FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 30, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LONNIE BOWLING, EVERETT DARRELL BALL, and WALTER JACKSON	:	
v.	:	Docket Nos. KENT 95-604-D
	:	KENT 95-605-D
MOUNTAIN TOP TRUCKING COMPANY, INC., ELMO MAYES, WILLIAM DAVID RILEY, ANTHONY CURTIS MAYES, and MAYES TRUCKING COMPANY, INC.	:	KENT 95-613-D

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks, Riley, and Beatty, Commissioners

These consolidated discrimination proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). The Secretary of Labor, as well as Lonnie Bowling, Everett Darrell Ball, and Walter Jackson (collectively the "drivers"), on whose behalf the Secretary filed complaints alleging violations of section 105(c) of the Act,[1] seek review of parts of Administrative Law Judge Jerold Feldman's Decision on

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[1] Section 105(c)(1) provides in part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by [the Act].

Liability, 19 FMSHRC 166, 188-97, 203-04 (Jan. 1997) (ALJ), and his Supplemental Decision and Final Order, 19 FMSHRC 875 (May 1997) (ALJ). For the reasons that follow we reverse the judge's determinations that Bowling and Ball were not constructively discharged and that Jackson failed to mitigate his damages from his discriminatory discharge.

I.

General Factual and Procedural Background

These proceedings are before the Commission as a result of discrimination complaints filed by the Secretary on behalf of the three drivers pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[2] 19 FMSHRC at 167. The complaints were filed against Mountain Top Trucking Company, Inc. ("Mountain Top"), Mayes Trucking Company, Inc. ("Mayes Trucking"), Elmo Mayes, Anthony Curtis Mayes ("Tony Mayes"), and William David Riley (collectively the "operators").[3] *Id*.

On July 12, 1993, Mountain Top contracted with Lone Mountain Processing, Inc. ("Lone Mountain"), to haul coal approximately 8 miles between Lone Mountain's Huff Creek underground mine in Harlan County, Kentucky, and its processing plant in Lee County, Virginia.

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30 U.S.C. § 815(c)(1).

[2] Section 105(c)(2) provides in part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief.

[3] In unappealed rulings, the judge reaffirmed his determination, made in the temporary reinstatement proceeding (*see* 17 FMSHRC 1695, 1708-09 (Oct. 1995) (ALJ)), that Mayes Trucking was liable as the successor to Mountain Top for remedying its discrimination, and further concluded that Elmo and Tony Mayes, but not Riley, should be treated as operators under the Mine Act and thus responsible parties personally liable for discriminating against the three drivers. *See* 19 FMSHRC at 197-203.

Id. at 170.[4] Mountain Top operated approximately 30 trucks to haul that coal, paying its drivers $13.00 per load of coal and $6.00 per hour for down periods when their assigned trucks were being repaired. *Id*. at 170, 172.

Lone Mountain permitted its contract with Mountain Top to expire on April 12, 1995. 17 FMSHRC at 1700. At that time, Mayes Trucking took over the contractual rights and obligations that Mountain Top had with Lone Mountain. *Id*. Mayes Trucking, whose President was Tony Mayes, continued to employ Mountain Top's drivers and its truck foreman, Riley. *Id*. Mayes Trucking also continued to operate the trucks that Mountain Top had used in hauling Lone Mountain coal. *Id*. Neither trucking company owned trucks, but instead leased them from E&T Trucking, a sole proprietorship owned and operated by Elmo Mayes, Tony's father. 19 FMSHRC at 170; 17 FMSHRC at 1700.

II.

Bowling and Ball

A. Factual and Procedural Background

1. The Initial Discrimination Against Bowling and Ball

Mountain Top hired Ball in July 1994 and Bowling the following month, and they routinely drove to work together. 19 FMSHRC at 173. In addition to driving, Bowling's and Ball's duties included general preshift inspections and minor maintenance of their assigned trucks. *Id*. Mountain Top's drivers usually arrived at its truck lot around 5:00 a.m., so that they could start their trips in the next half hour. *Id*. at 172, 173. Drivers would make round trips until the "cutoff" driver for that day was designated, which, in late 1994 and the beginning of 1995, usually occurred between 4:00 and 6:00 p.m. *Id*. at 171-72. The cutoff driver was required to make one last round trip, while all of the other drivers finished for the day once they had completed their current round trip. *Id*. at 171.

In late January and early February 1995, Lone Mountain's coal stockpile increased substantially, as it opened a new section of the Huff Creek mine. *Id*. at 172. At the same time, snow and icy conditions interfered with Mountain Top's normal haulage operations. *Id*. In response to Lone Mountain's pressure to increase haulage, Mountain Top required its drivers to work longer hours. *Id*. From early February 1995 until mid-to-late March 1995, it was not unusual for Mountain Top's drivers, including Bowling and Ball, to work 15 to 16 hours per day, 6 days per week. *Id*. at 172, 174.

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[4] The approximately 1 hour and 15 minute-round trip between the mine and plant consisted of travel over a Kentucky state road for approximately 2-1/2 miles and the remainder over a mountain via a steep, narrow, bumpy, winding gravel haul road owned by Lone Mountain. *Id*. at 170-71, 173.

Beginning in February 1995, Bowling and Ball periodically complained to Riley, Tony Mayes, and loader man Bill Lefevers about the long hours the drivers were working. *Id*. at 174. Many of the other drivers also complained about their extremely long workdays. *Id*. Riley responded to the complaints by promising that, when Lone Mountain's coal stockpile was reduced, the company would do what it could to cut back the hours, though warning that the cutoff time would still be between 5:00 and 6:00 p.m. *Id*.

Bowling and Ball called the Commonwealth of Kentucky's Transportation Cabinet, Division of Motor Vehicle Enforcement, to complain about their long working hours. *Id*.; Tr. I 282-85.[5] Both spoke with Major Michael Maffett, who told them of the federal and state laws that govern how many hours truck drivers could lawfully drive or be on-duty. 19 FMSHRC at 174.[6] In response to Ball's opinion that he would be terminated if he refused to drive the hours Mountaintop required, Maffett referred Bowling and Ball to the Occupational Safety and Health Administration in Atlanta, Georgia. *Id*. at 175. Maffett also recommended that they file a written complaint with the Federal Highway Administration office in Frankfort, Kentucky. *Id*. No one from Maffett's organization investigated Bowling and Ball's complaint. *Id*.

On March 7, 1995, Bowling and Ball decided to confront management about the excessive hours. *Id*. at 175. At approximately 5:30 p.m., after hearing over the CB radio that the cutoff driver would not be designated until 7:00 p.m., Ball pulled into the truck lot to talk to Riley. *Id*. Ball was followed by trucks driven by Bowling and Leonard McKnight. *Id*. Ball and Bowling told Riley they could not continue working such long hours because they were exhausted and thought it unsafe. *Id*. They also told Riley that they had been advised about a 10-hour workday rule. *Id*.

Ball testified that Riley was sympathetic until Elmo Mayes pulled into the truck lot. *Id*. When the three drivers expressed their concerns to Elmo Mayes regarding the long hours, he responded "the cutoff time tonight is 7:00 o'clock, you get your ass back out there and haul coal." *Id*. at 175-76. Ball testified that, in response to their statements that "DOT" had told them that they were not supposed to be hauling such long hours, Riley told the three that he "didn't give a shit what the DOT said" because the drivers worked for him, and if they couldn't work the required hours "they didn't need us and to get our ass to the house." *Id*. at 176. Bowling and Ball each turned in their time sheets, at which point, according to Ball, Elmo Mayes "hollered" to

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[5] References to the transcripts for the hearings in this matter are to Tr. I, Tr. II, and Tr. III, corresponding to the hearings held in June, July, and August 1996, respectively.

[6] For example, Maffett advised the two drivers of 49 C.F.R. Part 395, which contains the United States Department of Transportation regulations limiting the amount of driving time and on-duty time for truck drivers covered by the regulations. *Id*. at 174-75. Included in the regulations is a requirement that 10 hours of driving be followed by at least an 8-hour break. *See* 49 C.F.R. § 395.3(a)(1).

both "don't bring your ass back." *Id*. Although McKnight supported Bowling's and Ball's concerns, he decided to return to work to avoid losing his job. *Id*.

Bowling and Ball each filed discrimination complaints with the Department of Labor's Mine Safety and Health Administration ("MSHA") on March 9, 1995. *Id*. Included in the relief sought was backpay for all lost wages, reinstatement and assignment to the trucks they had driven previously, and regulated 10-hour workdays and required breaks and lunch periods for all employees. *Id*.; *see* Gov't Ex. 9.

2. The Constructive Discharge Claims

On March 22, 1995, following MSHA investigator Gary Harris' interviews with company personnel, Tony Mayes telephoned Harris. 19 FMSHRC at 176. Tony Mayes explained that Mountain Top was under a lot of pressure because of the coal that was accumulating at the Huff Creek mine, conceded that many of its employees had been complaining about the long hours, and expressed a willingness to work things out, saying that Bowling and Ball were good truck drivers. *Id*. Shortly after talking to Harris, Tony Mayes called the two drivers to offer them their jobs back. *Id*. at 176-77. Both agreed to return to work. *Id*. at 177.

a. Bowling's Return to Work

Bowling reported to work on Thursday, March 23, at approximately 5:00 a.m. *Id*. Riley did not follow the normal practice of assigning Bowling his truck immediately, but instead told him to wait to speak with Tony Mayes. *Id*.; Tr. I 425. When Tony Mayes arrived approximately 2-1/2 hours later, instead of assigning Bowling the truck he had been driving before his discharge, truck 144, he assigned him truck 139, an older, slower truck in worse condition. 19 FMSHRC at 177, 181; Tr. I 426. When Bowling asked Tony Mayes why he was not assigned his regular truck, Tony Mayes told him that he did not want to cause any conflict with the other drivers. 19 FMSHRC at 177.[7]

Bowling refused to drive truck 139, citing a missing license plate, a broken rear wheel stud, and concerns regarding its wipers and lights. *Id*. Bowling left the site around 8:00 a.m. *Id*. Before departing, according to Tony Mayes and Riley, Bowling informed them that he would not drive truck 139, and that he would wait on MSHA's investigative decision. *Id*. Bowling did not go to the truck lot on Friday, March 24. *Id*. at 178.

On Monday, March 27, Bowling telephoned Tony Mayes and received assurance that the job offer remained open. *Id*. Bowling reported to work at approximately 8:00 a.m. that day, but found that the broken wheel stud on truck 139 had not been repaired. *Id*. When Bowling

[7] Tony Mayes had asked Harris if he could assign Bowling and Ball to drive any truck, and was told that he could as long as the trucks were safe and preshift inspections performed. 19 FMSHRC at 193.

complained to mechanic William Bennett, he was told that while the other necessary repairs to truck 139 had been made, Bennett could not replace the wheel stud because the welder needed to remove it was not available. *Id*. Bennett also told him that Riley would need to approve the repair before it could be made. Tr. I 433-34. This surprised Bowling because it was a minor repair that would not take long to finish, which usually meant that no prior approval by management was necessary. Tr. I 434, 655, 661, Tr. II 581-82. Bowling told Bennett to have the truck fixed by 5:00 a.m. the next day, when he would be back to work. 19 FMSHRC at 179. He then went home approximately 1-1/2 hours after he arrived and was paid $9.00 for his down time. *Id*.

At approximately 5:00 a.m. on Tuesday, March 28, Bowling and Ball arrived at the truck lot together. *Id*. at 180. While Bowling was still assigned truck 139, it was out at the time, and he was not assigned one of the many other trucks in the lot. Tr. I 437-41. During the approximately 2-1/2 hours that Bowling waited for the truck to return, Tony Mayes told Bowling that the wheel stud on truck 139 had not been fixed. 19 FMSHRC at 180; Tr. 441. The wheel stud was not repaired because the diesel-powered welding machine required to remove the stud was not working, and alternative means of repairing the stud were not utilized. 19 FMSHRC at 180; Tr. I 670-71, 672, Tr. II 365, 418. Bowling stated he would not drive the truck in that condition, and left with Ball before the truck returned. 19 FMSHRC at 180.

Tony Mayes telephoned Bowling on the morning of Wednesday, March 29 about returning to work. *Id*. at 180, 192. During that phone conversation, Tony Mayes accused Bowling of "nitpicking shit about this wheel stud" and Bowling hung up on him. *Id*. at 180; Tr. I 446-47. Bowling did not return to work for the operators. 19 FMSHRC at 168.

b. Ball's Return to Work

Ball did not return to work until Monday, March 27. *Id*. at 179. When he arrived that morning at approximately 5:00 a.m., he was told by Tony Mayes that the truck he had previously driven, truck 147, which also was one of the newer and better trucks, was not available, and he was given a choice between trucks 139 and 134, both of which, because of their condition, were considered to be among the worst of the fleet and thus less desirable to drivers. *Id*.; Tr. I 121, 663-64. Ball chose 134, and told Tony Mayes he would preshift it and that he "would work a ten-hour shift and that was all I was going to work." 19 FMSHRC at 179. Tony Mayes told Ball he didn't want to hear about "any ten hour bullshit." *Id*.

Ball completed his last round trip on March 27 at 4:00 p.m., even though the cutoff driver was not designated that day until between 5:00 and 6:00 p.m. *Id*. At approximately 4:15 p.m., before leaving the truck lot, Ball told mechanic Lee Payne there was a loose U-joint that caused truck 134 to "wander real bad" whenever it hit a hole. *Id*. When Riley saw Ball leaving he asked him where he was going and was told that he was not going to drive for more than 10 hours, because that was what he had been told was the safe and legal limit. *Id*. at 191. Tony Mayes

testified that, upon learning of Ball's complaint about the U-joint, he and Riley checked and found nothing wrong with it. *Id*. at 180, 191.

When Ball arrived with Bowling the next day, he asked Riley if he was fired for having left the previous day at 4:00 p.m., and Riley responded that he never said that. *Id*. at 180. As with Bowling, Ball's assigned truck was out, but he also was not assigned another one, even though many were in the lot, including his former truck, 147. Tr. I 138-41. After waiting 2-1/2 hours for truck 134 to return to the lot, and learning that its U-joint had not been repaired, Ball said he would not drive truck 134 until the repair was made. 19 FMSHRC at 180; Tr. I 142-43. Ball was then assigned truck 147, but when he told Tony Mayes he would preshift it, Mayes called him a "cry-ass" who wanted to "preshift everything in the damn lot." 19 FMSHRC at 180. Tony Mayes also accused Ball of just wanting to find some "bullshit" because he "wasn't interested in working." *Id*. Ball told Tony Mayes he was not going to allow himself to be cursed at and he left with Bowling. *Id*.

During a March 29 telephone call, Ball told Tony Mayes "he felt like he was getting the run around." *Id*. Tony Mayes told Ball there were several trucks without drivers and asked Ball to come to work. *Id*. Ball told him that he could not return to work because of all the cursing and friction the previous 2 days. *Id*.

The complaints the Secretary filed on behalf of both Bowling and Ball alleged that each was "unlawfully discriminated against, discharged, and harassed during his temporary return to work by respondents for engaging in" protected activity on March 7, 1995. S. Am. Compls. at 2-3. While the judge determined that Bowling and Ball had been discriminatorily discharged on March 7 for engaging in protected work refusals, he concluded that their departure from the operators' employ after returning to work in late March 1995 did not qualify as a "constructive discharge," and thus was not a further adverse action for those work refusals. 19 FMSHRC at 187-97.[8] Both the Secretary and the drivers seek review of the judge's determination that the two drivers were not constructively discharged.

B. Disposition

The question presented on review with respect to Bowling and Ball is whether the judge correctly determined that the operators did not take further adverse action against the two drivers upon their return to work from their initial discharge by constructively discharging them, i.e.,

[8] Consequently, the judge reduced the Secretary's proposed penalties of $3,000 each for the discrimination against Bowling and Ball to $750 each, and limited the backpay relief period for the two drivers to the time from March 8 through March 22, 1995. 19 FMSHRC at 197; 19 FMSHRC at 883-84. The parties eventually agreed that Bowling and Ball would receive $1,500 each in backpay for that period. 19 FMSHRC at 877-78.

forcing them to quit their jobs.[9] The Mine Act, like other federal anti-discrimination provisions, has been interpreted to prohibit constructive discharge, in order to prevent employers from accomplishing indirectly what the law prohibits directly. *See, e.g., Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir. 1988); *see generally* I Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* 839 (3d ed. 1996). Under the Mine Act, "[a] constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994) (citing *Simpson*, 842 F.2d at 461-63).[10]

1. Whether Substantial Evidence Supports the Judge's Finding that Bowling and Ball Engaged in Protected Work Refusals on March 7, 1995

The first inquiry in a constructive discharge analysis is whether the miner was engaged in protected activity. *See Nantz*, 16 FMSHRC at 2210. In this case, the alleged protected activity took the form of work refusals. Consequently, we address, under the substantial evidence standard,[11] the operators' contention that the judge erred in concluding that the March 7, 1995, work refusals of Bowling and Ball were protected under the Mine Act.[12]

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[9] At oral argument, the operators contended that the Commission lacks jurisdiction over the trucking operations at issue here, because those operations do not cause Mountain Top to fall within the definition of "operator" contained in section 3(d) of the Mine Act, 30 U.S.C. § 802(d). Oral Arg. Tr. 47-48. We reject that contention, because Section 3(d) defines "operator" to include "any independent contractor performing services or construction" at a mine. This definition clearly includes a contractor providing trucking service between a mine and its processing plant. *See Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1357-59 (Sept. 1991) (trucking company transporting coal under contract with mine found to be operator under section 3(d)).

[10] Despite the dissent's reliance on "aggravating factors" (slip op. at 27-32), the Commission and courts have not always insisted on this concept when discussing constructive discharge in Mine Act cases. *See, e.g., Simpson*; *Nantz*. Instead, those cases uniformly apply the constructive discharge standard set forth above.

[11] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[12] The operators did not file a petition for discretionary review with respect to any part of the judge's decisions in these proceedings. However, because the question of whether Bowling

The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990). A miner refusing work is not required to prove that a hazard actually existed. *See Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810-12 (Apr. 1981). In order to be protected, a work refusal must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.* at 812; *see also Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.[13]

The judge found that Bowling's and Ball's March 7, 1995, complaints about being fatigued as a result of their excessive work hours, as communicated to the operators, were reasonable safety-related concerns to which the operators failed to adequately respond, thereby provoking the two drivers' work refusals that day. 19 FMSHRC at 185-86. The judge concluded that, while Bowling and Ball had failed to establish that a 4:00 to 6:00 p.m. cutoff time was unlawful or otherwise unreasonable, their work refusals on March 7 were protected under the Mine Act because of the long hours they had put in during the preceding weeks driving multi-ton haul vehicles over mountainous terrain on narrow and winding roads. *Id*. at 188.

The operators object that the judge should not have accepted Bowling's and Ball's claims of fatigue as a reason for their refusing to continue to drive on March 7 because Bowling stated at trial that he only considered driving 80 to 90 hours a week to be excessive (Tr. II 190), and Ball

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and Ball engaged in protected work refusals is a prerequisite to a determination of whether the two were constructively discharged, we denied the Secretary's motion to strike the operators' protected work refusal arguments. *See* Unpublished Order dated July 27, 1998, at 1.

[13] Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 998-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb. 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99. The operators do not contest the judge's finding that their response to Bowling's and Ball's March 7 safety concerns was insufficient.

stated that a cutoff time up to 8:00 p.m. was not unreasonable (Tr. I 119). Op. Br. at 11-12.[14] Because the record contains ample evidence to support the judge's decision to credit their claims of fatigue, we will not disturb that determination.[15]

The operators also contend the judge's conclusion that the Mine Act protected the 5:30 p.m. work refusals is inconsistent with his earlier findings that, even under normal working conditions, it was customary for the cutoff driver to be designated as late as 6:00 p.m., and that Bowling and Ball had accepted their positions under those conditions. Op. Br. at 11. However, such an analysis views the events of March 7, 1995, in a vacuum, which the judge properly refused to do. *See* 19 FMSHRC at 172 (Bowling's and Ball's complaints regarding hours must be viewed in context of their 15 to 16-hour workdays and 6-day work weeks leading up to March 7). Given that the drivers had been exceeding their normal hours for a number of weeks, it was not error for the judge to recognize that their fatigue on March 7 posed a safety hazard even prior to the normal cutoff time. Moreover, the record establishes that Bowling and Ball only acted after it was announced that the cutoff time would again be later than 6:00 p.m. *Id*. at 175.

The judge recited the hours the drivers had been working and the necessity for them to drive multi-ton haul vehicles over mountainous terrain on narrow and winding roads. *See* 19 FMSHRC at 187-88. Thus the judge adequately supported his finding that Bowling and Ball were fatigued and his conclusion that their fears were reasonable regarding fatigue posing a serious driving hazard. Also, the record reflects that snow and icy conditions interfered with haulage operations that winter, and the haul road was in worse shape than normal. *Id*. at 172, 173. Moreover, there was testimony not only from Bowling and Ball but many others regarding fatigue the drivers were suffering due to their long work hours. *See* Tr. I 82, 385-86, 408, 573-74, 606-08.[16] Accordingly, we affirm, as supported by substantial evidence, the judge's

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[14] The operators filed two briefs. We cite herein to the brief they filed in response to the Secretary's brief. The operators' other brief, filed in response to the drivers' brief, raises no new arguments and incorporates by reference the operators' brief in response to the Secretary.

[15] A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Here, the very record citations the operators offer in support of their argument actually buttress the judge's decision to credit the two drivers' claims of fatigue. With regard to Bowling's testimony, the 15 to 16-hour days and 6-day weeks the drivers were working (*see* 19 FMSHRC at 172, 174) resulted in a work week of at least the 90 hours Bowling found to be excessive. Ball's testimony on the issue was that he believed that working these "[f]ourteen (14), 15, 16 hour shifts, constantly[,]" would "get somebody killed," because "everybody was tired and half asleep on the job and wasn't paying attention to what they were doing." Tr. I 115-19.

[16] The operators argue that the judge erred in failing to consider that Mountain Top never had an accident resulting in an injury to a driver or other person. Op. Br. at 12. However, in

conclusion that the March 7, 1995, work refusals of Bowling and Ball were protected under the Mine Act.

2. Whether Bowling and Ball Were Constructively Discharged

In rejecting Bowling's and Ball's claims of constructive discharge, the judge concluded that the two drivers had failed to "demonstrate[] that they were forced to endure intolerable working conditions that forced them to refuse to return to work." 19 FMSHRC at 197. Questioning whether the two drivers "truly desired to return to their jobs" (*id*. at 192), he found that "their actions during the period March 22 through March 29, 1995, were provocative in nature and evidenced attempts to provoke their discharge for the apparent purpose of preserving their pending discrimination complaints." *Id*. at 197. The judge was especially critical of Bowling and Ball's "refusal to work 'a minute' more than ten hours per day[,]" finding such conduct "unreasonable" and that it "provided an independent and unprotected basis for their termination." *Id*. at 194, 197.

a. Whether Working Conditions Were Intolerable

While, as will be discussed below, much of the judge's analysis of the evidence improperly focused on the actions of Bowling and Ball upon their return to work, he did correctly state the proper test for constructive discharge, which is whether it was established that the conditions the two drivers faced upon their return to work were so intolerable that they were forced to quit their jobs. 19 FMSHRC at 189, 197; *see Nantz*, 16 FMSHRC at 2210; *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 777 (May 1989). The judge also made some findings in that regard. Specifically, the judge noted that Bowling and Ball had been assigned less desirable trucks than they had driven prior to their discharge, acknowledged but did not resolve the question of whether the newly assigned trucks had safety problems, and recognized that the drivers had been the subject of cursing and epithets when complaining about their working conditions. 19 FMSHRC at 193-94. The Secretary and the drivers claim that, in concluding the drivers failed to demonstrate that such conditions were not so intolerable so as to compel them to quit, the judge ignored or failed to appreciate the import of evidence showing how badly Bowling and Ball were treated upon their return to work. S. Br. at 17-22; Drivers Br. at 28-43.[17] The

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considering whether the drivers' fears were reasonable, the judge was obligated to view their perception of a safety hazard from their perspective at the time of their work refusals, and there is no requirement that a miner objectively prove that a hazard actually existed. *Gilbert*, 866 F.2d at 1439.

[17] The judge did not address the drivers' claim below that the record established that Bowling had not actually been reinstated to his job. *See* Drivers Post-Hearing Br. at 2, 38 n.79, 65. The issue not having been raised on appeal, for the purposes of review we do not consider the separate question of whether Bowling and Ball were not returned to work upon legally sufficient offers of reinstatement.

operators contend the record supports the judge's determination that the two drivers were not constructively discharged. Op. Br. at 12-13.

In conducting our review, we keep in mind that intolerable working conditions may be established by evidence of the "alteration of . . . working conditions or other forms of harassment." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980) (finding, on basis of employer harassment over course of 1 week, reasonable cause to believe that employee was constructively discharged due to union activity). In addition, in determining whether working conditions were so intolerable that a reasonable person would have felt compelled to resign, each incident or working condition should not be viewed discretely, but rather in the context of the cumulative effect it could have on the employee. *See Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1027-28 (5th Cir. 1992). Those incidents or conditions are viewed from the perspective of a reasonable employee alleging such conditions. *See, e.g., Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230-31 (3d Cir. 1988); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50 (6th Cir. 1985).

It is clear that the judge did not take the foregoing principles into account, and thereby failed to conduct a proper review of the evidence regarding Bowling and Ball's working conditions upon their return to work. The judge did not consider whether the operators' treatment of Bowling and Ball constituted harassment in retaliation for their earlier invocation of Mine Act rights. Moreover, when the judge examined the operators' conduct towards Bowling and Ball, he made findings regarding only some of those actions, and then only in isolation. The judge thus failed to consider the totality of the circumstances Bowling and Ball faced from their perspective as employees who had already been discriminated against by the operators, and had complaints pending with MSHA. Consequently, we find fatal flaws in the judge's conclusion that the working conditions imposed upon the two drivers were not intolerable.

Furthermore, we agree with the contentions of the Secretary and the drivers that the judge failed to properly consider that Bowling and Ball were treated differently upon their return to work, both in comparison to the operators' other drivers and in comparison to how the two were treated prior to engaging in their protected work refusals. *See* S. Br. at 18-21; Drivers Br. at 32-35. While the judge acknowledged that the assignment of trucks less desirable than the two drivers' former trucks could be an indication that the operators were discriminating against them because of their protected activity, he asserted that discrimination alone is not sufficient to show constructive discharge. 19 FMSHRC at 194. He stated that in such an instance, a driver can instead bring another discrimination complaint for the disparate treatment. *Id*. The judge erred in dismissing any evidence of disparate treatment as relevant to the question of constructive discharge. *See Watson v. Nationwide Insurance Co.*, 823 F.2d 360, 361-62 (9th Cir. 1987) (discriminatory acts over course of less than 1 month sufficient to establish intolerable conditions). Moreover, the discrimination Bowling and Ball suffered upon their return to work was not limited to being assigned trucks less desirable than they had driven prior to their March 7 protected work refusals.

While we could remand this case for a proper analysis of the evidence, we have found remand unnecessary where the record as whole admits only one conclusion on an issue. *See Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998), *affirming* 19 FMSHRC 48, 52-53 (Jan. 1997). Reviewing the record here, we see no reason for remand, as the operators' disparate treatment of Bowling and Ball, considered in its totality from the drivers' perspective, including the delay in assignment and repair of vehicles, their assignment to drive trucks in poor condition, and the scorn and verbal abuse to which the operators subjected the drivers, compels the conclusion that the drivers were subject to intolerable working conditions.

i. Delay in the Assignment and Repair of Vehicles

The judge's constructive discharge analysis does not reflect that, on returning from their previous discriminatory discharge, both Bowling and Ball were made to wait by the operators for a number of hours for their truck assignments. Bowling had to wait on March 23 for approximately 2-1/2 hours to receive his assignment to drive truck 139, and on March 28 both drivers had to wait 2-1/2 hours for their assigned trucks to return to the lot before they could begin hauling, even though there were at least 20 other trucks then in the lot. 19 FMSHRC at 177, 180; Tr. I 138-43, 437-41. As the Mountain Top drivers were not paid an hourly wage, but by the load each hauled, such treatment was clearly adverse to them. We agree with the Secretary and the drivers (S. Br. at 18; Drivers Br. at 36) that the operators' actions in making Bowling and Ball wait without pay before assigning them trucks contributed to the intolerability of their working conditions. Therefore the judge erred in failing to take those actions into account in his constructive discharge analysis.

Moreover, in addition to making Bowling wait without pay for over 2 hours on March 23 before being assigned a truck, even though other trucks were available, the operators eventually assigned him a truck with a broken wheel stud that was still not fixed as of March 28, despite his requests for a repair that would normally be completed in no more than an hour.[18] 19 FMSHRC at 177, 178, 179, 180; Tr. I 428-29, Tr. II 581-82. Because drivers were paid a flat rate of $6.00 per hour during such repairs, instead of the higher rate they earned while driving, there was a substantial economic cost to Bowling from such disparate treatment.[19]

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[18] Although the welder normally used to make such repairs was disabled during that time period, the operators' agents acknowledged there were other methods of repair that were not attempted. Tr. II 365, 417-18. Furthermore, during that time Mountain Top sent other trucks to a nearby welding shop when necessary. Tr. I 670-71, 672; Tr. II 418. Consequently, we reject the operators' claim that there is no evidence they treated Bowling differently from other drivers' with respect to requests for repairs. *See* Op. Br. at 13.

[19] The judge found that a Mountain Top driver putting in a 12-hour workday would normally make nine round-trips. 19 FMSHRC at 187. At the $13.00 per round trip being paid the driver, he would earn $117.00 for the day, or $9.75 per hour.

Ball likewise was assigned the older truck 134, and after driving it for one shift, requested repair of a loose U-joint on the truck's steering arm. 19 FMSHRC at 179, 191. When he returned the following morning, and waited 2-1/2 uncompensated hours before again being assigned truck 134, he learned that its U-joint had not been repaired. *Id*. at 180, 191; Tr. I 138, 143. The operators ultimately assigned Ball another truck after he declined to drive the unrepaired truck 134, thus implicitly acknowledging that the truck was not in safe operating condition. *See* 19 FMSHRC at 180, 191.

The judge erred by failing to take into account that, upon their return to work, both Bowling and Ball were prevented from driving, and thereby earning the same level of wages they had earned prior to their protected work refusals, due to delays in truck assignments and repairs to the trucks they were assigned. "[E]nforced idleness" has been found by itself to constitute intolerable working conditions, even at a rate of pay that is not reduced. *See Parrett v. City of Connersville*, 737 F.2d 690, 694 (7th Cir. 1984) (policeman given nothing to do). Here, the enforced idleness was at reduced pay, or no pay at all.

ii. Condition of Assigned Vehicles

In discussing the missing wheel stud on Bowling's truck 139, the judge acknowledged that being required to drive an unsafe truck is an intolerable working condition. 19 FMSHRC at 193. He nevertheless rejected Bowling's refusal to drive the truck as "pretextual in nature given [his] other provocative conduct and his refusal to work past 3:00 p.m." *Id*. The judge similarly dismissed Ball's complaint about the U-joint on his newly assigned truck 134. *See id.*

We agree with the Secretary's contention (S. Br. at 20-21) that the judge erred in failing to properly consider the condition of the vehicles which Bowling and Ball were assigned to drive upon their return to work. As will be discussed below, the judge's summary conclusions on the subject are not supported by substantial evidence. *See* slip op. at 16-17. Moreover, Bowling's and Ball's complaints about the condition of the trucks they were assigned were not minor. MSHA Inspector Adron Wilson testified that steering problems related to a faulty U-joint can result in the total loss of control of a truck, and that a broken wheel stud can cause a wheel to come off a truck. Tr. II 578-79.

iii. Scorn and Verbal Abuse by Management

The judge recognized that curses and epithets were directed by management towards Bowling and Ball upon their return, but concluded that the operators' behavior did not make working conditions intolerable under the circumstances, explaining that "[t]here is no evidence of any personal threats," and that "[p]assions run high in labor disputes and epithets and accusations, particularly by truck drivers, are not uncommon in such instances." 19 FMSHRC at 194 (citing *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970)). The Secretary contends that the verbal abuse and scorn management heaped on Bowling and Ball by itself supports a finding of constructive discharge. S. Br. at 19-20 & n.14.

We agree that this abusive language directed at an employee contributed to intolerable working conditions for Bowling and Ball, particularly when viewed in the context of their prior protected work activity under the Mine Act. In considering whether abusive language directed at an employee contributed to intolerable working conditions, courts have been persuaded by language considerably less harsh than that directed at the two drivers here. *See Wilson v. Monarch Paper* Co., 939 F.2d 1138, 1140 (5th Cir. 1991) (supervisor referring to employee as "old man"). The courts have also taken such language into account even though it was used on only one occasion. *See Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984). Here, there were several incidents of abusive language. In addition, courts have considered whether abusive language accompanied demotions to lesser responsibilities or efforts to prevent an employee from doing his or her job, took place in front of other employees, or was in retaliation for the filing of a discrimination complaint. *See Meeks v. Computer Associates Int'l*, 15 F.3d 1013, 1015 (11th Cir. 1994); *Aviles-Martinez v. Monroig*, 963 F.2d 2, 6 (1st Cir. 1992); *Wilson*, 939 F.2d at 1140-41; *Goss*, 747 F.2d at 888. All of those factors are present here, and therefore clearly contributed to the intolerable and coercive effect of the abusive language directed at Bowling and Ball.

We find *Crown Central*, relied on by the judge, inapposite. There, the court found the employer committed an unfair labor practice by disciplining two employees for the language they used and the accusations they made in a *grievance meeting* held pursuant to a collective bargaining agreement. 430 F.2d at 724-31. Here, it is undisputed that the operator's agents directed abusive language at two employees *while they attempted to do their jobs and asserted protective rights*. The judge found that the March 7 complaints by both drivers regarding the danger of working long hours were met with vituperative responses by Elmo Mayes. 19 FMSHRC at 176, 194. The judge also found that Tony Mayes and Riley responded similarly to Ball's statements regarding his working hours, the condition of truck 134's U-joint, and his desire to preshift truck 147. *Id*. at 179, 180, 194.[20] Such a pattern of abusive language in response to miners' exercise of their rights under the Mine Act evinces a contempt for the law and contributes to intolerable working conditions.

The foregoing establishes that, upon their return to work, Bowling and Ball were consistently confronted with pretextual situations orchestrated by the operators to prevent them from driving and thus earning the wages they otherwise would have earned. Having invoked the protection of the Mine Act, first when they engaged in protected work refusals on March 7, 1995, and then when they filed their first discrimination complaints with MSHA shortly thereafter, it was reasonable for the drivers to believe that this mistreatment was a strong indication that the operators would continue to make it impossible for them to work steadily and safely at their livelihood. We are aided in reaching this conclusion by the explicit statements of the operators

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[20] For example, Ball's statement to the operators that he would only drive truck 147 after he had performed the required preshift safety inspection was met with the response that Ball was "a 'cry-ass' who wanted to 'preshift everything in the damn lot.'" 19 FMSHRC at 180 (quoting Tr. I 146).

themselves who colorfully and often profanely reiterated their complete disrespect for statutorily protected safety complaints.

b. Whether the Judge Applied the Proper Test

We also agree with the Secretary's assertion that the judge's constructive discharge analysis is fundamentally flawed because his primary focus was on the actions of Bowling and Ball, rather than on the operators' actions. *See* S. Br. at 17-18. While, as pointed out, the judge correctly stated the proper test for constructive discharge and discussed some of the evidence pertaining to the allegedly intolerable conditions, he devoted the overwhelming majority of his analysis to examining the drivers' actions upon returning to work. *See* 19 FMSHRC at 189-94.

Such an inquiry strays far from the proper focus in a constructive discharge case under the Mine Act, which is on working conditions. Because it is the employer who is ultimately responsible for working conditions, it is the employer's actions that must be closely examined. *See generally Employment Discrimination* at 839-41.[21] Thus, to the extent that the judge ignored how Bowling and Ball were treated by the operators upon their return to work, we reject his analysis as incorrect.

The judge's analysis is further undercut by a number of other errors he made in concluding that the drivers were attempting to provoke another discharge upon their return to work. For instance, because Ball had driven the truck the previous day and only stopped after driving for what he thought to be the legal maximum of 10 hours, the judge rejected as "self-serving and uncorroborated" Ball's refusal on March 28 to drive truck 134 on the ground that it had a loose U-joint. 19 FMSHRC at 192. However, there is record evidence that Ball complained about the U-joint before leaving on March 27, another driver complained about how the truck was handling on the morning of March 28, and the operators consequently agreed to assign Ball to a different truck. *See* 19 FMSHRC at 180, 191; Tr. I 134,137, 138-45. Substantial evidence, therefore, does not support the judge on this point.

The judge similarly erred in considering Ball's desire to conduct a preshift inspection of that alternate truck, 147, "as provocative and calculated to antagonize." 19 FMSHRC at 193. The judge did so even while recognizing that "preshifts are required." *Id*. We fail to see, and the

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[21] *See, e.g., Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150, 152-53 (10th Cir. 1991) (court agreed that welder with diagnosed respiratory condition was justified in quitting inadequately ventilated mine where operator demonstrated no intention of improving ventilation); *Simpson*, 842 F.2d at 463 (miner justified in quitting rather than continuing to work in mine in which operator was responsible for multiple "blatant" safety violations that had repeatedly and continually occurred); *Nantz*, 16 FMSHRC at 2210-13 (bulldozer operator's decision to quit justified in light of operator's failure to protect him from dust which caused breathing and visibility problems).

judge does not explain, why Ball's desire to preshift the truck should be held against him. Preshifting was not only Ball's right, but his duty.

The judge also erred in his analysis of Bowling's actions. Most notably, the judge concluded that Bowling's refusal to drive truck 139 with a broken wheel stud could not qualify as protected activity because it was not made in good faith. *Id*. The judge based his finding of a lack of good faith on, among other things,[22] "Bowling's . . . refusal to work past 3:00 p.m." *Id*. However, as previously mentioned, Bowling made no such refusal.

c. Conclusion

We think this record leads to only one conclusion — that, considered cumulatively, the conditions Bowling and Ball encountered upon their return to work were so intolerable that it was reasonable for them to cease attempting to convince the operators of the seriousness of their safety complaints, and terminate whatever employment relationship remained. *See Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 265-66 (D.C. Cir. 1993) (constructive discharge established where employer took actions resulting in reduction of employee's pay, engaged in disparate disciplinary action, and threatened employee). When "an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge." *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997). In light of the foregoing, we reverse the judge's determination that Bowling and Ball failed to prove that they were constructively discharged as of March 28, 1995, and remand the case for a determination of the proper remedies and penalties in light of our ruling.[23]

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[22] The judge also appears to discredit Bowling's initial complaints regarding the condition of truck 139 because those complaints were based not on the driver's inspection of the truck upon its assignment to him, but on his previous experience with it. *See* 19 FMSHRC at 177. However, it is undisputed that Bowling was correct in his claim that truck 139 had a broken wheel stud.

[23] Our dissenting colleague disputes our finding of a constructive discharge by suggesting that Bowling and Ball were not exposed to adverse working conditions following their rehiring for a sufficient period of time to support such a finding, and that they did not make an adequate effort to remain on the job and thereby mitigate their damages. *See* slip op. at 28, 29, 30, 31-32. We respectfully disagree. We do not believe that any miner could be reasonably expected to endure the extremely intolerable working conditions to which Bowling and Ball were exposed, or the high degree of hostility that management officials demonstrated to them and their protected activities, for a period of months or years. Rather, in our view, the record compels the conclusion that the operators convincingly demonstrated to these miners in just a few short days that they were unwanted and would continue to experience highly intolerable working conditions until they voluntarily terminated their reestablished employment relationship. Even our dissenting colleague acknowledges that the case law will support a finding of constructive discharge where, considered cumulatively, "the conditions alleged to be intolerable existed over

III.

Walter Jackson

A. Factual and Procedural Background

Jackson, who had no prior experience as a truck driver, was hired by Mountain Top approximately 9 months prior to his discharge on February 17, 1995. 19 FMSHRC at 181. That night, after dumping his tenth load of coal for the day, he pulled into Mountain Top's truck lot for a prearranged meeting with Riley so they could inspect the truck he was driving that day, 139. *Id*. at 181-82. Jackson had reported experiencing problems with the truck's transmission, blue smoke emissions, and a lack of oil pressure during his previous return trip from the mine. *Id*. As soon as Riley began inspecting the truck, Elmo Mayes, who had overheard the CB conversations between Riley and Jackson but had nonetheless told the scaleman to designate Jackson as the cut-off driver, arrived in the lot and ordered Riley to get Jackson back out on the road to get the last load. *Id*. at 171, 182-83. When Jackson told Elmo Mayes he would return for the last load as soon as it was determined that it was safe to do so in his truck, Elmo Mayes objected to any further delay and told Jackson he was fired if he did not get the load. *Id*. at 183. The next month, Jackson filed a discrimination complaint with MSHA, alleging that he was fired for refusing to operate an unsafe truck after having operated the truck for 16 hours that day. *Id*.; *see* Gov't Ex. 34. As relief, he requested reinstatement with backpay and regulated working hours, breaks, and lunch breaks. *Id*.

The Secretary filed an application for temporary reinstatement on Jackson's behalf that was consolidated with similar applications filed on behalf of Bowling and another of the operators' drivers, whose discrimination complaint was later withdrawn.[24] 19 FMSHRC at 168; 19 FMSHRC 661, 662 (Mar. 1997) (ALJ). At the outset of the first day of hearings on the applications, the Secretary moved to withdraw Jackson's application at his request because he had obtained full-time employment with Cumberland Mine Service ("Cumberland") as of August 1, 1995. 19 FMSHRC at 878. Consequently, while the two other applications were granted by

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an extended period of time *or* there were indications that they had become permanent employment conditions." Slip op. at 31 (citations omitted) (emphasis added). We conclude the record unequivocally demonstrates that the latter situation was clearly present here.

[24] Under section 105(c)(2), upon investigating a miner's complaint of discriminatory discharge, and finding that complaint has not been "frivolously brought," the Secretary must apply to the Commission for an order temporarily reinstating the miner to his position, pending a final order on the discrimination complaint, if the miner desires temporary reinstatement. 30 U.S.C. § 815(c)(2). The Commission is required to grant the application if it finds the statutory standard has been met. *Id*.; *see generally Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

the judge, Jackson's was dismissed without prejudice to his discrimination complaint. 17 FMSHRC at 1709-10.

Jackson was employed at Cumberland until October 10, 1995, when he was laid-off. 19 FMSHRC at 878. The only subsequent time Jackson was employed between that layoff and June 21, 1996, when Mayes Trucking allegedly stopped hauling coal for Lone Mountain, was 2 weeks in January 1996. *Id*. at 878-79. The Secretary was unable to specify when she first learned of Jackson's layoff from Cumberland, and Jackson never requested that his application for temporary reinstatement be reopened. *Id*. at 879.

The judge found that Jackson was discriminatorily discharged. 19 FMSHRC at 185-86. In order to determine the proper period for relief, the judge requested information on whether Jackson, after being laid off from Cumberland, had ever inquired of the Secretary regarding refiling or reopening his temporary reinstatement application. 19 FMSHRC at 664. The judge also asked for the parties' views on whether Jackson's failure to make such an inquiry should be considered in determining whether he had made reasonable efforts to mitigate his damages. *Id*.

In his decision on relief, the judge found it reasonable that Jackson withdrew his temporary reinstatement application upon finding a permanent position, and that Jackson continued to seek full-time employment for a period of time after being laid off from that job. 19 FMSHRC at 882. However, he concluded that "there comes a point in time when one who has been unsuccessful at securing other employment, and who is seeking reinstatement relief in this proceeding, is obliged to make efforts to reopen his temporary reinstatement application." *Id*. Distinguishing the Commission's decision in *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982), the judge found that it was unreasonable for Jackson to remain unemployed for months without making at least an inquiry of the Secretary regarding reopening of the temporary reinstatement case, especially given that the two other drivers whose applications had been consolidated with his had been successful in obtaining temporary reinstatement orders. *Id*. at 879-82. Consequently, the judge limited the backpay period to the 60 days subsequent to Jackson's layoff from Cumberland. *Id*. at 882-83. On review, the Secretary and the drivers challenge the judge's decision on the mitigation issue.

B. Disposition

The Secretary argues that, contrary to the judge's conclusion, a miner has no affirmative duty to seek temporary reinstatement as a means of mitigating damages, especially when he is otherwise actively seeking alternative employment. S. Br. at 24-28. The Secretary also suggests that it was not unreasonable for Jackson, a non-lawyer, to believe that, by withdrawing his application, he had permanently terminated his right to temporary reinstatement. S. Br. at 28-29. The operators argue that once Jackson withdrew his temporary reinstatement application on August 23, 1995, he forfeited the right to further backpay, so the judge erred in including in the relief order backpay for any time after that point. Op. Br. at 14-15.

The Commission applies an abuse of discretion standard in reviewing a judge's remedial orders. *See Secretary of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Id*. at 1258 n.3 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998) (per curiam) (unpublished table decision).

Under Section 105(c), the Commission is authorized to "require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2). Accordingly, the Commission endeavors to make miners whole and to return them to their status before the illegal discrimination occurred. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (Dec. 1983). "Our concern and duty is to restore discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Dunmire*, 4 FMSHRC at 143. "'Unless compelling reasons point to the contrary, the full measure of relief should be granted to'" a discriminatee. *Bailey*, 5 FMSHRC at 2049 (quoting *Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982)).

Dunmire recognized the failure of a discriminatee to mitigate his damages as one such compelling reason that could warrant less than complete relief. *See* 4 FMSHRC at 144 (while "back pay is ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings[,]" a discriminatee's award of "back pay may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings'") (quoting *Oil, Chemical & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977)). In *Dunmire* the operator alleged that a discriminatee who had not sought temporary reinstatement had failed to mitigate his damages to the extent that he could have earned more upon reinstatement than he did from the alternative employment he had obtained. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 3 FMSHRC 1331, 1344 (May 1981) (ALJ). In concluding that the discriminatee had made the required reasonable efforts to mitigate his loss of income, the Commission expressly stated that the Mine Act does not "*require*[]" the discriminatee "to seek temporary reinstatement[.]" *Dunmire*, 4 FMSHRC at 144 (emphasis in original).

In this case, the only record evidence upon which a finding of a failure to mitigate by Jackson could rest is his failure to seek reopening of his reinstatement application.[25] Given that

[25] The operators attached to their briefs three pieces of evidence not submitted below. The evidence relates to their arguments that Jackson was not discriminated against for engaging in a protected work refusal, and, that by withdrawing his temporary reinstatement application on August 23, 1995, he forfeited any right to backpay beyond that point. Op. Br. at 13-16 & Addendums 1-2. However, because these contentions were not raised by the operators in a PDR,

there is no evidence that Jackson even knew that he had a right to ask the Secretary to refile his application for temporary reinstatement, and because the burden of proving a failure to mitigate is on the operator (*Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985)), the only conclusion that the record can support is that the operator did not show a failure to mitigate on the part of Jackson.[26] Accordingly, remand is limited to a recalculation of backpay and interest owed Jackson consistent with our conclusion that it was not shown that Jackson failed to mitigate his damages.

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were not ordered by the Commission sua sponte for review, and attack the judge's orders granting Jackson's discrimination complaint and establishing a backpay period for him running until December 9, 1995, they are not properly before the Commission. *See* 30 U.S.C. § 823(d)(2)(A)(iii), (B); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990) (respondent may not attack judgment or seek to enlarge its rights thereunder without filing cross-petition for discretionary review). In addition, because they were not part of the record before the judge, the documents the operators attached to their brief cannot properly be considered by the Commission on review. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1544-45 (Sept. 1996). Consequently, we granted the Secretary's motion to strike those documents and all references thereto in the operators' briefs. *See* Unpublished Order dated July 27, 1998, at 1-2.

[26] We take no position on whether a miner's failure to seek temporary reinstatement can ever be taken into account in determining whether that miner made reasonable efforts to mitigate damages.

V.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that Bowling and Ball were not constructively discharged and that Jackson failed to mitigate his damages. The proceeding is remanded for a determination of the proper relief to be awarded for the constructive discharge of Bowling and Ball, a reassessment of the penalty against the operators for their violations of section 105(c) with respect to Bowling and Ball, and a recalculation of the backpay and interest owed Jackson.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting in part and concurring in part:

As explained below, I concur in result with Part III.B of the majority decision, and dissent from Part II.B of their decision.

A. Jackson's Duty To Mitigate Damages

I agree with my colleagues that the judge improperly reduced Jackson's award of backpay based on Jackson's failure to seek temporary reinstatement while unemployed. I write separately, however, because I reach this conclusion on different grounds.

First, I believe that the procedural facts relating to Jackson's claim raise concerns with the Secretary's role as Jackson's counsel.[1] Jackson was fired by Mountain Top on February 17, 1995. 19 FMSHRC at 181. In the ensuing months, the Secretary filed a discrimination complaint on Jackson's behalf, and applied for his temporary reinstatement. *Id*. at 167; 17 FMSHRC at 1696. On August 1, 1995, Jackson obtained a job with Cumberland Mine Service. 19 FMSHRC at 882. The Secretary moved to withdraw Jackson's application for temporary reinstatement at a hearing held on August 23-24, 1995 (17 FMSHRC at 1696), a motion the judge granted in a decision released on October 5, 1995 (*id*. at 1695, 1710). On October 10, 1995, five days after the judge issued his decision, Cumberland Mine Service laid off Jackson. 19 FMSHRC at 882. Jackson's complaint went to a hearing during the summer of 1996. 19 FMSHRC at 168. On January 23, 1997, the judge issued a decision finding that Mountain Top discriminated against Jackson and ordering the parties to propose appropriate relief. *Id*. at 204-05.

On March 6, 1997, Jackson submitted a statement of the relief he sought, and also stated, among other things, that Cumberland Mine Service laid him off in October 1995. 19 FMSHRC 661, 662 (Mar. 1997). In response to Jackson's submission, the judge directed the parties to address the issue of whether Jackson was under any obligation after being laid off to mitigate his damages by seeking to reopen his temporary reinstatement application. *Id*. at 664. In her response to the judge's order, the Secretary was unable to state when she discovered that Jackson had been laid off. 19 FMSHRC at 879. In his final decision, the judge held:

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[1] Section 105(c)(2) of the Mine Act in effect designates the Secretary as statutory counsel for any miner who complains of discrimination and whose complaint is found to be meritorious by the Secretary. 30 U.S.C. § 815(c)(2). Although such a miner has the statutory right to "present additional evidence on his own behalf," *id*., has a right to private counsel, *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 18 FMSHRC 487, 488 (Apr. 1996), and is accorded party status, 29 C.F.R. § 2700.4(a), he or she has no independent cause of action under section 105(c)(2). The Secretary has the *exclusive* right to proceed before the Commission on behalf of a complainant under section 105(c)(2), including the filing of any application for temporary reinstatement.

> While . . . it may have been reasonable for Jackson to pursue permanent employment for a reasonable period of time after his October 10, 1995, lay-off, there comes a point in time when one who has been unsuccessful at securing other employment, and who is seeking reinstatement relief in this proceeding, is obliged to make efforts to reopen his temporary reinstatement application. . . . [W]ithout so much as an inquiry with the Secretary about the possibility of reopening his temporary reinstatement case . . . does not persuade me that Jackson has demonstrated reasonable efforts to mitigate his loss of earnings.

Id. at 882. The judge then held that the "point in time" when Jackson was obligated to "make efforts to reopen his temporary reinstatement application" was 60 days after being laid off. *Id*. at 883.

I find several aspects of the judge's holding erroneous. But more importantly, as a threshold matter, I find disturbing the fact that, in the course of an ongoing discrimination proceeding, the Secretary failed to keep abreast of Jackson's employment status. She was, after all, Jackson's statutory counsel, and was presumably preparing for a hearing on this matter during the spring of 1996. I fail to comprehend how such trial preparations could adequately be made without the Secretary preparing an appropriate prayer for relief on which to present evidence at trial. The outcome in this case can only lead me to conclude that no such preparations took place and that the Secretary was apparently less than zealous in representing Jackson's interests. I also find troubling the fact that, when the Secretary moved to withdraw Jackson's temporary reinstatement application, she apparently failed to inform him that she could reopen his application if his job at Cumberland Mine Services failed to work out.

As to the judge's decision, I disagree that *Jackson* was "obliged to make efforts to reopen his temporary reinstatement application." *Id*. at 882. Clearly, only the *Secretary* could have made any such efforts. 30 U.S.C. § 815(c)(2). Moreover, I do not believe that, in the absence of any evidence that the Secretary informed Jackson of the possibility of reopening his application, that the judge should have retroactively placed the burden upon Jackson to have made "an inquiry with the Secretary about the possibility of reopening his [application]." 19 FMSHRC at 882.

I also find the judge erred as a matter of law in applying Commission precedent on mitigation of damages. The Commission has held that to properly mitigate damages, a discriminatee "must reasonably search for a suitable alternative job." *Metric Constructors*, 6 FMSHRC at 232. Under this objective standard, all the particular facts and circumstances of a case must be weighed against what would constitute a reasonable effort upon the part of the discriminatee to find employment. The judge, however, in effect based his ruling simply on the fact that Jackson neglected to ask the Secretary to reopen his temporary reinstatement application, it being the single circumstance on which the judge based his conclusion that

Jackson failed to make "reasonable efforts to mitigate his loss of earnings." 19 FMSHRC at 882. As a matter of law, the judge's inquiry was inadequate to determine whether Jackson "reasonably search[ed] for a suitable alternative job." 6 FMSHRC at 232. I also find that the judge's conclusion is not supported by substantial evidence since the record is largely silent on this point.[2]

I agree with the majority that "the burden of proving a failure to mitigate is on the operator . . . ." Slip op. at 21 (citing *Metric Constructors*, 6 FMSHRC at 233). Here, I have reviewed the record and determined that Mountain Top simply failed to adduce any evidence whatsoever that Jackson failed to "reasonably search for a suitable alternative job," 6 FMSHRC at 232, and that it was the *Secretary* who offered evidence into the record that Jackson had been laid off and did not ask for his temporary reinstatement application to be reopened, 19 FMSHRC at 879. Insofar as Mountain Top could be said to have raised this defense,[3] I find as a matter of law that they failed to carry their burden to establish such a defense. I therefore join with my colleagues in reversing the judge's calculation of Jackson's damages and remanding for a recalculation of his damages "consistent with [the] conclusion that it was not shown that Jackson failed to mitigate his damages." Slip op. at 21.

B. The Constructive Discharge Claims of Bowling and Ball

I disagree with my colleagues' holding that Bowling and Ball were constructively discharged. The majority correctly recognizes that, "[u]nder the Mine Act, '[a] constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign.'" Slip op. at 8 (quoting *Nantz*, 16 FMSHRC at 2210). What the majority fails to acknowledge is that when this standard of proof was established, in *Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988), the court, by then Judge Ruth Bader Ginsburg, was careful to state that "the requirement that conditions be 'intolerable' to support a constructive discharge will not easily be met. Minor or technical violations of the Mine Act, or those that do not endanger health and safety, ordinarily will not support a finding of constructive discharge." *Id*. at 463. Just as importantly, the court also explained that "[w]hether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact." *Id.*[4]

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[2] Incidentally, I find that the judge's imposition of a 60-day period beyond which Jackson was purportedly under an obligation to ask the Secretary to reopen his temporary reinstatement application (19 FMSHRC at 883) has no basis in law or the record of this case.

[3] In fact, it was the *judge* who raised the issue of mitigation sua sponte in his Order Requesting Comments on the Calculation Period for Damages. *See* 19 FMSHRC at 663-64.

[4] While the majority reviews the record primarily in light of non-Mine Act case law (*see* slip op. at 11-15, 17), the court in *Simpson* stated that the test it was establishing under the Mine Act for constructive discharge was "[t]he same test [that] is employed in adjudicating

Despite these clear pronouncements that the burden of proving constructive discharge under the Mine Act is not easy to meet, and that the question of the intolerability of working conditions is for the Commission administrative law judge hearing the case to resolve in the first instance, the majority reverses the judge's factual finding that Bowling and Ball failed to prove that their working conditions were intolerable. I cannot agree with the majority's decision. It is clear from the judge's decision that he applied the proper standard for constructive discharge.[5] As will be discussed in further detail below, it is also clear that he adequately considered the relevant evidence on the two drivers' working conditions upon their return to work. The judge noted that the two drivers had been assigned less desirable trucks than they had driven prior to their discharge, that those trucks had safety problems, and that the drivers had been the subject of cursing and epithets when complaining about their working conditions. 19 FMSHRC at 193-94. Nevertheless, he concluded that the drivers had not demonstrated that the conditions they faced were so intolerable so as compel them to quit. *Id*. at 197.

I believe that substantial evidence supports the judge's conclusion that Bowling and Ball did not prove that they faced intolerable working conditions. *See* 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994). Under the substantial evidence test, the Commission is not only limited to searching for, as the majority recognizes, "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion" (slip op. at 8 n.11), but it also may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *see also Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997), *cert. denied*, 142 L. Ed. 2d 541 (1998). As will be demonstrated

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constructive discharge claims under other statutes that protect employees exercising statutory rights from adverse job action." 842 F.2d at 461-62. A review of the case law under such other statutes confirms the court's statement. *See, e.g., Chrystal Princeton Refining Co.*, 222 NLRB 1068, 1069, 91 LRRM 1302, 1303 (1976) (to establish constructive discharge under National Labor Relations Act, employee must prove that burden imposed upon him by change in working conditions is so difficult or unpleasant as to force him to resign).

[5] While it is true that the judge engaged in a lengthy analysis of the actions of the two drivers upon their return to work, that analysis was in addition to, and not in the place of, application of the proper test for constructive discharge. As the majority recognizes (slip op. at 11), before analyzing the evidence, the judge correctly stated that "Bowling and Ball have the burden of establishing that they were forced to endure the requisite intolerable working conditions that forced them to quit their jobs on March 29, 1995." *See* 19 FMSHRC at 189. After discussing the evidence, including that on the allegedly intolerable conditions (*see id*. at 193-94), the judge concluded that "Bowling and Ball have not demonstrated that they were forced to endure intolerable working conditions that forced them to refuse to return to work." *Id*. at 197. Consequently, I cannot agree with the majority that the judge's discussion of Bowling and Ball's actions prevents a finding that the judge applied the proper test for constructive discharge. *See* slip op. at 16-17.

below, in this case the majority ignores the foregoing precedent and draws its own conclusions from the evidence on a question of fact reserved to the judge and on which his determination is amply supported by the record and thus reasonable.

1. Discriminatory Treatment

The majority asserts that the judge "erred in dismissing any evidence of disparate treatment [of Bowling and Ball] as relevant to the question of constructive discharge. Slip op. at 12. The judge, however, did not dismiss the evidence that Bowling and Ball were discriminated against upon their return to work. The judge correctly recognized that the assignment of trucks less desirable than the drivers' former trucks could be an indication that the operators were discriminating against them because of their protected activity. *See* 19 FMSHRC at 194. The judge concluded, however, that discrimination alone is not sufficient to establish the intolerable conditions necessary to prove constructive discharge. *Id*.[6]

The judge's conclusion has a solid legal foundation. In *Clark v. Marsh*, the District of Columbia Circuit held that discrimination by itself is generally insufficient to establish the requisite intolerable conditions, but instead must be accompanied by "aggravating factors." 665 F.2d 1168, 1173-76 (D.C. Cir. 1981). Most of the courts that apply the intolerability standard are in agreement with the approach followed in *Clark*. *See Employment Discrimination* at 842.[7] *See also Ramsey v. Industrial Constructors Corp.*, 12 FMSHRC 1587, 1593 (Aug. 1990) ("The cases cited by the [District of Columbia Circuit] in *Simpson* [842 F.2d at 461-63] agree that a finding of constructive discharge must demonstrate 'aggravating factors such as a continuous pattern of discriminatory treatment.'").

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[6] The judge stated that in such an instance, the drivers can instead bring a discrimination complaint for the disparate treatment. 19 FMSHRC at 194. Actually, all the drivers needed to do was amend their complaints that were pending with MSHA. However, despite the focus by the Secretary and the drivers on the discrimination Bowling and Ball suffered upon their return to work, there is no indication in the record that there was an alternative claim made that, even if they were not constructively discharged, the drivers were at least entitled to back pay relief for that discrimination, such as for the waiting time for which they were not paid or, in Bowling's case, the repair time for which he received reduced pay. In essence, the Secretary and drivers adopted the risky litigation strategy of putting all of their eggs in one basket.

[7] Nevertheless, the majority's analysis does not mention the concept of "aggravating factors." Instead, my colleagues state that "the Commission and Courts have not always insisted on this concept [of aggravating factors] when discussing constructive discharge." Slip op. at 8 n.10. What my colleagues mean by this statement is unclear, other than to suggest that they reject the *Clark* court's holding that discrimination alone is generally insufficient to justify a discriminatee from walking off a job and establish a constructive discharge. *See* 665 F.2d at 1173-76.

In *Clark*, aggravating factors were found in the "historic" and "continuous pattern of discrimination" the plaintiff faced, as well as her "repeated but futile attempts to obtain relief from that discrimination" that took place over the course of 5 years. *Clark*, 665 F.2d at 1170, 1174, 1175. Other courts have also "upheld factual findings of constructive discharge when the plaintiff was subjected to incidents of differential treatment over a period of months or years." *Watson v. Nationwide Insurance Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (citing cases).

Even though the discrimination suffered by Bowling and Ball took place over a far shorter period of time, the majority finds it persuasive. *See s*lip op. at 12. After his discriminatory discharge on March 7, Ball returned to work later that month for little more than one day before leaving and never returning. While Bowling appeared for work on three separate days, he never did so for more than a few hours, even though he would have been paid $6.00 per hour until his assigned truck was repaired. Under such circumstances, and given the case law, I cannot agree that the judge erred in concluding that the discrimination suffered by Bowling and Ball was insufficient, by itself, to establish that the working conditions they faced upon their return were intolerable.[8]

Because the discrimination against the two drivers was insufficient by itself to establish intolerable conditions, it was thus necessary for the judge to examine how the two were otherwise treated.

2. Other Aggravating Factors

a. Delay in the Assignment and Repair of Vehicles

The majority agrees with the Secretary and the drivers that the judge erred by failing to take into account that the operators delayed assigning trucks to the two drivers and delayed repairing the trucks that were eventually assigned them, characterizing this as "enforced idleness" that by itself could constitute intolerable working conditions. Slip op. at 13-14. The majority is apparently swayed by the Secretary's and the drivers' argument that the judge failed to consider that Bowling and Ball were made to wait "long periods," "hours on end," and "without pay" before trucks were assigned to them. S. Br. at 18; Drivers Br. at 36.

[8] The majority cites *Watson*, 823 F.2d at 361-62, in support of its decision, because the discrimination and abusive treatment the plaintiff suffered in *Watson* occurred over a period of less than one month. Slip op. at 12. However, the court in *Watson* stated that "these facts . . . could constitute the necessary aggravating factors such that *a trier of fact could (but not necessarily would)* conclude that reasonable person would find the conditions so intolerable and discriminatory as to justify resigning." 823 F.2d at 362 (emphasis added). Thus, *Watson* cannot be relied upon as support for reversing the judge's conclusion that the drivers' working conditions were not proven to be intolerable.

However, with regard to delay in the assignment of trucks, what is at issue is, at most, only the 2½-hour period Bowling had to wait on March 24 to receive his assignment to drive truck 139 and the 3-hour period he waited for that truck to return to the lot on March 28, as well as the 2½-hour period Ball had to wait on March 28 for his assigned truck to return to the lot before he could begin hauling in it. As for the delay in truck repair, the record indicates that Bowling waited for only 1-1/2 hours on the mornings of March 24 and March 27 for the wheel stud to be repaired on truck 139 before leaving each day, thus forfeiting the $6.00 per-hour he would have been paid for continuing to wait. *See* 19 FMSHRC at 190-91, 193.

While I agree with the majority that delays in assignment of vehicles and their repair are relevant considerations in examining working conditions, the few hours at issue here hardly justifies reversing the judge and independently finding that the two drivers' working conditions were intolerable. To the extent that the two drivers were subject to "enforced idleness,"[9] even the cases the drivers cite as having applied that concept were all ones in which the idleness occurred over a period of much longer than a few hours, or appeared to have become a permanent condition of employment. *See* Drivers Br. at 42-43.[10] That not being the case here, I do not believe the judge committed error, much less reversible error, by failing to take into account the time the drivers waited to be assigned trucks, or the time Bowling waited for his truck to be repaired, in concluding that constructive discharge was not established.

b. Condition of Assigned Vehicles

The majority also finds that the judge erred in his consideration of the condition of the vehicles Bowling and Ball were assigned to drive upon their return to work. Slip op. at 14. However, it is clear from his decision that the judge adequately considered the issue, as he acknowledged that being required to drive an unsafe truck is an intolerable condition. *See* 19 FMSHRC at 193. He stopped his analysis at that point because the record is clear that neither driver was "required" to drive an unsafe vehicle. As the majority recognizes (slip op. at 3, 5-6), when Bowling refused to drive truck 139 without the wheel stud being repaired, the operators did

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[9] Ironically, in the case cited by the majority, *Parret v. City of Connersville*, 737 F.2d 690, 693-94 (7th Cir. 1984), the court suggested that constructive discharge may not lie for enforced idleness if the work an employee was being paid not to do was "dangerous . . . or otherwise disagreeable." *Id*. at 694. In any event, that is another case in which the court held that the record evidence of enforced idleness could support the finding of intolerable conditions reached below, a much different proposition than the majority's conclusion here that a finding of intolerable conditions is compelled by the record and is the only conclusion a reasonable trier of fact could reach.

[10] Citing *Parish v. Immanuel Medical Center*, 92 F.3d 727, 732-34 (8th Cir. 1996) (permanent demotion to demeaning and intolerable work); *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712 (1st Cir. 1994) (6 months); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991) (months); *Parret*, 737 F.2d at 693-94 (3 months).

not order him to drive it, but rather took it out of service for repairs, during which time Bowling was to receive reduced pay. *See* Drivers Br. at 37 (citing Tr. II 356, 358). Similarly, and again as the majority acknowledges, when Ball refused to operate truck 134, asserting that the U-joint was loose, he was offered another truck. Slip op. at 7. Consequently, unlike the majority, I cannot agree with the Secretary's contention that the resignations of Bowling and Ball were justified by their "repeated exposure to unsafe conditions." *See* S. Br. at 19 n.14. Unlike in previous Mine Act constructive discharge cases, the employees here were not faced with the choice of continuing to work in dangerous conditions or quitting.[11] The record amply demonstrates that Bowling and Ball each had other choices available to them.

c. Language Used by Management

The majority acknowledges that the judge took into account in his constructive discharge analysis the language the operators used when speaking with Bowling and Ball, but examines the same record and agrees with the Secretary that such language contributed to intolerable working conditions for the two drivers. *See* slip op. at 14-15. Again, the majority bases its conclusion on case law (*see id.* at 14-15), but, again, in none of the cases cited did the court hold that a finding of intolerable working conditions was compelled by the facts. Moreover, all of those cases contain key facts vastly different than the facts of this case. *See, e.g., Meeks v. Computer Associates Intl.*, 15 F.3d 1013 (11th Cir. 1994) (confrontations taking place over months); *Wilson v. Monarch Paper* Co., 939 F.2d 1138 (5th Cir. 1991) (same); *Aviles-Martinez v. Monroig*, 963 F.2d 2 (1st Cir. 1992) (daily abuse for 1 year); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984) (pregnancy-related abuse). It thus is hardly reversible error for the judge to have come to a different conclusion in this case, given that Bowling and Ball returned to work for only a matter of hours before resigning.

d. Cumulative Effect of Conditions

I agree with the majority that the question of intolerability of working conditions must be addressed by examining the totality of the circumstances. *See* slip op. at 12, 15, 17.[12] However,

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[11] *See, e.g., Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150, 152-53 (10th Cir. 1991) (welder with diagnosed respiratory condition justified in quitting inadequately ventilated mine where operator demonstrated no intention of improving ventilation); *Simpson*, 842 F.2d at 463 (miner justified in quitting rather than continuing to work in mine in which operator was responsible for multiple "blatant" safety violations that had repeatedly and continually occurred); *Nantz*, 16 FMSHRC at 2210-11 (dust which caused breathing and visibility problems and which operator could have protected him from but did not justified bulldozer operator's decision to quit); *see also Ramsey*, 12 FMSHRC at 1593-94 (no constructive discharge established, given working conditions and no continuous pattern of operator misconduct).

[12] Regardless of whether the operators "had it in" for Bowling and Ball upon their return, as the majority essentially asserts (*see* slip op. at 15), "'an employer's subjective intent is

in almost all of the cases they cite in support of that proposition the conditions alleged to be intolerable existed over an extended period of time or there were indications that they had become permanent employment conditions, neither of which was the case here. *See, e.g., Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (years of sexual harassment); *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257 (D.C. Cir. 1993) (2 months of anti-union organization retaliation); *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023 (5th Cir. 1992) (signs of permanence to discrimination).[13] Consequently, it was reasonable for the judge to conclude that neither Bowling nor Ball had established that the conditions they faced upon their return to work were intolerable. The Mine Act reserves that determination for the judge to make in the first instance, and substantial evidence supports his conclusion here.[14]

It is worth noting that courts require that aggravating factors be present in employment discrimination cases before constructive discharge will be found because "[employment discrimination law] policies are best served when the parties, if possible, attack discrimination within the context of their existing employment relationships." *Watson*, 823 F.2d at 361. "A . . . plaintiff must, therefore, 'mitigate damages by remaining on the job' unless that job presents such an aggravated situation that a reasonable employee would be forced to resign." *Clark*, 665 F.2d at 1173 (quoting *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 66 (5th Cir.

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irrelevant" to the issue of constructive discharge" under the Mine Act. *Simpson*, 842 F.2d at 462 (quoting *Clark*, 665 F.2d at 1175 & n.8).

[13] These are also cases in which it was held that the facts could support a finding of constructive discharge, not that such a finding was compelled by the record. The same is true of *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047 (2d Cir. 1980), which is also cited by the majority. *See* slip op. at 12.

[14] The majority states that "in our view, the record compels the conclusion that the operators convincingly demonstrated to these miners in just a few short days that they were unwanted and would continue to experience highly intolerable working conditions until they voluntarily terminated their reestablished employment relationship." Slip op. at 17 n.23. The majority goes on to "conclude the record unequivocally demonstrates" that indications that the conditions Bowling and Ball faced "'had become permanent employment conditions'" were "clearly present here." *Id*. (citations omitted). Aside from the problem of finding indications of permanence arising in "a few short days," the majority appears to have lost sight of the fact that their role is not to find facts on review. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) ("It would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record."); *see also Wellmore Coal Corp.*, 1997 WL 794132 at *4 ("'[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence'") (citations omitted). Put another way, my colleagues essentially compare apples to oranges when they cite in their opinion the quantum of evidence that *could support* a finding of constructive discharge versus the much greater quantum necessary to *compel* such a finding and to set aside the judge's contrary findings.

1980)). Here, there is ample evidence to support the judge's conclusion that neither Bowling nor Ball made sufficient efforts to remain on the job to mitigate their damages.[15] Accordingly, I would affirm the judge's determination that the two failed to establish that they had been constructively discharged.

Theodore F. Verheggen, Commissioner

[15] For instance, as the judge correctly pointed out, each day that Bowling reported to work, instead of remaining and receiving reduced pay, he left the truck lot while his assigned truck was awaiting repair, and consequently was not paid for the remainder of those days. *See* 19 FMSHRC at 190-91. Although the majority believes that the miners acted "reasonably" in this case (slip op. at 17 n.23), "reasonableness" has been recognized as a lower standard than that to be applied in constructive discharge cases. *See Employment Discrimination* at 846 (case law under various statutes requires that to establish requisite intolerable conditions to show constructive discharge, circumstances must be such to *compel* resignation, not just that resignation was reasonable reaction).

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