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

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

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)

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).

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).

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).

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).

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)

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.

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

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

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.

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.

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

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.

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

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))

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

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

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).

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

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

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.

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

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

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

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

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

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.

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:

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