

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 2, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. CENT 95-8-RM
v.	:	CENT 95-9-RM
	:	
ASARCO, INC.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of DAVID HOPKINS	:	
	:	
v.	:	Docket No. CENT 95-122-DM
	:	
ASARCO, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley Commissioners¹

ORDER

BY THE COMMISSION:

In these consolidated contest and discrimination proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”), the parties filed a Joint Motion To Approve Settlement Agreement on October 23, 1996 (“Joint Motion”). For the reasons set forth below, we deny the Joint Motion without prejudice.

On March 4, 1996, Administrative Law Judge Richard W. Manning issued a decision finding that ASARCO, Inc. (“ASARCO”) violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it discharged David G. Hopkins, the complainant. 18 FMSHRC 317, 335 (March 1996) (ALJ). In a Supplemental Decision and Final Order issued on July 16, 1996, Judge

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

Manning awarded Hopkins reinstatement² and \$12,752 in back pay (minus payroll deductions), interest, and expenses. 18 FMSHRC 1160, 1163-65 (July 1996) (ALJ). Judge Manning also ordered ASARCO to expunge from Hopkins' personnel records any mention of his discharge, and to pay a civil penalty of \$800 for its violation of section 105(c). *Id.* On August 23, 1996, the Commission granted ASARCO's petition for discretionary review challenging the judge's conclusion.³

ASARCO subsequently filed with the Commission two motions requesting extensions of the briefing schedule, indicating that the parties were either engaged in settlement discussions or in the process of executing a settlement agreement. The Commission granted both motions and directed ASARCO to file its brief by November 6, 1996. The parties filed their Joint Motion before ASARCO's brief was due. The motion requests, *inter alia*, that the Commission approve the settlement agreement set out in seven numbered paragraphs within the motion. Joint Motion at 3-4.

Under the terms of the settlement agreement, ASARCO agrees to pay Hopkins \$15,000 "in settlement of any and all of Mr. Hopkins' claims against [the company]," and to pay \$500 in settlement of the \$800 fine assessed by the judge. *Id.* at 3. Without further elaboration, the parties state that their proposed penalty "is consistent with the statutory criteria for penalties under the Mine Act." *Id.* Hopkins waives any rights to be reinstated or to seek employment at any facility owned by ASARCO or its subsidiaries, successors, or assigns, and he releases ASARCO from further liability. *Id.* The parties agree to bear their own costs in connection with the proceeding, and represent that the settlement "is in the public interest and will further the intent and purpose of the Mine Act." *Id.* at 3-4. The motion is signed by counsel for ASARCO and the Secretary, and by Hopkins. Included in the motion is a "Confidentiality Agreement" paginated as part of the overall submission and signed by ASARCO's counsel and Hopkins, but not by the Secretary's counsel. *Id.* at 5.

Oversight of proposed settlements is committed to the Commission's sound discretion. *Pontiki Coal Corp.*, 8 FMSHRC 668, 674-75 (May 1986). The Commission has exercised this discretion in the past in both section 105(c)(2) and section 105(c)(3) discrimination cases. *See, e.g., Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (March 1993); *Secretary of Labor on behalf of Gabossi v. Western Fuels-Utah, Inc.*, 11 FMSHRC 134 (February 1989).

On its face, the instant settlement agreement fails to adequately set forth the intent of the parties regarding the nature of ASARCO's \$15,000 payment to Hopkins and whether that amount

² Hopkins declined the offer of reinstatement.

³ In its PDR, ASARCO also raises the question of whether the judge properly concluded that ASARCO violated 30 C.F.R. § 57.14100(b) in connection with its discharge of Hopkins. *See* 18 FMSHRC at 331-34, 336. Since the Joint Motion requests Commission of approval of ASARCO withdrawing its PDR, this issue is moot.

represents a net amount to be paid to Hopkins or whether deductions are to be taken out of that amount. We conclude that the parties must more clearly express their intentions regarding the payment to Hopkins to avoid the possibility of future litigation over the terms of the payment.⁴

In addition, the parties have failed to meet the requirements of Commission Procedural Rule 31(b)(3). In keeping with Congress' intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties," S. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Legislative History of the Federal Mine Safety and Health Act of 1977, at 663 (1978), Rule 31(b)(3) requires that a motion to approve settlement include "[f]acts in support of the penalty agreed to by the parties" (29 C.F.R. § 2700.31(b)(3)), so that the Commission can verify that the reduced penalty is appropriate. Here, no such facts were provided by the parties in support of their proposal to reduce the \$800 fine assessed by the judge to \$500. ASARCO and the Secretary state that their proposed penalty "is consistent with the statutory criteria," but fail to provide any further justification for reducing the penalty. Joint Motion at 3.

⁴ This result is in keeping with our recent ruling in *Secretary of Labor on behalf of Kaczmarczyk v. Reading Anthracite Co.*, 18 FMSHRC 299 (March 1996). In *Kaczmarczyk*, we were presented with a dispute regarding whether deductions should have been taken from an award of monetary damages paid in compensation for unlawful discrimination under section 105(c) of the Mine Act. *Id.* at 300. Noting that the "issue [was] governed by the terms of the Internal Revenue Code, not the Mine Act," we held that "[i]n order for both Reading and Kaczmarczyk to treat that damage award properly for income tax purposes, the basis for the stipulated damages must be categorized in appropriate detail." *Id.*

Accordingly, the parties' joint motion is denied without prejudice. The parties are invited to file a revised joint motion clarifying their intent as to the nature of ASARCO's payment to Hopkins and fulfilling the requirements of Commission Procedural Rule 31(b)(3). Any revised motion to approve settlement shall be filed with the Commission by December 17, 1996. If such a motion is not filed, ASARCO's brief shall be filed with the Commission by December 31, 1996. The Secretary's response brief will be due thirty days thereafter.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner