



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

September 18, 1987

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Box 124
Mt. Gay, WV 25637

Hobet Mining, Inc.
P.O. Box 305
Madison, WV 25130

Roger Wolfe, Esq.
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Charleston, WV 25322

Mary C. Buchmelter
Assistant Attorney General
812 Quarrier St.
Charleston, WV 25301

RE: Hall v. Hobet Mining, Inc.
EH-530-86

Dear Parties:

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

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script that reads "Howard D. Kenney".

Howard D. Kenney
Executive Director

HDK/mst
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE
OF STATUTORY RIGHT TO JUDUCUAL REVIEW
AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Err. H. B. 2638]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*, That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same, or, if applicable, within thirty days
42 after a final order of the supreme court of appeals, a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court, and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief, and shall make and enter upon the
51 pleadings, testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARTHUR HALL,

Complainant,

v.

DOCKET NO. EH-530-86

HOBET MINING, INC.

Respondent.

FINAL ORDER

On the 12th day of August, 1987, the West Virginia Human Rights Commission reviewed the recommended order of Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned, the commission does hereby adopt said recommended order, encompassing findings of fact and conclusions of law as its own, with modifications set forth below.

In the subsection titled Conclusions of Law paragraphs enumerated as 3 is stricken. Paragraphs enumerated as 4 and 5 are renumbered as 7 and 8, respectively. Substituted therefore and supplemental thereto, are the following conclusions:

"3. Handicap is defined as any physical or mental impairment which substantially limits one or more of an individual's major life activities. [See WV Code 5-11-3(t).]

"4. Alcoholism, in the presence of a medically verifiable addiction, is a handicapping condition within the meaning of the West Virginia Human Rights Act. Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984); Simpson v. Reynolds Metal Co., 629 F2d 1226 (7th Cir. 1980).

"5. Under section 4.02 of the Interpretive Rules Governing Discrimination of the Handicapped, a qualified handicapped person is one who is able and competent with reasonable accommodation to perform the essential functions of the job in question.

"9. It is not unlawful discrimination under the West Virginia Human Rights Act for an employer to discharge a person whose current use of alcohol impedes job performance and threatens the property and safety of others. Richardson v. United States Postal Service, 613 F. Supp. 1213 (D.C.D.C 1985)"

Accordingly, following review of all the evidence in a light most favorable to the non-moving party upon the undisputed facts of this case, the respondent is entitled to judgment. It is hereby ORDERED that the Hearing Examiner's recommended order, encompassing findings of fact and conclusions of law, be attached hereto and made a part of this final order except as modified by this final order.

It is finally ORDERED that this case be dismissed with prejudice.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they may seek judicial review.

Entered this 17th day of September, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Samuels
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARTHUR HALL,

Complainant,

v.

DOCKET NO.: EH-530-86

HOBET MINING, INC.

Respondent.

RECOMMENDED ORDER

This matter matured for hearing for summary judgment on the 5th day of December, 1987. The hearing was held at 405 Capitol Street, Suite 600, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner.

The Complainant appeared by his counsel, Mary K. Buchmelter, and Emily Speiler. The Respondent appeared by its counsel, Roger A. Wolfe and Michael J. Bommarito.

The hearing was pursuant to the Respondent's motion for summary judgment. The parties agreed and recommended that the case should be submitted to the Examiner on the issue of summary judgment prior to any public hearing being held.

After reviewing the pleadings, memoranda of the parties and the argument of counsel, the Examiner makes the following findings of fact and conclusions of law.

ISSUE

1. Whether the the Respondent discriminated against the Complainant on the basis of his handicap.

FINDINGS OF FACT

1. The Complainant is a forty-nine (49) year old male.
2. The Respondent is a corporation licensed to do business in the State of West Virginia. Its primary business purpose is the mining of coal.
3. The Complainant was employed by the Respondent from March 19, 1971 until March 18, 1986.
4. The Complainant was a heavy equipment mechanic. His job duties were generally performed at various strip mine operations of the Respondent.
5. The Complainant's responsibilities included various pieces of heavy equipment, the troubleshooting of problems, repair of the problem, test driving or operating the equipment in question.
6. By necessity, these activities required the Complainant to exercise independent discretion and ultimately to make judgment of both, the approach and application of his work, as well as, the sufficiency of any results realized by making a repair to a given piece of equipment.
7. Due to the strenuous nature of his work, the Complainant had a helper most of the time.
8. It is the Complainant's position that most of his work went without someone double-checking.
9. The Complainant approximated the average value of the equipment on which he performed repairs to be \$450,000.
10. In addition, he conceded that improperly repaired

equipment may be damaged in later operation.

11. The Complainant also admitted that repairing the equipment in question was potentially dangerous to him, and if improperly repaired, would be dangerous to his co-workers.

12. The Complainant admitted reporting to work intoxicated approximately 20 times between the times of 1980 and March 15, 1986. On some of these occasions, the Complainant either did not work or was prevented from working by Respondent's supervisory employees. However, on the residual occasions, the Complainant actually undertook to work notwithstanding his intoxicated condition.

13. In March, 1982, the Respondent issued a warning letter to the Complainant as a result of its perception that he had appeared for work while intoxicated.

14. The warning letter was subsequently withdrawn for reasons other than the merits of the situation.

15. Later in 1982 the Complainant advised several managerial employees that he had been stopped by law enforcement authorities for a second offense of driving while intoxicated. In the context of expressing his concern about being possibly incarcerated as a result a conviction for this offense, the Complainant was advised by management to undertake an Alcohol Rehabilitation Program.

16. It was at this time that the Complainant acknowledged to himself that he was an alcoholic.

17. Management offered the Complainant a leave of absence, so that he could participate in the Alcohol

Rehabilitation Program, and it also arranged for the Complainant to receive insurance benefits and to take contract days to pay him for the leave of absence. However, after learning that he would not receive a jail sentence, the Complainant declined a leave of absence and rejected the Alcohol Rehabilitation Program.

18. Subsequent to that date, On or about March 15, 1986, the Complainant reported to work intoxicated. A blood alcohol test administered at Boone Memorial Hospital revealed the Complainant's blood alcohol content was .210; more than twice the amount permitted by law.

19. As a result of this incident, the Respondent suspended the Complainant and subsequently terminated him effective March 18, 1986.

20. The Complainant filed this charged on May 15, 1986, alleging he was terminated for noticable intoxication on the job.

21. The Complainant further alleged that he had been discriminated against because of alcoholism.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. The West Virginia Human Rights Act makes it unlawful for an employer to discriminate against an individual on the basis of handicap. WVC § 5-11-9(a).

3. The definition of "handicap" excludes alcoholics whose use of alcohol impedes job performance or threatens the property or safety of others. 29 U.S.C. § 706 (7)(13).

Richardson v. United States Postal Service, 613 F. Supp. 1213 (D.C. 1985), Huff v. Israel, 573 F. Supp. 107 (M.D. 1983).

4. It is the opinion of the Examiner that Sections 4.02 and 4.03 of the Interpretive Rules do not require that an employer continuously allow an intoxicated employee to return home rather than being discharged for instances when the employee reports to work intoxicated.

5. The fact that the Respondent took more lenient action in response to earlier such infractions by the Complainant in no way postures them in an exception which would effect an obligation to perpetuate such a response to the employees continued misconduct.

6. Complainant is without meritorious argument that he should have been earlier accommodated, inasmuch as, the Complainant had never represented to the Respondent that he was an alcoholic, notwithstanding, the Respondent's actions in seeking a rehabilitative program for the Complainant. Robinson v. Devine, 37 E.P.D. § 38,446 (D.C. 1985).

PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Respondent's motion for summary judgment be granted and that the Complainant's complaint be dismissed with prejudice.

DATED: June 22, 1987

ENTER:

Theodore R. Dues, Jr.
Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

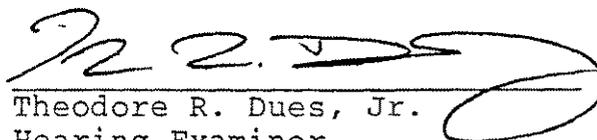
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED ORDER upon the following:

Mary C. Buchmelter, Esq.
Assistant Attorney General
812 Quarrier Street
Fourth Floor, L & S Bldg.
Charleston, WV 25301

and

Michael J. Bommarito, Esq.
Jackson, Kelly, Holt & O'Farrell
1600 Laidley Tower
P.O. Box 533
Charleston, WV 25322

by mailing the same by United States Mail on this 22nd day of June, 1987.


Theodore R. Dues, Jr.
Hearing Examiner