

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building – Room 2R90, 100 Alabama Street SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

T.E. Stevens Company, Inc.,

Respondent.

OSHRC Docket No. **16-1274**

**ORDER DENYING MOTION TO DISMISS NOTICE OF CONTEST**

T. E. Stevens Company, Inc., (TES) is an excavation contractor. TES filed a timely notice of contest on August 2, 2016, contesting a Citation and Notice of Penalty issued to it by OSHA on July 6, 2016. On August 15, 2016, the Secretary filed a *Motion to Dismiss Notice of Contest*. The Secretary contends TES waived its right to contest the Citation because its representative signed an Informal Settlement Agreement (ISA) during an informal conference with an OSHA representative on July 15, 2016. The Secretary submitted the *Declaration of Hector Julian-Camacho*, an Assistant Area Director (AAD) for the Birmingham, Alabama, area office of the Occupational Safety and Health Administration (OSHA), in support of its *Motion*. In its *Response in Opposition to Motion to Dismiss Notice of Contest*, TES argues there was no enforceable ISA because its representative lacked authority to enter into an agreement on its behalf. In support of its *Response*, TES submitted the *Declaration of James S. Robinson*, the Safety Manager and Human Resources Manager for TES; *Declaration of James “Jake” Lyle*, Utility Superintendent for TES; and *Declaration of Tom Stevens*, President of TES.

After reviewing the Secretary’s *Motion to Dismiss Notice of Contest*, TES’s *Response in Opposition to Motion to Dismiss Notice of Contest*, and the declarations submitted by the parties, the Court finds the representative for TES did not have authority to enter into the ISA on behalf of TES and, therefore, the ISA is not enforceable. Accordingly, the Court **DENIES** the Secretary’s *Motion to Dismiss Notice of Contest* and directs the Secretary to file a complaint within 20 days of the issuance of this Order.

## BACKGROUND

### *Inspection and Citation*

On July 6, 2016, OSHA issued a one-item Citation to TES alleging a serious violation of 29 C.F.R. § 1926.652(a)(1) for failing to provide cave-in protection for an employee who was working in an excavation measuring 7 feet, 4 inches, deep. The Citation resulted from an inspection conducted by a compliance safety and health officer (CSHO) at a TES worksite in Vestavia, Alabama, on April 28, 2016. The Secretary proposed a penalty of \$5,390.00 for the item.

The Citation includes a paragraph addressing an informal conference. It states:

**Informal Conference** – An informal conference is not required. However, if you wish to have such a conference you may request one with the Area Director during the 15 working day contest period. During such an informal conference you may present any evidence or views which you believe would support an adjustment to the citation(s) and/or penalty(ies).

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Area Director within 15 working days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

If you decide to request an informal conference, please complete, remove and post the Notice to Employees next to this Citation and Notification of Penalty as soon as the time, date, and place of the informal conference have been determined. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest.

(Citation, pp. 1-2)

Upon receipt of the Citation, company president Stevens “told James [Robinson] to call OSHA to go on a fact finding mission and report to” him. *Declaration of Tom Stevens*, ¶ 6. James Robinson is TES’s Safety Manager and Human Resources Manager. Stevens promoted him to that position sixteen months ago from his position as a laborer. *Declaration of James S. Robinson*, ¶¶1-2. Stevens states Robinson “earned the job because he works hard and I thought this position would be something he could learn to do with the support of my staff.” *Declaration*

of Tom Stevens, ¶ 5. Stevens also states, “Robinson was aware of the location surrounding the citation and the penalty and was the appropriate employee to attend the informal conference to gather more information.” *Declaration of Tom Stevens*, ¶ 7.

#### *The Informal Conference*

According to AAD Julian-Camacho, Robinson called him on July 14, 2016, to schedule “an informal conference to discuss the citation and penalty . . . pursuant to 29 C.F.R. § 1903.20.”

*Declaration of Hector Julian-Camacho*, ¶ 3. Section 1903.20 provides:

At the request of an affected employer, employee, or representative of employees, the Assistant Regional Director may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest. The settlement of any issue at such conference shall be subject to the rules of procedure prescribed by the Review Commission. If the conference is requested by the employer, an affected employee or his representative shall be afforded an opportunity to participate, at the discretion of the Assistant Regional Director. If the conference is requested by an employee or representative of employees, the employer shall be afforded an opportunity to participate, at the discretion of the Assistant Regional Director. Any party may be represented by counsel at such conference. No such conference or request for such conference shall operate as a stay of any 15-working-day period for filing a notice of intention to contest as prescribed in §1903.17.

AAD Julian-Camacho met with Robinson and TES’s General Superintendent Ronald Connally on July 15, 2016, at OSHA’s Birmingham area office. AAD Julian-Camacho stated the TES representatives “gave me their T.E. Stevens Construction [sic] business cards and represented that they were there to negotiate on behalf of the company.” *Declaration of Hector Julian-Camacho*, ¶ 4. The AAD does not address any topics discussed at the conference other than the ISA signed by him and Robinson:

5. During the informal conference, an Informal Settlement Agreement (ISA) was reached in which the penalty for the citation was reduced to \$2,695. The terms of the agreement allow the company to pay the penalty in twelve monthly installments with the total due on or before July 15, 2017.
6. The ISA provides in paragraph 5 that by signing the ISA, the Employer waives its right to contest the citation and penalty.
7. At the conclusion of the informal conference on July 15, 2016, James S. Robinson signed the ISA on behalf of T. E. Stevens Company, Inc. I signed on behalf of OSHA. A true and exact copy of the ISA is attached as Exhibit C.

*Declaration of Hector Julian-Camacho.*

Robinson provides more detail regarding the informal conference with AAD Julian-Camacho:

9. Our meeting with Hector [Julian-Camacho] was very strange. Hector said that OSHA had been getting numerous and obscene threats from one of our employees and that we and OSHA had a big problem.
10. Hector said OSHA had gotten The Department of Homeland Security involved and the police to look into this problem.
11. When Hector showed Ronald and me his file on our “problem employee” it quickly became obvious to me this guy had no connection to our company.
12. I told Hector that the “problem employee” did not work for us. Hector asked Ronald and me to help get rid of the guy who was causing so much of a stir at OSHA by his threatening voicemails and obscene language.
13. We spent most of the meeting talking about the “problem employee” and spent very little time talking about the citation that I had been sent to find out about.
14. When we finally discussed the citation, Hector told me he had [a] really good deal for us.
15. I signed the agreement without any authority from Tom after Hector told me OSHA was cutting it in half.
16. I signed the agreement without any authority from Tom thinking I was getting a good deal for the company even though I was told only to go on a fact finding mission.
17. I regret acting without authorization.

*Declaration of James S. Robinson.*

*Events Immediately Following Informal Conference*

After leaving the informal conference, Robinson went to the worksite and met with the general contractor on the project to discuss the “problem employee,” who worked for the electrical subcontractor. According to Robinson, the employee “was terminated right then.”

*Declaration of James S. Robinson, ¶ 18.* Robinson then called Tom Stevens to inform him of the ISA. He states, “Tom told me that was not what I was sent there to do. He told me to call Hector back and tell him that I was not supposed to settle anything without his permission. . . . Tom said a ‘serious’ violation could cripple our company because many of the larger General

Contractors have a written policy that prohibits them from taking bids from subcontractors who have had a serious violation. . . . I was unaware of the implication of a ‘serious’ OSHA violation.” *Declaration of James S. Robinson*, ¶¶ 20-22.

Stevens agrees with Robinson’s account. “James [Robinson] called me from his truck an hour or so after settling the matter with OSHA. He stated he got the fine cut in half. . . . I believe James thought he was helping the company by getting the fine reduced, but this is not what he was sent to do or authorized to do.” *Declaration of Tom Stevens*, ¶¶ 11-12. AAD Julian-Camacho, Stevens, and Robinson agree Robinson called the AAD on July 15, 2016, the day of the informal conference, and informed him he did not have the authority to sign the ISA on behalf of TES. *Declarations of Julian-Camacho, Stevens, and Robinson*, ¶¶ 8, 13, and 24, respectively. On July 18, 2016, AAD Julian-Camacho called Robinson and told him “the terms of the settlement could not be altered.” *Declaration of Hector Julian-Camacho*, ¶ 9.

*July 22, 2016, Meeting Between AAD Julian-Camacho and Stevens*

Stevens called the AAD on July 20, 2016, and reiterated Robinson did not have authority to sign the ISA. *Declarations of Julian-Camacho and Stevens*, ¶¶ 10 and 14, respectively. They arranged to meet on July 22, 2016, to discuss the issue. At that meeting, also attended by Utility Superintendent Jake Lyle, Stevens repeated that Robinson was not empowered with settlement authority at the informal conference and TES wanted “to revoke or renegotiate the agreement.” *Declaration of Tom Stevens*, ¶ 16. According to AAD Julian-Camacho, “Stevens admitted that Mr. Robinson is a Safety Manager and Human Resources Manager for T. E. Stevens Company, Inc. Mr. Stevens further stated that Mr. Robinson made a mistake by agreeing to the terms of the ISA, but admitted that it was his own fault for allowing Mr. Robinson to attend the informal conference on the company’s behalf. Mr. Stevens explained that he had been too busy to attend himself, with ‘too many things on [his] plate.’” *Declaration of Hector Julian-Camacho*, ¶ 11.

*Notice of Contest*

Stevens states:

17. At the beginning of the meeting, Hector [Julian-Camacho] pointed out that we could not file a Notice of Contest as long as the agreement was in place.
18. During the meeting, Hector called his supervisor and discussed what I wanted to do.

\* \* \*

20. When Hector hung up the phone with his supervisor, he told me and Jake [Lyle] ‘she will not reduce the classification but you have until August 3, 2016, to file your Notice of Contest.’

21. I took this as great news because I understood this to mean that the agreement was rescinded because the agreement clearly states that by signing the agreement the Employer waives the right to file a Notice of Contest. I left the meeting with Hector, 100% sure that the agreement had been revoked and that we were free to file a Notice of Contest.

*Declaration of Tom Stevens.* Jake Lyle essentially repeats the representations of Stevens regarding the topic of filing the notice of contest at the July 22, 2016 meeting. *Declaration of James “Jake” Lyle.*

AAD Julian-Camacho states, “On August 2, 2016, Mr. Stevens sent a letter, by regular mail, certified mail, and hand delivery, notifying Area Director Ramona Morris of the company’s intention to contest the citation and penalty. . . . [T]he notice of contest was filed within the time period set forth in 29 C.F.R. § 2200.33.” *Declaration of Hector Julian-Camacho*, ¶ 13.

#### **DISCUSSION**

Paragraph 5 of the ISA provides: “The Employer, by signing this informal settlement agreement, hereby waives its right to contest the above citation(s) and penalties, as amended in paragraph 4 of this agreement.” *Motion to Dismiss, Exhibit C.* Based on the “‘four corners’ of the unambiguous document, the Secretary contends the ISA is enforceable and TES waived its right to contest the Citation.

Generally speaking, the Commission is reluctant to permit a party to withdraw from an executed settlement agreement. *See Zantec Dev. Co. Inc.*, 16 BNA OSHC 2102 (No. 93-2164, 1994) (“[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).

TES counters its representative, James Robinson, lacked authority to enter into the ISA on behalf of TES. Stevens delegated Robinson to set up and attend the informal conference as “fact finding mission,” and did not intend for him to enter into an ISA.

### *Actual Authority*

The Secretary argues Robinson had the required authority, as evidenced by Stevens's purported statements at the July 22, 2016, meeting with the AAD.

Mr. Stevens admitted that Mr. Robinson is a Safety Manager and Human Resources Manager for the Employer. Mr. Stevens took responsibility for allowing Mr. Robinson to attend the conference instead of attending himself. His statements indicate both that he knew Mr. Robinson was attending the informal conference and that he intended for Mr. Robinson to act on the company's behalf. The purpose of informal settlement conferences is to discuss and settle citations and penalties.

#### *Motion to Dismiss*, p. 3.

The Court disagrees with the inference drawn by the Secretary from Stevens's remarks. Stating he "took responsibility for allowing Mr. Robinson to attend the conference instead of attending himself" does not indicate Stevens gave Robinson settlement authority at the informal conference. It indicates a hindsight conclusion his subordinate did not handle an important issue in the manner Stevens wished. In fact, his subordinate, who Stevens sent to gather information, agreed to the precise outcome Stevens wished to avoid—the acceptance of the Citation for a serious violation of § 1926.652(a)(1). Stevens believes this acceptance could "cripple" TES due to the policy enforced by larger contractors prohibiting them from hiring subcontractors have committed serious OSHA violations. Stevens's disagreement with the classification of the alleged violation was manifested immediately when he instructed Robinson to call the AAD and rescind the ISA. Stevens followed up by arranging a meeting with the AAD and attending it himself.

The Court also disagrees with the Secretary's characterization of the informal conference. The Secretary states, "The purpose of informal settlement conferences is to discuss and settle citations and penalties." *Motion to Dismiss*, p. 3. The Citation itself, as well as § 1903.20, refers to an *informal conference*, not, as the Secretary styles it, "informal *settlement* conferences." Although a settlement discussion may be part of an informal conference, it is not its sole purpose. Section 1903.20 clearly contemplates the parties may discuss topics other than settlement: "[T]he Assistant Regional Director may hold an informal conference *for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest.*" (emphasis added.)

The Citation also informs the employer it may request an informal conference for reasons other than settlement negotiations: “Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. *If conditions warrant, we can enter into an informal settlement agreement* which amicably resolves this matter without litigation or contest.” (emphasis added.) Settlement is just one of the possible topics that could be addressed at an informal conference “[i]f conditions warrant.”

The Secretary contends that by sending “two high-ranking members of company management, the Employer manifested its consent to allow those individuals to act on its behalf.” *Motion to Dismiss*, p. 4. Neither the Citation nor § 1903.20 requires the presence of an employer representative with settlement authority. The mere fact Tom Stevens left attendance of the informal conference to Robinson, the employee who “was aware of the location surrounding the citation and the penalty,” does not manifest consent to an agreement made by that representative.

There is no evidence in the record before the Court that TES delegated settlement authority to Robinson. Actual authority is not established.

#### *Apparent Authority*

The Secretary argues, “Even if Mr. Robinson did not have actual authority, he had apparent authority. Apparent authority does not require an explicit delegation of authority.” *Mission to Dismiss*, p. 3. The doctrine of apparent authority is “based on the actions of the principal, not those of the agent. Apparent authority is based on the principal holding the agent out to the third party as having the authority upon which he acts, not upon what one thinks an agent's authority might be, or what the agent holds out his authority to be.” *Gen. Am. Life Ins. Co. v. AmSouth Bank*, 100 F.3d 893, 898 (11th Cir. 1996).

Here, TES (the principal) did not hold Robinson (the agent) out to OSHA (the third party) as having authority upon which OSHA acted. The only communication between TES and OSHA after the Citation was issued and prior to the informal conference was initiated by Robinson. Stevens told Robinson to call OSHA because he was “too busy to attend himself, with ‘too many things on [his] plate.’” *Declaration of Julian-Camacho*, ¶ 11. Nothing TES, through Stevens, did created the appearance that Robinson had settlement authority at the informal conference.



The Secretary cites a Commission case in which the ALJ granted the Secretary's motion to dismiss the notice of contest on the grounds the employer had waived the right to contest the citation by signing an ISA that included such a waiver in its terms. The employer argued, as here, the company representative signing the ISA did not have authority to sign on the employer's behalf. Although the cited decision is an unreviewed ALJ decision with no precedential authority, the reasoning of the ALJ is instructive.

In *National Electric Coil Co., L.P.*, 13-1199, 2014 WL 3778586, (No. 13-1199, 2014), *remand*, 2014 WL 3778585 (O.S.H.R.C. July 28, 2014) (noting discretionary review granted; joint motion to remand for consideration settlement agreement approved), OSHA issued two citations to the employer, one alleging safety violations and the other alleging health violations. The employer requested and was granted an informal conference. Attending the informal conference for OSHA were an OSHA Area Director and an Assistant Area Director. Attending on behalf of the employer were "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. . . . Mr. Baldwin . . . had represented other companies in at least four or five different" informal conferences previously. *Id.* at \*2.

The Area Director began the informal conference by asking whether the employer's representatives had full settlement authority. Spangler and Baldwin both asserted Spangler had settlement authority. Spangler signed two settlement agreements, one for the safety citation and one for the health citation. After the employer's representatives left the informal conference and were driving back to their offices, "Mr. Spangler received a phone call from [the vice-president], who indicated his disapproval with the terms of the settlement in the health Citation case, specifically with regard to accepting the willful violation. . . . [The vice-president] 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." *Id.*

The ALJ held an evidentiary hearing on the Secretary's motion to dismiss. He subsequently granted the motion, based on the apparent authority of Spangler to sign an ISA on behalf of the employer.

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).

*Id.* at \*5.

Here, the AAD did not ask Robinson if he had settlement authority and Robinson did not represent that he had it. Furthermore, the employer in *National Electric Coil* did not dispute the settlement agreement for the safety citation, indicating it had empowered Spangler with settlement authority with regard to that citation. The employer's inconsistent treatment of the two settlement agreements undermines its claim Spangler had no authority to bind the employer. TES did nothing to manifest intent to imbue Robinson with settlement authority.

The Court finds TES did not "hold out" Robinson to OSHA as an agent with settlement authority. TES did not cause OSHA to believe Robinson had such authority. No apparent authority existed at the time of the informal conference.

Accordingly, the Court concludes Robinson lacked authority to sign a contractual agreement on behalf of TES. The settlement agreement is, therefore, unenforceable. The Court **DENIES** the Secretary's *Motion to Dismiss Notice of Contest*.

SO ORDERED.

Date: **September 23, 2016**  
Atlanta, Georgia

*/s/ Sharon D. Calhoun*  
**SHARON D. CALHOUN**  
Judge