FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 8, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RONALD MAXEY	:	
v.	:	Docket No. KENT 97-257-D
LEECO, INC.	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

On March 31, 1998, the Commission, upon consideration of the Petition for Discretionary Review (APDR@) filed by Leeco, Inc. (ALeeco@), directed review in this matter. The following day, Leeco filed a Motion to Withdraw Petition, stating that it had agreed to pay to the Secretary of Labor the penalty assessed by the judge and had entered into a settlement agreement with complainant Ronald Maxey. In an April 23, 1998, unpublished order, the Commission directed the parties to submit their settlement agreement for review before the Commission would treat the motion to withdraw the PDR as one to vacate the direction for review and dismiss the appeal.

Pursuant to their Joint Motion to Approve Confidential Settlement, and to Seal Record (AJoint Motion@), Leeco and Maxey have submitted their settlement agreement and request that, upon in camera review, it be approved and sealed. It is well established that oversight of proposed settlements in discrimination cases is committed to the Commission=s sound discretion. *Secretary of Labor on behalf of Hopkins v. ASARCO, Inc.*, 19 FMSHRC 1, 2 (Jan. 1997); *Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390, 390 (Mar. 1993); *Secretary of Labor on behalf of Gabossi v. Western Fuels-Utah, Inc.*, 11 FMSHRC 134, 135 (Feb. 1989); *Secretary of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 197, 198 (Feb. 1987). We have reviewed the settlement and, upon full consideration, we grant the Joint Motion, approve the settlement, and seal it in accordance with the parties= request.

Despite the fact that the parties have not objected to Commission review of their agreement, Commissioner Beatty, writing in partial dissent, questions our authority in general to

review settlement agreements in discrimination cases. He apparently views the authority of the Commission to review settlements of civil penalties under section 110(k) of the Act as exclusive, barring review of any other type of settlement made in any Commission proceeding. Section 105(c), however, empowers the Commission to grant such relief as it deems appropriate in discrimination cases. This broad grant of authority must of necessity include the authority to review settlement agreements arising under section 105(c), for if no such authority existed, the ability of the Commission and its judges to ensure that discriminatees are made whole would be severely curtailed,[1] a result at odds with the intent of the Mine Act.[2] All the more compelling a reason for Commission review of settlements is the chance of an agreement being made that is Ainconsistent with the enforcement scheme of the Act.@ *Amax Lead Co. of Missouri*, 4 FMSHRC 975, 978 (June 1982).

[1] The settlement reviewed in *ASARCO*, for example, indicated that the parties had failed to consider whether a monetary award to the complainant represented damages or back pay, a distinction with significant taxation consequences that could have left the complainant with much less of an award than he had ever contemplated. 19 FMSHRC at 2.

[2] *See* S. Rep. No. 95-181, at 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) (AIt is the Committee=s intention 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 . . . .@).

Accordingly, the Commission=s direction for review is vacated and this proceeding is dismissed.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, concurring in part, dissenting in part:

While I concur in the result reached by the Commission majority in its order vacating the pending petition for discretionary review and dismissing this proceeding, I write separately to state my views on what I consider to be a significant issue raised by the pending case **C** the scope of the Commission=s authority to review and approve settlement agreements. I have serious questions about the source of the Commission=s authority to review and approve settlements that relate not to the assessment of a civil penalty, but rather to negotiated back pay awards designed to resolve allegations of unlawful discrimination in cases arising under section 105(c)(2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c)(2), (3) (the AMine Act@).[1]

Congress has granted the Commission authority to review and approve settlements involving civil penalties. This statutory mandate can be found in the express language of section 110(k) of the Mine Act, which states that A[n]o [contested] proposed *penalty* . . . shall be compromised, mitigated, or settled except with the approval of the Commission.@ 30 U.S.C. ' 820(k) (emphasis added). This authority is also referenced in Rule 30 of the Commission=s Procedural Rules, which states: A*In determining the amount of penalty*, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.@ 29 C.F.R. ' 2700.30(b) (emphasis added). The legislative history of section 110(k), however, speaks *only* of the Commission=s authority to approve the settlement of civil penalties, and contains no discussion of the Commission=s new-found right to pass judgment on the propriety of a back pay settlement. Nor does any other provision of the Mine Act authorize the Commission to approve back pay settlements in cases arising under section 105(c) of the Mine Act.

My colleagues contend (slip op. at 2) that the Commission=s authority to review settlement agreements in cases arising under section 105(c) Amust of necessity@ be derived from section 105(c), which grants the Commission authority Ato take such affirmative action to abate [a section 105(c)] violation as [it] deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.@ 30 U.S.C. ' 815(c)(2). In my view, however, the broad grant of authority in section 105(c)(2) to order

[1] While my colleagues in the majority correctly note that the parties herein have not objected to Commission review of their agreement, I believe this has no relevance to the question of whether the Commission has the authority to review and approve settlements in discrimination cases. Certainly, the parties= assent to review could not sanction action by the Commission that otherwise would be outside the scope of its statutory authority.

appropriate relief for unlawful discrimination found in cases litigated before Commission cannot be properly relied upon to expand the scope of the Commission=s authority to approve settlements, which are typically entered into before any determination of discriminatory conduct has been made, particularly in the absence of any indication by Congress that it intended to grant the Commission that authority. To the contrary, as noted above, the Commission=s authority to

approve settlements is discussed expressly only in section 110(k) in the context of settlement of a proposed penalty.

My colleagues also assert that, if no authority to review and approve section 105(c) settlements existed, the ability of the Commission and its judges to ensure that discriminatees are made whole would be Aseverely curtailed,@ contrary to the Aintent of the Mine Act.@ Slip op. at 2. I believe, however, that the Secretary of Labor, who generally represents complainants in discrimination cases, is in the best position to ensure that discriminatees are made whole in section 105(c) cases that settle prior to a final Commission decision. Significantly, in this case, the Secretary did not object to the terms of the settlement between Maxey and Leeco. In cases where the Secretary is not a party, the miner likely will be represented by private counsel, or, in rare cases, proceed in the litigation pro se. Even in the latter case, I have confidence that miners understand, better than anyone else, the value of their labor when it comes to negotiating a back pay award.

My colleagues in the majority state that oversight of proposed settlements in discrimination cases is committed to the Commission=s sound discretion, citing *Secretary of Labor on behalf of Hopkins v. Asarco, Inc.*, 19 FMSHRC 1, 2 (Jan. 1997), and several other prior cases. In *Asarco*, as in several of the other decisions, the Commission cited *Pontiki Coal Corp.*, 8 FMSHRC 668, 674-75 (May 1986), for the proposition that A[o]versight of proposed settlements is committed to the Commission=s sound discretion.@ 19 FMSHRC at 2. Significantly, however, *Pontiki* did not involve a settlement of a discrimination claim, but rather a judge=s determination that the amount of a *penalty* agreed to by the Secretary and the operator was an inadequate assessment for the four violations involved in that case. 9 FMSHRC at 673, 678. After reviewing *Pontiki*, and the cases cited by my colleagues, however, I have serious reservations about the Commission=s authority to review back pay settlements. In *Asarco* and the other cases cited, the Commission, relying on *Pontiki*, has taken an increasingly expansive role in reviewing settlement agreements, which has led it to evaluate the propriety of negotiated back pay awards and other related matters in cases arising under section 105(c) of the Act.[2] This expansion in the scope of the Commission=s authority to review settlements has evolved without any analysis or discussion by the Commission of the source of its legal authority to take a more expansive role in this area. Likewise, my colleagues offer no explanation of the source of the Commission=s authority to

[2] For instance, in *Asarco*, the Commission directed the settling parties to clarify the issue of whether the operator=s agreed-upon payment to the complainant was a net amount to be paid to the miner directly, or whether deductions were first to be taken out of the payment. 19 FMSHRC at 2.

review settlement agreements in discrimination cases other than to opine that such authority Amust of necessity@ be derived from section 105(c). Slip op. at 2. In my view, this unexplained expansion of an otherwise narrowly-defined statutory authority to approve settlements of civil penalties has led the Commission into areas not envisioned by Congress, resulting in an unjustified delay in allowing parties to enjoy the benefits of the bargain that they negotiate, as has occurred in this case.

Because of my initial concerns about the Commission=s authority to review and approve the type of settlement involved in this case, I declined to join in the unpublished order of the Commission majority dated April 23, 1998, directing the parties to submit their settlement agreement for review by the Commission. Rather, as I stated in my joint dissent (with Chairman Jordan) to that order, I then would have granted the unopposed motion of Leeco, Inc., to withdraw its petition for discretionary review, and dismissed the appeal, without requiring the parties to submit their settlement agreement to the Commission for its review and approval. In retrospect, I continue to believe that this was the appropriate course to have followed in this case, which would have avoided the continuation of what I consider to be an unjustified expansion in the scope of the Commission=s authority to approve settlements, as well as a delay of over 2 months in the implementation of the settlement agreement negotiated by the parties.

Robert H. Beatty, Jr., Commissioner

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