

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

November 30, 1999

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

DECISION

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

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 Decision on Remand awarding relief to, among others,<sup>1</sup> truck driver Walter Jackson. 21 FMSHRC 913 (Aug. 1999) (ALJ). On August 30, 1999, Mountain Top Trucking Company (“Mountain Top”), Mayes Trucking Company, Elmo Mayes, Anthony Curtis Mayes, and William David Riley (collectively the “operators”), filed a motion for relief from the judge’s Decision on Remand. After considering filings in opposition from both the Secretary of Labor and Jackson, the Commission treated the operators’ motion as a petition for discretionary review, directed review, and stayed briefing. For the reasons that follow, we vacate the judge’s damages award and remand the case for further proceedings consistent with this opinion.

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<sup>1</sup> The Commission has since ordered severance of the discrimination dockets of two other truck drivers that had been consolidated with this proceeding. *See Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 967 (Sept. 1999).

## I.

### Factual and Procedural Background

Following an evidentiary hearing, the judge determined that the operators' discharge of Jackson on February 17, 1995, violated Mine Act section 105(c)(1).<sup>2</sup> 19 FMSHRC 166, 181-86 (Jan. 1997) (ALJ). The judge subsequently ordered the parties to confer, in the hope that they could stipulate to the amount of backpay the operators owed Jackson as part of his relief. *Id.* at 204.

When the parties could not agree on the amount of backpay Jackson was owed, Jackson, pursuant to the judge's order (*id.* at 205) and through private counsel, filed a Statement of Backpay.<sup>3</sup> Thereafter, he provided copies of his tax returns for 1995 and 1996. As the result of a further oral request by the operators and a conference call with the judge, Jackson's private counsel, by letter dated March 21, 1997, addressed the source of interest income reflected on Jackson's 1996 tax return. This item was described as interest on certificates of deposit Jackson had purchased in 1996 with the proceeds from a judgment he received that year in a product liability suit he had filed against General Motors Corporation. The suit stemmed from an eye injury Jackson suffered in February 1991 when a wrench broke while he was changing a flat tire on his pickup truck. In the letter Jackson's counsel further stated that "Jackson did not file a disability claim regarding his eye injury, nor did it affect his ability to work during the backpay

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<sup>2</sup> 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).

<sup>3</sup> Pursuant to the judge's request (19 FMSHRC at 205), the Statement addressed why Jackson had withdrawn his application for temporary reinstatement to his position with the operators prior to the August 1995 hearing on the application. According to the Statement, Jackson had obtained "full-time employment with Cumberland Mine Service" ("Cumberland"), and worked from August 1, 1995, until October 10, 1995, when he was laid off by Cumberland. Statement of Backpay for Walter Jackson (March 3, 1997), at 2. His compensation for those 10 weeks was \$3,343. *Id.*

period in this proceeding. Therefore, the matter is irrelevant to my client's claim for backpay herein."

The judge subsequently ordered Jackson to supply certain additional information and the parties to address certain legal issues. *See* 19 FMSHRC 661 (Mar. 1997) (ALJ). Most of the order addressed Jackson's obligation to mitigate his damages, and questioned the extent to which that obligation was satisfied in light of Jackson's withdrawal of his temporary reinstatement application and later layoff from Cumberland. *See id.* at 663-64. However, in the fifth of the seven enumerated requests for information, the judge stated:

(5) The respondents have alleged that Jackson may have been party in a pertinent disability proceeding. Has Jackson been a party in any legal action or claim involving allegations of physical or mental impairment? If yes, identify or describe the legal action or claim, provide the date of such actions or claims, and provide the status or outcome.

*Id.* at 664.

The Secretary responded by letter dated April 18, 1997, to the judge's order, but deferred to Jackson's counsel on this request. Through counsel, Jackson filed a pleading in response to the order. He stated that "[t]he answer to this question is 'No[,]'" but also went on to reference his March 21, 1997, letter to Judge Feldman, in which the genesis of Jackson's suit against General Motors was described. *Resp. of Walter Jackson to Court's Order of March 24, 1997*, at 2-3.

The operators replied to the submissions of the Secretary and Jackson. They did not address the section of the judge's order regarding legal claims involving allegations of impairment. Instead, they took the position that Jackson forfeited the right to further backpay upon the withdrawal of his temporary reinstatement application. *Reply to Complainants' Resp. to Order of March 24, 1997*, at 2-3.

In his decision on relief, the judge did not address this part of his earlier order. *See* 19 FMSHRC 875 (May 1997) (ALJ). He determined that the maximum amount of time for which Jackson could be awarded backpay was February 18, 1995, the day after his discharge from Mountain Top, until June 21, 1996, the termination date of the operators' haulage contract which necessitated the employment of drivers such as Jackson. *Id.* at 878-79 & n.2. Focusing solely on Jackson's failure to attempt to reopen his temporary reinstatement application, the judge held that Jackson had failed to mitigate his damages, and consequently awarded him backpay only through December 9, 1995, which was 60 days subsequent to Jackson's layoff from Cumberland. *Id.* at 882-83.

The Commission granted petitions for review of the judge's decision filed by the Secretary and Jackson. The Commission subsequently 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 (Mar. 1999). Reviewing the evidence that had been submitted to the judge, we further concluded that the only record evidence upon which a finding of a failure to mitigate by Jackson could rest was his failure to seek reopening of his reinstatement application. *Id.* Consequently we held that the only conclusion that the record before us could support was that the operators did not meet their burden of establishing a failure to mitigate on the part of Jackson, and we limited remand 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. *Id.* at 284-85.

After the case was returned to him, the judge held a telephone conference with the parties. Unpublished Order dated April 23, 1999, at 2. Operators' counsel stated he had information he wished to submit regarding Jackson's availability to work during the backpay period. *Id.* The judge established a procedure for submission of the information and comment by the parties on it. *Id.* at 2-3.

The operators submitted to the judge copies of the following documents: (1) the April 1995 Unemployment Compensation Report that resulted from Jackson's claim for unemployment benefits following the end of his employment relationship with Mountain Top; (2) October 1992 answers to interrogatories Jackson provided in his product liability lawsuit; (3) excerpts from a June 1994 deposition Jackson gave in that lawsuit; (4) an October 1995 vocational assessment report of Jackson conducted in connection with the suit which discusses, among other things, Jackson's college attendance between August and December 1995 and his ability to drive a truck; and (5) the January 1996 jury verdict form from the suit, which contains both handwritten amounts detailing the award to Jackson as well as the printed figure of \$12,043.00, identified as "[l]oss of wages and income sustained to date directly by reason of the injuries[.]" *See* Resp. to Order Requesting Information Concerning Jackson's Availability for Work for the Period February 18, 1995 through June 21, 1996 (hereinafter "Operator's Resp. to Judge's Order"), Exs. I-V.<sup>4</sup> In response, both the Secretary and Jackson argued to the judge that

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<sup>4</sup> Copies of documents 1, 4, and 5 were attached to the briefs the operators had earlier submitted to the Commission. (The operators filed two briefs. We cite herein to the brief they filed in response to the Secretary's brief.) The operators stated that the documents supported their arguments that Jackson was not discriminated against for engaging in a protected work refusal, and, that by withdrawing his temporary reinstatement application, he forfeited any right to backpay beyond that point. Op. Br. at 13-16 & Addendums 1-2. We held that, because the three documents were not part of the record before the judge, they could not properly be considered by the Commission on review. 21 FMSHRC at 284-85 n.25 (citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1544-45 (Sept. 1996)). Consequently, we granted the Secretary's motion to strike the documents and all references thereto in the operators' briefs (*see* Unpublished Order dated July 27, 1998, at 1-2), and did not consider them in reaching our

the Commission's statement that "the only conclusion that the record can support is that the operator did not show a failure to mitigate on the part of Jackson" was res judicata on that issue. S. Resp. to Judge's Order at 2-3; Jackson Resp. to Operator's Resp. to Judge's Order at 3. Jackson also submitted a proposed order for relief predicated on his assertion that he was available for work at all times during the backpay period. Proposed Order for Relief for Walter Jackson (June 4, 1999).

The judge then ordered the Secretary to provide information regarding the period in 1995 that Jackson was a college student and an employee of Cumberland. 21 FMSHRC 693, 698 (June 1999) (ALJ). The judge also ordered the Secretary to further explain her contention that Jackson was available to work each weekday of the backpay period for 12 hours each day. *Id.* While both the Secretary and Jackson moved the judge to reconsider his decision, the Secretary provided the requested information and explanation, and Jackson submitted a 1-page affidavit stating that he sought employment while in college and would have stopped attending college if he had found a job which required him to do so. S. Mot. for Recons. at 2-3; Jackson Resp. at 2-6 & Aff. of Walter Jackson.

In his decision on remand on the backpay owed Jackson, the judge found that in the record originally before him and the Commission, Jackson had not been forthcoming regarding his college attendance, despite the judge's request that Jackson "disclose any 'periods when [he] was not available for employment.'" 21 FMSHRC at 917 (quoting 19 FMSHRC at 204). The judge also found that information provided by Jackson in the vocational assessment contradicted the statement of Jackson's private counsel in his letter of March 21, 1997, that the product liability lawsuit was irrelevant to the issue of backpay before the judge at that time. *Id.* According to the judge, the misleading information in that letter prevented the operators from pursuing relevant evidence regarding the suit and contributed to the Commission's striking such evidence when the operators attached it to their briefs. *Id.* The judge concluded by stating:

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

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decision on mitigation of damages.

that Jackson was available for work. Accordingly, I shall award the net backpay of \$32,642.00, plus interest, sought by Jackson in this matter.

*Id.* at 918.

## II.

### Disposition

In their motion for relief from the judge's decision, the operators contend that the information provided by counsel for Jackson in March 1997 was not truthful or forthcoming, contributed to a delay by the operators in obtaining evidence from Jackson's civil suit, and influenced the Commission to strike evidence concerning that civil suit in the belief that the issues concerning Jackson's representations in that suit had not been raised before the judge. Op. Mot. at 3. The operators submit that their "newly discovered" evidence is probative on a number of matters relevant to whether Jackson was available for full-time employment during the backpay period, and request remand to the judge for further consideration of the issue. *Id.* at 3-4.

The Secretary opposes the relief requested by the operators, contending that the evidence establishes that Jackson was available for work while he was in college. S. Opp'n at 1-3. According to the Secretary, the judge should not have ordered the development of further evidence he considered relevant to the mitigation issue, and his analysis of the evidence contains errors. *Id.* at 3-5 & n.4. Jackson joins in the Secretary's opposition, and specifically denies that he and his counsel submitted false information to the judge at any time. Jackson Resp. at 4-6. Jackson contends that the operators had adequate opportunity prior to the judge's original decision on damages to obtain all of the evidence they claim is "newly discovered." *Id.* at 4-5. According to Jackson, nothing in the record supports the operator's argument that Jackson was not available for full-time employment as a truck driver during the backpay period. *Id.* at 5.

As we discussed in our earlier decision, the Commission recognizes that a backpay award "may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings.'" 21 FMSHRC at 284 (quoting *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982)) (other citations omitted). Under the duty to mitigate damages from discrimination, "a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept *substantially equivalent employment*, fails diligently to search for alternative work, or voluntarily quits without good reason." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972) (citations omitted) (emphasis in original).<sup>5</sup>

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<sup>5</sup> "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

The Commission's earlier statement that the only conclusion that could be drawn from the record is that the operators did not establish that Jackson failed to mitigate his damages was based on the record as it was developed before the judge. *See* 21 FMSHRC at 285. We note that the record at that time was then devoid of evidence on the issue of mitigation. Instead it contained representations of the various counsel on Jackson's efforts at obtaining employment during the backpay period, and what those efforts meant with respect to his entitlement to backpay. Consequently, once we determined that the evidence the judge found dispositive on the issue of mitigation — Jackson's failure to seek reopening of his temporary reinstatement application — did not resolve the issue, we were left with no evidence to consider. As the burden of proving a failure to mitigate is on the operator (21 FMSHRC at 285 (citing *Metric Constructors*, 6 FMSHRC at 233)), and there was nothing in the record to support the conclusion that Jackson failed to mitigate his damages, we so held, and limited remand to a calculation of the backpay and interest owed Jackson. *Id.*

According to the judge, however, the operators, in a teleconference that was held while the judge was originally determining damages, raised the issue of whether Jackson had always remained in the labor market during the backpay period. Moreover, according to the judge, the representations of Jackson's counsel regarding the nature of Jackson's civil suit prevented the operators from obtaining evidence from that suit relevant to the issue of whether Jackson could have returned to work as a full-time truck driver. Both the Secretary and Jackson oppose consideration of the documents, relying on our earlier refusal to consider some of the civil suit documents when the operators attached them to their briefs. *S. Opp'n* at 2-3; *Jackson Resp.* at 3-4. They read too much into our decision, however, as we refused to consider the documents only because they had not been before the judge when he made his original decision. *See* 21 FMSHRC at 284-85 n.25. The Secretary is therefore mistaken in suggesting that the operators should have requested the Commission to reconsider its decision to strike the documents before submitting them to the judge. *See S. Opp'n* at 5. Because the documents had yet to be admitted into the record by the judge, the Commission could not have considered them, regardless of their relevance.

While the proceedings on remand in which the judge requested, received, and reviewed the documents may have exceeded the literal terms of our remand order, we cannot deny the relevancy of the information contained in the documents to the questions of whether and to what extent Jackson was available to work during the backpay period. There is also evidence that supports the judge's conclusion that the information provided by Jackson's counsel was not as accurate as he had a right to expect. The judge specifically asked whether Jackson has "been a party in any legal action or claim involving *allegations of physical or mental impairment.*" 19 FMSHRC at 664 (emphasis added). The documents from Jackson's civil suit show that in that

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discretion in awarding back pay." *Metric Constructors, Inc.*, 6 FMSHRC 226, 231 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

case he sought compensation for lost wages and impairment of his earning capacity,<sup>6</sup> and eventually was compensated for, among other things, “[l]oss of wages and income sustained to date directly by reason of the injuries[.]” Resp. to Judge’s Order, Ex. V. Jackson’s response through counsel that “[t]he answer to . . . question [No. 5] is ‘No’” was thus not accurate. See Resp. of Walter Jackson to Court’s Order of March 24, 1997, at 2-3. In light of this discrepancy, as well as the earlier statement of Jackson’s counsel that the civil suit was irrelevant to Jackson’s claim for backpay, we will not find, as the Secretary and Jackson request (S. Opp’n at 6-7; Jackson Resp. at 4-6), that the operators’ failure to obtain the probative documents from Jackson’s civil suit while the proceeding was originally before the judge was due to the operators’ lack of diligence.

The Secretary and Jackson are correct that some of the information contained in the civil suit documents is contradicted by evidence elsewhere in the record. See S. Opp’n at 4-5 n.4; Jackson Resp. at 5. However, it is up to the judge to reconcile the conflicting evidence. Consequently, we direct him to do so on remand and resolve the question of whether and to what extent Jackson was available for employment during the backpay period.

In addition, 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. The question is whether Jackson sought full-time employment during that time, and would have accepted employment and quit college had a job become available. The burden of proof is on the operators to show that he either did not seek such employment or would not have quit college if it had become available. See *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1274 (4th Cir. 1985). On remand, the judge will have the opportunity to hear Jackson’s testimony on this and other issues relevant to the mitigation question.<sup>7</sup>

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<sup>6</sup> In his October 1992 answer to an interrogatory regarding the claim in paragraph 10 of his product liability complaint that he had suffered impairment of his power to earn money due to the accident, Jackson stated that he had suffered permanent loss of vision in his right eye, was unable to pass any type of pre-employment physical examination due to the damage to his vision, and thus was prohibited from any type of work as a truck driver or other work requiring visual acuity. Resp. to Judge’s Order, Ex. IV at 1, 3. In his June 1994 deposition he again stated that he believed he would be unable to pass a pre-employment physical (*id.*, Ex. II at 48), and, according to the October 1995 vocational assessment report, Jackson claimed to have failed a physical with Manalapan Mining Company for a driving position. *Id.*, Ex. I at 2-3.

<sup>7</sup> The judge never evaluated the credibility of the 1-page affidavit Jackson submitted regarding his college attendance and his search for employment. Given the conflicting evidence, we believe a hearing on the record is necessary for the judge to best decide the mitigation question.



III.

Conclusion

For the foregoing reasons, we vacate the judge's damages award and remand this case for further proceedings consistent with this opinion.

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Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

Because I conclude that the judge's damages award in favor of truck driver Walter Jackson should be affirmed, I dissent.

The operators bear the burden of proving a failure to mitigate damages in a discrimination case under the Mine Act. *See Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985). In January 1997, the judge determined that the operators' discharge of Jackson on February 17, 1995, violated Mine Act section 105(c)(1) and ordered the parties to confer on the issue of appropriate relief. 19 FMSHRC 166, 181-86 (Jan. 1997) (ALJ). In May 1997, the judge issued his supplemental decision and final order awarding back pay relief to Jackson. 19 FMSHRC 875, 883 (May 1997) (ALJ). Prior to this damages decision, Jackson, through counsel's letter of March 21, 1997, informed the operator and the judge of the lawsuit that Jackson filed in 1991 against General Motors. The operators with any measure of due diligence could have sought, prior to the May 1997 damages decision, all the information that it now claims is pertinent to the mitigation issue.<sup>1</sup> I refuse to let this case drag on and penalize Jackson, the discriminatee, when the operators failed in their mitigation burden more than two years ago.

This case has been pending before the Commission and its judges for nearly five years. The operators' recent maneuvering has succeeded in prolonging its responsibility to remedy its unlawful discrimination against Jackson. In the interest of justice and judicial economy, I would affirm the judge's damages award in favor of Jackson.

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Marc Lincoln Marks, Commissioner

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<sup>1</sup> For example, at the time that counsel for Mountain Top was first made aware of Jackson's eye injury in March 1997, he could have easily discovered the October 27, 1995, letter from the vocational rehabilitation consultant that was prepared in the course of the tort litigation, which stated: "Mr. Jackson is currently a full-time student at Union College . . . ." Resp. to Judge's Order, Ex. I at 2.

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