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November 21, 1997

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Re: Kathleen M. Wode v. Columbia Gas Transmission Corporation
Docket Nos. ESA-94-92 and EH-95-92

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

HERMAN H. JONES
EXECUTIVE DIRECTOR

HHJ/jk
Enclosures
Certified Mail/Return
Receipt Requested

cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHLEEN M. WODE,

Complainant,

v. DOCKET NO. ESA-94-92
EH-95-92

COLUMBIA GAS TRANSMISSION CORPORATION,

Respondent.

FINAL ORDER

On November 13, 1997, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Mike Kelly on March 31, 1997, and Judge Kelly's Supplemental Order regarding damages issued on April 29, 1997.

After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision and Supplemental Order, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision and Supplemental Order as its own, without modification or amendment.

It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision and Supplemental Order 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 and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 21st day of November 1997, in Charleston, Kanawha County, West Virginia.

HERMAN H. JONES, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHLEEN M. WODE,

Complainant,

v. **Docket Nos. ESA-94-92 & EH-95-92**

COLUMBIA GAS TRANSMISSION CORP.,

Respondent.

FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THIS MATTER matured for public hearing on 12 December 1995. By agreement of the parties the hearing was held at Council Chambers, City Hall, Charleston, Kanawha County, West Virginia. Complainant was present in person and her case was presented by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General Sandra K. Henson and Deputy Attorney General Mary Catherine Buchmelter. Respondent was present by its agent, Suzan Ingram, and by its counsel, William E. Robinson, Sean P. Harter and Robinson & McElwee. Both sides were well represented by able and competent counsel who did an excellent job for their respective clients.

I. ISSUE TO BE DECIDED

Whether respondent violated W.Va. Code § 5-11-9(1) by discharging complainant from employment because of her handicap, age and /or sex.[1]

II. STIPULATED FACTS

The parties stipulated that the following facts are true:

1. Complainant Kathleen Wode is a woman, over the age of forty, who filed two complaints under the West Virginia Human Rights Act. The first complaint alleged discrimination on the basis of sex and age. The second complaint alleged discrimination on the basis of handicap, i.e. a back injury and a bone tumor.

2. Respondent Columbia Gas Transmission Corp. (CGT) is a person and an employer as those terms are defined by W.Va. Code §§ 5-11-3 (a) and 5-11-3 (d) respectively.

3. At the time the Respondent terminated her employment, complainant Kathleen Wode was a member of a protected class under the Act due to her back injury-related handicap.

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[1] The Commission elicited little, if any, evidence of either age or sex discrimination, choosing, instead, to focus on the handicap claim. The age and sex claims are, therefore, DISMISSED with prejudice, without further discussion.

4. The Complainant, Kathleen Wode, was a person with a record of handicap. The Respondent was aware that the Complainant was a person with a history of cancer when it hired the Complainant as a permanent employee in January, 1987. The Respondent also was aware that the Complainant had a history of cancer when it terminated her in April, 1991.

5. On September 4, 1986, Complainant received a pre-employment physical examination for CGT. Dr. Paupradist, who performed the examination, discovered a lump in Complainant's breast. Ms. Wode was diagnosed with breast cancer.

6. Dr. David Gray performed a segmental mastectomy in September, 1986 and lymph node surgery in October, 1986. In November, 1986, Complainant went to the Fox Chase Cancer Center for radiation therapy under the treatment of Dr. Lawrence J. Solin.

7. After Complainant completed a course of radiation therapy treatment, Dr. Solin released Complainant to return to work as a secretary on February 2, 1987.

8. At the time the Respondent terminated Complainant, she earned a salary of $22,380 per year and received $466.25 per month in benefits.

9. Complainant received $326.00 in social security retirement benefits during 1991.

10. Complainant received $4,056.00 in social security retirement benefits during 1992.

11. Complainant received $5,210.00 in social security retirement benefits during 1993.

12. Complainant received $5,459.30 in social security retirement benefits during 1994.

III. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:[2]

A. Ms. Wode's Employment History with CGT

1. Kathleen Wode was originally hired by CGT in April 1980 for a clerical position. Ms. Wode's date of birth is 1 November 1929, making her over fifty years of age when first hired by

[2] To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

Respondent. Ms. Wode voluntarily resigned her employment seven months later in November 1980 in order to care for an ill relative.

2. In June 1986, Ms. Wode returned to Columbia as a temporary employee working through Smart Temporary Services. She later applied for full time employment as a CGT employee and was offered a "Secretary V" position in September 1986. She was then 56 years old.

3. During the course of a pre-employment physical examination, a malignant lump was discovered in her breast. Ms. Wode underwent surgery in September 1986 and October 1986, and began radiation treatment in November 1986. She worked at CGT as a temporary between surgeries, then was off from work from October 1986 through January 1987.

4. On 3 February 1987, Ms. Wode finally began her full time employment as a Secretary V. It is not disputed that Respondent was fully aware of Ms. Wode's cancer and treatment from September 1986 through January 1987 and that it held the Secretary V position open for her until she was able to return to work in February 1987.

5. From 3 February 1987 through 15 August 1990, Ms. Wode continued in the position of Secretary V. She and another employee provided clerical support to over 100 employees, including six mangers.

6. In January 1990, Ms. Wode suffered a serious, on the job back injury and was off work pursuant to doctor's orders for approximately 6 weeks.

B. The August 1990 Injury

7. In August 1990, Ms. Wode and others were transferred to a different floor of Respondent's building. With the transfer, Ms. Wode was to work for one manager, David Tolliver, and a staff of roughly fifteen people.

8. On 15 August 1990, Ms. Wode injured her back while unpacking boxes at her new work station. She reported her injury to CGT health personnel and was advised to see a doctor. She reported off work the next day and stayed in bed for the next two days. As it turned out, 15 August 1990 was to be Complainant's last day of work for CGT.

9. On Monday, 20 August 1990, Complainant saw Dr. Paul Bachwitt. Dr. Bachwitt diagnosed a back sprain, but, more alarmingly, an x-ray revealed an abnormality in the area of Ms. Wode's eleventh right posterior rib that Dr. Bachwitt feared could be metastatic cancer. He advised Ms. Wode to remain off work until further notice.

10. For the next six weeks, Ms. Wode and Mr. Tolliver, her new boss, spoke frequently by telephone. She kept him informed of her medical condition.

11. On 3 October 1990, after Ms. Wode had been off for thirty consecutive work days, Mr. Tolliver wrote a letter to her stating, in part:

> We have not received the Attending Physician's Statement from Dr. Bachwitt. Without this report, you cannot be placed on Leave of Absence i.e. your employment with Columbia must be terminated.
>
> It is your responsibility to ensure that this form is completed and returned to me. Please impress upon Dr. Bachwitt the importance of returning the statement to me immediately.
>
> Please contact me as soon as possible.
>
> (Comm. Ex. 4)

12. After her 15 August 1990 injury, Ms. Wode drew full pay and then half pay for about six weeks. She soon exhausted her available sick leave.

13. On 4 October 1990, Dr. Bachwitt completed an "Attending Physician's Statement of Disability". He described Ms. Wode's medical condition and affirmed, by checking the appropriate blocks, that Ms. Wode was "still totally disabled and unable to do any work" and that her possible return to work was "indefinite". (Comm. Ex. 5).

14. Upon receipt of Dr. Bachwitt's signed statement, Mr. Tolliver assigned Ms. Wode to the work status of "leave of absence". At some point, Mr. Tolliver completed an undated form and stated about Ms. Wode as follows: "Employee has history of cancer. Her doctor has noted abnormalities on her x-rays in the area of her pain. She has had numerous injuries and illnesses over the last few years. I do not believe she is capable of normal work activities." (Tolliver Depo., Comm.

Ex. 11). Mr. Tolliver testified that the form may have been completed in December 1990. (Id. pp. 108-09).

15. In October 1990, surgery revealed that the tumor on Ms. Wode's rib was benign.

16. In 1990, CGT provided to its employees who were unable to return to work due to illness or injury a Long-Term Disability ["LTD"] Plan. The LTD Plan provides "totally disabled" employees who meet certain eligibility requirements with an income commencing after six months of total disability. Under the terms of the Plan, total disability is defined as follows:

> Long-Term Disability covers illnesses or injuries which render the employee totally disabled. Total disability means that the employee is prevented from performing his or her own duties and engaging in any other reasonable occupation for which he or she is qualified by reason of training, education, and experience. If an employee is only partially disabled or handicapped, either temporarily or permanently, or is able to perform some other reasonable employment, this does not constitute total disability. This is true even though a position for which the employee is qualified is at a somewhat lower salary, and a different geographical area, or with different company.
>
> The test for Long-Term Disability involves only ability to perform and not availability of work that can be performed...
>
> (Resp. Ex. 4)

The determination of whether an employee is "totally disabled," or is able to return to any "reasonable occupation," lies solely with the Plan's insurer, Aetna Life Insurance Company. On the other hand, the determination of whether an employee is capable or qualified to perform or return to a specific job at Columbia lies exclusively with Columbia, and Aetna plays no role in that process.

17. Pursuant to the terms of CGT's LTD Plan:

> [I]f an employee is totally disabled (temporarily or permanently), the Manager of Benefits will secure all necessary information and file a claim for Long-Term Disability benefits with Aetna Life Insurance Company during the 16th week of disability.
>
> (Resp. Ex. 4).

In calculating the 16-week period mandated by the policy, Columbia takes into consideration any related illnesses not separated by a full six-months of active work. Since Ms. Wode had not returned to six full months of active employment between her return to work following the January 1990 back injury and the subsequent August 1990 back injury, those weeks were "bridged" for purpose of determining Ms. Wode's entitlement to LTD benefits. This policy of including prior absences within the six month period is intended to be beneficial to an employee by providing an income at the earliest possible date.

18. On 7 November 1990, Ms. Suzan Ingram, CGT's benefits coordinator, sent Mr. Tolliver an LTD "packet" containing forms to be completed and submitted to Aetna. He, in turn, sent the appropriate forms on to Ms. Wode, who completed and signed a "Disability Claim Notice" on 17 December 1990. (Comm. Ex. 6). When asked on the form "are you now totally disabled and unable to work?" Ms. Wode answered "yes".

19. Ms. Wode's testimony at hearing was somewhat inconsistent as to whether she subjectively believed herself to be totally disabled as of December 1990 when she filled out and signed the employee's portion of the disability claim notice. It is clear, however, and I find as fact, that Ms.

Wode's submission of the completed Disability Claim Notice provided reasonable cause for CGT officials to believe that she was, or think she was, at a minimum, temporarily totally disabled and incapable of returning to work in the immediate future.

20. It was similarly unclear whether Ms. Wode applied for LTD benefits on her own volition or at the direction or suggestion of Mr. Tolliver. Viewing the evidence as a whole and applying common sense, I find as fact that more likely than not the Respondent presented LTD as an income option for Ms. Wode and that she, not receiving a paycheck and not yet being released to return to work, saw no reason at that time to pass up such an option.

21. Also on 17 December 1990, Dr. Jamal H. Khan, who had performed the surgery on Complainant's rib, completed and signed an Attending Physician's Statement for LTD benefits. When asked to rate Ms. Wode's physical impairment, Dr. Khan checked the box labelled "Class 1 -- no limitation of functional capacity; capable of heavy work. No restriction." He found her mental condition to be "n/a", not applicable. Dr. Khan's prognosis was "excellent" and he found that she had reached her "maximum medical improvement." (Comm. Ex. 7). Dr. Khan's statement, of course, was solely in reference to the rib surgery and suspected cancer and did not address the state of recovery from her back injury.

22. Ms. Wode testified credibly that Dr. Khan, who was not treating her back injury, only released her back into the care of Dr. Bachwitt and did not release her to return to work. I credit this testimony as true, there being no evidence to the contrary.

23. On 10 January 1991, Ms. Wode was again seen by Dr. Bachwitt. They discussed the possibility of Ms. Wode's return to work and the availability of "light duty" work. At the conclusion of the visit, Dr. Bachwitt provided Ms. Wode with a handwritten return-to-work slip stating:

> No reaching. No stretching. No Bending. Light duty work only. 20# occasionally. 10# frequently.
>
> (Comm. Ex. 8).

Ms. Wode testified that Dr. Bachwitt specifically identified "answering telephones" as the type of light duty work she could perform. According to Dr. Bachwitt, the prescription slip was filled out by his office assistant and does not fully express his opinion as to the type of tasks Ms. Wode was capable of performing as of 10 January 1991.

24. Dr. Bachwitt's progress notes, from his 10 January 1991 examination of Ms. Wode, which he personally dictated, are meaningfully different from the prescription pad given to Ms. Wode and reflect his full opinion as to her then ability to return to work. The progress notes state, in part:

> ...She is still having some pain in her back... I think she could return to light duty at most anytime. She works for Columbia Gas in a essentially medium duty work situation. If a position is created for her where she can lift 10 pounds frequently and no more than 20 pounds and not have to perform overhead lifting activities to any significant extent, I think she could go back to work. Otherwise, she will need to be totally disabled, and at age 61, I think this would be unfortunate, because I think it would decrease the chance of her ever working again.
>
> (Evidentiary Dep. of Dr. Paul Bachwitt, Dep. Ex. 2).

As is obvious, the progress notes do not appear to prohibit Ms. Wode from all reaching, stretching and bending, as the return-to-work slip appears to do. There was no evidence that CGT was ever provided a copy of Dr. Bachwitt's progress notes prior to the initiation of this litigation.

25. Dr. Bachwitt testified, and there being no testimony to the contrary, I find as fact, that as of 10 January 1991 Ms. Wode was physically capable of performing the duties of Secretary V except that she could not lift more than twenty pounds and could not engage in overhead activities to any significant extent. There was no evidence that Dr. Bachwitt was ever provided with the Secretary Level V Task Analysis (Comm. Ex. 17) prior to the initiation of this litigation.

26. Also, on 10 January 1991, Aetna denied Ms. Wode's claim for LTD benefits based on Dr. Khan's statement. Apparently, Aetna was unaware that Complainant remained in Dr. Bachwitt's care for her back injury. Ms. Wode received proper notice of Aetna's decision.

27. On 17 January 1991, Ms. Wode and Mr. Tolliver spoke by telephone for 30 to 40 minutes regarding her medical status and possible return to work. Mr. Tolliver testified credibly that Ms. Wode told him about Dr. Bachwitt's release slip, but that she added that she felt that she was under even greater limitations. He recalls that she stated that she could not bring groceries home from the store, could not run out for small errands, could not sit for an extended period of time, could not reach or stop or engage in most of the normal activities of daily living. He asked Ms. Wode to put her restrictions in writing and to send them to him along with Dr. Bachwitt's release.

28. Also on 17 January 1981, Ms. Wode spoke with Ms. Ingram, CGT's benefits coordinator, about her LTD claim. Ms. Wode informed Ms. Ingram that she could do "light duty work" only, such as answering telephones. Complainant stated that she could not perform all of the duties of a Secretary V and that if light duty work was not available she would seek disability benefits. Ms. Ingram made a memorandum of her conversation with Ms. Wode which summarizes their discussion, in part, as follows:

> She [Ms. Wode] told me that she had gone to Dr. Bachwitt['s] office and he told her to check with Columbia and see if we had a light duty job with no lifting /20lbs. and no bending. He recommended a telephone operator job. He also told her to complete a list of her own which stated the things she felt she could not do on the job. He said she could not do the clerical job she had before.
>
> I then ask[ed] her if he had completed the attending physician[']s statement and she said he told her if Columbia could not find her a light duty job then he would complete the form and classify her as a class 4.
>
> (Resp. Ex. 6).

29. On 18 January 1991, the day after her conversations with Mr. Tolliver and Ms. Ingram, the Complainant initiated the process of applying for Social Security disability benefits. I find as fact that she did so pursuant to the suggestion of Mr. Tolliver, made during the previous day's conversation, and as reflected in her subsequent letter reproduced below.

30. On or about 21 January 1991, Ms. Wode sent a letter to Mr. Tolliver, as he requested, summarizing the comments she had made during their phone conversation. The letter reads, in significant part, as follows:

I talked with Dr. Bachwitt when I visited him on January 10. He told me to ask Columbia if they could find a light duty job for me. He said if this is not possible, then he will fill out and sign the Long Term Disability Form I took to him. Benefits Department told me to have him sign it. He gave me the attached office slip listing things he does not want me to do. He also ordered blood work. When I asked him what he meant by "light duty", he said "answering telephones".

I told him I am still experiencing some pain. This has increased with the advent of cold weather. The office slip indicates I can carry 20# occasionally. I cannot do this. I wold feel safer carrying 10 lbs. or less.

I returned 1/21 to get the results of the blood work. I told him of my concern about sitting 8 hours a day, because of my discomfort at home when I sit for 3-4 hours. He said I would get a lunch hour and the usual 15-minute break morning and afternoon. He said he rather felt that Columbia would give me a longer break morning and afternoon what with my back problems. I told him I sometimes have difficulty when driving.

As you requested, David, below is a list of activities I should not do:

Reaching
Stretching
Bending-stooping
Pulling any weight of any consequence
Dragging anything heavy
Carrying anything in excess of 10 lbs, at most
Pushing any weight of any consequence
Maintaining any one position for a long period of time

Again, as your requested, I took the LTD form to Dr. Khan who did fill it out. Also, called, as you wanted me to, to SSD and gave them a telephone interview on January 18th. They have sent me those papers to sign. I just received them.

31. At hearing, Ms. Wode testified that at the time she wrote the above letter she felt that she could do the physical activities listed in the letter, but that she would not feel comfortable doing

them and would prefer to not do them. The letter, of course, does not reflect the nuance that she now suggests.

32. Mr. Tolliver testified credibly that he did not question the truth or accuracy of the contents of the letter and was left with the belief that Ms. Wode was unable to return to work. Similarly, he did not question the truth or accuracy of Dr. Bachwitt's return to work slip.

33. When he compared Ms. Wode's letter to Dr. Bachwitt's note, Mr. Tolliver found them somewhat inconsistent since Ms. Wode's letter took a more restrictive view of her ability to return to her duties. He was also unclear about what Dr. Bachwitt meant by "light duty". However, he did not call or write to Dr. Bachwitt to gain more information as to her condition.

34. On 22 January 1991, Ms. Ingram called Ms. Wode and "informed her that we do not have any light duty jobs available". (Resp's Ex. 6). They also discussed having Dr. Bachwitt complete an LTD form to be submitted to Aetna. (Id.) Ms. Wode told Ms. Ingram that if CGT did not have any "light duty" jobs available that Dr. Bachwitt would classify her as disabled for LTD benefits. Ms. Ingram did not contact Dr. Bachwitt to determine what he meant by "light duty", nor did she send a job description or task analysis for his review.

35. On January 28, 1991, according to an entry in Dr. Bachwitt's progress notes, Ms. Ingram told a member of Dr. Bachwitt's staff during a telephone conversation that, "Columbia was not interested in sending letter saying no light duty available but this is what Suzie told me".

(Bachwitt Depo., Ex 2). Again, there is no indication that Ms. Ingram took this opportunity to explore the inconsistencies noted by Mr. Tolliver as set forth in Finding 34 above or ask for clarification as to Ms. Wode's ability to do the specific tasks of a Secretary V.

36. Also on 28 January 1991, Dr. Bachwitt completed and signed an LTD Attending Physician's Statement provided by Aetna. (Comm. Ex. 11). The statement indicates that as of an examination given on 21 January, 1991:

(a) Ms. Wode's diagnosis was "lumbosacral strain", with subjective symptoms of "low back pain, spasms low back";

(b) Ms. Wode's condition had "improved', but she had not "recovered";

(c) Ms. Wode's present physical condition (i.e. as of 21 January 1991) required limitations of "No reaching, no stretching, no stooping, no bending, carry 10# frequently only";

(d) Ms. Wode's physical impairment was a Class 4 rating, meaning "moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity (60-70%)";

(e) Ms. Wode's "Mental/Nervous Impairment" was a Class 3 rating, meaning "Patient is able to engage in only limited stress situations and engage in only limited interpersonal relations (moderate limitations)"[3] ;

(f) Her prognosis was "good"; and

(g) Maximum medical improvement was expected to be reached in "6 months".

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[3] At his evidentiary deposition, Dr. Bachwitt testified that the statement was actually completed by his office personnel and that, in fact, Ms. Wode did not have any mental impairment.

37. The evidence was unclear if Dr. Bachwitt's 28 January 1991 LTD statement was completed after, or was influenced by, Ms. Ingram's statement to his office that "light duty" work was not available for Ms. Wode. It is consistent, however, with the previous conversation between Ms. Wode and Ms. Ingram in which Ms. Wode reported that Dr. Bachwitt would give her a Class 4 rating if no "light duty" jobs were available.

38. Dr. Bachwitt's 28 January 1991 statement is somewhat internally inconsistent in that it states that Ms. Wode should refrain from reaching, stretching, stooping and bending, but at the same time states that she was then "capable of clerical/ administrative (sedentary) activity".

39. On 5 February 1991, after receiving Dr. Bachwitt's statement, Aetna denied Ms. Wode's appeal of her LTD claim. The denial letter states, in part:

> Please be advised that the form provided by Dr. Bachwitt did not provide Aetna Life Insurance Company with sufficient objective medical evidence which supports your claim that you are totally disabled and unable to perform the material and substantial duties of an reasonable gainful work activity in keeping with your age, education, training, and/or work experience. We do note, however, that Dr. Bachwitt does indicate that you have a moderate limitation of your functional capacity and that you are capable of clerical/administrative (sedentary) activity. Given the doctor's statement to this effect, it appears that you should be able to return to your job as a secretary for the Columbia Gas Transmission Corporation.

(Comm. Ex. 12). (Emphasis added).

40. On receipt of the letter denying her appeal for LTD benefits, Ms. Wode wrote a letter to Aetna, accompanied by additional medical records, for the apparent purpose of asking that the previous adverse decision be reconsidered. (Resp. Ex. 3).

C. The Discharge Decision

41. In an undated memo to Mr. Tolliver written after Aetna's first rejection of Ms. Wode's appeal, D.L. Stinnett, CGT's manager of benefits, asked Mr. Tolliver to review the restrictions set forth in Dr. Bachwitt's statement of 28 January 1991 and "advise us if you do or do not have a job position available in your section to comply with these restrictions". (Resp. Ex. 8 and 15).

42. In a memo to Mr. Stinnett dated 13 February 1991, Mr. Tolliver stated that he did not have a job that would comply with Dr. Bachwitt's restrictions:

> I do not have a job position within my section which complies [with] the restrictions outlined by Dr. Bachwitt.
>
> *While the secretarial position consists mainly of sedentary activities, duties such as filing, acquiring supplies, maintaining copiers and printers, and restocking cabinets do require some reaching, stooping, and bending. On rare occasions items over 10 pounds may have to be moved - possibly up to 15 - 20 pounds.*
>
> The job is very demanding and occasionally stressful. The position demands constant interaction with others internal and external to the department. The job provides telephone support for 17 individuals, direct clerical and administrative support for 11, and indirect clerical and administrative support for 92 people.
>
> I have no other job openings. Nor do I have any way to lessen the job demands and still fulfill the department's function.
>
> (Resp. Ex. 16). (Emphasis added).

43. At his evidentiary deposition, Mr. Tolliver testified as to the process he followed in reaching his conclusion that he did not have a job that Ms. Wode could do given her limitations:

> Q. [Mr. Robinson] Can you tell me generally the process that you went through in trying to decide if Kathleen Wode could return to her job?
>
> A. Sure. I had Dr. Bachwitt's statement in which he outlined the limitations. I also had Kathleen's letter and few notes from our previous conversations. I looked at the duties of the job. I looked at what reasonably could be done by other people in the job and then looked at what was remaining and then as I applied the restrictions and started taking away much of that there wasn't really much left. I don't recall even being able to identify minute tasks, any parts of the job based on the restrictions so at that point I had no alternative.
>
> (Resp. Ex. 14, pp. 75-76).

He also acknowledged, however, that when he "looked at the whole statement either from Dr. Bachwitt or from Kathleen, it seemed a little bit inconsistent, light duty work versus no reaching, stretching or bending...I had trouble with that statement." (Id. at 65).

44. On 18 February 1991, Ms. Ingram drafted a memorandum to Mr. Flenniken, Director of Information Services department, advising him of the absence of any position for Ms. Wode in Mr. Tolliver's section and requesting that he advise her if there was a position elsewhere in the Department that would be available to her. (Resp. Ex. 9).

45. By memo dated 18 February 1991, Mr. Flenniken responded that there were no such positions available for Ms. Wode. (Resp. Ex. 10).

46. On 19 February 1991, Ms. Ingram forwarded a memorandum to Mr. Jim Guillow, Director of Columbia's Placement Section, asking that he advise her if there are any vacant positions available for Ms. Wode on a company-wide basis. (Resp. Ex. 11).

47. On 19 March 1991, Ms. Wode was sent a letter from Leigh Chaney, Manager of Columbia's Placement Section, again advising her of Columbia's position that her physical and mental restrictions prevented reinstatement into her prior Secretary V position, and telling her of the 30-day company-wide search which had commenced on 11 March 1991. (Complainant's Ex. 13). Notwithstanding Ms. Chaney's invitation for Ms. Wode to contact her regarding that search, Ms. Wode made no such contact.

48. On 11 April 1991, the Benefits Section was advised, via memorandum from D.L. Shaw, that there were "no suitable vacancies" in which Ms. Wode could be placed, either at company headquarters or elsewhere. (Resp. Ex. 12).

49. Also on 11 April 1991, Mr. Tolliver was advised of the unsuccessful job search. Mr. Tolliver met with Mr. Stinnett of the Benefits Section and Mr. Jim Dissen, Director of Employee Relations, to determine if there were any alternatives to termination, such as an extended leave of

absence. Mr. Tolliver was advised that there was no policy that would allow for an indefinite leave of absence.

50. On 12 April 1991, Mr. Tolliver sent a letter to Ms. Wode, advising her that her employment with Columbia had been terminated, because "your work restrictions prevented a return to work in your present position...[and] a thorough search was conducted and not suitable job to accommodate your restrictions could be found". (Comm. Ex. 15).

51. In regard to the decision to terminate, I find as fact that:

(a) It was based primarily on Ms. Wode's letter of 21 January 1991, and her conversations around that time with Mr. Tolliver and Ms. Ingram, and Dr. Bachwitt's prohibition on reaching, stooping and bending as set forth in his note of 10 January 1991 and his statement of 28 January 1991;

(b) CGT gave little, if any, weight to Dr. Bachwitt's 28 January 1991 conclusion that Ms. Wode was "capable of clerical/administrative (sedentary) activity". (Comm. Ex. 11);

(c) CGT took no steps whatsoever to attempt to clarify the inconsistencies presented to it about Ms. Wode's ability to return to her former position, such as asking Dr. Bachwitt which of the tasks set forth in the Secretary Level V Task Analysis (Comm. Ex. 17) could Ms. Wode do without accommodation, which could she do with a reasonable accommodation (and what kind of accommodation), and which could she not do even with a reasonable accommodation; and

(d) Not only did CGT not attempt to seek clarifying information from Dr. Bachwitt, CGT also never sought or obtained an independent or in-house medical assessment of Ms. Wode's ability

to return to her former position, but, instead, relied on lay opinion and interpretation. Moreover, Mr. Tolliver testified that this was the first time he had ever been required to decide if an employee claiming a disability could return to work.

52. Prior to her termination, Ms. Wode did not inform respondent that her former verbal and written representations regarding her ability to do her job were inaccurate or no longer applicable. However, neither Mr. Tolliver nor Ms. Ingram ever broached the subject of reasonable accommodation with Ms. Wode or her doctor, nor did they enter into dialogue as to why she believed she could not do the job, nor did they ever specifically ask her if she wanted to return to work, or present returning to work in a slightly restructured position as an option.

53. Ms. Wode's claims for both LTD and SSD benefits were ultimately rejected as she simply was not "totally disabled."

IV. DISCUSSION

The facts of this case are, to say the least, confusing. What is clear is that neither side is blameless from creating artificial and irritating barriers to getting an answer to one simple question: as of her date of termination, was Kathleen M. Wode objectively capable, with or without accommodation, of performing the essential duties of a Secretary V position?

For her part, Ms. Wode's conversations with Mr. Tolliver and Ms. Ingram and her letter of 21 January 1991 obviously created the misbelief that the only job she was capable of doing was "answering telephones." Dr. Bachwitt's return-to-work slip and portions of his 28 January 1991 statement assisted the obfuscation by being internally contradictory and, on the surface, barring her from nearly all clerical jobs in the economy.

On the other hand, CGT made little, if any, effort to obtain a specific job-oriented evaluation from Dr. Bachwitt, or even one of its own medical personnel despite the recognition of the "inconsistencies" in the evidence supplied by Ms. Wode. A careful review of evidence indicates that the only energy expended by Columbia was directed towards getting Ms. Wode to apply for disability benefits and in determining that it had no "light duty"" jobs for her, regardless of a complete failure to explore with Dr. Bachwitt the type of "light duty" job that he thought she could do when he concluded that she <u>was</u> "capable of clerical/administrative (sedentary) activity." (Comm. Ex. 11).

In assessing responsibility for this situation, it is impossible to ignore that Ms. Wode, in early 1991, was 61 years old, a cancer survivor who had just lived through exploratory surgery for possible metastatic bone cancer, and was suffering from a second on-the-job debilitating back injury. CGT, on the other hand, is a large, sophisticated employer that routinely makes decisions requiring it to obtain medical records and opinions from employee's treating physicians and/or to obtain <u>its own</u> medical evaluations of employees. CGT's failure to be proactive in data gathering in this case is made suspicious by Mr. Tolliver's early memo, written <u>before</u> Ms. Wode's confusing telephone conversations and letter and <u>before</u> any physician's statement was received by respondent, in which

he concluded "I do not believe she is capable of normal work activities." (Tolliver Depo. Ex. C. 11). To at least some extent, it appears that CGT's behavior in this case was generated more by Mr. Tolliver's early-established opinion that Ms. Wode could not return to work than by a desire to return an injured employee to the job, if possible, with or without an accommodation.

A. *Skaggs v. Elk Run Coal Co.*

Discussion and analysis of this case must begin with *Skaggs v. Elk Run Coal Co.*, ___W.Va. ___, 479 S.E. 2d 561 (1996).

In *Skaggs*, the West Virginia Supreme Court of Appeals, after reiterating that the Human Rights Act (HRA) requires an employer to make reasonable accommodation for known impairments to permit an employee to perform the essential functions of the job, outlined the six necessary elements to state a claim for breach of the duty of reasonable accommodation:

> (1) The complainant is a qualified person with a disability;
> (2) The employer was aware of the complainant's disability;
> (3) The complainant required an accommodation in order to perform the essential functions of the job;
> (4) A reasonable accommodation existed that would meet the complainant's needs;
> (5) The employer knew or should have known of the complainant's needs and of the accommodation; and
> (6) The employer failed to provide an accommodation.
>
> 479 S.E. 2d at 475

In addition to the above, and of particular significance here, the factfinder must also scrutinize the "process by which accommodations are adopted". (Id. at 477). Such process, said the *Skaggs* Court, "ordinarily should engage both management and the affected employee in a cooperative, problem-solving exchange". (Ibid). *Skaggs* quotes approvingly 29 C.F.R. §1630 (o)(3), a regulation promulgated pursuant to the Americans with Disabilities Act (ADA), 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 from 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."

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. When information necessary for a meaningful determination of accommodation only can be provided by one party, the failure to provide that information is considered an obstruction.

479 S.E. 2d at 578.

B. HRA Is To Be Liberally Construed

Skaggs reemphasized that the HRA is a remedial law that is to be liberally construed to advance the purposes of the Act. 479 S.E. 2d at 547. *Skaggs* also reminded that the HRA has been held to impose on employers "an affirmative obligation to provide reasonable accommodation for disabled individuals." Id., citing *Morris Mem. Convalescent Home, Inc. v. WVHRC*, 189 W.Va. 314, 431 S.E. 2d 353 (1993) and *Coffman v. W.Va. Bd. of Regents*, 182 W.Va. 73, 386 S.E. 2d 7 (1988). In *Coffman*, the Court concluded that the required accommodations include "reasonable modifications or adjustments designed as attempts to enable a handicapped employee to remain in the position for which he was hired." 386 S.E. 2d at 6.

C. Is the Complainant a Qualified Persons with a Disability?

The hub of CGT's defense in this case is that Ms. Wode was not a qualified person with a disability at the time she was terminated. Respondent's support for this argument rests on complainant's own representations as to the extent of her disability in December 1990 and January 1991, as well as the restrictions listed in Dr. Bachwitt's statements. (Comm. Exs. 8 and 11). Given

these purported significant limitations, CGT represents, Ms. Wode could not have performed the essential functions of a Secretary V position regardless of whether a reasonable accommodation was offered. Therefore, she cannot meet the definition of a qualified person with a disability since she was not able and competent, with reasonable accommodation, to perform the essential functions of the job in question. 6 W.Va. C.S.R. §77-1-4.2 (1991).

If Ms. Wode was not "qualified", then the interactive process described in *Skaggs, supra,* was not triggered and CGT was under no obligation to discuss how she could be accommodated. *White v. York International Corp.*, 45 F. 3d 149 (10th Cir.1995).

Determining whether complainant was a "qualified individual" under the HRA involves a two step process: (1) Identifying the essential functions of a Secretary V position and (2) deciding whether Ms. Wode could perform those functions with or without reasonable accommodation as of the date she was terminated. *Carrozza v. Howard County, Maryland*, 847 F. Supp. 365 (D. Md. 1994) *aff'd* 45 F. 3d 425 (4th Cir. 1995).

Here, there is no dispute that the essential functions of the job are those duties set forth in respondent's Secretary Level V Task Analysis. (Comm. Ex. 17). The conflict, with considerable merit on both sides, concerns whether Ms. Wode could, in fact, perform those functions with or without accommodation.

Though it is certainly tempting to conclude that Ms. Wode should bear the full adverse weight of the confusion created, in significant part, by her own actions, I must reluctantly reject respondent's argument that her own words and actions are proof enough that she is not a "qualified individual". While Ms. Wode"s own behavior added immeasurably to the confusion surrounding the true extent of her injury and its actual limitations on her ability to return to work, the objective evidence, in the form of Dr. Bachwitt's testimony and his progress notes, indicates that as of the date of her termination, Ms. Wode was physically capable of returning to work with minor restrictions on lifting heavy objects and doing overhead tasks.

Though it may at first appear unfair and unreasonable to base a conclusion as to Ms. Wode's abilities on evidence respondent did not have in it possession when it decided to fire her, and to give such evidence greater weight than the evidence CGT did review, it must be remembered that as of the date of Ms. Wode's termination:

(1) Mr. Tolliver was aware of an "inconsistency" between Ms. Wode's articulated restrictions and Dr. Bachwitt's release for "light duty";

(2) Mr. Tolliver was aware of the "inconsistency" between Dr. Bachwitt's restrictions on reaching, stooping or bending and his simultaneous release of Ms. Wode for "light duty";

(3) CGT knew or should have known that as of 28 January 1991, Dr. Bachwitt believed that Ms. Wode was "capable of clerical/administrative (sedentary) activity" (Comm. Ex. 11);

(4) CGT knew that Aetna, an outside third party, had concluded, based on Dr. Bachwitt's 28 January 1991 statement, that "...it appears that you [Ms. Wode] should be able to return to your job as a secretary for the Columbia Gas Transmission Corporation" (Comm. Ex. 12);

(5) Ms. Ingram spoke with Dr. Bachwitt's office as early as 28 January 1991 but apparently made no specific inquiry as to whether the doctor believed that Ms. Wode could or could not do the essential functions of the Secretary V position; and

(6) From the time it received Dr. Bachwitt's return-to-work slip (approximately 22 January 1991), CGT had more than sixty days to contact Dr. Bachwitt to obtain his records and attempt to resolve the various inconsistencies, but failed to do so.

Given the above, I do not believe it is unfair or unreasonable to now use against Columbia evidence that it could have obtained had it bothered to explore those matters with Dr. Bachwitt by making, perhaps, only one telephone call or writing one letter and specifically inquiring into Ms. Wode's abilities to perform the particular duties of her former position.

Based on Dr. Bachwitt's testimony and contemporaneously recorded notes, I conclude that Ms. Wode was a qualified person with a disability who could perform the essential functions of the job by a restructuring of the duties to eliminate lifting over 20 pounds and repetitive overhead tasks, neither of which comprise more than a minuscule percentage of a Secretary V's duties.

D. Failure of the Accommodation Process and Placement Of Responsibility.

Of the remaining elements necessary to show a breach of the duty to accommodate, *Skaggs* at 475, it is obvious that respondent was aware of complainant's disability and that both sides knew that a reasonable accommodation ("light duty") was required. It is also not disputed that respondent failed to provide an accommodation.

The last, and disputed, element is whether a reasonable accommodation existed that would meet Ms. Wode's needs. A determination of whether the Commission proved this element brings us back to the "process" discussed in *Skaggs*.

Once an employee makes known her disability and need for accommodation to the employer, the employer's duty to engage the employee in an interactive process is triggered. *White, supra.* Here, there is no question but that Columbia was aware of Ms. Wode's disability and that Dr. Bachwitt's return-to-work slip of 10 January 1991 put respondent on notice that she needed an accommodation of "light duty work only".

The interactive process triggered as of Columbia's receipt of the return-to-work slip "requires a great deal of communication between the employee and the employer", *Bultemeyer v. Fort Wayne Community Schools*, 100 F. 3d 1281, 1285 (7th Cir. 1996), and "both parties bear responsibility for determining what accommodation is necessary". Ibid.

In *Beck v. University of Wisconsin Board of Regents*, 75 F. 3d 1130 (7th Cir. 1996), perhaps the leading case on point, the Court, as did our Court in *Skaggs, supra*, explained the assignment of responsibility when the interactive process fails:

> No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.
>
> (75 F. 3d at 1135).

In *Beck*, the Court specifically noted that "the cause of the breakdown might be missing information," Id., a cause which the regulations promulgated pursuant to the ADA envisioned:

> In some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation.
>
> (29 C.F.R. pt. 1630, app.).

"Where the missing information is of the type that can only be provided by one of the parties," said the Beck Court, "failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have obstructed the process. The determination must be made in light of the circumstances surrounding a given case." 75 F. 3d at 1135.

Bultemeyer v. Fort Wayne Community Schools, supra., a progeny of *Beck*, is particularly instructive here. In that case, plaintiff, who was mentally ill, was unable to clearly articulate to his employer the specific type of accommodation he needed, though his physician did communicate in writing that Mr. Bultemeyer needed a job that was "less stressful". The Court stated that if the note from the doctor "was too ambiguous and FWCS did not know what Bultemeyer wanted, FWCS easily could have called Dr. Fawver for a clarification". 100 F. 3d at 1285. An employer, said the Court, "has to meet the employee half-way, and if it appears that the employee may need an accommodation, but doesn't know how to ask for it, the employer should do what it can to help". Id.

As "another example of the breakdown in the interactive process," the *Bultemeyer* Court found that "this whole incident may not have happened if someone at FWCS had merely had the patience to sit down with Bultemeyer and ask him what the problem was". Id. at 1286.

Here, of course, Ms. Wode is not mentally ill. However, at the time the interactive process began, she was 61 years of age, going through her second serious back injury within a twelve month span and was coming out of an undoubtedly terrible scare for both her and her family that her cancer had possibly recurred. Given this situation, it does not appear unreasonable that Columbia should bear the responsibility for merely noting the various "inconsistencies" in the information it was receiving, rather than contacting Dr. Bachwitt or one of its own doctors, and determining, very specifically, whether Ms. Wode had the ability, with or without reasonable accommodation, to perform the essential functions of the Secretary V position.

In light of the circumstances surrounding this case, I conclude that there was a breakdown in the "interactive process" and that responsibility for that breakdown should be assigned to respondent. I have isolated the following as the causes of the breakdown:

(a) Respondent's failure to provide Dr. Bachwitt with the job task analysis and failure to make specific inquiry of him as to Ms. Wode's ability to do those tasks;

(b) Respondent's repeated insistence that it had no "light duty" jobs for Ms. Wode without ever asking for clarification from Dr. Bachwitt as to the specific type of secretarial tasks he considered "light duty";

(c) Respondent's failure to obtain full medical records from Dr. Bachwitt and, instead, relying on a return-to-work slip and a physician's statement specifically geared to determining whether

Ms. Wode was eligible for total disability benefits, not whether she could do the essential functions of her former position; and

(d) Respondent's failure to refer Ms. Wode for an in-house or independent medical assessment.

All of the above are reasonable responsibilities that a large employer like Columbia should bear in order to assure that full information about a disabled employee's condition is on the table and has been fairly considered before a decision is made to terminate her. Here, I have reluctantly concluded that Columbia failed to meet its duty to fully "assess the extent of an employee's disability and how it can be accommodated." 479 S.E. 2d at 579.

To the extent that Columbia objects on the ground that the duty to engage in an interactive process did not exist in 1991, it should note that the HRC's 1991 rules regarding disability discrimination defined "reasonable accommodation" to include "reasonable modification or adjustments designed as attempts to enable a handicapped employee to remain in the position for which she/he was hired", 6 W.Va. C.S.R. §77-1-4.4, and stated that an employer was obligated to make a reasonable accommodation "where necessary to enable a qualified handicapped person to perform the essential functions of the job." 6 W.Va. C.S.R. §77-1-4.5. Under the facts of this case, it is not an undue stretch to conclude that a necessary and minimal modification or adjustment that CGT had to undertake was to consult with Ms. Wode's physician to resolve the "inconsistencies" that were blocking her return to work.

V. FINDINGS OF ULTIMATE FACTS

1. I find as fact, based on medical evidence of record, that as of 12 April 1991, Kathleen Wode was a qualified handicapped person who was able and competent to perform the essential duties of a Secretary V.

2. I find as fact that respondent was aware of Ms. Wode's disability.

3. I find as fact that complainant required an accommodation of "light duty" work.

4. I find as fact, based on the medical evidence of record and the relevant job task analysis, that a reasonable accommodation existed that would meet the complainant's needs/

5. I find as fact that respondent knew or should have known, by interaction with Dr. Bachwitt, that complainant needed a "light duty" accommodation.

6. I find as fact that respondent failed to provide an accommodation.

7. I find as fact that there was a breakdown in the interactive process designed to explore complainant's return to work and I assign responsibility for that breakdown to respondent.

8. I find as fact that by allowing a breakdown in the interactive process, respondent breached its duty to reasonably accommodate complainant's disability and violated W.Va. Code §5-11-9 (1).

9. I find as fact that as a result of respondent's unlawful act complainant suffered lost earnings and is entitled to a "make whole" remedy.

10. I find as fact that as a result of respondent's unlawful discriminatory act Ms. Wode suffered hurt, humiliation and emotional and mental distress.

VI. CONCLUSIONS OF LAW

1. Respondent, Columbia Gas Transmission Corporation, is an employer within the meaning of W.Va. Code §5-11-3 (d).

2. The complainant is a person within the meaning of W.Va. Code §5-11-3 (a).

3. The Human Rights Commission has jurisdiction over this matter, complainant having filed a timely, verified complaint and complied with all procedural requirements of the West Virginia Human Rights Act W.Va. Code §5-11-1, et al.

4. The Commission showed by a preponderance of the evidence that respondent breached its affirmative duty to reasonably accommodate Ms. Wode's disability, *Skaggs v. Elk Run Coal Co.*, ___W.Va.___, 479 S.E. 2d 561 (1996), and thereby violated W.Va. Code §5-11-9(1).

5. The Commission having prevailed on all elements by a preponderance of the evidence, I conclude that complainant is entitled to the following relief:

(a) Back pay: Back pay and lost benefits in the amount of $115,461.51 for the period January 1991 through Ms. Wode's retirement at the end of November 1994, as set forth in the Commission's Attachment A;

(b) Deductions From Back Pay: Under the peculiar circumstances of this case and with the absence of disparate treatment, the deduction or offset of social security benefits is warranted;

(c) Interest: Prejudgment interest on net back pay (lost salary plus benefits, minus social security) at the rate of 10% per annum, calculated quarterly, from the time it should have been paid to complainant up to the date of hearing, and postjudgment interest on that gross amount from the date of this decision until paid in full;

(d) Incidental Damages: Complainant is awarded $1,000 for the humiliation, embarrassment and loss of personal dignity suffered by her.

THE COMMISSION SHALL RECALCULATE THE BACK PAY AND INTEREST AWARD AND SUBMIT A REVISED "ATTACHMENT A" TO ME WITHIN FIFTEEN DAYS OF RECEIPT OF THIS ORDER. RESPONDENT SHALL HAVE TEN DAYS TO RESPOND TO THE REVISION.

7. The respondent shall reimburse the Commission and the Attorney General their costs in the amount of $3,072.47.

8. Finally, a cease and desist Order is hereby directed against respondent to cease and desist from engaging in acts of unlawful discrimination in violation of the West Virginia Human Rights Act.

Decided the 31st day of March, 1997.

MIKE KELLY
Administrative Law Judge
P.O. Box 246
Charleston, WV 25321

BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHLEEN M. WODE,

Complainant,

v. **Docket Nos. ESA-94-92 & EH-95-92**

COLUMBIA GAS TRANSMISSION CORP.,

Respondent.

SUPPLEMENTAL ORDER

Based upon the submissions of the parties, which are hereby incorporated into the record, and given the discretion afforded a factfinder to fashion relief consistent with the particular circumstances of the case and the attainment of the HRA's objectives, I find that Kathleen A. Wofe is entitled to the following monetary relief:

Back pay and interest	$134,027.53
Incidental damages	$ 1,000.00
TOTAL	$135,027.53

The Commission and the Attorney General shall recover costs in the amount of $3,072.47.

WV HUMAN RIGHTS COMMISSION

ENTER this 29th day of April, 1997.

MIKE KELLY
Administrative Law Judge
P.O. Box 246
Charleston, WV 25321

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

COLUMBIA GAS TRANSMISSION CORPORATION,

Petitioner,

v.

Civil Action Number: 97-AA-150
Judge Herman G. Canady, Jr.

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION and KATHLEEN WODE,

Respondents.

ORDER REMANDING TO THE WEST VIRGINIA HUMAN RIGHTS COMMISSION FOR FURTHER FACTUAL DEVELOPMENT

The petitioner, Columbia Gas Transmission Corporation, by counsel, appeals an adverse decision of the West Virginia Human Rights Commission (Commission). The Commission found[1] Kathleen Wode (claimant) was entitled to back-pay and further damages. The petitioner contends the decision was made in mistake of law and plainly wrong. The Court, upon review of the substantial briefs of both parties,[2] pertinent legal authorities and the record as a whole, concludes questions of fact which may change the outcome of this case remain unresolved, and accordingly the Court must remand this case to answer the questions contained in the following opinion.

OPINION

The Court begins its analysis by identifying the standards by which a decision of the Commission is reviewed. "West Virginia Human Rights Commission's findings of fact should be

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[1] The Court's reference to the Commission's findings refers to Commission's adoption of the Final Decision of the Administrative Law Judge without modification. Accordingly, cites within this Opinion refer to the Final Decision of the Administrative Law Judge.

[2] The parties originally submitted 50+ page briefs in late 1997 and early 1998. In December, 1999, the Court allowed the parties to update their arguments and authorities in light of the recent developments in this area of law.

sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." Syllabus point 1, Morris Memorial Convalescent Nursing Home v. West Virginia Human Rights Com'n, 189 W.Va. 314, 431 S.E.2d 353 (1993). "[L]egal rulings made by the Commission are subject to *de novo* review." Fairmont Specialty Services v. West Virginia Human Rights Com'n, 1999 WL 503780. Pursuant to W.Va. Code §29A-5-4(g), the circuit court may affirm the order of decision of the agency or remand the case for further proceedings. Specifically, "[t]he circuit court shall reverse, vacate or modify the order of decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: '(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law, or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'" Syllabus Point 1, Smith v. Bechtold, 190 W.Va. 315, 438 S.E.2d 347 (1993), *quoting* Syllabus Point 2, Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983).

Broadly, the most pertinent facts of this case are as follows. The claimant injured her back while in the process of moving her office. Final Decision, Finding of Fact No. 8, page 6.[3] During her treatment for her back injury, the claimant was diagnosed with cancer in one of her ribs. Final Decision, Finding of Fact No. 9, page 6. She was effectively treated for the cancer and released back

[3] Final Decision means the Final Decision of the Administrative Law Judge, dated March 31, 1997.

into the care of her doctor regarding her back injury. Final Decision, Findings of Fact Nos. 21, 22, page 10. After treating the claimant for her back injury, the physician released the claimant for "light duty." Final Decision, Finding of Fact No. 23. The physician's hand written note also included additional, contradictory instructions including no stretching, no bending, and no lifting. Id.

The claimant remained in contact with the petitioner throughout her treatment. Final Decision, Finding of Fact No. 10, page 6. On January 21, 1991, the claimant contacted the petitioner alleging several additional limitations on her returning to work. Final Decision, Finding of Fact No. 30, pages 12-14. The claimant outlined her perceived limitations in a letter sent to the petitioner. Id.

After January 28, 1991, the claimant applied for long-term disability benefits from the petitioner's insurer and was denied. Final Decision, Findings of Fact Nos. 37, 39, page 17. Furthermore, at some point before her termination, the claimant filed for Social Security Disability Insurance (SSDI) benefits. Final Decision, Finding of Fact No. 53, page 22. The petitioner continued to seek employment that would comply with the claimant outlined limitations. Final Decision, Findings of Fact Nos. 44, 46, pages 19, 20. Finding no positions suiting the claimant's self-affirmed limitations, the petitioner terminated the claimant. Final Decision, Finding of Fact No. 50, page 21.

The Court now examines the petitioner's three assignments of error. The petitioner argues that the Commission erred as a matter of law because it failed to apply judicial estoppel. The petitioner argues that the claimant's certification of total disability in applications for long-term disability and SSDI estops the claimant from claiming under the ADA. Next the petitioner argues that Commission erred when it determined the claimant was a "qualified person with a disability" under West Virginia law, and, that the Commission erred when it concluded Columbia breached its duty to

reasonably accommodate the claimant. The Commission urges the adoption of its findings of fact and conclusions of law. The Court reviews each of the assignments of error in turn.

The petitioner states "[t]he commission erred in failing to apply judicial estoppel to Ms. Wode's claim of disability discrimination as a result of her certification of total disability in applications for long-term disability and Social Security disability benefits." Petitioner's note of argument at page 33. This point was recently addressed by the United States Supreme Court in Cleveland v. Policy Management Systems Corp., *et al.*, ___ U.S. ___, 119 S. Ct. 1597, 143 L. Ed.2d 966 (1999). The U.S. Supreme Court ultimately concluded that neither judicial estoppel nor a negative presumption may be uniformly applied to a claimant seeking redress under the American's with Disabilities Act (ADA) where the claimant had previously pursued and received Social Security disability benefits. The U.S. Supreme Court further concluded that, under a case-by-case analysis, some SSDI applications may conflict with ADA claims so as to estop the claimant under the ADA, especially where the claimant fails to sufficiently explain how both an SSDI application and a claim under the ADA may co-exist.

The Supreme Court of Appeals of West Virginia routinely considers cases decided under the ADA to be helpful in deciding cases under the West Virginia Human Rights Act.[4] Accordingly, this Court concludes the W.Va. Supreme Court would likely adopt the holding of Cleveland outlined above. Under this standard, the Court cannot determine from the record whether a conflict exists so as to estop the claimant from pursuing her ADA claim.

Therefore, the first question to be determined on remand is:

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[4] *See*, Hanves v. Rhone-Poulenc, Inc., 1999 WL 503782, (W.Va. 1999), n. 14.

> Whether Kathleen Wode can sufficiently explain the differences between her long-term disability insurance application and SSDI application, and, her claim for disability discrimination before the Commission.

If claimant can provide an explanation which would cause reasonable minds to differ as to the sufficiency of the explanation, then the Commission should continue on to the next question.

If she fails to produce such an explanation, however, the Court concludes the Commission should dismiss the petition. The Court believes the claimant admits that she could not perform work related activities when she applied for long-term disability. In response to the question "[what] does the phrase 'totally disabled' mean to you?," the claimant specifically states "[t]hat you can't do anything." Transcript at page 206. This admission cuts against her disability claim, and is, in and of itself, sufficient to bar her claim in the absence of a cognizable explanation of her actions, especially in light of the Commission's finding that the claimant "was somewhat inconsistent as to whether she subjectively believed herself to be totally disable as of December 1990 when she filled out and signed the employee's portion of the disability claim notice." Final Decision, Finding of Fact No. 19, page 9. Consequently, in the absence of an adequate explanation, the claimant's admission constitutes a conflict so as to bar the claimant's ADA claim.

The next assignment of error assigned by petitioner is "[a]ssuming arguendo that Ms. Wode is not estopped from pursuing her claim, the Commission nevertheless erred in concluding that Ms. Wode is a 'qualified person with a disability' within the meaning of the [Human Rights] Act." Petitioner's note of argument, page 36. The determination of a "qualified person with disability" is closely related to the judicial estoppel argument above in that the determination of the question above determines whether claimant is a "qualified individual with a disability" under the Human Rights Act. She must sufficiently distinguish between her negative admission made in her application for long-

term disability and SSDI benefits to demonstrate she could do the requirements of the Secretary V job with or without a reasonable accommodation. If she makes sufficient explanation, she must be considered a "qualified person with a disablity." If she cannot offer an adequate explanation, then the Commission must assume she could not perform the requirements of the Secretary V job, even with a reasonable accommodation, and, accordingly, would not be a "qualified person with a disability."

The Court addresses the last argument of petitioner, which contends "[t]he Commission erred in concluding that Columbia breached its duty to reasonable accommodate Wode,"[5] to prevent the issue of law arising again if the case cannot be settled otherwise. Under its argument, the petitioner offers four points. First, the petitioner states it has not duty to interact with an employee unless the employee requests an accommodation. Next, petitioner argues there is no legal requirement under either the Human Rights Act or the ADA that an employer contact an employee's physician to determine what a reasonable accommodation would entail. Then, petitioner argues the Commission erred by determining that Columbia is to be held responsible for the alleged breakdown in the interaction process. Lastly, the petitioner states that the interactive process did not exist at the time the claimant's case ripened, and, therefore, the petitioner had no duty to enter the interactive process.

The Court finds the first allegation, that petitioner had no duty to interact with the claimant until she asks for an accommodation, to be wholly devoid of reason. Merely because the claimant did not ask for a specific accommodation does not relieve the employer of its duty to provide a reasonable accomodation. Here, the petitioner sought accommodations, and cannot now claim the

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[5] Petitioner's note of argument, page 42.

claimant's failure to formally request an accommodation relieved it from its duty. Accordingly, the point is without merit and is not discussed further.

The next argument of the petitioner, that petitioner is under no legal requirement to contact an employee's physician to determine a reasonable accommodation, is persuasive but must also fail because both ADA jurisprudence and West Virginia law recognize the possibility of contacting a physician. Under Bultemeyer v. Fort Way Community Schools, 100 F.3d 1281 (7th Cir. 1996), the Seventh Circuit stated the employer could have easily contacted a physician with regard to an accommodation for a mentally debilitated individual. Additionally, this Court finds support for a duty to contact a physician in Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 79, 479 S.E.2d 561, 589 (1996), no. 15, where the W.Va. Supreme Court stated:

> [w]hen an employee requests a reasonable accommodation and the employer has doubt as to the employee's disability, the employer may request documentation from an appropriate professional (e.g., a doctor, rehabilitation counselor, etc.), describing the employee's disability or limitations. Our law does not require an employer to wear blinders at the preaccommodation stage but contemplates an interactive process beneficial to both an employer and employee.

Reason dictates that an employer, in the face of a demand for an extensive accommodation, would require explicit documentation from a health care provider. Reflexively, the employer should require further documentation when it is unclear as to what a reasonable accommodation should entail.

In the present case, the Commission found the petitioner had reasonable notice of a conflict between the story of the claimant and the information provided by the physician. The Commission went on to hold the petitioner to the knowledge it would have had, if it had contacted the physician. While this particular issue, as far as the Court can determine, is of first impression in West Virginia, this Court finds the Commission's interpretation to be reasonable. Accordingly, the Court concludes

an employer is held to the standard of what it should have known in disability discrimination cases where it had notice of a discrepancy between the employee's statements and any medical documentation the employee provided and failed to do an adequate investigation. Accordingly, the Court upholds the Commission in its interpretation of the law.

Having established this interpretation of law as reasonable, the Court may now impute the knowledge of what petitioner should have known at the time of the termination because the petitioner was on notice of the facially inconsistent statements of the claimant and her physician. Had the petitioner taken the time to write a letter to the doctor requesting interpretive notes as to what "light duty" meant, instead of blindly accepting assertions of its employee, little, if any, of this litigation would have ensued. Furthermore, the petitioner was on notice that the claimant had been turned down for long-term disability, which, in and of itself, should have triggered further investigation into the employee's claims. Therefore, the Court accepts the Commission's conclusion that the petitioner is liable for what it should have known.

The Court now considers the assignment of fault made by the administrative law judge for breakdown in the "interaction process." The Commission assigned all the error for the breakdown in the "interaction process" to the petitioner. Based on the record developed here, the Court cannot completely agree. The Court reads Skaggs, *supra*, to impose a duty of good faith in the "interactive process" on both parties.

The Court specifically finds, from the record developed below, that petitioner acted with good faith. However, the Court cannot determine from the record that the claimant also acted in good faith because of the claimant's negative admissions and typed statements to the petitioner may indicate a

bad motive on the part of the petitioner. In the absence of a finding of good faith, the Court remands to determine:

> Whether Kathleen Wode's actions constitute bad faith in the context of an interactive process.

If the Commission determines that the claimant made an adequate explanation from above, and further determines the claimant did not act in bad faith, then the award must stand. If the Commission determines that the claimant made an adequate explanation from above, and determines the claimant acted in bad faith, then the Commission must interpret the law as to whether the breeched duty of the employer to contact the physician supercedes the claimant's duty to act in good faith, or, whether the duty to interact in good faith supercedes the duty of the employer to contact the physician.

The Court expresses no opinion as to the outcome of either of the questions posed above. The Court lacks the factual basis to determine whether the claimant has an adequate explanation of both claims. Additionally, the Court lacks information to determine whether the claimant's actions constituted good faith. Accordingly, the Court cannot express an opinion as to how these issues should be determined.

The Court rejects the petitioner's argument that the requirements of Skaggs, *infra*, should not apply. The Commission provides a reasonable analysis of the law as it existed at the time of the claimant's claim ripened. No other jurisprudence in West Virginia conflicts with the Commission's analysis. Accordingly, the Court adopts the Commission's analysis.

For the reasons above, the Court **ORDERS** this matter be, and, hereby is **REMANDED** to the Commission, for a determination by way of additional evidence of:

a. Whether Kathleen Wode can sufficiently explain the differences between her long-term disability insurance application and SSDI application, and, her claim for disability discrimination before the Commission, and,

b. if so, whether Kathleen Wode's actions constitute bad faith in the context of an interactive process.

The parties may then, in accordance with their statutory appeal right, appeal, if need be, any determination of the Commission. The Court, finding all matters at issue have been resolved, **ORDERS** the case be **DISMISSED** and **STRICKEN** from the docket. The Court further **ORDERS** the Kanawha County Circuit Clerk's Office to distribute certified copies of this order to all parties and counsel of record.

IT IS SO ORDERED.

ENTER:

DATE: February 17, 2000

HERMAN G. CANADY, JR., Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 17 DAY OF February, 2000
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA