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VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

August 5, 2003

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John Amos Power Plant
P.O. Box 4000
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Re: Orville J. Cottrell v. Appalachian Power Company
Docket Number: EH-100-99 EEOC Number: 17J980359

Dear Parties:

Enclosed please find the **ADMINISTRATIVE LAW JUDGE'S FINAL DECISION** of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge'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 administrative law judge, 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 administrative law judge shall not operate as a stay of the decision of the administrative law judge 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 administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, 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 an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

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

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. 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 an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge'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."

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Very truly yours,

Phyllis H. Carter

Phyllis H. Carter
Administrative Law Judge

PHC/lgt

Enclosure

cc: Ivin B. Lee, Executive Director
Lew Tyree, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ORVILLE J. COTTRELL,

Complainant,

v.

Docket Number: EH-100-99
EEOC Number: 17J980359

APPALACHIAN POWER COMPANY,

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

This matter matured for public hearing on August 8, 2001 in Winfield, at the Putnam County Library before Administrative Law Judge Gail Ferguson. The evidentiary deposition of the Complainant's physician, Ziad Kahwash, M. D. was taken on September 27, 2001.

The Complainant, Orville J. Cottrell, appeared in person and by his attorney, Robert Goldberg, Assistant Attorney General. The Respondent, Appalachian Power Company appeared in person by its representative, Tim Ohlinger, Human Resources Manager for Respondent, and by its counsel Bryan R. Cokeley, Esquire and Keith Lively, Esquire of Steptoe & Johnson.

This case was transferred to Administrative Law Judge Phyllis H. Carter for a decision after Administrative Law Judge Gail Ferguson retired in July 2002. The parties agreed to a Final Decision based on the record in October 2002.

All proposed findings of fact, conclusions of law and argument submitted by the parties and the evidentiary deposition of Ziad Kahwash, M. D., F.A.C.E. have been considered and reviewed in relation to the adjudicatory record developed in this matter. To the extent that the proposed

findings of fact, conclusions of law and argument advanced by the parties are in accordance with the findings, conclusions, and legal analysis of the administrative law judge and supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been determined as not in accord with a proper decision. To the extent that testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

At the adjudicatory hearing, Judge Ferguson ruled that the record should reflect the correct name of the Respondent, that is, Appalachian Power Company and not American Electric Power. An Order was entered on October 2, 2002, amending the Complaint to reflect the correct name of the Respondent.

I.
FINDINGS OF FACT

1. The Complainant, Orville J. Cottrell, resides with his wife in Scott Depot, Putnam County, West Virginia. (Tr. at 15).

2. The Respondent, Appalachian Power Company, is a person and employer as those terms are defined by W. Va. Code §§ 5-11-3(a) and 5-11-3(d) within the meaning of the West Virginia Human Rights Act. (Tr. Joint Ex.1 ¶ 2).

3. Mr. Cottrell has been employed at the John Amos Plant near Saint Albans, West Virginia as a mechanic in the maintenance department since 1972. (Tr. at 15). His job duties and responsibilities have remained consistent during his entire tenure with the Respondent. (Tr. at 59-

60). He works on various pieces of equipment such as pumps, valves, motors, coal conveyors and coal chutes in the coal yard and in the plant itself. Also, he works on heavy equipment such as bulldozers, graders, fork trucks, coal machines, turbos and generators. (Tr. at 34).

4. During his thirty plus years with the Respondent, Mr. Cottrell has been a good employee with no attendance or performance problems. (Tr. at 92-95,177-178; Respondent's Exhibit 2).

5. Mr. Cottrell worked as a maintenance mechanic on rotating shift from January 1, 1996 to June 4, 1999.

6. Prior to being placed on shift work, Mr. Cottrell worked an eight hour shift five days a week. (Tr. at 63). Prior to January 1996, the Respondent had one maintenance team working day shift and the other maintenance teams working rotating shifts. Mr. Cottrell worked the day shift. The day shift worked from 8:00 a.m. to 4:30 p.m. In January, 1996, the Respondent attempted to become more efficient. It discontinued the day shift. It increased the number of persons on the rotating teams, eliminated the day shift, laid off some employees and assigned the maintenance work performed by the day shift to the Regional Services Organization ("RSO"). (Tr. at 49, 172-177).

7. The changes were not limited to shifts, but included restructuring personnel. Prior to January, 1996, teams were segregated according to their job duties or "lines of progression." In January, 1996, teams were integrated with employees from different "lines of progression." [Id.]

8. Mr. Cottrell was in the maintenance line of progression. (Tr. at 173).

9. Mr. Cottrell stayed at the John Amos Plant after the shift change and did not join the RSO. The evidence reflects that the RSO would be traveling to other facilities. The record does not reflect that he was asked to join the RSO. Also, the record reflects that Mr. Cottrell

was unable to travel because of his diabetic condition. (Tr. at 177).

10. Mr. Cottrell suffers from Diabetes Millitus Type I. He was initially diagnosed with diabetes in 1982 at which time he informed the Respondent. The Respondent does not dispute that it has been aware of Mr. Cottrell's condition since his diagnosis in 1982. (Tr. at 16,49,50). Initially, he was able to control his diabetes with pills and diet. Subsequently, he became insulin dependent. (Tr. p 18-19; Evidentiary Deposition of Dr. Kahwash at 8).

11. There is no cure for diabetes. Mr. Cottrell will always have this disease. (Evidentiary Deposition of Dr. Kahwash at 45).

12. As a result of his diabetes, Mr. Cottrell's pancreas does not produce insulin naturally. He must inject insulin throughout the day. (Evidentiary Deposition of Dr. Kahwash at 18-19). Insulin injections help Mr. Cottrell to metabolize food which in turn causes Mr. Cottrell's blood sugar to lower. (Evidentiary Deposition of Dr. Kahwash at 13-16,19).

13. Ziad Kahwash, M. D., F. A. C. E. began treating Mr. Cottrell in February 1998 as a result of a referral by Mr. Cottrell's family physician. Dr. Kahwash is a Board certified endocrinologist. He diagnosed Mr. Cottrell as a brittle diabetic. Dr. Kahwash saw Mr. Cottrell eight times in 1998, three times in 1999, and five times in 2000. Dr. Kahwash continues to treat Mr. Cottrell. (Evidentiary Deposition of Dr. Kahwash at 5, 10, 12, 43).

14. It was at this time that Mr. Cottrell learned that he had brittle diabetes and that his diabetic condition had gotten worse. He had been working on the rotating shift for two and one half years by then. (Tr. at 73-80, 178-180).

15. Brittle diabetes is a diagnostic term used to describe patients with diabetes who have repeated and unpredictable fluctuations of blood sugar readings. (Evidentiary Deposition of

Dr. Kahwash at 27-28).

16. When Mr. Cottrell was referred to Dr. Kahwash, he was suffering from repeated low blood sugar reactions and could not control his blood sugar levels. In the words of Dr. Kahwash, he was "failing miserably"to control his blood sugar levels. (Evidentiary Deposition of Dr. Kahwash at 23).

17. During the time Mr. Cottrell worked rotating shifts, his blood sugar bounced from extremely high readings to extremely low readings, all of which were detrimental to his health. (Tr. at 23). For Mr. Cottrell, any reading above 160 constitutes a hyperglycemic event. On occasion, Mr. Cottrell's blood sugar rose to a level between 300-400. (Tr. at 24).

18. In addition to insulin injections, Mr. Cottrell follows a treatment regime that requires him to balance his insulin injections with his food intake. An imbalance could result in hypoglycemic events. Hypoglycemia is a serious complication of diabetes. (Evidentiary Deposition of Dr. Kahwash at 39).

19. Scheduling variations in Mr. Cottrell's work shift cause fluctuations in his blood sugar readings because he is unable to take his insulin and eat his meals at the same time everyday. (Evidentiary Deposition of Dr. Kahwash at 37).

20. Because Mr. Cottrell is a brittle diabetic, his sugar can fall from 80 to 40 without his awareness. He had such an episode in Dr. Kahwash's office in May of 1998. During the episode, Mr. Cottrell began to sweat. His speech became slurred. He was unaware that he was experiencing a hypoglycemic event. (Evidentiary Deposition of Dr. Kahwash at 29-33).

21. Mr. Cottrell has experienced numerous hypoglycemic events. On one occasion he lost consciousness. On another occasion he was involved in an automobile accident.

On the work site, he became agitated and punched out a window pane with his fist. Once he was found by a co-worker sitting dazed in the locker room. Still, on another occasion, co-workers rushed him to the company cafeteria so that he could get something to eat. (Tr. at 47-48,56).

22. Also, Mr. Cottrell suffers from sympathetic neuropathy because he has hypoglycemia unawareness. Neuropathy is a disease that impairs the sympathetic nervous system. (Kahwash Evidentiary Deposition at 41-42).

23. During his employment with the Respondent, Mr. Cottrell has been allowed to take breaks to take his insulin injections. (Tr. at 96-99).

24. There have been occasions when a fellow employee has expressed distaste at the sight of Mr. Cottrell injecting himself with insulin, but this has not prevented him from taking the insulin at the job site. (Tr. at 51,97-99).

25. Mr. Cottrell tries to take his insulin out of the sight of other employees. The Respondent does not require him to do so.[Id.].

26. Although the Respondent has a first aid room where Mr. Cottrell can take his injections, he chooses to take his injections in locations more convenient to the coal yard and other locations where he works. [Id.].

27. Mr. Cottrell rotates his injection spots between the right and left side of his stomach, his right arm and his left inner thigh. Mr. Cottrell has suffered muscle breakdown at these injection spots. (Tr. at 31).

28. On July 3, 1998, Mr. Cottrell met Tim Ohlinger, Human Resources Manager and requested a transfer to the day shift because of his diabetes. He told Tim Ohlinger that his treating physician had recommended this change because of his diabetic condition. (Tr. at 75).

29. Mr. Ohlinger told Mr. Cottrell that no day shift positions were available in his line of progression. (Tr. at 76-77). During the meeting Mr. Ohlinger informed Mr. Cottrell that he might need additional medical records but that Mr. Ohlinger would discuss the matter with Plant Manager Wayne Adkins and get back with him. (Tr. at 74, 77, 79, 80). He never did. Mr. Ohlinger testified that he does not recall talking to Plant Manager, Wayne Adkins. (Tr. at 220). The Respondent never asked Mr. Cottrell to sign a medical records release form as he did when Mr. Cottrell subsequently requested a travel accommodation because of his diabetic condition. Mr. Cottrell left the meeting with the understanding that Mr. Ohlinger would talk with Wayne Adkins first about the requested accommodation, get back with him and then the medical records would be forthcoming. Mr. Cottrell's testimony in this regard is credited. The Respondent failed to engage in interactive dialogue.

30. Mr. Ohlinger told Mr. Cottrell that due to his age, Mr. Cottrell could be placed on leave for two years and then removed. (Tr. at 77).

31. As a result of his conversation with Mr. Cottrell, Mr. Ohlinger felt that Mr. Cottrell had little skills outside his "line of progression."(Tr. at 173).

32. Mr. Ohlinger testified at the hearing as to what it would take to accommodate Mr. Cottrell. The record does not support a finding that the undue hardship the Respondent alleges was significant, extensive, substantial or fundamentally altered the nature or operation of the business. Furthermore, Mr. Ohlinger did not engage in any communication written or verbal with Mr. Cottrell after their initial conversation. There was no interactive process, no problem solving exchange between the employer and the employee.

33. At the time of this hearing, Appalachian Power Company employed more than

200 persons at the John Amos Plant (Hr.. Tr. Respondent's Exhibit 4).

34. Employees were separated into five teams of approximately 52-56 persons. There were approximately 10-12 maintenance mechanics per team. (Respondent's Exhibit 4).

35. In the summer of 1998, each team rotated between a twelve hour shift (7:00 a. m. to 7:00 p. m.), a straight 8-hour day shift (7:00 a .m. to 3:30 p. m.), a twelve hour midnight shift (7:00 p. m. to 7:00 a. m.) and an 11:00 a. m. to 7:00 p. m. shift. The straight eight hour day shift was scheduled each week Monday through Friday and rotated from team to team. In February 1999, Mr. Cottrell worked from 7:00 p. m. to 7:00 a. m. for four days, was off for three, then worked 11:00 a. m. to 7:00 p. m. for three days, was off one, then worked 7:00 p. m. to 7:00 a.m. for three days, was off for three, then worked 11:00 a. m. to 7:00 p. m. for four days, and was off for three days. (Commission's Exhibit 1, Respondent's Exhibit 3).

36. In September, 1998, Mr. Cottrell filed a complaint with the West Virginia Human Rights Commission. (Tr. at 109).

37. Mrs. Cottrell wrote a letter on behalf of her husband requesting his treating physician to send a letter regarding his diabetic condition to Appalachian Power Company. In December, 1998, Mr. Cottrell received a letter from Dr. Kahwash. Mr. Cottrell gave the letter to Jackie Heath, an investigator at the Commission. (Tr. at 113).

38. Dr. Kahwash wrote the letter because Mr. Cottrell had brittle diabetes and unpredictable episodes of hypoglycemia and he (Dr. Kahwash) felt that if Mr. Cottrell could be put on a fixed daytime shift that he would be able to control his diabetes by minimizing the variability in his blood sugar readings and hypoglycemic events. (Evidentiary Deposition of Dr. Kahwash p. 12 and 13).

39. Mr. Cottrell did not know that Jackie Heath had not forwarded the letter to Appalachian Power Company. Mr. Cottrell sent the letter to Mr.Ohlinger who received it on April 15, 1999. (Tr. pgs. 113-114). It is the policy of the Commission that the Complainant send medical records to the Respondent. Mr. Cottrell was not accommodated until June 4, 1999.

40. As of April, 1999, the Respondent was in the process of creating a new day team which would include maintenance mechanics. Mr. Ohlinger testified that it was "highly likely" that Mr. Cottrell would be placed on the new day team. He was not accommodated until June 4, 1999. (Tr. pgs. 215, 193).

41. On June 4, 1999, Mr. Cottrell was placed on permanent day shift because of his seniority and not as an accommodation. He is still employed today. (Tr. pgs. 113-114).

42. After Mr. Cottrell was placed on day shift, he was told that the day shift would travel to different locations. In March, 2000, he was asked to travel to Louisa Kentucky, 70 miles from the John Amos Plant where he worked. He asked Mr. Day, his supervisor and Mr. Ohlinger, Human Resource Manager, for an accommodation, that is, not to travel. This accommodation was granted by the Respondent prior to receipt of any medical records or letter from Mr. Cottrell's treating physician. He signed a medical records release form.(Tr. pgs. 80-83, 121-124).

43. Dr. Kahwash, Mr. Cottrell's treating physician, wrote a letter on April 27, 2000 in which he expressed reservations about Mr. Cottrell traveling long distances and working in unfamiliar places because of his brittle diabetes and unpredictable episodes of hypoglycemia unawareness. (Evidentiary Deposition of Dr. Kahwash p. 34).

44. Dr. Kahwash stated that since Mr. Cottrell was placed on a fixed shift he experiences less frequent low blood sugar reactions. (Evidentiary Deposition of Dr. Kahwash p. 26).

At the present time, Mr. Cottrell injects two shots of insulin daily. When he worked rotating shifts, Mr. Cottrell injected six to eight shots per day. (Tr. p 34).

II.
ARGUMENT

Mr. Cottrell works for the Respondent as a maintenance mechanic. He had at the time of the public hearing, close to thirty years of service. He is a brittle diabetic. The Respondent had knowledge of Mr. Cottrell's medical condition since 1982. In July 1998, he requested an accommodation, which was denied. Instead, in June, 1999, the Respondent assigned Mr. Cottrell to a newly re-instituted day shift on the basis of seniority. Subsequently, in March, 2000, Mr. Cottrell requested an accommodation to be placed on a no travel status because of his diabetes. This request was granted at which time the Respondent asked Mr. Cottrell to sign a medical records release form so that it could obtain his medical records. This accommodation was granted prior to receiving the medical documentation that arrived at the Respondent's office two months later. So, Mr. Cottrell was granted an accommodation regarding his travel status because of his diabetic condition but the Respondent would not recognize his diabetic condition as a disability and accommodate him. The Respondent argues that it did not have a day shift at the time the initial request was made in July, 1998; that it would have been under an undue hardship if it had to place Mr. Cottrell on a day shift prior to June 1999 and that Mr. Cottrell did not submit any medical records to the Respondent that supported the need for an accommodation. The record does not support the Respondent's position. Mr. Cottrell is disabled under the West Virginia Human Rights Act and is entitled to an accommodation based on his disability. Furthermore, Mr. Cottrell is entitled to attorney fees, costs and incidental damages. He should have been moved to the day shift because

of his disability not solely because of his seniority. The West Virginia Human Rights Act is a remedial law that is to be liberally construed to advance the purposes of the Act. Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 574 (1999).

This is a reasonable accommodation case. The West Virginia Human Rights Act imposes an affirmative duty on the Respondent to reasonably accommodate "qualified disabled person[s]." *West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities,* W.Va. C.S.R. § 77-1-4.5 (1994); see Morris Memorial Convalescent Nursing Home, Inc. v West Virginia Human Rights Commission, 189 W. Va. 314, 431 S.E.2d 353 (1993); Coffman v. West Virginia Board of Regents, 182 W. Va. 73, 386 S.E.2d 1 (1988). "[R]easonable accommodation means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or remain in the position for which he or she was hired." Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1999), at SYL. pt. 1 (*quoting in part* W. Va. C.S.R. § 77-1-4.4).

If an accommodation is possible and it would allow the employee to perform the essential functions of the job, then the Respondent must provide the accommodation, unless it would impose an undue hardship upon the Respondent's business. W. Va. C.S.R. § 77-1-4.6. Failure by the Respondent to reasonably accommodate is unlawful discrimination, notwithstanding motive.

The West Virginia Human Rights Commission has duly promulgated guidelines for interpreting the West Virginia Human Rights Act prohibition against disability discrimination. W. Va. C.S.R. § 77-1-4 *et seq.* Because these regulations are legislative rules, they have the force and effect equivalent of the Human Rights Act itself and are entitled to controlling weight. See Appalachia Power Co. v. State Tax Dept of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995);

West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996).

The Commission's 1994 legislative rules explain that under the Human Rights Act, "Reasonable accommodation requires that an employer make reasonable modifications or adjustments designed as attempts to enable a disabled employee to remain in the position for which she/he was hired." W. Va. C.S.R. § 77-1-4.4. Further, the rules provide that "[r]easonable accommodations include, but are not limited to:...[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent to perform ...and similar actions[.]" W. Va. C.S.R. § 77-1-4.5. et seq. See generally Skaggs, 479 S.E.2d at 582 (*discussed in* Page v. Columbia Natural Resources, Inc., 198 W. Va. 378, 480 S.E.2d 817,830,n.14 (1996)). A Complainant must prove, by a preponderance of the evidence, every element of the failure to reasonably accommodate claim. See generally Lutz v. Orinick, 184 W. Va. 531,401 S.E.2d 464, 467 (1990) (citations omitted).

> To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W.Va. Code, 5-11-9 (1992), a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need for the accommodation; and (6) the employer failed to provide the accommodation.

Skaggs, at Syl. pt. 2.

In addition to the above, and of particular significance here, the fact finder must also scrutinize the "process by which accommodations are adopted." Skaggs, 479 S.E.2d at 577. Such process, said the Skaggs Court, "ordinarily should engage both management and the affected

employee in a cooperative, problem solving exchange." Id. Skaggs quotes approvingly 29 C.F.R. § 1630.2(o)(3), a regulation promulgated pursuant to the Americans With Disabilities Act, 42 U.S.C. §§12101 et seq., which provides that:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting form the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3) (1995).

Skaggs also cites to 29 C.F.R. § 1630.9 (Appendix, at 414), which provides that "[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the [employee] with a disability." 479 S.E.2d at 577.

Finally, the Skaggs Court admonished that both sides bear responsibility for the success of the process:

> Neither the West Virginia statutes nor the federal law assigns responsibility for when the interactive process is not meaningfully undertaken, but we infer that neither party should be able to cause a breakdown in the process. The trial court should look for signs of failure to participate in good faith or to make reasonable efforts to help the other party determine what specific accommodations are necessary and viable. A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith.

479 S.E.2d at 577-578.

The Human Rights Commission's legislative regulations define the term "disability" as follows:

> 2.1.1 A mental or physical impairment which substantially limits one or more of a person's major life activities; or

2.1.2 A record of such impairment; or

2.1.3 Perception of such an impairment.

2.1.4 This term does not include persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat (as defined in Rule 4.8) to property or the safety of others.

W.Va. C.S.R. § 77-1-2.1. (1994).

The term "Qualified Individual with a Disability" is defined in Rule 4.2 of the Commission's legislative regulations as an "individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job[.] ..." "Able and Competent" as defined in Rule 4.3 "means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a direct threat (as defined in Section 4.8) of injury to the health and safety of other employees and the public."

The evidence supports a finding that Mr. Cottrell is a qualified person with a physical disability which substantially limits one or more of his major life activities. He also has a history of such impairment. There is a perception that he is impaired because of his diabetic condition.

Mr. Cottrell has a history of a disability. He was first diagnosed as diabetic in 1982, approximately ten years after he began working for Appalachian Power Company. Mr. Cottrell informed the Respondent the same year. In 1998, he learned that he suffers from brittle diabetes. The Respondent has stipulated that it is aware of Mr. Cottrell's condition. (See Joint Exhibit 1). Brittle diabetes is a term used to describe diabetics subject to severe, repeated and unpredictable episodes of hypoglycemia (low blood sugar) or hyperglycemic (high blood pressure) episodes. (Tr. 21-22, 26-27, 37; Kahwash Evidentiary Depo. 12, 26-27, 30-31). Although Mr. Cottrell no longer

works shift work, and despite his adherence to a treatment schedule which includes regular insulin shots and lifestyle modifications, his diabetes continues to be brittle. (Kahwash Evidentiary Depo. 28.) Despite the seriousness of his condition, he continued to perform his job as best he could. When he requested an accommodation, the brittle nature of Mr. Cottrell's diabetes was so severe that he was taking six shots to eight shots of insulin per day. (Tr. 34). He performed his job duties at risk of great harm to his physical well being. (Tr. at 26-27, 37; Kahwash Evidentiary Depo. 23). Although the Respondent knew about his disability, he was transferred to the day shift because of his seniority and not because of his need for an accommodation as result of his disability.

Mr. Cottrell's brittle diabetes is a physical impairment that substantially limits several major life activities including his ability to physically ingest food. He is limited in what, when and how he eats. Eating constitutes a major life activity under the ADA although it is not explicitly listed. Lawson v. CSX Transportation, Inc. 245 F. 3d. 916, 11 A. D. Cas. 1025 (7th Cir. 2001). The record contains undisputed testimony that Mr. Cottrell's ability to regulate his blood sugar and to metabolize food is "difficult, erratic, and substantially limited." (Tr. 17, 20, 26-27, 28, 47-49; Kahwash Evidentiary Depo. 23, 26-28). Because of Mr. Cottrell's diabetes he is incapable of manufacturing insulin. (Kahwash Evidentiary Depo. 9). Therefore he is unable to convert food into energy without the use of injected insulin. (Kahwash Evidentiary Depo. 13-14). If his blood sugar drops, he must eat immediately. If he does not eat, he could be subjected to a hypoglycemic event or worse.

Mr. Cottrell also suffers from "hypoglycemic unawareness." According to Dr. Kahwash his endocrinologist, this condition is the result of long term damage to the sympathetic nervous system (neuropathy). This nerve damage is a direct result of his diabetes. (Kahwash Evidentiary Depo. 40-

42.) The condition is exacerbated by the frequency of Mr. Cottrell's hypoglycemic episodes; episodes which are more likely because of the brittle nature of his diabetes. (Tr. 44; (Kahwash Evidentiary Depo. 30, 34.)

Hyperglycemic episodes are marked by increased thirst, increased urination, and fatigue. (Tr. 24). Prolonged periods of hyperglycemia can be fatal. Repeated hyperglycemic episodes may result in damage to the kidneys and the eyes. According to Mr. Cottrell, a high blood sugar reading would be 160. While he was working shift work, his blood sugar went as high as 300. (Tr. 24).

Mr. Cottrell had several hypoglycemic episodes at work which have been witnessed by co-workers. Also, co-workers have witnessed him taking insulin shots throughout the day.

In Hendricks-Robinson v. Excel Corp., 154 F.3d 6854, 8 A.D. Cas. 875 (7th Cir. 1998), the court said:

> Under the ADA, an employee begins the accommodation "process" by informing his employer of his disability; at the point, an employer's "liability' is triggered for failure to provide accommodations." Beck v. University of Wis. Bd. Of Regents, 75 F.3d 1130, 1134 [5 A.D. Cas. 304] (7th Cir. 1996).

Hendricks-Robinson, 8 A.D. Cas. At 881.

The day Mr. Cottrell requested an accommodation, he informed the Respondent that this request for permanent day shift was prompted by his doctor's advice and was based upon the affect shift work was having on his diabetes. (Tr. 75).

His doctor, in a December 1998 letter expressed the view that Mr. Cottrell's long-term health required him to work more normal hours. (Tr. 75; Commission's Exhibit 2)and that failure to work normal hours put him at risk for serious, and perhaps fatal, health problems. (Tr. 26-27; (Kahwash Evidentiary Depo. 37-38).

The record supports a finding that a modified work schedule would have allowed Mr. Cottrell to work a day shift that would have reduced the number of insulin shots he was taking and would have enabled him to better control his blood sugar readings.

Even after the Respondent received the medical information it requested in April, 1999, there were no efforts made to accommodate Mr. Cottrell based on his disability.

The concept of reasonable accommodation is a flexible one which is to be implemented in a manner consistent with the purposes of the West Virginia Human Rights Act to prevent "unnecessary denials of job opportunities to people with disabilities." Skaggs, 479 S.E.2d at 573.

The Commission's legislative regulations (§ 77-1-4.5.) set forth various types of actions which may constitute reasonable accommodation in a particular case. Those include "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent . . . to perform . . . and similar actions." W. Va. C.S.R. § 77-1-4.5.2. However, the regulation explicitly provides that the types of actions listed are not intended to be exhaustive.

Modified work schedules are explicitly mentioned. Working a full-time, regular job, with the necessity of working shift work, is certainly among these possible accommodations.

The Respondent also argues that it could not take any action regarding an accommodation, until it received medical records from Mr. Cottrell's doctor stating that he needed an accommodation. When the Respondent received the medical documentation it requested from Dr. Kahwash in May 1999, it still did not recognize that Mr. Cottrell is entitled to an accommodation based on his disability. Instead, the Respondent elected to put Mr. Cottrell on the new day shift in June, 1999 based on his seniority.

Although, Mr. Ohlinger testified at the public hearing as to what would have been involved in accommodating Mr. Cottrell's request to be moved to day shift in July 1998 (Tr. at 194-196) the record does not reflect that the Respondent engaged in any interactive process with Mr. Cottrell. Mr. Ohlinger never spoke with Wayne Adkins nor did he have any subsequent conversations with Mr. Cottrell about his accommodation request until Mr. Cottrell filed a complaint with the West Virginia Human Rights Commission. Mr. Ohlinger's testimony on cross-examination does not support the Respondent's defense of undue hardship. (Tr. at 220-221). The travel accommodation was made after Mr. Cottrell filed a complaint with the West Virginia Human Rights Commission and after the day shift was reinstated in June, 1999.

Once the Commission establishes a prima facie case of failure to accommodate, The Respondent can avoid liability only by proving by a preponderance of the evidence that the available accommodation would have been a undue hardship.

"An employer shall not be required to make such an accommodation if he/she can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business." W.Va. C.S.R. § 77-1-4-6.

The law is very clear that once reasonable accommodations have been identified, this is the only remaining issue, and the burden to prove that the accommodation is unduly burdensome is upon the Respondent.

> An employer my defend against a claim of reasonable accommodation by disputing any of the above elements or by proving that making such accommodation would impose an undue hardship on the employer. The latter is an affirmative defense, upon which the employer bears the burden of persuasion.

Skaggs, 479 S.E.2d 576 (citations omitted).

The issue of undue hardship focuses on an analysis of various factors, including financial considerations and the structure of the employer's operations. Rule 4.6 of the Commission's legislative disability regulations provides:

> An employer shall not be required to make such accommodation is she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business. The term "undue hardship" means an actions requiring significant difficulty or expense, when considered in light of the factors set forth in the following subparagraphs (4.6.1.-4.6.5.):
>
> 4.6.1. The overall financial resources of the employer; the overall size of the employer's operation with respect to the number of its employees; the number, type and location of its facilities;
>
> 4.6.2. The nature of the employer's operation, including the composition, structure, and functions of the employer's workforce; the geographic separateness, administrative, or fiscal relationship of the employer's facility or facilities:
>
> 4.6.3. The nature and cost of the accommodations needed (taking into account alternate sources of funding, such as Division of Vocation Rehabilitation); the effect on expenses and resource, or the impact otherwise of such accommodation upon the employer's operation;
>
> 4.6.4. The possibility that the same accommodations may be able to be used by other prospective employees; and
>
> 4.6.5. The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, W.Va. Code § 18-10F-1 et seq. Any changes or alterations required due to the failure of the employer (or his lessee, lessor, or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable.

However, an employer must do more than merely identify reasons why it would prefer not to make an accommodation. Not every hardship is an undue hardship.

> Determinations about the reasonableness of an accommodation or the impact of its hardship must be done on a case-by-case basis, with careful attention to the particular circumstances and guided by the Human Rights Act's policy of enhancing employment opportunities for those with disabilities through workplace adjustments. . . "Undue hardship" implies a balancing, and the employer's interest in avoiding

costs and disruption can furnish a defense only when they outweigh the policy gains.

Skaggs, 479 S.E.2d at 577 (footnote omitted) (emphasis supplied).

> In order to withstand judicial scrutiny, the employer's undue hardship defense will have to have a strong factual basis and be free of speculation or generalization about the nature of the individual's disability or the demands of a particular job.

United States v. City and County of Denver, 943 F. Supp. 1304, 6 A.D. Cas. 245, 252 (D.Colo. 1996) (citations and quotations omitted) (emphasis supplied).

The concept of "undue hardship" requires a balancing between the employer's interest and those of the employee. This Court must weigh any evidence of undue hardship against the potentially disastrous consequences engendered by the Respondent's refusal to accommodate Mr. Cottrell. The Respondent employs over 200 employees it its energy production department alone. These employees are separated into five teams of approximately 52-56 employees each. (See Respondent Exhibit 4). There may be as many as 10 to 12 maintenance mechanics working per team. (Tr. 158). Given the vast size and resources of this employer, Respondent's contention that the accommodation of one man would so disrupt the smooth operation of this plant as to render it impossible is unreasonable.

Respondent's undue hardship argument focuses on the issues of job continuity and planning. Also, Respondent argues that an eight-hour shift may require Mr. Cottrell to jump from team to team during the course of a day or leave in the middle of a shift. But, there is no testimony in the record that the job tasks of the maintenance mechanics were shift specific. Although the teams had different supervisors, the work performed was the same. Rick Rutledge, a maintenance mechanic who worked for the Respondent for 21 years testified at the public hearing that the Respondent did not always replace maintenance mechanics who quit or retired. The same amount of work would

get done anyway. So, it appears that moving Mr. Cottrell to day shift prior to June, 1999 would not have substantially disrupted the Respondent's business.

In March 2000, the day shift maintenance mechanics were asked to travel to Louisa, Kentucky , 70 miles from the John Amos Plant where Mr. Cottrell worked to perform repairs. Mr. Cottrell asked his supervisor if he could be relieved of travel because of his diabetic condition because it would cause a hardship. However, the Respondent did accommodate Mr. Cottrell with regards to travel because of his diabetic condition and the fact that he needed to balance when he ate and when he needed to take insulin shots. This accommodation was made prior to the receipt of medical documentation from Dr. Kahwash. The Respondent cannot recognize an employee's disability and offer an accommodation on some occasions and not others.

Incidental damages are awarded in Human Rights cases. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S. E. 2d 145 (1977); Bishop Coal Co. v. Salyers, 181 W Va. 71, 380 S.E.2d 238 (1989). Mr. Cottrell testified at the public hearing that he felt like a number.

The Complainant is entitled to a cease and desist order. Sheperdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S. E.2D 342 (1983).

III.
CONCLUSIONS OF LAW

1. At all times relevant hereto, Mr. Orville J. Cottrell the Complainant is a person and an employee of the Respondent, Appalachian Power Company, within the meaning of W. Va. Code §§ 5-11-3(a) and (e).

2. Appalachian Power Company, the Respondent, is an employer and person as defined by W. Va. Code § 5-11–1 et seq. and is subject to the provisions of the West Virginia Human Rights Act.

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

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code § 5-11–9 et seq.

5. The prima facie burden to show the existence of a reasonable accommodation is on Mr. Cottrell, the Complainant. Mr. Cottrell has established a prima facie case of disability discrimination for failure to accommodate and has proven by a preponderance of the evidence every element of the failure to reasonably accommodate.

6. The Respondent failed to meet its burden that the reasonable accommodation requested by the Complainant created an undue hardship upon the Respondent.

7. Mr. Cottrell is entitled to an accommodation and incidental damages because of his disability..

8. The issues of back pay, front pay and reinstatement are not relevant to this case.

9. The Complainant is entitled to a cease and desist order preventing the Respondent from refusing to acknowledge that the Complainant is a person with a disability and that it has an obligation to accommodate the Complainant.

10. The Commission is entitled to its litigation costs and expenses.

IV.
RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, this administrative law judge orders the following relief:

1. The above-named Respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. The Complainant shall be given an accommodation and placed on the day shift because of his disability and because of his seniority.

3. Within 31 days of receipt of the undersigned order, the Respondent shall pay the Complainant incidental damages in the amount of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of Respondents' unlawful discrimination, plus statutory interest at 10 percent simple interest per annum that might be assessed against the incidental damages should the Respondent fail to pay within 31 days of the receipt of this final decision.

4. Complainant, as a prevailing party, is entitled to recover his costs, expenses, and reasonable attorney fees. Within 31 days of from the effective date of this Final Decision, Respondent shall pay the Commission the sum of $699.75 for litigation costs incurred in the form of hearing and deposition transcript fees and witness reimbursement expenses and the Attorney General's Office the sum of $23.46 for travel expenses incurred by Robert Goldberg, Assistant Attorney General.

5. In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainant is directed to immediately so advise the West Virginia Human

Rights Commission, Ivin B. Lee, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Phone: (304) 558-2616.

It is so **ORDERED**.

Entered this 4th day of August, 2003.

WV HUMAN RIGHTS COMMISSION

BY: Phyllis H. Carter

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ADMINISTRATIVE LAW JUDGE
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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ORVILLE J. COTTRELL,

Complainant,

v. **Docket Number: EH-100-99**

APPALACHIAN POWER COMPANY,

Respondent.

CERTIFICATE OF SERVICE

I, Phyllis H. Carter, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing **ADMINISTRATIVE LAW JUDGE'S FINAL DECISION** by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 5th day of August, 2003.

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Phyllis H. Carter

PHYLLIS H. CARTER
ADMINISTRATIVE LAW JUDGE