UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 12-1899
	)	
ROSE STEEL, INCORPORATED	)	
	)	
Respondent.	)	
	)	

ORDER GRANTING RESPONDENT'S MOTION TO RESCIND SETTLEMENT AGREEMENT

Background

Rose Steel, Inc. (Respondent or Rose Steel) is engaged in the operation of a steel erection business. On July 26, 2012, the Andover Area Office of the Occupational Safety and Health Administration (OSHA) issued a Serious citation with three items to Respondent, alleging violations of 29 C.F.R. § 1926.502(b)(13); § 1926.754(c)(1); and § 1926.1053(b)(16) (the Citation). On October 22, 2012, the Secretary transmitted to the Court an informal settlement agreement signed by the authorized representatives of both the Secretary and Respondent, affirming all three items of the citation. Respondent's attorney transmitted a letter to the Commission on November 5, 2012 asserting that Respondent's vice-president, Marc Cox, signed the settlement agreement while counsel was on vacation and that the agreement did not reflect the intent of Rose Steel. Specifically, Respondent's attorney asserted that Respondent did not intend to have Item 2 of the Citation affirmed. Rather, it intended to litigate the validity of Item 2 and the attendant standard. Therefore, Respondent asked the Court to return the Settlement Agreement to the parties for revision. Although never formally filed as a Motion, the Court interprets the letter as a Motion to Rescind the Settlement Agreement (Motion). For reasons set

forth below, the Motion is granted.

I. FACTS

Following an inspection of the Rose Steel worksite in Lowell, MA that occurred on about June 18-20, 2012, Respondent was issued the Citation alleging three serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, with total proposed penalties of $12,600. Of relevance here, is Item 2 alleging a violation of 29 C.F.R. § 1926.754(c)(1) on the grounds that:

> Shear connectors (such as headed steel studs, steel bars or steel lugs), reinforcing bars, deformed anchors or threaded studs were attached to the top flanges of beams, joists or beam attachments so that they project vertically from or horizontally across the top flange of the member until after the metal decking, or other walking/working surface, has been installed.

The Secretary asserted that the violation exposed employees "to a fall hazard up to 30 feet while connecting steel beams with the shear connectors pre-installed." A penalty of $4,900 was proposed by the Secretary for the alleged violation.

Respondent timely contested the entire Citation. On September 11, 2012, the Secretary filed a Motion to Extend Time to File Complaint until October 26, 2012 to allow the parties an opportunity to continue discussions which could result in resolution of the matter. On October 5, 2012, the Chief Judge issued an Order placing this case in Simplified Proceedings, suspending the requirement for a Complaint and Answer, and assigning it to the undersigned Judge. By letter dated October 9, 2012, Respondent's counsel advised the Chief Judge that the parties were in the process of settling Items 1 and 3; but that the file would thereafter be transmitted to the Solicitor's office for determination of Item 2, which Respondent argued should be declared void for vagueness.[1] (R-E).

On October 22, 2012, the Secretary transmitted to the Court an informal settlement

[1] A copy of this letter was served upon Complainant's counsel. (R-E).

agreement, signed by authorized representatives of both the Secretary and Rose Steel, affirming all three items of the Citation. On October 30, 2012, Respondent paid the penalty as amended in the settlement agreement. On November 5, 2012, Respondent's attorney transmitted a letter to the Court asserting that he was on vacation when Mr. Cox signed the settlement agreement and that the settlement agreement did not reflect the intent of Rose Steel. (R-G, K).

On December 7, 2012, Respondent filed its Position Statement on Enforceability of Settlement Agreement. Respondent seeks to have the settlement agreement rescinded on the grounds that it was the result of mutual mistake of fact, the agreement was ambiguous and there was no meeting of the minds.

Complainant filed her Reply to Respondent's Position Statement on the Enforceability of the Settlement Agreement on December 21, 2012, asserting that there was no mutual mistake of fact with regard to the executed settlement agreement, and that the settlement agreement constituted a binding contract on the parties.

The Court determined that an evidentiary hearing was necessary to determine whether the parties settled, or intended to settle, the matter through the execution of the settlement agreement. *See Adams v. U. S.*, No. Civ. A.97-0706-R, 1999 WL 1059680 (W.D. Va. March 3, 1999); *Zantec Dev. Co., Inc.*, 16 BNA OSHC 2012 (No. 93-2164, 1994); *Phillips 66 Co.*, 16 BNA OSHC 1332 (No. 90-1549, 1993). In the Order setting the hearing, the Court directed the parties to present evidence relevant to 20 specific questions.

> 1. Was there any fraud, duress, harassment or overbearing conduct during settlement negotiations?
> 2. What transpired during settlement negotiations?
> 3. What law and principles should apply?
> 4. What grounds, if any, are generally accepted for invalidating a signed instrument?
> 5. When, and by whom, was any alleged mistake first discovered and what, if any, notice of any mistake was given, and when and to whom?

6. Did OSHA have reason to know of any mistake or misunderstanding by Respondent before signing the settlement agreement?

7. Were both parties, or only one party, mistaken to any fact?

8. Was Respondent negligent when signing the settlement agreement?

9. What were the intentions of the parties during the settlement negotiations and when signing the settlement agreement?

10. Should parol evidence be considered?

11. Was there any mutual meeting of the minds reached with regard to the settlement agreement?

12. Did any party change their position during the settlement negotiations, or thereafter?

13. Who has the burden of proof to show that the settlement agreement should be invalidated?

14. Is the settlement agreement ambiguous?

15. What was OSHA's understanding regarding Respondent's representation by legal counsel?

16. Did OSHA believe that Respondent intended to settle all citation items through the settlement agreement?

17. Did Respondent read the settlement agreement before signing it?

18. Did [Respondent's Vice-President] Marc Cox either consult with anyone, or have the opportunity to do so, before signing the agreement?

19. What experience, if any, did Mr. Cox, have in the execution of settlement agreements and/or contracts.

20. Who drafted the settlement agreement?

The Evidentiary Hearing

The evidentiary hearing on the Motion was held in Boston, MA on April 9, 2013. Two witnesses were called. The first witness, for Rose Steel, was Marc Cox, Respondent's vice-president. Mr. Cox has been with Rose Steel for 25 years. The witness for the Secretary was Robert Carbone, the assistant area director (AAD) for the Andover, MA, OSHA office. (Tr. 21).

Testimony of Marc Cox

Marc Cox testified that, at an informal conference with AAD Carbone on August 14, 2012, Respondent took the position that it would accept Items 1 and 3, and wanted Item 2 to be deleted.[2] After approximately one minute of discussion, AAD Carbone agreed to change Items 1

[2] Mr. Cox and Respondent's counsel attended the meeting on behalf of Respondent. (C-2).

and 3 from serious to other than serious and "probably" cut the proposed penalties in half.[3] Regarding Item 2, Mr. Cox testified that Respondent needed a clarification as to whether it correctly understood what the Secretary was requiring it to do to abate the alleged hazard. Mr. Cox testified that Item 2 was "a critical point for me." Mr. Cox pointed out that, as he understood the Secretary's requirement, abatement would have a substantial financial impact on Respondent's business and was also an issue that was important to Respondent's industry. The issue was whether shear studs are to be placed in the beams at the factory, or on site. Respondent told AAD Carbone that if it were required to install the shear studs at the jobsite 40% would be added to the cost which could translate into a difference of between at least $60,000-$100,000 per job. This could render Respondent noncompetitive in the industry. At the end of the August 14 meeting, Item 2 was not settled. Instead, AAD Carbone said that he needed to get guidance from his superiors.[4] (Tr. 21-32; C-2).

A second conference, attended by AAD Carbone, Mr. Cox, and Respondent's counsel, was held on September 20, 2012. At this conference, the parties reiterated their agreement on the settlement of Items 1 and 3, but Item 2 remained unresolved.[5] When he left the meeting, Mr. Cox believed that Item 2 was going to be referred to the Solicitor's office for resolution by an Administrative Law Judge (ALJ). At no time did AAD Carbone state that Item 2 would be deleted. Mr. Cox testified that AAD Carbone and Respondent's attorney agreed that, after AAD Carbone again got in touch with Respondent's attorney, AAD Carbone would draw up an

[3] The Settlement Agreement reduced the penalties for Item 1 from $4,900 to $2,000 and for Item 3 from $2,800 to $1,000.

[4] AAD Carbone's Report of Informal Conference stated, in part, "1-2 [Citation 1, Item 2] debate ensured over memos and Directive related to this particular isse [sic] – no agreemet [sic] reached." (C-2).

[5] Mr. Cox admitted that his earlier affidavit, where he asserted that the first settlement conference was held on September 20, 2012 and that a second and final settlement conference was held on October 17, 2012, was mistaken. At the evidentiary hearing, Mr. Cox testified that the first settlement conference occurred on August 14, 2012 and the second settlement conference occurred on September 20, 2012. Mr. Cox further testified that he and Respondent's counsel attended both settlement conferences with AAD Carbone. Mr. Cox also met with OSHA's Bill Todd at an informal conference prior to August 14, 2012. (Tr. 44-57).

agreement and send it to Mr. Cox for signing. The settlement agreement was being sent to Mr. Cox instead of Respondent's attorney because the attorney was going on an extended vacation. (Tr. 32-33, 36, 50-51).

On October 17, 2012, Mr. Cox received an email from AAD Carbone informing him that AAD Carbone contacted Respondent's attorney and that they reached an agreement that was suitable for both parties. The email stated that "[f]ollowing my conversation with [Respondent's attorney] yesterday I have drafted an informal Settlement Agreement which is attached. I have added the language that [Respondent's attorney] requested to line #9." Mr. Cox interpreted the email as implying that his attorney had actually read and approved the settlement agreement. It was Mr. Cox's understanding that Items 1 and 3 were settled and that Item 2 was to remain in contest and go before an ALJ for a decision on Respondent's assertion that the item was void for vagueness.[6] (Tr. 34, 36, 53-54, 63-64; C-3).

The next day, on October 18, 2012 Mr. Cox went to the OSHA office where he reviewed the settlement agreement with AAD Carbone and signed it. Mr. Cox testified that he did not remember going over all the items. Also, Mr. Cox did not read the settlement agreement. He assumed that the agreement followed what AAD Carbone, Respondent's counsel, and he had agreed to in the prior meetings. He testified that he "thought" that AAD Carbone had drafted the settlement agreement consistent with the prior discussions that only Items 1 and 3 were being resolved; but admitted that it was his "fault for not reading it [the settlement agreement]." He signed the settlement agreement because he thought that AAD Carbone indicated that Respondent's attorney had approved it. The meeting lasted approximately an hour. Mr. Cox testified that he interpreted AAD Carbone's October 17, 2012 email as saying that Respondent's

[6] Mr. Cox testified that he believed that both he and AAD Carbone were making a partial settlement agreement settling Items 1 and 3, and referring Item 2 to the Solicitor's office to secure a resolution before an ALJ. (Tr. 34-36).

attorney had approved the settlement agreement. Although Mr. Cox testified that he believed that AAD Carbone told him that Item 2 was not deleted, Mr. Cox left the meeting still believing that Item 2 was going to the Solicitor's office for further resolution on the merits at a trial in order to clarify what Item 2 meant. At the end of October, Respondent paid the penalty for all three items, including the reduced penalty for Item 2 from $4,900 as originally proposed by OSHA to $2,900. Mr. Cox realized that there was a mistake in the settlement agreement as soon as Respondent's attorney called him on the Monday after Mr. Cox had signed it. (Tr. 54-58, 64-65; C-1, C-3).

The settlement agreement was drafted by OSHA. Mr. Cox did not suggest any revisions when the settlement agreement was presented to him. Mr.Cox testified that, even though AAD Carbone went over each Item with him, he misinterpreted what was being done with Item 2. Mr. Cox was not intimidated by AAD Carbone and testified that the two of them had a good rapport. He further testified that he did not believe that he was misled by AAD Carbone during the October 18, 2012 meeting with regard to Item 2. Rather, he attributed the problem to a miscommunication on his own behalf. (Tr. 59-62).

Mr. Cox testified that he has also been involved with a company named Novel Iron for two and a half years. As part of his duties with both Respondent and Novel Iron, he reviews and signs contracts. He has also entered into other settlement agreements with OSHA. As recently as February 2, 2012, he signed a settlement agreement with the Bangor OSHA area office. Indeed, he was aware that Rose Steel entered at least five other agreements with OSHA. He considered himself to be a proven business man. (Tr. 37-39; C-4 through C-9).

Testimony of Robert Carbone

Robert Carbone has been the AAD for the Andover OSHA office since October, 2010.

He reviewed the file in the instant case and agreed with the recommendation to issue the citation. His first involvement with this matter after issuance of the citation was an informal conference, held on August 14, 2012, with Mr. Cox and Respondent's attorney in the OSHA Andover office. The participants discussed the three violations. Agreement was reached on Items 1 and 3 and lengthy discussions were held on Item 2. Mr. Cox indicated that he wanted Item 2 vacated for vagueness. At no time did AAD Carbone tell Mr. Cox that Item 2 would be deleted. By the end of the conference, the status of Item 2 was still in flux and AAD Carbone intended to obtain guidance on the item. (Tr. 67, 71-73, 83, 99).

Respondent timely filed its Notice of Contest on August 22, 2012. A second meeting between AAD Carbone, Mr. Cox, and Respondent's attorney was held at the Andover OSHA office on September 20, 2012. Again, the parties reached agreement on Items 1 and 3. Respondent reiterated that it wanted Item 2 deleted. However, Item 2 was not resolved. Photos of the alleged violation were produced by AAD Carbone and guidance memos related to the item were discussed by the parties. AAD Carbone explained to Respondent that he would be seeking further guidance as to Item 2 from the local Enforcement Program and Technical Services (EPTS) area of the regional office. Guidance was received approximately a month later. During that period, AAD Carbone spoke with Respondent's attorney on October 2, 2012 and told him that guidance was being delayed because the person he needed to speak to was on an extended vacation. (Tr. 71-75, 84-85, 90; C-1 through C-2).

On October 16, 2012, AAD Carbone was told by EPTS "to hold firm on 1-2 [Citation 1, Item 2] shear studs." Later that day, AAD Carbone called Respondent's attorney[7] and offered to

[7] Initially, Respondent's attorney challenged whether the phone conversation took place. However, after reviewing the phone bill and AT&T records at the evidentiary hearing, it became clear that the attorney had a lapse of memory and that the phone call did occur on the date asserted by AAD Carbone. However, Respondent's attorney continues to assert that he did not approve the settlement agreement. (Tr. 102-31; C-10, R-J).

drop the categorization of Items 1 and 3 from serious to other-than-serious and keep Item 2 as serious. AAD Carbone explained that he was not going to withdraw Item 2 and Respondent's attorney "said something to the effect of okay then well draw up an agreement, and that's what I did." [8] Respondent's attorney did not explicitly state to AAD Carbone that Rose Steel was accepting Item 2 as serious. When asked whether or not Respondent's counsel told him on October 16, 2012 that Rose Steel was accepting Citation one, Item 2 as a serious, AAD Carbone testified "In that many words, no." AAD Carbone testified that the telephone records show that the telephone call lasted 2 minutes and 33.9 seconds. In AAD Carbone's view, he did not make a mistake by including Item 2 in the settlement agreement. He agreed, however, that he made an assumption regarding the resolution of Item 2 in his October 16, 2012 conversation with Respondent's attorney where he indicated that he (AAD Carbone) was not willing to withdraw Item 2. AAD Carbone interpreted Respondent's attorney's statement to "draw up an agreement" as Respondent agreeing to accept Item 2. In AAD Carbone's view, Respondent had surrendered its position, even though it had previously indicated that it was a big issue for them and their industry. AAD Carbone testified that it is not uncommon for employers to agree to violations employers previously contested. Therefore, AAD Carbone was not surprised when he was asked to draw up the settlement agreement by Respondent's counsel. Respondent's attorney told AAD Carbone to forward the settlement agreement to Mr. Cox because Respondent's counsel was going away to be on extended leave. The settlement agreement was drafted by AAD Carbone. (Tr. 77-78, 87-88, 95-100, 129-30; C-1, C-10).

AAD Carbone testified that on October 17, 2012 he sent an email to Mr. Cox informing him that he and Respondent's attorney spoke the day before. AAD Carbone's email further

[8] AAD Carbone's diary sheet entry for October 16, 2012 states, in part: "Called Paul Katz offer to OTS 1-1+3, serious on 1-2 Paul acapt (sic) to draft agreement." (Tr. 77-79; C-1).

stated that AAD Carbone had drafted a settlement agreement that was attached to the email.[9] AAD Carbone testified that it is not unusual to send a settlement agreement directly to the employer, even when that employer is represented by counsel, especially when the agreement is to be signed by the employer itself. (Tr. 78-79, 101, C-3 through C-4).

Mr. Cox came to AAD Carbone's office on October 18, 2012 after noon time. They had a lengthy discussion on a range of topics, and Mr. Cox signed the agreement.[10] The settlement was discussed by the parties, but Mr. Cox had no questions about its terms. There was a lot of talk about different aspects of Item 2 and what the violation was in relation to the standard, employee exposure and whether the shear studs should be installed in the factory or in the field. AAD Carbone offered to coordinate a meeting between Mr. Cox and a representative of EPTS. Nobody from the regional solicitor's office was involved in the meeting. (Tr. 79-80, 88-89, 91-94).

AAD Carbone testified that he did not recall whether Respondent's attorney asked him to draft a partial agreement. AAD Carbone never told Mr. Cox that this was a partial settlement agreement. The idea of a partial settlement agreement was brought up by Respondent's attorney during the meeting of August 14. At the time, AAD Carbone had never heard of such an agreement and had never drafted one. However, there was no reason why he would not enter into a partial settlement agreement. It is also common for OSHA to offer compliance guidance to employers after they have settled the case and accepted the citation. (Tr. 78, 80-82, 95).

On November 2, 2012, Respondent's attorney told AAD Carbone that "there was a misunderstanding related to the agreement signed and that he is planning to contest 1-2 [citation

[9] AAD Carbone further stated in his email that he had "added the language that Paul requested to line #9. ... If there are no issues with the agreement please sign it and return a signed copy via either email/scanned or by fax and please mail the original to my attention at the address listed below. If you have any questions related to this matter please feel free to call my office, my direct phone number is listed below." (C-3).

[10] The meeting lasted between one-half an hour to an hour. (Tr. 58, 83).

1, Item 2]." (C-1).

Position of the Parties

Secretary

The Secretary asserts that settlement agreements are contracts and whether they can be rescinded is governed by contract law. The Secretary contends that, under contract law, there are no grounds for rescinding the agreement. It is the Secretary's position that the settlement agreement was not ambiguous and that any problem Respondent had with the settlement agreement was the result of a unilateral mistake. Also, enforcement of the agreement would not be unconscionable. As Mr. Cox testified, "it was my fault for not reading [the agreement]." (Tr.55). Mr. Cox bore the risk of his own negligence and his mistake is insufficient to invalidate the agreement. *See Anzueto v. WMATA*, 357 F.Supp.2d 27, 31-32 (D.D.C. 2004); *see also Dotson v. Potter*, 180 Fed.Appx. 620, 621 (8th Cir. 2006)(per curium)(rejecting challenge to settlement agreement where plaintiff realized after signing agreement that it did not comport with her understanding); *Samman v. Wharton Econometric Forecasting Assoc., Inc.*, 577 F. Supp. 934, 935 (D.D.C. 1984) (plaintiff's alleged subjective intent not to release Title VII claims does not invalidate unambiguous written release of such claims).

Respondent

Respondent asserts that it never intended to sign a settlement agreement that affirmed Item 2. To the contrary, at every juncture Respondent insisted that Item 2 either be deleted or sent to the Solicitor's office for litigation. That the agreement affirmed Item 2 and that Mr. Cox signed the agreement was the result of a mutual mistake and is grounds to rescind the settlement agreement under traditional contract law.

Respondent also asserts that the settlement agreement was vague insofar as it related to

the disposition of Item 2. Accordingly, there was never a "meeting of the minds" and equity requires that Respondent not be held to the settlement agreement.

Discussion

Before reaching the merits of Respondent's Motion to Rescind, we must first address the Secretary's assertion that consideration of the Motion must be limited to the four corners of the agreement and that parol evidence should not be considered.

It is generally true that if the language of a settlement agreement is unambiguous, its meaning must be discerned within the "four corners" of the agreement. *U. S. v. ITT Cont. Baking Co.,* 420 U.S. 223, 233 (1975). However, parol evidence, *i.e.*, extrinsic oral or written testimony, is admissible to prove fraud, illegality, accident or mistake, even if the testimony contradicts the terms of a complete integration in writing. *Phillips 66 Co.,* 16 BNA OSHC at 1338 (Parol evidence is admissible to prove … accident or mistake).[11] In this matter, while there is no allegation of any fraud or illegality, Respondent does allege accident or mistake. Respondent also alleges that the settlement agreement was not a completely integrated agreement that accurately constituted a final expression of what the parties had actually agreed to. Negotiations prior to or contemporaneous with the adoption of a settlement agreement are admissible in order to establish that a settlement agreement is or is not integrated.[12] *See* Restatement (Second) of Contracts § 214(a) (1981). It is not possible to resolve these issues without going beyond the four corners of the settlement agreement and examining parol evidence. The four corners of the settlement agreement cannot reveal what Respondent's attorney instructed AAD Carbone to include in the settlement agreement. Nor can it reveal what

[11] *See also Berezin v. Regency Sav. Bank*, 234 F.3d 68, 70 (1st Cir. 2000) ("[W]e conclude that Massachusetts law permits the consideration of extrinsic evidence when one party to a contract alleges a mutual mistake in its terms,…."), *Davis v. Dawson*, 15 F. Supp. 2d 64, 113 (D. Mass., 1998) (same).

[12] *See Sylvania Elec. Prods. v. U.S.*, 458 F.2d 994 (Ct. Cl. 1972) ("Parol or extrinsic evidence must be admissible on the issue of the extent to which a written agreement is integrated, for as has been said, the writing cannot prove its own integration, 3 Corbin, Contracts, …, § 582; *see also* 9 Wigmore, Evidence, §§ 2400(5), 2470 (1940)."

AAD Carbone told Mr. Cox, or whether AAD Carbone erroneously included resolution of Item 2 when he drafted the settlement agreement. Therefore, the Court finds that parol evidence may properly be considered when determining the disposition of Respondent's motion.

Settlement agreements "are in the nature of contracts." *Makins v. District of Columbia*, 277 F.3d 544, 546 (D.C. Cir. 2002). An agreement to settle litigation is a contract and may generally not be unilaterally rescinded unless the principles of contract law authorize rescission. *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986). The Court recognizes that settlement agreements are contracts to be enforced "in accordance with federal common law principles."[13] *Horizon Homes, Inc.*, No. 06-0095, 2007 WL 2265138, at *2 (O.S.H.R.C. Apr. 3, 2007), *Phillips 66,* 16 BNA OSHC at 1338. In determining whether a settlement agreement is enforceable, the language of the written settlement agreement controls unless the language is ambiguous, or there is fraud, duress, or mistake. *Horizon Homes, Inc.*, 2007 WL 2265138, at *2 (citing *Callen v. Penn. R.R. Co.*, 332 U.S. 625, 630 (1948). The burden of demonstrating that the contract is tainted with invalidity is with the party attacking the settlement agreement.[14] *Horizon Homes, Inc.*, 2007 WL 2265138, at *2 (Attacker must show contract tainted with invalidity, either by fraud practiced upon him or mutual mistake under which both parties acted).

There is no allegation that any fraud or duress was involved in either the settlement negotiations or in any inducement to obtain the signature of Mr. Cox on the settlement agreement. However, Respondent does maintain that the settlement agreement was ambiguous and that it was the product of mutual mistake.

[13] The parties agree that federal common law controls whether or not the settlement agreement can be voided based upon mistake. (Tr. 17, 144; S. Br. at p. 5, 7, R. Br. at p.10).
[14] The parties agree that Respondent has the burden to invalidate the settlement agreement. (Tr. 148; S. Br. at p. 10, R. Br. at p. 13).

Respondent's assertion of ambiguity revolves around paragraphs (2) through (5) of the settlement agreement which read as follows:

> 2. The Employer agrees to pay the proposed penalties, if any, as issued with the above referenced citations, or, if amended by this agreement, as amended below. It is further agreed that payment of the amended penalty will be made within 15 days of the signing of this agreement. Default of this agreement will cause modifications to be considered null and void, and the penalty due will revert to the original amount of $12,600.00 along with any accrued interest, delinquent and administrative fees (not applicable.)
> 3. The Employer and OSHA agree that the following citations and penalties (if any) are not being amended by this agreement:
> -None
> 4. OSHA agrees that the following citations and penalties are being amended as shown:
> -Citation 1, Item 1 is reclassified to Other Than Serious; the penalty is amended to $2,000.00
> -Citation 1 Item 2 the penalty is amended to $2,900.00
> -Citation 1 Item 3 is reclassified to Other than Serious, the penalty is amended to $1,000.00
> -Total penalty is $5,900.00
>
> 5. The Employer, by signing this Informal Settlement Agreement, hereby waives its rights to contest the citations and penalties, as amended in paragraph 4 of this agreement.

(C-3).

Arguing that the settlement is ambiguous, Respondent asserts in its brief:

> Respondent believes that Part 3 and 4 of the Settlement Agreement are inconsistent with one another. Part 3 of the Settlement Agreement calls for the listing of all Items which are not being amended. Although Complainant takes the position in this matter that Item 2 is not being amended, Item 2 is not listed in Part 3. To be consistent, Part 2[15] should indicate that Item 2 is not amended by the Agreement. Anyone reading Parts 3 and 4 of the Settlement Agreement would be confused: Is Item 2 affirmed or amended? Therefore, the Settlement Agreement is ambiguous.

(R. Br. at p.13)

Respondent asserts that paragraphs three and four are inconsistent If there is any

[15] It is not clear why Respondent makes reference to Part 2. That part only sets forth Respondent's obligation to pay the penalties. Therefore, for purposes of its vagueness argument, the Court will assume that this was a typographical error and that Respondent intended to refer to Part 3.

problem, it is in Part 3's statement that no "citations and penalties" are not being amended. It should have read "citations or penalties." However, Part 3 is not incorrect in that the penalty of Item 2 was reduced. Insofar as Part 3 intends to indicate which items are unchanged, it is not ambiguous. As clearly stated in Part 3, none of the items are unchanged and Part 4 clearly states that the penalty of Item two is amended. Certainly, the use of a double negative in Part 3 is less than a model of clarity. (*i.e*. none of the items are not changed). However, the Court finds any ambiguity to be minimal and easily resolved upon careful reading.

A mutual mistake is one where both parties are mistaken as to a material fact that goes to the heart of the bargain. *Anzueto v. WMATA*, 357 F.Supp. 2d at 31.[16] Two types of mutual mistake have been recognized as providing a basis for attaining relief from an agreement: a mutual mistake as to a basic assumption, and mutual mistake in integration. An agreement may be rescinded or revised where, at the time of the agreement, the parties made a material mistake as to a basic assumption upon which the agreement is based.[17] Relief generally requires a showing that both parties made a mistake as to a similar fact.[18] A mutual mistake as to a basic assumption exists when a court determines that the parties would have altered their agreement had they known the correct information at the time the agreement was entered into. Here, Complainant mistakenly assumed that Respondent had agreed to accept Item 2 and Respondent assumed and believed that the Complainant understood that Respondent had not agreed to accept Item 2. The Court finds that these mistaken assumptions were a significant part of both parties bargaining positions. The Court further finds that the parties would have altered the settlement

[16] *See also* Restatement (Second) of Contracts § 151 (1981) ("A mistake is a belief that is not in accord with the facts.").
[17] *See* Restatement (Second) of Contracts § 152 (1981).
[18] *See McNamara Constr. of Manitoba, Ltd. v. U.S.*, 509 F.2d 1166, 1180 (Ct. Cl. 1975) (both parties were ignorant as to whether or not shells could be produced by the hot cup-cold draw system without the use of turning equipment), *Morgan v. U.S.*, 8 F. Supp. 746 (Ct. Cl. 1934) (mutual mistake is an erroneous belief by the parties in the present existence of a thing material to the agreement).

agreement had they known that their assumptions were mistaken at the time the settlement agreement was executed.

The second type of mutual mistake involving integration occurs when the settlement agreement fails to express the actual agreement of the parties. Restatement (Second) of Contracts § 155 (1981). Relief from an agreement may occur when it reflects the mistaken assumptions of the parties.[19] As discussed above, here the parties never actually agreed that Item 2 was resolved and ought to be included in the settlement agreement as a resolved item. The Court finds that the settlement agreement did not express the actual agreement of the parties.

Based on this record, the Court finds that both types of mutual mistake occurred here and concludes that the parties entered into the settlement agreement under a mutual mistake of fact with regard to a basic assumption respecting the disposition of Item 2.[20]

Alternatively, the Court further finds that, at a minimum, a unilateral mistake by Respondent existed at the time the settlement agreement was entered into. A unilateral mistake may also be grounds for rescission. Such criteria include when the effect of the mistake makes the enforcement of the contract unconscionable, or that the other party either knew of the mistake or actually caused the mistake. *Horizon Homes, Inc.*, 2007 WL 2265138 at *2; *DSP Venture Group, Inc. v. Allen*, 830 A.2d 850, 853 (D.C. Ct. of Appeals 2003). The basis for asserting that the Secretary actually caused the mistake was Mr. Cox's allegation that AAD Carbone informed him that on October 16, 2012 Respondent's attorney had reviewed and approved the agreement. Mr. Cox based his conclusion that Respondent's attorney approved the Settlement Agreement from an email he received from AAD Carbone on October 17, 2012 that stated: "Following my

[19] *See Sw. Welding & Mfg. Co. v. U.S.*, 373 F.2d 982 (Ct. Cl. 1967) (Reformation granted where both parties shared mistaken notion as to plaintiff's steel procurement cost).
[20] *See Shear v. National Rifle Assn. of Am.*, 606 F.2d 1251, 1260 (D.C. Cir. 1979) (A traditional remedy for mutual mistake of fact is to relieve the parties of their obligation under the agreement when the assumption is erroneous), Restatement (Second) of Contracts, § 152 (1981).

conversation with [your attorney] yesterday [October 16, 2012] I have drafted an informal Settlement Agreement which is attached." AAD Carbone testified that he intended his October 17, 2012 email to reflect his assumption that he and Respondent's counsel had agreed to include Item 2 as a violation in the settlement agreement.[21] Mr. Cox interpreted the October 17, 2012 email consistent with AAD Carbone's stated intention to convey to Mr. Cox that AAD Carbone and Respondent's counsel had reached a settlement. As a result, Mr. Cox was misled, inadvertently or otherwise, to believe that Respondent's counsel had agreed to include Item 2 as a violation in the settlement agreement, when he had not. (Tr. 34, 57-58, 63-64; C-3).

A party's negligence is not a bar to relief based upon unilateral mistake. Here, Mr. Cox did not read the settlement agreement before he signed it. Instead, he chose to rely upon his interpretation of AAD Carbone's October 17, 2012 email representation that Respondent's counsel had reviewed and approved the settlement agreement. While it would have been prudent for Mr. Cox to have read the settlement agreement before signing it, any negligence on his part here is not a bar to relief from the settlement agreement that may be available based upon the presence of a unilateral mistake by Respondent. In many cases, a party "guilty of egregious blunders" may, nonetheless, obtain relief from a written agreement based upon a unilateral mistake. *See Ruggerio v. U.S.*, 420 F.2d 709, 713 (Ct. Cl. 1970). It would be unfair to hold a party to an agreement when the facts indicate that the other party either knew, or should have known, that the party was mistakenly entering into the agreement.[22] When determining whether

[21] In this regard, AAD Carbone testified:

Q … [D]id you [AAD Carbone] intend to have Mr. Cox think that I [Respondent's attorney] okayed the informal settlement agreement?

A. The intent was again me and you spoke. I assumed we had reached an agreement and that's what I was trying to convey.

(Tr. 101).

[22] Respondent asserts, without contradiction, that the standard as interpreted by the Secretary would increase his job costs $60,000-80,000 for each job. (Tr. 29). It alleges that this would render it noncompetitive because its competitors would not be required to comply. However, if the matter is litigated, and the Secretary's position is

the Complainant should have known of Respondent's mistake with regard to Item 2, the test is whether a reasonable person, knowing all of the facts and circumstances, would have suspected a mistake.[23]

The record is clear that what occurred was a confluence of events that resulted in a settlement agreement that failed to represent a true meeting of the minds. AAD Carbone, Mr. Cox and Respondent's attorney had an obvious breakdown in communication that led AAD Carbone to erroneously conclude that Respondent had decided to accept Item 2. On the other hand, Respondent's attorney erroneously believed that he reached an agreement with the Secretary that would leave Item 2 unchanged. Mr. Cox signed the settlement agreement in the erroneous belief that it had been approved by Respondent's attorney and that Item 2 would be litigated.[24] When AAD Carbone sent the draft settlement agreement to Mr. Cox on October 17, 2012, he told him to just sign it and send it back to him if there were no issues. Instead of just signing the draft agreement and sending it back, Mr. Cox went to AAD Carbone's office and spent between one-half an hour to an hour discussing issues relating primarily to Item 2.[25] Clearly, Mr. Cox was not comfortable just signing the draft settlement agreement and clearly his

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upheld, the industry may eventually be legally bound to comply with the position taken by the Secretary. This would place Respondent on equal footing with all similarly situated companies and would nullify any competitive disadvantage. However, if the case is settled, no precedent would be set to which other employers must adhere. Only Respondent would be bound by the terms of the settlement. Arguably, this would prejudice Respondent and place it in a substantial competitive disadvantage.

[23] *See Chernick v. U.S.*, 372 F.2d 492, 496 (Ct. Cl. 1967) (the test as to whether or not an official should have known of mistake must be that of reasonableness; *i.e.* whether under the facts and circumstances of the case there were any factors which reasonably should have raised the presumption of error in the mind of the officer).

[24] The Court finds that Mr. Cox and Respondent's counsel never changed their belief that Item 2 was going to be litigated despite their agreement to settle Items 1 and 3. *See Adams v. U.S.*, 1999 WL 1059680 at * 2 (expressed intentions a central element in determining whether a contract should be rescinded because of a mistake).

[25] Underlying the negotiation of the precise terms of the settlement agreement is whether or not AAD Carbone was acting as an agent of Complainant's counsel and whether or not AAD Carbone's communications with Mr. Cox on October 17 and October 18, 2013 constituted appropriate direct communications with a person represented by counsel. *See* Rule 4.2, Communication with Person Represented by Counsel, ABA Model Rules of Professional Conduct. *See also* OSHA's Field Operations Manual, Directive No. CPL-02-00-150, Chapter 8, Settlements, ¶ I. A. 1., dated April 22, 2011 ("After the employer has filed a written notice of contest, the Area Director may proceed toward a Formal Settlement Agreement with the concurrence and participation of the RSOL."). Neither party has made an issue of the propriety of these communications.

concerns with the Secretary's proffered agreement related to Item 2. By the end of the October 18, 2012 meeting, AAD Carbone should have recognized that there was no meeting of the minds with regard to resolving Item 2.[26] At that point, rather than both parties executing the settlement agreement, AAD Carbone should have recognized that the more prudent thing to do was to hold off on any signing of the agreement and, instead, contact Respondent's counsel to confirm that the draft settlement agreement was in order and reflected a mutual meeting of the minds as to Item 2.[27] This he did not do. The Court finds that AAD Carbone was instrumental in causing the mistake that led Mr. Cox to believe that his lawyer had approved a settlement agreement that included the resolution of Item 2. AAD Carbone transformed his assumption that Respondent's counsel had agreed to accept liability for Item 2 on October 16, 2012, when in fact he had not, into a misrepresentation to Mr. Cox the next day that Respondent's attorney had approved the settlement agreement, when in fact he had not.[28] The settlement agreement is voidable because Mr. Cox signed it after being induced by a material misrepresentation by AAD Carbone, upon which Mr. Cox was justified in relying.[29] The Court further finds that the settlement agreement does not reflect the true intent of the parties.

Accordingly, the record demonstrates that Respondent is entitled to obtain relief from the Settlement Agreement through recession based upon mutual mistake by the parties, as well as a unilateral mistake by Respondent.

While the Secretary argues for strict application of contract law, such strict application does not necessarily always apply to settlement agreements pending before the Commission. A

[26] By the end of the October 18, 2012 meeting, AAD Carbone had reason to know that Mr. Cox mistakenly believed that Respondent would be permitted to continue to pursue its contest of Item 2 despite the settlement agreement.
[27] Respondent did not have the benefit of legal counsel when he signed that settlement agreement on October 18, 2012 because Respondent's attorney was on vacation. AAD Carbone was aware of this.
[28] A misrepresentation is an assertion that is not in accord with the facts. It need not be fraudulent to be a misrepresentation. Restatement (Second) of Contracts, § 159 (1981).
[29] *See* Restatement (Second) of Contracts, § 164 (1981).

settlement agreement as a traditional contract is, generally, binding on both parties. However, "because of the Secretary's unique role in effectuating the purposes of OSHA, he has the power to withdraw from any settlement agreement prior to the entry of a final decision by the Commission." *Sun Petroleum Prods. v. OSHRC,* 622 F.2d 1176, 1187 (3d Cir. 1980) (Secretary able to withdraw from a settlement agreement after ALJ approved the settlement agreement and after direction of review ordered by the Commission). The Secretary's ability to exercise her discretion to withdraw from a settlement agreement prior to the issuance of a final order of the Commission undermines her contention that a contractually valid settlement agreement cannot be rescinded absent mutual mistake, ambiguity or fraud. Moreover, under Commission rules, a settlement agreement is not final until approved by the Judge. 29 C.F.R. § 2200.100 (b) and (c), Commission Rule 100(b) and (c). These rules set forth technical requirements that must be met before the Judge or Commission can approve a settlement agreement.[30] Rules 100 (b) and (c) also make it clear that a settlement agreement is not final until approved by the judge and an order terminating the litigation is issued by the Judge or the Commission.[31] Here, Respondent notified the Court of its objections two weeks after the agreement was signed, but before the judge approved the settlement agreement and before an order terminating litigation was issued by the Court or Commission. The Settlement Agreement was never approved or finalized by the

[30] Rule 100(b) states that a settlement agreement must "specify the terms of settlement for each contested item, specify any contested item or issue that remains to be decided (if any remain), and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time." Similarly, Rule 100(c) requires that all settlement agreements contain proof of service on all parties and authorized employee representatives, and posting of notice to non-party affected employees. Further, the parties "shall also file a final consent order for adoption by the Judge." Finally, Rule 100(c) grants ten days after service on affected employees to consider objections to the abatement dates filed by any affected employee or authorized employee representative before the Judge or the Commission can issue "an order terminating the litigation before the Commission because of the settlement."

[31] The Court takes judicial notice that settlement agreements submitted to it are occasionally returned to the parties before court approval to correct errors relating to not specifying the terms of settlement for each contested item, item penalty amounts that do not add up to the overall amount to be paid, wrong dates shown for payments, omitted posting requirements, and/or missing signatures. Here, the evidence shows that the settlement agreement is flawed because it fails to identify that Item 2 remains to be decided.

Court or Commission.

The technical requirements set forth in Rule 100 are not the exclusive grounds for refusing to approve a settlement agreement. Although the Commission does not have the authority to refuse approval of a settlement agreement because it disapproves of its substantive terms (*i.e*. characterization of the violation, penalty assessment, exculpatory language),[32] it has made it clear that it will not just "rubber stamp" its approval of settlement agreements, especially where a party alleges the settlement agreement does not reflect the intent of the parties. Rather, the Commission "must be assured that a proposed settlement represents a genuine agreement between the parties and a true meeting of the minds on all provisions thereof." *84 Components Co.,* 20 BNA OSHC 2063, 2064 (No. 02-0363, 2003); *Aerlex Corp.,* 12 BNA OSHC 1989 (No. 85-1257, 1986) (same). Under the Commission's rules and case law, Court approval is a condition precedent-to the settlement agreement being final and enforceable. *See Transcontinental Gas Pipe Line Corp. v. Fed. Energy Regulatory Comm'n,* 659 F.2d 1228, 1233 n. 45 (D.C. Cir. 1981) ("Approval by a third party is certainly a condition precedent."). A condition precedent is an event which must occur before performance under a contract becomes due.[33] *Psaromatis v. English Holdings I, L.L.C.*, 944 A.2d 472, 482 (D.C. 2008). The Commission has always favored cases being decided on their merits. *Duquesne Light Co.,* 8 BNA OSHC 1218, 1222 (No. 78-5034, 1980)(consolidated). This is consistent with the role of the Commission is to ensure that all parties to a controversy have a full, fair and equal opportunity to be heard. *Manti Homes,* 16 BNA OSHC 1458, 1461 (No. 92-2222, 1993).

Similarly, a court has the discretion to decline approval of a settlement agreement when

[32] Regarding substantive matters set forth in a settlement agreement, the Commission may only review the reasonableness of the abatement date when challenged by an authorized employee representative. *United Steelworkers of Am., Local No. 185 v. Herman*, 216 F.3d 1095, 1098 (D.C. Cir. 2000).

[33] *See Moses v. Howard University Hospital,* 601 F.Spp.2d 1, 5 (D.D.C. 2009) (Court denied motion to enforce settlement agreement not approved by Bankruptcy Court, a condition precedent to performance), *aff'd*, 606 F.3d 789 (D.C. Cir. 2010).

warranted by unusual factual circumstances. *Lloyd v. Mukasey*, 568 F.Supp.2d 2, 17-18 (D.D.C. 2008). While settlement agreements, deliberately entered into by the parties generally bind the parties and "ought not to be lightly set aside," a court may set aside such agreements "wherever justice requires." *Id.* at 17 (citing *Maiatico v. Novick*, 108 A.2d 540, 541 (D.C. Mun. App. 1954)).

Also, Respondent acted prudently by promptly seeking to have the settlement agreement rescinded as soon as the error was discovered and before the settlement agreement was approved by this Court.

The Court declines to approve the Settlement Agreement based upon the unusual factual circumstances of this case. The Settlement Agreement is not enforceable. Under these facts, the Court finds that justice requires that the settlement agreement be set aside in its entirety and Respondent allowed its day in court as to Item 2.

Order

Accordingly, it is ORDERED that Respondent's Motion to Rescind the Settlement Agreement is GRANTED. The parties are granted 30 days from the date of this Order to submit a new settlement agreement to the Court if they jointly choose to do so. If the parties fail to reach a settlement within the allotted time, the parties shall advise the Court of such and a date for a hearing will be set and the case will proceed to trial on all unsettled Items.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: July 31, 2013
Washington, D.C.