



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
One Lafayette Centre  
1120 20th Street, N.W.— 9th Floor  
Washington, DC 20036-3419

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SECRETARY OF LABOR,

Complainant,

v.

F. A. BARTLETT TREE EXPERT CO., INC.,

Respondent.

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OSHRC Docket No. 95-1211

**ORDER**

On April 10, 1996, the Commission received the Secretary's petition for interlocutory review requesting that the Commission review the administrative law judge's decision and order rejecting a settlement agreement. F.A. Bartlett Tree Expert Co., Inc. ("Bartlett") filed an opposition to the petition. Pursuant to Commission Rule 73(a), 29 C.F.R. § 2200.73(a), the Commission denies the petition for interlocutory review in light of the particular circumstances in this case.<sup>1</sup> Pursuant to the judge's order of April 18, 1996, the Secretary has until June 17, 1996, to file his complaint.

As an administrative matter, the Commission notes that the judge forwarded her decision and order to the Commission for docketing by the Executive Secretary under Commission Rule 90(b)(2), 29 C.F.R. § 2200.90(b)(2), even though she stated therein that the Secretary still has an opportunity to file his complaint. The Commission finds that the judge improperly forwarded her decision and order, as well as the official file, to the Commission because it did not constitute a final disposition of the proceedings in this case under Commission Rule 90(a), 29 C.F.R. § 2200.90(a). Accordingly, we rescind the judge's

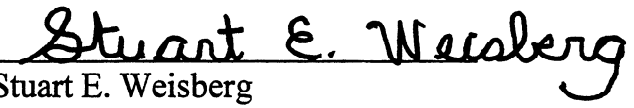
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<sup>1</sup>In denying the Secretary's petition for interlocutory review, we express no view as to the validity of the settlement agreement. Under Commission Rule 73(c), 29 C.F.R. § 2200.73(c), the Secretary is not precluded from raising his objection to the judge's interlocutory ruling later in a petition for discretionary review.


notice of decision (dated April 1, 1996) and the Executive Secretary's notice of docketing of administrative law judge's decision (dated April 26, 1996). Because the judge's decision and order was not a final disposition, the petition for discretionary review filed by Bartlett is premature.<sup>2</sup> We, therefore, deny Bartlett's petition for discretionary review at this time.

The judge who considered this case is no longer with the Commission. Accordingly, we refer this case to the Chief Administrative Law Judge for reassignment.

It is so ordered.

  
Stuart E. Weisberg  
Chairman

  
Velma Montoya  
Commissioner

  
Daniel Guttman  
Commissioner

Dated: May 10, 1996

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<sup>2</sup>Although Bartlett's petition for discretionary review is premature, we are troubled by the Secretary's refusal to forward Bartlett's notice of contest to the Commission's Executive Secretary, as required by Commission Rule 33, 29 C.F.R. § 2200.33. See section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c).



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
 1120 20th Street, N.W., Ninth Floor  
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Office of  
 Executive Secretary

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OSHRC Docket No. 95-1211

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**NOTICE OF ORDER**

The attached order was issued by the Commission on May 10, 1996.

BY DIRECTION OF THE COMMISSION

Date: May 10, 1996

*Ray H. Darling, Jr.*  
 \_\_\_\_\_  
 Ray H. Darling, Jr.  
 Executive Secretary

95-1211

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Ave., N.W.  
Washington, D.C. 20210

Frank V. McDermott, Jr.  
Regional Solicitor  
U.S. Department of Labor  
One Congress Street  
P.O. Box 8396  
Boston, MA 02114

Gary L. Lieber, Esq.  
Schmeltzer, Aptaker & Shepard, P.C.  
The Watergate, Suite 1000  
2600 Virginia Avenue, N.W.  
Washington, D.C. 20037



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Respondent.

OSHRC DOCKET  
NO. 95-1211

**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 April 26, 1996. The decision of the Judge will become a final order of the Commission on May 28, 1996 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 May 16, 1996 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: April 26, 1996

DOCKET NO. 95-1211

NOTICE IS GIVEN TO THE FOLLOWING:

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Office of the Solicitor, U.S. DOL  
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Gary L. Lieber, Esq.  
Schmeltzer, Aptaker & Shepard, P.C.  
The Watergate, Suite 1000  
2600 Virginia Avenue, N.W.  
Washington, DC 20037

Barbara Hassenfeld-Rutberg  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
McCormack Post Office and  
Courthouse, Room 420  
Boston, MA 02109 4501

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UNITED STATES OF AMERICA  
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SECRETARY OF LABOR,

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Respondent.

---

OSHRC

DOCKET NO. 95-1211

Appearances:

Gail Glick, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
For Complainant

Gary L. Lieber, Esq.  
Schmeltzer, Aptaker & Shepard, P.C.  
Washington, DC  
For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

**DECISION AND ORDER**

On June 13, 1995, F.A. Bartlett Tree Expert Co., Inc. ("Respondent") was issued two citations, one serious citation 1, item 1 with a proposed penalty of \$5000.00 and an other than serious citation 2, item 1 with a proposed penalty of \$1000.00 for alleged violations on June 2, 1995 at a work site on Four Mile River Road, Old Lyme, CT. The serious citation alleged a violation of 29 CFR § 1910.269(r)(1)(v) for failure to insure that employees maintain the minimum distance from energized parts when performing line clearance tree trimming in two instances. The other than serious citation alleged a violation of 29 CFR § 1910.133(a)(1) for failure to provide protective face equipment where there was reasonable probability of injury; to wit, an employee was not wearing a face shield when feeding slash into a wood chipper.

The Respondent received documents from the Occupational Safety and Health Administration ("OSHA") informing it of its right to an informal conference in the Hartford area office. In those notices, the Respondent was made aware of the possibility that the matter could be

office. In those notices, the Respondent was made aware of the possibility that the matter could be resolved by a settlement agreement at that level, thereby avoiding further litigation (Ex. C-1). The Respondent elected to have an informal conference and on June 13, 1995, the conference was held at the Hartford OSHA office. Josef Nomand, the assistant area director for safety and health for that office met with Michael Keegan and Steven A. Gould, representatives of the Respondent. Victor Fleck, a vice president of the Respondent was the person who had received and read the pamphlets and citations explaining the informal conference, stating " If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest." (Ex. C-1). After reading the OSHA material, Fleck instructed the two representatives to attend the informal conference (Tr. 142-43). Keegan has been a division manager for the Respondent for about five years. In that capacity, he manages, hires, fires, signs bids up to \$50,000.00 and oversees the safety policies and programs for his division of 100 persons. Gould is a superintendent for the Respondent.

As a result of the informal conference, Keegan signed a settlement agreement with Nomand to resolve the pending matter. Keegan testified that he was not coerced or deceived by Nomand into signing the agreement (Tr. 115, 122). Keegan also testified that Fleck never told him he did not have authority to sign an agreement or instructed him on any limits to his authority in representing the company (Tr. 110-111). Thus, it appears that Keegan had actual authority to represent the company and sign an agreement that would bind only his division as he already has the authority to bind the company on bids up to \$50,000.00. The total proposed penalty for the citations was \$6,000.00, certainly within the realm of his financial authority for his division. It was reasonable for Nomand to rely on at least what appeared to be Keegan's apparent authority as Keegan negotiated with him regarding the agreement and willingly signed it on behalf of the Respondent. Had the agreement terms been limited to the violations alleged in the citations, then Keegan's authority would not have been in doubt by the undersigned Judge. The problem concerns the extent of his authority to bind the company beyond the boundaries of the citation and beyond the division which he heads. The undersigned Judge finds that the parties may sign an agreement that includes both cited and non-cited conditions and may also be broad enough to include corporate-wide settlements. *Secretary of Labor v. Phillips 66 Co.* 16 BNA OSHC 1332, 1334 (No. 90-1549, 1993). The authority to go beyond the scope of the items cited is based on the concept of ancillary jurisdiction. *Davies Can Co.* 4 BNA OSHC 1237 (No. 8182, 1976).

Here, the facts of who is the Respondent's representative must be closely analyzed and what is the scope of that person's authority. Certainly, had Fleck signed the agreement, there would be less to discuss regarding his authority to sign such a broad contract. Here, the circumstances warrant scrutiny because a division manager signed an agreement that clearly is beyond the scope of the citation and his division. The scope of the settlement agreement went beyond the authority of Keegan, who as a division manager, is not authorized to bind the whole company. Paragraphs 10 and 11 require the Respondent's implementation of applicable personal protective equipment and noise standards and further mandate the filing of progress reports to the OSHA Hartford area office regarding those standards (Ex. C-2). These paragraphs could easily be interpreted as applying to the whole company.

The Commission has held that an Administrative Law Judge may not accept an agreement in part and reject an agreement in part as it would leave the parties bound by a reformed contract



they never intended to make. *Phillips 66*, supra at 1335. Thus, in the case herein, the undersigned Judge must reject the entire agreement as being beyond the scope of citations and thus beyond the scope of Keegan's authority, actual or apparent. Fleck, immediately upon discovering what had been signed, requested that Respondent's attorney, Gary L. Lieber, file a Notice of Contest, which is dated July 6, 1995 (Ex. C-3). I find the Notice of Contest to have been timely and properly filed. I also find that the Secretary of Labor has not lost its right to timely file a complaint in this matter; therefore the Respondent's prehearing Motion to Default the Secretary of Labor is hereby denied. The time for filing of the complaint will toll from the date of receipt of this decision.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

**ORDER**

The Settlement Agreement is null and void; the Respondent's Notice of Contest is timely filed; the Respondent's Motion to Default the Secretary is denied, and the Secretary may file its Complaint.

  
BARBARA L. HASSENFELD/RUTBERG  
Judge, OSHRC

Date: April 23, 1996  
Boston, Massachusetts