

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

October 21, 2015

SCOTT D. MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

ORDER DENYING PARTIES' JOINT MOTION TO DISMISS

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation (“Dominion”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (“Mine Act” or “the Act”). The parties filed cross-motions for summary decision as there were no outstanding issues of relevant material facts.

A consolidated Decision Granting Complainant’s Motion for Summary Decision and Decision on Liability, issued on June 11, 2015, resolved the liability at issue in this matter without the need for an evidentiary hearing. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ). That decision held that Dominion violated the anti-discrimination provisions of section 105(c)¹ by interfering with McGlothlin’s right to pay protection under 30 C.F.R. Part 90 as a miner with pneumoconiosis, when Dominion reduced McGlothlin’s pay after McGlothlin sought a determination from the National Institute for Occupational Safety and Health (“NIOSH”) concerning his eligibility for Part 90 protection. *Id.* at 1264-1266.

¹ Section 105(c)(1) provides, in relevant part:

No person shall . . . in any manner discriminate . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101

30 U.S.C. § 815(c)(1); 37 FMSHRC at 1258.

The Decision on Liability noted that it was an interim decision that did not become final, in that it was not ripe for appeal, until a Decision on Relief was issued. *Id.* at 1265-1266. The June 11, 2015, Decision on Liability also noted that the liability decision would be referred to the Secretary pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), to provide the Secretary with the opportunity to file a petition for assessment of civil penalty for Dominion's violation of 105(c) of the Act. Following notification, on July 24, 2015, the Secretary filed a penalty petition, docketed as Docket No. VA 2015-285, seeking to impose a \$12,500.00 civil penalty as a consequence of Dominion's violation of the anti-discrimination provisions of the Act.²

The Decision on Liability ordered the parties to confer in an attempt to reach an agreement on the specific relief to be awarded. The parties were advised that consideration should be given to the difference in the compensation paid to McGlothlin and the compensation that he is entitled to as a Part 90 miner, plus interest, reasonable attorney fees, and reimbursement for any other relevant incidental expenditures. *Id.* The parties were given two options: 1) to file individual petitions on relief if the parties could not agree on a relief proposal; or 2) to file a joint petition on relief if Dominion could agree to the relief proposed by McGlothlin. The parties did neither.

Rather, on September 2, 2015, the parties filed a Joint Motion to Dismiss McGlothlin's complaint in light of the parties' proposed agreed-upon relief. The parties' Joint Motion to Dismiss is predicated upon McGlothlin's agreement that "the parties jointly move the Court to dismiss all claims in this action with prejudice," in exchange for Dominion's agreement to the relief, including attorney fees, sought by McGlothlin. In this regard, the parties' Motion to Dismiss was accompanied by a Confidential Settlement Agreement and General Release of All Claims that specified the agreed upon relief to be awarded to McGlothlin, including reimbursement for attorney fees.³

Longstanding Commission case law has recognized the utility of bifurcated decisions on liability and decisions on relief in section 105(c) proceedings.⁴ Bifurcation preserves

² Civil penalty Docket No. VA 2015-285 was assigned to me on September 18, 2015. As discussed *infra*, collateral estoppel applies in this matter. Thus, Docket No. VA 2015-285 will be held in abeyance pending the ultimate resolution of the issue of Dominion's liability for violation of section 105(c) of the Act.

³ The parties have requested that the terms of their agreed-upon relief be kept confidential. I will give effect to the parties' request for confidentiality at this time.

⁴ See, e.g., *Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 64 (Jan. 1995) (ALJ Feldman) (decision on liability), and *Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 359 (Mar. 1995) (ALJ Feldman) (decision on relief); *Jeanlouis v. Morton Int'l*, 25 FMSHRC 536 (Sept. 2003) (ALJ Feldman) (decision on liability), and *Jeanlouis v. Morton Int'l*, 25 FMSHRC 673 (Nov. 2003) (ALJ Feldman) (decision on relief); *Womack v. Gramont Western US*, 25 FMSHRC 235

Commission resources by avoiding the unnecessary development of a record regarding the appropriate relief to be awarded in cases where the discrimination complaint is dismissed after an evidentiary hearing on liability. *See, e.g., Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (Aug. 2012), *aff'd Metz v. FMSHRC*, 532 F.App'x 309, 2013 WL 3870733 (3d Cir. 2013). Although bifurcated decisions on liability are not final, in that they are not ripe for Commission appeal until a decision on relief is rendered, the decision on liability is a final disposition on the merits with respect to liability. Thus, absent a petition for discretionary review filed with the Commission, a mine operator that is found liable in a decision on liability following a hearing is collaterally estopped from denying liability in a related civil penalty proceeding.

As a threshold matter, the Commission has repeatedly acknowledged its authority to review the propriety of settlement motions conferred in section 110(k) of the Act extends to settlement agreements arising under section 105(c) of the Act. *Sec'y of Labor o/b/o Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998) (citations omitted). In this regard, the parties may submit, subject to Commission approval, post-decision settlement terms with respect to their proposals regarding the appropriate civil penalty and relief to be awarded in discrimination cases brought pursuant to section 105(c).

However, the parties may not mutually agree to vitiate a post-adjudication decision on liability *nunc pro tunc* through a mutual agreement that both insulates a mine operator from the adverse history of a 105(c) violation, and releases the operator from the resultant civil penalty liability that must be imposed as a consequence of that violation. 30 U.S.C. §§ 814(a), 815(a); 29 C.F.R. § 2700.44(b). To hold otherwise would render Commission decisions on liability in bifurcated 105(c) proceedings as advisory opinions that are analogous to decisions by non-binding alternative dispute resolution bodies that may be disregarded at the whim of the parties.

[n.4 cont'd] (May 2003) (ALJ Feldman) (decision on liability), and *Womack v. Gramont Western US*, 25 FMSHRC 469 (Aug. 2003) (ALJ Feldman) (decision on relief); *Descutner v. Newmont USA*, 34 FMSHRC 2838 (Oct. 2012) (ALJ Barbour) (decision on liability), and *Descutner v. Newmont USA*, 35 FMSHRC 504 (Feb. 2013) (ALJ Barbour) (decision on relief); *Meek v. Essroc Corp.*, 13 FMSHRC 1970 (Dec. 1991) (ALJ Fauver) (decision on liability), and *Meek v. Essroc Corp.*, 14 FMSHRC 518 (Mar. 1992) (ALJ Fauver) (decision on relief), *aff'd Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171 (Feb. 1999) (ALJ Hodgdon) (decision on liability), and *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 377 (Mar. 1999) (ALJ Hodgdon) (decision on relief); *Sec'y of Labor o/b/o Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730 (Mar. 2014) (ALJ Bulluck) (decision on liability requesting a follow up petition for relief from the parties).

A case in point is the Commission's order in *Sec'y of Labor o/b/o Hopkins v. ASCARO, Inc.*, 19 FMSHRC 1 (Jan. 1997). In *Hopkins*, Judge Manning, in his bifurcated decision on liability, determined that ASARCO, Inc. ("ASARCO") had violated section 105(c) of the Act. 18 FMSHRC 317 (Mar. 1996) (ALJ). The decision on liability was followed by Judge Manning's supplemental decision and final order on relief. 18 FMSHRC 1160 (July 1996) (ALJ). Although the Secretary had proposed a civil penalty of \$5,000.00, Judge Manning, finding relevant mitigation, reduced the civil penalty to \$800.00, and awarded Hopkins back pay, interest, and miscellaneous expenses. ASARCO filed a petition for discretionary review challenging Judge Manning's conclusions, which was granted by the Commission. Following ASARCO's petition for discretionary review, the parties filed with the Commission a joint motion to approve settlement agreement, in which ASARCO agreed to pay the relief sought by Hopkins. The settlement agreement also proposed that ASARCO pay a \$500.00 civil penalty, rather than the \$800.00 civil penalty assessed by Judge Manning. The Commission, noting that oversight of proposed settlements is committed to the Commission's sound discretion, granted the motion to approve settlement and vacated their direction for review. 19 FMSHRC at 2-3.

Significantly, the settlement terms approved by the Commission *did not* include circumvention of Judge Manning's finding of liability by virtue of ASARCO's agreement to pay the \$500.00 civil penalty. However, in the present case, unlike *Hopkins*, the settlement terms proffered on behalf of Dominion must be rejected as they seek to insulate Dominion from liability that would preclude imposition of the \$12,500.00 civil penalty sought by the Secretary. Simply put, parties to a Commission proceeding do not have standing to vacate a judicial finding of liability.

In reaching this conclusion, I am cognizant of the Commission's decision in *Shemwell*. In the bifurcated proceeding in *Shemwell*, the Commission concluded that a judge retains the jurisdiction to consider approval of settlement terms before the issuance of a decision on relief because the decision on liability, alone, does not constitute a final decision on the merits as contemplated by Commission Rule 69.⁵ *Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co., Inc.*, 36 FMSHRC 1097, 1100-01 (May 2014) (vacating the judge's denial of a motion to approve settlement in a discrimination proceeding). In the majority decision in *Shemwell*, the Commission, on abuse of discretion grounds, vacated the judge's decision denying a Joint Motion to Approve Settlement, and approved *sua sponte* the parties' settlement terms.

However, unlike this case, in *Shemwell*, the Commission expressly conditioned its approval of the parties' settlement terms on the fact that deterrence was achieved through settlement terms that included an admission of liability by the mine operator with respect to any subsequent proceedings brought against it under the Mine Act. *See id.* at 1102-03. In this regard, in *Shemwell*, the mine operator did not deny liability, but rather agreed to pay a reduced civil penalty of \$35,000.00, as opposed to the \$70,000.00 civil penalty initially proposed by the Secretary and imposed by the judge.

⁵ Commission Rule 69(b) provides: "[e]xcept to the extent otherwise provided herein, the jurisdiction of the Judge terminates when his decision has been issued." 29 C.F.R. § 2700.69(b).

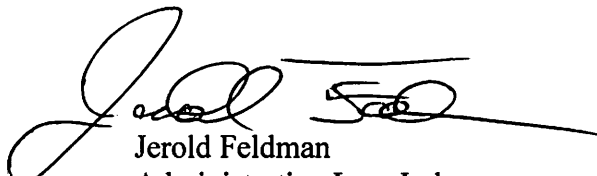
ORDER

In view of the above, **IT IS ORDERED** that the parties' Joint Motion to Dismiss **IS DENIED**, because it is contingent on proposed settlement terms that seek to release Dominion from an adjudicated finding of liability in a Commission proceeding.

If the parties agree on relief, it is immaterial whether the parties' agreement on relief is styled as a joint petition for relief or as a motion to approve settlement. However, any proposal for relief, filed jointly or individually, should include a calculation consisting of the difference between McGlothlin's approximate hourly compensation of \$25.67 and the \$35.00 per hour he was entitled to during the period from June 16, 2013, to date, plus an adjustment for overtime, if any, as well as any incidental expenses incurred.

With respect to the issue of the reasonable attorney fees to be awarded, relevant detailed attorney fee petitions should be submitted for worked performed in this matter. This submission should include separate detailed logs specifying the nature and extent of the legal services rendered by each of McGlothlin's attorneys with respect to all filings and depositions in this proceeding, as well as any other legal services for which reimbursement is sought. Specifically, the log should contain a daily accounting of the claimed legal services, the hours worked, and the hourly rate of legal fees sought to be recovered for each service by each attorney.

IT IS FURTHER ORDERED that the parties file separate petitions for relief, or a joint petition, **within 21 days of the date of this Order**.


Jerold Feldman
Administrative Law Judge

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