



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,
Complainant,

v.

CATERPILLAR, INC.,
Respondent.

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,

Authorized Employee
Representative.

OSHRC Docket No. 94-347

DECISION AND ORDER

BEFORE: WEISBERG, Chairman; and MONTROYA, Commissioner.

BY THE COMMISSION:

At issue in this case is the appropriate sanction the Commission or its judges may impose against a party or its attorney for failure to comply with the Commission's orders and rules when the case results in a settlement agreement. For the reasons that follow, we find that the sanction the judge imposed here was not an appropriate one. Accordingly, we vacate his order approving the modified settlement agreement and remand the case to him so that he may consider whether to assess an appropriate sanction.

1996 OSHRC No. 4

Following an October 1993 inspection of its facility at Peoria, Illinois, Caterpillar, Inc., was cited for several serious violations, primarily of the confined space and lockout-tagout standards,¹ and two nonserious violations of the hazard communication standard.² Penalties totaling \$19,500 were proposed for the alleged serious violations.

On November 1, 1994, the parties notified Administrative Law Judge James H. Barkley that they had settled the matter. The next day, the judge cancelled the scheduled hearing and directed the parties to file the settlement agreement with the Commission within twenty days. The parties did not comply with the judge's order. On December 29, 1994, because the parties still had neither filed the settlement agreement nor filed a motion seeking an extension of time, the judge issued a show cause order directing each party to explain its part, if any, in the failure to file the agreement. Both parties responded to the show cause order.

The judge found that Caterpillar was responsible for the delay and that its response, which blamed the delay on the intervening holiday season and personal vacation schedules, failed to establish good cause. He additionally found that Caterpillar's failure to timely file the settlement agreement was part of a pattern of conduct involving several cases, and concluded that the company had shown a lack of respect for the Commission, its rules, and its orders. The judge also observed that Caterpillar's failure to timely file the settlement agreement prolonged employee exposure to the cited hazards, which are not required to be abated until the entry of a final order. He concluded that sanctions were in order under Commission Rule of Procedure 41, 29 C.F.R. § 2200.41,³ struck those parts of the settlement agreement that reduced the penalties, and

¹29 C.F.R. §§ 1910.146 and 1910.147, respectively.

²29 C.F.R. § 1910.1200.

³ The rule states in pertinent part:

§ 2200.41 Failure to obey rules

(a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either:

(continued...)

substituted the penalties originally proposed by the Secretary.

We agree with Judge Barkley that Caterpillar failed to establish good cause for not complying with his original order to file the settlement agreement. We are unable to see how personal vacation schedules and easily anticipated national holidays justify a delay in the filing of a settlement agreement for over two months after the judge was notified that it had been reached. We can only wonder how much longer the filing would have been delayed if Judge Barkley had not issued his order to show cause on December 29, 1994. No justification was ever offered either for the failure to inform Judge Barkley of the delay or for the failure to request an extension of time to file the settlement agreement. Indeed, over a month after the agreement was due to be filed, Judge Barkley initiated the action to determine the status of the settlement. Assuming that this conduct is part of a pattern involving several cases in which Caterpillar has failed to timely file settlement agreements and warrants a finding that it is contumacious, an appropriate sanction may be imposed by the judge.

However, it is well-settled that the Commission does not have the authority to approve a settlement agreement only in part because to do so would substantively alter the terms under which the parties decided to forgo litigating the issues in the case. *Phillips 66 Co.*, 16 BNA OSHC 1332, 1335, 1993 CCH OSHD ¶ 30,191, pp. 41,539-40 (No. 90-1549, 1993); *Snider Indus., Inc.*, 8 BNA OSHC 2046, 2047, 1980 CCH OSHD ¶ 24,749, p. 30,478 (No. 78-452, 1980); *Independence Foundry & Mfg. Co., Inc.*, 8 BNA OSHC 2020, 2022, 1980 CCH OSHD ¶ 24,747, p. 30,475 (No. 79-5772-P, 1980). By altering the penalty provisions of this settlement agreement, the judge has in effect altered the terms of the settlement and thus abused his discretion. We therefore vacate

³(...continued)

- (1) On the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or
- (2) On the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

his order modifying and approving the settlement agreement.⁴

Nevertheless, while the judge did not have the authority to alter the terms of the settlement agreement, he was not without available sanctions. For example, under Commission Rule 104(b), 29 C.F.R. § 2200.104(b),⁵ the judge has the authority to exclude any party or its representative who refuses to comply with his orders or the Commission's rules of procedure, continuously uses dilatory tactics, or fails to act in good faith.

In other instances, where a party fails to timely file a settlement agreement, and neither seeks an extension of time nor establishes good cause for its failure to timely file, dismissal of either the citation or notice of contest has been found to be appropriate. *Chartwell Corp.*, 15 BNA OSHC 1881, 1883, 1992 CCH OSHD ¶ 29,817, pp. 40,626-27 (No. 91-2097, 1992).⁶ Whether dismissal is appropriate in any situation depends on whether a party's behavior demonstrates

⁴We note that it could be argued that approving the settlement agreement with a penalty higher than that agreed to by the parties has the same effect as approving the settlement agreement as signed and assessing a separate penalty for noncompliance with the judge's order. We find nothing in the law that would authorize an administrative law judge to assess a monetary penalty under these circumstances.

⁵The rule states in pertinent part:

§ 2200.104 Standards of conduct.

....

(b) *Misbehavior before a Judge-(1) Exclusion from a proceeding.* A Judge may exclude from participation in a proceeding any person, including a party or its representative, who engages in disruptive behavior, refuses to comply with orders or rules of procedure, continuously uses dilatory tactics, refuses to adhere to standards of orderly or ethical conduct, or fails to act in good faith. The cause for the exclusion shall be stated in writing, or may be stated in the record if the exclusion occurs during the course of the hearing. Where the person removed is a party's attorney or other representative, the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or other representative.

⁶In finding that under certain circumstances dismissal of either the citation or notice of contest may be appropriate sanctions, Chairman Weisberg does not endorse the Commission's holding in *Chartwell Corp.*, based on the facts in that case.

contumacy, whether the other party suffered prejudice, and whether other aggravating circumstances were present. *Morrison-Knudsen Co./Yonkers Contrac. Co.*, 16 BNA OSHC 1105, 1117, 1991-93 CCH OSHD ¶ 30,048, p. 41,274 (No. 88-572, 1993); *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2005, 1991-93 CCH OSHD ¶ 29,900, p. 40,797 (No. 90-1505, 1992), *aff'd*, 16 F.3d 1219 (6th Cir. 1993)(unpublished). Thus, the Commission has held that where a party displays a pattern of disregard for Commission procedures, dismissal may be an appropriate sanction. *Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1131, 1993 CCH OSHD ¶ 30,051, p. 41,295 (No. 92-899, 1993).

We recognize that, generally, the Secretary has the discretion to withdraw or settle citations. Nonetheless, the Commission retains the authority to ensure that various legal and procedural requirements are met. *Asbestos Abatement Consultation and Engg.*, 15 BNA OSHC 1252, 1256, 1991-93 CCH OSHD ¶ 29,464, p. 39,733 (No. 87-1522, 1991). For example, before approving a settlement agreement, the Commission requires that employees be given an “opportunity” for “input” in the settlement process. *Boise Cascade Corp.*, 14 BNA OSHC 1993, 1991-93 CCH OSHD ¶ 29,222 (No. 89-3087, 1991) (consolidated).

The Commission also has the authority to take such procedural actions as may be necessary to maintain the integrity of its adjudicatory proceedings.

We think the broad congressional power to authorize agencies to adjudicate ‘public rights’ necessarily carries with it power to authorize an agency to take such procedural actions as may be necessary to maintain the integrity of the agency’s adjudicatory proceedings.

Atlantic Richfield Co. v. United States Dept. of Energy, 769 F.2d 771, 794 (D.C. Cir. 1984).⁷

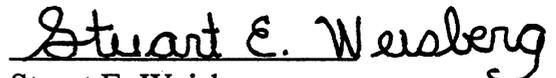
When parties fail to respect the authority of the Commission and its judges, the entire statutory scheme created by Congress, to assure the fair and impartial adjudication of cases brought under the Act, is put at risk. To put it directly, any party who fails to comply with a Commission order does so at its peril. *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1583, n.6, 1991-93 CCH

⁷Indeed, Congress has explicitly granted the Commission authority to “make such rules as are necessary for the orderly transaction of its proceedings.” Section 12(g) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(g), (“the Act”).

OSHD ¶ 29,662, p. 40,185, n.6 (No. 88-1545, 1992) (consolidated), *rev'd on other grounds*, 16 F.3d 1149 (11th Cir. 1994).

While dismissal of Caterpillar's notice of contest or another sanction under Rule 104(b) and (c), including suspension from practice before the Commission, may in certain circumstances be appropriate sanctions, we are reluctant to make such a determination here. The judge is most familiar with the conduct in question and whether it is part of a pattern and, therefore, is in the best position to determine what sanction, if any, is appropriate. Accordingly, we remand this case to the judge to determine whether, in the instant circumstances, the behavior of Caterpillar or its attorney warrants a sanction. If so, the judge should further determine what the appropriate sanction should be, and, consistent with that, determine whether the settlement agreement, as signed by the parties, should be approved.

Accordingly, this case is remanded to the judge for consideration consistent with this decision.


Stuart E. Weisberg
Chairman


Velma Montoya
Commissioner

Dated: January 26, 1996

NOTICE OF DECISION AND ORDER

The attached Decision and Order by the Occupational Safety and Health Review Commission was issued and served on the following on January 26, 1996.

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Counsel for Regional Trial Litigation
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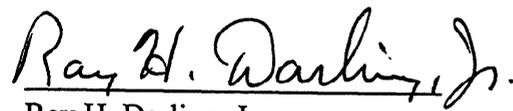
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James Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
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1244 North Speer Boulevard
Denver, CO 80204-3582

FOR THE COMMISSION

A handwritten signature in cursive script that reads "Ray H. Darling, Jr." The signature is written in black ink and is positioned above a horizontal line.

Ray H. Darling, Jr.
Executive Secretary



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
Complainant,

v.

CATERPILLAR INC.
Respondent.

OSHRC DOCKET
NO. 94-0347

**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 February 17, 1995. The decision of the Judge will become a final order of the Commission on March 20, 1995 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 March 9, 1995 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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: February 17, 1995

DOCKET NO. 94-0347

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

CATERPILLAR, INC.,

Respondent.

- - - - -
UAW - LOCAL 974,

Authorized Employee
Representative.

OSHRC DOCKET
NO. 94-0347

FINAL ORDER

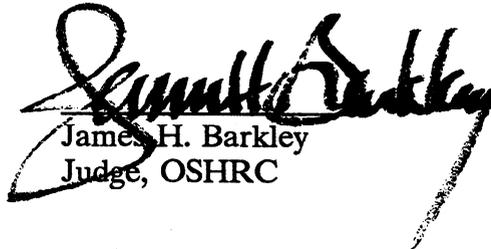
On October 31, 1994, Respondent notified the Secretary that the case was settled, and on November 1, 1994, the Secretary so notified the undersigned. On November 2, 1994, the hearing was cancelled and the parties directed to file the Settlement Agreement within twenty (20) days. By December 29, 1994, the Settlement Agreement had not been filed, nor had a motion seeking an extension. A Show Cause Order was entered directing each party to explain its part, if any, in the untimely filing. The Secretary's response established diligent efforts to secure the timely filing of the Settlement Agreement. Respondent pointed to inconvenience caused by holidays, but failed to show good cause. By its failure to file the Settlement Agreement as directed, by failing to request an extension, and by its lack of justification for the untimely filing, Respondent has shown a lack of respect for the

Commission, its rules, and its orders.¹

More importantly, Respondent's actions have adversely affected the safety of employees. By operation of law, Respondent is not required to abate workplace hazards until the Settlement Agreement is filed and a Final Order is entered. Delaying filing the Settlement Agreement prolongs employee exposures to the cited hazards.

Respondent's disregard of Commission rules and orders and the resulting prolonged employee exposure to the cited hazards require sanctions.

In accordance with Commission Rule 41, 29 C.F.R. §2200.41, those parts of the Settlement Agreement proposing reduced penalties are stricken. In lieu thereof, the original penalties are substituted.



James H. Barkley
Judge, OSHRC

Dated: February 10, 1995

¹ This case is not an isolated instance, but rather one in a pattern of filing Settlement Agreements in an untimely fashion by this Respondent. (See Caterpillar cases Docket Numbers 94-0153; 94-0580; 94-0682).