

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
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SECRETARY OF LABOR
Complainant,
v.
ZANTEC DEVELOPMENT CO., INC.
Respondent.

OSHRC DOCKET
NO. 93-2164

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 14, 1994. The decision of the Judge will become a final order of the Commission on October 13, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before October 3, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: September 14, 1994

DOCKET NO. 93-2164

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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Columbus, OH 43215

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
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SECRETARY OF LABOR,

Complainant,

v.

ZANTEC DEVELOPMENT CO. INC.,

Respondent.

Docket No. 93-2614

Appearances:

Heather Joys, Esq.
 U.S. Department of Labor
 Cleveland, Ohio

For the Complainant

Roger L. Sabo, Esq.
 Schottenstein, Zox & Dunn, Esqs.
 Columbus, Ohio

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

Zantec ("Respondent") was issued four citations totalling \$4500 from the Occupational Safety and Health Administration ("OSHA") on February 8, 1993. Under the OSHA Act, the 15 working days within which a notice of contest opposing any or part of the citations must be filed ended on March 5, 1993. At an informal conference conducted on March 3, 1993, OSHA offered to reduce the penalties to \$2200 upon the signing of a settlement agreement. By the terms of the agreement the Respondent waived its right to contest the citations, and that all rights to review by either a court or agency would be terminated. This offer was made at the settlement negotiations conducted on March 3, 1993, with the Respondent being informed said offer was valid only until the end of business on

said day. The Respondent avers that he attempted to conduct his attorney for advice and being unsuccessful signed the agreement.

On March 5, 1993, the Respondent filed a notice of contest with OSHA who did not forward it to the Commission as required since they considered the settlement final and binding. Thereafter, the Respondent filed the notice of contest with the Commission, where it was docketed on August 6, 1993. On October 28, 1993, the Secretary of Labor moved to dismiss the notice of contest alleging the citations had become final based on the signed settlement agreement, and that the Commission no longer had jurisdiction over the matter.

The issue presented is whether the settlement agreement signed by both parties herein is final and binding, and thus bars the Respondent from contesting the citations. The Respondent claims the agreement was signed under duress, and is not enforceable. The Secretary counters that there was no duress herein and the settlement is binding on both parties.

Settlement agreements are contracts. As such, they are binding and enforceable under familiar principles of contract law, and are not subject to unilateral rescission. *Secretary of Labor v. Phillips*, 66 Co., 16 BNA OSHC 1332, 1336 (No. 90-1459, 1993). Courts have long favored voluntary resolution of litigation in order to conserve judicial resources. See *Lewis v. S.S. Baume*, 534 F2d 1115, 1122, (5th Cir. 1979); Further, to 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. See *Pennsylvania Steel Foundry & Machine Company v. Secretary of Labor*, 13 BNA OSHC 1417, (3rd Cir. 1987) and *Secretary of Labor v. Aerlex Corp.*, 13 BNA OSHC 1197 (No. 85-1257, 1987). Also, the Commission encourages settlements of disputes between the parties. Commission Rule 100(a), 29 CFR Sec. 2200.100(a).

There are some exceptions to the finality of settlement agreements. Settlements entered into under duress, harassment, or overbearing conduct can be invalidated. *Lewis*, supra at 1122.-

The Respondent alleges that he signed the settlement agreement under duress, having been given a short period to either sign or else loose out, and that his inability to contact his attorney for advice was duress. The evidence shows that the Respondent was allowed approximately two hours decide whether or not to sign the settlement agreement which he had discussed with the OSHA personnel. Not having made contact with his attorney he under his own free will made the decision to close his case by settlement. Duress is not implicated as herein where one party states he will avail himself of his legal rights if an offer is not accepted. Only the threat of wrongful or unlawful acts constitutes duress. *Beatty v. U.S.*, 168 F. Supp 204, 206-7, (Ct. Cl. 1958). The Respondent alleges that his inability to contact his attorney before signing the settlement agreement enables him to rescind. However "courts have consistently held that parties have a right to settle or compromise their litigation without the knowledge or consent of their counsel."

Lewis, supra.

The Respondent appeared and testified at the hearing. He gave the distinct impression of an above normal intelligence, and engaged in operating his own business for many years; he admitted to signing and reading contracts in the course of his business and herein did peruse and read the settlement agreement. His actions in signing the agreement when considered against his business background, his experience in business dealings including contractual matters, his obvious intelligence, his decision freely made to settle this matter shows no impropriety therein, and I so find.

The Respondent's allegations that the settlement agreement is invalid because the OSHA area director did not forward the notice of contest as required, and also violated its field manual by not allowing additional time to contact an attorney are without merit. Since the agreement was valid and binding as indicated above and the waiver agreed to binding, OSHA had no reason to forward the notice of contest to the Commission since the matter was settled and closed. The Respondent's allegations concerning the failure of OSHA to follow its Field Operations Manual is 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." Finally, failure of the area director to forward the notice of contest to the Commission did not prejudice the Respondent's case since the waiver signed was valid and effective.

The preponderance of the evidence demonstrates there was a valid binding agreement entered into between the parties, and as such, the Respondent waived his right to contest the citations herein. Accordingly, the motion by the Secretary to dismiss the notice of contest is granted. All other proposed findings, conclusions, or motions inconsistent with this order are hereby denied.

FINDINGS

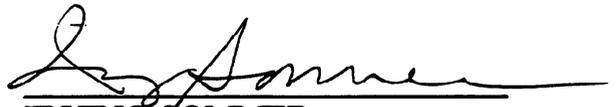
1. The Respondent was issued four (4) citations on February 8, 1993 with penalties totaling \$4500.
2. On March 3, 1993 the Respondent and OSHA entered into a settlement agreement which was duly signed by both parties.
3. The settlement agreement was entered into by both parties openly and without any duress or coercion, or any other action which would invalidate the agreement.
4. By the terms of the agreement the Respondent waived his right to contest the citations.
5. The settlement agreement is final and binding on all parties.

CONCLUSION

Motion by the Secretary to dismiss the Respondent's notice of contest is granted.

ORDER

The settlement agreement is **AFFIRMED** as valid and binding in all respects.



IRVING SOMMER
Judge

DATED: SEP 10 1994
Washington, D.C.