



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**WV HUMAN RIGHTS COMMISSION**

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

**GASTON CAPERTON**  
GOVERNOR

TELEPHONE (304) 348-2616

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**Quewannoii C. Stephens**  
Executive Director

11 May 1992

George W. Blair, Jr.  
P. O. Box 639  
Matewan, WV 25678

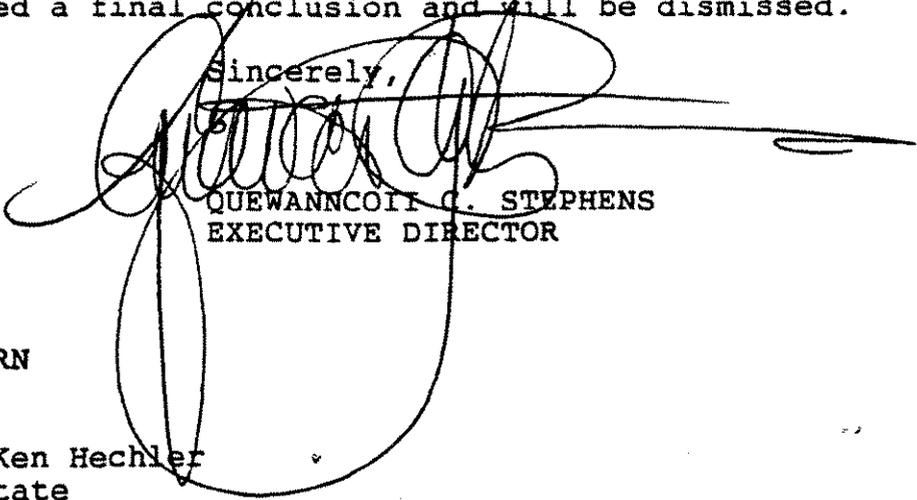
Eddie Hurley, President  
Hollow Mining Co.  
P. O. Box 382  
Phelps, KY 41553

Re: Blair v. Hollow Mining Co.  
Docket No. EH-168-90

Dear Parties:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Since the Corrected Hearing Examiner's Final Order was not appealed, this Final Order is being issued without the Commission's review. You have a right to appeal this Final Order to the Supreme Court of West Virginia. Attached is information about the appeal process to this Final Order. If you do not appeal, you should realize that your case has reached a final conclusion and will be dismissed.

Sincerely,

  
QUEWANNOII C. STEPHENS  
EXECUTIVE DIRECTOR

QCS/jm  
Enclosure  
CERTIFIED MAIL/RETURN  
RECEIPT REQUESTED

cc: The Honorable Ken Hechler  
Secretary of State

Mary Catherine Buchmelter  
Deputy Attorney General  
Civil Rights Division

### NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the Clerk of the Supreme Court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GEORGE W. BLAIR, JR.,

Complainant,

v.

DOCKET NO. EH-168-90

HOLLOW MINING CO.,

Respondent.

**FINAL ORDER**

On December 4, 1991, this matter came on for public hearing before Hearing Examiner Richard M. Riffe. On January 16, 1992, after consideration of the testimony and other evidence, as well as the proposed findings and other written submissions of the parties, the hearing examiner issued his Corrected Hearing Examiner's Final Order. The hearing examiner found in favor of the complainant and awarded him back pay in the amount of \$27,150, plus prejudgment interest (as of December 4, 1991) on back pay in the amount of \$8,145. In addition, the hearing examiner awarded the complainant incidental damages in the amount of \$2,500, and ordered the respondent to cease and desist its discriminatory hiring policies and practices.

No appeal having been filed pursuant to W. Va. Code § 5-11-8(d)(3) and § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission,

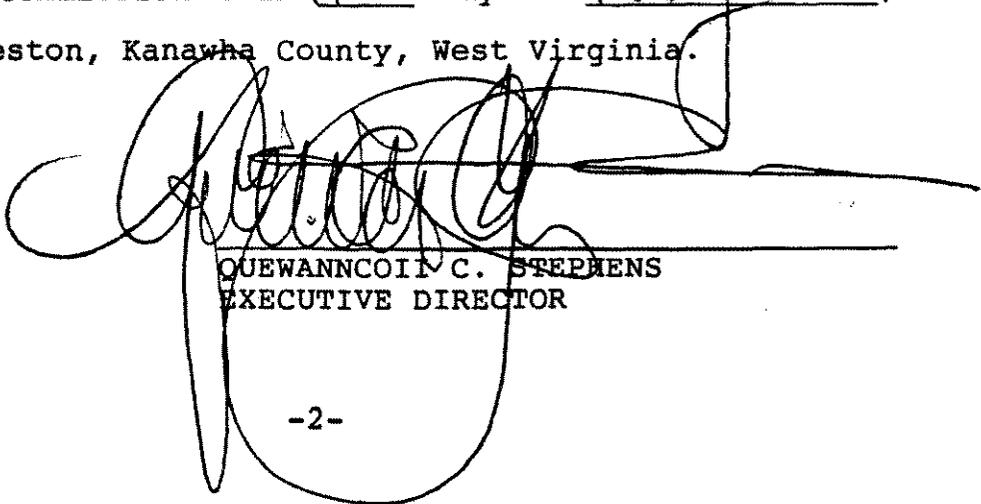
the Corrected Hearing Examiner's Final Order has been reviewed only as to whether it is in excess of the statutory authority and jurisdiction of the Commission, in accordance with § 77-2-10.9. of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. Other defects in said Corrected Hearing Examiner's Final Order, if there be any, have been waived. Finding no excess of statutory authority or jurisdiction, the Corrected Hearing Examiner's Final Order attached hereto is hereby issued as the Final Order of the West Virginia Human Rights Commission.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 1<sup>st</sup> day of May, 1992 in Charleston, Kanawha County, West Virginia.



QUEWANNCOTT C. STEPHENS  
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GEORGE W. BLAIR, JR.,

Complainant,

v.

DOCKET NO. EH-168-90

HOLLOW MINING CO.,

Respondent.

RECEIVED  
JAN 21 1992  
ATTORNEY GENERAL  
CIVIL RIGHTS DIV.

HEARING EXAMINER'S FINAL ORDER

This matter came on for hearing on December 4, 1991, in the Mingo County Courthouse in Williamson, West Virginia. The complainant appeared in person, the Commission appeared by its counsel, Mary Catherine Buchmelter, Deputy Attorney General. The respondent, Hollow Mining Co., did not appear at hearing.

Originally, this case was set for hearing on September 5 and 6, ~~1991~~ in Room 222 of the Mingo County Courthouse in Williamson, West Virginia. (Hearing Examiner's Exhibit No. 3). By order entered September 24, 1991, the case was continued until December 3 and 4, ~~1991~~. At that time, the order indicated that the hearing would be held in the County Commission Room, at the Mingo County courthouse, on December 3 and 4, 1991. Notice was served on the parties and that service is reflected in a Certificate of Service signed by the hearing examiner on September 25, 1991.

Subsequently, on or about November 15, 1991, counsel for respondent, Donna M. Colberg, of Smith, Heenan & Althen, 1380 One Valley Square, Charleston, West Virginia, telephoned the hearing examiner and indicated that she wished to withdraw as counsel due to fiscal problems of the respondent and respondent's resultant inability to pay for legal services. Ms. Colberg then sent a letter to the respondent advising it of her withdrawal as counsel and advising respondent that should no representative appear at hearing, a judgment would be rendered against it. (Hearing Examiner's Exhibit No. 2).

At hearing on December 4, 1991, Mary Catherine Buchmelter, Deputy Attorney General, represented to this examiner that Ms. Colberg had also relayed to her her intention to withdraw as counsel for respondent. At that time, Ms. Buchmelter verified with Ms. Colberg that Mr. Eddie Hurley, President of Hollow Mining, was without counsel. Ms. Buchmelter contacted Mr. Hurley and asked if this matter could begin at 12:00 noon on December 4, 1991, rather than at 9:30 a.m. Ms. Buchmelter represented under oath to this examiner that Mr. Hurley agreed to this two and one-half hour delay. Ms. Buchmelter memorialized this conversation in a letter to the hearing examiner dated November 27, 1991. (Hearing Examiner's Exhibit No. 1). The hearing examiner subsequently faxed a notice to the Courthouse and requested that it be posted on the door of County Commission Room before 9:30 a.m. on the day of the hearing informing the parties that the hearing would be held in Room 222 of the Courthouse. This notice

was posted on the County Commission door and remained there all morning. (See Attachment A). Furthermore, by letter dated November 12, 1991, the hearing examiner advised the parties that the hearing would be held in Room 222, Second Floor Conference Room, in the Mingo County Courthouse.

For all the above reasons, including documentary evidence and testimony (Tr. pp. 3-14), the hearing examiner finds that the respondent received proper notice of the hearing date, time, and location, and of the consequences of its failure to appear and defend the charges of the complainant.

The case proceeded to hearing at approximately 1:00 p.m.

#### FINDINGS OF FACT

1. Complainant, George Washington Blair, Jr., is, and at all times relevant to this action has been, a resident of Matewan, Mingo County, West Virginia. (Tr. p. 20).

2. Complainant, since birth, has had a medical condition that is referred to as "dwarfism." (Tr. p. 21). His condition consists of, but is not limited to, a bone deficiency in his femurs. (Tr. p. 21).

3. Complainant testified that he has had approximately four operations on his hips and legs to correct some of the

effects of his dwarfism. (Tr. p. 21). The femur is curved and without surgery it could shear off at the femur head. (Tr. p. 55; Commission's Exhibit No. 7).

4. Complainant testified that the surgeries have enabled him to walk without crutches and function out of a wheelchair. His femurs can now support his torso. (Tr. p. 22). The birth defect, however, still exists and results in an extremely short stature and the appearance typically associated with dwarfism. (Tr. p. 22).

5. Complainant testified to an extensive work history. He began working in a supermarket at the age of sixteen. (Tr. p. 23). He then worked for the Mingo County EEOC as a carpenter's helper during the 1977 flood. He worked in the office and did odd jobs. (Tr. p. 23).

6. After leaving the Mingo County EEOC, complainant got a job with Wolford Enterprises on the tipple at Thacker, West Virginia, dropping railroad cars, shoveling belt, and picking rock. He worked there approximately a year. He then left and went to Florida and worked for Rex Packaging for approximately eight months. (Tr. p. 25). His duties consisted of working a machine called a right angle, which made bores.

7. After leaving Rex Packaging, complainant testified that he began employment at BCDE Coal Company at Turkey Creek,

Kentucky. He ran an endloader, answered the phone, kept water going inside the mine, shoveled the belt head outside, kept the belt greased, and kept everything clean. (Tr. p. 24). He moved coal and got supplies. (Tr. p. 25).

8. When BCDE switched owners, complainant was laid off. He testified that during that time, he worked odd jobs until he became employed at Carbon Black in approximately 1985. (Tr. p 26). At Carbon Black (a coal mine), complainant started as a general laborer, building bratters, shoveling belt, shoveling the rib, running the scoop and working as a pinner helper. (Tr. p. 26). A pinner helper assisted a "pinner" by making up pins and loading supplies. When the pinner drills the hole, the pinner helper puts the bolts in the top, and tightens them. (Tr. p. 26).

9. Complainant was assistant to "pinner" Jimmy Pruitt on the Carbon Black job. (Tr. p. 26). Pruitt testified that he trained complainant for approximately six months. (Tr. pp. 26, 27, 64, 65). Pruitt also testified that he had opportunity to observe complainant at work and found him to be a "good worker." (Tr. p. 65).

10. After Pruitt left employment with Carbon Black, complainant testified that he did the "pinner" work. He continued in this position for approximately six months and then voluntarily left employment. (Tr. p. 27).

11. After leaving employment with Carbon Black, complainant testified that he did odd jobs. (Tr. p. 28). Complainant testified that he heard from a friend that they were hiring at Amey, No. 11 Mine in Thacker. Complainant went to the site, talked to the boss several times and was ultimately hired. (Tr. p. 28).

12. Complainant testified that his duties consisted of running the scoop, hauling supplies, i.e., pins, plates and cinder blocks. He scooped up loose coal so that it could be pinned. (Tr. p. 28).

13. Complainant worked at Amey for four to six months until it shut down and everyone was given layoff slips. (Tr. p. 28). Amey shut down operations and Hollow Mining took over. (Tr. p. 28). The period of time between Amey's shut down and the takeover by Hollow Mining was approximately two months. (Tr. p. 29).

14. Complainant testified that he began applying for a position with Hollow Mining and went to the site at least four to six times a month. (Tr. p. 29).

15. Complainant testified that he talked to the Superintendent, Taylor Norman, and asked to be hired. (Tr. pp. 31, 32). Norman instructed complainant to write his name, phone

number and what he could do on a piece of paper and told complainant that he would see what he could do. (Tr. p. 32).

16. Complainant testified that he continued to visit the job site attempting to secure a position. (Tr. p. 32). He stopped at respondent's office at the mouth of the hollow and spoke to a woman employee. She told complainant to write his name, address, phone number and previous experience and qualifications on a piece of paper. She said she would then pass them on to the man in charge. (Tr. p. 33).

17. Hollow Mining was hiring at this time. (Tr. pp. 33, 36; Commission's Exhibit Nos. 1 through 6).

18. Complainant testified that he was never asked to fill out an application. (Tr. p. 37). The applications filled out by men hired and submitted by respondent are not dated, and it is not possible to discern when they were filled out. (Commission's Exhibit Nos. 2-6). The "application" of Jimmy Mounts submitted by respondent consists of only a paper with his name, age, address, experience and references. (Commission's Exhibit No. 6).

19. It is standard practice in smaller mines to hire without a formal application process. (Tr. pp. 37, 66, 67). Often, applications are filled out after one is hired.

20. During the time complainant was attempting to be employed by respondent, respondent hired Charles Adams (Tr. pp. 37, 38; Commission's Exhibit No. 2); James Stanby (Tr. p. 38; Commission's Exhibit No. 3); Ancie Norman (Tr. p. 38; Commission's Exhibit No. 4); Buford Combs (Tr. pp. 38, 39; Commission's Exhibit No. 5); and Jimmy Mounts (Tr. p. 40, Commission's Exhibit No. 6).

21. On approximately October 23, 1990, complainant was told by Jimmy Mounts and Donald Atwood that respondent was going to open on the third shift and that they would be hiring a "greaser." (Tr. p. 42). A greaser greases equipment and puts in oil. (Tr. p. 42). Complainant was qualified to be a "greaser." (Tr. pp. 42, 64).

22. Jimmy Pruitt testified that complainant was qualified for the position of "greaser." He testified that complainant could "do anything anybody else could do in the mines." (Tr. p. 65).

23. Complainant visited the Hollow Mining site and talked to Taylor Norman, asking him specifically for the position of "greaser." Norman told complainant, "I don't think you can handle it." (Tr. p. 41).

24. Complainant was never hired by Hollow Mining. (Tr. p. 45).

25. Complainant continued to seek employment. He did odd jobs during this time and earned approximately \$300 per month. (Tr. pp. 47, 51). Complainant mitigated his damage by working whatever odd jobs he could find. He was hired by Northwest Energy in Thacker, West Virginia in April 1990. Complainant went to EMT school and obtained his EMT papers. (Tr. p. 45). He worked underground at Thacker running the scoop, hauling supplies, cinder blocks, rock dust, and greasing belt heads and equipment.

26. By numerous visits to the job site and by filling out the requested form, complainant applied for a position with respondent.

27. Respondent's refusal to hire complainant was due to complainant's handicap and/or respondent's perception of complainant's handicap.

28. Complainant is entitled to back wages.

29. Complainant was humiliated and embarrassed by respondent's discriminatory action and is entitled to incidental damages.

## DISCUSSION OF LAW

### A. DISCRIMINATION BASED UPON HANDICAP IS ILLEGAL.

West Virginia Code § 5-11-9 provides, in pertinent part: "It shall be an unlawful discriminatory practice . . . for any employer to discriminate against an individual with respect to . . . terms [or] conditions of employment if the individual is able and competent to perform the services required even if such individual is . . . handicapped. . . ." West Virginia Code § 5-11-3(t) provides that the term "handicap" refers to a person who:

- (1) Has a mental or physical impairment which substantially limits one or more of such person's major life activities; the term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;
- (2) Has a record of such impairment; or
- (3) Is regarded as having such an impairment.

The 1989 amendments to the Human Rights Act, which expanded the definition of handicap, became effective on July 1, 1989. On February 26, 1990, the Human Rights Commission filed its Rules Regarding Discrimination Against the Handicapped. These emergency rules were subsequently approved by the Legislative Rule Making Review Committee, thereby becoming legislative rules. These rules amplify the 1989 amendments to the Act, which substantially altered the landscape of handicap discrimination

law in West Virginia, and moot much prior interpretive case law. (Plainly, the amendments specifically render moot the decisions in Ranger Fuel Corp. v. West Virginia Human Rights Commission, 376 S.E.2d 154 (W. Va. 1988) and Chico Dairy Co. v. West Virginia Human Rights Commission, 382 S.E.2d 75 (W. Va. 1989)).

B. THE COMPLAINANT IS A QUALIFIED HANDICAPPED PERSON.

The respondent has never contested George Blair's claim that he is a handicapped individual under the West Virginia Human Rights Act. Had the respondent contested complainant's handicap status, Blair would have had the burden of proving that his condition met the requirements of the Act.

Section 77-1-3 of the Commission's Rules Regarding Discrimination Against the Handicapped state:

3.1. If, at the time of public hearing, there is a question or dispute as to whether the complainant is a handicapped person, or as to the nature of the impairment, the burden of proof shall be upon the complainant to present by reasonable medical opinions or records:

3.1.1. The nature of the handicapping condition;

3.1.2. Any limitations caused by said handicap; and

3.1.3. Any restrictions upon the handicapped individual's work activity. If the complainant prevails, the costs of obtaining and presenting such medical evidence may be assessed against the respondent.

3.2. It is intended that medical evidence will be required only in cases where there is an actual dispute as to the nature or medical implications of the handicapping condition.  
(Emphasis supplied).

Mr. Blair is obviously handicapped. His condition, present since birth, result in an appearance that leaves no doubt that his musculoskeletal system is affected. His medical records speak of severe deformity of his right lower extremity." (Commission's Exhibit No. 7, p. 14). I noted on the record upon encountering him at hearing that he has the appearance typically associated with dwarfism, the shaping of the arms and legs are those typically associated with dwarfism, as well as his short stature.

Even though the complainant went to great lengths on the stand to appear unaffected by his handicap, it is obvious that his disability affects some major life functions. Section 77-1-2.5. of the Commission's Rules Regarding Discrimination Against the Handicapped defines "substantially limits" to mean "interferes with or affects over a substantial period of time." (Emphasis supplied). Blair's condition has been present since birth. Further, Mr. Blair's uncontroverted testimony that he was told by the Superintendent, Taylor Norman, that "he couldn't handle the work" is strong evidence that he was at least perceived as handicapped. Thus, Mr. Blair meets the third definition of handicapped under the Act in that he is "regarded as having such an impairment" W. Va. Code § 5-11-3(t), and in that the respondent has not contested Mr. Blair's status as a

handicapped person; and for the above reasons, I find that the complainant, George Blair, is a handicapped person as defined by the West Virginia Human Rights Act and its accompanying rules and regulations.

In order to meet the burden of a "qualified" handicapped person, a complainant must show that he can perform the essential functions of the job, with or without accommodation. It is undisputed that George Blair meets the requirements of a "qualified" handicapped person. His uncontroverted testimony of his prior job experience and duties and the testimony of a co-worker, Jimmy Pruitt, along with the fact that Blair was ultimately hired by a coal company and performed the duties that would have been expected of a position at Hollow Mining, are convincing that Blair was qualified for the positions which he sought.

C. THE COMPLAINANT MET HIS PRIMA FACIE  
AND ULTIMATE BURDEN.

Although the West Virginia Supreme Court of Appeals' decision in Ranger Fuel Corp. v. West Virginia Human Rights Commission, 376 S.E.2d 154 (W. Va. 1988) pre-dates statutory changes which broadened the definition of "handicapped," and despite the fact that it is out of step with the more recent Americans With Disabilities Act, \_\_\_ U.S.C. § \_\_\_ et seq. (P.L. 101-336), it nevertheless provides the model for analyzing claims

of handicap discrimination in employment. Syllabus point two provides, in relevant part:

A handicapped person claiming employment discrimination under W. Va. Code 5-11-9 [1981], must prove as a prima facie case that such person (1) meets the definition of "handicapped," (2) possesses the skills to do the desired job with reasonable accommodations and (3) applied for and was rejected for the desired job. The burden then shifts to the employer to rebut the claimant's prima facie case by presenting a legitimate, nondiscriminatory reason for such person's rejection.

Complainant testified credibly about his numerous trips to the respondent's job site seeking employment. He had been employed by the company previously mining on that site (Amey Coal) and testified that co-workers had been hired by Hollow Mining. He further testified credibly about being asked on at least two occasions to write his name, phone number, and previous job experience on a piece of paper. He complied with these requests. Complainant credibly testified that previously he obtained employment at small mines in this manner, and Jimmy Pruitt's testimony substantiated that small mines routinely hired by this procedure. In addition, the previously-submitted documents of the respondent indicated that at least one employee was hired with that form of application. Inasmuch as respondent has not refuted this testimony, I find that complainant did indeed apply for a position with respondent. It is undisputed that he was rejected.

George Blair obviously meets all three prongs of the prima facie burden. He is a qualified handicapped individual, and he applied for and was rejected for the job. The burden then shifted to the employer to rebut the prima facie case by presenting a legitimate nondiscriminatory reason for the rejection.

In this case, the respondent failed to present a defense. As stated above, the respondent neglected to appear at hearing.

Section 77-2-7.6. of the Commission's Rules of Practice and Procedure state: The respondent may appear at the hearing with or without counsel. Failure of a respondent to appear shall not prevent presentation of the case or the entering of a final decision.

This case was presented by the Commission. Testimony was given by the complainant and one witness. As stated above, I have concluded that the complainant met his prima facie case. Since the respondent did not articulate a defense, the complainant need go no further. The complainant has met his ultimate burden and shown that respondent's refusal to hire him was based upon his handicap or the respondent's perception of handicap.

D. COMPLAINANT'S DAMAGES

The Commission having shown unlawful discrimination, I shall award such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). The injured party is to be placed, as near as possible, in the situation which he would have occupied had he not been discriminated against.

Here, George Blair, under the "make-whole" rule, is entitled to back pay, with prejudgment interest, and incidental damages. Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E.2d 251 (1986). In addition, the respondent will be ordered to cease and desist from discriminatory conduct.

Precise damages in this case are not easily calculable. Again, respondent's failure to cooperate in producing information or participating in hearing precludes us from having all of the necessary information at hand. I have no choice but to calculate damages on the unrefuted testimony of the complainant.

In an action for damages, the finder of fact is bound to award damages based on the evidence and to not engage in speculation. Where the evidence is sketchy because of a respondent's failure to produce the records which would clarify

the matter, the law is clear that doubt should be resolved in favor of the complainant.

Uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminatory employer.

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974).

Complainant testified that employees of respondent were being paid approximately \$12 per hour. (Tr. p. 48). He testified that he was provided this information by friends who worked for the respondent. Complainant's unrefuted testimony indicates that the job was operating at least 40 hours per week, and that for all hours worked in excess of 40, employees were paid at one and one-half times their regular hourly rate. (Tr. p. 49). He also testified that he made an average of \$300 per month on odd jobs while seeking employment. Complainant ultimately received employment with Northwest Energy at the rate of \$13 per hour in April 1990.

I, therefore, conclude that complainant's damages should be calculated thus: although complainant's date of incident is stated as October 28, 1989, this date reflects when he realized that the reason respondent was not hiring him was due to his handicap. The Superintendent's statement, "I don't think you can handle this" constituted complainant's impetus to file. He began seeking employment, and respondent began hiring, in January 1989. Thus, complainant's damages can begin in January 1989. I

have calculated the damages based upon a 40 hour week and ended them on April 1, 1990, when complainant testified that he began work for Northwest Energy. (See Attachment B).

Furthermore, complainant's compelling and credible testimony regarding the humiliation and embarrassment he suffered because of the respondent's discriminatory act leads me to find that complainant is entitled to \$2,500 in incidental damages.

Next, I am hereby issuing a cease and desist order requiring the respondent to cease and desist from its discriminatory conduct. The respondent is directed to post notices in its establishment that the respondent is an equal opportunity employer and that unlawful discriminatory practices with regard to hiring, firing, or any other term of employment may be reported to the West Virginia Human Rights Commission.

#### CONCLUSIONS OF LAW

1. The complainant, George W. Blair, Jr., is an individual aggrieved by an unlawful discriminatory practice and is a proper complainant under the West Virginia Human Rights Act, W. Va. Code § 5-11-10, and the Rules of Practice and Procedure Before the West Virginia Human Rights Commission.

2. George W. Blair, Jr., is a handicapped individual as defined in W. Va. Code § 5-11-3(t) in that he has, since birth, a condition known as "dwarfism."

3. The respondent, Hollow Mining Co., is an employer as defined by W. Va. Code § 5-11-3(d).

4. The complaint in this matter was properly and timely filed in accordance with W. Va. Code § 5-11-10.

5. The complainant has established a prima facie case of handicap discrimination in that he is a qualified handicapped person, that he possesses the necessary skills to do the job desired, and that he applied for and was rejected for the position.

6. The respondent did not appear in person, nor was the respondent represented by counsel at hearing.

7. The complainant has established by unrefuted testimony and by direct evidence that the respondent failed to hire him because of his dwarfism and that the respondent perceived him as handicapped. The complainant met his ultimate burden of showing that the respondent's refusal to hire him was based upon illegal discriminatory motives.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to back pay in the amount of \$27,150.00.

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to prejudgment interest on back pay, as of December 4, 1991, in the amount of \$8,145.00.

10. As a result of the unlawful discriminatory action of the respondent, the complainant suffered humiliation, embarrassment, and emotional distress, and is entitled to incidental damages in the amount of \$2,500.

11. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to a cease and desist order, requiring the respondent to cease and desist its discriminatory policies and practices.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and discussion of applicable law; and based upon a thorough review of the hearing transcript and all relevant testimony and documentary evidence; I hereby find that the complainant is entitled to the following relief:

1. Back pay in the amount of \$27,150.00;

2. Prejudgment interest on back pay, as of December 4, 1991, in the amount of \$8,145.00;
3. Incidental damages in the amount of \$2,500; and
4. A cease and desist order requiring the respondent to cease and desist its discriminatory policies and practices.

It is so ORDERED.

ENTER:

  
\_\_\_\_\_  
RICHARD M. RIFFE  
HEARING EXAMINER

Date: 23 December 1991

12/3

BLAIR

v.

HOLLOW MINING

Hearing moved to  
Room 222 at

12:00 noon today

ATTACHMENT B

BLAIR DAMAGES

I BACKPAY January 2, 1989 - April 1, 1990

|          | Lost<br>Back<br>Pay   | - | Mit-<br>iga-<br>tion | = | Total<br>Backpay   | + | Interest<br>2.5 % | = | Total<br>Balance       |
|----------|-----------------------|---|----------------------|---|--------------------|---|-------------------|---|------------------------|
| 1989 (1) | 6,240.00 <sup>1</sup> |   | 900.00               |   | 5,340.00           |   | 0                 |   | 5,340.00               |
| (2)      | 6,240.00              |   | 900.00               |   | 5,340.00           |   | 133.50            |   | 10,813.50              |
| (3)      | 6,240.00              |   | 900.00               |   | 5,340.00           |   | 270.33            |   | 16,423.80              |
| (4)      | 6,240.00              |   | 900.00               |   | 5,340.00           |   | 410.59            |   | 22,174.39              |
| 1990 (1) | 6,240.00              |   | 900.00               |   | 5,340.00           |   | 544.35            |   | 28,068.75 <sup>2</sup> |
|          |                       |   |                      |   | <u>\$27,150.00</u> |   |                   |   |                        |

Total Backpay net mitigation without interest 27,150.00  
 Total Backpay net mitigation with incremental, compounded interest 28,068.75  
Total Backpay, net mitigation with straight interest for 3 years 33,095.85<sup>3</sup>

II INCIDENTAL DAMAGES 2,500.00

III TOTAL DAMAGES \$30,568.78 -- \$35,595.85

<sup>1</sup>\$12.00 per hour x 40 hours per week x 13 weeks per quarter

<sup>2</sup>As of April 1, 1990

<sup>3</sup>Interest as of January 2, 1990 (2 years after date of

9.3.3. Award such other equitable relief as will make the complainant whole, including, but not limited to, an award of attorney's fees and costs.

9.3.4. If upon all the testimony, evidence and record of the hearing the hearing examiner shall find that the respondent has not engaged in any unlawful discriminatory practice as defined in the Act, the hearing examiner shall issue a decision dismissing the complaint as to such respondent.

9.5. Copies of the hearing examiner's final decision shall be served by certified mail, return receipt requested, on the complainant, the respondent, all intervenors, and counsel of record, and by personal delivery or first class mail on the Commission's attorney and all other persons, offices or agencies deemed appropriate by the hearing examiner or the Commission.

9.6. All final decisions rendered by a hearing examiner shall be filed at the central office of the Commission and shall be open to public inspection during regular office hours of the Commission.

#### §77-2-10. Appeal to the Commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the Commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the Commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the Commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the Commission, neither the parties nor their counsel may appear before the Commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the Commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the Commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the Commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the Commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the Commission shall issue a final order affirming the examiner's final decision; provided, that the Commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the Commission. The final order of the Commission shall be served in accordance with Rule 9.5.

§77-2-11. Judicial Appeal.

11.1. Judicial review of a final order of the Commission may be obtained by the complainant, respondent or other person aggrieved by such order.

11.2. A party who seeks judicial review must file his/her appeal within thirty (30) days after receipt of the final order of the Commission.

11.3. For purposes of judicial appeal, the decision of the Commission affirming, modifying or setting aside the final decision of the hearing examiner shall constitute the final order of the Commission.

§77-2-12. General Investigations.

12.1. The Commission may, at its discretion and in accord with the power conferred upon it by the Act, conduct such general investigations and hearings into problems of discrimination as it deems necessary or desirable and may study and report upon the problems of the effect of discrimination on any field of human relationships.

12.2. In pursuing its functions authorized by the Act and by this section, the Commission may exercise its full powers of discovery as set forth in the Act and in these regulations.

§77-2-13. Declaratory Rulings and Guidelines.

13.1. Petitions for declaratory rulings filed with the Commission pursuant to W. Va. Code § 29A-4-1 shall contain the following:

13.1.1. A statement of the question on which the declaratory ruling is sought.

13.1.2. A full statement of the facts giving rise to the question.

13.1.3. A statement of the basis for the petitioner's interest in the question.

13.1.4. Any legal argument which petitioner wishes to submit.

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing CORRECTED HEARING EXAMINER'S FINAL ORDER by depositing a true copy thereof in the U.S. Mail (certified) postage prepaid this 16 day of January 1992 to the following:

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Richard M. Riffe  
Hearing Examiner