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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF DENNIS WAGNER,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. VA 88-19-D
NORT CD 87-8

v.

McClure No. 1 Mine

CLINCHFIELD COAL COMPANY,
RESPONDENT

ORDER APPROVING SETTLEMENT
AND DISMISSING PROCEEDING

Before: Judge Broderick

On February 12, 1988, the Secretary of Labor (Secretary) filed on behalf of Dennis Wagner, a complaint alleging that Respondent violated Section 105(c)(1) of the Act, when it suspended and discharged Wagner because he reported a safety violation to a federal inspector.

The Secretary sought an order directing Respondent to pay interest on lost wages (Wagner was paid the wages he lost as a result of an arbitration decision), an order directing Respondent to reimburse complainant for private attorney fees incurred as a result of the discrimination, an order directing Respondent to comply with section 105(c), an order assessing a civil penalty, and an order directing Respondent to post a notice at the mine that it will not violate section 105(c).

Complainant Wagner intervened in this proceeding pursuant to 29 C.F.R. 2700.4(b)(2). He also filed a separate proceeding against Respondent Clinchfield, Pittston Coal Group, three employees of Clinchfield or Pittston, the Secretary of Labor, the Mine Safety and Health Administration (MSHA), and two employees of MSHA. That proceeding was docketed as VA 88-21AD, and is presently before the Review Commission which directed the case for interlocutory review.

On October 17, 1988, the Secretary filed a motion to approve a settlement agreed to by the Secretary and Respondent Clinchfield. The settlement provides that Clinchfield will pay complainant Wagner interest at the adjusted prime rate on all wages lost as a result of his suspension; that Clinchfield agrees

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that it will comply with section 105(c), and will not discriminate against Wagner in violation of section 105(c); that Clinchfield agrees that its employees have the right to make safety complaints to MSHA, and that it will neither institute nor enforce any policy that requires such complaints be first made to Respondent; that Clinchfield will post a notice at the mine stating that it will not violate section 105(c) of the Act; that Clinchfield will expunge from its records all adverse statements concerning events leading up to, resulting in, or following Wagner's June 26, 1987, suspension; that Respondent will pay a civil penalty of \$700 to MSHA. Respondent does not, by agreeing to the settlement, admit that it violated the act.

The complaint in this case was filed by the Secretary. I must determine whether the proposed settlement is in the public interest, that is, whether it furthers the purposes of section 105(c) of the Act. One factor to be considered is whether the complainant on whose behalf the case was filed approves the settlement. But more important that his approval or disapproval is a consideration of what the complaint sought, and a comparison of what was sought with the result if the Secretary were to prevail in a contested case.

The settlement proposal achieves all the Secretary's prayer for relief except (1) a finding of discrimination and (2) reimbursement of complainant's private attorney's fees. Under recent case law, attorneys fees are not authorized in cases where the Secretary filed the complaint pursuant to section 105(c)(2). *Eastern Associated Coal Co. v. FMSHRC*, 813 F.2d 639 (4th Cir.1987); *Maggard v. Chaney Creek*, 9 FMSHRC 1314 (1987).

I conclude that the proposed settlement substantially achieves what the complaint sought and is in the public interest.

Therefore, the settlement agreement is APPROVED, and, subject to Respondent carrying out its terms, this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge