FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 28, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of WALTER JACKSON	:	
v.	:	Docket No. KENT 95-613-D
MOUNTAIN TOP TRUCKING COMPANY, INC., ELMO MAYES, WILLIAM DAVID RILEY, ANTHONY CURTIS MAYES, and MAYES TRUCKING COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman issued a second Decision on Remand setting the back pay owed Complainant Walter Jackson for his discriminatory discharge by Mountain Top Trucking Company ("Mountain Top"), Mayes Trucking Company, Elmo Mayes, and Anthony Curtis Mayes (collectively the "operators"). 22 FMSHRC 1391 (Dec. 2000) (ALJ). The Commission granted Jackson's petition for discretionary review ("PDR") challenging the judge's decision.[1] For the reasons that follow, the judge's decision is affirmed in result.

[1] The Secretary of Labor, who originally filed and presented the case on Jackson's behalf up through the second remand to the judge, neither requested review of the judge's decision nor filed a brief with the Commission. In addition to the representation provided by the Secretary, Jackson has been represented by private counsel throughout this case.

I.

Factual and Procedural Background

This is the third time the question of the back pay due Jackson has been before the Commission.[2] Following an evidentiary hearing, the judge determined that the operators' February 1995 discharge of Jackson from his position as a truck driver with Mountain Top was discriminatory and thus violated section 105(c)(1) of the Mine Act.[3] *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 19 FMSHRC 166, 181-86 (Jan. 1997) (ALJ). The judge subsequently held that Jackson's failure to attempt to reopen his temporary reinstatement application after his layoff from alternative employment he had obtained with Cumberland Mine Services ("Cumberland") constituted a failure to mitigate damages, and consequently awarded him back pay only through December 9, 1995, which was 60 days after Jackson's layoff from Cumberland. 19 FMSHRC 875, 880-83 (May 1997) (ALJ). On review, the Commission reversed the judge's failure-to-mitigate determination on the ground that the Mine Act does not require a discriminatee to seek temporary reinstatement. 21 FMSHRC 265, 284-85 (Mar. 1999) (*Jackson I*).

In his first remand decision on the back pay due Jackson, the judge found that, in the record originally before him and the Commission, Jackson had not revealed his college attendance during approximately 3 months of the 16-month back pay period. 21 FMSHRC 913, 917-18 (Aug. 1999) (ALJ). The judge concluded that Jackson's college attendance was relevant evidence that should be considered on the mitigation issue, but felt constrained from addressing it by the limits placed on him by the Commission's remand decision. *Id.* at 918. Consequently, the judge awarded Jackson net back pay for the full back pay period, a total of $32,642.00 plus interest. *Id*. at 918-19.

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[2] The history of this proceeding is recounted in greater detail in *Sec'y of Labor on behalf of Jackson v. Mountain Top Trucking Co.*, 21 FMSHRC 1207, 1208-11 (Nov. 1999) (*Jackson II*).

[3] 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].

30 U.S.C. § 815(c)(1).

In reviewing the judge's first remand decision, we agreed that there were legitimate outstanding issues regarding the extent to which Jackson was available to work during the back pay period, including whether Jackson had removed himself from the job market during the time he attended college. *Jackson II*, 21 FMSHRC at 1213-14. Consequently, we again remanded the case to the judge, with instructions to reconcile conflicting evidence on those issues and make credibility resolutions where necessary. *Id.* at 1214-15.

On the second remand, the judge held a 1-day hearing to take further evidence on Jackson's efforts to find employment during the back pay period, whether he suffered from any physical impairment during the period that interfered with his ability to work, and the impact, if any, of his college attendance on his availability for full-time employment. 22 FMSHRC at 1393. At the hearing, Jackson explained that, after losing his position with Mountain Top in February 1995 and being unable to find substitute employment, he enrolled in July 1995 for the upcoming fall semester at Union College in Barboursville, Kentucky, approximately 70 miles from his home. *Id.* at 1397; Tr. 27-33, 63-64. Jackson, who had previously obtained an Associate of Arts degree, had the ultimate goal of teaching math or science in junior or senior high school. 22 FMSHRC at 1397. Jackson's class schedule required him to attend classes throughout the day and well into the night on Tuesdays and Thursdays. *Id.*; Tr. 56.

The evidence regarding Jackson's efforts to find full-time work while he was enrolled in college was all provided by him. Before he began classes in late August 1995, Jackson started working full-time as a general laborer with Cumberland. 22 FMSHRC at 1397. Once his classes began, Jackson at first worked around his class schedule to put in 40 or more hours per week, but was working less than 40 hours per week when he was laid off from Cumberland in early October. *Id.* at 1397-98; Compl. Ex. 1. The only other work Jackson obtained between that time and fall 1996 was a week-long position in December 1995 with a Cumberland affiliate, the Garland Company. 22 FMSHRC at 1401; Tr. 37-42.

Contemporaneous evidence of Jackson's job search efforts after his layoff from Cumberland consists of copies of the completed forms for the period October 1995 to January 1996 that he was obligated to submit every 2 weeks to receive unemployment benefits from the Virginia Employment Commission ("VEC"). 22 FMSHRC at 1398-99; Tr. 32-33; Compl. Ex. 3. Each form listed a single employment "contact" Jackson had made each Monday, Wednesday, and Friday he was not working during that time period, for a total of 38 contacts. 22 FMSHRC at 1399; Tr. 55-56; Compl. Ex. 3.

To shorten his commute and reduce associated expenses, in January 1996 Jackson transferred from Union College to Southeast Community College ("SCC") in Cumberland, Kentucky, for the semester that ended in May 1996. Tr. 66-67, 79-83. After January 1996, Jackson's eligibility for unemployment compensation ceased, so he had no copies of completed unemployment benefits forms to submit as evidence. Tr. 237-38. For the period after January 1996, Jackson testified that he continued looking for work at the places he had applied to previously. Tr. 83-84.

With regard to both Union College and SCC, Jackson testified he would have left school if necessary to take a full-time position. Tr. 66, 70, 84. He also testified to using the services provided by the Kentucky Unemployment Insurance Office ("KUIO"), and investigating employment possibilities to which it referred him. Tr. 57-58. Jackson eventually obtained two successive positions in late 1996 due to KUIO referrals, the latter of which he still held in September 2000, at the time of the hearing. Tr. 25-27, 58-63.

In his subsequent decision, the judge initially indicated that he expected Jackson to show that, having enrolled in college, he continued looking for a full-time job and would have quit school if necessary to obtain one. 22 FMSHRC at 1397. After finding that the evidence presented by Jackson was insufficient to demonstrate that, the judge then addressed the issue specified by the Commission on remand, which the judge expressed as "the impact of Jackson's college attendance on his availability for employment." *Id.* at 1399. The judge rejected Jackson's assertion that he would have left college for a full-time job, determining that the weight of the evidence was to the contrary. *Id.* at 1401. Consequently, the judge concluded that the back pay period should not include the time during which Jackson was enrolled in college, and accordingly reduced the net back pay amount the operators owe Jackson to $16,515.40, plus interest. *Id.* at 1402-03.

II.

Disposition

The scope of the Commission's review of a judge's remedial order, such as a back pay determination, is one of abuse of discretion. *See Sec'y of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997); *see also Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985) (applying standard to determination that discriminatee, as full-time student, was not ready, willing, and available for alternative employment and thus failed to mitigate her damages). "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.'" *Reike*, 19 FMSHRC at 1258 n.3 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)).

The Commission has previously held, including more than once in this proceeding, that "[t]he operator bears the burden of proof with respect to willful loss" of earnings by a discriminatee seeking back pay. *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984) (citing *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977)), *aff'd* 766 F.2d 469 (11th Cir. 1985);[4] *see also Jackson I*, 21 FMSHRC at 284-85. With regard to college attendance, in *Jackson II* the

[4] "Because the Mine Act's provisions for remedying discrimination are modeled largely upon the National Labor Relations Act, [the Commission] ha[s] sought guidance from settled cases implementing that Act in fashioning the contours within which a judge may exercise his discretion in awarding back pay." *Metric Constructors*, 6 FMSHRC at 231. The NLRB continues to require an employer to show that the employee failed to mitigate his damages. *See, e.g., Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3rd Cir. 2001).

Commission stated that "[t]he burden of proof is on the operators to show that [Jackson] either did not seek [full-time] employment [during the time he was enrolled in college], or would not have quit college if it had become available." 21 FMSHRC at 1214 (citing *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1274 (4th Cir. 1985)).

Despite that clear statement, the judge stated that it was sufficient that the operators here came "forward with evidence of Jackson's college attendance" for "the burden [to] shift[] to Jackson to demonstrate that he was ready, willing and able to work, and actively looking for full-time employment during the back pay period." 22 FMSHRC at 1397. The judge erred in describing the operator's burden to show a failure to mitigate, particularly as to what must be shown regarding the impact of a discriminatee's enrollment in school. We plainly stated in *Jackson II* that "Jackson's status as a college student does not necessarily mean that he must be found to have failed to mitigate his damages during the time he was enrolled in college." 21 FMSHRC at 1214.

This clearly means that something more than the mere evidence of college attendance is necessary to decide the issue in favor of the operators. In *Jackson II* we required the operators to additionally establish that either Jackson did not seek full-time employment while in college or would not have quit college to accept a full-time position. *Id.* Moreover, a review of the case law applying the burden of proof we articulated in *Jackson II* shows that courts look to the circumstances surrounding the discriminatee's school attendance and availability for full-time employment. For instance, in *Miller v. Marsh*, the court took into account evidence that the discriminatee's commitment to attend law school was unequivocal, which was indicated by, among other things, her resignation from her alternative employment upon entering school. 766 F.2d at 492. The judge here was therefore mistaken in believing that the operators had no way of showing that Jackson did not make reasonable efforts to find full-time work while in school, or would not have quit school to accept a full-time position.

In addition, courts have rejected the notion that the employer meets its burden of proof simply by establishing that the discriminatee's school attendance potentially conflicts with the ability to hold a full-time job. *See Hanna v. Am. Motors Corp.*, 724 F.2d 1300, 1307-09 (7th Cir.), *cert. denied*, 467 U.S. 1241 (1984). In the context of other federal discrimination statutes, courts have rejected a per se rule that school attendance is incompatible with the duty to mitigate damages. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820, 838-39 (4th Cir. 2001) (Family and Medical Leave Act)*; Dailey v. Societe Generale*, 108 F.3d 451, 456-57 (2d Cir. 1997) (Title VII); *Huegel v. Tisch*, 683 F. Supp. 123, 125-26 (E.D. Pa. 1988) ("there is no per se rule that back pay is tolled during periods of enrollment in an education program. Rather, the issue is to be determined in the context of the factual matrix in a particular case."); *see also Metric Constructors*, 6 FMSHRC at 232 (determination of whether duty to mitigate has been met "is made on the basis of the factual background peculiar to each case").[5]

[5] As the judge recognized (22 FMSHRC at 1400), the Fifth Circuit has stated:

On its face, the judge's apportionment of the burden of proving a failure to mitigate would appear to be an error of law and thus sufficient grounds to hold that he abused his discretion. *See Jackson I*, 21 FMSHRC at 284; *Reike*, 19 FMSHRC at 1258-60. However, the judge did not stop his analysis of the evidence at this point, but instead went on to acknowledge the Commission's remand instructions in *Jackson II*, recognizing that there is no per se rule that school enrollment establishes a failure to mitigate, and that the issue must be resolved on a case-by-case basis. 22 FMSHRC at 1399. More importantly, the judge also addressed the evidence which he found to contradict Jackson's assertions that he was looking for a full-time position and would have quit school if necessary to obtain one. *Id.* at 1400-01.

The judge, doubting that Jackson had actually applied to the employers he listed on his unemployment benefits forms, refused to credit Jackson's testimony and other evidence regarding his job search while enrolled in college, as well as Jackson's statements that he would have quit school if he had obtained a full-time position necessitating that he do so. *Id.* at 1399, 1401-02. 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). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Here, record evidence supports the judge's negative credibility determination. As the judge pointed out, Jackson was less than forthcoming in this proceeding regarding his college attendance during the back pay period. 22 FMSHRC at 1401. Jackson did not divulge either semester of his college attendance during the judge's original consideration of the back pay issue (21 FMSHRC at 917), and only during the hearing held upon the second remand did he reveal his SCC attendance. 22 FMSHRC at 1396; Tr. 220-25.

As for his job search, Jackson testified that he filed an application at each employment contact listed on his VEC forms. Tr. 44, 49-51, 78-79. However, Jackson checked the "no" box next to "application taken" for all 38 of the employment contacts listed on the forms. Compl.

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

Brady, 753 F.2d at 1276. Nevertheless, the court went on to examine whether the employer had shown that the discriminatee did in fact fall within that "vast majority of college students," and found that it had not. *Id.* at 1274, 1276.

Ex. 3. Without addressing the conflict between Jackson's testimony and the forms, the judge found the forms to be an admission by Jackson that he did not file applications with the employers listed. 22 FMSHRC at 1399, 1401. In addition, the judge found it significant that Jackson changed his position before the VEC with respect to whether he was available for full-time work. *Id.* at 1401. Jackson initially reported to the VEC that he was not available for work on Tuesdays and Thursday because of school, but after that stated that he was available to work each day. *Id.* at 1399; Tr. 230-31; Compl. Ex. 3. Based on the record evidence, we see no reason to overturn the judge's negative credibility determination.

In addition to refusing to credit Jackson's testimony, the judge drew several inferences to conclude that Jackson would not have quit school to take a full-time position. The Commission has recognized that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). In considering the evidentiary effect of inferences, the Commission has held that judges may draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (November 1989). In cases where more than one reasonable inference could have been drawn from the record, it is for the trier of fact to decide between those inferences. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995).

In our opinion, some of the inferences the judge drew are reasonable and rational, given the nature of the issue. For example, the judge drew a negative inference from Jackson's change in position before the VEC regarding whether he was available for work each weekday. 22 FMSHRC at 1401. The judge was persuaded that Jackson's initial answer on the VEC form that he was not available for work on Tuesdays and Thursdays was the more reliable information, because the later statements were made by Jackson with the knowledge that he could not receive unemployment benefits if he was not available to work each day. *Id.* at 1399. The judge also found noteworthy Jackson's ability to find a brief, full-time position between college semesters with a Cumberland affiliate, the Garland Company. *Id.* at 1401. Accordingly, we conclude that inferences the judge properly drew support his failure-to-mitigate determination.[6]

[6] We do not agree with the judge that, by only searching for a job on the days he did not have classes, Jackson unreasonably limited his job search. 22 FMSHRC at 1401. There is no authority for the proposition that a discriminatee must look for work each and every weekday to avoid being found to have failed to mitigate his damages. All that is required is a reasonable effort to find substitute employment. *See, e.g., Metric Constructors,* 6 FMSHRC at 231-33. Chairman Verheggen finds notable the judge's inference that, because Jackson had taken out a $4,100 student loan to attend 1995 fall semester classes at Union College, he was unlikely to quit school without finishing the semester. 22 FMSHRC at 1401.

While Jackson correctly points out that the operators themselves did little to prove that he failed to mitigate his damages (PDR at 17, 24),[7] employers may chose to use no more than the discriminatee's own testimony to show his failure to mitigate damages. *See Nord v. United States Steel Corp.*, 758 F.2d 1462, 1471 (11th Cir. 1985). More importantly, the judge found that the record as it developed throughout the proceeding was sufficient to disprove the notion that Jackson was looking for full-time work and would have quit school to take a full-time position.[8]

In sum, we hold that, while the judge's initial statements about the burden of proof were erroneous, sufficient evidence under the applicable abuse of discretion standard supports his determination that Jackson was not seeking a full-time position for which he would have quit school if necessary. We therefore conclude that the judge did not abuse his discretion in determining that Jackson failed to mitigate his damages while attending college, and affirm the judge's determination in result.[9]

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[7] Jackson designated his PDR as his opening brief.

[8] Jackson argues that he only enrolled in college when all his efforts to find work proved fruitless, and cites cases in which discriminatees were found not have to failed to mitigate damages by attending school because, with time, it had become apparent that searching for alternative employment was futile. PDR at 20-23. Jackson's reliance on this point is inconsistent with his primary position before the Commission and the VEC, that he was actively seeking full-time employment, and would have accepted full-time work even if he had to quit school. Moreover, in the cases Jackson cites, the discriminatees by and large had given up on the idea of finding immediate full-time employment, and were instead going to school in order to again become active members of the workforce in the future. *See Miller v. AT&T Corp.*, 250 F.3d at 838-39; *Dailey*, 108 F.3d at 456-58; *Brady*, 753 F.2d at 1276; *see also Smith v. Am. Serv. Co. of Atlanta, Inc.*, 796 F.2d 1430, 1432 (11th Cir. 1986). Jackson's case is otherwise — he was hired full-time at Cumberland before he even started classes at Union College.

[9] Mountain Top concludes its brief by requesting that the Commission "reverse" the judge with respect to many of the rulings he made throughout these proceedings, both in favor of Jackson and in favor of the operators, going all the way back to the judge's original 1997 decision on the merits of Jackson's complaint. Op. Br. at 10. As we previously explained, because we denied review of the operator's PDR, those rulings are final, and the Commission lacks jurisdiction to review them. Unpublished Order dated April 4, 2001, at 2.

III.

Conclusion

For the foregoing reasons, we affirm in result the judge's backpay award.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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