



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

August 16, 1985

Clyde A. Marshall
35 Beechview Dr.
St. Albans, WV 25177

Carbon Fuel Co. 40
U.S. Steel Mining Co.
13905 MacCorkle Ave., SE
Chesapeake, WV 25315

Gail Falk, Esq.
Brooks Medical Bldg.
1200 Quarrier St., Suite 27
Charleston, WV 25301

Louise Q. Symons, Esq.
U.S. Steel Corp.
600 Grant St., RM 1580
Pittsburgh, PA 15230

RE: Marshall v. Carbon Fuel Co.
EH-172-82

Gentlemen:

Herewith please find the Order of the WV Human Rights Commission in the case of Marshall v. Carbon Fuel Co..

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within thirty (30) days, the Order is deemed final.

Sincerely yours,

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

Howard D. Kenney
Executive Director

HDK/mst
Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Clyde A. Marshall,
Complainant,

v.

Docket No.: EH-172-82

Carbon Fuel Company,
Respondent.

ORDER

On the 19th day of July, 1985, the Commission reviewed Hearing Examiner George C. Duffield's Findings of Fact and Conclusions of Law, the Complainant's Exceptions and Respondent's Reply to the Complainant's Exceptions. After considerations of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own with the following additions:

It is hereby ORDERED that the Respondent pay the Complainant prejudgment interest of 10% compounded annually on the award of back wages.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which to be sent by certified mail, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE A RIGHT TO JUDICIAL REVIEW:

Entered this 14th day of August, 1985.

RESPECTFULLY SUBMITTED,



CHAIRMAN/VICE CHAIRMAN
WEST VIRGINIA HUMAN RIGHTS
COMMISSION

*Approved SRH
June 17, 1985*

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

CLYDE A. MARSHALL,

COMPLAINANT,

VS.

EH-172-82

CARBON FUEL COMPANY,

RESPONDENT.

THE HEARING EXAMINER'S FINDINGS OF
FACTS AND CONCLUSIONS OF LAW

INTRODUCTION

Pursuant to notice, duly served upon the respondent, this matter came for hearing on April 12th, 1985, at 9:00 o'clock a.m. in the Conference Center, Building No. 7 of the State Capitol Complex, Charleston, Kanawha County, West Virginia, before the undersigned hearing examiner, George C. Duffield. The complainant, Clyde A. Marshall, was present and in person and represented by his counsel, Gail Falk, attorney at law, practicing in the city of Charleston, Kanawha County, West Virginia. The respondent, Carbon Fuel Co., was present

throughout the hearing by and through its officers, agents, servants or employees and was represented by its counsel, Louise Q. Symons, attorney at law of Pittsburgh, Pennsylvania.

An objection was raised by the respondent concerning the complaint that was filed by the complainant in this case. The respondent's counsel alleges that the complaint was not filed upon a proper form provided by the West Virginia Human Rights Commission, but rather upon a form provided by some other agency of government. However, after examining the complaint, the hearing examiner was of the opinion that the original complaint filed in this matter met the requirements of Chapter 5, Article 11, Section 10 of the Code of West Virginia, which provides in substance what information a complaint shall contain.

Although the complaint is generally filed upon a form as provided by the West Virginia Human Rights Commission, the undersigned hearing examiner can find no statutory authority to the effect that a complaint is defective per se because it was not filed upon a form provided by the West Virginia Human Rights Commission. After the ruling upon the motion aforesaid, the parties were given a full and complete opportunity to present their evidence and argument in support of their respective positions. Based solely upon a review of the transcript of the witnesses' testimonies and of the numerous exhibits placed in evidence by the parties and based upon the observations which

relate to the relative credibility of the witnesses at the hearing appearing on behalf of each of the parties, the undersigned hereby makes the following findings of fact.

FINDINGS OF FACT

1. The respondent, Carbon Fuel Co., is a corporation organized and existing under the law of the state of West Virginia for the purpose of mining and marketing coal. A part of its operations were taken over under a lease arrangement by United States Steel Corporation, including the portion of the operation at which the complainant had applied for a job. It therefore became the responsibility of the respondent, United States Steel Corp., to defend this action and to assume any liabilities that result from findings and recommendations of this examiner.

2. Complainant, Clyde Marshall, is a resident of Kanawha County, West Virginia. He applied for employment with the respondent, Carbon Fuel Co., in February of 1981.

3. Respondent, Carbon Fuel Co., was in 1981 and 1982 a large coal company with a work force substantially in excess of twelve employees in southern West Virginia. It maintained a personnel office in Winifred, West Virginia, where applications for employment were processed. In June 1982, U. S. Steel Corp.

acquired some of Carbon Fuel Co.'s assets, including the responsibility of defending this complaint.

4. On or about July 23, 1981, complainant had successfully completed all preliminary steps to be selected for employment by Carbon Fuel Co. These included:

- [1] completion of an application for employment;
- [2] reference check by the prospective employer;
- [3] interview with the personnel director.

5. As a part of the respondent's usual procedure in processing applications for employment, they required a physical examination by Dr. Houck and/or Dr. Gray, both licensed physicians in Kanawha County, West Virginia and a set of chest and back x-rays taken and interpreted by Associated Radiologists of Charleston, a West Virginia profit-making corporation consisting of eleven [11] specialists per their ad in the yellow pages of the Charleston telephone directory. On July 23, 1981, the respondent sent the complainant for his pre-employment physical and x-rays, and these constituted the last stage in the hiring process.

6. Complainant passed the pre-employment physical by Dr. Gray but was rejected for employment based solely upon the recommendations of Dr. Briley of Associated Radiologists. Dr. Briley's recommendations were based upon his reading of complainant's back x-ray. Dr. Briley did not examine the

complainant in person, nor did he suggest comparing the July 23rd x-rays with any previous x-rays, nor was he present at the hearing in this matter and did not offer any evidence. It was therefore impossible for the hearing examiner to take into consideration the credibility of Dr. Briley as a witness other than his typewritten report concerning the complainant, which is filed with the exhibits in this action.

7. All the physicians who have reviewed the July 23, 1981 x-ray of complainant's back have agreed that they show an old compression fracture of L-2 and L-4 with minor hypertrophic changes typical for a man of complainant's age.

8. But for the results of his back x-ray, complainant would have been hired by Carbon Fuel Co. to begin work on July 24, 1981 as a general laborer. Because complainant was an experienced miner, his training period for the job would have been one day.

9. During the period at issue in this complaint, Carbon Fuel Co. was a major regional employer, having hired six to seven hundred persons in the year prior to July, 1981.

10. On or after July 23, 1981, complainant was labeled incompetent to perform a job as general coal mine laborer.

11. Approximately one month after being denied employment, complainant secured an orthopedic examination by Dr.

Michael O. Fiddler and a comparison reading by Dr. James T. Smith of the July 23, 1981 x-ray with two sets of 1979 x-rays. These physicians confirmed that the x-rays showed an old injury and the complainant had no symptoms or physical evidence relating to past or present spinal disability and that he was able to work without restriction.

12. Dr. Smith's and Dr. Fiddler's reports were submitted to Tom Cloer, Jr., Carbon Fuel's Personnel Director, who did not seek medical consultation and did not change his refusal to hire the complainant.

13. Complainant continues to be able to perform work as a general laborer as evidenced by his work in 1981, 1982, 1983, and 1984. His jobs, including coal mine work, were comparably strenuous to the job of general laborer for Carbon Fuel and he had no lost time for injuries. Also, his physical examination in April, 1985 by Dr. Gregory Wagner evidenced his physical fitness.

14. As evidenced by this case, a pre-employment back x-ray is not an accurate or cost-effective method of predicting the future probability of back injuries nor, taken by itself, is it a professional, respected method of pre-employment screening.

15. As evidenced by this case, a pre-employment back x-ray is a discriminatory screening device because it is relied upon to reject applicants for employment who are able to work and who may never develop back problems. The use of a pre-employment

x-ray is particularly discriminatory where as here an employer refuses to consider the results of an orthopedic exam and comparison studies which show the condition to be stable.

16. Respondents have failed to demonstrate that there is no alternate test or criteria with less discriminatory impact.

17. Carbon Fuel has global questions about physical and mental impairments on its employment applications which exceed the scope of questions about an applicant's ability to do the job.

18. In answering these questions, complainant listed a wrist injury for which he received a three percent [3%] disability award, but he did not list other "lost time" injuries. Complainant's failure to list other injuries was based upon a belief that the applications only needed such information about physical conditions that were presently job-related.

19. There was no material in the statements in the medical history provided to Dr. Gray in connection with complainant's pre-employment physical.

20. Complainant's failure to list previous spine x-rays was due to a misunderstanding of the nature of these x-rays, but he provided these x-rays to Carbon Fuel voluntarily since he learned of their significance.

21. Respondent has failed to demonstrate that the

complainant's original denial of previous spinal x-rays had any effect upon the hiring process.

22. Complainant's charge of discrimination was first received by the West Virginia Human Rights Commission on October 16, 1981 and was docketed on that date. This was 85 days after respondent's initial refusal to hire complainant and approximately 50 days after respondent's refusal to consider complainant's additional medical evidence.

23. On October 20, 1981, the West Virginia Human Rights Commission issued an amended complaint upon the "proper form" that they provide and had the same notarized, but otherwise was the same subject matter as contained in the October 16th charge.

24. If complainant had been hired by the respondent, he would have been hired as a coal miner and his wages would have been set in accordance with the National Bituminous Coal Wage Agreement, as well as his pension and benefits.

25. For a more concise statement of the pertinent facts of this matter, the undersigned is of the opinion that Mr. Marshall applied for employment with Carbon Fuel as a coal miner. His application was filed in February of 1981. On his application, he had to answer certain questions and had to be examined by a physician of Carbon Fuel's choice. He had to be x-rayed by a radiologist of Carbon Fuel's choice. He was asked certain questions which he answered honestly as to a medical

history concerning his prospective employment and with relation to any compensation which he may have ever received in his life. He had a fracture of L-2 and L-4, which is an old compression fracture of his back and it showed up in the x-rays. He was never given any opportunity, after this showed up, to give any explanation as to how this occurred or what the results were of said fracture and whether it healed well or whether he was able to use his back and whether other doctors had told him that he had or had not made a complete recovery from this old fracture, nor was he or even the other doctors who x-rayed him permitted to testify or be brought in to testify as to whether such an old fracture to the complainant's back would have prevented him from leading a normal life and doing normal coal mining operations in a coal mine. These are the basic grounds for the claim in this case.

CONCLUSIONS OF LAW

1. Under the interpretive rules governing discrimination of the handicapped, this complainant is a handicapped person within the meaning of Section 2.07 of said rules and is therefore covered under the Human Rights Commission Act.

2. The respondents, Carbon Fuel and U. S. Steel, are

employers within the meaning of Code Section 5-13-3 [d] and are subject of the jurisdiction of the West Virginia Human Rights Commission in this matter.

3. Complainant filed a timely complaint of employment discrimination on the basis of handicapped with the Human Rights Commission in accordance with the requirement of Code Section 5-11-10.

4. The respondent, Carbon Fuel, in order to screen applicants, and it seems unfairly, chose to disregard this complainant for any employment because of his previous back injury without giving the complainant any right to explain how extensive the injuries were, what his recovery had been and whether he had any medical evidence to the effect that such back injuries would not affect his work in any way in or around the coal mines of this state.

5. Under the West Virginia Human Rights Commission's interpretive rules governing discrimination of the handicapped, the parties' attention is called to Section 2.07: "Handicapped person" defined and other subsequent rules therein contained as relate to the handicapped.

6. Attention is called to the case of E. E. Black Ltd., et al, vs. Marshall, et al, 497 F. Supp. 1088 [D. Hi. 1980]. This is a case based upon an actual situation very

similar to the one at bar. In the E. E. Black case, an apprentice carpenter was denied a job after a radiologist read the man's x-rays, found a congenital back anomaly and stated that the man was a poor risk for employment. The job applicant consulted an orthopedist who cleared him for work. The company would still not hire him. In the Black case, the Federal Court concluded that the job applicant was either a handicapped individual or else because of the company's response was regarded as being a handicapped person; in either case, he was a handicapped person entitled to the Act's protection. In this instance, there is no doubt that the complainant did have a compression fracture to his back. However, it has not been determined as to when this compression fracture had occurred. Yet four doctors, Gray, Bsharah, Fiddler, and Wagner, did not find it a problem and did not think it would prevent the complainant from passing the pre-employment physicals in 1982 to work at the Witcher Coal Co. mines. Complainant received no permanent disability award for compensation for his knee injury and this did not, in fact, prevent him from working steadily at Union Boiler or Witcher Creek and Cedar Coal Co. mines.

7. It was testified and undisputed that the complainant had an award for pneumomelanosis [black lung], but this did not prevent him from working as a coal miner in the mines of this state.

8. Courts of other jurisdictions have considered the practice of refusing to hire able-bodied persons because of back x-ray results and have disapproved of the practice and have found in favor of the complainant. Please see the following: City of Appleton vs. Labor and Industry Review Commission, 20, EPD paragraph 30, 137 [Wisc. Cir. Ct. 1979]; Bucyurs-Erie Co. vs. Wisc. Dept. of Industry, Labor and Human Relations, 20 EPD Section 30, 104 [Wisc. Sup. Ct. 1979].; Sterling Transit Co. vs. FEPC, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 [1981] (mere possibility of future risk revealed by back x-ray did not justify employer's discharge of a truck driver).

CONCLUSION

Based upon the statement of facts and conclusions of law herein recited, it is the opinion of the undersigned hearing examiner that the complainant is entitled to recover of and from the respondent at the rate of eighty-five dollars and fifty-eight cents [\$85.58] per day for the period from July 24, 1981, through September 22, 1982: for fifty-six (56) weeks less two weeks for vacation at five days per week for the sum of twenty-three thousand one hundred six and 60/100 dollars [\$23,106.60] less the sum of one thousand four hundred ninety-one dollars and sixty cents [\$1,491.60] for employment for about a month in 1981 by

Union Boiler, Inc. and for three thousand five hundred fifty-six dollars and twelve cents [\$3,556.12] for employment at Witcher Creek Coal Co. in February or March of 1982. Also, it is the opinion of the undersigned that the complainant should recover of and from the defendant a sum for his expenditures in this matter for attorney's fees for the attorney representing him in this matter.

It is therefore the opinion of the undersigned that the respondent, Carbon Fuel Co. and/or U. S. Steel Corp., is guilty of discrimination to a handicapped person in violation of the West Virginia Code 5-11-9. Therefore, it is the recommendation to the West Virginia Human Rights Commission that:

1. Clyde A. Marshall should recover from the respondent the sum of eighteen thousand fifty-eight and 88/100 dollars [\$18,058.88] for his loss of earnings and

2. he should recover from the respondent the sum of one thousand two hundred fifty dollars [\$1,250.] for his expenses incurred in this matter including the expenses of expert testimony;

3. the complainant should recover of and from the respondent his reasonable attorney's fees in this matter in the amount of four eight-hour days at one hundred dollars [\$100.00] per hour or the sum of three thousand two hundred dollars [\$3,200.00];

4. the respondent should pay the cost of this action as determined by Mrs. Brenda Canterbury, the Acting Clerk of this Commission.

Dated: 12th day of June, 1985.

Enter:

George C. Duffield
Hearing Examiner