FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 28, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of CLEMMIE CALLAHAN	:	
	:	
v.	:	Docket No. KENT 97-13-D
	:	
HUBB CORPORATION	:	

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

DECISION

BY: Marks and Beatty, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is Administrative Law Judge Avram Weisberger=s order dismissing the proceeding in its entirety upon complaining miner Clemmie Callahan=s motion, which was prompted by Callahan=s settlement of his discrimination claim against operator Hubb Corporation (AHubb@). Unpublished Order dated June 10, 1997. The Commission granted the Secretary of Labor=s petition for discretionary review challenging the order of dismissal. The judge=s order is reversed and the matter is remanded for resumption of proceedings.[1]

I.

Factual and Procedural Background

[1] Commissioners Marks and Beatty vote to reverse the judge=s order and remand for further proceedings. Chairman Jordan concurs in a separate opinion. Commissioners Riley and Verheggen vote to affirm the judge, and dissent in a separate opinion.

Callahan had worked for approximately 9 months as a roof bolter at Hubb=s No. 5 mine, an underground coal mine in Perry County, Kentucky, when he was laid off in early March of 1996. Tr. 45-46, 56-57, 67-68. On April 5, 1996, Callahan filed a discrimination complaint with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. ' 815(c)(2).[2] H. Ex. 1. After conducting an investigation

[2] Section 105(c)(2) provides:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of . . . subsection [105(c)] may . . . file a complaint with the Secretary alleging such discrimination. . . . [, who] shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order . . . affirming, modifying, or vacating the Secretary=s proposed order, or directing other appropriate relief. . . . The complaining miner . . . may present additional evidence on his own behalf during any hearing held pursuant to this

of the complaint, the Secretary filed a complaint on October 21, 1996, alleging that Callahan=s layoff was due to his complaints to the company about being forced to work in unsafe conditions. S. Compl. at 2.[3] The complaint requested relief for Callahan, as well as an order assessing a civil penalty against Hubb. *Id*. at 2-4. On November 18, 1996, the Secretary amended her complaint to set the requested penalty amount at $10,000. S. Am. Compl. at 1-2, 5.

At the hearing, the Secretary called two witnesses prior to the lunch recess. Carl Ingram testified that he had worked at the Hubb No. 5 mine as a repairman while Callahan was working there and had discussions with him regarding shocks Callahan had received from the trailing cable to a bolter Callahan was using. Tr. 8, 13, 15, 16-18. Callahan, who was represented by his own counsel at the hearing, then testified and was cross-examined about the allegations that formed the basis for the Secretary=s discrimination complaint. Tr. 43-126.

---

paragraph.

[3] The Secretary alleged that Callahan had complained to Hubb about being shocked by a trailing cable to his bolter that had bad splices, being required to work on a section without sufficient ventilation, and being required to work underground while other employees were smoking. S. Compl. at 2.

The Secretary planned to continue to present her case after the lunch recess. Tr. 129.[4] However, during that recess the three parties resumed settlement discussions that they had begun prior to the hearing. S. Br. at 2; H. Br. at 3.[5] Consequently, prior to the resumption of testimony after the recess, Callahan=s trial counsel moved that Athis claim be dismissed pursuant to an agreement reached between myself and counsel for [Hubb].@ Tr. 128. He further stated that A[w]e would admit at this time there has been no violation of the [A]ct and would ask the court to dismiss the case in its entirety.@ Tr. 128.

The Secretary=s counsel objected to the motion, citing Callahan=s testimony in support of his allegations, and went on to state:

> [T]he Secretary=s position is that [she] filed the case on behalf of [Callahan] . . . .
>
> . . . [T]here has been a 105(c) case established, and at this point I would like to ask that you allow me to continue to put the rest of my case on so that a civil money penalty can be assessed against [Hubb].

Tr. 128-29. At that point Hubb joined in the motion to dismiss, its counsel stating that A[i]f the complainant has admitted that there is no violation, then . . . there is no case and we therefore move that this matter be dismissed.@ Tr. 130.

The judge granted Callahan=s motion orally at trial, ruling that Callahan, having conceded the lack of a violation, was entitled to seek dismissal. Tr. 130. The judge went on to state:

> If there is not any individual complainant who is alleging an act of discrimination, I don=t see how the Secretary has a[ny] standing at that point to seek any penalty against the company.
>
> I don=t see where I have any jurisdiction to consider assessing the penalty against the company for an alleged violation of Section 105(c).
>
> . . . [T]he person allegedly discriminated against has conceded that an act of discrimination did not occur; hence, the

---

[4] According to the Secretary on appeal, she was going to offer the testimony of two more witnesses. S. Br. at 2. At the hearing, an MSHA electrical supervisor who was present was identified as one potential witness. *See* Tr. 9.

[5] At the outset of the hearing, the judge stated that the parties had apprised him that they had not been able to reach a settlement, and he encouraged them to continue discussions. Tr. 3.

> motion [is] well founded, and the motion is granted. The case is dismissed.

Tr. 130-31. The judge subsequently issued a one-page order reiterating his grant of Callahan=s motion and dismissal of the case. Unpublished Order dated June 10, 1997.

The judge did not review the terms of the settlement between Callahan and Hubb either before or after granting the motion. Responding to the Secretary=s statement that Hubb and Callahan agreed on the amount of backpay Hubb would pay Callahan (S. Br. at 2), Hubb states that it accepted a proposal for settlement made by Callahan, and A[t]he terms of the settlement were not made a part of the record nor revealed to the ALJ or counsel for the Secretary . . . .@ H. Br. at 3. Hubb and the Secretary agree that the Secretary rejected any offer of settlement with respect to the $10,000 civil penalty she had proposed. S. Br. at 2 & n.1; H. Br. at 3.

II.

Disposition

The Secretary has not objected to Callahan=s settlement with Hubb. However, the Secretary contends that she should have been permitted to present her case to its conclusion, as section 105(c)(2) requires judges to decide discrimination cases brought by the Secretary. S. Br. at 5-7. According to the Secretary, the Mine Act and its legislative history provide that, because the Secretary seeks to vindicate broader interests, the Secretary=s case is separate and distinct from a complainant=s. *Id*. at 7-8. The Secretary submits that, regardless of whether the settlement made Callahan whole, the Mine Act requires the imposition of civil penalties for violations. *Id*. at 8-11. Lastly, the Secretary relies on other federal labor statutes for the proposition that a judgment or settlement in a private action does not bar the government from continuing its action against the same defendant on the same statutory claim. *Id*. at 11-13.

Hubb claims that the judge properly found, based on Callahan=s testimony and his later admission of no violation, that there was no violation. H. Br. at 4-5. Hubb argues that because substantial evidence supports that determination, the judge=s dismissal of the case should not be overturned. *Id*. at 5-6. Callahan has new counsel who entered an appearance for him on this appeal, but did not submit any other pleading at this stage of the proceeding.

1. The Basis for the Judge=s Dismissal of the Entire Proceeding

Reviewing the judge=s ruling at trial, it is clear that he dismissed the entire proceeding for what he perceived to be a lack of jurisdiction. Once he permitted Callahan to withdraw from the case, the judge was faced with a decision regarding the status of the Secretary. From his references to a lack of Ajurisdiction@ and Astanding@ (Tr. 130-31), we interpret the judge=s involuntary dismissal of the Secretary=s discrimination claim as based on his understanding that, because the party that had initiated the discrimination complaint had withdrawn from the

proceeding, there no longer was a basis upon which the Secretary could proceed with a discrimination claim against Hubb.[6]

[6] Callahan=s trial counsel initially moved to dismiss only Callahan=s Aclaim@ (Tr. 128), a motion that did not reach the Secretary=s complaint against Hubb. It is only when that motion was expanded to include a request for Adismiss[al of] the case in its entirety@ (Tr. 128) that dismissal of the Secretary=s complaint was made an issue.

While the judge also made a passing reference to the statement made by Callahan=s attorney in moving to dismiss that there had been no violation of the Act (*see* Tr. 131), we do not consider the judge=s remark as a determination of the merits of the Secretary=s complaint.[7] This is

[7] The dissent=s characterization of the judge=s decision as one on the merits is, like Hubb=s, based on the judge=s reference to the admission by Hubb=s counsel that Athere has been no violation of the [Act].@ *See* slip op. at 11; Tr. 128. We do not interpret the judge=s decision in that fashion. The judge could not make a substantive determination of whether Hubb violated the Mine Act based solely on the post-settlement, unsupported opinion of Callahan=s trial counsel. To render a decision on the merits, the judge must first consider and analyze the record *evidence*, including that supplied under oath by Callahan. *See Anaconda Co.*, 3 FMSHRC 299, 300 (Feb. 1981). Because there was no such analysis and consideration of the record here, there could be no decision on the merits of the discrimination violation.

Our dissenting colleagues also parse the words of the Secretary=s counsel to conclude that she had rested her case in chief, and that therefore a motion to dismiss was timely. *See* slip op. at 13 (quoting Tr. 129). However, the language on which they focus is from counsel=s extemporaneous response to Callahan=s motion to dismiss. Consequently, we do not interpret counsel as making an after-the-fact acknowledgment that the Secretary had no more evidence on the issue of discrimination, and that her remaining two witnesses would speak solely to the appropriate penalty assessment. Our approach is especially appropriate here because nothing in the record reveals the matters about which the remaining witnesses were going to testify.

particularly true because the Secretary, who has the burden of proof, had not finished presenting her evidence. Consequently, we reject Hubb=s unsupported argument that we should affirm dismissal of the entire proceeding on the ground that substantial evidence supports a finding of no discrimination.[8] Because there was no decision on the merits of the discrimination complaint, the substantial evidence standard is inapplicable to this case. *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994) (before Commission can review judge=s decision under substantial evidence standard, judge must weigh and analyze all relevant testimony, make appropriate findings, and present reasons for his decision).

2. Whether a Discrimination Complaint Brought by the Secretary Survives Settlement of the Initiating Complaint

The first inquiry in statutory construction is Awhether Congress has directly spoken to the precise question in issue.@ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).

Section 105(c)(2) both authorizes the Secretary to bring discrimination complaints under the Mine Act and governs that complaint process. According to the language of section 105(c)(2), the Secretary=s decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary=s investigation* of the initiating complaint to her, and not merely on the initiating complaint itself. *See also Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997) (scope of complaint Secretary may pursue before Commission not circumscribed by matters addressed in original complaint filed with her, but by subject matter of investigation conducted by Secretary in response to that complaint). Section 105(c)(2) also clearly states that the hearing held and the order subsequently issued by the Commission are on *the Secretary=s complaint and proposed order for relief*. The provision in section 105(c)(2) that a complainant miner Amay present additional evidence on his own behalf@ is a further indication that *the Secretary=s* case may be separate and independent from the complainant=s.

Section 105(c)(3) of the Mine Act states that A[v]iolations by any person of paragraph (1) [of section 105(c)] shall be subject to the provisions of section[110(a)] . . . .@ 30 U.S.C. ' 815(c)(3). Section 110(a) provides that A[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act], shall be assessed a civil penalty by the Secretary . . . .@ 30 U.S.C. ' 820(a). Thus,

[8] In arguing that substantial evidence supports a finding of no discrimination, Hubb does not cite to the record below. *See* H. Br. at 4-6.

sections 105(c) and 110(a) of the Mine Act plainly *require* that a penalty be assessed for discrimination violations of the Act.

Moreover, the legislative history is clear that relief for the individual miner provided by section 105(c) is to be Ain addition@ to the Secretary=s authority to assess a penalty against an operator for violating the Act by discriminating. *See* S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978) (A*Legis. Hist.*@). Such penalties are imposed on operators to induce them to comply with the Act. S. Rep. No. 95-181, at 41, *Legis. Hist.* at 629. The Commission=s procedural rules also require the Secretary to propose a civil penalty for a violation of section 105(c). *See* 29 C.F.R. ' 2700.44. Additionally, in *Meek v. Essroc Corp.*, 15 FMSHRC 606, 617-18 (Apr. 1993), *overruled on other grounds, Secretary of Labor v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), the Commission held that the Mine Act authorizes the assessment of a separate civil penalty against an operator who unlawfully discriminates against a miner, apart from the relief owed to the miner to remedy the discrimination.

The Mine Act plainly confers Commission jurisdiction over a discrimination complaint and request for relief brought by the Secretary apart from the discrimination proceeding initiated by the complainant. Any settlement between Hubb and Callahan could not affect the Secretary=s right, as a party who had not entered into the settlement,[9] to pursue the relief she sought, which in this case included a penalty assessment against Hubb. Accordingly, we conclude that the judge erred in granting the motion to dismiss to the extent that it resulted in dismissal of any of the Secretary=s claims. To rule otherwise would bestow upon initiating complainants veto authority over the Secretary=s enforcement of the Mine Act=s discrimination provisions, a result plainly at odds with the language of the Act.

Despite the plain meaning of the terms of the Mine Act, our dissenting colleagues come to the conclusion that, under section 105(c)(2), a complaining miner=s interest in settling his or her case trumps any interest the Secretary may have in continuing the case she has brought on behalf of that miner. *See* slip op. at 12-13. However, there is no support in the Mine Act or Commission precedent for the proposition that the goal of making complainants whole is more important than the interest the Secretary may have in pursuing a discrimination case.[10] While

[9] To the extent that our dissenting colleagues find fault with the Secretary=s failure to also reach a settlement with Hubb, they err. We are aware of no authority *requiring* the Secretary to compromise the assessed penalty. Nor is it proper to speculate why a settlement was not reached between the Secretary and Hubb.

[10] The dissent relies on section 105(c)=s legislative history for this proposition (*see* slip op. at 12), but that history is silent regarding the importance of the miner=s interests *relative to those of the Secretary* in a discrimination proceeding. Similarly, *Meek* says nothing regarding the *relative* importance of the interests of the miner and the Secretary, who was not even a party in that case. In fact, *Meek* plainly states that a miner=s discrimination complaint is separate and apart

acknowledging the Secretary=s Aseparate and distinct@ interest in discrimination proceedings (slip op. at 12), the dissent seems to subordinate that interest to those of the complainant, characterizing the Secretary=s interests as no more than Aabstract@ (*id*. at 13 n.2) and part of her Ainstitutional agenda.@ *Id*. at 12. Given the language and history of the Mine Act, we fail to see why the Secretary=s Ainterests@ **C** which here are to continue the case in order that a penalty may be assessed upon a finding of violation **C** merit such a description. Indeed, by seeking to assess penalties for discrimination, the Secretary thus serves the broader public purpose of deterring future discrimination, which is also unquestionably an important purpose of section 105(c).

---

from the Secretary=s civil penalty action stemming from a discrimination violation of the Act. *See* 15 FMSHRC at 618.

The dissent states that remanding the case for further proceedings means that Callahan will be brought back into the case, and that his settlement thus will be impeded. Slip op. at 12, 13. However, the record does not support this proposition.[11] The Secretary has voiced no opposition to Callahan settling with Hubb, and there is nothing in the record to suggest that Callahan=s settlement with Hubb will be voided should the Secretary=s case survive the dismissal motion. Consequently, we disagree with the dissent=s unsupported characterizations of the basis for the Secretary=s decision to continue to pursue this case.

III.

Conclusion

The judge=s dismissal order as it applies to the Secretary is reversed, and this proceeding remanded for further proceedings.

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

[11] These concerns are apparently based on the dissent=s fear that A[w]ithout Callahan=s cooperation, it would be impossible for the Secretary to meet her burden of proving by a preponderance of the evidence that Hubb discriminated against Callahan, especially since he now admits that no such discrimination occurred.@ Slip op. at 11. However, the Commission should not give dispositive weight to the post-settlement opinion of Callahan=s trial counsel when his client supplied testimony indicative of discrimination under oath.

Chairman Jordan, in favor of reversing the decision of the administrative law judge:

I agree with Commissioners Marks and Beatty that the judge erred in ruling that he lacked jurisdiction over this case once Callahan sought a dismissal pursuant to a confidential settlement agreement between himself and Hubb. The judge=s jurisdiction was invoked by the filing of the Secretary=s complaint. She was a party to the case. Jurisdiction is not automatically extinguished simply because another party to this litigation has entered into a settlement agreement and asks that the action be dismissed. Therefore, I would reverse the judge=s decision and remand the case.

I write separately, however, because I am unwilling to join my colleagues= statement that A*[a]ny* settlement between Hubb and Callahan could not affect the Secretary=s right, as a party who had not entered into the settlement, to pursue the relief she sought . . . .@ Slip op. at 6-7 (emphasis added and footnote omitted). This blanket assertion grants the Secretary the automatic right to proceed with her case despite the existence of any settlement between Callahan and Hubb, no matter what the terms.

The question of whether and on what grounds a judge may dismiss a discrimination proceeding over the objection of the Secretary, on the basis of a settlement reached between the complainant and the operator, has not previously been addressed by the Commission.[1] Answering that question requires a discussion of the interests at stake, as well as the Commission=s role in awarding relief under section 105(c)(2) of the Mine Act and overseeing settlements.[2] Because of

---

[1] Although the complainant=s trial counsel moved to dismiss, that motion was clearly a *quid pro quo* for the settlement agreement.

[2] Although this appears to be a case of first impression for the Commission, other agencies have been confronted with somewhat analogous situations. *See, e.g., Central Cartage Co.*, 206 NLRB 337, 84 LRRM 1273 (1973) (NLRB dismisses case over objections of its General Counsel, when charging party, union, and employer settled); *Al-Hilal Corp.*, 325 NLRB No. 43, 157 LRRM 1113, 1114 (1998) (NLRB revokes ALJ=s approval of settlement agreement because

the present posture of the case, the Commission has not had the benefit of hearing the views of all of the parties, or even the judge on these issues. Moreover, it is clear that such a discussion can only take place when the terms of the settlement forming the basis of the motion have been made available to the judge and the litigants and are not, as here, a

---

Amost of the alleged violations are unremedied,@ and because Athe public interest . . . [was] not addressed by the settlement.@). The Commission has previously exercised its discretion to oversee settlements in both section 105(c)(2) and section 105(c)(3) discrimination cases. *See Asarco, Inc.*, 18 FMSHRC 2081, 2082 (Dec. 1996); *Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (Mar. 1993); *Secretary of Labor on behalf of Gabossi v. Western Fuels-Utah, Inc.*, 11 FMSHRC 134 (Feb. 1989).

confidential matter between the parties to the agreement. Accordingly, on remand I would order the judge to review the settlement agreement and address these issues.

Mary Lu Jordan, Chairman

Commissioners Riley and Verheggen, dissenting:

Section 105(c)(2) of the Mine Act requires the Secretary to file a discrimination complaint with the Commission if, during the investigation of a complaint made to her, she determines the provisions of section 105(c) have been violated. 30 U.S.C. ' 815(c)(2). At issue here is whether a subsequent complaint made by the Secretary can proceed without the complainant miner=s consent after the miner has withdrawn his or her original complaint. Our colleagues hold that under such circumstances, the Secretary=s complaint must be fully adjudicated. Slip op. at 6-7 (opinion of Commissioners Marks and Beatty, joined by Chairman Jordan).[1] We disagree and would affirm the judge=s ruling dismissing the Secretary=s complaint. We therefore dissent.

Very early in the hearing, the judge encouraged the parties, including the Secretary, to continue settlement negotiations. Tr. 3. Hubb and Callahan heeded the judge=s admonition, and during a lunch hour recess, agreed to settle. Slip op. at 3. However, the Secretary rejected any settlement of the $10,000 proposed civil penalty. *Id*. at 4. When the hearing reconvened, Callahan moved to dismiss the case pursuant to the agreement he and his attorney worked out with Hubb during the recess. *Id*. at 3. The judge granted this motion, stating in his written order memorializing his ruling at the hearing that Callahan Aadmit[ted] that he was not discriminated against by Hubb . . . .@ *Id*.; Unpublished Order dated June 10, 1997. The Secretary appealed to the Commission because she apparently believes, notwithstanding the judge=s finding that there was no violation of the Act, the judge should have assessed a penalty against Hubb. S. Br. at 8-11.

---

[1] We disagree with the majority=s reliance on *Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009 (June 1997), for the proposition that the Secretary=s authority to proceed under section 105(c)(2) is not bound by the initiating complaint. Slip op. at 6. In *Pontiki*, the Commission held that a section 105(c) complaint made by a representative of miners **C** Dixon **C** could properly be construed by the Secretary to include as complainants those miners who designated Dixon as their representative. 19 FMSHRC at 1014-16. The Commission did not address in *Pontiki* whether the Secretary=s complaint could be expanded into a litigation dragnet that included any alleged victim of discrimination who did not complain. This latter point is closer to the issue here: whether Callahan should be forced to participate in further litigation without his consent.

Further legal action on behalf of Callahan may have some theoretical basis, but under the particular facts and circumstances of this case, any such action would be impossible since it would have to be achieved over the former complainant=s (i.e., Callahan=s) objections and protestations to the contrary. Without Callahan=s cooperation, it would be impossible for the Secretary to meet her burden of proving by a preponderance of the evidence that Hubb discriminated against Callahan, especially since he now admits that no such discrimination occurred. We view a remand of this case as an exercise in futility and a waste of the judicial resources of the Commission. *See American Mine Svcs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary where judge=s reconsideration of issue would serve no purpose).

We hasten to add that we do not question the Secretary=s assertion that although her case and Callahan=s case come before the Commission as parts of a single proceeding, they are legally separate and distinct involving separate and distinct interests. S. Br. at 7. At issue here, however, is what happens to *Callahan=s* interests when, encouraged by the judge to negotiate a settlement, he reaches an accord with his former employer, but where the Secretary refuses to acknowledge Callahan=s interest in resolving his case in a manner most favorable to himself.

It is this latter interest that we find most important in this case. Callahan, having settled with Hubb, has been made whole to his satisfaction, thus effectuating the *primary* goal of section 105**(**c**)** which is unequivocally to make miners whole. **S. Rep. No. 95-181, at 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) (A*Legis. Hist.*@) (AIt is the Committee=s intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct@)**; *see also Meek v. Essroc Corp.*, 15 FMSHRC 606, 617 (Apr. 1993) (AThe Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred.@). It is simply unfair to Callahan to resurrect his case and drag him unwillingly back into the fray with a remand order. We are also troubled by the broader implications of the majority=s decision. We believe that the majority=s decision could encourage miners to avoid bringing discrimination complaints to the Secretary knowing full well that once the Secretary files a formal complaint on their behalf, it will be all but impossible to achieve a favorable settlement unless the *Secretary=s* institutional agenda is satisfactorily served.

Our colleagues argue that a complaining miner=s interest to be made whole is not the primary goal of section 105(c). Slip op. at 7. We disagree. The purpose of section 105(c) is unequivocally to protect *miners* against any possible discrimination by ensuring that they will be made whole if they suffer any adverse, retaliatory action. The legislative history makes clear that Congress intended this section to provide Aall relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct.@ S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625. *Miners* **(**not the Secretary**)** are given first priority under the Mine Act. In section 2 of the Act, Congress declared that Athe first priority and concern of all in

the coal or other mining industry must be the health and safety of its most precious resource **C** the miner.@ 30 U.S.C. ' 801(a).

In fact, section 105(c) does set forth a hierarchy of interests. Sections 105(c)(2) and 105(c)(3) clearly state, and Commission precedent holds, that a discrimination complaint can only be initiated by a miner Awho believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection.@ 30 U.S.C. ' 815(c)(2), (c)(3). In other words, a discrimination case under the Act proceeds only if a *miner* initiates it, then is willing to participate in and cooperate with the proceedings. We fail to see how the Secretary=s position in a discrimination proceeding could not be subordinate to that of the complainant when section 105(c)(3) permits the complainant **C** and ultimately the Commission **C** to Asecond guess@ the results of the Secretary=s initial 105(c)(2) investigation by proceeding to a hearing on the merits of the original complaint, in effect reducing the Secretary=s role to little more than that of a discredited fact finder. As between the original complainant and the Secretary, the Act makes it abundantly clear who is in the driver=s seat.

We also find the Secretary=s litigation conduct at odds with her position on appeal. At the hearing, when Callahan announced through counsel his settlement with Hubb, the Secretary=s counsel objected, but only by stating that Callahan had testified as to his prima facie case (Tr. 128), and as follows: AIt has been established and we feel like there has been a [section 105(c)] case established, and at this point I would like to ask that you allow me to continue to put the rest of my case on *so that a civil money penalty can be assessed against the operator*.@ Tr. 129 (emphasis added). The solicitor=s response was odd for two reasons. First, she made no effort to rebut Callahan=s new admission that he was not discriminated against, other than by relying on his prior testimony. She could at least have made an offer of proof when the judge indicated he was granting the motion. Second, and more puzzling, is the solicitor=s apparent lack of any concern for whether the settlement was in Callahan=s best interests.[2]

The Secretary=s objections to Callahan=s settlement could be interpreted as predicated upon a fundamental lack of faith in the ability of miners to make informed decisions regarding their own best interests. Indeed, we are troubled by the Secretary=s apparent reluctance to trust Callahan=s judgment, in the forming of which Callahan had input not only from the Secretary in her role as statutory counsel, but from private counsel as well **C** private counsel with no separate agenda retained by Callahan at his own expense. *See Eastern Associated Coal Corp. v.*

---

[2] In this proceeding, we believe a conflict may have arisen between the Secretary=s abstract interests and Callahan=s much more concrete interests. Although Callahan settled his differences with Hubb, when he moved to have his case dismissed, the Secretary objected strenuously. Yet the Secretary was Callahan=s statutory counsel. The question arises whether the Secretary has the authority to pursue her separate agenda when it might be in conflict with her client=s interests. *See* Model Rules of Professional Conduct Rules 1.2(a) (AA lawyer shall abide by a client=s decision whether to accept an offer of settlement of a matter.@) and 1.3 cmt. 1 (AA lawyer should act . . . with zeal in advocacy upon the client=s behalf.@) (1998).

FMSHRC, 813 F.2d 639, 644 (4th Cir. 1987). We do not believe that it is appropriate for the Secretary to impede Callahan negotiating a settlement that is presumably most favorable to him.

Accordingly, we would affirm the judge=s decision dismissing this docket, and thus dissent from the majority=s remand order.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Gene Smallwood, Jr., Esq.
Polly & Smallwood
P.O. Box 786
104 North Webb Avenue
Whitesburg, KY 41858

Kenneth A. Buckle, Esq.
P.O. Box 1890
Hyden, KY 41749

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041