



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING

1036 QUARRIER STREET

CHARLESTON, WEST VIRGINIA 25301

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ARCH A MOORE, JR
Governor

October 31, 1986

Raymond S. Harrah
1954 Indianola Ave.
Columbia, OH 43201

Executive Officer
Central Appalachian Coal
Company
217 94th St.
Marmet, WV 25315

Emily Spieler, Deputy
Attorney General and
Mary C. Buchmelter
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1204 Kanawha Blvd.
Charleston, WV 25301

Joseph M. Price and
William Robinson
Attorneys at Law
P.O. Box 1791
Charleston, WV 25326

RE: Harrah v. Central Appalachian Coal Co.
EH-233-83

Ladies and Gentlemen:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case.

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 thirty (30) days, the Order is deemed final.

RAYMOND S. HARRAH
OCTOBER 31, 1986
PAGE TWO

The Respondent is required to provide to the Commission proof of compliance with the attached Order by affidavit, cancelled check or other means calculated to provide proof within 35 days of service of the enclosed Order.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/mst

Enclosure

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RAYMOND S. HARRAH,

Complainant,

vs.

Docket No. EH-233-83

CENTRAL APPALACHIAN
COAL COMPANY,

Respondent.

O R D E R

On the 10th day of September, 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, except as it conflicts with the exceptions, amendments and reasoning set forth below.

The Commission concurs with the findings and conclusions of the Hearing Examiner except as to the date the discrimination occurred. The respondent's deferral of the complainant's employment as a result of the possibility of a dangerous medical condition, and the requirement that further examinations be conducted to determine if, in fact, the complainant was medically capable of coal mine work were reasonable responses for legitimate business reasons. Similarly, the Commission is of the opinion that respondent is not required to hold a position for complainant until it is determined whether or not he is medically fit. It would be an undue hardship rather than a reasonable

accommodation to require respondent to delay in filling a position that in its business judgment needed to be filled while awaiting the results of complainant's further medical tests.

However, since complainant's employment was deferred because of a perceived handicap, when it became clear from the medical reports that the complainant was fit, it was the duty of the respondent to offer him the first available position rather than comparing his qualifications to a later applicant.

Therefore it is the conclusion of the Commission that the complainant should have been hired on August 24, 1982, when the first available position for which he was qualified became available, after he was pronounced medically fit.

The Commission therefore finds that the damage award for back pay must be limited to \$20,700.00, the amount his wages would have been if he had been hired August 24, 1982, less \$7,726.00, the complainant's earnings from 1982 to July 10, 1984, when he would have been laid off, a total of \$12,974.00.

The Commissioner therefore hereby amends the Recommended Decision in paragraph 17 of the Conclusion of Law, page 12, by deleting therefrom the figure "\$85,664.00" and substituting therefor the figure "\$20,700.00."

The Commission further amends the Recommended Decision in paragraph 3 of the Proposed Order, page 13, by deleting therefrom the figure "\$77,938.00" and substituting therefor the figure "\$12,974.00."

The Commission further amends the Recommended Decision by deleting in its entirety paragraph 5 of the Proposed Order, page 13.

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 72nd day of Oct, 1986.

Respectfully submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RAYMOND S. HARRAH,

Complainant,

v.

DOCKET NO. EH-233-83

CENTRAL APPALACHIAN
COAL COMPANY,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

This matter matured for public hearing on the 19th and 20th day of May 1986, at the Kanawha County Library and the law offices of Robinson & McElwee, Charleston, West Virginia, respectively, before the Honorable Theodore R. Dues, Jr. The presence of a hearing commissioner was previously waived by the parties.

Appearing at the hearing were the Complainant, in person, and by his counsel, Emily Speiler and Mary K. Buchmelter. The Respondent appeared by its counsel, Joseph M. Price and William E. Robinson. Also present on behalf of the Respondent was Donald Williams.

After considering the testimony of record, the documentary evidence and the proposed findings submitted by the Complainant and the Respondent on May 6, 1986, the Examiner makes the following recommended decision.

ISSUES

1. Is Raymond Harrah a qualified handicapped individual

within the meaning of the Act?

2. If so, did respondent discriminate against Raymond Harrah because of his handicap, or fail to make reasonable accomodation for his handicap, in violation of the Act?

FINDINGS OF FACT

1. Complainant Raymond Harrah applied to Central Appalachian Coal Company for employment as an underground electrician on March 1, 1982. At that time, he had nine years experience as an underground miner including eight years of experience as an electrician. He was 35 years old. Mr. Harrah had never previously been turned down for employment in the mines for any reason.

2. In March, 1982, Central Appalachian Coal Company employed 415 individuals in three underground coal mines and related surface facilities. Donald Williams was Personnel Director and was responsible for making the determination as to whether an individual could perform underground coal mine work without risk to himself and others.

3. On March 2, 1982, Mr. Harrah was not hired by Central Appalachian Coal Company because he exhibited PVCs during his preemployment physical examination performed by Dr. Roberto DeOcampo. Dr. DeOcampo found Harrah to be otherwise healthy.

4. Dr. DeOcampo is a general surgeon with a general practice in Montgomery, West Virginia. He received four months of internal medicine training in his first year of training after medical school. He has no other formal training in internal

medicine, cardiology, or occupational medicine.

5. Dr. DeOcampo found Harrah physically incompatible for coal mine work based upon his history and physical examination of Harrah and upon his interpretation of the results of a resting electrocardiogram.

6. After receiving Dr. DeOcampo's recommendation, Don Williams, respondent's Personnel Manager, told Harrah to obtain a release for work from a specialist. Williams did not hold open a position for Harrah or instruct him as to when the release was needed in order for Harrah to obtain a job.

7. Based upon the foregoing findings of Dr. DeOcampo, respondent failed to hire Harrah on or about March 2, 1982.

8. Harrah saw Dr. Mahendra Patel who took a history, did a physical, performed a resting electrocardiogram, an echocardiogram and a stress test. The resting electrocardiogram was normal. The echocardiogram and stress test showed unifocal PVCs but exhibited no underlying heart disease.

9. Dr. Patel is an expert in the assessment of cardiac and pulmonary problems and is more competent than Dr. DeOcampo to assess such problems.

10. Based upon his examination, Dr. Patel determined that Harrah was not at increased risk for heart attacks. He was competent and had the expertise to make this determination. This determination was factually based and correct.

11. Harrah presented a letter from Dr. Patel to respondent which released him for coal mine employment on March 23, 1982. Respondent refused to accept it and directed Harrah to

obtain a second opinion.

12. Harrah was examined by Dr. Ganpat Thakker, an expert in cardiology, in April, 1982. Dr. Thakker confirmed, in every respect, the conclusion previously reached by Dr. Patel, and released Harrah for underground coal mine work on April 23, 1982.

13. When Harrah presented Dr. Thakker's note to respondent, he was told that he would be considered for the next available position.

14. Respondent did not hire Mr. Harrah for the next available position which was filled on August 23, 1982. Instead, respondent hired an applicant who applied on June 18, 1982, and who was less qualified than the complainant.

15. Harrah has a chronic abnormality in his heart rhythm known as unifocal premature ventricular contractions (PVCs).

16. PVCs are a physical condition which was regarded as a handicap by the respondent. Harrah is a handicapped person.

17. PVCs in a 35-year-old man with a history of coal mining employment and no other abnormal findings are likely to be benign; that is, they do not present a probability that an individual with them is reasonable likely to suffer a heart attack when performing strenuous work.

18. PVCs are not a significant risk factor for heart attacks. They are less important as a risk factor than having a parent die at a young age from heart disease. Unifocal PVCs are more likely to be benign than multifocal PVCs.

19. PVCs are not listed on the listing supplied by AEP

for preemployment evaluation, nor are they equivalent in seriousness to any listed condition. They are not a serious arrhythmia like atrial fibrillation.

20. A resting EKG is an inadequate screening device for PVCs in that it fails to identify most people who have PVCs and fails to distinguish between individuals with organic heart disease and those who are without such disease.

21. Harrah has performed strenuous work without adverse health consequences since 1971.

22. Central Appalachian Coal Company hired seven electricians in 1982, after Harrah was rejected for employment, on the following dates: March 8 (1); March 17 (1); March 29 (3); April 2 (1); and August 23 (1). Raymond Harrah was never hired by respondent.

23. On March 2, 1982, and at all times thereafter, Mr. Harrah was in all respects qualified and physically capable of performing the job of underground mine electrician.

24. At the end of February, 1982, Don Williams was instructed to hire six underground electricians. At the time, Central Appalachian Coal Company was opening one new section. Williams could offer no explanation for the need to hire six electricians immediately.

25. An underground mine must have a certified electrician supervise all electrical work. It is impractical not to employ an electrician on each section. The opening of a new section would, therefore, require the hiring of three electricians (one per shift). Electricians worked overtime to

fill in when one was off from work. Respondent failed to prove that it would have been a undue hardship to keep a position open for Harrah for a reasonable period of time.

26. All applicants for employment in the years 1980-1982, inclusive, who passed the preemployment physical was hired.

27. Don Williams had full authority to make an independent assessment of an applicant's employability based upon the medical report of the examining physician, the AEP Guidelines, and his own knowledge of the job.

28. Respondent failed to follow its own procedure for evaluation of applicants with physical abnormalities in that respondent failed to make a truly independent assessment of the safety risks associated with Harrah's condition and failed to apply the listing of conditions justifying deferral from employment.

29. On at least one occasion in 1982, Williams authorized the hiring of an individual who had failed the preemployment physical because of a diagnosis of hypertension and obesity without requiring the applicant to seek further medical evaluation. Hypertension is a risk factor for heart attacks. Williams did not know the relative risks of hypertension and PVCs.

30. Had Harrah been hired, he would have needed only one day of training before being able to perform all aspects of the electrician's job.

31. Respondent failed to hire the complainant because of respondent's fear that the complainant's cardiac condition might

pose a health and safety risk for the complainant or others.

32. Respondent failed to prove that, even if complainant were at increased risk for heart attack, such a risk posed any danger to other employees.

33. Respondent failed to assess fully the nature of the risk that would be involved if Harrah were hired. Respondent failed to prove that there was a reasonable probability that the complainant would have posed a substantial hazard to himself or others if he had been hired.

34. It was not reasonable for respondent to fail to hire Harrah on or about March 2, 1982, or on or about March 23, 1982, or on or about August 23, 1982.

35. Respondent denied employment to complainant because of respondent's concern that his condition might worsen and become job related in the future.

36. Had Harrah been hired on or after March 2, 1982, he would have been laid off on July 10, 1984, and would have been entitled to all rights and benefits under the National Bituminous Coal Wage Agreement, including a clothing allowance of \$150.00 per year.

37. If Rayomnd had been hired on the following dates his total earnings (from date of hire to date of final lay off) without consideration of interim earnings or other offset, and his seniority rank, would have been as follows:

<u>DATE</u>	<u>SENIORITY</u>	<u>BACKPAY</u>
March 3, 1982	299 out of 315	\$85,664.00
March 23, 1982	307 out of 315	\$61,376.00

August 24, 1982 315 out of 315 \$20,700.00

The seniority rank would entitle Mr. Harrah to panel and recall rights as provided for in the National Bituminous Coal Wage Agreement.

38. Harrah earned \$1,218.00 in 1982, \$6,508.00 in 1983, and no wages in 1984. In 1984, he worked for the CWEP (Community Work Experience Program) so that he and his family could collect welfare benefits of \$232.00 per month.

39. Harrah, at all relevant times, made reasonable efforts to mitigate his damages.

40. Harrah suffered humiliation and emotional distress as a result of respondent's failure to hire him.

CONCLUSIONS OF LAW

1. Complainant is a handicapped person with the meaning of the Human Rights Act and of § of the Interpretive Rules Governing Discrimination on the Handicapped (1982) (hereinafter Interpretive Rules) because he has a cardiac arrhythmia known as premature ventricular contractions which respondent regarded as a handicap.

2. Respondent is an employer within the meaning of W.Va. Code § 5-11-3(d) and is subjected to the jurisdiction of the West Virginia Human Rights Commission.

3. Complainant filed a timely complaint of discrimination on the basis of handicap with the West Virginia Human Rights Commissions in accordance with W.Va. Code § 5-11-10.

4. Complainant proved that he was a handicapped individual. Premature ventricular contractions, a type of cardiac arrhythmia, is a physical condition which was regarded by respondent as substantially limiting one or more of complainant's major life activities.

5. Complainant met his burden to prove a *prima facie* case in that he showed that he is a handicapped individual, that he is a qualified handicapped individual within the meaning of § 4.02 of the Interpretive Rules since he was able and competent to perform the job of underground electrician at all times on and after March 2, 1982, and that he was excluded from employment because of his handicap.

6. Respondent failed to hire complainant between March 2, 1982, and April 23, 1982, solely on the basis of a handicap which was not job related but which respondent feared might worsen and become job related in the future, in violation of § 4.02 of the Interpretive Rules.

7. Respondent's articulated reason for its failure to hire the complainant in August, 1982, was not credible and was pretextual.

8. Hiring complainant on March 2, 1982, would not have imposed an undue hardship of respondent given the size of respondent's work force, the fact that complainant was an experienced miner, and the fact that it was unlikely that complainant faced an increased risk of heart attack.

9. In order to state a safety defense pursuant to § 4.04 of the Interpretive Rules, a respondent must show, by a

preponderance of the evidence, that there is a reasonable probability of substantial risk to the applicant or others.

10. Respondent has failed to meet its burden of proof to show that its failure to hire complainant was based upon bona fide occupational qualification, upon undue hardship or upon a threat to safety, in that respondent failed to show that there was a reasonable probability of substantial risk to the complainant or others if complainant had been hired on March 2, 1982 or thereafter.

11. Respondent's hiring procedures, as they were applied to complainant, unlawfully discriminated on the basis of handicap in the following respects:

a. As used in this case, respondent's use of a resting electrocardiogram to screen out applicants with PVCs discriminated on the basis of handicap because the test is not an accurate predictor of whether a job applicant has a significantly increased risk of future heart attacks.

b. The questions regarding prior medical conditions on the preemployment physical history form, which was provided by respondent to its examining physician, required information about conditions which were not currently job related in violation of § 5.01 of the Interpretive Rules.

c. The failure of the respondent to set a clear and reasonable timetable for complainant to provide a release from a specialist represented a failure to offer reasonable accommodation in light of complainant's handicap.

d. The failure of the respondent to hold a job open

for the complainant for a reasonable time, without proving that to do so would have imposed an undue hardship, represented a failure to reasonably accomodate complainant's handicap.

e. The failure of respondent to accept a release from the complainant's physicians, who was qualified to certify the complainant's ability to work, violated respondent's duty not to discriminate on the basis of handicap.

f. Respondent's decision to return complainant to applicant pool and to have him compete with later applicants for opening, rather than affording him the first available opening after he was released for work, discriminated against complainant on the basis of handicap in that it perpetuated the failure to hire him because of his handicap.

12. Good faith and the appearance of reasonableness are not defenses to a claim of discrimination based upon handicap.

13. Respondent had failed to demonstrate that its failure to hire complainant on or after March 2, 1982, was based upon good faith and reasonableness.

14. Complainant's claim is not barred or diminished by his failure to list his prior psychiatric illness, or by any other inaccuracies on his preemployment physical history form because:

a. The questions were improper under § 5.01 of the Interpretive Rules.

b. Complainant had no job related permanent impairment which he failed to reveal.

15. Respondent's failure to hire complainant on or after

March 2, 1982, was because of his handicap and constituted an unlawful discriminatory practice in violation of W.Va. Code § 11-9(a).

16. Complainant cannot be afforded the remedy of hiring in this case because all electricians hired after March 2, 1982, have been on permanent layoff since July 10, 1984.

17. Complainant is entitled to receive back pay in the amount he would have earned had he been hired by respondent on or about March 2, 1982, in the amount of \$85,664.00 less interim earnings of \$7,726.00.

18. Complainant is entitled to payment of the clothing allowance he would have received had he been employed on March 2, 1982, in the amount of \$450.00, and is further entitled to all rights and benefits under the National Bituminous Coal Wage Agreement to which he would have been entitled had he been hired on March 2, 1982, including but not limited to rights to recall to employment should respondent reopen any mines.

19. Welfare assistance payments represent collateral benefits and should not be deducted from a back pay award.

20. In view of the seriousness of the offense and its effects upon the complainant, he is further entitled to an award of \$5,000.00 as damages for humiliation and emotional distress.

21. The Human Rights Commission is entitled to recover its costs incurred in presenting proof of the complainant's handicapping condition.

PROPOSED ORDER

Therefore, pursuant to the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered:

1. The respondent shall cease and desist from engaging in any practices that violate W.Va. Code § 5-11-9.

2. Respondent shall post a copy of this Order in its office at Marmet, West Virginia, and on the bulletin boards at any mine it is operating for a period of 60 days.

3. Respondent shall, within 25 days of issuance of this Order, pay to the complainant the sum of \$77,938.00 for back pay (representing back pay less interim earnings) for the period March 2, 1982 to July 10, 1984; the sum of \$5,000.00 as incidental damages; the sum of \$450.00 for non-wage benefits to which complainant would have been entitled, and prejudgment and post judgment interest on these sums to be calculated at the rate of ten percent (10%) per annum until the date of payment of this award, compounded annually.

4. Respondent shall place the complainant on the recall panel for its mines with a seniority rank of 299 (out of 315), the rank he would have had if he had been hired on March 3, 1982, and shall accord the complainant all rights and benefits as if he had been hired on that date.

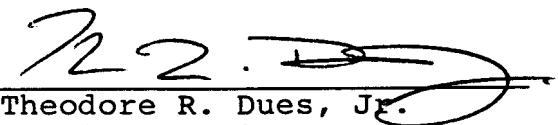
5. Respondent shall reimburse the Human Rights Commission for all costs incurred in proving complainant's handicap in this matter. Counsel for the Human Rights Commission shall submit an accounting of all such costs within two weeks of the filing of the Recommended Decision.

6. Respondent shall, within 30 days of issuance of this

Order, provide the Human Rights Commission with proof of its compliance with the Order.

DATED: May 28, 1986

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

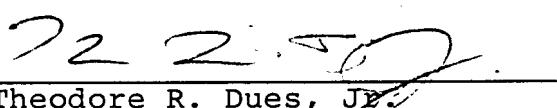
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and sayt that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

William E. Robinson, Esq.
Joseph E. Price
600 KB & T Center
500 Virginia Street, East
Charleston, WV 25301

and

Emily A. Speiler
Deputy Attorney General
1204 Kanawha Boulevard, East
Charleston, WV 25301

by mailing the same by United States Mail on this 142 day of May, 1986.


Theodore R. Dues, Jr.

Hearing Examiner