STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 28, 1993

Daniel K. Hayes
Rt. 3, Box 159
Hurricane, WV 25526

Ravenswood Aluminum Corp.
PO Box 98
Ravenswood, WV 26164

Ricklin Brown, Esq.
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Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

Re: Hayes v. Ravenswood Aluminum Corp.
EH-5-92

Dear Parties:

Enclosed, please find the 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 July 1, 1990, 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 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 a 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 a 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 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:

10.8.1. 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 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 the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DANIEL K. HAYES,

Complainant,

v. DOCKET NUMBER(S): EH-5-92

RAVENSWOOD ALUMINUM CORP.

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on March 31, 1993, in Jackson County, at the City Hall Conference Room, Ripley, West Virginia, before Gail Ferguson, Administrative Law Judge. Briefs were received through August of 1993.

The complainant, Daniel K. Hayes, appeared in person and by counsel for the Commission, Mary C. Buchmelter, Deputy Attorney General. The respondent, Ravenswood Aluminum Corp., appeared by its representative Cindy Fairbanks, Corporate Manager for Personnel and by counsel, Ricklin Brown, Esq. and Elizabeth Harter, Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are 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 omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Daniel K. Hayes, complainant, except for a brief stint in the United States Navy, is a lifelong resident of West Virginia. The complainant has been employed in a series of blue collar jobs throughout his entire adult life. Following his military discharge, the complainant was employed in 1975 at the Kanawha Glass Factory as a warm-up boy.

2. In 1976, the complainant went to work for the K-Mart Corporation in St. Albans as a sales clerk. He also worked as a stock clerk and night watchman. He worked at K-Mart from 1976 to 1979, when he left to take a job driving a dump truck for Dolen's Trucking. He left this employment to work for Artel Chemicals. Complainant worked for Artel Chemicals as a chemical operator from 1981 until 1988 when the plant shut down. He then worked for a printing company and for Valley Publications.

3. In November 1990, while working at Valley Publications, Hayes saw an advertisement in the newspaper for openings with the

respondent, Ravenswood Aluminum in Ravenswood, West Virginia. In response to that ad, complainant sent a resume and letters of recommendation.

4. As a result of a labor dispute during November, 1990, respondent, Ravenswood Aluminum Corporation, was in the process of hiring workers to replace its entire regular hourly work force of 1,700 employees represented by the United Steelworkers of America.

5. About one week after sending out his resume and while working at Valley Publications, the complainant received a call from respondent requesting him to come in for an interview.

6. On November 19, 1990, the complainant went to respondent's plant, proceeded through the application process and participated in a partial physical examination.

7. During November and December of 1990 approximately 1,500 replacement applicants went through the initial application process. Each applicant was required to do the following: complete and employment application; fill out other paperwork to facilitate employment if it were determined that he or she was qualified to perform the jobs available; have measurements taken for fire-protective clothing; and complete a W-4 form. Each applicant was then scheduled for a screening interview. During the interview, which was conducted by at least two of respondent's employees, the applicant was asked questions about background information and other general questions regarding his or her application, job experience, skills and expectations. If the interview team determined that the applicant was a suitable candidate for employment, the applicant was asked to complete a medical questionnaire, and to provide a medical

history in preparation for a pre-employment physical examination to be performed by the respondent's medical staff.

8. According to respondent at the interview, the complainant was asked several questions about his employment history. He was asked whether he could work in heat. The complainant responded affirmatively that he had previously worked in power plants and a glass factory. After the interview, the complainant was sent to the medical department for a physical where he was examined by respondent's plant physician Marianne Lindroth

9. Dr. Lindroth testified that the respondent's pre-employment physical examination normally consisted of checking the applicant's vital signs, reviewing the medical history provided by the applicant on the written form, and interviewing the applicant during the examination itself. The examination could also involve a drug screen, blood test, pulmonary function test, EKG, vision and hearing tests and X-rays, depending on the applicant's health and time allotted for examination. Dr. Lindroth testified that in mid-November, 1990, respondent was not always giving complete physicals because of the urgent need to get people into the jobs. For example, a person would often be hired following preliminary screening and then asked to return at a later date for the hearing and eye examination. The average physical examination lasted from one hour and fifteen minutes to one hour and thirty minutes for the process.

10. Complainant was classified as "healthy" by Dr. Lindroth following his physical examination; she neither discovered nor observed anything unusual or remarkable during the examination.

Routine blood and urine samples were taken and the complainant left respondent's plant expecting to be hired.

11. Complainant's blood samples were taken on November 19, 1990 and sent to an independent laboratory for analysis. The results were then returned to respondent by computer transmission on November 21, 1990.

12. When the results of complainant's laboratory tests were reported back to the respondent's medical department, the blood test disclosed that complainant had a cholesterol level of 661, which was three times the normal healthy value for a man of his age, and a triglyceride level of 3,662, which was 15 times the normal value for a man of his age. These cholesterol and triglyceride values are collectively and alternatively referred to as the "lipid values." The reports were removed from the computer printer and placed on Dr. Lindroth's desk for her review.

13. During November and December of 1990 the respondent's medical department was performing from 25 to 125 pre-employment physicals per day.

14. Dr. Lindroth testified that she would have looked at complainant's lab results sometime during November 1990, noted that his lipid levels were higher than normal, and then circled those levels. However, she also testified that because her department was so busy giving physicals as well as treating illnesses and injuries of personnel already employed at the plant, and because she was personally working 11 to 12 and sometimes even 14 to 16 hours a day, complainant's application was placed in a category designated "needs further evaluation" or "NFE." Those applicants so designated were

not disapproved or rejected for employment on medical grounds, but rather were merely placed "on hold" until Dr. Lindroth had time to get in touch with these applicants for further assessment.

15. Dr. Lindroth also testified that once she had completed the initial examination, applicants could be placed in one of the following several categories: (i) those who were not being recommended for employment because they had tested positive for illicit drugs; (ii) those who were physically qualified to begin work because she had sufficient information to allow her to complete the evaluation process; (iii) those who needed further evaluation; and (iv) those applicants whose tests revealed urgent medical conditions that needed to be notified immediately in order to get immediate treatment, such as abnormal chest x-rays revealing cancer or other life threatening conditions.

16. After about a month with no word, complainant and his wife decided that since he was at work during the day, Mrs. Hayes should call Ravenswood for information and find out what was happening. Mrs. Hayes called the personnel department at Ravenswood and was told that the results of her husband's tests were still not back. Mrs. Hayes called back about a week later and was told that there was a freeze on hiring. Finally, Mrs. Hayes called respondent and she was told that personnel would check with the medical department to see if the results of the physical had come back yet.

17. Later, shortly after New Year's, Mrs. Hayes received a call from the respondent's medical department. The person calling, later identified as nurse Frances Fields, asked for complainant. Since the complainant was not home, Mrs. Hayes asked if she could take a

message. Mrs. Hayes was instructed to have her husband call the plant the next day.

18. When complainant returned home that evening, Mrs. Hayes told him about the telephone call. He called respondent back the next day. According to the complainant he called Nurse Fields on January 11, 19991, and she told him that he had very high triglyceride and cholesterol levels. The complainant then asked her how high the values were and she informed him that his cholesterol level was 661.0 and his triglyceride level was 3,662.0. Complainant also asked her "what's normal?" and she provided that information. Fields told complainant to "see your local doctor" and to send the test results to Dr. Lindroth; she also provided him with the address. All of that information was written down by complainant on an envelope at his home and is not disputed by either party to the conversation. However, complainant also testified that "I asked her, I said, 'Is this going to affect me from getting a job up there?' and she said 'Yes.' She said, 'you need to go see your doctor.'" He expounded on this by saying that "I said, 'What do I need to do?' She said, 'Go to your doctor and get them down to normal range.'" These allegations are denied by Nurse Fields. An examination of the envelope reveals that the complainant wrote nothing down regarding getting the values down to normal before sending them to respondent.

19. Nurse Fields testified that Dr. Lindroth had told her to contact complainant, advise him of his laboratory results, tell him to see his physician as soon as possible and get the results back to Dr. Lindroth. She testified that she called him and told him exactly what Dr. Lindroth had instructed her to tell him. She then noted the

substances of the conversation on his lab report. Although she had no independent recollection during the hearing of her conversation with complainant, she identified the notes she made documenting her conversation with him.

20. The complainant's wife also testified about what complainant told her about the conversation. Mrs. Hayes testified that complainant relayed the nurse's statement that his cholesterol and triglycerides were extremely high and that he needed to get them down to normal range in order to be recommended by the respondent's medical department for the job.

21. Both complainant and Mrs. Hayes also testified that complainant, relying upon this information from the respondent's medical department, began to work to lower his cholesterol and triglyceride levels to the normal range of 140-233 for cholesterol and 50-200 for triglycerides as instructed. They called complainant's sister-in-law who is a nurse. She told them that complainant should start dieting, eating right and see a doctor as soon as possible.

22. Dr. Lindroth testified that she sometimes made telephone calls to the applicants herself, but that she was too busy during that period to make the call to complainant. Moreover, that in the complainant's case this procedure for further evaluation was necessitated by the extremely abnormal lipid levels disclosed by the lab report and that his doctor should provide respondent with either corrective results or an indication of treatment given.

23. According to Dr. Lindroth, these high lipid values could have resulted from several of the following factors: the test itself

may have been flawed; complainant may not have been fasting prior to the test, which would have caused inaccurate readings; or the results may have been accurate, thus indicating an unhealthy condition causing concern and requiring treatment. Dr. Lindroth's concern with complainant's report was that if the reported levels were accurate, then they were "extraordinarily high" and "very abnormal." Such levels, if accurate, would indicate that complainant was at risk for coronary artery disease, which potentially could place a burden on his heart if he were required to perform heavy physical labor in areas of extreme heat. Dr. Lindroth explained that employees were regularly exposed to such conditions in the respondent's plant. She anticipated that complainant's private doctor, as a treating physician, could repeat the tests under more controlled conditions, evaluate the results, and prescribe treatment, if necessary, to lower his lipid levels. Dr. Lindroth testified that, based on the plant job descriptions of the physical requirements for plant jobs and the National Institute for Occupational Safety and Health (NIOSH) guidelines for pre-employment physical examinations, an employee with coronary artery disease, <u>if untreated</u>, would be a potential candidate for a heart attack if placed in an entry level job with respondent.

24. About a week later, complainant went to Dr. Lewis C. Richmond, a local general practitioner. Dr. Richmond received the results of respondent's blood test, took a blood sample and put the complainant on medication. He told him to start dieting and exercising. He did not give complainant any written instructions; just to watch what he ate and to diet and exercise. He prescribed Lopid.

25. Approximately one week later, complainant received the results of his blood test. The results indicated a cholesterol level of 386 and triglyceride levels of 390. Dr. Richmond told complainant to diet and exercise for a couple of months and then come back for a follow-up visit.

26. Complainant was encouraged by the greatly-reduced levels. He continued dieting and exercising.

27. In April, complainant returned to Dr. Richmond and had his cholesterol and triglycerides retested. His cholesterol had dropped to 313; his triglycerides had risen slightly to 438. He did not send those results to respondent because he had been instructed to send back results when they were at "normal" levels.

28. Complainant lost hope and doubted that he would ever get his cholesterol and triglyceride levels lowered to the levels he believed respondent mandated.

29. Complainant followed the instructions he believed he was given by the respondent. He tried everything in his power to reduce his lipid levels to the normal range he believed mandated by respondent. He did not achieve that level and, therefore, did not send the results back.

30. Complainant and Mrs. Hayes were credible witnesses.

31. Nurse Fields and Dr. Lindroth were credible witnesses.

32. Based on the evidence as a whole, it appears that the complainant misunderstood Nurse Fields or there was miscommunication between the complainant and Nurse Fields.

33. Dr. Lindroth did not make hiring decisions.

34. Many applicants Dr. Lindroth examined during the months of November and December had high cholesterol and triglycerides. Some were immediately approved for employment while others needed further evaluation and were asked to have tests performed by their personal doctors. Those who provided additional information that allowed Dr. Lindroth to complete her evaluation all had their names sent to the personnel department.

35. No applicant was ever rejected for employment by respondent because of high or abnormal lipid ratings.

36. Complainant was never rejected for employment because the necessary information requested of him was never received by the medical department. Once complainant was categorized as "needing further evaluation," he remained in that category pending receipt and review of the new test results from him or his personal physician.

37. Because he failed to complete the application process, no one had ever told complainant he was hired, nor was he ever rejected for employment.

38. The complainant never contacted respondent, the personnel department, the medical department or Dr. Lindroth, and never provided any of the 1991 or 1992 laboratory test results or other information to respondent.

39. Complainant's condition of elevated lipid values has never limited his ability to engage in major life activities. Both complainant and his expert witness, Dr. Bruce Merkin, testified that he was not handicapped.

40. Dr. Merkin who was qualified as an expert in internal medicine and in the treatment and control of high cholesterol, was a

credible witness. Dr. Merkin explained that cholesterol and triglycerides are the primary types of fat in the blood.[1/] He further stated that they may be affected by a number of different factors, such as diet and heredity, and that they are associated with various health risks, depending on there levels. The health risk that Dr. Merkin identifies was cardiovascular disease. Dr. Merkin explained the method for testing cholesterol and triglyceride levels and the difference between HDL, the so-called good cholesterol, and LDL, the so-called bad cholesterol. He suggested that the diet,[2/] adjustment of exercise and encouragement to lose weight were all standard treatments, along with several medications.

41. Dr. Merkin reviewed the medical documents. After identifying each document, he testified to how he would review the results of a test that indicated that an individual had a cholesterol level of 661 and a triglyceride level of 3,662. Dr. Merkin said that it would make him think that this person "had a severe lipid disorder," but he further testified he would want to get a "follow-up test to confirm before he would make that diagnosis." He said he thought that test results might be "spurious." When reviewing the results of complainant's second test, in which the cholesterol level was reported as 386 and the triglyceride level as 390, Dr. Merkin

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[1/] Dr. Merkin's testimony is that cholesterol is the type of fat more closely associated with the high risk of development of heart disease than are triglycerides. The evidence about the association of triglycerides and heart disease is inconclusive according to Dr. Merkin.

[2/] Dr. Merkin elaborated and suggested that a low-fat diet was preferable. Diet, he testified, was important not only to reduce obesity, but to limit fat in the system.

said he considered that a "substantial" lowering.[3/] He notes, however, that they were still quite high.

42. The gist of Dr. Merkin's testimony was that a person with the lipid levels of complainant, if left uncorrected, might present a long-term risk of coronary heart disease, but that person would not be an immediate risk. In Dr. Merkin's expert opinion, that person would not be a danger to himself and others. Also, there would be no reason why that person could not work while they underwent treatment for high lipid levels. Dr. Merkin, although never arguing with a decision that would involve more testing, after lab results with such high cholesterol and triglyceride readings, never faltered in his testimony that, in his opinion, complainant could have worked while his cholesterol and triglycerides were being treated in the accepted medical treatment of diet, exercise and perhaps medication.

B.

DISCUSSION

The complainant alleges respondent engaged in an unlawful discriminatory practice based on handicap in violation of the West Virginia Human Rights Act, WV Code §§5-11-1, et seq. (the "Act"). Specifically, complainant alleges that he was "discriminated against because of an assumed Handicap, Heart Condition," in that he

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[3/] Dr. Merkin stated that the lower results of the second test might indicate indeed that the first results were "spurious."

was told by a representative of respondent that he "would not be hired due to high cholesterol and triglyceride levels."

The legal standard for proving a case of employment discrimination based on handicap under the Act has been articulated by the West Virginia Supreme Court of Appeals as follows:

> A handicapped person claiming employment discrimination under WV Code, 5-11-9, 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 rejections. An example of such a legitimate, nondiscriminatory reason is that a person's handicap creates a reasonable probability of a materially enhanced risk of substantial harm to the handicapped person or others. Teets v. Eastern Associated Coal Corp., 187 WV 663, 421 S.E.2d 46 (1992); Anderson v. Live Plants, Inc., 187 WV 365, 419 S.E.2d 305 (1992); and Ranger Fuel Corp. v. Human Rights Commission, 180 WV 260, 376 S.E.2d 154 (1988).

This case is one of first impression in that complainant seeks to show that he meets the definition of handicap based upon the section of the statutory definition which extended protection to those persons regarded or perceived as handicapped. This amendment, added in 1989, reversed the effect of the West Virginia Supreme Court's ruling in Ranger Fuel, supra, and Chico Dairy Co. v. WV Human Rights Commission, 181 WV 238, 382 S.E.2d 75 (1989), by enlarging the definition of handicap under West Virginia law and brought the definition of handicap in line with federal law and the overall intent of the statute. Section 5-11-3(m) of the WV Code defines "handicap as follows:

"(m) the term 'handicap' means a person:
(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...." WV Code §5-11-3(m) (1992).

Thus, the complainant must prove that he falls within at least one part of this three part definition to satisfy this element of a prima facie case.

The undisputed facts in the record demonstrate that the complainant does not satisfy this first part of the three-part definition of a handicapped person. Complainant's elevated lipid values are not a physical or mental impairment substantially limiting one or more major life activities. While evidence in the record includes laboratory test results indicating that complainant's cholesterol and triglyceride levels were elevated above normal levels from late in 1990 through early 1992. Complainant admits that this physical condition has never substantially limited his major life activities. Similarly the complainant's expert medical witness testified that complainant was not, in his opinion, in any way disabled.

The second part of the three-part definition of handicap includes persons that have a record of impairment. This provision includes persons that have a history of, or that have been

misclassified as having a physical or mental impairment substantially limiting one or more major life activities. See, C.S.R. §77-1-2.7. In this case, complainant has neither alleged nor presented any evidence of any history of, record of or misclassification as having any physical or mental impairment substantially limiting one or more major life activities. As noted above, complainant admits that he has never been diagnosed with high lipid values before and that his elevated lipid values did not substantially limit his major life activities. Thus, complainant does not satisfy this second part of the definition of a handicapped person.

The third part of the definition of handicap set forth in the Act includes persons regarded as having an impairment. Subsequent to the amendment of the definition of "handicap," the commission's legislative rules were properly promulgated through the Legislative Rule Making Review Committee. See, WV Human Rights Commission's Legislative Rules Regarding Discrimination Against the Handicapped, 77 CSR 1, §§77-1-1-to 77-1-7. Under §77-1-2.8., "is regarded as having an impairment" includes the following:

> "2.8.1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by another as having such a limitation;
>
> 2.8.2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> 2.8.3. Has none of the impairments defined above but is treated as having such an impairment." West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against the Handicapped, 77 CSR 1, §§77-1-2.8.

Accordingly, complainant must prove that respondent treated him as having a physical or mental impairment substantially limiting one or more major life activities in order to satisfy this part of the definition of handicap.

In Chico Dairy, supra, Chief Justice Workman stated the purpose behind the perceived handicap rule:

> This regulation follows the federal [statutory] definition and expands upon the [West Virginia] statutory definition of "handicap" by including persons with a history of such impairment. This extension is necessary to make clear that the law prohibits discrimination against persons who are incorrectly perceived as handicapped as well as persons who are correctly perceived as handicapped. Chico Dairy, 382 S.E.2d at 86 (Emphasis in original).

After the Chico Dairy decision, it was the Legislature's intent that there be no doubt about the scope of the Act. The definition was expanded to include people who are the victims of myths and stereotypes about disabilities.

The undisputed evidence in this case shows that in November, 1990, complainant began the application process for a position as a replacement worker with respondent. At that time, along with over 1,000 other applicants, he completed a medical questionnaire in preparation for a pre-employment physical examination. Complainant then underwent his pre-employment physical examination, which included having blood samples taken. Dr. Marianne Lindroth, respondent's plant physician, classified complainant as "healthy" after neither discovering nor observing anything unusual or remarkable during the initial physical examination.

However, when the results of complainant's laboratory tests were reported back to the respondent's medical department, the blood test

disclosed that complainant had a cholesterol level of 661, which was three times the normal healthy value for a man of his age, and a triglyceride level of 3,662, which was 15 times the normal value for a man of his age.

According to the respondent, these high lipid values could have resulted from several of the following factors: the test itself may have been flawed; the complainant may not have been fasting prior to the test, which would have caused inaccurate readings; or the results may have been accurate, thus indicating an unhealthy condition causing concern and requiring treatment. Testimony reflected that the blood samples were taken on November 19, 1990, and sent to an independent laboratory on November 21, 1990 and placed on Dr. Lindroth's desk for her review.

Dr. Lindroth testified that during November and December of 1990 the respondent's medical department was performing from 25 to 125 pre-employment physicals per day.

Dr. Lindroth testified that she would have looked at complainant's lab results sometime during November, 1990, noted that his lipid levels were higher than normal, and then circled those levels. However, she also testified that because her department was so busy giving physicals as well as treating illnesses and injuries of personnel already employed at the plant, complainant's application was placed in a category designated "needs further evaluation" or "NFE." Those applicants so designated were not disapproved or rejected for employment, but rather were merely placed "on hold." Dr. Lindroth also testified that once she had completed the initial examination, applicants could be placed in one of the following

several categories: (i) those who were not being recommended for employment because they had testified positive for illicit drugs; (ii) those who were physically qualified to begin work because she had sufficient information to allow her to complete the evaluation process; (iii) those who needed further evaluation; and (iv) those applicants whose tests revealed urgent medical conditions that needed to be notified immediately in order to get immediate treatment, such as abnormal chest x-rays revealing cancer or other life threatening conditions.

Apparently, the complainant argues that Dr. Lindroth's action in placing his file in a pile for further evaluation because of elevated lipid levels, rather than immediately recommending him for employment, portends inculpatory conduct within the meaning of §77-1-2.81. To be sure, Dr. Bruce Merkin, the complainant's medical expert concurred with the decision by Dr. Lindroth to pursue further evaluation in light of the extremely high values of complainant.

Additional evidence reveals and the gravamen of this complaint evolves around a controverted conversation between respondent's nurse Frances Fields and the complainant which took place on or about January 11, 1991. The complainant maintains that he was told by Nurse Fields that he would not be employed by respondent until his values were in the normal range, thereby constituting direct evidence of an adverse action toward him because of a perceived handicap, high lipid values and resultant coronary risks.

The testimony of Nurse Fields and Dr. Lindroth demonstrates that Nurse Fields, who routinely contacts applicants needing further evaluation, telephone complainant to inform him of the laboratory

test results, to recommend that he see his local doctor, and to request that he transmit the new test results to Dr. Lindroth. Although complainant testified to a different version of this conversation, Nurse Fields clearly denies ever having told any applicant that he or she had to get elevated cholesterol and triglyceride levels down to normal range before becoming employed. Dr. Lindroth testified that she sought further evaluation of other applicants with elevated lipid values, and then gave these applicants medical approval for the personnel department to hire. Dr. Lindroth also confirmed that lipid values of an applicant did not have to be normal in order for her to approve the applicant for work with respondent.

In addition, Nurse Fields, who routinely made similar calls to applicants at Dr. Lindroth's direction, specifically denied that she ever told any applicant to get his lipid values down to normal. Nurse Fields' notes of the telephone conversation, which contain the same information as the complainant's notes, do not include any notation that complainant was instructed to get his lipid values down to normal.

Both the complainant, Nurse Fields, the complainant's wife and Dr. Lindroth credibly testified regarding different versions of a disputed telephone conversation.

Based on the totality of the evidence, the complainant simply misinterpreted, or misunderstood Nurse Field's instructions.

There should be no question as to the veracity of the complainant. His subsequent conduct and general demeanor suggests that he, in good faith, followed through on what he believed he

needed to do in order to get a job with respondent, that is to get his lipid values in the normal range.

The evidence in this case shows that complainant was not treated as a handicapped person, but rather was treated as a person with laboratory test results indicating extraordinary high lipid levels that needed to be verified or checked by a treating physician. Just as Dr. Lindroth, as an examining physician, would have been expected to recommend and/or pursue a further evaluation of an applicant's test results indicting a life threatening medical condition such as cancer, she requested additional data regarding complainant for purposes of further evaluating his lipid values. To do otherwise would require a plant physician conducting a preplacement physician examination to ignore an applicant's lab results and not inform her of a potentially serious medical condition. Unfortunately, the complainant did not provide this data, so Dr. Lindroth was unable to complete complainant's physical examination. As a result, respondent never had an opportunity to make any employment decisions about complainant, and did not treat him as if he were handicapped.

The second part of complainant's argument that respondent regarded him as handicapped is that he has a physical impairment that substantially limits major life activities only as a result of the attitude of respondent toward such impairment. Specifically, complainant contends that respondent treated his high lipid values as an impairment that substantially limited the major life activity of working.

To support his conclusion that respondent treated his high lipid values as an impairment that substantially limited the major life

activity of working, complainant relies on a three-factor test of whether an impairment is perceived as a substantial limitation to an applicant's ability to work. See E.E. Black Ltd v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980). As complainant explains, Black articulates the following three factors to be considered in determining whether an impairment is perceived as a substantial limitation to an applicant's ability to work: (1) the number and type of jobs from which the person is disqualified; (2) the geographical area to which the person has reasonable access; and (3) the person's job expectations and training. However, this portion of complainant's analysis is of little to no value because it is entirely unsupported by any evidence in the record.

For example, as to the first Black factor, complainant asserts that Dr. Lindroth "effectively labeled him as disqualified from all jobs in the production area," and that he was "disqualified from all departments of production." However, nothing in the record addresses this issue; moreover because complainant's application was "on hold," no evidence regarding disqualification from any job could have been (or was) elicited.

Similarly, complainant makes sweeping conclusions about the availability of production or manufacturing jobs in West Virginia, and the working conditions of glass factories, chemical companies and power plants as compared to respondent. In addition to operating under the assumption that complainant was disqualified for employment, these conclusions are unsubstantiated by any evidence in the record.

In short, the Black case is factually distinguishable from the present case. Unlike the plaintiffs in those cases, complainant was never rejected for employment or disqualified from particular jobs by respondent. The evidence does not support a conclusion that complainant was considered to be substantially limited from the major life activity of working. On the contrary, courts uniformly find that "an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." See e.g. Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986).

Complainant has not demonstrated by a preponderance of the evidence that he was regarded as handicapped by respondent. Therefore, complainant has failed to satisfy this essential element of his case of unlawful discrimination, regardless of whether a circumstantial or direct mode of proof is used.

In summary, complainant has not demonstrated that he meets the definition of "handicap" set forth in the Act and further delineated in the Handicap Regulations. Therefore, he fails to prove this crucial element of his prima facie case of discrimination under the Act. See, e.g., O'Dell v. Jenmar Corp. of West Virginia, Inc., 184 WV 280, 400 S.E.2d 288, 292-93 (1990).

The second essential element of complainant's prima facie case is that he applied for and was rejected for the desired job with respondent. Syl. pt. 2, Teets, supra; Syl pt. 1, Anderson, supra; Syl. pt. 2, Ranger Fuel, supra. The evidence in the record, however, clearly demonstrates that respondent neither rejected nor took any other action to prevent complainant from becoming employed with

respondent. Rather, although respondent's staff physician made a request for further information in order to complete complainant's physical examination, complainant never provided such information. As a result, no action was ever taken on complainant's employment application. No evidence was produced by complainant to show that he was rejected. The only notation ever made regarding complainant's application was that he "needs further evaluation."

Complainant overlooks the fact that according to the testimony of Dr. Lindroth and Nurse Fields, it was complainant's responsibility to provide further medical information to enable Dr. Lindroth to complete the medical evaluation. Complainant also neglects to discuss the undisputed testimony that complainant's application with respondent remained "on hold" pending completion of the medical evaluation, and that a number of other applicants with elevated lipid levels provided such further information and were hired by respondent during this period.

In short, complainant fails to demonstrate by a preponderance of the evidence that respondent took any affirmative steps or made any positive decisions resulting in rejection or other adverse action.

If a person claiming employment discrimination meets his burden of proving a prima facie case, the burden then shifts to the respondent to rebut such showing by presenting a legitimate, nondiscriminatory reason for the claimant's rejection. Syl. pt. 1, Teets, supra; Syl. pt. 1, Anderson, supra; Syl. pt. 1, Ranger Fuel, supra. One example of such a legitimate, nondiscriminatory reason is that a person's handicap creates a reasonable probability of a

materially enhanced risk of substantial harm to the handicapped person or others.

In this case, as explained above, complainant has failed to prove the essential elements of a prima facie case of employment discrimination. He is not handicapped. Nonetheless, it is important to note that regardless of complainant's failure to meet his burden of proof, all of respondent's actions in administering his application were based on legitimate, nondiscriminatory bases.

As noted above, complainant's pre-employment physical examination by respondent was conducted by Dr. Lindroth, the plant physician. As plant physician, Dr. Lindroth testified that she performs the following two basic functions: (i) treating occupational and non-occupational injuries and illnesses of nearly 2,000 of respondent's employees; and (ii) performing pre-employment post-offer physicals and medical surveillance physicals of applicants and employees. Dr. Lindroth is responsible for knowing what the jobs in the respondent's plant entail, and knowing the risks of each job so that she can accurately assess an individual to determine whether he or she can do a specific job. As plant physician, Dr. Lindroth guards against combinations of health conditions of individuals and work conditions at the plant that are potentially dangerous to employees.

During the busy hiring period in late 1990 and early 1991, Dr. Lindroth relied on information specifically tailored to medical concerns in an aluminum plant in performing pre-employment physical examinations. For example, she referred to a detailed guide to plant preplacement physical examinations that had been prepared

specifically for the respondent's plant. In addition, she relied on reports providing detailed analysis of the necessary physical capabilities for each job with respondent. Dr. Lindroth also consulted a document providing criteria for recommended standard occupational exposure to hot environments, prepared by the National Institute of Occupational Safety and Health ("NIOSH"). The NIOSH criteria included recommendations for pre-employment physical examinations, emphasizing that screening for hot environments like the respondent's plant require detailed medical evaluations.

Dr. Lindroth's role in the hiring process with respondent during late 1990 and early 1991 was to perform pre-employment physicals and then evaluate an applicant to see if the applicant needed any restrictions in order to work. This information was then passed on by respondent's medical department to the personnel department which made the hiring decision. In this process, Dr. Lindroth utilized her knowledge of the specific employment conditions with respondent to evaluate fully each applicant's condition, and to prevent any employee from being placed in a job where a risk of substantial harm to the employee and other was present.

After examining complainant's lab report, Dr. Lindroth concluded that she could not complete her evaluation without additional testing; the extraordinary high lipid values reflected in the November lab report necessitated such a response for reasons entirely unrelated to whether complainant was an individual with a handicap. The medical department commonly made such requests for additional information, and both Dr. Lindroth and Dr. Merkin concur that complainant's results needed to be confirmed at least with a second

blood test, if not also with an additional and more thorough examination than that customarily performed by an examining physician during a pre-employment physical. Dr. Lindroth testified that there was no reason for anyone in her department to tell complainant to get his lipid levels down to normal, because those levels did not have to be normal for her to complete the physical evaluation and approve him to work with respondent. She also testified that she never instructed Nurse Fields to tell any applicant to get their lipid values down to normal and then call the respondent. Furthermore, she rated Nurse Fields as an excellent nurse who is very organized, reliable and dependable. As Dr. Lindroth testified, "She does exactly what I ask her to do."

If complainant had complied with Nurse Fields' instructions and provided Dr. Lindroth with the additional information and test results from his own physician, Dr. Lindroth could have completed the physical examination and either recommended restricted activities or indicated to the respondent's personnel department that no restrictions were required. However, complainant never again contacted respondent, the personnel department, the medical department or Dr. Lindroth regarding examinations and tests performed by his own physician.

Another reason for further evaluation was to complete a diagnosis of complainant's condition, which Dr. Merkin agrees could not be diagnosed based merely on the first laboratory test and an initial physical examination. If such lipid levels were accurate, complainant could have been potentially at risk for coronary artery disease, which would potentially have placed a burden on his heart if

he were required to perform heavy physical labor in areas of extreme heat such as those at the respondent's plant. Based on Dr. Lindroth's extensive knowledge of the physical requirements of jobs at the respondent's plant and the NIOSH guidelines, further evaluation was necessary in order to evaluate fully whether complainant actually had a serious physical condition, and if so, whether that condition created a reasonable probability of materially enhanced risk of harm to himself or others. See Davidson v. Shoney's Big Boy Restaurant, 181 WV 65, 380 S.E.2d 232 (1989) (holding that an employer must rely on complete, competent medical advice in determining whether a risk of harm exists).

The medical records from Dr. Richmond, the Veteran's Administration Hospital and other pre-employment physicals, all of which were evidence in this case, were not available to Dr. Lindroth in January, 1991, when she instructed Nurse Fields to advise complainant to see his local doctor and send the results to the respondent. If complainant had provided any of these records to Dr. Lindroth, she would have been able to complete the further evaluation that Dr. Merkin agrees was necessary under the circumstances. Then she would have been able to evaluate his condition, assess the risk of harm, if any, and even recommend reasonable accommodations, if appropriate. In fact, Dr. Lindroth testified that if she had received results of the testing done by Dr. Richmond and the treatment prescribed, she would have approved complainant for employment (with Dr. Richmond's clearance). However, because complainant never provided these records, none of these decisions could be made.

The evidence reveals that Dr. Lindroth, as respondent's physician, attempted under the circumstances to complete her further evaluation of complainant. Although there were admittedly delays in the process, these delays were the result of the enormous numbers of applicants being processed and not the physical condition of complainant. No further evaluation was completed, however, because complainant provided no additional records. Therefore, his physical examination was never completed and no final employment decision was ever made. However, all of these action by respondent were based on legitimate, nondiscriminatory reasons.

In conclusion, there is no evidence, circumstantial or direct, that respondent discriminated against the complainant on the basis of a handicap, real or perceived. The complainant has failed to sustain his ultimate burden of proving handicap discrimination in violation of the West Virginia Human Rights Act.

C.

CONCLUSIONS OF LAW

1. The complainant, Daniel K. Hayes, is an individual claiming to be aggrieved by an unlawful discriminatory practice, and is a proper complainant for purposes of the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Ravenswood Aluminum Corporation, is and was at all times relevant hereto, an employer as defined by WV Code §5-11-3(a).

3. The complaint in this matter was timely filed pursuant to WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of the complaint.

5. The complainant is not a handicapped person as defined by WV Code §5-11-3(m) (1992) in that he was not perceived or regarded by the respondent as having an impairment which substantially limits a major life activity.

6. The complainant has not established a prima facie case of handicap discrimination in that he has not shown that he meets the definition of handicap or that he was rejected for employment by respondent because of a handicap, real or perceived.

7. Respondent's articulated nondiscriminatory reasons for its failure to hire complainant, that he did not follow instructions and send results from his doctor or that he was not qualified to perform the essential functions of the position, have not been shown to be pretextual.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** that this case be dismissed with prejudice and be closed.

Entered this 27 day of December, 1993.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE