

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041
March 24, 1997

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-604-D
on behalf of LONNIE BOWLING, : MSHA Case No. BARB CD 95-11
Complainant :
v. : Mine ID No. 15-17234-NCX
: Huff Creek Mine

MOUNTAIN TOP TRUCKING CO., INC., :
ELMO MAYES; WILLIAM DAVID RILEY; :
ANTHONY CURTIS MAYES; and MAYES :
TRUCKING COMPANY, INC., :
Respondents :

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-605-D
on behalf of : MSHA Case No. BARB CD 95-11
EVERETT DARRELL BALL, :
Complainant : Mine ID No. 15-17234-NCX
v. : Huff Creek Mine

MOUNTAIN TOP TRUCKING CO., INC. :
ELMO MAYES; WILLIAM DAVID RILEY; :
ANTHONY CURTIS MAYES; and MAYES :
TRUCKING COMPANY, INC., :
Respondents :

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-613-D
on behalf of WALTER JACKSON : MSHA Case No. BARB CD 95-13
Complainant :
v. : Huff Creek Mine

MOUNTAIN TOP TRUCKING CO., INC., :
ELMO MAYES; and MAYES TRUCKING :
COMPANY, INC., :
Respondents :

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-615-D
on behalf of DAVID FAGAN,	:	MSHA Case No. BARB CD 95-14
Complainant	:	
v.	:	Huff Creek Mine
	:	
MOUNTAIN TOP TRUCKING CO., INC.,	:	
ELMO MAYES; WILLIAM DAVID RILEY	:	
ANTHONY CURTIS MAYES; and MAYES	:	
TRUCKING COMPANY, INC.,	:	
Respondents	:	

**ORDER REQUESTING COMMENTS ON THE
CALCULATION PERIOD FOR DAMAGES**

A related temporary reinstatement hearing in these matters was conducted on August 23 and August 24, 1995. At the reinstatement hearing, counsel for the Secretary moved to withdraw the temporary reinstatement application filed on behalf of Walter Jackson. Consequently, Jackson's temporary reinstatement application was dismissed in the temporary reinstatement decision released on October 5, 1995. 17 FMSHRC 1695. The temporary reinstatement decision ordered the immediate reinstatement of Lonnie Bowling and David Fagan to their former positions as coal haulage truck drivers. *Id.* at 1709.

A decision on liability in these discrimination cases was released on January 23, 1997. 19 FMSHRC 166. That decision determined that Jackson's February 17, 1995, discharge was in violation of the anti-discrimination provisions of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). Consequently, it was determined that Jackson was entitled to relief as of February 18, 1995.

The liability decision provided an opportunity for the parties to propose the appropriate relief to be awarded to Jackson. Jackson was requested to explain why he withdrew his application for temporary reinstatement in his proposal for relief. *Id.* at 205.

On March 6, 1997, Jackson replied that he withdrew his request for temporary reinstatement on August 23, 1995, because he had obtained full-time employment with Cumberland Mine Service as of August 1, 1995. Jackson indicated he was employed at Cumberland Mine Service from August 1, 1995, through October 10, 1995, when he was laid-off. Jackson also worked for Garland Company, Inc. for two weeks in January 1996. Jackson indicated his total gross wages earned at these two jobs was \$3,758.00.

Jackson asserts the respondents are liable for back pay plus interest, minus Jackson's gross earnings of \$3,758.00, for the 70 week period from February 18, 1995, until June 21, 1996, when the respondents reportedly stopped hauling coal for Lone Mountain Processing.

On the other hand, the respondents argue Jackson is only entitled to relief from February 18, 1995, until he withdrew his application for temporary reinstatement on August 23, 1995, less pertinent wages from other employment.

The case law concerning a complainant's obligation to mitigate back-pay awards by seeking other employment is clear. Thus, back-pay awards must be reduced in situations where a miner fails to mitigate damages, for example, by failing to remain in the labor market or to search diligently for other work. @ Metric Constructors, Inc., 6 FMSHRC 226, 231-32 (February 29, 1984) (citing Dunmire and Estle, 4 FMSHRC at 144), aff'd 766 F.2d 469 (11th Cir. 1985).

Thus, this case involves the frequently raised issue of whether an unemployed complainant, who is seeking back-pay damages, has actively sought other work. In addition, however, this case presents the novel question of what obligation, if any, an unemployed discriminatee has to reapply for temporary reinstatement, after he had previously withdrawn his initial reinstatement application because he secured other employment.

In view of the above, in order to determine the appropriate period for calculating the relief that should be awarded, Jackson should provide the following information:

- (1) On what date did Jackson first advise counsel for the Secretary that he wished to withdraw his temporary reinstatement application?¹
- (2) What was Jackson's reason for withdrawing his temporary reinstatement application?
- (3) Jackson was laid-off from his job at Cumberland Mine Service on October 10, 1995. When did Jackson first advise counsel for the Secretary that he was laid-off from his job at Cumberland Mine Service?
- (4) At approximately the same time Jackson was laid-off from Cumberland Mine Service, Jackson, through Counsel for the Secretary, was served with the October 5, 1995, temporary reinstatement decision that dismissed his application for temporary reinstatement, and ordered the reinstatement of two of Jackson's

¹ Tony Oppgard filed a Notice of Appearance on behalf of Jackson on December 27, 1995. Some of the questions posed refer to the Secretary's counsel because the questions involve events that may have occurred before Mr. Oppgard was retained. Of course, Mr. Oppgard is also invited to respond to this order on behalf of Jackson.

former colleagues. Did Jackson request the Secretary to reopen his application for temporary reinstatement? If yes, was it reopened? If not, why not?

(5) The respondents have alleged that Jackson may have been a party in a pertinent disability proceeding. Has Jackson been a party in any legal action or claim involving allegations of physical or mental impairment? If yes, identify and describe the legal action or claim, provide the dates of such actions or claims, and provide the status or outcome.

(6) Jackson should state what he did to look for work from October 11, 1995 through June 21, 1996.

(7) Jackson should address whether or not he was required to seek temporary reinstatement in order to mitigate back-pay damages, citing pertinent statutory provisions, legislative history, or case law to support his position.

IT IS ORDERED that Jackson's response shall be filed within 21 days of the date of this Order. **IT IS ALSO ORDERED** that the respondents shall have ten (10) days thereafter to reply. **IT IS FURTHER ORDERED** that Jackson shall have ten (10) days to respond to the respondents' reply.

Jerold Feldman
Administrative Law Judge

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