FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041
December 4, 2000

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, ANTHONY CURTIS	:	
MAYES, and MAYES TRUCKING	:	
COMPANY, INC.,	:	
Respondents	:	

DECISION ON REMAND

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
Stephen A. Sanders, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky, for the Complainant;
Edward M. Dooley, Esq., Fairhope, Alabama, for the Respondents.

Before: Judge Feldman

A. Case History

The initial decision in this discrimination matter determined the respondents' February 17, 1995, discharge of Walter Jackson violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(1), and, that the above named respondents were jointly and severally liable for Jackson's damages.[1] 19 FMSHRC 166, 181-86, 197-203 (Jan. 1977) (ALJ). The initial decision was followed by a decision on relief that determined that the maximum period for which Jackson could be awarded back pay was February 18, 1995, the day after his discriminatory discharge, until June 21, 1996, the termination date of Mountain Top Trucking Company's haulage contract that necessitated the employment of truck

[1] The case against William David Riley, who had also been named as a respondent in this matter, was dismissed. 19 FMSHRC at 201. It was determined that Riley, who was not a principal and acted solely in his role as a foreman, was not liable for the back pay relief sought by Jackson pursuant to the provisions of section 105(c). *Id.* at 200-01.

drivers such as Jackson. 19 FMSHRC 875 (May 1997) (ALJ). The decision on relief further determined that the calculation for Jackson's relief shall be eight loads per day @ $13.00 per load, or $520.00 per five day work week. 19 FMSHRC at 878. Crediting Jackson for relief purposes of completing an average of eight round trip loads per day from the mine to the processing plant, each round trip taking approximately one hour and 15 minutes, was based on Jackson's normal 12 hour workday from 6:00 a.m. until approximately 6:00 p.m. 19 FMSHRC at 171.

Jackson's temporary reinstatement hearing was conducted on August 23, 1995. Jackson did not appear at the hearing. Instead, Jackson's counsel withdrew Jackson's application for temporary reinstatement because Jackson had obtained full time employment with Cumberland Mine Service beginning on August 3, 1995. Jackson worked for Cumberland Mine Service approximately ten weeks until he was laid-off on October 4, 1995. With the exception of one week of employment with the Garland Company in December 1995, during which time Jackson earned $415.00, Jackson had no additional employment during the February 18, 1995, through June 21, 1996, period of relief. The Garland Company is affiliated with Cumberland Mine Service.

As a general proposition, a discrimination complainant has a duty to mitigate damages by remaining in the labor market and diligently looking for alternative work. *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972) (citations omitted). The May 21, 1997, decision on relief held that Jackson had not demonstrated reasonable efforts to mitigate his damages in view of his lengthy period of unemployment and his failure to even inquire with the Secretary about the possibility of reopening his temporary reinstatement application. 19 FMSHRC at 882. Thus, Jackson was awarded net back pay of 18,497.40 for the period February 18, 1995, through December 9, 1995, but not for the entire period of relief that ended on June 21, 1996. 19 FMSHRC at 880-83.

The Commission reversed the failure-to-mitigate determination on the ground that the Mine Act does not require a discriminatee to seek temporary reinstatement. 21 FMSHRC 265, 284 (March 1999). Consequently, the Commission remanded the case for a recalculation of back pay and interest owed Jackson consistent with its conclusion that it was not shown that Jackson failed to mitigate his damages. *Id.* at 284-85.

In view of the Commission's remand, On April 22, 1999, the undersigned had a telephone conference with the parties to determine if they wished to file briefs on the question of the recalculation of Jackson's damages. During the conference, the respondents' counsel advised that he had information to submit concerning Jackson's availability for work. The information furnished included details concerning Jackson's product liability suit wherein Jackson had complained of a significant eye impairment impacting on his ability to drive a truck, and information concerning Jackson's college attendance as of August 1995 at Union College. The information was relevant in view of Jackson's prior representations in this proceeding concerning his availability for work. A schedule was established for submission of the respondents' information and comments by the parties.

The information provided by the respondents indicated Jackson had been less than forthcoming.[2] Jackson had failed to disclose his college attendance despite a January 23, 1997, Order that he disclose any "periods when [he] was not available for employment."[3] 19 FMSHRC at 204. Moreover, by Order dated March 24, 1997, Jackson was specifically asked if he had "been a party in any legal action or claim involving *allegations of physical or mental impairment*." 19 FMSHRC at 664 (emphasis added). Jackson responded on March 21, 1997, stating that his product liability suit was irrelevant despite what was ultimately revealed to be Jackson's assertion of a serious eye impairment. However, given the Commission's determination that the prior record did not support that Jackson had failed to mitigate his damages, on remand, Jackson was awarded net back pay damages of $32,642, plus interest, less deductions of applicable Federal and local taxes, for the entire period of relief. 21 FMSHRC 913, 918.

The Commission subsequently remanded this matter on November 30, 1999. 21 FMSHRC 1207. The Commission, noting conflicting evidence, directed me to resolve the question of whether and to what extent Jackson was available for employment during the back pay period. *Id.* at 1214. Jackson continues to seek net back pay of $32,642.00 plus interest for the entire February 1995 through June 1996 period of relief.

B. Findings and Conclusions

A hearing was conducted on September 14, 2000, in Pineville, Kentucky to determine the appropriate relief to be awarded to Jackson during the February 18, 1995, through June 21, 1996, back pay period. The scope of the hearing was limited to Jackson's efforts to find employment during this period; whether Jackson suffered from any physical impairment during this period that interfered with his ability to work; and the impact, if any, of Jackson's college attendance on his availability for employment.

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[2] Jackson has sought to strike evidence concerning his college attendance and civil suit because it had not been raised during the pre-decisional liability phase of this case. The Commission, noting Jackson's history of failing to provide accurate information, denied Jackson's request to strike because of "the relevancy of the information . . . to the questions of whether and to what extent Jackson was available to work during the back pay period." 21 FMSHRC at 1213.

[3] As discussed *infra*, on October 19, 1995, Jackson certified to the Virginia Unemployment Commission that he was unavailable for work on Tuesdays and Thursdays due to his college attendance. (Jackson Ex 3, p. 1).

1. The Effect of Jackson's Eye Impairment on Jackson's Ability to Work

On February 20, 1991, Jackson, while attempting to rotate the tires on his vehicle, was struck in the right eye by a metal fragment that was dislodged from the tire iron wrench he was using. Jackson's eye injury was the subject of a product liability suit docketed as Civil Action 92-112, in the United States District Court in the Eastern District of Kentucky. (Resp. Ex. 1, at 4-12, 19). A judgement in favor of Jackson against General Motors Corporation was entered on January 9, 1996, which, in addition to monetary damages for pain and suffering, and past and future medical expenses, included damages not to exceed $12,043.00 for lost wages. *Id.* at 19.

The record contains deposition testimony, and medical and vocational assessments, that arose out of Jackson's civil action. During the course of a July 19, 1993, deposition, Jackson testified that he worked as a laborer for Cumberland Mine Service until his February 1991 eye injury. *Id.* at 8-9. Jackson further testified that he returned to work as a laborer for Cumberland Mine Service in June 1992. *Id.* In addition, Jackson's deposition testimony reflects that, upon returning to work, the only limitation caused by Jackson's eye impairment was his inability to spot weld because of his loss of visual acuity. *Id.* at 13.

Jackson was subsequently deposed on July 14, 1994, at which time he reported having been hired by Mountain Top Trucking three weeks before. *Id.* at 45-46. Jackson stated that he had a commercial driver's license and that he did not have to take any physical tests for his job at Mountain Top Trucking. *Id.*

Jackson was examined by Dr. John W. Garden on June 29, 1995. Id. at 17-18. Dr. Garden summarized a history of a right corneal laceration that was repaired at the University of Kentucky medical facility. *Id.* Garden noted Jackson subsequently developed a cataract that was removed in 1994. *Id.* On examination, Garden determined Jackson had corrected right eye vision of 20/50 and corrected left eye vision of 20/20. *Id.* Garden's diagnosis was post-traumatic right corneal scarring, pseudophakia, traumatic mydriasis, pupillary sphincter atrophy, and posterior capsule opacity. *Id.* Garden found Jackson's left eye was mildly myopic. Garden concluded Jackson "had a very nice result from a serious ocular injury." *Id.*

Jackson was seen on October 11, 1995, for a standard vocational evaluation by Luca E. Conte, a Vocational Rehabilitation Consultant. *Id.* at 13. 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.* at 14. During Conte's interview, Jackson reported past employment as a truck driver with Mountain Top Trucking. *Id.* Jackson also 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 14-15.

Conte's occupational analysis noted various subjective complaints of right eye discomfort and corrected right eye vision of 20/50. *Id.* at 15. Conte concluded that Jackson's

reported eye fatigue and light sensitivity were "not significant enough to affect [Jackson's] occupational functioning or success. Indeed, as indicated by [Jackson's] successful post-injury work as a commercial truck driver . . . Mr. Jackson retains his pre-injury capacity to access the labor . . . ." *Id.*

Records from the Commonwealth of Kentucky Division of Driver Licensing reflect Jackson retained a commercial driver's license until it was voluntarily surrendered on December 3, 1996. (Jackson Ex. 4). The respondents, relying on the provisions in Federal Highway Administration regulation 49 U.S.C. § 391.45 that require operators of commercial vehicles to have minimum corrected vision of 20/40 in each eye, assert that Jackson's right eye impairment is disqualifying. (Resp. Ex. 3). Thus, they maintain Jackson was not capable of performing truck driver duties during the period of relief. Consequently, they argue that they are not liable for back pay.

As a threshold matter, the duty to mitigate damages does not require the victim of discrimination to seek identical employment. Rather, the duty is satisfied as long as the discriminatee seeks "substantially equivalent employment." *NLRB v. Madison Courier, Inc.*, *supra* at 1317. Employment as a general laborer, in the context of mitigating lost wages, is substantially equivalent to employment as a truck driver. Thus, assuming *arguendo*, Jackson's eye condition disqualified him from holding a commercial driver license, Jackson could satisfy his duty to mitigate damages by seeking work as a general laborer. In fact, a portion of the wages Jackson earned as a laborer at Cumberland Mine Service shall be deducted from the relief that shall be awarded to Jackson in this proceeding.

Moreover, Jackson's ability to work despite his eye impairment must be evaluated based on Jackson's state of mind. There is no evidence that Jackson ever asserted, in furtherance of his civil suit, that he was incapable of working. In fact, Jackson disclosed working for Mountain Top Trucking as a truck driver during his during his July 14, 1994, deposition. In this regard, Jackson continued to hold a valid commercial driver license until December 1996. Significantly, it has neither been contended nor shown that Jackson's eye impairment interfered with his truck driver duties at Mountain Top Trucking. In fact, if the respondents had not discharged Jackson on February 17, 1995, in violation of the anti-discrimination provisions of section 105(c) of the Mine Act, Jackson would have continued working as a truck driver with Mountain Top Trucking. Accordingly, the evidence reflects that Jackson was capable of performing duties as a general laborer and/or a truck driver at all times during the February 18, 1995, through June 21, 1996, period of relief.

2. <u>The Effect of Jackson's College Attendance on Jackson's Availability for Work</u>

Having concluded Jackson was capable of substantially equivalent employment, the focus shifts to Jackson's availability for employment. As the Commission discussed in its previous decisions providing guidance in this matter, a back pay award "may be reduced in appropriate circumstances where an employee incurs a willful loss of earnings." 21 FMSHRC at

1212 (quoting *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (February 1982) (other citations omitted). Under the duty to mitigate damages from discrimination, "a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept *substantially equivalent employment*, fails diligently to search for alternative work, or voluntarily quits without good reason." *Id. Citing NLRB v. Madison Courier, Inc.*, *supra* at 1317 (emphasis in original).

In general, once discrimination has been found and a gross amount of back pay during a period for relief is alleged, "the burden is on the employer to establish facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability." *NLRB v. Madison Courier, Inc.*, *supra* at 1318, *quoting NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *see also Metric Construction, Inc.*, 6 FMSHRC 226, 233 (February 1984), aff'd, 766 F. 2d 469 (11th Cir. 1985). In this regard, in the absence of evidence to the contrary, there is a presumption that an unemployed victim of discrimination is ready, willing and able to work, and actively looking for work. There is no evidence that Jackson failed to mitigate his damages by not seeking alternative employment immediately following his February 17, 1995, discharge.

However, the respondents have provided evidence that Jackson attended college on a regular basis on Tuesdays and Thursdays beginning in August 1995. During this proceeding Jackson revealed, albeit reluctantly, that he attended Union College until December 13, 1995, leaving the impression that his college attendance terminated at that time. However, at the September 14, 2000, hearing, in the interest of full disclosure, Jackson's counsel elicited from Jackson the fact that Jackson's college attendance continued after he left Union College in December 1995. Jackson now admits he attended classes at Southeast Community College (SECC) on Tuesdays and Thursdays from January 17, 1996, through May 11, 1996.[4] (Tr. 79). Thus, Jackson attended college on Tuesdays and Thursdays for two consecutive semesters during the period August 29, 1995, through May 11, 1996, at Union College and SECC.

Although an operator is required to provide evidence that casts doubt on a complainant's availability for work, an operator is not required to prove that a discriminatee is not looking for work because a party can not be required to prove a negative. *See RAG Cumberland Resources Corporation*, 22 FMSHRC 1066, 1070 (citing *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984), *aff'd sub nom. UMWA v. FMSHRC* 768 F.2d 1477 (D.C. Cir. 1985) (to continue a 104(d) chain the Secretary need not prove the absence of a clean inspection). To be required to do so, an operator would have to identify all businesses where a complainant had not applied for work. Rather, once an operator presents an affirmative defense to an award of back pay based on the complainant's apparent unavailability for work, the burden of persuasion shifts to the complainant

[4] As an officer of the court, in view of the inquiries made of Jackson concerning his college attendance, Jackson's counsel had a duty to ensure Jackson's attendance at SECC was disclosed. As discussed at the hearing, Jackson's private counsel's effort to ensure full disclosure is appreciated. (Tr. 222-25).

seeking back pay relief. *See e.g., NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175-77 (2nd Cir. 1965), *cert. den.*, 384 U.S. 170 (1966). Having come forward with evidence of Jackson's college attendance, the burden shifts to Jackson to demonstrate that he was ready, willing and able to work, and actively looking for full-time employment during the back pay period. In addressing whether Jackson was available for full-time employment, it must be remembered that Jackson seeks lost wages based on his employment with Mountain Top Trucking that consisted of approximately a 60 hour, five day work week.

Jackson was discharged from his position as a truck driver at Mountain Top Trucking in violation of section 105(c) of the Mine Act on February 17, 1995. Following his termination from Mountain Top Trucking, Jackson applied for, but was denied, unemployment benefits. (Tr. 32-33).

Having failed to find employment after he was fired from Mountain Top Trucking, in July 1995, Jackson decided to enroll in the fall semester at Union College in Barbourville, Kentucky. (Tr. 64). Union College is approximately 70 miles away from Jackson's home in Evarts, Kentucky. Jackson registered for 12 credit hours by taking classes that were conducted on Tuesdays and Thursdays beginning on August 29, 1995. (Tr. 69; Resp. Ex. 1 at 14). Jackson's intention was to major in math or science with the ultimate goal of becoming a teacher on the high school or junior high school level. (Resp. Ex. 1 at 14). Jackson's $4,100 per semester college tuition was financed with a Stafford loan. (Tr. 225-26).

Shortly after enrolling for the fall semester at Union College, Jackson found a job with a former employer, Cumberland Mine Service. Jackson had previously worked for Cumberland Mine Service from October 1986 until August 1988 when he resigned his employment to enroll in college as a full time student at Southeast Community College (SECC). (Resp. Ex. 1 at 14). Jackson had received an Associate in Arts (A.A.) degree from SECC in December 1991. *Id.*

Jackson began full-time employment at Cumberland Mine Service on August 3, 1995, earning $8.00 per hour as a general laborer. (Jackson Ex. 1). Upon beginning Union College on August 29, 1995, Jackson adjusted his work hours at Cumberland Mine Service so that he did not have to work on Tuesdays and Thursdays. (Tr. 65, 69). In this regard, Jackson's employment records reflect that beginning on September 14, 1995, approximately two weeks after starting Union College, Jackson limited his employment at Cumberland Mine Service to three days per week. (Jackson Ex. 7). Specifically, the number of hours worked by Jackson were:

Aug. 3 - Aug. 9 - - 33.25 hours regular time;
Aug. 10 - Aug. 16 - - 40 hours regular time plus 28 hours overtime;
Aug. 17 - Aug. 23 - - 40 hours regular time plus 18 hours overtime;
Aug. 24 - Aug. 30 - - 40 hours regular time plus 2 hours overtime;
Aug. 31 - Sept. 6 - - 40 hours regular time plus 13.75 hours overtime;
Sept. 7 - Sept. 13 - - 40 hours regular time plus 8 hours overtime;
Sept. 14 - Sept. 20 - - 23 hours regular time;

Sept. 21 - Sept. 27 - - 24 hours regular time;
Sept. 28 - Oct. 4 - - 30.25 hours regular time

Id.

Jackson worked at Cumberland Mine Service until October 4, 1995, earning $3,342.60 during this period. (Tr. 183-84; Jackson Ex. 5). Jackson reported he was laid-off due to lack of work. Although there were lay-offs at the time Jackson stopped working on October 4, 1995, Nancy Garland, President of Cumberland Mine Service, testified she could not recall why Jackson's employment was terminated.[5] (Tr. 179-80). The respondents contend Jackson worked at Cumberland Mine Service for the sole purpose of establishing eligibility for unemployment insurance. However, the respondents' assertion is conjecture that is not supported by the record.

After Jackson's employment was terminated on October 4, 1995, Jackson applied for Virginia state unemployment benefits. (Tr. 32-33; Jackson Ex. 3). I take official notice that in order to qualify for full state unemployment benefits an applicant must certify that he is ready, willing and able to work, and actively looking for work on a daily basis. While issues concerning the adequacy of mitigation efforts by a complainant seeking to recover lost wages under a Federal anti-discrimination statute are different from issues concerning eligibility to unemployment benefits, resolution of both questions requires an analysis of the availability for work of the party seeking relief. In this regard, Jackson was required to complete a biweekly Claim for Benefits form certifying, under penalty of perjury, that he was "ready, willing and able to work each day." (Jackson Ex. 3).

On the initial Claim for Benefits form for the two week period October 1 through October 14, 1995, Jackson certified on October 19, 1995, that he was ready, willing and able to work each day - - "Accept (sic) Tuesday and Thursday — going to school." *Id.* at 1. In apparent recognition that such a disclosure could jeopardize his continuing eligibility to unemployment benefits, Jackson failed to reveal his college attendance at Union College or SECC on seven subsequent Claim for Benefit biweekly unemployment certifications during the period October 15, 1995, through January 20, 1996. *Id.* at 2-8.

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[5] An affidavit from Nancy Garland executed on July 21, 1999, states Jackson was laid off in October 1995 due to "a reduction in work force." (Jackson Ex. 7). Attached to the affidavit is a summary of Cumberland Mine Service's personnel records prepared for Garland's testimony that reflects Jackson's earnings as well as the dates and names of employees who had been laid-off in October 1995. (Tr. 186-87). Jackson's name was not among those laid-off in October 1995. Garland testified Cumberland Mine Service records do not reflect why Jackson was terminated in October 1995. Garland testified she "[did not] really recall" why Jackson was terminated, but she assumed it was "probably because [they] had run out of work or work had slowed down." (Tr. 179-80). Garland also testified that she did not recall that Jackson had reduced his work hours in September 1995, or that he was attending college. (Tr. 196-97).

The biweekly Claim for Benefit certifications also require an unemployment claimant to list his efforts to seek employment. During the period October 15, 1995, through January 20, 1996, Jackson listed one employer contact each Monday, Wednesday and Friday. *Id.* at 1-8. During this entire period, Jackson listed no efforts to find employment on Tuesdays and Thursdays. *Id.* The Claim for Benefit certifications also require an unemployment claimant to indicate whether a job application was completed at the employers where the claimant reportedly sought positions. Significantly, without exception, Jackson reported that he had not filed a job application at any of the businesses where he purportedly sought employment. *Id.*

In support of his assertion that he was diligently seeking employment despite his college attendance, Jackson has failed to provide any independent evidence of his job efforts such as testimony from prospective employers, letters documenting scheduled interviews or letters documenting the results of such interviews. The only evidence of Jackson's reported employment efforts is Jackson's unemployment benefit certifications reflecting that he contacted only one employer per day, three days each week. Such reports, given Jackson's admitted failure to file any applications for a position where there was a job opening, are indicative of self-serving reports to maintain unemployment eligibility rather than sincere efforts to secure employment. In the final analysis, once an operator raises legitimate issues concerning a complainant's availability for work, it is incumbent on the complainant to present more than lists of business names, addresses and telephone numbers that can be obtained from any telephone directory.

Finally, the Commission, in its remand decision, citing *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir. 1985), noted that "Jackson's status as a college student does not necessarily mean that he must be found to have failed to mitigate his damages during the time he was enrolled in college." 21 FMSHRC at 1214. Thus, the Commission directed me to consider the impact of Jackson's college attendance on his availability for employment.

A review of the case law concerning the effect of college attendance on back pay awards reveals ". . . that there is no *per se* rule that back pay is tolled during periods of enrollment in an education program. Rather, the issue is to be determined in the context of the factual matrix in a particular case." *Huegel v. Tish*, 683 F. Supp. 123, 125-26 E.D. Penn. 1988). Thus, this issue must be resolved on a case-by-case basis.

The *Brady* case cited by the Commission concerned the issue of the eligibility to back pay of Pendergrass, a complainant in a Title VII discrimination action, who was attending college during the day and working after school hours Monday through Friday from 2:00 p.m. until 9:00 p.m. In *Brady*, the court stated:

> We take notice that the vast majority of full-time college students could not also hold down a full-time job, and that in the usual case when one decides to attend college on a full-time basis, it does curtail his present earnings capacity and effectively removes him from the employment market.

753 F.2d at 1276, *citing Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir.). However, the *Brady* decision distinguished Pendergrass' situation from the usual college student by noting that ". . . Pendergrass remained in the job market which is shown conclusively by the fact that he did maintain a full-time job during all the time he was in college." *Id.*

In the present case, unlike Pendergrass, Jackson curtailed his work week from five days to three days effective September 14, 1995, two weeks after Jackson began attending college. Moreover, unlike Pendergrass, with the exception of several weeks, Jackson was not employed during the period of his college attendance.

The issue of whether full-time college attendance effectively removes a student from the labor market has been addressed by the Supreme Court. In *Idaho Department of Employment v. Smith*, 434 U.S. 100 (1977), the Supreme Court, applying the rational basis test, upheld an Idaho statute under the equal protection clause that precluded any person who attended school during the day from receiving unemployment benefits. The Court noted that:

> It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than night-time work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining full-time employment than does attending school at night . . . ."

434 U.S. at 101-02. Jackson's college attendance on Tuesdays and Thursdays severely restricted his opportunity to obtain full-time employment. Significantly, Jackson's self-serving assertion that he would have left college if he found full-time employment is belied by his reduction in work schedule to part-time employment at Cumberland Mine Service as of September 14, 1995.

While full-time college enrollment can evidence that an individual has removed himself from the labor market, courts have recognized circumstances where college attendance after a lengthy and diligent job search has become futile may be consistent with one's responsibility to mitigate damages. One such case, relied upon by Jackson, is *Dailey v. Societe General*, 108 F.3d 451 (2nd Cir. 1997). In *Daily*, the court was presented with a highly paid Title VII complainant who served in dual roles as a Vice-President of a financial institution and a Manager of a banking group. The court noted that Daily had enrolled in college only after she had exhausted her
efforts to find suitable employment in the banking industry by: (1) using her former employer's out-placement services; (2) contacting people in the industry to obtain job leads; (3) using the services of executive recruiters; and (4) interviewing for open positions. 108 F.3d at 455. Thus, the court concluded that Daily's decision to enter college in order to change careers, in view of her failure to find suitable employment in banking despite her diligent efforts, "was in accord with her duty to mitigate." *Id.*

Unlike *Daily*, Jackson does not have specialized skills or an employment specialty that limits him from obtaining equivalent employment. Jackson has not demonstrated that his

decision to enhance his education in order to become a teacher was dictated by a lack of job opportunities for general laborers. Moreover, unlike the *Daily* case where the complainant made diligent efforts to seek equivalent employment, Jackson has furnished only lists of businesses and telephone numbers that were provided to the unemployment office in furtherance of his unemployment claim. There is no evidence that Jackson applied to any businesses that were accepting applications for present or future open positions.

As noted, the record lacks independent evidence supporting Jackson's reported job efforts such as job applications or letters from prospective employers. Moreover, Jackson limited his employment opportunities effective September 14, 1995, by his willingness to work only three days per week. His work limitations are further reflected by his admission that he only looked for work three days per week. It is also noteworthy that, despite Jackson's asserted longstanding inability to obtain work as a general laborer, he was able to find employment at the Garland Company in December 1995 during a week between college semesters.

It bears repeating that, in this proceeding, Jackson is seeking back pay for lost wages earned at Mountain Top Trucking that are calculated based on a five day work week consisting of approximately 60 hours per week. However, upon beginning Union College, Jackson reduced his full-time schedule at Cumberland Mine Service to part-time. When viewed in context, there is no basis for concluding that Jackson's decision to remove himself from the labor market on Tuesdays and Thursdays by returning to college was in accord with his duty to mitigate his loss of wages as a general laborer.

Jackson's claim that he would have left college for a full-time job is self-serving. It is entitled to little weight for several reasons. First, Jackson would have to forfeit the $4,100 Stafford loan he had obtained to finance his Union College attendance. (225-26). Second, Jackson's purported continuing attachment to the full-time labor market is belied by his reduction to part-time work on September 14, 1995, shortly after he began college. Third, there is no evidence that Jackson applied for any open job positions while he was in college given his admitted failure to complete any job applications. Finally, and significantly, Jackson's failure to readily disclose his college attendance during this proceeding, as well as to Virginia State Unemployment officials, negatively impacts on his credibility.

As previously noted, the back pay period in this proceeding is February 18, 1995, through June 21, 1996. The record supports a finding that Jackson was available for full-time employment during the 30 week period from February 18, 1995, until September 13, 1995, the day before Jackson restricted his work week to three days. Jackson was unavailable for full-time employment during his college attendance from September 14, 1995, until May 11, 1996, when he finished attending SECC. Consequently, Jackson again became available for full-time employment during the seven week period from May 12, 1996, until the termination of the back pay period on June 21, 1996.

Thus, the relief to be awarded to Jackson is a total of 37 weeks back wages calculated at $520.00 per week, or $19,240, less earnings of $2,724.60 from employment at Cumberland Mine

Service from August 3 through September 13, 1995.[6] Accordingly, the net relief to be awarded to Jackson is $16,515.40 plus interest.

As a final note, the award of back pay is equitable relief. Jackson's continuing failure to forthrightly disclose his college attendance is troubling and could preclude his entitlement to any equitable remedy. However, Jackson's lack of full disclosure must be balanced against the respondents' discriminatory conduct that gave rise to this proceeding. Consequently, it is not without misgivings that I am awarding Jackson monetary damages in this matter.

ORDER

In view of the above, **IT IS ORDERED** that, consistent with the *Decision on Liability*, 19 FMSHRC 166 (January 1977), the respondents are jointly and severally liable for Payment of $16,515.40 plus interest calculated from February 18, 1995, to the date of payment, less applicable Federal, State and local tax deductions, if any, to Walter Jackson, constituting payment for a total of 37 weeks net lost wages from February 18, 1995, through September 13, 1995, and, from May 12, 1996, through June 21, 1996. **IT IS FURTHER ORDERED** that payment shall be made to Walter Jackson by the respondents within 45 days of the date of this decision.

Interest shall be calculated in accordance with the formula adopted in the Commission's decisions in *Secretary of Labor o/b/o Bailey v Arkansas-Carbona Company*, 5 FMSHRC 2042, 2049-52 (December 1983) as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988). Applicable interest rates and daily interest factors may be obtained on the Internet at: www.nlrb.gov/ommemo/ommemo.html.

Jerold Feldman
Administrative Law Judge

Distribution:

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[6] Jackson earned a total of $3,342.60 at Cumberland Mine Service. The $2,724.60 wages to be deducted from Jackson's back pay award do not include the $618.00 Jackson earned at Cumberland Mine Service from September 14 through October 4, 1995, during which time Jackson worked part-time for a total of 77¼ hours @ $8.00 per hour. The wages to be deducted also do not include the $415.00 Jackson earned at the Garland Company in December 1995 during the interim period between college semesters since Jackson is not eligible for back pay during this period.

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