COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LARRY MOYER, II, Complainant	:	
v.	:	PHRC CASE NO. 200408084 EEOC CHARGE NO. 17FA562414
GARY DEIMLER & SONS CONSTRUCTION, Respondent	:	

STIPULATIONS OF FACT

FINDINGS OF FACTS

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Larry Moyer, II, Complainant	:	
v.	:	PHRC Case No. 200408084
	:	EEOC No. 17F200562414
Gary Deimler & Sons Construction, Respondent	:	

STIPULATIONS OF FACT

The parties hereby stipulate that the following facts are true and no additional proof thereof is required:

1. Complainant Larry Moyer II is an adult and, at all times relevant, was a resident of Pennsylvania.

2. At all times relevant, Respondent Gary Deimler & Sons Construction was an employer within the meaning of section 4 of the Pennsylvania Human Relations Act, 43 P.S. § 954.

3. Respondent hired Complainant in 2001 as a carpenter.

4. Complainant worked for Respondent until on or about February 28, 2005.

5. Complainant filed the captioned verified complaint with the Pennsylvania Human Relations Commission ("PHRC") on or about June 9, 2005.

6. A PHRC representative served a copy of the complaint on Respondent on July 1, 2005.

7. Respondent filed a timely verified answer to the complaint.

8. On or about August 5, 2009, the PHRC notified Respondent that it believed probable cause existed to credit the allegations of the complaint.

9. PHRC conducted a conciliation conference on December 18, 2010.

10. Conciliation was not successful.

11. The jurisdictional prerequisites for a public hearing have been satisfied.

Frank Clark, Esq.
For Respondent

12/16/11
Date

Joseph Bednarik, Esq.
For Commission Staff

12/20/11
Date

FINDINGS OF FACTS *

1. The Respondent in this case is Gary Deimler & Sons Construction, (hereinafter "Deimler") a state wide home remodeling construction company that performs work on approximately 250 projects a year, and is located at 6530 Derry Street, Harrisburg, Pennsylvania. (N.T.1 144-145, 147; N.T.2 61).

2. Gary Deimler is Deimler's President and his son, Craig Deimler is Deimler's Vice President. (N.T.1 159; N.T.2 176; C.E. 7 at 10).

3. The work week for Deimler employees begins on Friday and ends on Thursday. (N.T.1 119, 145)

4. Typical work hours for Deimler employees are from 7:00 a.m. to 3:30 p.m., however in the winter the hours of 7:30 a.m. to 4:00 p.m. is more typical. (N.T.1 45, 146; J.E. 1 at 24).

5. Deimler employees working 35 hours or more per week are full time employees and employees whose work schedules are less than 35 hours per week are part-time. (J.E. 1 at 7).

*The foregoing "Stipulations of Fact" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T.1 Notes of Testimony – June 7, 2011
N.T.2 Notes of Testimony – June 8, 2011
J.E. Joint Exhibit
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
S.F. Stipulations of Fact

6. Each Deimler project is separated into 25 phases which involves everything from initial set up to final clean up. (C.E. 7 at 30).

7. Deimler employees are responsible for maintaining weekly time cards on which an employee lists the number of hours worked according to a particular job, the category of work performed, the phase of the project, the name of the project, the date, and a description of the work done on a particular day. (N.T.1 119, 150; C.E. 7 at 27; J.E. 1 at 20).

8. On their time cards, employees are specifically required to fill in the total number of hours they worked each day. (J.E. 1 at 21).

9. Each Deimler project is assigned one of 8 Project Leaders. (N.T.1 59; C.E. 6 at 6).

10. Before an employee turns in a weekly time card the Project Leader, for whom the employee worked, is required to initial it. (J.E. 1 at 20).

11. Teams of Deimler employees are assigned to a project and a team can be anywhere from one to eight employees depending on the size of a job. (N.T.1 51, 151).

12. In January 2001, the Complainant, Larry Moyer, II, (hereinafter "Moyer") was hired by Deimler for the position of Carpenter Level 1. (N.T.1 40; N.T.2 103).

13. After being informed that his work was excellent, in early 2003, Moyer was promoted to the position of Carpenter Level 2 where he was assigned more independent work involving more meaningful tasks. (N.T.1 41-42)

14. In March 2003, Moyer took a medical leave of absence to receive medical treatment of a severe torn meniscus and cartilage in his right leg.

(N.T.1 42, 146; C.E. 7 at 16).

15. Before going on medical leave, Moyer spoke with Craig Deimler who, because Moyer had injured his leg partly at work and partly at home, agreed to permit Moyer to receive unemployment benefits rather than have Moyer file a worker's compensation claim. (N.T.1 40; R.E. 1 at 48-49).

16. Moyer was off work for 11 months and 3 weeks. (R.E. 1 at 51).

17. Shortly after leaving work on medical leave, on March 12, 2003, Moyer underwent the first of two arthroscopic surgeries on his right knee.

(N.T.1 44, 95, 101, 128, 176; J.E. 23 at 41; R.E. 34-35).

18. Following the first surgery, Moyer developed blood clots and swelling in his right leg. (N.T.1 176).

19. Additionally, following the first surgery, Moyer began to experience chronic pain from a point above his right knee down to his foot.

(N.T.1 106, 127).

20. In January 2004, a second orthopedic surgeon, Dr. Thompson, performed a second surgery on Moyer's right knee.

(N.T.1 95; 128; R.E. 1 at 41).

21. Dr. Thompson suspected that the chronic pain Moyer was experiencing was reflex sympathetic dystrophy, (hereinafter "RSD") otherwise know as chronic "complex regional pain syndrome." (N.T.1 176-177).

22. When neither outpatient therapy nor an August 2003, ganglion nerve block relived Moyer's chronic pain in his right leg, in December 2003, Moyer began to receive treatments from Dr. Jay J. Cho, a pain management expert. (N.T.1 105, 174, 230; J.E. 23 at 41; R.E. 1 at 42).

23. Before seeing Dr. Cho, various doctors had prescribed a variety of pain medications to relieve Moyer's pain in his right leg. (J.E. 23 at 41).

24. Upon seeing Moyer the first time, in addition to ordering various blood tests, Dr. Cho prescribed lowering the dosage Moyer was taking of Neurotin, to continue Coumadin, and to additionally take Medrol and Percocet for his pain. (J.E. 23 at 44)

25. Dr. Cho's initial diagnosis was "primary sensory neuropathy, similar to RSD." (J.E. 23 at 45)

27. When Moyer was seen by Dr. Cho in January 2004, Dr. Cho again changed Moyer's pain medication prescriptions. (J.E. 23 at 47).

28. Between January 2004 and October 22, 2004, Moyer went to Johns Hopkins for testing and evaluation of the pain in his right leg where he was given a bone scan and received numerous treatments and was diagnosed with RSD. (N.T.1 106, 130, 230; R.E. 1 at 45-46).

29. Dr. Cho testified that there are four stages of RSD: 1. sensitive to touch, constant throbbing pain, burning, aching, swelling, and discoloration of the skin; 2. tropic changes; 3. necrosis where the tissue dies; and 4. the entire body stiffens. (N.T.1 196-197).

30. Dr. Cho testified that in 2004-2005, Moyer's condition was between stage one and two and his symptoms were getting worse. (N.T.1 201).

31. With RSD, the Winter and rainy days are the worst times as such times aggravate inflammation. (N.T.1 85-86, 200).

32. During the time Moyer was out on medical leave, either Moyer would periodically keep in touch with Deimler or someone from Deimler would call Moyer asking him when he was coming back to work. (N.T.1 43-44).

33. In order to return to work, Moyer was told that Deimler's insurance carrier required him to have a Doctor's note that said he had no restrictions. (N.T.1 46, 96-97, 100; C.E. 6 at 24; R.E. 1 at 58).

34. Moyer obtained a Doctor's note from his orthopedic surgeon, Dr. Thompson dated February 18, 2004, indicating that Moyer could return to work on February 23, 2004 with no restrictions. (J.E. 4).

35. Before his return, Moyer spoke with Craig Deimler seeking an agreement that Moyer would be permitted to come back part-time at first and be given the latitude to come in late on days Moyer found it difficult to get going until his medications made his pain level bearable and he was able to move around and for Moyer to be able to take breaks during the work day when ever his work became too much for him. (N.T.1 44, 102-103, 136; N.T.2 21, 110-112; C.E. 6 at 24, C.E. 7 at 18, 64-65; R.E. 1 at 58, 64).

36. During his discussion with Craig Deimler, Moyer informed Craig Deimler about the extent of his pain and that because he was on pain medications he

would endure the pain and discomfort of getting to work because he was desirous to work. (N.T.1 111; C.E. 7 at 57; R.E. at 87).

37. Craig Deimler had no problem with Moyer's requests and granted each aspect of Moyer's modified schedule request. (N.T.2 112).

38. No specifics were outlined regarding how late Moyer would be permitted to come in. (N.T.2 112)

39. For the first and second weeks of his return to work, Moyer worked 18 hours per week. (N.T.1 104; J.E. 29; R.E. 66)

40. The third week back, Moyer worked 28 hours. (N.T.1 104; J.E. 29).

41. By his fourth week, Moyer worked 40 hours plus overtime. (N.T.1 104; J.E. 29).

42. With input from Craig Deimler and Production Leader Dave Fox, on October 29, 2004, Moyer was promoted to the position of Carpenter Level 3 where he received higher pay and more responsible and independent duties. (N.T.1 55; N.T.2 113; C.E. 7 at 31-32).

43. As part of his newly expanded responsibilities, Moyer was given a Home Depot credit card that enabled him to purchase materials when he needed them. (N.T.2 114-115).

44. Upon his return, whenever Moyer experienced difficulty, he would tell his Project Leader and either request assistance or reassignment of duties. (N.T.1 52)

45. When made, such requests were granted. (N.T.1 52; N.T.2 54, 68).

46. Moyer's co-workers were helpful to him and generally understood Moyer's condition and accommodated him. (N.T.1 51, 53).

47. One of Deimler's more extensive projects was called the Cooney project which generally involved the tearing down of an existing structure and rebuilding it. (N.T.1 60; N.T.2 41-42)

48. At times, there were as many as 12 Deimler employees working on the Cooney project. (N.T.2 49; J.E. 21).

49. Deimler employees were assigned to various projects by either Gary or Craig Deimler. (N.T.1 59; N.T.2 76).

50. Once assigned to a project, the Project Leader of that project organizes the flow of a project and coordinates both materials and labor by assigning employees to specific tasks. (N.T.2 89).

51. Moyer was periodically assigned to work on the Cooney project. (N.T.2 75).

52. The Project Leader of the Cooney project was Dave Fox. (N.T.1 59; N.T.2 46-47).

53. A small part of the Cooney project involved cutting to shape and installing cement siding. (N.T.2 38, 42)

54. The Cooney project cement panels were 4' x 8' sheets each weighing approximately 50 pounds. (N.T.2 29).

55. With regard to installation of the cement siding, of the five working on this aspect of the project, several were assigned to work on the ground and others worked on ladders and scaffolding. (N.T.2 43, 92).

56. Project Leader Fox was aware that Moyer was taking prescription medications. (N.T.2 57, 81).

57. One of Moyer's co-workers reported to Fox that after taking his medications, Moyer seemed unsteady on the scaffolding and "at times" he felt unsafe working with Moyer. (N.T.2 29, 32-33, 40).

58. Moyer had never dropped anything or fallen from either a ladder or scaffolding. (N.T.2 31, 53).

59. At times, Project Leader Fox simply switched Moyer from working on scaffolds to working on the ground crew. (N.T.2 54, 67-68).

60. Moyer was never told to go home or subjected to a drug test or given an independent medical examination. (N.T.2 67-68, 70).

58. The same co-worker who indicated that Moyer seemed unsteady at times also complained to Fox that Moyer came to work late some days. (N.T.2 33, 38).

59. Co-workers, including Project Leader Fox, were never informed that Craig Deimler had specifically agreed to permit Moyer to come to work later as an accommodation of his condition. (N.T.2 37, 90).

60. Deimler conducts staff meetings the third Thursday of each month. (C.E.6 at 7).

61. Without going into specifics, during the January 2005 staff meeting, Project Leader Fox told Craig Deimler that Moyer had been demonstrating behavior that he had not previously demonstrated that raised concerns of safety. (N.T.2 74; C.E.7 at 40-41).

62. All Fox told Craig Deimler was that Moyer tended to be a little unstable, shaky, and in a cloudy haze from time to time. (N.T.2 118-119).

63. Craig Deimler instructed Fox to keep track of the situation and see if the behavior continued and to let him know. (N.T.2 118).

64. Craig Deimler was unaware of what equipment Moyer operated or what duties were being assigned to Moyer. (C.E.7 at 37, 77).

65. On or about February 11, 2005, Craig Deimler called Moyer to his office to generally discuss reports regarding safety concerns posed by Moyer taking prescription drugs. (N.T.1 67, 122; N.T.2 119; R.E. 1 at 78).

66. During the brief 5 to 6 minute discussion during which no specifics were discussed, Moyer informed Craig Deimler that he did not feel unsteady or unsafe on ladders or scaffolding and that there was no issue as far as he was concerned. (N.T.1 68, 109; R.E. 1 at 70-71, 80).

67. Moyer also informed Craig Deimler that his medications had been prescribed by Dr. Cho and agreed that he would both authorize and make arrangements for Dr. Cho to speak with Craig Deimler. (N.T. 1 68, 108, 112; N.T.2 120-121; R.E. 1 at 80).

68. When Moyer told Dr. Cho that Craig Deimler wanted to speak with him, Moyer related that he thought that Deimler was trying to push him out for medical reasons. (N.T.1 209).

69. On February 16, 2005, Craig Deimler had a brief telephone conversation with Dr. Cho. (N.T.1 206, 252, 255-56; N.T.2 122).

70. Craig Deimler informed Dr. Cho that Moyer was not performing as well as he had performed previously and asked if Moyer's medications presented a cognitive concern? (N.T.1 204-05, 211).

71. Dr. Cho replied that Moyer's medications would not affect his cognitive ability, but Moyer's medications might tend to make him more calm and possibly cause fatigue and that because of the extent of Moyer's pain, he might be experiencing difficulty sleeping. (N.T.1 205, 252; N.T.2 134; C.E. 7 at 87-89).

72. Dr. Cho indicated that he had prescribed Methadone to Moyer which is more calming and might make him fell tired a bit but he could change Moyer's medication to Oxycodone which would give Moyer more energy and Craig Deimler would see a difference. (N.T.1 205, 215-16, 218, 260).

73. Dr. Cho also informed Craig Deimler that he could change Moyer's medications in such a way that Moyer would not have to take medications during the day. (C.E. 6 at 25 and C.E. 7 at 89)

74. On the morning of February 11, 2005, Craig Deimler also met with Moyer to discuss with him that, because it was unfair to other employees, Deimler was no longer going to honor the accommodation of extended flex time in the mornings and that Moyer had to begin to do better. (N.T.1 61, 107, 155-56; N.T.2 124; C.E. 6 at 26)

75. On the afternoon of February 11, 2005, Craig Deimler again met with Moyer regarding a purported concern about Moyer's time card for the week ending February 10, 2006. (N.T.1 60, 63, 65, 107; N.T.2 126, 173).

76. Craig Deimler adjusted Moyer's time card for the week ending February 10, 2005, by reducing each of Moyer's daily totals by 1 hour. (N.T.1 65-66; N.T.2 128-129, 149).

77. Moyer explained to Craig Deimler that he had failed to record his time each day and had waited until the final day to record his time and that any errors were errors in recollection and were not intentional. (N.T.1 63, 120).

78. Craig Deimler accepted Moyer's explanation that he had been rushed to complete his time card and had simply made mistakes. (N.T.1 60, 64; C.E.6 at 6 and 16)

79. On the morning of February 28, 2005, Craig Deimler called Moyer to his office and advised Moyer that he was terminated. (N.T.1 70; R.E. 1 at 100).

80. Moyer's separation notice lists three reasons for Moyer's termination: 1. performance; 2 attendance; and 3. safety, with "remarks" – medications clouded judgment. (J.E. 11).

81. Craig Deimler told Moyer that the primary reason for his termination was "safety issues". (C.E. 6 at 19).

82. Following Moyer's termination, Craig Deimler informed an unemployment compensation Hearing Referee, that the primary reason for Moyer's termination was the safety of other employees. (N.T.2 153-54).

83. Following his termination, when next examined by Dr. Cho, Moyer's medications were changed from methadone to oxycondone. (N.T.1 125, 221).

84. The parties stipulated that all back pay claims cease on October 11, 2007. (N.T.1 11)

85. The parties also stipulated that for the period November 2006 through December 2006, Moyer was unable to work. (N.T.2 178-79).

86. At the time of his termination, Moyer was earning $16.50 per hour.

87. Following his termination, Moyer applied for work with various construction employers and had been interviewed but not hired. (N.T.1 77).

88. The first employment Moyer was able to secure following his termination was as a short-order cook at Applebees. (N.T.1 78).

89. In January 2006, Moyer was hired by Klawitter Construction as a Carpenter. (N.T.1 78, 152).

90. After working for Klawitter for approximately 8 months, Moyer began employment with Ambassador Homes. (N.T.1 79, 153).

91. The parties stipulated that the PHRC paid Dr. Cho $2,400.00 for his expert testimony and that Moyer also paid Dr. Cho $1,200.00 to testify as an expert. (N.T. 1 227)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.

2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.

3. Moyer is an individual within the meaning of the PHRA.

4. Deimler is an employer within the meaning of the PHRA.

5. Moyer established that he had a disability under the meaning of the PHRA.

6. The determination of whether a person has a disability is made without regard to whether the effects of an impairment can be mitigated by measures such as medications or therapy.

7. Deimler was aware of Moyer's disability.

8. Deimler failed to establish that Moyer posed a demonstrable threat of harm to his health and safety or to the health and safety to others.

9. Moyer established that his disability was a motivating factor in Deimler's decision to terminate Moyer.

10. Deimler failed to prove that it would have terminated Moyer even if Deimler had not considered Moyer's disability.

11. To establish a *prima facie* case of a disability-based termination under the burden shifting analytical framework, a Complainant must show:

    a. That he is a disabled person within the meaning of the PHRA;

b. That he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and

c. That he suffered an adverse employment action as a result of discrimination.

12. Moyer established a *prima facie* case under the burden shifting analysis.

13. Deimler articulated several legitimate reasons for Moyer's termination.

14. Moyer has established by a preponderance of evidence that Deimler's articulated reasons were a pretext to disability-based discrimination.

15. The PHRC has broad discretion in fashioning a remedy.

16. The PHRC may order a Respondent to cease and desist from discriminatory practices and to take affirmative action as, in the judgment of the Commission, will effectuate the purposes of the PHRA.

OPINION

This case arises on a complaint filed by Larry Moyer, II (hereinafter "Moyer") against Gary Deimler & Sons Construction (hereinafter "Deimler"), on or about June 9, 2005, at PHRC Case Number 200408084. Generally, Moyer alleged that Deimler discriminated against him because of his disability (Reflex Sympathetic Dystrophy Syndrome), when, on February 28, 2005, he was terminated from his Carpenter Level 3 position. Moyer claims that Deimler violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on June 7 and 8, 2011, in Harrisburg, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. Post-hearing briefs were submitted by the parties. The Respondent's brief was received on December 16, 2011, and the PHRC brief on behalf of the state's interest in this case was received on December 15, 2011.

Initially, there is recognition that there are fundamental and glaring discrepancies in the versions of events that constitute the factual background that must be evaluated before the law can then be applied to the facts present in this

case. There is agreement on basic events, however, on important aspects surrounding several critical events, there is wide disparity between much of the testimony offered. Because of this, an initial assessment of credibility is imperative. Once credibility has been assessed, the law can be applied to the versions of events found to be more credible.

On the issue of credibility, Deimler's post-hearing brief begins with the premise that both Moyer's and Dr. Cho's testimony should be totally discounted because neither was credible. Deimler's post-hearing brief suggests that Moyer was not credible in two specific areas: 1. Moyer's testimony that the cause of his condition was partially work-related; and 2. on several occasions, telling Dr. Cho that he worked 12 hour days. The post-hearing brief submits that Dr. Cho's testimony was inconsistent and implausible and therefore, his testimony should be discounted. On this point, we disagree and find Dr. Cho's testimony wholly credible.

Chronologically, the first area of conflicting testimony deals with how and where Moyer injured his leg and why Moyer was able to collect unemployment compensation while off work on medical leave. Moyer's testimony suggests that he injured his knee in early 2004 while shoveling snow for Deimler. Moyer also testified that he reported the injury to his crew chief the night of the injury and the next morning to his on-site supervisor. (N.T.1 91, 147; N.T.2 18; R.E. 1 at 28-29). Further, Moyer testified that he later reported the injury to the office. (R.E. 1 at 30). Moyer then suggests that approximately one month later he

aggravated the knee injury when he twisted it at home. (N.T.1 94, 176; R.E. 1 at 36).

Deimler submits that Moyer injured his leg at home and not at work. (N.T.2 103). Deimler points to Moyer's deposition testimony that suggests that he was treated for the knee injury over 10 times by company doctors (N.T.1 91) and Moyer's statement that "for the most part" he was truthful with his doctors. (N.T.1 93). Deimler observes that Moyer told his doctors that the injury to his knee was not work-related. (N.T. 2 19-20). Moyer testified that, in effect, he told his doctors that he did not want his leg injury to be classified as a worker's compensation injury. (N.T. 2 19-20). Moyer's testimony referenced that, earlier, upon discussing the injury with Deimler, together they came to the decision that Moyer would not file a worker's compensation claim but, instead, Moyer would be allowed to collect unemployment compensation while off on medical leave. (N.T. 2 19).

Deimler's point is well taken as Moyer is certainly shown to be less than credible regarding saying that he had been treated approximately 10 times at a treatment facility other than the medical facility employees always use when injured at work and by telling several of his doctors that the injury should not be considered as a work-related injury. However, on the larger question of where Moyer injured his knee, close scrutiny of the evidence reveals that Deimler was fully aware that Moyer had initially injured his leg at work and that he was later unable to work only after further injuring his knee at home. Moyer testified that before going out on medical leave, Moyer and Deimler discussed the possibility of

Moyer applying for worker's compensation. (N.T.2 19). Moyer further indicated that rather than Moyer applying for worker's compensation, Deimler would agree to allow Moyer to collect unemployment compensation. (R.E. 1 at 49). Moyer indicates that Craig Deimler indicated that, to allow Moyer to collect unemployment, he would say Moyer was off work due to "lack of work". (R.E. 1 at 49). At no point did Craig Deimler attempt to rebut this contention. Instead, Craig Deimler is portrayed as being prepared to fabricate a plot designed to facilitate Moyer improperly collecting unemployment benefits.

Clearly, Deimler chose not to contest Moyer's collecting unemployment compensation. (N.T.2 105) Deimler submits that its motive in this regard was benevolent, however, it is much more likely that benevolence had nothing to do with it. During the Public Hearing, Craig Deimler was asked to explain the gap in Moyer's employment with Deimler. Craig Deimler replied, "[a]bout 2003, Larry had hurt his knee, not work related, and had come to us and said, look, I need to have a surgery, and so we gave him a leave of absence. And in order to help him along because of not knowing---well, in order to help him along, we had said that we would allow him to claim unemployment..." (N.T.2 103-04). One can easily understand Craig Deimler's pause after the phrase "because of not knowing" when you add the possibility of a worker's compensation claim to the mix. It appears that what Craig Deimler was about to say was "because of not knowing" whether the injury would be attributed to a work injury, Deimler would not contest Moyer collecting unemployment compensation. If the knee injury was strictly unrelated to work, there would have been no reason for Deimler to offer to allow Moyer to

collect unemployment. But here, clearly, Deimler did. Accordingly, on this point, Craig Deimler is found less credible than Moyer.

During his deposition on February 18, 2011, Craig Deimler testified that he does not recall why Moyer only worked ½ time when he first returned to work following his medical leave of absence. (C.E. 7 at 19). Moyer testified that, before his return, he and Craig Deimler made an agreement that upon his return, Moyer would initially work part-time. (N.T.1 44, 49) Further, it is clear that there was an agreement that Moyer would be allowed to come in late on days that he had to wait for his medications to take effect to make coming to work bearable. (N.T.1 44). Additionally, both Gary Deimler and Craig Deimler knew that Moyer was taking prescription drugs for pain. (N.T.2 81; C.E. 7 at 45). Clearly, the reason Moyer initially only worked part-time was because he and Craig Deimler had agreed that Moyer would be permitted to ease back into his job. Craig Deimler's deposition testimony was simply not credible on this point.

Next, we review the testimony of Craig Deimler before an unemployment compensation appeals referee taken on May 11, 2005, that indicated he attempted to find projects for Moyer that were less dangerous. (C.E. 6 at 12). When deposed, Craig Deimler testified that he was unaware of what equipment Moyer operated or what duties he was being assigned. (C.E. 7 at 37, 77). This fundamental inconsistency makes it highly unlikely that Craig Deimler ever made any attempt to find projects to accommodate Moyer's condition. Craig Deimler simply assigned Moyer to projects and, without any guidance, allowed the Project Leaders to exercise their discretion when assigning daily tasks to Moyer.

Next, we review the full scope of Craig Deimler's testimony regarding Moyer's attendance. On this account, we note that Craig Deimler told the unemployment compensation referee that Moyer's attendance began to get erratic in December 2004 and that he spoke with Moyer about this issue mid-January 2005. (C.E. 6 at 7). Craig Deimler also told the unemployment compensation referee that during the week of February 21, 2005, he again spoke with Moyer regarding his coming in late. (C.E. 6 at 8). Earlier, when Deimler had taken exception to the PHRC's probable cause finding, Deimler indicated that Moyer was continually late beginning in December 2004 until he was terminated. (C.E. 1 at p.3) Further, when Craig Deimler was deposed, he indicated that Moyer was showing up late in the later part of 2004 and early 2005, (C.E. 7 at 27, 36-37), and that after he spoke with Moyer on February 11, 2005, Moyer was still coming in later than acceptable. (C.E. 7 at 61). Also, in Deimler's Request for Relief from Charges, filed on March 10, 2005 with the Pa. Department of Labor and Industry, Deimler indicated that one of the circumstances of Moyer's termination was violation of company policy regarding "punctuality and attendance..." Deimler stated that Moyer had the skills to do his job and was capable of doing his job "but didn't show up consistently." Finally, when Craig Deimler testified at the Public Hearing, he indicated that he had been receiving reports about Moyer's punctuality since October 2004. (N.T.2 at 118).

First of all, the record is clear that from the time of Moyer's return to work in March 2004 until February 11, 2005, he and Craig Deimler had an agreement that on days that Moyer needed extra time, he was permitted to come in late.

The entire time, the agreement remained unspecified regarding just how late Moyer was permitted to come in. In fact, it was not until February 11, 2005 that Craig Deimler even spoke to Moyer about the issue and informed Moyer that there was any problem at all. Even at that point, Craig Deimler simply told Moyer that he'd have to do better but still left open the opportunity for Moyer to come to work later than the regular starting time. (N.T.2 124). Indeed, in effect, Craig Deimler testified that, with respect to Moyer coming in late after he spoke to Moyer on February 11, 2005, "it had gotten better, so it was --- as far as the delayed starting times, so I don't think that was too much of an issue, athough it had been an issue coming up and to that point." Once Craig Deimler spoke to Moyer on February 11, 2005, Craig Deimler's own observation was that there was no further problem in this regard. This is certainly in direct conflict with four instances that spoke about Moyer's punctuality: 1. Craig Deimler's testimony before the unemployment compensation referee; 2. Craig Deimler's deposition testimony; 3. Deimler's exceptions to the PHRC's probable cause finding; and 4. Deimler's March 10, 2005, Request for Relief from Charges. It is also interesting to note that while other employees felt it was unfair that Moyer was coming in late and were complaining, Craig Deimler never told either Moyer's Project Leader or Moyer's co-workers that Moyer was allowed to come in late. One can readily see how this circumstance would cause hard feelings among Moyer's co-workers and lead to other types of complaints being lodged against Moyer. When Deimler's post-hearing brief suggests that there is no evidence of animosity between Moyer and his co-workers, the evidence of Deimler's failure to appraise

Project Leaders and co-workers of the agreement to allow Moyer to come in late appears to have understandably created a degree of animosity.

This brings us to a variety of disputed testimony regarding the precise extent of discrepancies Moyer purportedly reported on his time cards. First, the procedure for completing and turning in time cards is clearly spelled out in Deimler's Employee Information Guide. (J.E. 1). Deimler's Guide instructs that individual employees maintain their time cards and are to hand them in to the office on Thursday afternoon with the initials of Project Leaders for whom the employee worked that week. (J.E. 1 at 20). The Information Guide's instructions also declare that employees are to briefly describe the tasks worked on and total the number of hours worked each day. (J.E. 1 at 21).

In this case, Deimler submits that there were two instances of time sheet falsification: Moyer's time sheet for the week ending February 10, 2005; and Moyer's time sheet for the week ending February 24, 2005. (J.E. 6). Initially, a review of these time sheets clearly reveals that, on Moyer's week ending February 10, 2005 time sheet, both the daily hours and the total number of hours have been boldly written over with adjusted hours which operated to reduce Moyer's total hours for the week from 35 hours to 30 hours. On Moyer's February 24, 2005 time sheet, no such write over adjustments were made. At the bottom of the February 24, 2005 time sheet, clearly the numbers have not been modified. This observation brings into focus several versions of events surrounding these two time sheets.

Both Moyer and Craig Deimler agree that Craig Deimler called Moyer to his office on February 11, 2005 to discuss his February 10, 2005 time sheet. Both also agree that the February 10, 2005 time sheet was adjusted and that the adjustment was necessary because Moyer had been rushed that week to complete his time sheet and simply made mistakes when attempting to recollect time worked on projects that week. Normally, an employee keeps their time sheets daily to avoid a last minute scramble to complete the time sheet. Here, all agree, Moyer waited until the last minute to complete his February 10, 2005 time sheet which led to unintentional inaccurate reporting.

The question of credibility arises with respect to Moyer's time sheets in a number of respects. First, Moyer testified both at the Public Hearing and at an unemployment compensation hearing that there had been only one discussion regarding his time sheets and that single discussion occurred on February 11, 2005. (N.T.1 66; C.E. 6 at 20). On the other hand, Craig Deimler's testimony on the subject is best described as inconsistent. Project Leader Fox testified that prior to February 2005, the entire company began to have Project Leaders record everyone's arrivals and departures. (N.T.2 76). Craig Deimler testified that this happened in January 2005. (N.T.2 at 125). Craig Deimler then indicated that individuals at the different jobs on which Moyer had worked gave him information regarding Moyer's time sheet ending February 10, 2005. (N.T.2 127). However, Deimler's guide specifically indicates that Project Leaders are supposed to initial an employee's time sheet each week. On Moyer's February 10, 2005 time sheet, it appears that he worked at three separate locations; Sisak, Trinity Church and

Bolas. There was no testimony that Craig Deimler contacted any of the Project Leaders at the Sisak, Trinity Church, and Bolas job sites to ascertain whether Moyer's reported times were accurate. On the contrary, Fox testified that he had never been called in to discuss discrepancies with time cards. (N.T.2 87). Craig Deimler testified that there had been "oral" reports from Moyer's Project Leader and a co-worker about Moyer's starting times, but in the warning notice Craig Deimler drafted after meeting with Moyer on February 11, 2005, he wrote, "[a]fter reviewing the time card and the report of the starting times from the project leader and co-worker, it was confirmed that for the second time in a month, the information on the time card is incorrect." Fox said he was not called in to discuss the matter and Craig Deimler said the reports were oral. One has to ask, how then could Craig Deimler "review" the report? Once again, there is a glaring discrepancy when the evidence is closely scrutinized. Additionally, Craig Deimler again directly contradicted himself with the testimony he gave at an unemployment compensation hearing when he testified that he knew the times Moyer had indicated on his February 10, 2005 time sheet were inaccurate because the ending times of each day for that week had been recorded by an office person when Moyer stopped by the office on his way out each day. (C.E.6 at 17). Yet again, Craig Deimler's credibility suffered a powerful blow.

Another major snag that further significantly reduces Craig Deimler's overall credibility can be found by closely reviewing Craig Deimler's testimony at a May 11, 2005 unemployment compensation hearing. (C.E. 6). Craig Deimler's testimony began with an assertion that in January 2005, a Project Leader brought

to his attention that Moyer had made a time sheet error. (C.E.6 at 6). Craig Deimler testified that he called Moyer in to discuss the situation and the time sheet discrepancy was corrected. (C.E. 6 at 6). A short while later, Craig Deimler testified that on February 11, 2005, a second time sheet error was discovered and discussed with Moyer. (C.E. 6 at 7-8). Craig Deimler confirmed that by February 11, 2005, he had two meetings with Moyer regarding time card discrepancies. In fact, at the PHRC Public Hearing, Craig Deimler confirmed that the February 11, 2005 meeting with Moyer was the first instance of his discussing time card discrepancies with Moyer. Returning to Craig Deimler's testimony at the unemployment compensation hearing, Craig Deimler did not even mention a purported time sheet discrepancy regarding the week ending February 24, 2005. In fact, Craig Deimler described the final meeting he had with Moyer on February 24, 2005, as a discussion about Moyer's tardiness not about time sheets. (C.E. 6 at 8-9).

During the Public Hearing, Craig Deimler submitted that a discrepancy on Moyer's time sheet for Friday February 18, 2005 was the "last straw". (N.T.2 140). Craig Deimler indicated that on February 18, 2005 he sent an individual to Moyer's work site to check on him. (N.T.2 138, 171-172). Craig Deimler testified that, a week later, when Moyer turned in his time sheet for the week ending February 24, 2005, Craig Deimler asked the person he sent to check on Moyer for his recollection of what had happened on the 18th and was told that Moyer was not there when the person checked. (N.T.2 172).

Contrary to Craig Deimler's testimony, Moyer testified that it was on February 19, 2005, that Craig Deimler asked him where he was on the 18th. On February 18, 2005, Moyer was assigned a painting job at a location near Deimler's offices. (R.E. 1 at 78). Moyer testified that when asked on February 19, 2005, where he was on the 18th, he informed Craig Deimler that he had gone for supplies and then returned to the job site to perform more work and that if Craig Deimler would have the person return to the job site, the person would see the difference in the amount of work that had been accomplished. (N.T.2 142; R.E. 1 at 77).

Interestingly, Craig Deimler testified that on February 28, 2005, when he asked Moyer where he had been on February 18, 2005, Moyer purportedly told him that he had gone for materials "and that if I'd just come up and take a look at what was done, I would see that more had been done..." (N.T.2 142).

Craig Deimler suggests that the discussion occurred on the 28th because by then, Moyer would have turned in his time sheet for the week ending February 24, 2005. If the discussion had occurred earlier on February 19, 2005, Moyer's time sheet would not have been turned in yet and there would have been no time sheet discrepancy to discuss.

Given that both Moyer and Craig Deimler generally agree that Moyer responded by asking that someone come to look and they would see that more work had been accomplished, the discussion would have had to have taken place on the 19th. Otherwise, after a week, it would be impossible to distinguish work that had been done on the 18th with work done the rest of the week.

It is far more credible that on February 19, 2005, Craig Diemler simply asked Moyer why he was not at the worksite on the 18th and was informed that Moyer had just gone for materials. Testimony that Moyer submitted his February 24, 2005 time sheet and a discrepancy was noted is simply not credible. On this point, the credible testimony is Moyer's testimony that there had been only one discussion between Moyer and Craig Deimler regarding a purported time sheet discrepancy. (N.T.1 66; C.E. 6 at 20). Further, the credible testimony reveals that this single discussion occurred on February 11, 2005.

The next area where Craig Deimler's lack of credibility is exposed deals with two written warning notices. (J.E. 9 and 10). On February 11, 2005, Craig Deimler prepared two warning notices: 1. a written notice indicating that Moyer received a verbal warning at 9:00 a.m. for showing up late; and 2. a warning notice indicating that Moyer was suspended and would be discharged if there was another incident of falsification of Moyer's time card.

Craig Deimler testified that on February 11, 2005, he merely told Moyer that he had to try to do better and come in not more than ½ hour after the scheduled starting time. (N.T.2 124). Up until that point, from the time he retuned to work in March 2004, there had been no specifics regarding a time by which Moyer was expected to come in. The March 2004 agreement between Moyer and Craig Deimler was vague and in no way specified an expected time of arrival to work for Moyer. Instead, the agreement gave Moyer wide latitude of when to come in because, as Craig Deimler understood it, there were days where

Moyer's pain was intense and he had to wait for his medication to begin to relieve the pain before he could get going. (N.T.1 112; C.E. 7 at 57).

On the warning notice purportedly for "falsifying time card", Craig Deimler indicated that Moyer would be suspended, however, Moyer was never suspended. More importantly, contrary to a specific assertion in a December 3, 2009 letter from Deimler's then counsel to the PHRC investigator in which Deimler took exception to findings made in the PHRC's probable cause finding, neither warning notice was ever given to Moyer. The December 3, 2009 letter emphatically declares that Moyer was issued the two warnings, (C.E. 1 at paragraph 8 p. 3). Craig Deimler at one point testified that he had no idea whether Moyer had been given copies of the warnings. (C.E. 7 at 70-17). When he testified at the unemployment compensation hearing, Craig Deimler confirmed that the warnings were meant to be verbal and admitted that he never even told Moyer that he might be terminated. (C.E. 6 at 19). It is abundantly clear that Craig Deimler knew very well that he never gave Moyer a copy of either of the warning notices he prepared on February 11, 2005 or, for that matter, that he ever intended to give Moyer the notices. Clearly, the intention in preparing the notices was that they were designed to be used as background support for Moyer's termination.

In Deimler's post-hearing brief, Deimler points to Moyer's declaration that, on several occasions, Moyer told Dr. Cho that he worked 12 hour days. Moyer attempted to explain that what he meant was that when he got off work at Deimler, he would do additional work at home and in total, he worked

approximately 12 hours a day. (N.T.2 9). On this minor point, we agree with Deimler that Moyer's credibility is questionable.

Another general area where an assessment of credibility is essential deals with Craig Deimler's February 16, 2005, telephone conversation with Dr. Cho.. In Deimler's December 3, 2009 letter, Deimler stated, "Dr. Cho did not provide any advice to Respondent... Dr. Cho merely stated it was his opinion that the Complainant presented no safety concerns while on Oxycodin. There is no evidence that Dr. Cho provided any recommendations to Respondent to accommodate or assist Complainant. More importantly, there is absolutely nothing in the record to show that Dr. Cho worked with Complainant to correct Complainant's behavior issues at work..." (C.E. 1 at paragraph 9, p 3).

At the Public Hearing when Craig Deimler was asked what role Dr. Cho played in Moyer's termination, Craig Deimler stated that "according to [Dr. Cho], there was no ... there was no issue." (N.T.2 139). Craig Deimler further stated that "I had nothing to go on other than the fact that this is just not being careful." (N.T.2 140).

Later in his testimony, Craig Deimler agreed that Dr. Cho had offered the possibility of changing Moyer's prescriptions. (N.T.2 161). When deposed, Craig Deimler had agreed that Dr. Cho had indicated that other medications were available and that lots of medications could be used. (C.E. 7 at 63-64). Further, Craig Deimler indicated in his deposition that Dr. Cho had stated that he would change Moyer's medications so that Moyer would not have to take medications during the day. (C.E. 7 at 89). Additionally, when Craig Deimler testified at the

unemployment compensation hearing, he stated that Dr. Cho told him that he was going to change Moyer's prescriptions. (C.E. 6 at 18).

When Dr. Cho testified, Dr. Cho revealed that he told Craig Deimler that Moyer's cognitive facilities were okay but that the medications he was taking tended to result in more fatigue. (N.T. 211). Dr. Cho indicated that he informed Craig Deimler that once he changed Moyer's medications, he would see a difference in Moyer. (N.T.1 218). Clearly, Craig Deimler's testimony which suggests that Dr. Cho gave him nothing to go on lacks credibility.

As a final observation regarding credibility, when Craig Deimler was deposed, much of his testimony can best be described as evasive. When evaluating credibility, this feature contributes to a finding that Craig Deimler was quite often less than credible.

In summary, while several minor points of Moyer's testimony were questionable, overall, Craig Deimler's testimony is found to lack credibility on numerous extremely important areas. Accordingly, the law will be generally applied to the versions of events as told by Moyer.

Turning to the applicable law in this case, the PHRA's core liability provision is Section 5(a) of the PHRA that provides in relevant part:

> It shall be an unlawful discriminatory practice...for any employer because of the...non-job-related handicap or disability...of any individual to discharge from employment...such individual...or to otherwise discriminate against such individual ...with respect to compensation, hire, tenure, terms, conditions or privileges of employment,...if the individual...is the best able and most competent to perform the services required...(43 P.S. 955(a))

Sections 4(p) and 4(p.1) provide the Act's only clarification of the reach of the cited portion of Section 5(a). Section 4(p) states:

> The term "non-job-related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in...

Section 4(p.1) states:

> The term "handicap or disability," with respect to a person, means:
>
> (1) a physical or mental impairment which substantially limits one or more of such persons major life activities;
>
> (2) a record of having such an impairment; or
>
> (3) being regarded as having such an impairment...
>
> (43 P.S. 954(p) and (p.1))

The PHRA provisions are supplemented by applicable regulations promulgated by the PHRC which provide:

> *Handicapped or disabled person* - Includes the following:
>
> (i) A person who has or is one of the following:
>
> (A) A physical or mental impairment, which substantially limits one or more major life activities.
>
> (B) A record of such impairment.
>
> (C) Regarded as having such an impairment.
>
> (ii) As used in subparagraph (i) of this paragraph, the phrase:
>
> (A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs;

cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.

(B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(C) "has a record of such impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(D) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.

(16 Pa. Code §44.4)

Non-job-related handicap or disability – The term includes the following:

(i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job-related.

(ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.

(iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would

pose a demonstrable threat of harm to the health and safety of others.

(16 Pa. Code §44.4)

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. See *Pennsylvania State Police v. PHRC*, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983) and *Pennsylvania State Police v. PHRC*, 85 Pa. Commonwealth Ct. 624, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

The PHRC's post-hearing brief on behalf of the state's interest in Moyer's disparate treatment allegation submits that Deimler could be found liable under any one of three separate analytical frameworks that assess whether a *prima facie* case has been established: 1. direct evidence; 2. mixed-motive; and 3. the burden-shifting method of proof described in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The PHRC's post-hearing brief uses the term "pretext" model in describing this indirect evidence framework.

Deimler's post-hearing brief generally references the mixed-motive analytical framework and submits that Moyer failed to establish that he has a "disability" within the meaning of the PHRA, that Moyer was not impaired in a "major life activity", that Deimler had no knowledge that Moyer had a condition that meets the definition of a "disability" or in the alternative that after initiating an interactive process, Deimler concluded that Moyer had not established that he

has a disability, and finally, that in any event, Deimler had legitimate non-discriminatory reasons to terminate Moyer.

The direct evidence model involves cases in which a Complainant presents persuasive evidence of discriminatory motive to support an allegation of intentional discrimination. *See Blalock v. Metal Traders, Inc.,* 775 F.2d 703, 39 FEP Cases 140 (6th Cir. 1985); and *Lujan v. Franklin County Board of Education,* 766 F.2d 917, 38 FEP Cases 9 (6th Cir. 1985). In the rare direct evidence case, a Complainant's *prima facie* case consists of evidence of overt discrimination, i.e., there is evidence that a Respondent terminated a Complainant specifically because of the Complainant's protected category. If such overt evidence is established, the burden of persuasion shifts to the Respondent to prove either that 1. even absent the discrimination, the Respondent had legitimate reasons to terminate the Complainant; or 2. the Respondent's overt discrimination can be justified as a *bona fide* occupational qualification. *See Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); *Smallwood v. United Airlines,* 728 F.2d 614 (4th Cir. 1984); and *Lee v. Russell County Board of Education,* 684 F.2d 769, 29 FEP Cases 1508 (11th Cir. 1982).

The second disparate treatment proof model listed by the PHRC's post-hearing brief is the mixed-motive model. Under this model, a Complainant must present sufficient evidence to prove by a preponderance that a Respondent took the Complainant's protected characteristic into account when making the alleged adverse employment decision. In other words, a Complainant shows that his disability was a motivating factor in the Respondent's decision-making process. If

a Complainant can make this showing, the Respondent then has a burden of persuasion, not merely a production burden, that the Respondent would have made the same adverse decision even if it had not considered the Complainant's disability. The emphasis remains on proving the Respondent intentionally used a protected characteristic as motivation for the adverse action. The mixed-motive approach was first recognized by the U.S. Supreme Court in *Price Waterhouse v. Hopkins,* 490 U.S.228 (1989). More recently, the U.S. Supreme Court case of *Desert Palace Inc. v. Costa,* 539 U.S. 90 (2003), held that a mixed-motive case could be established by circumstantial evidence and that direct evidence was not required.

Numerous circuit courts have declared that the mixed-motive analysis applies to disability cases. *See Parker v. Columbia Pictures Industries,* 204 F.3d 326, 10 AD Cases 396 (2nd Cir. 2000). Also, a majority of circuits have adopted the "motivating-factor" standard of causation when assessing liability. *See Katz v. City Metal Co.,* 87 F.3d 26 (1st Cir. 1996); *Parker v. Columbia Pictures Industries, 204 F.3d 326, 10 AD Cases 396 (2nd Cir. 2000);* Baird v. Rose, *192 F.3d 462 (4th Cir. 1999); Foster v. Arthur Anderson, LLP,* 168 F.3d 1029 (7th Cir. 1999); *Pedigo v. P.A.M. Transport, Inc.,* 60 F.3d 1300 (8th Cir. 1995); and *McNealy v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996).

Given that Section 12(a) of the PHRA mandates a liberal construction of the provisions of the PHRA, when analyzing the mixed-motive proof formula, the "motivating-factor" standard of causation will be applied in this case.

The third proof formula analytical framework is the oft cited burden shifting framework first articulated in *McDonnell Douglas Corp. v. Green,* 422 U.S. 792, 5 FEP Cases 965 (1973). Under this proof formula, a Complainant bears the initial burden of establishing each element of a *prima facie* case by a preponderance of the evidence. Once a *prima facie* case has been established, a rebuttable presumption arises. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 62 FEP Cases 96 (1993). In order to rebut this presumption, the Respondent then bears the burden of producing a legitimate, nondiscriminatory reason for the adverse employment action. If the Respondent is able to articulate a valid reason, the Complainant then has the opportunity to prove that the Respondent's stated reason was a pretext for discrimination. Throughout this proof process, the Complainant always bears the burden of proving by a preponderance of evidence an act of intentional discrimination. *Id* at 507.

To establish a *prima facie* case under this proof formula, a Complainant must demonstrate: 1. that the Complainant is "disabled" within the meaning of the PHRA; 2. that the Complainant is qualified, with or without reasonable accommodations; 3. that the Complainant suffered an adverse employment action; and 4. that the Complainant was discharged because of his disability, *See Ordahl v. Forward Technology Industries, Inc. 301 F. Supp. 2d 1022, 15 AD Cases 562 (D.C. Minn. 2004); and Siemon v. AT&T Corp.*, 117 F.3d 1173, 7 AD Cases 1699 (10th Cir. 1997), or under circumstances that give rise to an inference of discrimination. *Allegheny Housing Rehabilitation Corp. v. PHRC,* 516 Pa. 124 (1987).

Because these alternative theories were not expected or intended to operate with rigid precision with respect to the infinite variety of factual patterns that emerge in discrimination litigation, it is often appropriate to assess allegations and defenses alternatively. *See Wright v. Olin Corp.*, 697 F.2d 1172, 30 FEP Cases 889 (4th Cir. 1982). With the exercise of discretion, and given that the result remains the same in either event, the present allegation will be examined under the rubric of both the mixed-motive and the shifting burden theories only.

In Deimler's post-hearing brief, after a lengthy argument regarding who was credible in this case, Deimler submits that Moyer failed to prove that he has a disability within the meaning of the PHRA. Deimler begins by arguing that Moyer did not establish that he had a physical impairment. Deimler observes that on February 23, 2004, Moyer was medically cleared to return to work without restrictions. Deimler also submits that Moyer did not credibly establish that his condition rises to the level of an impairment. Deimler points to Dr. Cho's testimony that Moyer has "RSD" and suggests that a diagnostic test ruled out that Moyer had RSD.

In the alternative, Deimler argues that if Moyer can establish he has a disability within the meaning of the PHRA, Deimler submits that Moyer failed to establish that his condition substantially limits him in a major life activity. Deimler correctly lists the factors to consider when assessing whether an individual is limited in a major life activity. These factors are: 1. the nature and severity of the impairment; 2. the duration or expected duration of the impairment; and 3. the expected or actual permanent or long-term impact of or

resulting from the impairment. *Snyder v. Norfolk Southern Railway Corporation,* 463 F. Supp. 2d 528, 538 (W.D. Pa. 2006).

Deimler's post-hearing brief further argues that by working and performing the tasks associated with his job "such as walking, climbing, lifting, seeing, hearing, etc," this is proof that Moyer was not substantially limited in a major life activity. Each of the arguments Deimler put forth on the issue of whether Moyer established that he is disabled within the meaning of the PHRA will be individually addressed.

In a footnote in Deimler's post-hearing brief, Deimler submits that this case should be interpreted under the PHRA as it existed in 2005 and not in a manner that is consistent with the ADA Amendments Act of 2008 ("ADAAA") and regulations promulgated there under. This reference in Deimler's post-hearing brief more than likely was made because of several 1999 U.S. Supreme Court decisions that generally held that when determining whether a person has a disability under the ADA, any measure taken to control the effects of the person's impairment, such as medication or therapy, must be considered. *See Sutton v. United Air Lines, Inc.,* 119 S. Ct. 2139; *Murphy v. United Parcel Service,* 119 S. Ct. 2133; and *Albertsons, Inc. v. Kirkingburg,* 119 S. Ct. 2162. Commentators have observed that the directives of these decisions severely limited who would be protected by the ADA. After these cases, under ADA analysis, if mitigating measures a person took were considered, limitations one continued to experience despite medications or therapy had to be much more carefully analyzed. Of course, after these cases, one would still be considered disabled if the mitigating

measures taken did not fully control the effects of the impairment or there were intermittent periods during which the individual was substantially limited or the side effects of the mitigating measures themselves substantially limited the person in major life activities.

When the ADAAA was passed in 2008 covering ADA cases arising after January 1, 2009, the U.S. Congress specifically rejected the idea that the ameliorative effects of mitigating measures should be considered when analyzing whether an impairment substantially limits a major life activity. After the passage of the ADAAA, the ADA was returned to the position most courts took prior to the *Sutton v. United Airlines* decision where an individual's condition was analyzed without regard to mitigating measures. (ADAAA, A.3406 §4(a).

Here, in Pennsylvania, prior to the U.S. Supreme Court's 1999 declarations that mitigation measures should be considered, consistent with §12(a) of the PHRA's mandate to construe the PHRA liberally, the PHRC followed the reasoning found in the line of cases that declared that mitigation measures should not be considered when evaluating whether a person has a disability. *See ie Baert v. Euclid Bev. Ltd,* 8 AD Cases 973 (7th Cir. 1998); *Arnold v. United Parcel Service,*7 AD Cases 1489 (1st Cir. 1998); and *Schaefer v. State Insurance Fund,* 10 AD Cases 700 (2nd Cir. 2000). After the 1999 line of U.S. Supreme Court cases, Pennsylvania joined with states like Massachusetts and continued to determine whether an impairment amounts to a disability without regard to whether the effects of an impairment can be mitigated by measures such as medications. *See Dahill v. Police Department of Boston,* 434 Mass. 233, 748 N.E. 2d 956 (2001).

In other words, Pennsylvania has always analyzed whether an impairment substantially limits a major life activity without regard to mitigating effects.

Accordingly, in the present case, we first review Moyer's condition without regard to the fact that Moyer was taking multiple pain medications. The record reveals that, after tearing the meniscus in his right knee, Moyer underwent two arthroscopic surgeries: one in March 2003 and a second surgery in January 2004. (N.T.1 44, 128, 176; R.E. 1 at 35). After the first surgery, Moyer developed blood clots and swelling of the right leg and, at the time, his surgeon, Dr. Thompson, suspected reflex sympathetic dystrophy ("RSD"). (N.T.1 176). Moyer credibly testified that since 2003, he has suffered chronic pain, 24 hours a day, 7 days a week and has been variously diagnosis for the condition. (N.T.1 127, 141). The record reveals that the pain was so intense that, at one point, Moyer underwent a ganglion nerve block procedure to relieve the pain, but this was to no avail. (N.T.1 178). Although Deimler contends that Moyer was not diagnosed with RSD, both Dr. Thompson and Dr. Cho suspected RSD was Moyer's condition. Although a September 13, 2004 triple phase bone scan done on Moyer at Johns Hopkins in Maryland concluded that Moyer did not have RSD and Dr. Cho had initially indicated that Moyer suffered more from sensory neuropaty than from RSD, Dr. Cho later concluded that Moyer's condition should be classified as between stage 1 and stage 2 RSD and that Moyer's condition was getting worse. (N.T.1 201, 242; C.E. 5).

Moyer credibly presented his perspective of his personal experience stating that, without pain medication, he would not be able to stand or walk and that

before he began taking pain medications, he went no where and could not do anything. (N.T.1 85, 157). Moyer's testimony alone is sufficient in that he is not required to submit expert testimony on the extent his impairment affects major life activities. *See Haynes v. Williams,* 392 F.3d 478 (D.C. Cir. 2004). Never-the-less, as support for Moyer's testimony, Dr. Cho confirmed that with RSD, a person suffers constant throbbing pain, a burning ache and the affected area is painful just to touch. (N.T.1 240). Dr. Cho also testified that without pain medications, Moyer would lead a "miserable life all day" and be "unable to sleep." (N.T.1 185-186).

Given the circumstances of Moyer's condition, we find that Moyer had a disability within the meaning of the PHRA and that his disability substantially affected his major life activities of standing, walking and sleeping. Further, without pain medications, Moyer's disability would almost totally prevent him from doing activities that are of central importance to most people's daily lives.

Deimler's post-hearing brief generally argues that Moyer failed to prove a "mixed-motive" violation of the PHRA, however, Deimler chose not to specifically address the actual question. Instead, Deimler submits that a mixed-motive analysis is not necessary because Moyer failed to demonstrate that he had a disability and that Deimler knew about a disability.

Of course, a determination has now been made that Moyer did have a disability. This leaves Deimler's argument that Deimler did not have knowledge of a condition that amounts to a disability. On this question, the record reveals that as early as March 2004, when Moyer returned from medical leave, Craig Deimler

and Moyer sat together and discussed the conditions of Moyer's return. At that time, Moyer requested and was granted several accommodations. Moyer informed Craig Deimler that due to chronic pain, Moyer was taking various pain medications and that on some mornings, Moyer needed extra time for his medications to take effect so the pain level was bearable and he would be able to move around. (N.T.1 44-45). Without setting any specific time by which Moyer had to arrive at work, Craig Deimler accepted this component of Moyer's request to be accommodated. Additionally, Craig Deimler granted Moyer the ability to take more frequent breaks whenever his pain became too severe. (N.T.1 45). Finally, when Moyer returned, he did not immediately start working full time. Instead, Moyer's return was made contingent on a part-time trial basis where Moyer's continuing with Deimler depended on the amount of work Moyer could do. (N.T.1 44). Accordingly, Moyer began part-time and only gradually worked up to full-time.

Thorough out his employment upon his return from medical leave, Moyer's colleagues and Project Leaders all knew that Moyer took prescription medications. In fact, Moyer carried a large pill box described as the size of a fishing tackle box. In his deposition, Craig Deimler confirmed that he knew Moyer was on prescription drugs. (C.E. 7 at 45). Further, Fox testified that Gary Deimler told him that Moyer was taking prescription drugs. (N.T.2 81). Clearly, Deimler was well aware that Moyer continually took medications to relieve chronic pain in his leg. No doubt, it was the sheer force of Moyer's will that he was able to work despite the considerable pain he continually suffered.

In Deimler's post-hearing brief, Deimler cites the cases of *Curtis v. Tyco Retail Healthcare Group, Inc.,* 2008 U.S. Dist. LEXIS 58572 (E.D. Pa. 2008) and *Hoff v. Performance Group Inc.,* 2009 U.S. Dist. LEXIS 111220 (C.D. Ill. 2009 in support of its argument that Moyer failed to disclose to Deimler that he had a disability. In the *Hoff* case, the question revolved around whether a Complainant was denied a reasonable accommodation not whether a Complainant's disability was the reason for a termination. The distinction is important. As the court in *Hoff* indicated, sometimes an individual's symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of a disability. Further, deliberate ignorance does not insulate an employer from liability. The court in *Huff* cited to another case, *Adams v. Rice,* 531 F.3d 936 (D.C. Cir. 2008), where the court in *Rice* stated, "An employer's knowledge of an employee's limitation – as opposed to [an] impairment – is certainly relevant when the disabled employee requests a workplace accommodation...in such cases the accommodation sought must relate to the limitation at issue. But in pure discrimination cases...an employer's knowledge of the precise limitation at issue is irrelevant; so long as the employee can show that [the] impairment ultimately clears the statutory hurdle for a disability-...the employer will be liable if it takes adverse action against [the Complainant] based on that impairment."

In the Curtis case, the Complainant was terminated by a supervisor that was wholly unaware that the Complainant suffered from a medical condition and required an accommodation. Of course, in the present case, Deimler certainly

knew that Moyer had a condition that required several aspects of a continued accommodation. The *Curtis* case is clearly distinguishable from the present case. In the present case, Deimler certainly knew of Moyer's impairment.

The PHRC's post-hearing brief on behalf of the state's interest in Moyer's allegation submits that a mixed-motive analysis reveals the existence of both lawful and unlawful motivations for Moyer's termination. The PHRC's post-hearing brief points to several instances where Deimler directly articulated discriminatory animus. First, the PHRC's post-hearing brief observes that Deimler's Separation Notice listed safety – "medications clouded judgment", as one reason for Moyer's termination. (J.E. 11). Next, at an unemployment compensation hearing occurring less than three months following Moyer's termination, Deimler revealed that Moyer was fired "primarily for a safety issue." (C.E.6 at 12).

In addition to these observations in the PHRC's post hearing brief, at the Public Hearing, Craig Deimler also testified that there were multiple reasons for Moyer's termination including a "residual safety issue". (N.T.2 139) Further, at his deposition, Craig Deimler testified that he informed Moyer that his primary concern was a safety issue. (C.E.6 at 19).

This repeatedly stated evidence directly demonstrates that Moyer's termination was primarily motivated by the perceived effects of Moyer's disability. Without question, Deimler's principal reason for Moyer's termination was the thought that Moyer posed a safety risk.

On the question of whether Deimler sufficiently demonstrated that Moyer was a demonstrable safety risk, Deimler failed to make such a showing. PHRC

regulations provide that a "... disability may be job-related if placing the ... disabled employee ... in the job would pose a demonstrable threat of harm to the health and safety of others." 16 Pa. Code §44.4. In short, it is an employer's burden to prove that an employee poses a direct threat. *See EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505, 520 (W.D. Pa. 2010). In this case, the record contains no evidence of an individualized assessment of Moyer's ability to safely perform the essential functions of his job. Additionally, there is no evidence that reasonable medical judgment that relies upon the most current medical knowledge was used to make the judgment that Moyer posed a safety risk. Instead, the record reveals that Moyer could have been sent for a medical examination, but he was not. Indeed, Deimler's Employee Information Guide specifically reserves the right to require a medical examination for the express purpose, "[t]o help ensure that employees are able to perform their duties safely." (J.E. 1 at 8).

The record reveals that the only medical information available to Deimler was the information Dr. Cho provided when he spoke briefly with Craig Deimler. In effect, this information enlightened Craig Deimler that Dr. Cho had the option of changing Moyer's medications and that if he did so, Craig Deimler would see a difference in Moyer's performance.

Clearly, Deimler utterly failed to meets its burden to establish that Moyer posed a demonstrable risk of harm to himself or to others or that his continued employment represented a direct threat to Moyer or to others. On the contrary, Moyer's Project Leader indicated that he would simply reassign Moyer to different

duties on the few occasions he considered Moyer to be less than fully capacitated. In this case, two simple accommodations easily could have been employed by Deimler to alleviate any safety concern Deimler had: 1. allow Dr. Cho time to adjust Moyer's pain medications; and 2. periodically reassign Moyer's duties away from the need for Moyer to be on a ladder or scaffold.

On the question of whether Deimler met its burden of proof that Deimler would have discharged Moyer even in the absence of the purported safety concern, we find that Deimler failed to meet this burden. In fact, considered as a whole, the evidence reveals that the other reasons given at various times by Deimler for Moyer's termination were fabricated and that the only reason Moyer was terminated was because Deimler prematurely and inappropriately considered Moyer a safety threat. The details of this conclusion will be fully explained in the pretext stage of the next analytical model being reviewed.

Accordingly, this brings us to the remaining proof formula – the *McDonnell Douglas* proof model. Once again, under this model, Moyer has to establish a prima facie case and if he does, Deimler has to articulate a non-discriminatory reason for Moyer's termination and if Deimler can do this, Moyer has the ultimate burden to establish that Deimler's reasons are a pretext and the action was motivated by intentional disability-based discrimination.

The PHRC's post-hearing brief correctly articulated the requisite elements of a *prima facie* showing. Deimler's post-hearing brief fails to even review its view of the requisite elements of a *prima facie* showing. Here, as previously analyzed, Moyer established that he is a member of a protected class in that, during the

relevant time period, he had a disability. Further, there is no dispute that Moyer was qualified to be a Carpenter Level 3 and that he was terminated.

The final element of the requisite *prima facie* showing is met in several ways. As discussed preciously, there is evidence that Moyer's condition was the driving reason for Deimler's decision to terminate him. Indeed, the record fully supports a finding that Moyer's condition was a motivating factor in the decision to terminate Moyer. In the present case, the evidence shows that Deimler perceived that Moyer had an impairment that prevented Moyer from attending work regularly and that his condition posed a safety risk. These stated reason are directly related to the effects of the medications Moyer was taking to control the pain associated with his disability. Further, Deimler failed to consider the possibility of a reasonable accommodation for Moyer's disability. When such a failure leads to a termination for performance inadequacies resulting from the disability, this amounts to a termination solely because of the disability. *See Borkowski v. Valley Center School District,* 63 F.3d 131, 4 AD Cases 1264 (2nd Cir. 1995). In the present case, Moyer's physical condition was the main obstacle to Moyer keeping his job. Instead of determining the feasibility of Dr. Cho's proposal to change Moyer's medications and when perceived to be necessary, continuing to change Moyer's assigned duties, Deimler simply terminated Moyer. This fundamental failure to consider alternatives sanctions a finding that Deimler terminated Moyer "because of" his disability.

Therefore, Moyer has established his initial burden of establishing a *prima facie* case of unlawful disability-based discrimination. This brings us to Deimler's

burden of production. Deimler now has the burden to show that it articulated some legitimate, non-discriminatory reason for terminating Moyer.

In this regard, Deimler's post-hearing brief submits that there are three non-discriminatory reasons for Moyer's termination: 1. Deimler received reports that Moyer was a safety risk; 2. Moyer's lackluster adherence to a Reasonable work schedule; and 3. Moyer's inaccurate and dishonest time card reporting. Deimler's post-hearing brief also generally contends that Moyer was both warned about these three "problems" and warned that he would be terminated if the problems recurred. By articulating these reasons, Deimler sustains its burden of production and by doing so, Moyer is required to now show that the proffered reasons are a pretext for unlawful discrimination.

In the case of *Fuentes v. Perske,* 32 F.3d 759 (3rd Cir. 1994), the court explained that an articulated reason for an action can be discredited by the presentation of evidence that demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions." In the present case, a totality of the evidence reveals that Deimler's stated reasons are both incredible and not worthy of credence.

First, the record is clear that, while testifying at an unemployment hearing, Craig Deimler admitted that he never told Moyer that he might be terminated. (C.E.6 at 19). In fact, Craig Deimler also told the unemployment hearing referee that he only wrote the warning notices to make sure he had written down the things he discussed with Moyer. (C.E.6 at 13). In Deimler's letter to the PHRC dated December 9, 2009, Deimler declared that the warning notices were issued

to Moyer, (C.E. 1 ¶8 p. 3), however, in Craig Deimler's deposition, he testified that he had no idea if Moyer was given copies of the warnings, (C.E.7 at 70-71), additonally, when testifying at the unemployment hearing, Craig Deimler indicated that the warnings were meant to be verbal, (C.E.6 at 19), and finally, at the Public Hearing, Craig Deimler admitted that he never gave Moyer the February 11, 2005 warning notice regarding purported time card falsification. Clearly, Moyer was neither given the written warnings nor ever informed that he would be terminated if the things discussed persisted. On the February 11, 2005 warning notice purporting to address time card falsification, Craig Deimler noted that an action to be taken was "suspension". (J.E. 10). Of course, Moyer was never suspended.

Of the three general reasons stated by Deimler in its post-hearing brief, the easiest to discredit is that Moyer failed to adhere to a reasonable work schedule. From the time Moyer returned to work in March 2004, Craig Deimler specifically advised Moyer that, at his discretion, he was permitted the latitude to come to work later than the normal starting time. (C.E. 6 at 15). There were no set parameters to the open ended flex-time Craig Deimler gave Moyer in this regard. From March 2004 until February 11, 2005, nothing was said to Moyer whenever he came to work later than the normal starting time. Not until February 11, 2005 did Craig Deimler change the terms of the March 2004 open-ended agreement with Moyer.

Craig Deimler's decision to readjust the terms of when Moyer should come to work was very likely prompted by co-worker complaints. Indeed, when Craig

Deimler did speak with Moyer he told Moyer that his continued use of flex-time was unfair to other employees, (N.T.1 155-156), and that Moyer would have to begin to follow the rules like the other employees. (N.T.1 115).

More importantly, on this issue, when Craig Deimler testified at the Public Hearing, he admitted that the matter of Moyer's delayed starting times was not "much of an issue." (N.T.2 139). To suggest that part of the reason Moyer was terminated was because Moyer came in late is simply incoherent. Prior to February 11, 2005, Moyer was specifically permitted to come in late at his discretion. After that, Craig Deimler admitted that Moyer could still come in later just not as late and that on this point, Moyer had "gotten better." (N.T,2 139).

Next, we turn to the articulated reason that, on two occasions, Moyer was dishonest when reporting his time on his time sheets. Both inconsistencies and contradictions in Craig Deimler's various accounts of this reason lead to the inescapable conclusion that, like the late arrival to work reason, the time sheet reporting reason is not worthy of credence either. As the credibility issues associated with this reason have already been reviewed they will not be repeated again here.

Finally, with respect to Deimler's assertion that Deimler received reports that Moyer was a safety risk, the record evidence reveals that Deimler never adequately explored the details of the vague references being made that Moyer was a safety risk. As previously indicated, Deimler failed to meet its burden to show that Moyer posed a demonstrable risk of harm to himself or to others. What is clear is that during a meeting on the third Thursday in January, Project Leader

Fox generally related that one of Moyer's co-workers informed Fox that, after taking his medications, Moyer seemed unstable and unsteady on scaffolding and that "at times" he felt unsafe working with Moyer. (N.T.2 31-33). Fox testified that at times he would switch Moyer from working on scaffolding to the ground crew. (N.T.2 54). There was no instance where Moyer had fallen or dropped anything, just vague information that Moyer posed a safety risk. Tellingly, Moyer was never sent home from a job, never sent for a physical and never subjected to a drug test. (N.T.2 67-70). About all Craig Deimler did was to tell Fox to keep track and see if Moyer's appearance of being unstable continued and if so to let him know. Craig Deimler submits that all Fox told him at some later point is that, when asked, Fox indicated that it was still happening. (N.T.2 118-119).

A totality of the evidence reveals that Gary Deimler and Craig Deimler got together after Fox raised the safety issue and began to contemplate a way to terminate Moyer. Initially, in January 2005, Fox was instructed to keep closer tabs on Deimler employees. Shortly after Moyer was terminated, this procedure was stopped. Interestingly, the first instance of alleged time sheet error did not come to Craig Deimler's attention from Fox. Instead, Craig Deimler was inconsistent with regard to where he gained the insight that Moyer's time sheet for February 10, 2005 was in error. At one point, Craig Deimler indicated he received the information from individuals at the job, (N.T.2 127), however, Fox testified that he was never called in to discuss any time card discrepancies. (N.T.2 87). Additionally, when he testified at an unemployment hearing, Craig Deimler indicated that he knew Moyer's times were incorrect because Moyer would stop by

the office each day after work and his time would be noted. (C.E.6 at 17). This inconsistency begins to reveal a designed effort to fabricate reasons for Moyer's termination.

The timing of the purported second instance of time sheet error and the full circumstances surrounding Craig Deimler's version of events as described earlier lends more support to the conclusion that Deimler conjured up reasons to terminate Moyer because of an unwarranted fear that he posed a safety risk. Craig Deimler went so far as to suggest that, after speaking with Dr. Cho, he felt that Moyer was just being careless. Clearly, Dr. Cho had informed Craig Deimler that if Moyer's prescriptions were changed, Craig Deimler would see a difference. In effect, Dr. Cho informed Craig Deimler that a change in Moyer's prescriptions would likely alleviate any and all of the concerns he had.

The record in this case is abundantly clear. When the decision was made to terminate Moyer, it was not because of his attendance or because he had fabricated time sheets. Instead, the real reason why Moyer was terminated was because the medications he was taking to relieve the pain caused by his disability raised a vague concern over safety and because the effects of Moyer's condition remained after nearly a year. One can imagine Gary Deimler and Craig Deimler thinking that once Moyer returned to work, the effects of his knee surgery would soon disappear. When Moyer continued to experience significant pain that led to his need to continually take multiple pain medications for nearly a year, this became too long for Gary and Craig Deimler. Their solution was to design a

scheme that would result in Moyer's termination. Their problem is that Craig Deimler could not accurately keep the details of the scheme straight.

In summary, Moyer has proven by a preponderance of evidence that he was unlawfully terminated because of his disability. Accordingly, consideration of an appropriate remedy is in order.

Section 9(f)(1) of the PHRA provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement ... with or without back pay ... and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice ... as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which he would have been, absent the discriminatory practice. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975); *PHRC v. Alto-Reste Park Cemetery Assoc.*, 306 A.2d 881 (Pa. S. Ct. 1973).

The first aspect we must consider regarding making Moyer whole is the issue of the extent of financial losses suffered. When a Complainant proves an

economic loss, back pay should be awarded absent special circumstance. *See Walker v. Ford Motor Co., Inc.*, 684 F.2d 1355, 29 FEP Cases 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the Complainant] would probable have earned ..." *PHRC v. Transit Casualty Insurance Co.*, 340 A.2d 624 (Pa. Cmwlth. Ct. 1975), *aff'd.* 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim since the wrongdoer caused the damages. *See Green v. USX Corp.*, 46 FEP Cases 720 (3rd Cir. 1988).

During the Public Hearing, the parties stipulated that all back pay claims cease on October 11, 2007. Additionally, Moyer testified that for approximately two and a half months near the end of 2006, Moyer was unable to work as he was recovering from several hand surgeries. (N.T.1 80). Accordingly, the periods in question regarding back pay lost is limited to March 1, 2005 to October 15, 2006 and January 1, 2007 to October 11, 2007.

The parties also stipulated that from January 1, 2005 until Moyer discharge on February 28, 2005, Moyer earned a total of $4,578.75 from Deimler. January 1, 2005 until February 28, 2005 is a period of approximately 8 ½ weeks. Dividing 8 ½ into $4,578.75, this results in average earnings of $538.69 per week. Accordingly, the figure of $538.69 per week will be used to calculate the lost wages from March 1, 2005 until October 11, 2007.

From March 1, 2005 until October 15, 2006, there are approximately 85 weeks and from January 1, 2007 until October 11, 2007, there are approximately 40 ½ weeks. Accordingly, the following calculations are made:

85 weeks @ $538.69 per week..... $45,788.65

40 ½ weeks @ $538.69 per week..... $21,816.95

Total lost wages March 1, 2005 – October 11, 2007.... $67,605.60

Of course, interim wages must be deducted from this amount. Following his termination from Deimler, Moyer diligently applied to work at many places in the construction field and was periodically interviewed but was initially unsuccessful in finding employment in construction. Instead, Moyer's first job after his termination was as a short-order cook with Applebees. It was not until January 2006 that Moyer found a job as a carpenter. In January 2006, Moyer began working for Klawitter Construction as a carpenter and worked there approximately 8 months. After being unable to work for the last two and a half months in 2006, Moyer next found employment with Ambassador Homes in January 2007.

The parties stipulated to the amounts of Moyer's wages for the years 2005 – 2007. The stipulated earnings for 2007 are $29,859.00. However, the parties also stipulated that the back pay liability does not go beyond October 11, 2007. Accordingly, the earning made during the eleven and one half week period between October 11, 2007 and the end of 2007 should not be deducted as interim earnings. Dividing the sum of $29,859.00 by 52 weeks equals $574.21 per week. Because only forty and one half weeks of earnings in 2007 can be deducted, the sum to deduct for 2007 is $574.21 times forty and one half - $22,255.51. Using

the stipulated figures, the following calculations are made regarding interim wages that may be deducted from a back pay award:

Calendar year 2005 interim wages..... $2,263.25

Calendar year 2006 interim wages..... $12,023.00

Calendar year 2007 interim wages..... $23,255.51

Total Interim wages..... $37,541.76

Accordingly, Moyer's back pay award is as follows:

Wages lost March 1, 2005 – October 11, 2007..... $67,605.60

Minus interim wages..... $37,541.76

Total back pay award..... $30,063.84

Further, the PHRC is authorized to award interest on the back pay award. *Goetz v. Norristown Area School District,* 16 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1975).

The post-hearing brief on behalf of the state's interest in the complaint submits that both Moyer and the PHRC should be reimbursed for out-of-pocket expenses paid to Dr. Cho who provided expert medical testimony. Moyer paid $1,200.00 and the PHRC paid $2,400.00 to Dr. Cho. Section 9(f)(1) of the PHRA envisions an award of "...reasonable out-of-pocket expenses caused by such unlawful discriminatory practices..." The fees paid to Dr. Cho are found to have been reasonable under the circumstances present in this case.

Finally, any unemployment compensation benefits received by Moyer are not deductible. *See Craig v. Y&Y Snacks,* 721 F.2d 77 (3rd. Cir. 1983).

An appropriate Order follows:

COMMONWEALTH OF PENSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LARRY MOYER, II,	:	
Complainant	:	
	:	
v.	:	**PHRC CASE NO. 200408084**
	:	**EEOC CHARGE NO. 17FA562414**
GARY DEIMLER & SONS	:	
CONSTRUCTION,	:	
Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, the Permanent Hearing Examiner finds that the Complainant has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Facts, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELAITONS COMMISSION

January 3, 2012
Date

By: _____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LARRY MOYER, II, **Complainant**	:	
v.	:	**PHRC CASE NO. 200408084** **EEOC CHARGE NO. 17FA562414**
GARY DEIMLER & SONS CONSTRUCTION, **Respondent**	:	

FINAL ORDER

AND NOW, this 24th day of January, 2012, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Facts, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Stipulations of Fact, Findings of Facts, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S

1. That Deimler shall cease and desist from discriminating against employees because of their disabilities.

2. That, within 30 days of the effective date of this Order, Deimler shall pay to Moyer to lump sum of $30,063.84, which amount represents wages lost for the period between March 1, 2005 and October 11, 2007.

3. That Deimler shall pay additional interest of 6% per annum on the award calculated from March 1, 2005 until payment is made.

4. That Deimler shall pay to Moyer the additional amount of $1,200.00, which amount represents Moyer's reasonable out-of-pocket expenses paid to Dr. Cho for his testimony as a medical expert.

5. That Deimler shall pay to the PHRC the amount of $2,400.00, which amount represents the PHRC's reasonable out-of-pocket expenses paid to Dr. Cho for his testimony as a medical expert.

6. Payment to the PHRC shall be by cashier's check payable to the Pennsylvania Human Relations Commission and delivered to PHRC Harrisburg regional office Attorney Joseph Bednarik.

7. That Deimler shall report the means by which it will comply with this Order, in writing to Joseph T. Bednarik, PHRC Assistant Chief Counsel, within 30 days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Gerald S. Robinson, Chairman

Attest:

_____ **Dr. Daniel D. Yun, Secretary**

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LARRY MOYER, II, **Complainant**	:	
v.	:	**PHRC CASE NO. 200408084**
	:	**EEOC CHARGE NO. 17FA562414**
GARY DEIMLER & SONS CONSTRUCTION, **Respondent**	:	

DISSENT

I, PHRC Chairman, Gerald S. Robinson, hereby dissent from the PHRC's majority Opinion.

In my opinion, Larry Moyer, II failed to establish that he is an individual with a disability within the meaning of the PHRA. Upon his return to work in 2004, Moyer's Doctor provided Moyer with a doctor's note that indicated Moyer had no restrictions and that Moyer could return to full duties. Moyer then presented this doctor's note to Deimler. Further, I find that Moyer failed to establish that his condition substantially limited him in a major life activity. Upon his return in 2004, Moyer was able to perform nearly all of the duties he was assigned.

Additionally, I find that Moyer's injury was not work related, therefore, he could not and did not pursue a worker's compensation claim.

By: _____

Gerald S. Robinson, Esquire
PHRC Chairperson