FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 13 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of REUBEN SHEMWELL	:	
v.	:	Docket No. KENT 2013-362-D
ARMSTRONG COAL COMPANY, INC. and ARMSTRONG FABRICATORS, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

This discrimination proceeding, arising under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012),[1] involves a Commission Administrative Law Judge's denial of a motion to approve settlement filed by Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc. (collectively referred to as "Armstrong"), the Secretary of Labor, and Reuben Shemwell. For the reasons that follow, we vacate the Judge's decision and approve the parties' proposed settlement.

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[1] 30 U.S.C. § 815(c)(2) provides in pertinent 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. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

I.

Factual and Procedural Background

Reuben Shemwell's employment as a welder with Armstrong was terminated on September 14, 2011. 35 FMSHRC 1865, 1865 (June 2013) (ALJ). On January 23, 2012, Mr. Shemwell filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* Shemwell subsequently was temporarily reinstated based upon the Commission's determination that a non-frivolous issue existed as to whether Shemwell had been terminated for engaging in protected activity. 34 FMSHRC 1580, 1582-83 (July 2012). After MSHA's investigation into the matter, the Secretary declined to pursue a discrimination proceeding on Shemwell's behalf. Shemwell subsequently filed a section 105(c)(3)[2] proceeding in Docket No. KENT 2012-1497-D against Armstrong on his own behalf. On September 4, 2013, the Judge issued a decision approving settlement in KENT 2012-1497-D.

In August 2012, following the Secretary's decision not to pursue Shemwell's discrimination complaint, Armstrong filed a civil suit in a Kentucky state court alleging that Shemwell's discrimination complaint constituted a wrongful use of proceedings (referred to as the "Muhlenberg suit").

The Secretary subsequently filed a discrimination complaint in this proceeding pursuant to section 105(c)(2) of the Mine Act, alleging that the Muhlenberg suit interfered with Shemwell's right to file a discrimination complaint in violation of section 105(c)(1) of the Act. The Secretary proposed a civil penalty of $70,000 against Armstrong.

On June 19, 2013, the Judge issued in this proceeding a Decision on Liability and Cease and Desist Order. In the decision, the Judge concluded that the Muhlenberg suit violated section 105(c)(1) because it interfered with Shemwell's right to file a discrimination complaint. The Judge ordered Armstrong to cease and desist prosecution of the Muhlenberg suit "by filing an appropriate motion to dismiss" within 40 days of the decision (by July 29, 2013). 35 FMSHRC at 1886. The Judge noted that "withdrawal of Armstrong's suit can be without prejudice,

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[2] 30 U.S.C. § 815(c)(3) provides in part:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination. . . .

permitting Armstrong to once again bring its civil proceeding in the unlikely event Armstrong is ultimately successful on appeal." *Id.*

On July 29, 2013, Armstrong took three actions. First, it filed with the Commission a petition for interlocutory review. In the petition, Armstrong stated that on July 25, 2013, the parties verbally agreed to the terms of a settlement agreement that will resolve the case, including a term requiring Armstrong to dismiss the Muhlenberg suit. Second, Armstrong filed with the Commission an application for a temporary stay pending the Commission's review of the petition. Third, Armstrong dismissed, with prejudice, the Muhlenberg suit.

On that same day, the Commission issued an order granting a temporary stay.

On August 8, 2013, the Secretary, Shemwell, and Armstrong filed a joint motion to approve settlement with the Judge.[3] Under the terms of the proposed settlement, Armstrong would: (1) pay MSHA a civil penalty of $35,000; (2) provide a copy of the MSHA publication entitled "A Guide to Miners' Rights and Responsibilities" to all employees; (3) post a copy of the Joint Motion to Approve Settlement at each mine that is operated by Armstrong for 60 days; (4) provide two hours of training on miners' rights at each mine operated by Armstrong and, following the training, employees would watch the MSHA video entitled "A Voice in the Workplace: Miners' Rights and Responsibilities;" and (5) post a miners' rights poster about section 105(c) at each mine that is operated by Armstrong for a period of two years.

The motion further stated that Armstrong had dismissed with prejudice the Muhlenberg suit. In addition, the motion included the following exculpatory language:

> Respondents assert that except for proceedings under the Act, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or its regulations. Further, Respondents assert that except for proceedings under the Act, nothing contained herein is intended to constitute an admission of civil liability under any local, state or federal statute or any principle of common law.

Jt. Mot. at 3.

On August 19, 2013, the Judge issued an Order Denying Joint Motion to Approve Settlement Decision on Civil Penalty and Supplemental Decision on Relief. 35 FMSHRC 2680 (Aug. 2013) (ALJ). The Judge concluded that he lacked jurisdiction to consider the settlement motion after he had issued his decision on liability. *Id.* at 2682-83. He reasoned that his decision on liability was a final decision on the merits as contemplated by Commission Procedural Rule 69, 29 C.F.R § 2700.69. *Id.* at 2682. The Judge determined, as such, that his decision on

[3] Shemwell was represented by private counsel. Jt. Mot. at 4.

liability was the binding law of the case and is not subject to modification through a settlement agreement of the parties. *Id.*

The Judge further concluded that even if the proposed settlement agreement were not procedurally defective, he would dismiss it on a substantive basis as contrary to the public interest. *Id.* at 2683. He stated that the exculpatory language would not dissuade Armstrong or other operators from filing similar civil actions in violation of section 105(c)(1). *Id.* at 2686. The Judge also determined that there were no mitigating circumstances to justify the reduction in penalty. *Id.* He noted that Armstrong was required to dismiss the action under the terms of his prior decision and that the other settlement remedies, such as postings and training, are "routine" actions required of operators as a consequence of discriminatory conduct. *Id.* The Judge noted that the legality of civil suits such as the Muhlenberg suit, which are capable of repetition, must not evade review. *Id.* at 2687-88.

Finally, in determining appropriate remedial measures, the Judge required Armstrong to take the remedial actions specified in the settlement motion. *Id.* at 2689. The Judge further assessed a civil penalty of $70,000 against Armstrong, taking into account the "deterrent role civil penalties play in discouraging mine operators from engaging in future similar violative conduct." *Id.* at 2690-92.

The Secretary and Armstrong each filed petitions for discretionary review challenging the Judge's denial of the motion to approve settlement. The parties request that the Commission vacate the Judge's decision and approve the proposed settlement agreement. The Commission granted both petitions.

II.

Disposition

A. The Judge's Procedural Dismissal

We conclude that the Judge erred in holding that his June 19 decision on liability was a final decision on the merits as contemplated by Commission Procedural Rule 69[4] and that he lacked jurisdiction to consider the settlement motion. In an order dated July 26, 2013, we held that the Judge's June 19 decision on liability was "not a final decision ending the judge's jurisdiction over this matter." 35 FMSHRC 2056, 2057 (July 2013). We explained that "a Judge's decision finding a violation under the Mine Act is not final until the judge issues a

[4] Commission Procedural Rule 69(b) provides, "Except to the extend otherwise provided herein, the jurisdiction of the Judge terminates when his decision has been issued." 29 C.F.R. § 2700.69(b).

penalty against the operator." *Id.* Thus, the Judge clearly had jurisdiction to consider the parties' settlement motion, which was submitted after the June 19 decision on liability but before the Judge's August 19 decision assessing a penalty.

B. The Judge's Substantive Denial of the Proposed Settlement

Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). As the Commission has previously observed, "'[t]he judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.'" *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012) (quoting *Knox*, 3 FMSHRC at 2479).

A Judge's approval or rejection of a proposed settlement must be based on principled reasons. *Black Beauty*, 34 FMSHRC at 1864. If a "Judge's approval or rejection of a settlement is 'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper, it will not be disturbed, but . . . abuses of discretion or plain errors are subject to reversal." *Id.* (quoting *Knox*, 3 FMSHRC at 2480). An 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." *Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 n.3 (July 1997).

As explained below, we conclude in this case that the key legal rulings of the Judge were erroneous and that certain assertions he made were not supported in the record. Accordingly, his denial of the proposed settlement under such circumstances constituted an abuse of discretion.

1. The exculpatory language

The Judge in part rejected the settlement because he believed that the exculpatory language would not dissuade Armstrong or other operators from filing similar civil actions in violation of section 105(c)(1). We conclude that the Judge's rejection of the exculpatory language set forth in the proposed settlement agreement was "based on an improper understanding of the law." *Id.*

The Commission has recognized that the Mine Act requires the Commission "to oversee penalty settlements as a means of encouraging compliance." *Sewell Coal Co.*, 5 FMSHRC 2026, 2030 (Dec. 1983). Recognizing that "[i]nherent in the concept of settlement is that parties find and agree upon a mutually acceptable position that resolves the dispute and that obviates the need for further proceedings," the Commission has held that parties are free to admit or deny the fact of violation in settlement agreements. *Amax Lead Co.*, 4 FMSHRC 975, 977-78 (June 1982). The Commission has explained, however, that the goal of encouraging compliance is not met when a settlement agreement requires the payment of a penalty although the parties have

stipulated facts that do not show a violation. *Sewell*, 5 FMSHRC at 2030 (citing *Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (Dec.1980) (other citations omitted)).

Commission case law establishes that the type of exculpatory language contained in the proposed settlement here – language which would *not* apply to Mine Act proceedings – is acceptable in settlement agreements. The Commission has rejected a settlement agreement where it contained extremely broad exculpatory language that factual admissions by the operator would not be deemed an admission for any subsequent proceeding brought in any judicial or administrative forum by any party. *Amax*, 4 FMSHRC at 975. The Commission explained that, because the operator could attempt to use that language to shield future key enforcement provisions of the Mine Act, such language was inconsistent with the enforcement scheme of the Mine Act. *Id.* at 978. The Commission noted, however, that it had "no difficulty with the exculpatory language as it relates to proceedings arising outside the scope of the Mine Act's coverage," and that the "effect of such exculpatory language is properly left to the appropriate forum." *Id.* at n.4. The Commission found acceptable amended exculpatory language offered by the operator that the citations would not be used against the operator in forums other than in actions under the Mine Act. *Id.* at 978-79. The Commission reasoned that for purposes of any proceedings under the Mine Act, the violations were to be treated as if established. *Id.*

The exculpatory language at issue concedes Armstrong's violation of the Act for purposes of Mine Act proceedings. *See* S. PDR at 10 n.2; A. Br. at 21; Jt. Mot. at 3. The exculpatory language denies civil liability under "any local, state or federal statute or any principle of common law" other than Mine Act proceedings. Jt. Mot. at 3. Thus, the subject exculpatory language falls within the type of exculpatory language that the Commission has found to be within the public interest. *See Amax*, 4 FMSHRC at 977-78 & n.4. Moreover, we find no record support for the Judge's conclusion that the exculpatory language will not dissuade other operators from filing actions similar to the Muhlenberg suit.

2. <u>Consideration of the non-monetary portions of the proposed settlement</u>

The Judge's conclusion that "there are no mitigating circumstances" to justify the penalty reduction from $70,000 to $35,000 is not "fully supported by the record." *See Black Beauty*, 34 FMSHRC at 1864. Contrary to the Judge's finding that Armstrong was required to dismiss the Muhlenberg suit under the terms of the Judge's June 19 decision, Armstrong dismissed the Muhlenberg suit with prejudice, rather than without prejudice as permitted by the Judge. In addition, there is no support in the record for the Judge's statement that "[t]he other settlement remedies [besides payment], such as relevant postings and training, are routine actions required of mine operators as a consequence of discriminatory conduct." 35 FMSHRC at 2686. Indeed, the Secretary represents that such actions are not routine. S. PDR at 11.

3. The question of mootness

The Judge also erred in his application of mootness principles. The Commission has recognized that a case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012) (citations omitted).

The Judge stated that "[b]y submitting their settlement agreement for approval, the parties, in essence, rely on the dismissal of the [Muhlenberg suit] to support the proposition that all matters in issue have been resolved, and that further proceedings have essentially been rendered moot." 35 FMSHRC at 2687. We see no contention by the parties that further proceedings have essentially been rendered moot, or any other basis for applying mootness principles in reviewing the parties' proposed settlement agreement.

4. Consideration of the proposed settlement as a whole

Finally, we conclude that the Judge erred by considering the proposed settlement in a piecemeal fashion, focusing on the monetary aspects of the settlement. "The 'affirmative duty' that section 110(k) places on the Commission and its judges to 'oversee settlements,' . . . necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects." *Madison Branch Mgmt*, 17 FMSHRC 859, 867-68 (June 1995) (Chairman Jordan and Comm'r Marks) (citations omitted); *see also Aracoma Coal Co.*, 32 FMSHRC 1639, 1644 (Dec. 2010) (separate opinion of Chairman Jordan). The Judge was required to consider the settlement agreement as a whole, giving due consideration to the non-monetary aspects of the decision as well as to the monetary aspects. The payment of a reduced penalty was balanced by other non-monetary aspects of the settlement, such as the dismissal of the Muhlenberg suit with prejudice, and the posting and training requirements. We observe that the Secretary's action in filing the instant section 105(c)(2) proceeding can be expected to have a deterrent effect against the filing of Muhlenberg-type suits.[5]

Although it is possible, as the Judge stated, that payment of a higher penalty could achieve greater deterrence, our role in reviewing a settlement agreement is to ensure that the public interest is adequately protected before a penalty is reduced. In considering the public interest standard applied by the Antitrust Procedures and Penalties Act, courts have stated:

> The court should . . . bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will *best*

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[5] We note that Shemwell was reinstated and Armstrong paid monetary remedial relief in settlement of Docket No. KENT 2012-1497-D. *See* slip op. at 2, *supra*; Unpublished Order at 2 (Sept. 4, 2013).

> serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of public interest.'"

United States v. Western Elec. Co., 900 F.2d 283, 309 (D.C. Cir. 1990) (citations omitted) (emphasis in the original).

Here the Judge did not consider the different elements of the proposed settlement as a whole in determining whether the proposed settlement fell "within the reaches of public interest." Indeed, because of his erroneous rulings with regard to the non-monetary elements of the proposed settlement, an appropriate analysis of the proposed settlement as a whole was not possible.

We conclude that the settlement agreement proposed by the Secretary, Shemwell, and Armstrong contains sufficient consideration and deterrent effect to protect the public interest. Accordingly, we vacate the Judge's denial of the motion to approve settlement and approve the settlement agreement.

III.

Conclusion

For the reasons discussed above, we vacate the Judge's decision denying the Joint Motion to Approve Settlement submitted by the Secretary, Shemwell, and Armstrong, and we approve the settlement.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioners Young and Cohen, dissenting:

We dissent from the majority and conclude that the Judge did not abuse his discretion when he denied the parties' motion to approve settlement. On the contrary, substantial evidence supports the Judge's determination that the proposed settlement terms are inadequate to address the nature of the violation at issue: the filing of a baseless civil action with the intent to retaliate against Shemwell's exercise of his rights under the Mine Act and to chill other miners' exercise of those rights at Armstrong's mines.

Rueben Shemwell filed a complaint with MSHA alleging that he was unlawfully discharged from his position as a welder with Armstrong Coal. Thereafter, the Secretary of Labor filed an application for temporary reinstatement on his behalf. After a temporary reinstatement hearing, a Commission Judge concluded that Shemwell's complaint was not frivolously brought. 34 FMSHRC 1464, 1475 (June 2012) (ALJ), *aff'd*, 34 FMSHRC 1580, 1582-83 (July 2012). Thus, the Judge ordered Armstrong to temporarily reinstate Shemwell. *Id.* at 75-76. Before a hearing on the merits of the unlawful discharge complaint occurred, the Secretary dropped his representation of Shemwell. Shemwell then filed a complaint with the Commission on his own behalf pursuant to section 105(c)(3) of the Mine Act.

After the Secretary discontinued his representation of Shemwell, Armstrong filed a civil action in Kentucky's Muhlenberg Circuit Court, alleging that Shemwell's original filing of a discrimination complaint with MSHA amounted to "Wrongful Use of Civil Proceedings." Circuit Court Complaint at 7-8, No. 12-CI-00897 (hereinafter "Muhlenberg suit"). Armstrong sought an award of punitive damages as well as alleged compensatory damages from Shemwell. *Id.* at 9.

The matter currently before us concerns a second complaint of discrimination that was filed with the Commission by the Secretary on behalf of Shemwell under section 105(c)(2) of the Mine Act. In bringing this complaint, the Secretary alleged that Armstrong filed the Muhlenberg suit as retaliation for Shemwell's previous exercise of his statutory right to file a discrimination complaint. Complaint of Discrimination at 5 (Jan. 8, 2013). The Secretary further alleged that the lawsuit was an attempt by Armstrong to intimidate its workforce and discourage participation by other miners in enforcement proceedings under the Mine Act. *Id.*

Remarkably, at the time the Secretary filed the second complaint on behalf of Shemwell, there were discrimination cases pending before an Administrative Law Judge that involved ten other miners who were discharged by Armstrong in February 2012. Mot to Exp. at 2 (Jan. 8, 2013); *Sec'y, et al. v. Armstrong Coal Co.*, Docket Nos. Kent 2012-1370/1371/1372/1373-D. Three of the miners had been temporarily reinstated to their former positions with Armstrong. 34 FMSHRC 1658, 1667 (July 2012) (ALJ). These miners were laid off following MSHA's attempted inspection of Armstrong's fabrication shop (which Armstrong resisted), and the filing

of an anonymous complaint to MSHA about a safety issue.[1] *Id.* at 1660-62, 1664, 1667. In fact, Armstrong closed its shop and laid off a total of eleven miners following the anonymous safety complaint. *Id.* at 1664-67. Armstrong, as shown by these actions, obviously has a problem with the requirements of the Mine Act and specifically the requirements of section 105(c).[2]

On June 19, 2013, the Judge issued a decision on the Secretary's second complaint on behalf of Shemwell, ruling consistent with the Secretary's allegations, that by filing the Muhlenberg suit Armstrong violated section 105(c)(1) of the Act "with impunity" and intentionally interfered with Shemwell's statutory rights. 35 FMSHRC 1865, 1883 (June 2013) (ALJ). The Judge concluded that the First Amendment did not protect Armstrong's filing of the retaliatory civil action, as the operator contended.[3] *Id.* He ordered Armstrong to dismiss the civil action and further ordered the parties to attempt to reach an agreement on the specific relief to be awarded. *Id.* at 1886-87.

Shortly thereafter, the parties filed a joint motion for approval of settlement with the Judge. 35 FMSHRC 2680, 2682 (Aug. 2013) (ALJ). The Judge rejected the motion. In a decision issued on August 19, 2013, he concluded that he lacked jurisdiction at this stage in the proceedings. *Id.* at 2682-83. He also stated that regardless of the jurisdiction issue, he would deny the motion because the terms of the settlement were contrary to the public interest and inconsistent with the enforcement scheme of the Mine Act. *Id.* at 2683-88. The Judge was concerned that the parties' agreement contained exculpatory language that limited the finding of a violation exclusively to proceedings under the Mine Act. *Id.* at 2685. Specifically, the Judge stated that he was "unconvinced that [the] broad exculpatory language that seeks to shield Armstrong from responsibility for discriminatory conduct in virtually any statutory or common law matter that may arise outside of a Mine Act proceeding, can reasonably be construed as a means of dissuading Armstrong . . . from filing similar civil actions." *Id.* at 2686. Furthermore, he concluded that the joint motion failed to articulate mitigating circumstances that justified reducing the proposed penalty from $70,000 to $35,000. *Id.* The Judge stated that neither the cited posting and training requirements, nor Armstrong's filing of a motion to dismiss the

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[1] Special MSHA Investigator Kirby Smith testified in the temporary reinstatement proceeding that MSHA's attempt to inspect the facility was prompted by Shemwell's health and safety complaint. *Id.* at 1664. Armstrong's reaction to the attempted inspection was to shut off the power and send the employees home for the day. *Id.*

[2] Indeed, in the Decision and Order of Temporary Reinstatement, the Judge observed, "I can think of nothing more chilling on an employee's inclination to report possible health and safety issues than the threat imposed by [Armstrong's vice president of operations] Allen at that meeting . . . ." 34 FMSHRC at 1664.

[3] We agree with the Judge. It is well established that objectively baseless retaliatory lawsuits fall outside of the protection of the First Amendment. *See BE & K Const. Co. v. NLRB,* 536 U.S. 516, 530-31 (2002).

Muhlenberg suit subsequent to the July 19, 2013 decision, represented mitigating circumstances to justify the proposed reduction in penalty. *Id.*

Analysis

A. The Judge did not abuse his discretion when he denied the joint motion to approve settlement.

The Mine Act and its Procedural Rules require an Administrative Law Judge to approve the settlement of a contested civil penalty.[4] 30 U.S.C. § 820(k); 29 C.F.R. § 2700.31. A Judge is afforded discretion when considering whether to approve a settlement agreement. *See Black Beauty*, 34 FMSHRC 1856, 1864-69 (Aug. 2012) (holding that the Mine Act and its procedural rules provide Judges the discretion to consider whether a proposed settlement of a civil penalty constitutes a sufficient deterrent); *see also Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981) (stating that "[t]he Judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.").

For the reasons that follow, we dissent from our colleagues and conclude that the Judge did not abuse his discretion when he denied the parties' motion to approve settlement.[5]

1. The Muhlenberg suit is a SLAPP.

The safety of miners is directly dependent on their ability to voice relevant concerns to management as well as to the representatives of MSHA. We agree with the Judge that the filing of the Muhlenberg suit was an assault on the fundamental operation of the Mine Act. Any action that serves to intimidate miners with potential legal or financial consequences because of their exercise of statutory rights is anathema to the cooperative culture of safety and the Mine Act. *See* 30 U.S.C. § 801(e) (declaring that "the operators of [] mines *with the assistance of the miners* have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices") (emphasis added).

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[4] The Secretary's contention that its settlement agreements are essentially unreviewable by the Commission is contradicted by the plain language of the Mine Act. *See* S. PDR at 11. The Mine Act states that "[n]o proposed penalty which has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

[5] We agree with the majority that the Judge erred regarding his lack of jurisdiction to consider the motion, as well as in his application of mootness principles. However, since these matters are not essential to the Judge's decision, they are a distraction from the pertinent question before the Commission: Did the Judge abuse his discretion when he denied the motion to approve settlement?

When enacting the Mine Act, the Senate recognized that if miners are to be encouraged to take an active role in voicing safety concerns, they must be *assured* that they will be protected from any form of discrimination that they may face as a consequence for their protected activities. *See* S. Rep. No. 95-181, at 35-36, *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-624 (1978). "[M]ining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity" and as a result the loss of employment is a particularly devastating repercussion for a miner. *See id.* at 623.

The Muhlenberg suit objectively lacked a legal basis. The basic elements of a cause of action for "Wrongful Use of Civil Proceedings"[6] were plainly missing because there had yet to be a final decision issued on the merits of Shemwell's complaint. *See* 35 FMSHRC at 1868; *See* n.6, supra. Armstrong filed the suit regardless.

Armstrong, by virtue of its resources and access to representation, attempted to use state law as a weapon to discourage miners from exercising statutory rights. Similar abuses of the legal process are commonly referred to as SLAPPs ("Strategic Lawsuit Against Public Participation"). SLAPPs like the Muhlenberg suit function by

> . . . forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent.

Gordon v. Marone, 590 N.Y.S.2d 649, 656 (N.Y. 1992).

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[6] The elements of this cause of action are: (1) the institution or continuation of original . . . administrative . . . proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding. *D'Angelo v. Mussler*, 290 S.W.3d 75, 79 (KY App. 2009).

It is thus not surprising that 28 states as well as the District of Columbia and Guam have responded to the SLAPP threat with either legislative or judicial proscription. Bruce E. H. Johnson, Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 Wash. L. Rev. 495 (2012); *see, e.g.*, Cal CCP Code § 425.16(b)(1) (providing for a special motion to strike a complaint that involves a cause of action against a person that arises from any act of that person in furtherance of the person's right to petition the government).

The West Virginia Supreme Court recognized the need for a judicial proscription in the absence of relevant legislation. In *Webb v. Fury*, 167 W.Va 434, 460 (W.Va. 1981), the court granted a petitioner's request for a writ of prohibition to prevent a coal company from proceeding with a defamation action filed in a Circuit Court. The defamation suit was filed in response to a series of communications made by Webb and his non-profit corporation to the Environmental Protection Agency and the Office of Surface Mining regarding the effects of coal mining on water quality. *Id.* at 437. The court stated that communications regarding matters of public concern are protected by the First Amendment to the U.S. Constitution and Article III, § 16 of the West Virginia Constitution. In so ruling, the court stated that "[o]ur democratic system is designed to do the will of the people, and when the people cannot express their will, the system fails."[7] *Id.* at 460.

2. The exculpatory language is not consistent with the Mine Act.

Our colleagues contend that the exculpatory language included in the motion is consistent with the Mine Act, slip op. at 5-6 (citing *Amax Lead Co.*, 4 FMSHRC 975, 977-78 (June 1982)), and that the Judge erred when he rejected the inclusion of the language. *Id.* at 6.

We believe that the majority's reliance on *Amax Lead* is misplaced. *Amax Lead* did not involve a violation of section 105(c)(1). The Commission concluded that in settling an alleged violation of a mandatory safety standard an operator may limit its admission of liability to proceedings under the Mine Act. *Amax Lead*, 4 FMSHRC at 978-79. The Commission stated that limiting liability is consistent with the Act's enforcement scheme when it does not affect the implementation of some of the strongest compliance incentives, namely the sanction of an "unwarrantable failure" or a "pattern of violations." *Id.*

Unlike the situation with mandatory safety standards, the Mine Act does not contemplate progressive enforcement mechanisms for violations of the anti-discrimination provisions. Accordingly, we don't consider the reasoning or rationale used in *Amax Lead* to be applicable to the facts and circumstances before us.

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[7] The Commonwealth of Kentucky does not have a similar precedent or procedure and, accordingly, Shemwell was left without recourse under state law.

We are further troubled by the majority's reliance on *Amax Lead* because the subject settlement agreement's terms require it to be posted at each of Armstrong's mines. In *Amax Lead*, the Commission did not consider how language limiting liability may impair effective communications to a mining workforce of the Secretary's position on and the Commission's resolution of violations of section 105(c)(1). As discussed more fully below, the exculpatory language contained in the settlement agreement here eviscerates any educational and deterrent effect of the posting requirement.

We conclude that the Judge correctly recognized that the settlement of a violation of section 105(c)(1) is not directly analogous to the settlement of a citation issued for a violation of a safety standard. *See* 35 FMSHRC at 2685-86. Therefore, the Judge did not abuse his discretion in rejecting the subject exculpatory language.

3. The Judge considered all the terms in the motion for settlement.

Our colleagues have also held that the record does not support the Judge's conclusion that the settlement agreement lacks mitigating circumstances to justify a reduction in penalty from $70,000 to $35,000. Slip op. at 6. We again disagree.

First, the Judge correctly excluded Armstrong's withdrawal of the Muhlenberg suit as a mitigating circumstance. The Judge had already ruled that by filing the civil action Armstrong violated the Act. 35 FMSHRC at 1886-87. A fundamental principle of the Mine Act is that operators are required to abate violations of the Act. *See* section 104(a), 30 U.S.C. § 814(a) ("[i]f, upon inspection or *investigation*, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act *has violated this Act* . . . he shall, with reasonable promptness, issue a citation to the operator. [T]he citation shall fix a reasonable time for the abatement of the violation")[8] (emphasis added). Because Armstrong was *required* by the terms of the Act to dismiss the objectively baseless Muhlenberg suit, its abatement of the violative condition *cannot* be considered a mitigating circumstance.[9] The violative condition should have been abated as soon as the Secretary's investigator concluded that the Act had been violated and issued the complaint. Furthermore, Armstrong did not demonstrate good faith in its compliance. *See* 30 U.S.C. § 820(i) ("good faith" efforts to achieve

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[8] Under the terms of the Act, the Secretary should have fixed a reasonable time for abatement and required the suit to be dismissed within that time frame.

[9] Armstrong's ultimate dismissal of the Muhlenberg suit *with prejudice* as opposed to the Judge's minimum requirement of dismissal *without prejudice* lacks any real significance. The Judge explained that in his Decision on Liability and Cease and Desist Order, he permitted the dismissal of the Muhlenberg suit to be without prejudice so as to "permit[] Armstrong to once again bring its civil proceeding in the unlikely event Armstrong is ultimately successful on appeal." 35 FMSHRC at 1886. Our holding should make clear that baseless retaliatory lawsuits violate the Mine Act and therefore, if filed, must be dismissed.

compliance may be a mitigating circumstance justifying a reduction in civil penalty). It didn't dismiss the suit after both the Secretary and a Commission ALJ found it to be in breach of the Act. Rather, Armstrong flouted the law by refusing to dismiss the Muhlenberg suit without a settlement.

Second, the Judge was correct in stating that posting and training requirements are routinely included in motions for settlement in section 105(c) cases. In fact, the Secretary has recently authored several press releases announcing the inclusion of posting and training requirements in agreements to settle discrimination cases. *See* Press Release, Mine Safety and Health Administration, "MSHA settles two discrimination cases with Tennessee mine operator" (Jan. 9, 2014); Press Release, MSHA, "MSHA, New Elk Coal reach settlement" (May 8, 2013); Press Release, MSHA, "MSHA and Pennsylvania coal operator reach settlement in discrimination case" (Jan. 4, 2012). Our colleagues quote the Secretary's representation that the posting and training requirements were not routine. However, the Secretary's bare assertion is not supported by any evidence. The Secretary's lawyers are apparently unaware of the Secretary's actual practices as described by the press releases. Accordingly, the Judge did not abuse his discretion in concluding that the settlement terms before him were routinely included in motions to approve settlement of discrimination cases.

For the foregoing reasons, the Judge's conclusion that the parties failed to present mitigating remedies to offset the proposed $35,000 reduction in penalty is fully supported. His analysis in light of these facts reflects that he thoroughly considered each aspect of the settlement and then concluded that, on balance, the remedies were not proportionate to the insidiousness of the violation or consistent with the enforcement scheme of the Mine Act. *See* 35 FMSHRC at 2686-87. We disagree with the majority's assertion that the Judge's analysis reflects that he somehow failed to consider the effect of the settlement as a whole. *See* slip op. at 7-8 (citing *Madison Branch Management*, 17 FMSHRC 859, 867-68 (June 1995)). The Judge correctly concluded that the reasons advanced by the Secretary to justify reducing the penalty were baseless: "There are no mitigating circumstances to justify the proposed reduction." 35 FMSHRC at 2686. Perhaps the Secretary had some other reason for reducing the $70,000 penalty that his Office of Assessments proposed. We don't know. But there is nothing in the record to justify a reduction.[10]

[10] The fact that Shemwell was represented by private counsel, as noted by the majority, slip op. at 3 n.3, is irrelevant to the *Commission's* consideration of the settlement agreement.

B. The settlement agreement is not in the public interest because the terms are inadequate to address the nature of the violation and contrary to the public policy of the Mine Act.

1. The posting requirement in the settlement agreement is inadequate.

As a SLAPP, the Muhlenberg suit is contrary to the public policy of a majority of U.S. jurisdictions, and the Judge correctly condemned it as contrary to the federal policy goals of the Mine Act. Miners working at Armstrong's mines must be informed *in unambiguous terms* that in filing the civil action against Shemwell, Armstrong violated the Mine Act. We would require the mine operator to post a notice with language that is clear and direct.[11] *See* S. Rep. 95-181, 95th Cong., 1st Sess. 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978) (the Mine Act's legislative history states that the Commission should require "all relief that is necessary to make the complaining party whole and to *remove the deleterious effects of the discriminatory conduct* including . . . requirements for the posting of notices by the operator.") (emphasis added).

Instead of posting the Judge's decision, under the proposed agreement Armstrong is required merely to post a copy of the settlement motion complete with the clause that states: "except for proceedings under the Act, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or its regulations." Jt. Mot. at 3 (Aug. 8, 2013). The inclusion of this limiting language creates an equivocacy about the unlawfulness of the Muhlenberg suit that undermines the effectiveness of the posting requirement and the Act's anti-discriminatory provisions. *See Pottsville Bleaching Co.*, 301 NLRB 1095, 1095 (Feb. 1991) (rejecting the inclusion of a nonadmissions clause in a Board notice and stating that "the inclusion of a nonadmissions clause in the Board's notice could be confusing to those reading the notice and could undermine its effectiveness"); *see also Independent Shoe Workers of Cincinnati, Ohio*, 203 NLRB 783, 783 (May 1973) (rejecting a recommended official Board notice because it contained a nonadmissions clause that would "undermine the effectiveness intended to be had by the Board notice and, accordingly, would fail to effectuate the policies of the Act"). We cannot comprehend why the Secretary agreed to a posting requirement which does not state, in unambiguous terms, that Armstrong's lawsuit seeking punitive damages for Shemwell's filing of a safety complaint with MSHA was a gross violation of the Mine Act.

We conclude that the posting requirement in its current form is not in the public interest and represents ineffective enforcement of the Mine Act. In view of Armstrong's conduct, its miners need to be informed that they may assert statutory rights without the threat of reprisal by

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[11] The Judge, in his August 19, 2013 Order and Supplemental Decision on Relief, properly ordered Armstrong to post both the June 19th Decision on Liability and the August 19th Supplemental Decision at suitable locations at each of Armstrong's facilities for a period of 90 days. 35 FMSHRC at 2692.

oppressive litigation. This is especially important given the pattern of Mine Act discrimination complaints against Armstrong.

2. The reduction in penalty is not adequately justified.

The Secretary's motion does not adequately justify the proposed 50 percent reduction in the civil penalty. We agree with the Judge that the posting and training requirements that Armstrong agreed to are unremarkable and not proportionate to the violation. The Judge was well within his rights to insist that the filing of the Muhlenberg SLAPP is the type of violation that warrants the imposition of the statutory maximum penalty of $70,000 originally proposed by the Secretary.

In an attempt to justify the proposed terms of the settlement, the Secretary contends that he alone has "the historical expertise to determine whether the proposed relief will best protect miners." S. PDR at 11. However, Congress empowered the *Commission* to determine whether or not to approve a settlement. 30 U.S.C. § 820(k). In this case, the Judge found that a 50 percent reduction of the maximum penalty, for what he properly characterized as an egregious transgression against the Act, was inadequate. The record before us stands in support of his decision.

Conclusion

In summary, we dissent from our colleagues because we believe that the Judge did not abuse his discretion when he denied the motion to approve settlement. In addition, we independently consider the proposed settlement terms to be inadequate to address the violation. We would affirm the Judge's denial of the joint motion to approve settlement.

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