United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. NATIONAL ELECTRIC COIL CO., L.P., Respondent.	OSHRC Docket No. 13-1199

ORDER

On July 23, 2014, the parties filed a Joint Motion for Remand of this matter to the Administrative Law Judge for approval of their settlement agreement. After consideration by the Commission, the request to remand is granted. Accordingly, this matter is remanded to the judge for his consideration of the parties' settlement agreement pursuant to Commission Rule 100, 29 C.F.R. § 2200.100.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

Dated: July 28, 2014

/s/
John X. Cerveny
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. NATIONAL ELECTRIC COIL CO., L.P., Respondent.	DOCKET NO. 13-1199

DECISION AND ORDER

This matter comes before the Court on Complainant's *Motion to Dismiss*. Complainant contends that Respondent waived its right to contest the Citation and Notification of Penalty ("Citation") when its representative signed an Informal Settlement Agreement ("ISA") during a post-citation settlement meeting with local OSHA officials. Respondent, in its *Memorandum in Opposition to Motion to Dismiss*, contends that there was no enforceable agreement because its representative did not have authority to enter into the agreement, and because the agreement was voided by mutual rescission of the parties. Complainant filed a *Reply in Support of Motion to Dismiss*, wherein he took issue with Respondent's characterization of the evidence contained within various affidavits. In response to the parties' respective filings, the Court scheduled an evidentiary hearing to consider whether the ISA is enforceable and, therefore, whether Respondent's Notice of Contest should be dismissed.

The evidentiary hearing occurred on December 10, 2013 in Houston, Texas. Five witnesses testified at the hearing: (1) Michael Rivera, OSHA Area Director; (2) Michele Shield,

OSHA Asst. Area Director; (3) James Spangler, Respondent's Vice President of Human Resources; (4) Joseph Baldwin, OSHA Safety Consultant; and (5) Daniel Bucklew, Respondent's Senior Vice President and Business Unit Manager.

The parties were directed to file post-hearing briefs on the limited issue of the enforceability of the settlement agreement. In its post-hearing brief, Respondent proffered an additional argument that the ISA was voided by its own terms when Respondent failed to pay the agreed-upon penalties within 5 days of the date of the agreement. After reviewing Complainant's *Motion to Dismiss*, Respondent's *Memorandum in Opposition to the Motion to Dismiss*, Complainant's *Reply in Support of Motion to Dismiss*, the testimony and exhibits introduced during the hearing, and the parties' respective post-hearing briefs, the Court finds that the Informal Settlement Agreement is enforceable, that Respondent's Notice of Contest should be vacated, and that this proceeding be dismissed.

Background and Factual Findings

On June 25, 2013, Complainant issued two Citations to Respondent for alleged safety and health violations identified during two OSHA inspections conducted at Respondent's facility between January 14, 2013 and January 23, 2013. (Tr. 31; Ex. C-1). This case, OSHRC Docket No. 13-1199, focuses only on the health inspection, OSHA Inspection No. 841403, wherein Respondent was cited for four serious and one willful violations of the Act, with a total proposed penalty of $75,000.00. (Ex. C-1). The second Citation, which resulted from the safety inspection, was settled by the parties in a simultaneously executed Informal Settlement Agreement ("ISA") during the same July 10, 2013 meeting at issue in this decision. (Tr. 46–47). Respondent does not dispute the validity and enforceability of the ISA concerning the safety

Citation—only the enforceability of the ISA concerning the health Citation is at issue. (Tr. 46–48).

After it received the two sets of Citations, Respondent requested the aforementioned informal settlement conference with OSHA to discuss the possibility of resolving the alleged violations. (Tr. 35, 143–144). OSHA Area Director Michael Rivera and Assistant Area Director Michele Shield appeared on behalf of Complainant. (Tr. 27–28, 35). James Spangler, Respondent's Vice President of Human Resources, Maria Fernandez, Respondent's Environmental Health and Safety Coordinator, and James Baldwin, an independent safety consultant, appeared on behalf of Respondent. (Tr. 35–36, 116, 133). Mr. Baldwin testified that he had represented other companies in at least four or five different ISCs previously. (Tr. 185–186).

At the beginning of the ISC, AD Rivera asked whether Respondent's representatives had full settlement authority. (Tr. 37). Mr. Spangler and Mr. Baldwin confirmed that Mr. Spangler had settlement authority, and AD Rivera noted the same on his ISC checklist. (Tr. 37–39, 42, 53, 147, 187; Ex. C-2). During the negotiations, Mr. Spangler at one point excused himself so that he could make a telephone call about the settlement; however, he never indicated whom he was calling or the specific purpose for the call. (Tr. 44, 119, 186–187). By his own admission, Mr. Spangler never said anything during the ISC indicating whether he reached the person he was trying to call, or whether the phone call affected his ability to finalize the settlement terms. (Tr. 151). In fact, as was later revealed in filings and during the evidentiary hearing, Mr. Spangler was attempting to contact Dan Bucklew, Respondent's Senior Vice President and Business Unit Manager, who was on an airplane and unavailable to receive Mr. Spangler's calls at the time.

(Tr. 199). It is important to note that Mr. Bucklew does not directly supervise Mr. Spangler. (Tr. 137).

Mr. Spangler subsequently signed two settlement agreements, one fully resolving the safety Citation case and another fully resolving the health Citation case (the one at issue here). (Tr. 120; Ex. C-3). Once the agreements were signed, AD Rivera returned a box of documents that had been produced to OSHA by Respondent during the investigation. (Tr. 54).

After Respondent's representatives left the ISC and were driving back to their offices, Mr. Spangler received a phone call from Mr. Bucklew, who indicated his disapproval with the terms of the settlement in the health Citation case, specifically with regard to accepting the willful violation. (Tr. 121). Mr. Bucklew directed Mr. Spangler, Ms. Fernandez, and Mr. Baldwin to return to OSHA's office and submit a Notice of Contest with respect to the health Citation case only. (Tr. 47, 121, 200–201).

Mr. Baldwin then telephoned AD Rivera and told him that they were turning around and heading back to OSHA's office, and now wished to contest the health Citation case. (Tr. 54). Once they returned to AD Rivera's office, about 1 ½ hours after the original meeting, Mr. Baldwin went inside and delivered a contest letter to AD Rivera. The Court notes that the contest letter had already been pre-drafted by Respondent's representatives before the original meeting, in case the representatives could not negotiate acceptable settlement terms. (Tr. 192–193).

Unsure of the proper protocol in a situation like this, AD Rivera took the contest letter, date-stamped it, and asked Respondent to return the box of subpoenaed investigative documents. (Tr. 65). At no point during the exchange between AD Rivera and Mr. Baldwin did AD Rivera state that the previously signed agreement was cancelled, revoked, or otherwise affected by the

subsequently submitted contest letter. (Tr. 59, 191–192). Once AD Rivera received the contest letter, he followed his normal procedure of sending the file to the Department of Labor Solicitor's Office, and forwarding the contest letter to the Commission.[1] (Tr. 83).

Mr. Spangler testified during the hearing that due to his position with Respondent, he did not need anyone's approval in order to schedule the ISC with OSHA, to take Ms. Fernandez and Mr. Baldwin to the meeting, or to make the flight from his office in Ohio to attend the meeting in Texas. (Tr. 133–136). Mr. Spangler further testified that Mr. Bucklew was specifically aware that Mr. Spangler would be attending the ISC and that the goal of Respondent's team, inclusive of himself, Baldwin, and Fernandez, was to negotiate a resolution of both sets of Citations. (Tr. 137, 141-142). Mr. Spangler testified that his position as Vice President of Human Resources empowered him with the authority to meet with OSHA and attempt to settle both cases. (Tr. 144–145). He testified that Mr. Bucklew generally had final authority to approve any financial commitments that affect Respondent's Brownsville facility (the inspected facility at issue in the Citation), however, Mr. Spangler also testified that he was never told *not* to accept a willful violation until *after* he signed the ISC and had left the meeting with OSHA. (Tr. 145–146).

Mr. Bucklew testified that he was aware, prior to the ISC, that Respondent had been cited for a number of OSHA violations, including an alleged willful violation. (Tr. 201–202, 210–211). Mr. Bucklew also admitted that, typically, Mr. Spangler would in fact be the person at the company to attend an ISC with OSHA, as a part of his normal job duties. (Tr. 211). Mr. Bucklew had asked to speak with Mr. Spangler before the meeting, but acknowledged that he never told Mr. Spangler what he could agree, or not agree, to at the ISC, and never specifically prohibited Mr. Spangler from accepting the willful violation. (Tr. 202–203, 205, 213).

[1]. Respondent took issue with a redacted portion of AD Rivera's Case File Diary, which documents actions taken on the case. (Ex. C-5). At the parties' request, the Court conducted an *in camera* review of the contested diary entry. The Court's review of the redacted line in the diary sheet does not affect Court's decision in this matter.

Mr. Spangler claimed during the hearing that he did not know that he had the choice to walk away from the settlement conference without resolving the cases. (Tr. 155). However, the Court rejects that testimony on the basis that: (1) Mr. Baldwin, the third party OSHA consultant, had represented companies in other ISCs prior to this one (Tr. 185-186); (2) Respondent's negotiating team brought two pre-drafted contest letters with them to the OSHA settlement meeting (Tr. 172, 192; Ex. C-6); (3) there were seven days remaining in the 15-working day statutory contest period at the time of the settlement meeting, as clearly set out on the face of the Citations; and (4) Mr. Spangler was a sophisticated and knowledgeable representative, as evidenced by his position as Vice President of Human Resources, which among other things, requires him to understand and negotiate union labor contracts. (Tr. 155–157).

Discussion

Respondent submits three bases upon which the health Citation ISA should be nullified, allowing its Notice of Contest to proceed: (1) Mr. Spangler did not have authority to settle the health case, rendering the agreement unenforceable; (2) the ISC is null and void due to Respondent's failure to pay the negotiated penalty amount within 5 days; and (3) Complainant, by its acceptance of the contest letter and failure to collect past-due penalties, manifested its intent to mutually rescind the ISC. Complainant, on the other hand, contends that the ISC is binding and enforceable, that Mr. Spangler had authority to execute the ISC on behalf of Respondent, and that Complainant's post-agreement actions or inaction do not in any way manifest intent to rescind the ISC.

Mr. Spangler Had Authority to Bind Respondent

"A party may be held responsible for the acts of its purported agent under three agency theories." *Wells Fargo Business Credit v. Ben Kozloff, Inc.*, 695 F.2d 940, 944 (5th Cir. 1983).

The two theories the Court is concerned with in this case are actual authority and apparent authority. Actual authority requires that authority "must have been delegated to the agent either by words that expressly or directly authorize him to do a delegable act, or such authority may be implied from the facts and circumstances attending the transaction in question." *Id.* Mr. Bucklew and Mr. Spangler both admitted that attending an OSHA settlement meeting was a typical part of Mr. Spangler's responsibilities, and that he did not need a directive or permission from anyone to attend. (Tr. 134–136, 212). Although not his supervisor, Mr. Bucklew had asked Mr. Spangler to call him before he went to the OSHA informal settlement conference. (Tr. 137, 204–205). Mr. Bucklew admitted, however, that he never told Mr. Spangler of any limitations on his authority, including whether or not he could accept the willful violation. (Tr. 145, 202–204).

In light of the fact that attending ISCs is an anticipated part of Mr. Spangler's position, so much so that he could (and did) assemble a team which included an outside OSHA consultant to attend with him, the Court concludes, based on the totality of the circumstances in the record, that Mr. Spangler had actual authority to settle the case on behalf of Respondent.

Apparent authority, on the other hand, does not require an explicit delegation of authority. Rather, apparent authority "arises when the principal, either intentionally or by lack of ordinary care, induces third persons to believe an individual is his agent even though no actual authority, express or implied, has been granted to such individual." *Wells Fargo*, 695 F.2d at 945. To hold the principal liable, "a party must establish that it has been induced to act in good faith upon certain representations made to it by the principal." *Id.*

Respondent sent the Vice President of Human Resources (Mr. Spangler), its Environmental Safety and Health Coordinator (Ms. Fernandez), and an independent OSHA consultant (Mr. Baldwin) to represent its interests regarding two sets of Citations at a settlement

meeting with OSHA officials. At the beginning of the ISC, Mr. Spangler and Mr. Baldwin both told AD Rivera that Mr. Spangler had full settlement authority and could sign an agreement if acceptable terms were negotiated. (Tr. 37–39, 42, 53, 147, 187). Although Mr. Spangler indicated later during the meeting that he needed to call someone, he never stated the specific reasons for the call, the results of the call, or in any way indicated to OSHA that his authority was contingent upon anyone else's approval of the negotiated terms. Mr. Spangler simply returned to the meeting and subsequently signed both ISC's, fully resolving both sets of Citations. (Tr. 50–51, 174–175). Complainant, given no reason to believe otherwise, relied upon Respondent's representations that Mr. Spangler had apparent authority to enter into the agreements, execute the ISCs, and bind Respondent to the negotiated terms. (Tr. 51-53). This apparent authority is further solidified by the fact that Respondent does not dispute the enforceability or validity of the ISC signed with regard to the safety Citation; only with regard to the health Citation. (Tr. 46–48).

By sending three representatives, consisting of a Vice President, a Safety and Health Coordinator, and an independent OSHA consultant, Respondent manifested its consent to allow those individuals to act on its behalf. *See Interstate Brands*, 19 BNA OSHC 1440 (No. 00-1643, 2001) (holding that it was reasonable for Secretary to conclude that representative sent by Respondent had obtained permission to attend settlement conference and participate in discussion). There is no evidence in the record that any of the three representatives were ever informed that they could not settle the case, and no specific limitations on the parameters of their settlement authority was ever conveyed to any of them prior to the ISC. From the perspective of Complainant, without any information to the contrary, it was wholly reasonable to rely on the apparent authority of Mr. Spangler. The agreement amongst Respondent's representatives

regarding Mr. Spangler's authority underscores that Complainant "relied on the agent's authority in good faith, in the exercise of reasonable prudence." *Wells Fargo*, 695 F.2d at 945. The Court concludes that, based on the totality of the circumstances in the record, Mr. Spangler also had apparent authority to settle the case on behalf of Respondent.

The Informal Settlement Agreement is Not Nullified by Operation of its Own Terms

"Settlement agreements are contracts. As such, they are binding and enforceable under familiar principles of contract law, and are not subject to unilateral recision [sic]." *Zantec Dev. Co. Inc.*, 16 BNA OSHC 2102 (No. 93-2164, 1994) (ALJ) (citing *Phillips 66 Co.*, 16 BNA OSHC 1332, 1336 (No. 90-1459, 1993)). Through settlement "[e]ach party agrees to extinguish those legal rights it sought to enforce through litigation in exchange for those rights secured by the contract." *Village of Kaktovik v. North Slope Borough*, 689 F.2d 222, 230 (D.C. Cir. 1982). In construing a written contract, the primary concern is to determine the parties' intentions as expressed in the agreement. *Lawyers Title Ins. Co. v. Doubletree Partners, LP*, 739 F.3d 848, 858 (5th Cir. 2014). "All of the provisions of the policy must be considered with reference to the whole instrument, so that no single provision alone is given controlling effect." *Id.* (internal citations omitted); *see also Foster Wheeler Energy Corp. v. An Ning Jiang MV*, 383 F.3d 349, 354 (5th Cir. 2004).

Respondent contends that the language contained in paragraph 3 of the ISC renders it null and void, including Respondent's express waiver of its right to contest the Citation, because Respondent did not pay the agreed-upon penalties within five days of signing the ISC. The pertinent provisions of the ISC are as follows:

> …3. The Employer agrees to pay the proposed penalties, if any, as issued with the above citation(s), or, if amended by this agreement, as amended below. **Such penalty is to be remitted within five days of the signing of this agreement. If the original signed Agreement and payment is not received in accordance**

> **with this time period, the Agreement shall be null and void and all original penalties shall become payable along with appropriate fees and interest.**
>
> …5. The Employer, by signing this informal settlement agreement, hereby waives its right to contest the above citation(s) and penalties, as indicated in Paragraph 4 of this agreement.

(Ex. C-3) (emphasis as in original).

There is no dispute that Respondent failed to pay the agreed-upon penalty within five days; however, the parties disagree about the effect of that failure. Respondent contends that the contract is unenforceable and nullified by its own terms and, therefore, Respondent's subsequent contest letter filed later that same day is the only effective document. Complainant argues that Respondent is ignoring the final clause in paragraph 3, which explains that failure to pay the negotiated penalty amounts within five days results in the original proposed penalties becoming due and payable. The Court agrees with Complainant.

As noted above, the provisions of a contract must be construed in consideration of the contract as a whole, so that no single provision is given controlling effect. Respondent seeks to unilaterally render the entire ISC void by its failure to fulfill its own commitment to pay the agreed-upon penalties within the specified period of time. This is not a reasonable interpretation of the agreement. It appears that the parties' negotiated ISC agreement consisted of reducing the total penalties proposed in the case by grouping various violations together. (Ex. C-3). None of the proposed violations, or their characterizations, were vacated, modified, or otherwise altered. (Ex. C-3). Therefore, the Court interprets paragraph 3 to mean that if payment of the reduced fines was not remitted within following the five-day period, the penalty reductions "shall be null and void and all original penalties shall become payable along with appropriate fees, and interest. (*Id.*).

The Court does not read Paragraph 3 as a "re-start" button that can be unilaterally activated by Respondent through failure to comply with its commitments. Respondent seeks to benefit from its non-performance by regaining full contest rights that it expressly forfeited in the agreement. Similarly, if an employer entered into an ISC with OSHA, and then chose not to abate the hazards identified in accepted violations, the result would not be to void the ISC with contest rights fully reinstated.

Respondent's argument misconstrues the effect of paragraph 3, which penalizes non-performance with a reinstatement of the original penalties, which become immediately due and payable, with interest. The effect of this provision is clear—non-performance does not reboot the process; rather, it penalizes the offending party for not upholding its end of the bargain. Respondent cannot and should not benefit from its own failure to comply with the agreement's terms.[2] The Court rejects Respondent's arguments on this point and finds that the ISC is not deemed unenforceable as a result of Respondent's failure to pay the reduced penalty amount within the five-day period.

There was no Mutual Rescission of the Agreement

Parties to a contract can agree to mutually rescind the contract, and such an agreement can be inferred from the behavior of the parties. *Village of Kaktovik*, 689 F.2d at 230 (citing Corbin on Contracts § 1236 n.60 (1964 and Supp. 1981)). Respondent contends that Complainant's actions (or inaction) subsequent to receiving the contest letter was consistent with an intent to rescind the ISC. Specifically, Respondent identifies the following as indications of

[2]. Assuming, *arguendo*, that Respondent's interpretation of paragraph 3 is reasonable, the Court would still find that Respondent's July 10, 2013 contest letter should be vacated. The ISC, which included an express waiver of Respondent's contest rights, was signed on July 10, 2013. (Ex. C-3). Respondent submitted its purported contest letter later that same day. According to the ISC, the negotiated reduced penalty was due to be paid by July 15, 2013. Therefore, at the time Respondent submitted its contest letter, it did not have the right to do so. That right, *arguendo*, would not have been re-instated until five days later, when Respondent failed to pay the reduced penalty total. Respondent did not submit a contest letter after July 15, 2013. Subsequently, the contest period ended on July 17, 2013. 29 U.S.C. § 659 (Ex. C-1).

Complainant's acquiescence to the rescission: (1) AD Rivera's physical acceptance and processing of the contest letter; (2) AD Rivera's request that the box of subpoenaed investigative documents be returned; (3) Complainant's subsequent failure to take any action to collect the penalties and interest, failure to conduct a follow-up inspection, and failure to follow-up on abatement certification from Respondent; and (4) the Solicitor's communications with Respondent regarding an extension of time to file the complaint and discussions regarding the possibility of settlement.

First, with respect to AD Rivera's physical acceptance of the contest letter, he testified that this was an unusual situation and did not know the proper protocol to follow. (Tr. 60). Thus, he accepted the contest letter and requested the return of the investigative documents out of "an abundance of caution", because he was not sure what the outcome would be. (Tr. 65). The Court finds that AD Rivera's actions do not constitute any intent to rescind the ISC or any intent to recognize the legitimacy of the contest letter. The Court accepts AD Rivera's testimony that he simply sought to cover his bases in an unknown situation, pending review by his superiors and Complainant's attorneys.

Second, as to Complainant's "failure" to pursue collection of the negotiated penalties, interest, and abatement verification, the Court also finds that Complainant's inaction does not illustrate a clear intent to rescind the ISC, nor does it acknowledge the contest letter. The following passage is instructive:

> The Respondent's allegations concerning the failure of OSHA to follow its Field Operations Manual are rejected. These actions are merely discretionary with the area director. As the Commission stated in *H.B. Zachary*, 7 BNA OSHC 2202, 2205, "—the Field Operations Manual is an internal manual containing only guidelines for the exercise of the Secretary's enforcement responsibilities. We stated that the manual does not have the force and effect of law, nor does it accord important procedural and substantive rights to individuals.

Zantec Dev. Co. Inc., 16 BNA OSHC 2102. OSHA's temporarily suspending otherwise discretionary actions (such as penalty collection, abatement verification, and follow-up inspections) until a resolution is reached regarding the status of the case is a reasonable course of action and does not illustrate "an objective intent to abandon." *See Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 745 (Fed. Cl. 2004).

Likewise, the Court can discern no such intent resulting from the Solicitor's attempt to discuss the case with Respondent and explore settlement possibilities. In litigation, with disputed factual and legal issues, parties routinely seek extensions of time and discuss settlement possibilities for a variety of reasons. There is no evidence that such communication constituted Complainant's acceptance that the ISC is null and void, or that the contest letter is enforceable.

Conclusion

Ultimately, the Court agrees with Complainant that this case is a paradigmatic example of buyer's remorse. Complainant presented clear and convincing evidence of an executed Informal Settlement Agreement, signed by Respondent's authorized representative, which fully resolved this case and waived Respondent's right to subsequently contest the proposed violations or penalties. Respondent's arguments are post-hoc rationalizations intended to void a binding agreement which Respondent later decided it did not like. The Court is leery of the precedent that would be set if a party could unilaterally withdraw from an informal settlement agreement as Respondent proposes here. *See Zantec Dev. Co. Inc.*, 16 BNA OSHC 2102 ("[T]o allow employers to unilaterally withdraw from previously agreed-upon settlements would deprive the Secretary of the finality of settlement agreements necessary for the efficient enforcement of the Occupational Safety and Health Act of 1970."), citing *Pennsylvania Steel Foundry & Machine Company*, 13 BNA OSHC 1417 (3rd Cir. 1987), and *Aerlex Corp.*, 13 BNA OSHC 1197 (No.

85-1257, 1987). To be sure, if such an agreement had been executed by the same party representatives, in the same manner, yet with Complainant vacating the willful, the enforceability of the ISC would be the same. Complainant would likewise not be entitled to later decide he did not like the terms, and "walk away" from such a mutually negotiated and fully executed commitment.

Accordingly, the Court finds that the Informal Settlement Agreement is binding and enforceable, including the negotiated penalty reductions as outlined in the agreement.[3] Complainant's *Motion to Dismiss* is GRANTED, Respondent's Notice of Contest is VACATED, and this case is DISMISSED.

SO ORDERED.

/s/ *Brian A. Duncan*

Date: April 4, 2014
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

3. Respondent should not be penalized at this point for not paying the negotiated, reduced penalty amounts within the five-day period. Just as Complainant's witnesses testified that they were unsure of the protocol in this situation, with regard to pursuing unpaid penalties and demanding abatement verification, Respondent was equitably entitled to withhold penalty payment until the question of whether the executed Informal Settlement Agreement or the subsequently submitted Notice of Contest was enforceable.