U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

LARRY E. EASH, SR., **ARB CASE NO. 99-037**

COMPLAINANT, **ALJ CASE NO. 98-STA-28**

v. **DATE: October 29, 1999**

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
Paul O. Taylor, Esq. *Eagan, MN*

For the Respondent:
John T. Landwehr, Esq. *Eastman & Smith, Ltd., Toledo, OH*

DECISION AND ORDER OF REMAND

Complainant Larry E. Eash, Sr. (Eash) filed a complaint against his employer, Respondent Roadway Express, Inc. (Roadway) under section 405 of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. §31105 (1994). The Administrative Law Judge (ALJ) assigned to the case issued a Recommended Decision and Order (R. D. & O.) in which the ALJ determined that negotiations to settle the action subsequent to Eash's filing of the complaint had resulted in an enforceable settlement agreement. The ALJ found that Eash either had accepted or had authorized acceptance of an offer to settle the complaint; that an agreement therefore existed; and that the agreement should be approved because it constituted a fair, adequate and reasonable settlement of the complaint. We disagree with the ALJ's finding that the parties entered into an enforceable settlement. Accordingly, the complaint is remanded to the ALJ for a hearing on the merits.

BACKGROUND

Eash was employed by Roadway beginning in March 1988 as an operator of commercial motor vehicles. Eash maintained a near perfect work record until late 1997 and early 1998 when he received disciplinary letters and was suspended for having declined two work calls.

In March 1998, in response to the warning letters and suspension, Eash filed a STAA section 405 complaint of unlawful discrimination with the Occupational Safety and Health Administration

(OSHA). Eash alleged that Roadway issued the disciplinary letters and suspended him in retaliation for complaining about operating a commercial motor vehicle when fatigued and for refusing to operate a vehicle because he was fatigued, in violation of 49 U.S.C. §31105(a)(1)(A) and (B) and the Department of Transportation's "fatigue rule."[1/]

Eash requested the following relief: That all disciplinary warning letters be expunged from his employment file; that he be compensated for wages lost due to the retaliatory work suspension and for costs and expenses incurred in bringing the complaint; and that Roadway institute a policy which would permit reasonable requests by fatigued drivers to extend rest periods in the event of unexpected work calls and which would require Roadway to comply with its obligation to maintain and update "the 24-hour recording that line haul drivers call to check their position on the extra board . . . ." Complaint at 3.

After conducting an investigation, the OSHA Assistant Secretary found the complaint to be without merit. Eash filed a timely objection to the findings and a hearing request with the Office of Administrative Law Judges (OALJ) pursuant to 29 C.F.R. §1978.105 (1999). Since that time, Roadway has issued Eash an additional warning letter. Eash charged that the letter was false and that it was issued in retaliation for filing the STAA complaint.

Subsequent to Eash's filing of the objections and hearing request, Eash's then-attorney, John Tucker, entered into settlement negotiations with Roadway's attorney, John Landwehr. On October 28 and 29, 1998, the attorneys sought to conclude an agreement of settlement. During this two-day period, Eash had several discussions with Tucker, as hereafter addressed. On November 3, Eash was presented by his attorney with a written draft of the settlement which, after reviewing, he rejected.

On November 17, 1998, the ALJ convened a hearing in response to a motion filed by Roadway to enforce the settlement that Roadway argued had been agreed upon by the parties through counsel on October 29, 1998. Eash was represented at the hearing by a newly-retained attorney. Both Eash and Tucker testified at the hearing. Their testimony focused on telephone conversations which occurred between October 27 and November 3 and which involved Eash, Tucker and Landwehr. Eash's and Tucker's accounts differ in only limited respects.

Tucker testified that on October 27, 1998, Eash authorized him to discuss terms of settlement with Landwehr, and that he spoke to Eash on October 28 and 29 during the course of the negotiations and again on November 3, 1998, when Eash communicated his rejection of Roadway's offer. Hearing Transcript (T.) 61-62. In response to examination by Landwehr, Tucker testified that upon conclusion of negotiations on October 29 he stated to Landwehr, "that in principal [sic] we had a resolution that would await your [Landwehr's] written draft of the settlement and I would then forward the same to my client." T. 16. Tucker admitted that, while he mailed Eash the draft

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[1/] *See* 49 C.F.R. §392.3 (1999) (prohibiting any driver from operating, and any motor carrier from requiring or permitting a driver to operate, a commercial motor vehicle "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle").

settlement agreement, he neglected to read the agreement to him over the telephone and that at the time he and Landwehr entered into the agreement in principle, Eash had not seen its language. T. 20-21.

Eash testified that at about 10 p.m. on October 28, 1998, he telephoned attorney Tucker from the turnpike in New Stanton, Pennsylvania during a rest break.[2/] Eash recalled Tucker stating, "Look, we've got to get down to a settlement." T. 43. Eash advised Tucker that he wanted $5,000 in compensatory damages and the warning letters expunged from his employment file. Tucker stated that Roadway had declined to offer Eash a monetary settlement. Eash testified that he "still insisted on a clean work record. That's what this all came down to was a work record." *Id.* When asked whether he recalled anything else about the conversation on October 28, Eash testified, "Just the fact that he [Tucker] said that it would be basically a no-fault, shake hands, walk away. And I understood that to me, that my, those warning letters would be removed." T. 43-44.

Eash testified that during a discussion of settlement terms on October 28, he directed Tucker to "negotiate" what he could, as well as stating that he "want[ed] out" of the litigation. T. 72. Tucker testified that Eash directed that he (Tucker) "do" what he could. T. 68.

On or about November 3, 1998, Eash received a draft settlement agreement which Tucker had mailed. The draft agreement required Eash to dismiss his objections to OSHA's findings, to withdraw his request for a hearing, to move to cancel the STAA hearing scheduled before the ALJ, and to dismiss the STAA complaint with prejudice. The draft agreement further provided that Roadway would refrain from retaliating against Eash because he had filed a discrimination complaint and would waive the disciplinary hearing scheduled "for the purpose of discussing Eash's overall work record for the previous nine months as a result of [the most recent warning letter]." R. D. & O., Exhibit A (draft agreement). The draft agreement stipulated, however, that the last warning letter and infraction would "remain a part of Eash's overall work record for a period of nine months from the date of issue . . . ." *Id.* No previous warning letters would be expunged under the agreement. The agreement additionally stated that it should not be construed as an admission of liability on the parts of Roadway and Eash. Upon reviewing the agreement, Eash immediately telephoned Tucker and advised him that the terms of settlement were unacceptable. T. 48.

Eash testified at the hearing that he did not authorize attorney Tucker to accept the terms of settlement absent his prior approval. T. 77. In contrast, Tucker testified that he believed that he possessed the authority to settle the complaint based upon the terms he had discussed with Eash. T. 18.

THE ALJ'S DECISION

The ALJ found that Eash orally agreed to final negotiated settlement terms which were memorialized, clearly and unequivocally, in the draft written agreement. R. D. & O. at 5. The ALJ also found the agreement to be fair, adequate and reasonable, and in the best interests of Eash.

[2/] Eash was engaged in his line haul truck driving duties during the course of the settlement negotiations.

Finally, he found "that the settlement was arrived at without duress, only after full exploration by the parties of all issues in dispute and the legal and factual questions involved." *Id.* The ALJ consequently approved the settlement and granted Roadway's motion for its enforcement.

STANDARD OF REVIEW

Pursuant to the STAA implementing regulation at 29 C.F.R. §1978.109(c)(3), an ALJ's factual findings are conclusive if they are supported by substantial evidence on the record considered as a whole. *BSP Trans., Inc. v. United States Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1063 (5th Cir. 1991).

Pursuant to the Administrative Procedure Act, in reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C. §557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (applying analogous employee protection provision of Energy Reorganization Act, 42 U.S.C. §5851); *see* 29 C.F.R. §1978.109(b). The Board accordingly reviews questions of law *de novo. See Yellow Freight Systems, Inc. v. Reich,* 8 F.3d 980, 986 (4th Cir.1993); *Roadway Express, Inc. v. Dole,* 929 F.2d at 1063. *See generally Mattes v. United States Dep't of Agriculture,* 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano,* 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

DISCUSSION

On appeal of the ALJ's R. D. & O., Eash argues that the ALJ erred in finding an enforceable settlement between the parties. Specifically, Eash argues that the record contains no evidence of an unequivocal declaration by the parties that they agreed to all material terms, that Eash never accepted Roadway's settlement offer, and that Eash never authorized his counsel's acceptance of that offer. Eash also argues that the ALJ erred in finding the putative settlement to be fair, adequate and reasonable. In response, Roadway argues that the R. D. & O. should be adopted. According to Roadway, the ALJ's finding that the parties had agreed to a settlement was supported by substantial evidence, and the settlement represented a fair, adequate and reasonable disposition of Eash's complaint. The issues are whether the parties entered into an enforceable oral agreement and, if so, whether that agreement should be approved. The Board is authorized to decide this case under 49 U.S.C. §31105(b)(2)(C) and 29 C.F.R. §1978.109.

I.

Statement of Principles Governing STAA Settlements

Upon receiving a complaint under STAA section 405, the Secretary of Labor (now the Board) shall either grant or deny relief *unless* the proceeding on the complaint is terminated by the Secretary on the basis of a settlement. The complaint "may be ended by a settlement agreement made by the Secretary, the complainant, and the person alleged to have committed the violation."

49 U.S.C. §31105(b)(2)(C). Because of this "participation and consent" requirement, settlements under employee protection provisions such as that contained in the STAA are treated differently than are most other settlements. *Cf. Macktal v. Sec'y of Labor,* 923 F.2d 1150, 1157 (5th Cir. 1991) (analogous employee protection provision of Energy Reorganization Act). "Congress required the participation and consent of the complainant to ensure that the Secretary did not compromise the complainant's interest in [the Secretary's] settlement with the company." *Id.* at 1156.[3/] *See Beliveau v. U.S. Dep't of Labor,* 170 F.3d 83, 85-86 (1st Cir. 1999) (under employee protection provision of Toxic Substances Control Act, "[t]he Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant;" same prohibition applies under Clean Air Act and Safe Drinking Water Act). Once a complainant and respondent have reached agreement, the Secretary also "may consent to the agreement if it protects the interests of the public and the complainant." *Macktal v. Sec'y of Labor,* 923 F.2d at 1156. A complainant's consent, duly evidenced, is thus essential to Secretarial approval.

> The STAA implementing regulations provide in relevant part:
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> (2) *Adjudicatory settlement.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board . . . or the ALJ. A copy of the settlement shall be filed with the ALJ or the Administrative Review Board . . . as the case may be.

49 C.F.R. §1978.111(d). Although this provision would appear to contemplate only written settlement agreements, oral settlement agreements also are permitted. *See, e.g., Tankersley v. Triple Crown Services, Inc.,* Case No. 92-STA-8, Sec. Dec., Oct. 17, 1994. However, where an oral agreement is presented for approval, the record clearly must reflect all material terms of the settlement and evidence an unequivocal declaration by the parties that they have agreed to those terms. *Hasan v. Nuclear Power Services, Inc.,* Case No. 86-ERA-24, Sec. Dec., June 26, 1991, slip op. at 8 (under analogous employee protection provision of Energy Reorganization Act).

This standard has been met in other cases by admission into evidence of documentation of an agreement signed by the complainant or by reaffirmance of an agreement by the complainant in open court. In *Macktal v. Sec'y of Labor,* for example, the complainant admitted in an affidavit that he initially had agreed to an oral settlement reached by his attorneys, that he had signed two versions of a general release and that he had accepted his share of the proceeds provided under the agreement.

[3/] The court in *Macktal* cited legislative history evincing congressional intent. In comments explaining the addition of the "participation and consent" requirement under the parallel employee protection provision of the Safe Drinking Water Act, 42 U.S.C. §300j-9i, a co-sponsor of the amendment to include the requirement stated that it "is important because the Labor Department has found . . . that as the cases near the final steps of the machinery there is a tendency for settlements to be entered into. It is important that we guarantee by statute that the employee's interests not be compromised in these situations." *Macktal v. Sec'y of Labor,* 923 F.2d at 1157, *quoting* 102 Cong. Rec. 36393 (1974) (Representative Symington).

The court stated: "Given these indications of consent, we cannot conclude that the Secretary's finding of consent is an abuse of discretion." 923 F.2d at 1157 (Energy Reorganization Act). In *Tankersley v. Triple Crown Services, Inc.,* Case No. 92-STA-8, Sec. Dec., Oct. 17, 1994, the complainant indicated his consent in a signed statement in which he admitted that he then wished to reject the respondent's settlement offer and to pursue his claim further despite previously having authorized his attorney to "settle the claim for what you can get." Slip op. at 2 and n.2 (STAA). The attorney obtained a settlement in the amount of $10,000. *Tankersley v. Triple Crown Services, Inc.,* Case No. 92-STA-8, ALJ Rec. Dec., June 14, 1994, slip op. at 3 ("complainant did not ever deny that he gave his attorney authority to settle this matter 'for what he could get'; it was just that he, complainant, felt he should have settled for more than $10,000"). In *Petty v. Timken Corporation,* 849 F.2d 130, 132-133 (4th Cir. 1988) (Title VII, Civil Rights Act), a settlement existed where the employer made an offer of settlement; the offer was communicated to the employee by his counsel; the employee agreed to accept the offer after conferring with counsel; and the employee reaffirmed his acceptance in open court. The reviewing court found no basis for holding the settlement to be unfair, commenting that "[a]t most, [the employee] appears to have had second thoughts about the level of his recovery."

II.

Applicability of Federal Law

A settlement is a contract; its formation, construction and enforcement are dictated by principles of contract law. *Carr v. Runyan,* 89 F.3d 327, 331 (7th Cir. 1996), *cert. denied,* 519 U.S. 1117 (1997). The complaint at issue in this case invokes a right to sue derived from a federal statute (49 U.S.C. §31105); accordingly, federal law governs the validity of any settlement of that complaint. *Macktal v. Sec'y of Labor,* 923 F.2d at 1157 and n.32. *Cf. Snider v. Circle K Corp.,* 923 F.2d 1404, 1407 (10th Cir. 1991) (Title VII, Civil Rights Act); *Fennell v. TLB Kent Co.,* 865 F.2d 498, 501 (2d Cir. 1989) (42 U.S.C. §1981); *Taylor v. Gordon Flesch Co., Inc.,* 793 F.2d 858, 862 (7th Cir. 1986) (Title VII); *Brewer v. Muscle Shoals Bd. of Educ.,* 790 F.2d 1515, 1519 (11th Cir. 1986) (same); *Eatmon v. Bristol Steel & Iron Works, Inc.,* 769 F.2d 1503, 1516 (llth Cir. 1985) (Executive Order 11246); *Fulgence v. J. Ray McDermott & Co.,* 662 F.2d 1207, 1208-1209 (5th Cir. 1981) (Title VII).

Federal courts routinely employ the Restatements of Laws in fashioning rules of federal common law for interpreting, *e.g.,* Title VII administrative settlement agreements, "since those principles represent the 'prevailing view' among the states and are consistent with remedial [laws]." *Bowden v. United States,* 106 F.3d 433, 439 (D.C. Cir. 1997), *citing United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 729-730 (1979) and E.A. Farnsworth, Farnsworth on Contracts §7.3 (1990). Thus, in interpreting the purported settlement at issue in this case, particularly with regard to whether a binding settlement was reached by the parties, we turn to the Restatement (Second) of Contracts and the Restatement (Second) of Agency to discern the applicable federal common law rules, as well as to federal case law.

III.

Did Eash Authorize Acceptance?

Contrary to the ALJ's finding, no enforceable oral agreement existed because Eash neither accepted Roadway's settlement offer nor authorized its acceptance. The elements of contract formation -- offer, acceptance and consideration -- occasion the existence of an enforceable oral agreement. An oral agreement to settle a complaint is enforceable against a complainant who knowingly and voluntarily agreed to the terms of settlement or who authorized his attorney to settle the complaint. *Fulgence v. J. Ray McDermott & Co.,* 662 F.2d at 1209. *See Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 52 n.15 (1974) (complainant must knowingly and voluntarily consent to settlement agreement under which he waives his right to pursue action). "Knowingly" has been defined as meaning "'done voluntarily and purposely, and not because of a mistake or accident.'" *Taylor v. Gordon Flesch Co.,* 793 F.2d at 863, *quoting United States v. Jones,* 696 F.2d 479, 493 (7th Cir. 1982).

Under Roadway's offer of settlement, Eash would move to dismiss the STAA complaint with prejudice; he would receive no compensation for lost wages, costs and expenses; and all warning letters would remain in his employment file. As consideration, Roadway would cancel a disciplinary hearing without (according to the draft agreement) expunging the triggering warning letter, which left Eash as vulnerable to discipline as he had been previously.[4/] Eash never communicated acceptance of the offer directly to Landwehr. The question then becomes whether Eash authorized Tucker to settle the complaint either upon terms offered previously by Roadway or upon terms left to Tucker's discretion.

Any party challenging an attorney's authority to enter into a settlement agreement on his client's behalf assumes the burden of proving that the attorney lacked authority. *United States v. International Brotherhood of Teamsters,* 986 F.2d at 20 ("[t]he burden of proving that an attorney entered into a settlement agreement without authority is not insubstantial"). Nonetheless, it is also the case that "[t]he relationship between attorney and client is one of agent and principal," *Artha Management, Inc. v. Sonia Holdings, Ltd.,* 91 F.3d 326 (2d Cir. 1996), *citing United States v. International Brotherhood of Teamsters,* 986 F.2d 15, 20 (2d Cir. 1993), and the decision to settle a case belongs to the client rather than to the attorney. *United States v. Beebe,* 180 U.S. 343, 352 (1901) ("the utter want of power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed"); *Fennell v. TLB Kent Co.,* 864 F.2d 498, 501-502 (2d Cir. 1989) ("[w]e begin with the undisputed proposition that the decision to settle is the client's to make, not the attorney's"). An attorney consequently may not compromise a client's case without authorization. *Greater Kansas City Laborers Pension Fund v. Paramount Industries, Inc.,* 829 F.2d 644, 646 (8th Cir. 1987). *See Malave v. Carney Hospital,* 170 F.3d 217, 221 (1st Cir. 1999) ("a general retainer, standing alone, does not permit an unauthorized attorney to settle claims on his client's behalf[;] rule rests on the salutary proposition that the decision to settle

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[4/] Roadway's additional "concession" was not consideration. Roadway offered essentially to comply with the STAA by agreeing not to retaliate against Eash for filing the discrimination complaint. Eash, however, was entitled by law to this STAA protection. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts §4-2 (consideration requires that a promisee suffer detriment, "that is, do or promise to do what he is not legally obligated to do").

litigation belongs to the client, not the lawyer"); *Artha Management, Inc. v. Sonia Holdings, Ltd.,* 91 F.3d at 329 (retention of counsel does not in itself bestow the authority to settle a case); *Edwards v. Born, Inc.,* 792 F.2d 387, 390 (3d Cir. 1986) ("attorney does not possess the inherent authority to compromise by virtue of his retention for litigation alone").

Authorization may take the form of actual authority, either express or implied, or apparent authority. *Tiernan v. Devoe,* 923 F.2d 1024, 1036-1037 (3d. Cir. 1991). Apparent authority, which is created as the result of conduct between the principal and a third party, usually another litigant or its counsel, has no application here because Eash never interacted with Landwehr.[5/] Accordingly, we turn to the issue of actual authority.

The issue of actual authority concerns manifestations of the principal to the agent, here Eash to Tucker. "[A]uthority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Restatement (Second) of Agency §26 (1958).[6/] Actual authority is measured under a reasonableness standard, the question being, what did the agent (attorney) reasonably believe his authority to be, given the words or conduct of the principal (client)? Two forms of actual authority exist: *Express actual authority,* which depends on the authority that the client *explicitly* accords the attorney, and *implied actual authority,* which depends on the *totality* of the attorney-client relationship. *Edwards v. Born, Inc.,* 792 F.2d at 391; *Evans v. Skinner,* 742 F. Supp. 30, 32 (D.D.C. 1990).

A. Express actual authority

We consider the precise wording of settlement instructions especially important under statutory provisions, such as the STAA employee protection provision, which require a complainant's participation and consent in order to render an agreement enforceable. Eash and

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[5/] Apparent authority arises "as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency §27 (1958). Here, Eash never spoke to Landwehr directly or engaged in any conduct towards Landwehr which would cause Landwehr to understand that Tucker was authorized to settle the complaint. *Edwards v. Borne, Inc.,* 792 F.2d at 390-391 (apparent authority not present where record devoid of direct communication from client to opposing attorney). Landwehr conducted his settlement discussions exclusively with Tucker, who as the agent was not capable of imbuing himself with the apparent authority to settle since creation of that authority rested solely with Eash as principal. *See Evans v. Skinner,* 742 F. Supp. 30, 32-33 (D.D.C. 1990) (the issue is whether the *principal* has made representations concerning the agent's authority to the third party) (emphasis added) .

[6/] The manifestation rather than the intention of the principal is important. "[W]henever the principal manifests to the agent that the agent is to act on his account, authority exists although the principal is not in fact willing that he should do so." Restatement (Second) of Agency §26, at comment (a).

Tucker nearly agree on the language of the communication by Eash to Tucker directing Tucker to proceed in discussions with Landwehr. It is uncontroverted that at no juncture did Eash expressly direct Tucker to "settle" the complaint. *Compare Tankersley v. Triple Crown Services, Inc.,* Case No. 92-STA-8, Sec. Dec., Oct. 17, 1994, slip op. at 2 and n.2 (specific direction to "*settle the claim* for what you can get," contained in a statement signed by a complainant, construed as authorizing an attorney to settle a complaint). Rather, Eash testified that he instructed Tucker to: "Negotiate whatever you can." T. 74. Eash explained in response to examination:

> Q. When you authorized [Tucker] to negotiate what he could, did you authorize him to settle for whatever he could?
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> A. No. I didn't authorize him to settle. Because, I knew that it would come down to a signature and I always reserved that fact that I was going to have to put my signature on an agreement.

T. 77. Tucker similarly testified that at some unspecified point in a discussion of settlement terms, Eash told Tucker "to do whatever [he] could." T. 67-68.

Eash's asserted direction to "negotiate" what you can, *i.e.,* to confer, bargain or discuss with the object of reaching agreement, *see, e.g.,* Black's Law Dictionary 934 (5th ed. 1979), does not authorize settlement in common parlance. "'[D]iscussing' settlement and 'entering' into a binding enforceable final agreement are two distinct actions." *Evans v. Skinner,* 742 F. Supp. at 32. The issue then is whether the comment "do whatever you can" (Tucker's version) reasonably can be construed as a delegation of authority to compromise a claim. We find that the comment is not sufficiently explicit to authorize acceptance, especially in light of the Eash's expectation, shared by Tucker, that Eash ultimately would be presented with a written offer.[7/] The comment, in this context, reasonably is construed as a direction for Tucker to elicit whatever terms he could for Eash's consideration.

Indeed, the expectation of future action, such as Eash's consideration of a written draft agreement, has been held dispositive. In *Turner v. Burlington Northern R.R. Co.,* 771 F.2d 341, 343-345 (8th Cir. 1985), the plaintiff responded to his attorney's communication of the defendant's settlement offer by saying, "I suppose I'm going to have to settle and I'll call you." The attorney subsequently accepted the offer, and the plaintiff refused to accept the settlement check. The court found that the attorney lacked authority to settle the complaint because the plaintiff expressly had stated that he would make further contact with the attorney concerning settlement. By way of comparison, the court in *McEnany v. West Delaware County Community Sch. Dist.,* 844 F. Supp. 523 (N.D. Iowa 1994), found the existence of settlement authority where the parties and their attorneys met to discuss a final settlement offer, plaintiff's attorney advised her that he did not believe he could elicit a better offer, plaintiff replied, "I guess I better do what my attorney says," and plaintiff departed the meeting aware that her attorney and defendants' counsel were verifying the terms of a settlement agreement. The court found that plaintiff's statement "reasonably authorized [her attorney] to settle her case on the terms he had presented without indicating [that she]

[7/] *See* discussion at part IV, *infra.*

would make further contact to consummate the deal." *Id.* at 530. Tucker, in the instant case, may have iterated terms of settlement during a telephone conversation and Eash may have directed Tucker to do what he could, but the expectation of both was that Eash would be presented with a written offer to which he would respond. This expectation of future action by Eash is analogous to the reservation in *Turner* of future contact with the attorney concerning settlement.

Eash's expressed desire to get out of the litigation similarly did not authorize Tucker to settle on Eash's behalf without more.[8/] The plaintiff in *Fennell v. TLB Kent Co.,* 865 F.2d at 500, uttered an analogous thought when he advised his attorney that he would not accept a proffered monetary settlement but that "he was willing to settle the case out of court 'with the intentions of getting it out of the way and behind me.'" The court found the attorney's subsequent acceptance of a settlement offer to be unauthorized.

The ALJ's finding that Eash agreed to terms of settlement is not supported by substantial evidence on the record *considered as a whole*. The ALJ declined to identify the precise evidence that he relied upon in making the finding. We presume that it would have included Tucker's version of events, which the ALJ credited[9/] and which included the following: Tucker testified that on at least two occasions Eash provided explicit parameters to Tucker regarding settlement, including expungement of the disciplinary warning letters from Eash's employment file. T. 63-65. During a subsequent discussion of a settlement which would not have included expungement of the letters, Eash told Tucker essentially to "negotiate" what you can or to "do" what you can, "I want out of it." T. 68, 72. Based upon this comment, Tucker assumed authority to settle the complaint. He testified: "[I]t is my opinion that I had the authority to settle the case based upon those terms." T. 18. Under no reading of the record, however, did Eash tell Tucker to "*settle* for what you can" and, again, both Tucker and Eash understood that Eash expected to receive a written offer for consideration and

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[8/] Eash stated that he "want[ed] out." He explained that Roadway had curtailed any opportunity for him to prepare for the hearing by threatening to discharge him if he took time off from work on the day preceding scheduled depositions and on the day preceding the hearing. According to Eash, Tucker initially had instructed him to arrange to take time off from work on those dates in order to assist Tucker's preparation. After Eash had requested the time off and after Tucker had engaged in early discussions with Landwehr, Tucker warned Eash that he could face discharge if he took time off to prepare for the depositions. T. 76-77. The possibility of reprisal prompted Eash to "want out" of the proceeding. When asked whether the threat to his employment caused him to make the comment, Eash replied, "Well, sure; I was scared." T. 77.

[9/] The ALJ credited Tucker's testimony in its entirety and rejected Eash's testimony in its entirety. R. D. & O. at 5. Such blanket credibility determinations are highly questionable. *See Dorf v. Bowen,* 794 F.2d 896, 901-901 (3d Cir. 1983) (judge's wholesale discounting of testimony, especially in light of other record evidence which supported it, required reversal); *Kent v. Schweiker,* 710 F.2d 110, 116 (3d Cir. 1983) (conclusory wholesale rejection of testimony did not meet substantial evidence test); *Cotter v. Harris,* 642 F.2d 700, 706-707 (3d Cir. 1981) (full explanation required of why evidence was rejected since fact finder "cannot reject evidence for no reason or for the wrong reason").

approval or disapproval. Moreover, Tucker never testified that during the course of the conversation Eash actually stated that he agreed to settle the complaint on the basis of specific terms under discussion, only that at an unspecified juncture in the conversation Eash instructed him [Tucker] to do what he could and expressed a desire to get out of the litigation. T. 68. The ALJ's general credibility finding notwithstanding, substantial evidence of record simply does not support the ALJ's conclusion that Eash "agreed to the terms of the settlement as set forth in the [draft] written agreement." R. D. & O. at 5.

B. Implied actual authority

Nor are we persuaded that the totality of the attorney-client relationship supports a finding of implied actual authority. The relationship between Tucker and Eash was brief, spare and somewhat contentious. It consisted exclusively of telephone communication because Eash was engaged in performing his line haul truck driving duties during the negotiations. Eash recalled one telephone call which he initiated from the Pennsylvania turnpike to Tucker's residence in Ohio. Tucker recalled two particular instances when he discussed settlement terms with Eash by telephone. It is noteworthy, too, that when Tucker initially requested that Eash articulate settlement terms, Eash expressed his desire to proceed to hearing, whereupon Tucker admonished Eash, "Look, we've got to get down to a settlement." T. 43. While Tucker related the status of the negotiations by telephone, he either failed or declined to read the terms of the draft agreement to Eash or to provide Eash with a copy of the draft prior to advising Landwehr that they had achieved agreement in principle. Eash testified, "I was given a piece of paper with a place for my signature, and I was never permitted to read [it] before it required my signature; and all of a sudden I'm being told that, 'You're going to swallow this whether you like it or not.'" T. 36. We find little if anything in the attorney-client relationship that would lead Tucker reasonably to believe that he possessed actual authority to enter into a binding settlement agreement absent Eash's prior approval. *Cf. Edwards v. Born, Inc.,* 792 F.2d at 391-392 (implied actual authority to settle claims may have existed where client frequently throughout course of relationship refused to name settlement figure, stating that settlement was the attorney's job).

Eash did not in any manner ratify the settlement, for example by failing promptly to repudiate the attorney's act upon learning that the attorney had exceeded his authority or by accepting benefits flowing from the settlement. *See Tiernan v. Devoe,* 923 F.2d at 1037-1038 and n.10. *See also Macktal v. Sec'y of Labor,* 923 F.2d at 1157, where the complainant by affidavit admitted his initial agreement to the settlement terms, signed a general release and accepted his share of proceeds provided under the settlement. Instead, immediately upon reading the draft agreement, Eash advised Tucker that the terms were unacceptable. Thus, the instant case is similar to *Fennell v. TLB Kent Co.,* where counsel for the parties reached a settlement during a telephone conference call in which no party participated and the challenging party promptly objected to the agreement upon being advised of its terms. 865 F.2d at 503 ("[c]lients should not be faced with a Hobson's choice of denying their counsel all authority to explore settlement or being bound by any settlement to which their counsel might agree, having resort only to an action against their counsel for malpractice"). The court in *Fennell* found that counsel lacked settlement authority.

We find no acceptance, or authorization of acceptance, by Eash of settlement terms in the instant case. No agreement consequently existed.

IV.

Did the Parties Enter into an Enforceable Oral Agreement Given the Expectation of Written Documentation?

Even if we were to conclude that Eash accepted the offer of settlement or authorized his counsel to settle on his behalf, we nevertheless would find that no agreement existed. As previously noted, in order for us to conclude that the parties orally agreed to an enforceable settlement, as Roadway contends, we must find within the evidence of record an unequivocal declaration by the parties that they have agreed to all material terms of the settlement. Under federal law, if we find that the parties have entered into an oral agreement of settlement, that settlement will be held enforceable. *See Macktal v. Sec'y of Labor,* 923 F.2d at 1157 and n.32.

The ALJ found that the parties had entered into an enforceable oral agreement to settle the instant complaint. This finding is not supported by substantial evidence on the record considered as a whole.

Where a written settlement agreement is drafted concurrent with or subsequent to concluded negotiations, the initial issue is whether the parties intended the written document (1) to memorialize an already enforceable oral agreement or (2) to constitute a condition precedent to the existence of an agreement. If the parties to a settlement intend memorialization as a mere convenience, then they may be bound upon oral agreement prior to execution of the written document. If, however, the parties intend that no contract will exist until the agreement is formalized in writing and executed, then no legal consequences arise until that time. *Winston v. Mediafare Entertainment Corp.,* 777 F.2d 78, 80 (2d Cir. 1986) (because of freedom "to determine the exact point at which an agreement becomes binding, a party can negotiate candidly, secure in the knowledge that he will not be bound until execution of what both parties consider to be final document" [sic]).

Parties are accorded "the power to contract as they please, so that they may, if they like, bind themselves orally or by informal letters, or that they may maintain 'complete immunity from all obligation' until a written agreement is executed." *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d 69, 74 (2d Cir. 1984), *quoting* 1 A. Corbin, Corbin on Contracts §30 (1963). The Second Circuit, in *Consarc Corp. v. Marine Midland Bank, N.A.,* 996 F.2d 568 (1993), characterized the dichotomy:

> Many modern business transactions could not be carried out unless the parties were able to rely on oral promises or informal writings, such as letters, memos and faxes. A stock market transaction or insurance coverage by verbal binder are examples. In other, more complex transactions, negotiations would be chilled were a person later to be held bound by every chance promise made. In such situations, the legal obligation must await the execution of a formal

> written agreement so the party may be assured that all proper precautions were taken before it was legally committed. The tension between the concepts – contract arises upon meeting of the minds, no binding contract absent a writing – has resulted in courts struggling to resolve these inherently conflicting notions.

Id. at 570.

The issue is fairly straightforward if at least one of the parties expressly reserves the right not to be bound until a writing is executed. Difficulties arise when, ***as in the instant case***, the parties have not expressed their intent except to state that they expect the agreement to be reduced to writing. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts §2-7 (3d ed. 1987). Intent generally is derived in this circumstance from objective signs, *e.g.,* the parties' words and actions during negotiation. *Consarc Corp. v. Marine Midland Bank, N.A.,* 996 F.2d at 576 ("[f]act finders examining intent are instructed to look to the time of contracting[;] they must consider the objective intentions of the parties manifested at that time").

The Restatement (Second) of Contracts similarly recognizes the dichotomy, acknowledging that an oral contract may exist even where the parties contemplate a written memorial: "Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; *but the circumstances may show that the agreements are preliminary negotiations.*" Restatement (Second) of Contracts §27 (1981) (emphasis added). Parties may, orally or by an exchange of writings, agree upon all terms incorporated into a contract, including an agreement to execute a final writing which will contain a memorialization of all terms. If such is the case, it will be deemed that they have concluded the contract prior to the final writing. *Id.,* at comment (a). If, however,

> either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract.

Id., at comment (b).

The Restatement enumerates the following considerations for application in determining whether parties intend to be bound by an agreement in the absence of a document executed by the parties:

> the extent to which express agreement has been reached on all the terms to be included, whether the contract is of a type usually put in writing, whether it needs a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether a standard form of contract is widely used in similar transactions, and

> whether either party takes any action in preparation for performance during the negotiations.

Restatement (Second) of Contracts §27, at comment (c). Oral testimony, "correspondence or other preliminary or partially complete writings" may serve to demonstrate these circumstances. *Id.*

Courts have focused particularly on the following Restatement criteria, recognizing that no single criterion is decisive: (1) whether any party expressly has reserved the right not to be bound in the absence of an executed written agreement; (2) whether any party has partially performed and whether that performance has been accepted by the party disclaiming the agreement; (3) whether all terms have been fully negotiated or settled so that nothing remains but to sign what already has been agreed upon; and (4) whether the particular agreement is the type of contract usually committed to writing. *Ciaramella v. Reader's Digest Ass'n, Inc.,* 131 F.3d 320, 323 (2d Cir. 1997); *Consarc Corp. v. Marine Midland Bank, N.A.,* 996 F.2d at 575-576; *Winston v. Mediafare Entertainment Corp.,* 777 F.2d at 80; *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d at 75-76. We consider each criterion in turn.

A. Intent not to be bound absent a writing

Although neither party expressly reserved the right not to be bound absent a writing, the record supports a finding that Eash and Tucker intended any agreement to take effect only upon its execution. At the hearing convened a mere two weeks after negotiations had transpired, Tucker testified as follows in response to examination by Landwehr:

> Q. Is it not correct Mr. Tucker that you represented to me that we had a settlement of this case on the afternoon of October 29, 1998?
> A. That is correct.
> Q. Is it not correct that I asked you whether your client had agreed to that and you said, "Yes, he had."
> A. My recollection of our conversation is that I had told you that in principal [sic] we had a resolution that would await your written draft of the settlement agreement and I would then forward the same to my client.

T. 16. Consistent with the foregoing, Tucker subsequently testified: "You [Landwehr] indicated that [the terms] would be acceptable to your client [Roadway]. And you said that you would fax to me on the following date a written settlement agreement," which Tucker received in due course. T. 68.

Eash similarly expected the agreement to be reduced to writing. He testified that he understood from Tucker that Roadway had proposed a settlement and that after he received it he could either sign it or refuse to sign it. T. 37.

From the foregoing, it is evident that both Tucker and Eash considered execution of a written agreement as integral to settlement. Landwehr similarly knew that both Tucker and Eash expected to receive and consider a written agreement according to Tucker's testimony, (which the ALJ

credited). R. D. & O. at 5. We find most compelling in this respect Tucker's testimony, quoted above, that "resolution" would "await" the written draft which Tucker ultimately received from Landwehr and submitted to Eash, and which Eash refused to sign. These circumstances parallel those in which a court "rejected an alleged oral agreement because an earlier letter from one of the parties . . . said, 'If your client finds this proposal agreeable in principle, we can proceed to reduce it to a written agreement . . . .'" *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d at 75, *quoting ABC Trading Co. v. Westinghouse Electric Supply Co.,* 382 F. Supp. 600, 602 (E.D.N.Y. 1974).

Language in the draft settlement agreement itself also lends significant support to our finding that the parties intended to bind themselves at the moment of signing. The operative sections of the draft are framed in terms of the present and future, denoting an agreement entered into upon execution and obligating the parties to perform future acts. The draft begins by stating that "[t]his settlement agreement is entered into" by the respective parties. After reciting the background of the complaint, the draft states that "[b]ased on the circumstances described above, and in consideration of the terms set forth below, Eash and Roadway agree as follows." The draft requires that Eash "will immediately execute" operative documents. Further, "[i]t is . . . understood and agreed" that certain of Eash's obligations under the settlement "are conditions precedent to the completion of the settlement . . . ." As to consideration (and purported consideration), "Roadway will not request a hearing" available as the result of one of the warning letters, and Roadway "will not retaliate against Eash" for filing the complaint. Were the draft intended merely to memorialize a previous oral agreement, it follows that it would document the parties as having agreed to certain terms. Moreover, it would not state, as it does, that "[t]he parties acknowledge that this Agreement constitutes the *entire* agreement between them." (Emphasis added.) *See Ciaramella v. Reader's Digest Ass'n, Inc.,* 131 F.3d at 324 (presence of merger clause "is persuasive evidence that the parties did not intend to be bound prior to the execution of a written agreement"). Finally, the draft agreement contains a general release, which has been held to "emphasize the execution of the document." *Id.* at 325. The release states that on the specified date, "before me [the notary public] personally appeared Larry E. Eash, Sr., to me known to be the person named herein, who executed the foregoing Agreement, that he understands the contents thereof and that he voluntarily executed the same." A party's signature to such a release is "meant to signify his voluntary and informed consent to the terms and obligations of the agreement. By not signing, he demonstrate[s] that he with[holds] consent." *Id.*

As in *Ciaramella,* the sole communication suggesting a previous oral agreement consisted of a counsel's comment during negotiation with an opposing counsel. There, Ciaramella's counsel stated, "We have a deal." Here, Tucker stated that they had a settlement "in principle." In both cases, "nothing in the record suggests that either attorney took this [type of] statement to be an explicit waiver of the signature requirement." *Id.* Although neither party in the instant case expressly reserved the right not to be bound, the draft settlement proposal and pertinent communications reveal such an intent. *See Zucker v. Katz,* 836 F. Supp. 137, 144-148 (S.D.N.Y. 1993).

B. Partial performance

The next criterion is whether one of the parties has partially performed and whether that performance has been accepted by the party disclaiming agreement. "[P]artial performance is an unmistakable signal that one party believes there is a contract; and the party who accepts performance signals, by that act, that it also understands a contract to be in effect." *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d at 75-76. We find no evidence of performance and acceptance on this record.[10/] Indeed, evidence within the draft written agreement is to the contrary. *See* discussion at part V, *infra.*

C. All terms fully settled

The third criterion is whether there literally was nothing left to negotiate. "Nothing" has been construed to mean seemingly insignificant, as well as substantive, points. "The actual drafting of a written instrument will frequently reveal points of disagreement, ambiguity, or omission which must be worked out prior to execution. Details that are unnoticed or passed by in oral discussion will be pinned down when the understanding is reduced to writing." *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d at 75. "That these 'unnoticed' or 'passed by' points of disagreement may in the long view be fairly characterized as minor or technical does not mean that a binding contract was formed prior to the time that they were finally worked out." *Winston v. Mediafare Entertainment Corp.,* 777 F.2d at 82. For a court to so hold "would deprive the parties of their right to enter into only the exact contract they desired." *Id.* at 83.

This criterion clearly militates in favor of Eash. Eash objected that Roadway had not agreed to expunge the warning letters from his employment file as he had requested. He also objected that the draft agreement failed to mention that he had contested the letters and that they were issued because he had refused to drive when fatigued -- "that this was a fatigue issue." According to Eash, Tucker had advised him that "there was a proposed settlement" and had represented that it would be a "clean slate, shake hands, walk away" type of settlement when, as written, "[t]he basic blame for all of this was transferred onto my [Eash's] shoulders." T. 34. Because the warning letters were not expunged but instead were permitted to run their course, the agreement was not a "no-fault" agreement as Tucker had represented to Eash would be the case. Rather, it was an admission or "acceptance" of Eash's guilt. T. 31. Eash also points out that Roadway agreed to cancel a hearing arising from the most recent disciplinary warning letter. The letter remained in Eash's employment file under the draft agreement, however, which meant that it could serve as the basis for further disciplinary hearings as part of "Eash's overall work record." Tucker, according to his own testimony, never apprised Eash of this result, and Eash never agreed to it. *See* Complainant's Brief Opposing Recommended Decision and Order at 8.

[10/] Partial performance could have included action withheld, *i.e.,* declining to proceed with a disciplinary hearing. Eash asserts, however, that "[w]hile Respondent's offer included cancellation of a hearing on one of the warning letters, the Respondent went ahead and held the hearing anyway about one month ago." Complainant's Brief Opposing Recommended Decision and Order at 6. Roadway did not contest this statement, and the record otherwise is silent on the subject.

D. Type of agreement usually committed to writing

This criterion similarly favors Eash. Courts generally agree that settlement of litigation should be documented either in writing or on the record in open court. *Ciaramella v. Reader's Digest Ass'n Inc.,* 131 F.3d at 326. "Where, as here, the parties are adversaries and the purpose of the agreement is to forestall litigation, prudence strongly suggests that their agreement be written in order to make it readily enforceable, and to avoid still further litigation." *Winston v. Mediafare Entertainment Corp.,* 777 F.2d at 83.

Substantial evidence on the record considered as a whole fails to support the ALJ's finding that an oral agreement existed. Rather, the evidence demonstrates, and we find, that Eash never entered into an enforceable oral agreement with Roadway to settle the complaint because execution of a writing constituted a term of agreement.

V.

Any Agreement Entered into was Void for Nonperformance

Even if we were to find that Eash had consented to accepting the settlement terms and an oral agreement consequently existed, Eash's nonperformance voided that agreement under its express language. As drafted by Landwehr, Roadway's counsel, the written agreement provided the following as the first of five enumerated terms:

> Eash will immediately execute those documents necessary to dismiss with prejudice his objections to the Department of Labor's dismissal of his complaint, to withdraw his request for a hearing before an Administrative Law Judge, to cancel the hearing before an Administrative Law Judge presently scheduled November 17, 1998, and to dismiss Case No. 1988-STA-28. *It is expressly understood and agreed that the dismissal of Eash's objections to the Department of Labor's dismissal of his complaint, the withdrawal of his request for a hearing before an Administrative Law Judge, the cancellation of a hearing before an Administrative Law Judge and the dismissal with prejudice of Case No. 1988-STA-28 are conditions precedent to the completion of the settlement evidenced by this agreement.* ***Should these conditions precedent not occur, this Agreement shall be null and void.***

R. D. & O., Exhibit A (emphasis added). Thus, on this basis alone the ALJ's conclusion that the parties entered into an oral agreement, the terms of which are set forth in the draft written agreement, cannot stand. By the very terms of that draft agreement, Eash's noncompliance with the above-referenced conditions, rendered any purported agreement void. No basis consequently existed for the ALJ's enforcement of the agreement.

CONCLUSION

Complainant and Respondent did not enter into an enforceable oral settlement agreement. The ALJ's contrary finding is not supported by substantial evidence. Rather, the record supports a finding that Complainant neither accepted nor authorized acceptance of Respondent's settlement offer. The record also demonstrates that execution of a written document constituted a condition precedent to the existence of an agreement. The ALJ erred by failing to apply the appropriate legal analysis in this respect. Finally, any agreement would be void under its own terms. The ALJ erroneously failed to consider this operative provision of the agreement in finding the agreement enforceable. Because we have found an agreement lacking, we do not reach the issue whether the proffered terms constituted a fair, adequate and reasonable settlement of the complaint. The complaint **IS REMANDED** to the ALJ for a hearing on the merits.

SO ORDERED.

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

Paul Greenberg, Chair, concurring

I concur with the result reached in this case based on the analysis in part IV, which I join. However, because I am unconvinced that attorney John Tucker lacked authority to settle Complainant Larry Eash's complaint, I do not join in part III of the Decision.

The ALJ's Recommended Decision and Order (R. D. & O.) focuses primarily on whether Eash authorized his attorney to finalize a settlement with Roadway, and whether an oral enforceable settlement agreement reached by the parties is enforceable. Crediting attorney Tucker's testimony over the testimony of Eash, the ALJ implicitly finds that Eash had authorized Tucker to settle the case on his behalf. Moreover, the ALJ finds that oral settlement agreements are enforceable, citing *Tankersley v. Triple Crown Services, Inc.*, 92-STA-8, Sec'y Fin. Dec. and Ord. (Oct. 17, 1997) and *Hassan v. Nuclear Power Services, Inc.*, 89-ERA-24, Sec'y Ord. to Show Cause (Mar. 21, 1991). However, the ultimate question presented to the ALJ – *i.e.*, whether agreement between the parties was reached – receives only cursory attention in the R. D. & O.

Along with the majority, I agree that it is clear from the record in this case that no settlement was reached, and that the ALJ's conclusion to the contrary is not supported by substantial evidence. The testimony of both Eash and Tucker indicate an expectation that any agreement negotiated by Tucker on behalf of Eash would be reduced to writing and forwarded to Eash for review, consistent with conventional settlement procedures. The parties' actions confirm this expectation, with Roadway developing a draft which was forwarded to Eash for review. Once Eash had an opportunity to review the terms of the draft agreement *en toto*, he disapproved the proposed

settlement agreement because it included features that he viewed as unacceptable. The failure of the parties to reach the true "meeting of the minds" needed to settle the complaint is sufficient reason, by itself, to remand the case to the Administrative Law Judge for a hearing on the merits.

Although I join my colleagues in concluding that attorney Tucker *did not* settle Eash's complaint, I am unconvinced that Tucker *lacked the authority* to do so. *See* part III of the majority opinion. I am concerned that this finding is incompatible with the standard governing our review of cases under the STAA, and also is not supported by the high degree of proof normally required of a party asserting that his or her attorney acted without the client's authority.

Under the STAA regulations, an ALJ's factual findings are conclusive if they are supported by substantial evidence in the record. 29 C.F.R. §1978.109(c)(3). The record in this case includes Eash's testimony that he instructed Tucker to "negotiate what you can, I want out," as well as Tucker's testimony that Eash told him to do whatever he [Tucker] could because "I just want out of it." R. D. & O. at 3, 4. The ALJ generally credited Tucker's testimony, and discredited Eash's, but I believe it is noteworthy in this instance that testimony from *both* of the witnesses confirms that Eash communicated a strong desire to end the litigation – along with an emphatic charge to his attorney to take an aggressive role in bringing the matter to a conclusion. Although the record in this case is not extensively developed, Tucker might reasonably have inferred that Eash had authorized him to settle the case. Based on the statements of Tucker and Eash, I am reluctant to conclude that the ALJ's finding that Tucker had authority to settle Eash's complaint is not supported by substantial evidence on the record as a whole.

Further, it is axiomatic that parties such as Eash ordinarily are bound by the actions of the attorneys whom they chose to represent them. *Pioneer Investment Serv. Co. v. Brunswick Assoc. L't'd Partnership*, 507 U.S. 380, 381 (1993); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962). In this case, Eash chose to have attorney Tucker represent him in all his direct dealings with Roadway. As the majority notes at p. 8 citing *United States v. International Brotherhood of Teamsters*, 986 F.2d 15, 20 (2d Cir. 1993), "[t]he burden of proving that an attorney entered into a settlement agreement without authority is not insubstantial." In this instance, the only evidence in the record challenging Tucker's claim that he was authorized to settle the case is *Eash's* testimony, which was discredited by the presiding judge (R. D. & O. at 5) and which was offered without any independent corroboration.

For these reasons, I do not join the majority in holding that the ALJ erred in finding that Tucker had authority to settle Eash's complaint. However, the conclusion reached by the majority in part III of the Decision (dealing generally with agency) is not essential to the result reached in this Decision (*i.e.*, reversal and remand) because no final settlement agreement ever was reached.

PAUL GREENBERG
Chair