



COPY

**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCH A. MOORE, JR.  
Governor

June 4, 1986

Herb H. Henderson, Esq.  
Henderson & Henderson  
711 1/2 5th Avenue  
Huntington, WV 25711

Charles M. Surber, Esq.  
Jackson, Kelly, Holt & O'Farrell  
P. O. Box 553  
Charleston, WV 25322

RE: James E. Major V Pittston Coal Co.  
dba Elkay Mining Co./EA-285-85 & ER-284-85

Dear Mr. Henderson and Mr. Surber:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of James E. Major V Pittston Coal Company dba Elkay Mining Co., Docket Nos. EA-285-85 & ER-284-85.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney  
Executive Director

HDK/kpv  
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES E. MAJOR,

Complainant,

vs.

Docket Nos. EA-285-85  
ER-284-85

PITTSTON COAL CO. d/b/a  
ELKAY MINING CO.,

Respondent.

O R D E R

On the 6th day of May, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Theodore R. Dues, Jr. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law in the section entitled Proposed Order, paragraph A, by inserting after the word "plus" the word "prejudgment" and by inserting after the word "annum" the phrase "from September 28, 1984, until August 27, 1985, the date of the hearing in this matter."

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order, except as amended by this Order.

The respondent is hereby ORDERED to provide to the

Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 23 day of May, 1986.

Respectfully Submitted,



~~CHAIR/VICE-CHAIR~~  
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION

WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES E. MAJOR,

Complainant,

vs.

Docket Nos. EA 285-85;  
ER 284-85

PITTSTON COAL CO./dba  
ELKAY MINING CO.,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS  
OF FACT AND CONCLUSIONS OF LAW

This matter matured for public hearing on August 27, 1985. The hearing was held in Courtroom 2, Logan County Courthouse, Logan, West Virginia. Appearing at the hearing were the Complainant, in person, and by his counsel, Herbert H. Henderson and Dwight J. Staples. The Respondent appeared by its counsel, Charles M. Surber, Jr. Also present on behalf of the Respondent was A.W. Adams. The presence of a Hearing Commissioner was previously waived by the parties.

After considering the testimony of record, the documentary evidence and the proposed findings submitted by the Complainant and the Respondent on November 4, 1985 and October 4, 1985, respectively, the Examiner makes the following recommended decision.

ISSUES

1. Whether the Respondent discriminated against the Complainant due to the Complainant's age by implementing its early retirement plan.

2. Whether the Respondent discriminated against the Complainant due to his race by paying him less than similarly situated whites.

#### FINDINGS OF FACT

1. The Complainant was initially hired by the Respondent as a dust sampler on or about December 1, 1977.

2. In January, 1983, the Complainant and other white employees, who were subsequently recalled as safety inspectors, were laid off.

3. The recall was made sometime in June, 1983.

4. On or about August 3, 1984, the Respondent offered a one-time early retirement plan to all salaried employees who would be at least sixty (60) years of age by January 1, 1985.

5. The Respondent represented to its employees that the retirement plan was offered because of uncertainty as to the future of the coal industry and lower levels of productivity.

6. The early retirement plan was a discretionary act of management unsupported by any evidence of reduction in productivity.

7. The major criteria of the early retirement plan was age.

8. The early retirement plan was not a part of the regular pension plan provided to the Respondent's employees.

9. Under the regular pension plan an employee must have been age 65 to be eligible for retirement.

10. The Respondent's coal production from 1983 to 1984 almost doubled.

11. Of the nine employees eligible for the early retirement, the Complainant was the only person who suffered a loss of substantial medical benefits.

12. On September 28, 1984, the Complainant accepted the retirement plan.

13. At the time the Complainant retired, the Complainant was the only safety inspector over the age of sixty (60).

14. At the time the Complainant accepted the retirement plan he was the only black of six safety inspectors.

15. At the time the Complainant accepted the retirement plan the next oldest safety inspector was thirty-three (33) years of age and the next senior safety inspector to him had two years less seniority with the Respondent than he did.

16. During his tenure of employment with the Respondent, the Complainant had eight different West Virginia certifications and ten federal certifications; which included certification and First Aid, mine rescue apparatus and Safety Instructor cards for the state of West Virginia and from the federal government.

17. During the Complainant's tenure of employment with the Respondent the employee, Mr. Nuckles, had only one certification; that being a Shot Fire Certificate.

18. From the period of June, 1983 through September 28, 1984, Mr. Nuckles was paid \$7,590.00 more than the Complainant.

19. Both Mr. Nuckles and the Complainant had prior underground mining experiences.

20. Other than the certifications mentioned above, both the Complainant and Mr. Nuckles had similar educational

backgrounds.

21. During the Complainant's tenure with the Respondent, white safety inspectors performed personal tasks for the safety director during work hours and on some occasions at places off company property.

22. The Complainant performed extensive dust monitoring and calibrations during his tenure of employment with the Respondent.

23. Mr. Nuckles on the other hand performed a very small number of dust monitorings.

24. The Complainant accompanied state mine inspectors during their inspections of the Respondent's mine during the tenure of his employment.

25. Mr. Nuckles did not perform safety inspections with safety inspectors who were conducting safety inspections of the Respondent's mine during the Complainant's tenure.

26. The Respondent's treatment of the Complainant created a hostile work environment for the Complainant which suppressed and inhibited the Complainant's potential for advancement and resulted in the Complainant's acceptance of the early retirement plan.

27. The Complainant suffered extreme mental pain and anguish as a result of the Respondent's actions.

#### CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. As in all cases, the Complainant bears the burden of

proving the allegation of his complaint that the Respondent discriminated against him in its employment considerations and his salary for reasons of his age and/or race.

3. The Complainant established a prima facie case by establishing that he is a member of a protected class; that he was deceptively and constructively induced to resign from his employment; that whites and younger employees were affected less adversely than he by the early retirement plan and that as to safety inspectors the plan affected no whites in the department; and by establishing that the Respondent's representations for the early retirement plan were without merit.

Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

4. The Respondent failed to articulate a legitimate nondiscriminatory reason for its actions pertaining to the early retirement plan and the pay disparity between the Complainant and Mr. Nuckles.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

5. Accordingly, the Complainant made a prima facie case unrebutted by a credible legitimate nondiscriminatory reason for the Respondent's actions on both the race and age allegations before this Examiner.

6. The doctrine of collateral estoppel and res judicata are inapplicable in this proceeding.

Hubbard v. S.W.C.C. and Pageton Coal Co., 295 S.E.2d 659

(W.Va. 1981).

7. The Complainant is entitled to backpay in the amount of Seventy-Five Hundred Ninety (\$7,590.00) Dollars, plus interest at the rate of 10% per annum.

8. The Complainant is entitled to damages for mental pain and anguish in the amount of Fifteen Thousand (\$15,000.00).

9. The Complainant is entitled to attorney's fees.

10. The Examiner concludes that the petition for attorney's fees filed by the Complainant's counsel are in compliance with the current law of this jurisdiction and are reasonable. Accordingly, the Examiner awards attorney's fees to the counsel for Complainant in the amount of Ten Thousand Four Hundred Twenty-Five (\$10,425.00) Dollars.

#### DETERMINATION

The Complainant introduced evidence which established that he was the oldest safety inspector, as well as, the most qualified safety inspector employed by the Respondent during his tenure of employment. In addition, the Complainant introduced evidence that he received less pay than a younger and less qualified white employee. The evidence also indicated that the Complainant was the only employee to be adversely affected by the reduction in medical coverage as a result of the early retirement plan. The other employees eligible for the retirement plan were white.

The Respondent's explanation for his actions in regard to the establishment of the early retirement plan, its conduct in implementing the plan and its failure to properly advise the

Complainant of his rights under the plan as the same pertained to benefits were all considerably lacking in credibility. The testimony and the documentary evidence did not support their explanations.

Accordingly, the Examiner concludes that the Respondent discriminated against the Complainant in the terms and conditions of his employment and the implementation as well as represented reasons for the establishment of the early retirement plan due to the Complainant's age and race.

#### PROPOSED ORDER

The Examiner recommends the Commission take the following action:

A. That the Complainant be awarded backpay in the amount of \$7,590.00, plus interest at 10% per annum;

B. That the Complainant be awarded incidental damages in the amount of \$15,000.00;

C. That the Complainant be restored those benefits lost as a result of the implementation of the early retirement plan;

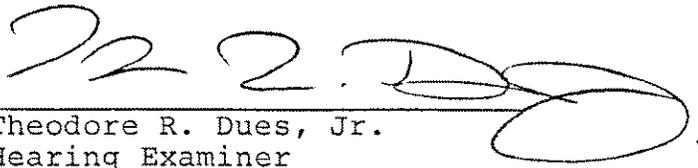
D. That the Complainant be reimbursed for any and all expenditures which would have been covered but for the implementation of the early retirement plan;

E. The Respondent pay unto the Complainant's counsel attorney's fees in the amount of \$10,425.00; and

F. That the Commission issue a cease and desist Order requiring the Respondent to comply with the West Virginia Human Rights Act in its interaction with the Complainant and any other targeted persons under the Act.

DATED Dec. 23, 1985

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner