



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

October 2, 1989

GASTON CAPERTON
GOVERNOR

**CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

Vennie E. Morris
Box 41
Verdunville, WV 25249

Buffalo Mining Co.
Box 429
Lyburn, WV 25632

John Spurlock, Esq.
Pittston Coal Corp.
P.O. Box 5100
Lebanon, VA 24266

John Skaggs, Esq.
405 Capitol St.
P.O. Box 113
Charleston, WV 25321

Louis Dene, Esq.
138 Court St. N.E.
P.O. Box 1135
Abingdon, VA 24210

Re: Morris v. Buffalo Mining Co.
EH-52-87

Dear Parties:

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

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script that reads "Norman Lindell".

Norman Lindell
Acting Executive Director

NL/mst

Enclosures

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 non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VENNIE MORRIS,

Complainant,

v.

DOCKET NUMBER: EH-52-87

BUFFALO MINING CO.

Respondent.

ORDER

On the 21st day of September, 1988, the West Virginia Human Rights Commission reviewed the proposed order and decision of Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned, the Commission does hereby adopt in toto said proposed order and decision, encompassing findings of fact and conclusions of law, as its own.

It is hereby **ORDERED** that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto and made a part of this final order.

By this final 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 final order and that they may seek judicial review.

Entered this 2ND day of October, 1989.

RESPECTFULLY SUBMITTED,

BY George Rutherford /m
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VENNIE E. MORRIS,
Complainant,

v.

BUFFALO MINING COMPANY,
Respondent.

DOCKET NO: EH-52-87

RECEIVED

MAR 10 1989

WV HUMAN RIGHTS COMM.
Answered

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on the 25th day of June, 1987. The hearing was held at the Logan County Courthouse, Logan County, Logan, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner. The presence of a Hearing Commissioner was previously waived by the parties. The Complainant appeared in person and by his counsel John Skaggs. The Respondent appeared by its representative A. W. Adams and by Louis Dene and Jim Spurlock, its counsel.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed

findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

ISSUES

1. Is the Complainant a qualified handicapped individual within the meaning of The West Virginia Human Rights Act?

2. If so, was the determination by the Respondent not to hire the Complainant motivated by the Complainant's handicap?

3. If so, to what relief is the Complainant entitled?

FINDINGS OF FACT

1. At the time of hearing, the Complainant was 32 years old.

2. The Complainant was employed with the Respondent on April 2, 1975 and was laid off on June 6, 1986. At the time of his layoff, the Complainant was a beltman at the Respondent's Number 5A-Mine.

3. The job of beltman entailed cleaning, shoveling and greasing the beltline. The heaviest thing the Complainant lifted was rock dust. The coal height he was required to typically work within was usually 30 inches.

4. From January 16, 1980 to March 30, 1986, prior

to becoming a beltman, the Complainant worked as a curtain hanger. This involved adjusting the ventilation in the mine by hanging partitions which were referred to as "curtains". The height of coal, the Complainant worked within, during this time, was 30 inches to 48 inches. This function did not require much lifting. The Complainant was given a full medical release when he assumed the ventilation position in January 1980. The curtains that the Complainant was required to lift weighed as much as 50 to 60 pounds.

5. The Complainant performed these duties without difficulty.

6. Immediately prior to the period of time he worked in the area of ventilation, the Complainant performed the function of pumper repairman. This entailed moving pumps to areas where undesirable water was located. The coal height during this portion of the Complainant's tenure was 30 inches to 40 inches. It required considerable lifting and carrying items, within this coal height. Also during this period of time, the Complainant was required to assist on the belt, by performing certain cleaning functions.

7. From April 1975 to August 1979, the Complainant performed as a general laborer. This entailed performing pin helping and setting jacks with considerable lifting.

8. For the relevant period of time, any layoffs realized by the Complainant were based upon job classification and seniority.

9. The Complainant realized layoffs on the following dates; April 2, 1975, April 4, 1979, January 16, 1980 and April 30, 1986.

10. On May 6, 1986, the mine at which the Complainant worked was shut down. However, the Complainant was recalled to work on the belt until June 6, 1986.

11. On approximately February 19, 1985, the Complainant injured his back while in the course of his employment.

12. The Complainant's physician advised him that he had a bent spine. He placed the Complainant on a therapy of heat treatment.

13. The Complainant returned to work, after his injury, in June 1985. The Complainant then returned to work in February 1986 and worked until June 6, 1986.

14. The Complainant indicated that he had problems getting up and down without his back hurting. However, he indicates that he could still perform the duties required of him at work.

15. Since April 1975, the Complainant was off work with his back problems on 5 occasions.

16. During his tenure with the Respondent, the Complainant was never disciplined for failure to satisfactorily perform his duties.

17. The Complainant never had to refuse to perform any of his duties, due to his back problem.

18. Prior to May 6, 1986, a member of the

Respondent's management, during a safety meeting, responded to the Complainant's question concerning employees who had been previously absent from work, due to a workers compensation injury and whether such employees would be transferred to another mine. The Complainant was advised that job classification and seniority governed who would be transferred to another mine.

19. The Complainant completed a panel sheet, which establishes respective seniority among the employees, resulting in the most senior man on the panel being entitled to be recalled, prior to others behind him, on the list.

20. The Complainant was physically examined by the Respondent's physician on December 5, 1979. This physical was the only physical given the Complainant, by the Respondent, other than the initial employment physical.

21. Between April 30, 1986 and June 6, 1986, the Complainant experienced pain in his back, on only one shift, and at that time, his supervisor allowed him to rest and eat his lunch.

22. At the time of his last layoff, the Complainant felt he had no restrictions and was capable of performing his duties.

23. On each of the occasions in which the Complainant had been absent from work, due to medical leave, he returned to work with a full medical release.

24. During his tenure, the Complainant never requested work restrictions, nor, gave the Respondent

information which would reasonably lead to an inference that the Complainant needed a work restriction or accommodation, to perform the duties of the various positions, to which he was assigned.

25. On April 26, 1986, the Complainant filed a charge against the Respondent alleging that he was not recalled or hired by the Respondent because he had filed a workers compensation claim. This charge did not mention any allegation pertaining to handicap.

26. The Complainant was not recalled by the Respondent.

27. The Respondent performed an economic study which reflected that to remain economically feasible they could only employ 25 people at the mine.

DISCUSSION

The Complainant failed to establish that he is a qualified handicapped individual within the meaning of the West Virginia Human Rights Act and its Interpretive Rules. The evidence establishes that the Complainant was diagnosed on February 19, 1985 as having a bent spine. However, prior to this time, the Complainant discloses no substantial restriction on any major activity. More importantly, with the exception of five occasions, since April, 1975, the Complainant was not absent from work due to the difficulty with his back. The various duties assigned to the Complainant during his tenure with the Respondent, for the

most part, were strenuous in nature, and performed by him, without difficulty. Further, the Complainant, himself, testified to the fact that it was his opinion that he had no restrictions on his activities at work. Accordingly, it is the opinion of the Examiner, that the Complainant has failed to establish that his bent spine constitutes a substantial limitation to a major life activity. The issue as to whether an impairment constitutes a substantial limitation to a major life activity has been determined by the Courts to be best suited to a case by case determination. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986)' E. E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1100 (D. Hawaii 1980). That is, whether the particular impairment constitutes, for this particular person, a significant barrier to employment. Forrisi, 794 F.2d at 933.

For the reasons previously discussed, the Examiner concludes that the Complainant has failed to establish that he is a qualified handicapped individual under the West Virginia Human Rights Act and its Interpretive Rules.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties herein.

2. The Complainant failed to establish that he is a qualified handicapped individual within the meaning of the West Virginia Human Rights Act and its Interpretive Rules by failing to establish that his condition, a bent spine,

constitutes a substantial limitation to a major life activity, and more particularly, that this particular impairment constitutes for him a significant barrier to employment.

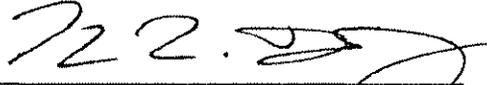
3. Accordingly, the Examiner concludes that the Complainant has failed to establish by a preponderance of evidence that he is a qualified handicapped individual.

PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Commission award judgment to the Respondent.

DATED: March 8, 1989

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner