

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

June 25, 1999

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. : Mine ID No. 15-17234-NCX  
: Huff Creek Mine

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

**ORDER REQUESTING INFORMATION**  
**CONCERNING JACKSON'S STUDENT STATUS**

This matter concerns the Commission's March 31, 1999, remand with respect to the determination of the proper backpay and interest to be awarded to Walter Jackson. 21 FMSHRC 265 (March 1997). The period for relief has been determined to be the period immediately following Jackson's discriminatory discharge on February 18, 1995, through June 21, 1996, the date the respondents ceased hauling coal for Lone Mountain Processing, Inc. *Supplemental Decision*, 19 FMSHRC 876, 878-79 (May 1997).

To date, Jackson is seeking \$41,973.29 backpay plus interest for the period of relief. The backpay is calculated at eight round trip haulage loads driven each day from approximately 6:00 a.m. until 6:00 p.m. @ \$13.00 per load, constituting \$104.00 per day wages, or \$520.00 wages per five day work week. *Jackson's March 3, 1997, Statement of Back Pay*, at p.3; *Jackson's June 4, 1999, Proposed Order for Relief* at pp.1-2; *Supplemental Decision*, 19 FMSHRC at 878.

In order to determine if Jackson is entitled to the backpay claimed it is necessary to determine if Jackson was available for employment at all times during the relevant period for relief. Although the Secretary's counsel and Jackson's private counsel (hereinafter referred to as "counsel") have asserted Jackson was actively looking for work during the February 1995 through June 1996 relief period, new evidence reflects, and Jackson now concedes, that he was a full time student at Union College in Barbourville, Kentucky, beginning the fall semester of 1995. Specifically, as discussed below, evidence indicates Jackson has stated he was a full time student at Union College beginning in August 1995.

Throughout this proceeding Jackson's counsel have represented that Jackson withdrew his application for temporary reinstatement at the temporary reinstatement hearing on August 23, 1995, because he was employed at Cumberland Mine Service (hereinafter referred to as "Cumberland"). In this regard, counsel have represented that Jackson was employed by Cumberland from August 1, 1995, through October 10, 1995, earning \$3,343.00 during this period. Counsel have furnished a 1995 W-2 form issued by Cumberland Mine Service reflecting Jackson earned \$3,343.00 in 1995, although the W-2 form does not state the dates of employment.

In addition to representations concerning Jackson's 1995 Cumberland employment, counsel have repeatedly represented that at all times during the relevant February 18, 1995, through June 21, 1996, period, Jackson had been actively looking for work and that he was available for work. For example, in the Decision on Liability in these matters, in order to determine the appropriate relief, Jackson was specifically ordered to state any "periods when Jackson was not available for employment" beginning on February 18, 1995, through the present time. 19 FMSHRC 167, 204 (January 1997).

Despite Jackson's full time college attendance at a time when he was seeking lost wages for working twelve hours per day, Jackson's response to the Decision on Liability did not specify any periods during which Jackson was unavailable for employment. *March 3, 1997, Statement of Backpay for Walter Jackson.*

As a further example of inquiries concerning Jackson's availability for employment, by Order dated March 24, 1997, concerning the appropriate calculation for damages, Jackson was requested to state what he did to look for work from October 11, 1995, after he reported he was laid-off from Cumberland, through the June 21, 1996, relief period termination date. Jackson's private Counsel responded:

Although Jackson objects to the question, his answer is that he registered with the state unemployment agencies in both Kentucky and Virginia, followed up on potential job referrals made by those agencies, and otherwise applied for work at numerous businesses, both in the mining and non-mining fields. (Response of Walter Jackson to the Court's Order of 3/24/97, at p.3).

While Jackson may have registered with the Virginia and Kentucky state unemployment offices, there is no evidence that he ever advised unemployment officials that he was a full time student. Thus, his reported eligibility for unemployment does not, in itself, evidence that he was available for work.

Finally, during these proceedings, counsel for the respondents sought to determine if Jackson had been involved in a civil personal injury suit that was relevant to Jackson's ability to work. Jackson's private counsel responded that Jackson received a favorable jury verdict on January 5, 1996, in the U.S. District Court in London, Kentucky in a products liability law suit brought against General Motors for an injury to Jackson's right eye in February 1991. However, Jackson's counsel did not provide additional information and stated:

Mr. Jackson did not file a disability claim regarding his eye injury, nor did it affect his ability to work during the backpay period in this proceeding. *Therefore, the matter is irrelevant* to my client's claim for backpay herein (emphasis added). (March 21, 1997, correspondence from Jackson's counsel to Judge Feldman).<sup>1</sup>

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<sup>1</sup> As discussed *infra*, although this statement was presumably made in good faith by

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Jackson's counsel, it was not true. This misinformation prevented the respondents from pursuing relevant evidence with regard to Jackson's unpublished civil suit and contributed to the Commission striking evidence concerning Jackson's civil suit under the mistaken belief that issues concerning representations made by Jackson in his civil suit had previously not been raised by the respondents. *Commission Order*, July 27, 1998 (Unpublished). In fact, in this proceeding Jackson had been specifically asked if he had "been a party in any legal action or claim involving allegations of physical or mental impairment." *Order Requesting Comments on the Calculation Period for Damages* (March 24, 1997).

As a consequence of the Commission's remand decision, a conference call with respondents' counsel Edward Dooley, the Secretary's counsel Donna Sonner, and Jackson's private counsel Stephen Sanders, was conducted on April 22, 1999. At that time Dooley stated he had information to submit concerning Jackson's availability for work. Consequently, a filing schedule was established during the conference call for Dooley to file this information and for Jackson's counsel to respond.

On May 10, 1999, Dooley provided a report dated October 27, 1995, prepared by Luca E. Conte, a Vocational Rehabilitation Consultant, summarizing a standard vocational evaluation of Jackson that occurred on October 11, 1995, to determine the impact, if any, on Jackson's alleged eye impairment on his ability to work. *Resp.'s May 10, 1999, Response Concerning Jackson's Availability for Work*, Ex. 1. The vocational evaluation was performed as a consequence of Jackson's product liability suit docketed as Civil Action 92-112, U.S. Dist. Ct., Eastern District of Kentucky.

Conte reported Jackson had received an Associate in Arts degree from Southeast Community College in December 1991. *Id.* at p.2. Jackson reportedly told Conte that he began full time course work at Union College as a first semester junior in August 1995 and that he was taking 12 credits as an education major. *Id.* Jackson reported his college costs were \$4,100.00 per semester and that he was receiving a combination of a PELL Grant and a Stafford loan to finance his education. Jackson further reported the commute from his home to college was approximately 50 to 70 miles, one way. *Id.* at p.1.

During the course of the vocational assessment, Jackson provided his employment history. He indicated he had worked for Cumberland Mine Service from October 1986 through August 1988, for seven months through the fall of 1990, and from June 1992 until October 1993. *Id.* at p.2. Conte's report does not reflect that Jackson reported he was employed by Cumberland Mine Service from August 1, 1995, until October 10, 1995, the day preceding the vocational assessment.

During the vocational evaluation Jackson complained of a continuing right eye impairment and "loss [of] some vision in the left eye" reportedly due to "overcompensation." *Id.* Jackson stated he had previously failed a physical examination for a truck driving position at Manalapan Mining Company although no further details were given. *Id.* at p.2-3. Although Conte concluded Jackson retained "his pre-injury capacity to access the labor market," *Id.* at p.3, Jackson's statements to Conte reflect he was pursuing his education in order to change careers because of his physical complaints.

In response to the information provided by Dooley, Jackson's private counsel now admits Jackson was a full time student at Union College beginning the fall semester of 1995. However, specific details concerning the dates and extent of Jackson's college attendance were not provided. *June 4, 1999, Statement of Walter Jackson*, p.5. The Secretary's response to Dooley's

information did not even address whether Jackson had been a full time college student. Rather, the Secretary asserted that the Commission's remand decision was "*res judicata*" on the issue of mitigation. *Secretary's May 24 1999, Response*, p.2-3. Thus, Jackson's private counsel and the Secretary have not provided details concerning the dates of Jackson's college attendance and the times of his scheduled classes.

The Commission's remand decision concluded Jackson's failure to seek to reopen his temporary reinstatement application, regardless of his extended unemployment, could not be considered as evidence of his failure to mitigate damages. 21 FMSHRC at 285. While the Commission also concluded the record supported "the operator did not show a failure to mitigate on the part of Jackson," *Id.*, the record before the Commission contained misleading statements regarding Jackson's availability for work. Although the issue of Jackson's relief is not final, misstatements concerning his availability for employment could be a basis for reopening the issue of Jackson's relief under Rule 60(b) of the Federal Rules of Civil Procedure even if this matter had become a final decision. Consequently, the Secretary's claim of *res judicata* is lacking in merit.

While counsel may not previously have known about Jackson's full time college attendance during a period they represented Jackson was actively looking for work, they know now. Counsel have an obligation to correct any misleading evidence and misstatements presented in Jackson's behalf. *See Model Rules of Professional Conduct Rule 3.3 (4)*.<sup>2</sup>

This matter has been brought on behalf of Jackson by the Secretary pursuant to section 105(c)(2) of the Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). Consequently, while the requested information and documentation can be obtained through consultation with Jackson's private counsel, the Secretary primarily is responsible for presenting evidence in this matter. Consequently, the Secretary is obliged to take the necessary remedial measures to correct this record. Accordingly, the Secretary is ordered to provide the following information and supporting documentation within 30 days of the date of this Order.

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<sup>2</sup> Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. . . . [T]he alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement. *Model Rules of Professional Conduct Rule 3.3 cmt.* (1995).



## ORDER

**IT IS ORDERED** that the Secretary shall request Walter Jackson to request Union College to send to the undersigned Administrative Law Judge a current **Certified Copy** of Jackson's college transcript. If Jackson fails to cooperate, the Secretary shall so state.

**IT IS FURTHER ORDERED** that the Secretary specify Jackson's hours of attendance for each of the courses reflected on the transcript.

**IT IS FURTHER ORDERED** that the Secretary state, with specificity, the days of the week and hours worked for each day reportedly worked at Cumberland Mine Service from August 1, 1995 through October 10, 1995, and the Secretary shall provide copies of Jackson's pay stubs issued during this period.

**IT IS FURTHER ORDERED** that the Secretary provide a sworn affidavit from an official of Cumberland Mine Service detailing Jackson's dates of employment during 1995, his job duties, and the reason for his termination of employment.

Jackson is seeking relief for daily lost wages that would have been earned from 6:00 a.m. until 6:00 p.m. during the period February 18, 1995, through June 21, 1996. **IT IS FURTHER ORDERED** that the Secretary explain, in detail, why she asserts Jackson was available for work each day during this entire period; what Jackson did to look for work each day during the period of his college attendance; and the impact of his PELL Grant and Stafford Loans on his decision whether or not to continue his full time college attendance.

Failure by the Secretary to provide the requested information within 30 days of the date of this Order may result in the dismissal of Jackson's discrimination complaint. Jackson's private counsel may also submit any additional information, documentation or arguments for my consideration within 30 days of the date of this Order.

Jerold Feldman  
Administrative Law Judge



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