**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 18, 1999

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| 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 | : | |
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| 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 | : | |
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| 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 | : | |

## DECISION ON REMAND

Before: Judge Feldman

These discrimination matters were remanded by the Commission on March 31, 1999. 21 FMSHRC 265. The initial determination concluded that, Lonnie Bowling and Everett Darrell Ball, upon being recalled to work on March 23, 1995, after they had been discharged on March 7, 1995, in violation of 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), acted in concert in an effort to provoke their discharges in order to perfect their discrimination complaints. *Decision on Liability*, 19 FMSHRC 166 (January 1997). Fundamental to this conclusion was Bowling and Ball's admitted refusals to work the 12 hour work shift they had previously accepted as a condition of their employment. *Id.* at 177, 194, 197; 21 FMSHRC at 275. In its remand decision, the Commission determined, in a divided opinion, that the evidence leads to only one conclusion - - that Bowling and Ball were the victims of a constructive discharge. 21 FMSHRC at 281. Consequently, the Commission remanded these matters for a recalculation of the proper relief to be awarded for the constructive discharges of Bowling and Ball.

With respect to Walter Jackson, the Commission determined that Jackson's failure to seek reopening of his temporary reinstatement application after a protracted period without employment, alone, was not sufficient evidence to conclude that Jackson had failed to mitigate his damages. *Id.* at 285. Accordingly, the Commission remanded this matter for a recalculation of the backpay and interest due Walter Jackson.

The pertinent period for calculating damages begins the date of the initial discriminatory discharges. With respect to Bowling and Ball, the beginning date is March 8, 1995. With respect to Jackson, the beginning date is February 18, 1995. The period for relief ends on June 21, 1996, the date the respondents ceased hauling coal for Lone Mountain Processing, Inc. *Supplemental Decision*, 19 FMSHRC 876, 878-79 (May 1997).

With respect to the backpay issue, it has been determined that the appropriate calculation for backpay is eight loads per day @ $13.00 per load, constituting wages of $104.00 per day, or $520.00 per week.[1] *Id.* at 878.

As a result of the Commission's remand, on April 23, 1999, an Order was issued requesting the complainants to submit proposed orders for relief. The complainants were

[1] Backpay of $104.00 per day is calculated based on an average delivery of eight truck loads that occurred during the course of the normal 12 hour work day, although, as noted *infra*, both Bowling and Ball refused to work more than 10 hours when they were called back to work by Mountain Top Trucking on March 23, 1995.

instructed to specify the amount of lost wages less any deductions for earnings from other employment, or less deductions for periods during which time any complainant was not available for employment. The complainants were also requested to specify any incidental damages claimed.

Lonnie Bowling and Darrell Ball

On June 4, 1999, Lonnie Bowling filed a Proposed Order for Relief with supporting documentation seeking gross back wages of $35,152.00 for the period March 8, 1995, through June 21, 1996, less earnings from other employment during this period totaling $8,595.00. Consequently, Bowling seeks net relief of $26,557.00, plus interest. Bowling is seeking no additional incidental damages.

On June 4, 1999, Darrell Ball filed a Proposed Order for Relief with supporting documentation seeking gross back wages of $35,152.00 for the period March 8, 1995, through June 21, 1996, less earnings from other employment during this period totaling $17,915.00. Consequently, Ball seeks net relief of $17,237.00, plus interest. Ball is seeking no additional incidental damages.

On June 4, 1999, the respondents filed their Response to the Order Requesting Proposed Orders for Relief. With respect to Bowling and Ball, despite the Commission's decision in this matter, the respondents contend that Bowling and Ball are only entitled to backpay from March 8, 1995, until they were called back to work on March 27, 1995.[2]

The respondents have presented no evidence to rebut the backpay awards sought by Bowling and Ball. Consequently, I shall award Bowling and Ball backpay of $26,557.00, plus interest, and $17,237.00, plus interest, respectively.

Walter Jackson

On June 4, 1999, Walter Jackson filed a Proposed Order for Relief with supporting documentation seeking gross back wages of $36,400.00 for the period February 18, 1995, through June 21, 1996, less earnings from other employment during this period totaling $3,758.00. Consequently, Jackson seeks net relief of $32,642.00, plus interest. Jackson is seeking no additional incidental damages.

With respect to Jackson, during an April 22, 1999, conference call with the parties, the respondents claimed they had information that Jackson had removed himself from the workforce in August 1995 when he enrolled in Union College as a full time student. In support of their assertion, the respondents subsequently provided a copy of a report dated October 27, 1995, prepared by Luca E. Conte, a Vocational Rehabilitation Consultant. The vocational evaluation, performed on October 11, 1995, as a consequence of Jackson's product liability suit docketed as Civil Action 92-112, U.S. Dist. Ct., Eastern District of Kentucky, sought to determine the impact,

[2] The evidence reflects Bowling and Ball were called back to work effective March 23, 1995.

if any, of Jackson's alleged eye impairment on his ability to work. *Resp.'s May 10, 1999, Response Concerning Jackson's Availability for Work*, Ex. 1.

Conte reported Jackson had received an Associate in Arts degree from Southeast Community College in December 1991. 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. 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.

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.

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.'" Jackson stated he had previously failed a physical examination for a truck driving position at Manalapan Mining Company although no further details were given. Although Conte concluded Jackson retained "his pre-injury capacity to access the labor market," Jackson's statements to Conte reflect he may have been pursuing his education in order to change careers because of his physical complaints.

In response to the information provided by the respondents concerning Jackson's availability for employment, Jackson now admits he was a full time student at Union College beginning the fall semester of 1995. Additional information furnished by Jackson, including an affidavit filed on July 30, 1999, reflects Jackson was enrolled from August 29 through December 13, 1995, as a student taking 12 credits at Union College in Barbourville, Kentucky. Jackson's classes required his attendance on Tuesdays and Thursdays.[3] In his affidavit, Jackson

[3] The consolidated temporary reinstatement hearing concerning Jackson's discrimination complaint was convened on August 23, 1995, in Pineville, Kentucky. Jackson did not appear at the hearing. Instead, the Secretary's counsel moved to withdraw Jackson's temporary

stated that he would have stopped attending college if he had found a job that required him to do so.[4] Jackson further stated that he did not return to Union College in the spring semester of 1996 because he could not afford to continue with his education.

The Secretary argues the Commission's decision is *res judicata* on the issue of whether Jackson failed to mitigate his damages. The Commission's decision did not conclude that Jackson did, in fact, make efforts to mitigate his damages. Rather, the Commission concluded that the record evidence did not "show a failure to mitigate damages on the part of Jackson." 21 FMSHRC at 284-85. However, the record considered by the Commission failed to reflect Jackson's full time college attendance because Jackson was not forthcoming about his college studies despite the fact that the initial decision on liability explicitly directed Jackson to disclose any "periods when Jackson was not available for employment." 19 FMSHRC at 204.

Moreover, during these proceedings, Jackson was specifically asked by the Administrative Law Judge 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). Jackson filed his response to the Order on April 22, 1997, asserting that Jackson had not claimed any physical impairment and referred to a portion of a March 21, 1997, correspondence from his counsel to Judge Feldman, that 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).

Although this statement was presumably made in good faith by Jackson's counsel, it is contrary to information provided by Jackson in his October 11, 1995, vocational evaluation, and

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reinstatement application because Jackson reportedly was working. 17 FMSHRC 1695, 1696 (October 1995). I am troubled by Jackson's full time college attendance on Tuesdays and Thursdays that began on August 29, 1995, only five days after Jackson's temporary reinstatement application was withdrawn. Jackson's college attendance would have precluded reinstatement at his former position at Mountain Top Trucking that required his work attendance from approximately 6:00 a.m. until 6:00 p.m., Mondays through Fridays.

[4] Jackson had a job opportunity that interfered with his college attendance and required him to leave college - - reinstatement at Mountain Top Trucking.

this statement apparently is 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 in an apparent 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).

Thus, consideration of Jackson's college attendance is not precluded by the doctrine of *res judicata*. Moreover, misstatements concerning Jackson's 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.[5] In addition, 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).[6] Consequently, the Secretary's request for interlocutory review with regard to the issue of the propriety of the admission of evidence into this proceeding concerning Jackson's student status is denied.

I am concerned about the apparent inconsistencies in Jackson's position, *i.e.*, asserting in his civil suit that his decision to attend college was related to an eye impairment that interfered with employment as a truck driver -- while asserting in this proceeding that he was looking for work as a truck driver, and that he would have left college to obtain full time employment. Although I have concluded Jackson's full time student status is relevant evidence that should be considered, I am constrained by the Commission's remand decision that "limited [me] to a recalculation of backpay and interest owed Jackson consistent with [the Commission's] conclusion that it was not shown that Jackson failed to mitigate his damages." 21 FMSHRC 285. Absent further direction from the Commission, I construe the Commission's decision as a finding that Jackson was available for work. Accordingly, I shall award the net backpay of

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[5] In relevant part, Rule 60(b) provides:

> **Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of a judgment . . . .

[6] 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).

$32,642.00, plus interest, sought by Jackson in this matter.

As a final matter, the respondents' motion to compel answers to its interrogatories, that were not material to the issue of Bowling and Ball's damages, is denied. Additionally, in view of the denial of the Secretary's request for interlocutory review, the respondents' August 12, 1999, request for an extension of time to respond to the Secretary's interlocutory review request is also denied.

## ORDER

In view of the above, consistent with the determination with respect to joint liability in the Decision on Liability issued in these matters on January 23, 1997, **IT IS ORDERED** that the respondents are jointly and severally liable for:

(1) Payment of $26,557.00, plus interest to the date of payment, less applicable Federal and State and local tax deductions, if any, to Lonnie Bowling, constituting payment for net lost wages from March 8, 1995, the day following Bowling's discriminatory discharge, through June 21, 1996.

(2) Payment of $17,237.00, plus interest to the date of payment, less applicable Federal and State and local tax deductions, if any, to Everett Darrell Ball, constituting payment for net lost wages from March 8, 1995, the day following Ball's discriminatory discharge, through June 21, 1996.

(3) Payment of $32,642.00, plus interest to the date of payment, less applicable Federal and State and local tax deductions, if any, to Walter Jackson, constituting payment for net lost wages from February 18, 1995, the day following Jackson's discriminatory discharge, through June 21, 1996.

Interest shall be calculated in accordance with the formula adopted in the Commission's decision in *Secretary of Labor o/b/o Bailey v Arkansas-Carbona Company*, 5 FMSHRC 2042, 2049-52 (December 1983). **IT IS FURTHER ORDERED** that payment to the above named individuals shall be made within 40 days of the date of this decision.

Jerold Feldman
Administrative Law Judge

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