for using either if the Commission were to re-calculate.

The Commission allowed additional argument by the parties as to whether to consider the issues raised by Commissioner Almy. After deliberation, since these issues were not raised by the parties, the Commissioners Broadbent, Brodsky, and Almy voted to modify the award of front pay to be the amount stipulated by the parties, \$348,458.81, and they voted to take no position on whether the formula or the discount rate used by the Hearing Officer was correct. Commissioner Bartos abstained.

Either party may petition the district court for judicial review of the Final Agency Decision. Mont. Code Ann. §§ 2-4-702 and 49-2-505. This review must be requested within 30 days of the date of this order. A party must promptly serve copies of a petition for judicial review upon the Human Rights Commission and all parties of record. Mont. Code Ann. § 2-4-702(2).

DATED this 23rd day of June 2021.

/s/ Debra Broadbent
Debra Broadbent, Acting Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 23rd day of June 2021.

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