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SECRETARY OF LABOR, Complainant, v. PHILLIPS 66 COMPANY, Respondent. OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND ITS LOCALS 4-227 AND 2-578, Authorized Employee Representative.	Docket No. 90-1549

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

On October 23, 1989, an explosion and fire occurred at Phillips 66 Company's ("Phillips") plant called the Houston Chemical Complex ("HCC") causing fatalities and numerous injuries. The Department of Labor's Occupational Safety and Health Administration ("OSHA") inspected the plant and issued numerous citations on April 19, 1990. In addition to citing Phillips for violations of general industry standards concerning emergency exit plans, respirator use, and hazard communication, the Secretary also cited the company for serious, willful violations of the "general duty clause," 29 U.S.C. § 654(a)(1), section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, for failure to furnish 566 employees with a workplace reasonably free of hazards. The citations proposed penalties amounting to over $5.6 million and required "immediate" abatement of many conditions. The balance of the violative conditions were to be abated in a matter of months. Phillips filed a timely notice of contest, and settlement negotiations

ensued. Although the authorized employee representative, the Oil, Chemical and Atomic Workers International Union and its Locals 4-227 and 2-578 ("OCAW" or "the union") was invited to take part in these discussions, it chose not to participate at that stage. On August 22, 1991, seventeen months after the citations had been issued, the Secretary of Labor and Phillips reached an agreement ("Main Agreement"). The Main Agreement not only settled the contested citations for conditions at the HCC plant, but also established a corporate-wide process safety management ("PSM") program[1] covering the cited plant and several other, non-cited plants as well. The timetables for implementing various stages of this program ranged from one to six and a half years.[2]

The settling parties submitted their agreement to the judge for approval. On September 5, 1991, before the end of the 10-day period specified in Commission Rule 100(c) for considering employee objections to settlement agreements, the administrative law judge approved this Main Agreement. The union, which had elected party status, filed a letter with the Commission objecting to the reduction of penalties and claiming that it had been deprived of its opportunity to review the agreement for the reasonableness of the abatement periods. The Secretary concurred that the judge had approved the settlement prematurely.

The Commission, treating the union's letter as a petition for discretionary review, set aside the judge's approval order and remanded the case to him for "development of the necessary factual record and determination of the merits of the union's objection to the abatement periods prescribed by the settlement agreement." In response to the Secretary's contention that the union would have no standing to object to portions of the settlement agreement involving non-cited plants, the Commission stated, "[w]e express no opinion on the merits of that contention at this time," directing the parties to present their positions to the judge.

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[1] The PSM plan requires the completion of process hazard analyses for each location to prevent the incidence and mitigate the consequences of a release of various harmful chemicals. The employer must also examine its safety procedures during each phase of its operations. Corrective actions may include development of contingency and emergency response planning, control over ignition sources, detonation traps, location of physical facilities, employee training, and assignment of management authority and responsibility.

[2] Although at the time of the inspection the Secretary had not issued a standard governing process safety management, a PSM standard has since been promulgated. 29 C.F.R. § 1910.119.

On remand, however, the union settled with the Secretary and with Phillips by way of two separate "Supplemental Agreements," thereby eliminating the need for a hearing. Under the terms of these agreements, the union agreed to withdraw its objections to the Main Agreement (including its extended abatement schedule) in exchange for notice of, and an opportunity to attend, all meetings between OSHA and Phillips regarding the implementation of the corporate-wide PSM program. In keeping with the terms of the Supplemental Agreements, the union filed a "withdrawal of objections" in a November 5, 1991 letter to the judge and asked that the Main Agreement be approved immediately.

One week later, however, on November 12, 1991, the union notified the judge that it wished to *rescind* that withdrawal of objections, claiming that it had made a mistake in entering into the Supplemental Agreement with Phillips because, in the union's view, the agreement inadvertently failed to refer to the attendance of an International union representative at certain meetings. According to the union's lawyer,[3] earlier that November 12th morning, Phillips' lawyer called off the first PSM strategy meeting under the Main Agreement, because, in the company's view, the union had breached the Supplemental Agreement by sending a representative of the International union to the meeting. The company maintained that the only designated representative under the agreement was the local union official, while the union claimed that someone from the International union was also entitled to attend.[4] The union did not ask the judge (or any other court) to enforce the Supplemental Agreement as the union interpreted it, but sought instead to have the contract voided altogether on the grounds of mistake.

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[3] We would emphasize that no evidentiary hearing was held in this case. The only "evidence"-- other than a batch of citations and three settlement agreements -- is the "certification" of the Union's lawyer (signed under penalty of perjury) as to what happened during the supplemental settlement negotiations and what happened on November 12, 1991 at the first PSM strategy meeting under the Main Agreement. We have no sworn testimony from Phillips or the Secretary as to what transpired.

[4] Under the Supplemental Agreements, Phillips and the Secretary agree "to provide OCAW's designated representatives with notice of and opportunity to attend all meetings." The agreements also state: "The designated representatives of OCAW are the Chairman of the Phillips plant group Workmen's Committee (HCC) and the President of OCAW Local 2-578 (Woods Cross)." Woods Cross was the non-cited plant in Utah. Elsewhere in the agreements, OCAW *international* union officials are listed as being permitted to discuss confidential information with the designated representative.

Despite resistance on the part of the Secretary and Phillips, who moved for enforcement of the Main Agreement, the judge summarily granted the union's motion to rescind, thus halting the implementation of the Main Agreement and again requiring a hearing on the union's objections. By order of December 18, 1991, the judge directed the parties to prepare for a hearing on the reasonableness of the abatement periods in the Main Agreement. The Secretary sought interlocutory review of this order, but the Commission denied review.

In preparation for the hearing on the reasonableness of the abatement periods, the judge issued an order on March 12, 1992, defining the scope of the issues and allocating the burden of proof. When the union discovered from this order that the only subject of the hearing was the abatement periods for those conditions actually cited at the HCC plant (to which the union had no objection), that the corporate-wide PSM program was not to be an issue at all, and that the burden was to be on the union to prove the abatement periods were unreasonable, it informed the judge that a hearing would "not serve any useful purpose" and asked for a final order so it could appeal to the Review Commission. On April 6, 1992, the judge issued an order approving the Main Agreement.

The union petitioned for discretionary review of the judge's April 6, 1992 settlement approval order which, in keeping with his earlier order, had effectively rebuffed the union's objections to the extended abatement schedule in the Main Agreement. The Secretary cross-petitioned for review of the judge's December 18, 1991 order. Commissioner Montoya directed the case for review in two directions for review dated March 23 and May 7, 1992. Oral argument was heard on November 17, 1992.

I. Jurisdiction

The Secretary and Phillips ultimately seek Commission approval of their Main Agreement, while the union requests that the Commission withhold its approval until the union has had an opportunity to challenge the abatement dates in the agreement. These contentions raise the threshold question of whether the Commission's authority extends to agreements covering actions to be taken to change conditions that are not actually the

subject of any citation.[5] Neither the parties nor the judge addressed the jurisdictional issue below, but we raised it *sua sponte* at oral argument.

We conclude that under Commission precedent, our jurisdiction does extend to such matters. In *Davies Can Co.*, 4 BNA OSHC 1237, 1976-77 CCH OSHD ¶ 20,704 (No. 8182, 1976), the Commission assured a reluctant administrative law judge that he could have approved a corporate-wide settlement (covering both cited and non-cited conditions) in full. The employer in *Davies Can* had admitted in the settlement agreement that noise levels in its Florida plant, as well as in its Ohio and Pennsylvania plants, exceeded the levels permitted by the applicable standard. The judge approved the agreement as to the cited Florida plant, but declined--for lack of jurisdiction--to approve the portions relating to plants not mentioned in the citation. On review, the Commission drew on powers analogous to a court's "ancillary jurisdiction" to ratify the entire agreement as a whole. The Commission explained:

> In its simplest terms, the concept of ancillary jurisdiction provides that once jurisdiction attaches to the primary dispute, a court is considered to have jurisdiction over 'subsidiary' or 'subordinate' matters 'even though it might not independently be able to adjudicate them.' The analogy holds up so long as the subject matter is within the framework of the Commission's adjudicative duties under the Act.

Id. at 1238, 1976-77 CCH OSHD at 24,828, (citing *Jersey Land & Dev. Corp. v. United States* 342 F. Supp. 48, 52 (D.N.J. 1972)). Since the Secretary would be empowered to cite the employer concerning the plants, and the employer would have a right to contest the citations, the Commission saw the matter as falling within the scope of its authority. The decision in *Davies Can* is factually similar to the case now on review and provides clear Commission precedent on point. In fact, at oral argument, counsel for the Secretary characterized *Davies Can* as being "on all fours" with the case now under consideration.

The concept of ancillary jurisdiction enables adjudicative bodies to serve both the parties' interests and the public's interest in judicial economy at the same time:

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[5] This question is related to, but not the same as, the question of whether employee representatives have standing to challenge abatement dates set forth in such agreements. That question is addressed in *Oil, Chemical and Atomic Workers Intl. Union (IMC Fertilizer)*, Docket 91-3349 (August 20, 1993) also issued today.

> It is clear that the district court has the power to enforce settlement agreements reached by the parties in federal cases because otherwise the court would be frustrated in its effort to resolve cases over which it has been given explicit jurisdiction by Congress. But it is equally true that the court's jurisdiction to enforce a settlement agreement must derive from its original jurisdiction over the complaint. Federal courts do not have common law contracts jurisdiction, and they cannot enforce settlement agreements except insofar as those agreements are ancillary to the resolution of cases over which they do have jurisdiction.

United States v. Orr Constr. Co., 560 F.2d 765 (7th Cir. 1977). Since the parties have chosen to incorporate non-cited matters in an agreement they want treated as a whole and as a final order, the non-cited matters are ancillary to the resolution of a case over which even the parties agree we do have jurisdiction.

The parties do not want the Commission to approve only those portions of the settlement agreement related to citations, nor does the Commission have any interest in severing settlement agreements or approving them in piecemeal fashion. Because we cannot know what each party considers to be a satisfactory *quid pro quo*, our approving anything less than the parties' complete, integrated agreement would inevitably leave one party, or both, bound by a reformed contract they never intended to make. This would only deter other parties from attempting to negotiate settlements, a result that would far from serve the interests of the employees the Act seeks to protect.

The Act provides a single, orderly enforcement scheme: If a violation is found during an inspection, the Secretary *must* issue a citation and may propose a penalty, sections 8 through 10(a) of the Act, 29 U.S.C. §§ 657 through 659(a); the Secretary may prosecute contested citations in enforcement proceedings before the Commission, section 10(c) of the Act, 29 U.S.C. § 659(c); the Commission has sole authority to assess penalties, section 17(j) of the Act, 29 U.S.C. § 666(j); the Secretary may seek enforcement of Commission orders, section 11(b) of the Act, 29 U.S.C. § 660(b). *See Donovan v. OSHRC (Mobil Oil)*, 713 F.2d 918, 926 (2d Cir. 1983). The Act offers only one way to obtain summary enforcement of a Commission final order, whether that order be the result of litigation or settlement, and that is to follow the enforcement scheme set forth in the Act. With the authority to litigate a case comes the authority not to. The Secretary's power to settle claims advances the central

purpose of the Act, which is to "reduce safety hazards and improve working conditions." *Donovan v. Intl. Union, Allied Indus. Workers (Whirlpool)*, 722 F.2d 1415, 1420 (8th Cir. 1983), (citing *Dale M. Madden Constr., Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). Under the Act's enforcement scheme, the Secretary is not entitled to claim final order status for a settlement agreement unless potential parties are accorded an opportunity to exercise rights granted under section 10 of the Act. This cannot occur in the absence of Review Commission jurisdiction.

Looking at the issue from a slightly different perspective, we consider *Local No. 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), a case which stands for the proposition that a court is not barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial. In that case, which the Secretary commended to us pending oral argument, certain minority firefighters lodged a discrimination complaint against the city. The Supreme Court upheld a settlement agreement that provided relief benefiting individuals who could not have maintained their own action in court. The Secretary apparently offers this case to support his argument that the Commission and the courts may approve settlement agreements like the one in this case that encompass more than citations. We conclude that applying *Local No. 93* requires the same result as *Davies Can*. If there had been a hearing on the citations in *Davies Can*, the Commission could not have ordered the company to abate noise hazards beyond those listed for the Florida plant in the formal citation, *i.e.*, hazards at the Ohio and Pennsylvania plants, but the Commission could, and did, approve a settlement agreement accomplishing just that. In this case, had the matter gone to a hearing on the citations, the Commission could not, of its own accord, have affirmed an order compelling Phillips to implement a PSM plan at any plant, because not all the hazards the corporate-wide PSM plan is intended to abate were among the hazards formally listed in the citation. However, the Commission can, and in this decision, does, approve a settlement agreement accomplishing just that.

The Supreme Court in *Local No. 93* cautioned that "[t]his is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based." *Id.* at 526. In this case, in light of our resolution of the "rescission

issue," *i.e.*, the union's attempts to rescind the agreement on the basis of mistake. *See infra*, we do not reach the ultimate issue of whether the parties have agreed to take action that conflicts with the OSH Act by seeking approval of the Main Agreement without having first defended the reasonableness of the abatement periods challenged by the employee representative. That issue is addressed in *Oil, Chemical and Atomic Workers Intl. Union (IMC Fertilizer)*, Docket 91-3349 (August 20, 1993).

We conclude that the Commission does have jurisdiction to review settlement agreements as a whole, including those which cover actions to be taken to change conditions that are not actually the subject of any citation.

II. Did the Judge Err in Granting the Union's Motion for Rescission?

In his December 18, 1991 "Ruling on Post-Remand Motions," the judge--without taking any evidence--granted the union's motion to rescind its November 5, 1991 withdrawal of objections to the Main Agreement. As counsel for the union acknowledged at oral argument, "I must say . . . one of our handicaps in this case is that, there is no record . . . . There is no transcript. And we have said in our brief that, if the Commission is not ready to affirm the judge's decision on rescission, then it should be remanded for a hearing, so we have a factual record to go on." For the following reasons, and subject to the following rulings, we remand this case to the judge for further evidentiary proceedings to develop the relevant facts and resolve the remaining issues as outlined below.

A. Validity of the Union/Secretary Agreement

As a preliminary matter, we must resolve the issue of the impact of the Union/Secretary agreement on this case. The union promised, in both Supplemental Agreements, to withdraw its objections to the Main Agreement in exchange for the opportunity to participate in the PSM plan meetings. As the Secretary points out, "[n]o infirmities or misunderstandings have been alleged" as to the Union/Secretary agreement; the union claimed that only the Union/Phillips agreement was based on a mistake. In other words, the Secretary is arguing that the Union/Secretary agreement, technically left unassailed by the union, remains intact regardless of whether the Union/Phillips agreement stands or falls. The Secretary cites federal cases supporting the principle that settlement agreements are contracts, and as such are binding and enforceable under familiar principles

of contract law, not subject to unilateral rescission. *Village of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982), *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978), *Strange v. Gulf & S. Am. S.S. Co.*, 495 F.2d 1235 (5th Cir. 1974).

The union argues, on the other hand, that "[n]o agreement has ever existed between Phillips and the Secretary whereby the Secretary can require Phillips to allow for the union's participation. Instead, both the Secretary and Phillips must contemporaneously perform their respective duties to the union in order for the union to receive its due consideration." It argues that without cooperation among the Secretary, Phillips and the union, no party would receive the benefit of the bargain it had struck. Drawing on the traditional contract principle of "mutuality of obligation," the union contends that the Commission should not look at the Union/Secretary agreement in a vacuum, as if the Union/Phillips agreement did not exist. According to the union, "an agreement with the Secretary is worthless without a concurrent agreement with Phillips."

The judge's decision offers no clue as to how he viewed the interplay of the two Supplemental Agreements. We conclude that while the two supplemental agreements are drafted so that neither one refers to the other, the parties nevertheless intended to bind themselves in a tripartite agreement, with interdependent rights and obligations. We therefore find that the two supplemental agreements must be construed as one.

B. Abuse of Discretion Based on Factual Error

The union argued, in its brief in support of its rescission motion before the judge, that the Supplemental Agreement was based on a mutual mistake and should therefore be voided. The Secretary and Phillips countered that there was no such mistake and that the language of the agreement was clear, unambiguous, and legally binding.

1. Judge's Ruling and Parties' Positions

The judge's ruling on the rescission motion did not address the parties' contract law arguments or their policy arguments favoring the finality of settlements. Instead, the judge seemed to focus solely on *how fast* the union had discovered the problem. Although one week had passed between the time the union agreed to withdraw its objections and the time it tried to rescind that withdrawal, the judge came under the misimpression that the union had changed its mind only thirty-six minutes later. Documents in the record show that at

12:56 p.m. on November 12, 1991, the Secretary had faxed the judge a copy of the union's November 5, 1991 letter withdrawing its objections. Thirty-six minutes later, at 1:32 p.m. on November 12, the union faxed the judge a letter attempting to rescind the November 5th withdrawal. The judge concluded that if the union so quickly found reason to rescind its withdrawal, "it is clear that no mutual meeting of the minds was reached." He also stated that "the essence of a settlement agreement is, of course, the uncoerced agreement of the parties to the terms of the document" and that "the emergence of a mutually satisfactory settlement agreement is the overriding consideration in these circumstances." The judge voided the Supplemental Agreements and reinstated the union's objections, thus halting the implementation of the Main Agreement.

The Secretary argues that because the judge appeared to be so impressed with the 36-minute time lapse, his decision was based substantially on clear, factual error. He contends that the judge abused his discretion and must be reversed. ***See, e.g., Sealtite Corp.***, 15 BNA OSHC 1130, 1134 n.7, 1991 CCH OSHD ¶ 29,398, pp. 39,582-83 n.7 (No. 88-1431, 1991).

2. Analysis

The question "How soon was the mistake discovered and notice given?" is among the dozen or so factors traditionally considered in determining whether a contract should be voided on the basis of mistake. (Others include whether the mistaken fact was of substantial importance; whether both parties, or only one, was mistaken and whether that party was negligent; whether one party knew or had reason to know of the other's misunderstanding; and whether either party, or a third party, changed its position, precluding a return to the status quo.) ***See*** 3 ***Corbin on Contracts***, § 597 (1960). However, the time-lapse factor is by no means dispositive of the issue of whether a mistake existed, or if so, what remedy is appropriate. Although the judge was mistaken as to the exact amount of time it took for the trouble with the agreement to emerge, this does not mean that his decision must be reversed for factual error. For the judge, the "overriding consideration" was the absence of a "mutually satisfactory settlement agreement." We therefore conclude that the judge's misunderstanding of the timing of the withdrawal does not, by itself, require reversal of his order.

C. Rescission on Grounds of Mistake

We turn finally to the issue of whether the Supplemental Agreement was properly rescinded on grounds of mistake. Mistake, along with fraud, illegality, and accident, are generally accepted grounds for invalidating a contract. As counsel for Phillips, however, explained at oral argument:

> [The contract] is to be performed in Texas and Utah. It was negotiated in Washington, D.C. Phillips 66 signed it, in Oklahoma. A representative of the International Union was supposed to sign it in Denver. And it was drafted by both myself and Mr. Wodka [counsel for the union]; myself, in Texas, and Mr. Wodka, in New Jersey.
>
> Now, I would not want to figure out that conflict of law problem, and I do not think it is necessary to.

These representations raise questions as to whether state law or federal common law governs, but neither the union nor the Secretary explicitly addresses the choice of law issues that this case presents.

1. Choice of Law

The union seems to rely heavily on Texas state law, citing two Texas cases to support the notion that without a "meeting of the minds," there can be no contract. *Volpe v. Schlobohm*, 614 S.W.2d 615 (Tex. Civ. App. 1981) and *Smulcer v. Rogers*, 256 S.W.2d 120 (Tex. Civ. App. 1953). The union also cites a legal treatise for the proposition that relief is only appropriate in exceptional circumstances, where a mistake of both parties upsets the very basis for the contract in such a way as to have a material effect on the agreed exchange of performances.

The Secretary expresses no position on choice of law, but Phillips makes an argument in another context, also relevant here, that the enforceability of settlement agreements in disputes based on federal law is itself determined under federal law, citing *Orr*. The court in that case, construing a settlement agreement of an action brought under the federal Miller Act, stated:

> It would be anomalous to utilize state law to determine the validity of the settlement agreement reached by the parties in this case when federal law governs the substantive rights of the parties and provides the basis on which the parties were able to bring the matter into federal court in the first place, and when jurisdiction over the settlement agreement only exists as a derivative

> of the original federal action. We therefore hold that the enforceability of the . . . agreement must be decided as a matter of federal law.

Id. at 769.

Other circuits concur. *E.g., Snider v. Circle K Corp.*, 923 F.2d 1404, 1406 (10th Cir. 1991) ("[a]lthough Title VII settlement agreements are contracts, they are inextricably linked to Title VII. Federal common law governs the enforcement and interpretation of such agreements because the 'rights of the litigants and operative legal policies derive from a federal source'"); *Ibarra v. Texas Employment Commn.*, 823 F.2d 873, 877 (5th Cir. 1987) (court applies federal law to dispute involving consent decree under FUTA); *Gamewell Mfg. v. HVAC Supply, Inc.*, 715 F.2d 112, 115 (4th Cir. 1983) ("*Gamewell*") (court applies federal law to resolve dispute over settlement of federal patent law case). Accordingly, we find that disputes involving settlements of OSHA litigation are to be resolved in accordance with federal common law principles.

2. Considerations on Remand

Because there is a scant record in this case, the Commission knows very little about the intentions of the parties other than what appears in the documents. According to the union lawyer's "certification" (the only evidence we have in this case other than the documents, *see supra* note 3), the union "felt that if it could gain full access to the oversight, review, and other consultations between OSHA and Phillips during the abatement period, it might be able to encourage Phillips and OSHA to accelerate the abatement of those hazards which the union believed were posing the greatest urgency for correction." The union's lawyer continued in this submission with his version of what happened:

> For purposes of efficiency, the agreement designated a local union official as a contact point for OSHA and Phillips to use in sending correspondence to the union and in making arrangements for meetings, but this person is not the only union representative who may attend the meetings. In the last paragraph of [the agreement], Phillips agreed to pre-approve several International Union officials, including the assigned International Representative, to receive the company's confidential information. *The union understood this paragraph as Phillips' agreement to the possible attendance of these International Union officials at the meetings between Phillips and OSHA. Apparently, the union was mistaken on this point.*

(Emphasis added).

The Secretary characterizes the position taken by the union in this submission as "indefensible" and "unsupportable," maintaining that neither he nor Phillips had any reason to suspect that the union was interpreting "designated representatives" as meaning someone other than the two local officials specified in the agreement. Under the plain terms of the contract, he argues, "there is no plausible basis . . . for asserting that a mistake has occurred, preventing a meeting of the minds." We find this contention particularly compelling on its face. Phillips emphasized this point at oral argument, and the union offered nothing in the way of explanation or rebuttal. On remand, the clear language of the agreement, particularly the stated definition of "designated representative" in the Supplemental Agreements, shall weigh heavily in the judge's consideration.

It is generally true that if the language of a settlement agreement is unambiguous, its meaning must be discerned within the "four corners" of the agreement. *United States v. ITT Cont. Baking Co.*, 420 U.S. 223, 236 (1975). However, parol evidence, *i.e.*, extrinsic oral or written testimony, is admissible to prove fraud, illegality, accident or *mistake*, even if the testimony contradicts the terms of a complete integration in writing. *See* 3 *Corbin*, § 580. In the case now under consideration, the definition of "designated representative" and the role of the designated representative in the PSM plan seems to us to be unambiguously set forth in the contract. On remand, relevant parol evidence, if any, will be admissible.

III. Order

We remand this case to the judge for an evidentiary hearing on the issue of whether the Supplemental Agreement was based on a mistake requiring rescission under principles of federal common law.

If the judge finds reason to rescind the Supplemental Agreement, thus releasing the union from its terms, the judge shall then conduct a hearing on the merits of the union's substantive claims of unreasonable abatement periods, in accordance with our decision in *IMC Fertilizer.*[6] If, on the other hand, the judge finds no cause to rescind the Supplemental

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[6] In any such hearing, the burden of proving reasonableness of the abatement periods shall rest with the Secretary. *See Kawecki-Berylco Indus.*, 1 BNA OSHC 1210, 1971-73 CCH OSHD ¶ 15,682 (No. 1942, 1973), and Commission Rule 38(a).

Agreement, the union's objections to the Main Agreement will be automatically withdrawn as agreed to in the Supplemental Agreement. The judge shall then review and approve the Main Agreement, as already sought by the parties, in accordance with *IMC Fertilizer*.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: August 20, 1993

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Secretary of Labor, Complainant, v. PHILLIPS 66 COMPANY, Respondent. OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND ITS LOCALS 4-227 and 2-578, Authorized Employee Representative.	Docket No. 90-1549

NOTICE OF COMMISSION DECISION AND REMAND ORDER

The attached Decision and Order of Remand by the Occupational Safety and Health Review Commission was issued on August 20, 1993. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

Ray H. Darling, Jr.

August 20, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1549

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor,
Complainant,

v.

Docket No. 90-1549

Phillips 66 Company,
Respondent.

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 13, 1991. The decision of the Judge will become a final order of the Commission on October 15, 1991 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, 1991** 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
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

Petitioning parties shall also mail a copy to:

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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 13, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1549

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Tom Gentry
President
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Local No. 4-227
2306 Broadway
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Louis G. LaVecchia
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

LYNN MARTIN, Secretary of Labor, United States Department of Labor, Complainant, V. PHILLIPS 66 COMPANY, Respondent.	§ § § § § § § § § § §	OSHRC Docket No. 90-1549

ORDER APPROVING SETTLEMENT AGREEMENT

A Stipulation and Settlement Agreement has been filed in this case which disposes of all issues pending before the Review Commission. Upon consideration, it is ORDERED:

1. The Stipulation and Settlement Agreement is approved and its terms are incorporated into this Order.

2. The citations are affirmed as modified in that Agreement.

Dated this 5th day of September, 1991.

Louis G. Lebuhn
JUDGE

0045575

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

LYNN MARTIN, Secretary of Labor, United States Department of Labor, Complainant, V. PHILLIPS 66 COMPANY, Respondent.	§ § § § § § § § § §	OSHRC Docket No. 90-1549

STIPULATION AND SETTLEMENT AGREEMENT

Phillips 66 Company ("Phillips") and Lynn Martin, Secretary of Labor, United States Department of Labor ("Secretary" or "OSHA"), in settlement of the captioned case, pursuant to 29 C.F.R. § 2200.100, hereby agree to the following. This Agreement disposes of any and all issues contained in that case.

1. To supplement and enhance existing safety practices and procedures, Phillips agrees to implement process safety management procedures at its Houston Chemical Complex ("HCC") pursuant to the terms of this Agreement. The goal of the process safety management system is to prevent the incidence and mitigate the consequences of uncontrolled releases of highly hazardous chemicals. The process safety management system shall: (1) provide a systematic approach to identifying, evaluating, and controlling hazards in the processes listed herein;

(2) provide a management structure to address the findings of the process hazard analysis; (3) recommend corrective action; and (4) confirm and document completion or other disposition of recommended corrective actions. The core component of the process safety management system at HCC shall be a process hazard analysis for each process that has the potential for an uncontrolled release of highly hazardous chemicals, and separate process safety management analyses to assess factors bearing on the overall safety of the HCC. The processes subject to this Agreement are as follows: (1) polyethylene units; (2) developmental unit; (3) polypropylene unit; (4) K-Resin unit; and (5) neohexene unit.

2. The process hazard analysis shall be conducted by Phillips or under its direction utilizing a methodology that will best address the hazards of the particular process at issue. The process hazard analysis shall include, but not be confined to, (1) a human factors analysis of working conditions that may adversely impact the safety performance of HCC personnel and potentially contribute to accident event sequences, and (2) an analysis of the safety effectiveness of process hardware, piping, valving, and instrumentation, especially during maintenance operations or upset/emergency conditions. The process hazard analysis shall be performed by individuals with expertise in engineering and in process operations. The team shall include at least one person with experience and knowledge specific to the hazard or process under evaluation, and be led by an independent consultant. Such independent consultant has been retained by Phillips.

3. In addition to the process hazard analysis, Phillips will address the following issues in separate process safety management analyses to ensure that these areas conform with applicable OSHA standards or generally accepted industry practices: (a) the adequacy of its safety permit and hot work permit procedures, including enforcement; (b) compliance with OSHA's standard regarding lockout/tagout of energy sources during maintenance operations; (c) proper classification of hazardous locations and control over the introduction of ignition sources into such hazardous locations; (d) contingency planning for upset conditions and emergency response planning; (e) upset and emergency condition detection systems, and systems to mitigate the scale of hazardous chemical releases; (f) the siting, separation, design and configuration of physical facilities and equipment to ensure that the facilities are designed, maintained, inspected, tested and operated in a safe manner; (g) the training of operators, technicians, and maintenance personnel, including HAZCOM training; (h) the safety of existing Standard Operating Procedures and maintenance procedures; and (i) the assignment of authority and responsibility to identify and correct hazardous conditions.

4. Phillips agrees that the process safety management system will promptly address the findings of each process hazard analysis and process safety management analysis and develop appropriate recommendations. This management system shall (1) implement and document any actions taken pursuant to the process hazard/process safety management analyses; (2) communicate such actions to

operations, maintenance or other personnel who work in the facility, including contractor employees whose working conditions are affected by the findings and recommendations of an analysis; and (3) assure that all corrective action is implemented according to this Agreement.

Phillips management will prepare written responses to each process hazard analysis. If, upon consideration of the recommendations contained in the process hazard analysis, management determines that corrective action is required, that action will be taken. If management disagrees with a hazard assessment or recommendation contained in a process hazard analysis, the written response shall explain and justify the disagreement.

5. Within thirty (30) days after execution of this Agreement, Phillips shall provide the OSHA Houston Area Office with the name of a management contact person for HCC. The management contact person shall meet with the OSHA Houston Area Director within sixty (60) days thereafter, and as necessary to review actions planned or undertaken by HCC pursuant to this Agreement. Such meetings can be requested by OSHA or Phillips.

6. Phillips agrees to provide the OSHA Houston Area Office with a certified copy of the process hazard/process safety management analyses and any management responses thereto, and to review with OSHA any comments or recommendations it may have upon request.

7. Phillips agrees to conduct the process hazard/process safety management analyses required by this Agreement, provide copies of such analyses and management responses to OSHA, and address any recommended corrective actions contained in or arising from such analyses, in accordance with the following schedule:

	Task	Completion Date
1.	Identify process hazard/process safety management analysis staff.	30 days from date of final Commission Order
2.	Complete process hazard/process safety management analyses.	1 year from same
3.	Provide OSHA Houston Area Office with process hazard/process safety management analyses.	1 year from same
4.	Provide OSHA Houston Area Office with management responses.	30 days from completion of analyses
5.	Complete actions recommended by process hazard/process safety management analyses.	As soon as practicable, but within 2 years from completion of Step 2

8. If the schedule contained herein cannot be met, OSHA will not unreasonably deny a timely-filed petition for modification of abatement. 29 C.F.R. ¶ 1903.14a.

9. Phillips further agrees that on or before the scheduled completion date for each numbered task in Paragraph 7 above, it will transmit written verification to the OSHA Houston Area Office that the task has been completed as scheduled.

10. Phillips further agrees to provide to OSHA an evaluation, to be conducted by an independent consultant, of the adequacy of settling leg maintenance procedures performed while polyethylene reactors are in operation. This evaluation will be forwarded to the OSHA Houston Area Office no later than six (6) months from the date of a final Commission Order.

11. If OSHA disagrees with Phillips' determination of (1) the assessment of a process safety hazard, (2) the need for corrective action, or (3) an appropriate time frame for executing corrective action, OSHA will state its points of disagreement, and the reasons therefor, in writing so that Phillips may review them. OSHA and Phillips will then engage in good faith discussions to resolve the disagreement. This paragraph shall not limit OSHA's right to use, as appropriate, enforcement methods provided by the OSH Act.

12. Phillips agrees to develop and maintain a compilation of written safety information to enable Phillips and all exposed employees, including contractor employees, to identify and understand the specific hazards posed by the processes involving highly hazardous chemicals present at HCC. This safety information will be communicated to all exposed employees, including contractor employees, and shall describe the hazards of the highly hazardous chemicals used in the process, as well as information pertaining to the equipment and technology involved in the process. In addition, Phillips agrees to develop and implement written operating procedures to provide clear instructions for safely conducting process and

maintenance operations consistent with the process safety information it develops. The steps required by this paragraph shall be completed within 90 days of the completion of the process hazard/process safety management analyses required under ¶ 7.

13. Phillips agrees to train each employee involved in a covered process or maintenance operation in an overview of the process and in pertinent operating procedures for that process. The training will emphasize the specific safety and health hazards of the process, and safe operating procedures and practices applicable to the process. Refresher and supplemental training shall be provided at least annually in the event the process does not undergo significant change, or concomitantly with any process change or modification to ensure understanding and adherence to the current operating procedures of the process or maintenance operation. Such training will be completed prior to assigning an employee to a process or maintenance operation.

14. Phillips agrees to inform any contractor performing work on, or near, a process, of the known potential fire, explosion or toxic release hazards related to the contractor's work and the process, and ensure that contractor employees are trained in the work practices and emergency procedures necessary to safely perform their job.

15. Phillips will implement a process safety management system at its Borger Refinery & NGL Process Center, Philtex/Ryton Complex, Sweeny

Refinery & Petrochemical Complex, and Woods Cross Refinery in accordance with the terms and timetable provided in Appendix "A," which is incorporated herein by reference.

16. All documents or other information made available by Phillips under this Agreement shall be handled in accordance with Section 15 of the OSH Act, 29 U.S.C. § 644, 18 U.S.C. § 1905, and 29 C.F.R. § 1903.9. Phillips will have the obligation to identify the document, information, or portion thereof that contains proprietary or confidential information.

17. OSHA agrees not to issue citations to Phillips for any working conditions identified in the process hazard analysis or any other analysis required by this Agreement, provided such conditions are being or will be addressed in good faith in accordance with this Agreement (including correction, if necessary). Phillips agrees to allow OSHA access to HCC to determine progress and compliance with this Agreement. OSHA agrees that, assuming good-faith implementation of this Agreement by Phillips, it shall not conduct general schedule inspections, except that OSHA may conduct monitoring inspections to determine compliance with this Agreement. OSHA retains the right to conduct all other types of inspections permitted under the OSH Act.

18. No later than six (6) months following Phillips' verification that it has completed all of the actions enumerated in Paragraphs 1 through 14 of this Agreement, OSHA shall return to Phillips all copies of Phillips' process hazard

analyses, written management responses, and other safety analyses. OSHA shall not thereafter retain any such copies.

19. OSHA amends Citation No. 1, Inspection No. 106612433 issued April 19, 1990, to delete any characterization of the alleged violations contained therein.

20. Phillips agrees to pay the amount of FOUR MILLION DOLLARS ($4,000,000.00) in settlement of Citations Nos. 1 and 2, as amended, Inspection No. 106612443 issued April 19, 1990, within thirty (30) days of a final Order of the Commission.

21. The parties agree that this Settlement Agreement shall become the final Order of the Commission and an agreed Order is attached hereto. The terms hereof shall be subject to enforcement under § 11(b) of the Act. Phillips consents to the entry of such an Order by the Circuit Court of Appeals.

22. The parties agree that the Citation as amended and Notification of Proposed Penalty, Complaint, Answer, Stipulation and Settlement Agreement, Phillips' Notice of Contest, Phillips' failure to continue to contest, Phillips' abatement of the alleged violations, Phillips' payment provided herein and the Commission's Final Order entered herein shall not constitute any evidence or admission on the part of Phillips of any violation of the Occupational Safety and Health Act or regulations or standards promulgated thereunder. None of the foregoing shall be admitted into evidence, in whole or in part, in any proceeding or

litigation in any court, agency or forum, except in proceedings brought directly under the Act by the Secretary. The contents of the Stipulation and Settlement Agreement are for the exclusive benefit of the parties hereto, and none of the foregoing constitute evidence or an admission on the part of Phillips that any of the conditions alleged in the Citations or Complaint existed or were a cause, proximate or otherwise, of any accident, or damages, if any, resulting therefrom. Phillips is entering into this Settlement Agreement without any prejudice to its rights to raise any defense or argument in any future or pending cases before the Commission or in any other proceedings, including but not limited to the right to assert that any future conditions identical or similar to those alleged in the original Citations or the Complaint do not violate the Occupational Safety and Health Act or any standard promulgated thereunder. By entering into this Settlement Agreement Phillips does not admit the truth of any alleged facts, any of the characterizations of Phillips' alleged conduct or any of the conclusions set forth in the Citations or Complaint issued in this matter regarding the standards cited therein.

23. Phillips certifies that the names and addresses of all authorized employee representatives of affected employees are:

Oil, Chemical and Atomic Workers
International Union, AFL-CIO
Local Union No. 4-227 (clerical group)
F. G. Bunch
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

Oil, Chemical and Atomic Workers
International Union, AFL-CIO (clerical group)
Joe Campbell
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

Oil, Chemical and Atomic Workers
International Union, AFL-CIO
Local Union No. 4-227 (plant group)
B. G. Martinez
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

Oil, Chemical and Atomic Workers
International Union, AFL-CIO (plant group)
Joe Campbell
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

International Brotherhood of Electrical Workers
Local Union No. 716
G. G. Welch
1475 North Loop
Houston, Texas 77008
Telephone No. (713) 869-8900
Facsimile No. (713) 868-6342

International Brotherhood of Electrical Workers, AFL-CIO
J. D. Muhl
1475 North Loop
Houston, Texas 77008
Telephone No. (713) 869-8900
Facsimile No. (713) 868-6342

Phillips further certifies that there are no other unions representing affected employees except as set forth above.

24. The Secretary certifies that service of the ~~fully executed~~ Saw mRD Settlement Agreement was made on each authorized employee representative by facsimile transmission on August 21, 1991. Affected employees have not raised objections to the reasonableness of any abatement period specified herein.

25. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

DATED August 22, 1991.

FOR PHILLIPS 66 COMPANY

By John K VanBuskirk
John VanBuskirk
Senior Vice President

Marion R. Froehlich
Marion R. Froehlich
Counsel for Phillips 66 Company

FOR U.S. DEPARTMENT OF LABOR

ALAN C. McMILLAN
Deputy Assistant Secretary
Occupational Safety and Health
Administration

ROBERT P. DAVIS
Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

JACK F. OSTRANDER
Counsel for Occupational
Safety and Health

SUE ANN WOLFF
Senior Trial Attorney

BRIAN L. PUDENZ
JANICE L. HOLMES
Trial Attorneys

APPENDIX "A" TO
STIPULATION AND SETTLEMENT AGREEMENT
BETWEEN PHILLIPS 66 COMPANY AND LYNN MARTIN,
SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Phillips 66 Company ("Phillips") and Lynn Martin, Secretary of Labor, United States Department of Labor ("Secretary" or "OSHA"), hereby agree to the following:

1. Phillips agrees to implement a process safety management system at its Borger Refinery & NGL Process Center, Philtex/Ryton Complex, Sweeny Refinery & Petrochemical Complex, and Woods Cross Refinery. This system will be a comprehensive process safety management system which includes but is not limited to the steps described in the Agreement to which this Appendix "A" is attached.

2. Phillips agrees to abide by the following timetable:

	Task	Completion Date
1.	Identify process hazard/process safety management analysis staff.	30 days from date of final Review Commission Order
2.	Complete process hazard/process safety management analysis on the following units:	Two and one-half years from date of final Review Commission Order

Sweeny:

26.1	ARDS Unit, A Train
30	HF Alkylation Unit
26.1	ARDS Unit, Trains A and B
28.1	DEA Regenerators and Sour Water Strippers
28.2	Sulfur Unit

15	Hexane Isom
3	FCC Unit
4	FCC Gas Plant
27.1	HOC Unit
27.2	HOC Gas Plant
43	Copper Treater
10ABC	NGL Fractionation
17	Light Aromatics Recovery
19	Benzene Hydrogenation

Borger:

43	Sulfur Recovery Unit
22	HF Alkylation
9	Crude Unit
10	Crude Unit
34	Sulfur Recovery Unit
42	ARDS
11	Ethane Recovery Unit
29	Cat Cracker
28	Crude Unit
40	Cat Cracker
35	Amine Treater & H_2S Dryers
41	Hydrogen Unit
44	Amine & Sour Water Treater
6	Hexane Isom

Philtex:

Propylene Unloading and Storage
H_2S System
SO_2 Unloading and Storage
Butadiene Unloading and Storage

Woods Cross:

7	HF Alkylation
10	Solvent Deasphalting
11	Straight Run Gas Plant
62	Propane Pit

3.	Complete process hazard/process safety management analysis on the following units:	Four and one-half years from same

Sweeny:

15	Benzene Hydrogenation
56	Waste Water System
22	Ethylene Plant
10D	NGL Fractionation
21	NGL Fractionation
11	Catalytic Reformer
14	Catalytic Reformer
24	Ethylene Plant
18	Propylene Fractionation
7	Heavy Aromatics Recovery
26.2	Hydrogen Purification Unit
20	Pentane Isomerization
25.2	Distillate HDS

Borger:

19.2	Reformer
7	Reformer
2.2	NGL HDS
19.1	Naphtha HDS
19.3	Distillate HDS
36	HDS Treater
1.6	Propane Treater
4	Butane Isom
5	Pentane Isom
6	Benzene Hydrogenation
26	Light Ends Recovery & Alky Feed Treater

Philtex:

Dimethyl Sulfide Blending and Storage
Methyl Mercaptan Reaction and Storage
Propane Storage and Processing
Butane Storage and Processing
Anhydrous HCl Storage

Woods Cross:

4	TCC
6	Reformer
12	NHDS
68	Pressurized HC Storage
86	Pressurized HC Truck Loading/Unloading
87	Pressurized HC Railroad Loading/Unloading
5	Vacuum
8	Crude
13	C5/C6 Isomerization

4. Complete process hazard/process safety management analysis on the following units: — Six and one-half years from same

Sweeny:

62	Clemens Terminal
68	Sweeny Tank Farm, #1 Pumphouse
88	Freeport Terminal #1
89	San Bernard Terminal
86	Truck Loading Rack
87	Tank Car Loading Rack
6	MTBE Unit and Hydroisom Unit
58	Pipelines
25	Crude Unit
9	Crude Unit
51	Steam Plants
52	Water Treater
90	Jones Creek Terminal
92	Freeport Terminal #2

Borger:

12	Pantex Cryogenic Gas Plant
No. 7	Cols. 35-42, 45

No. 1 Cols. 7, 9-12
No. 1 Cols. 13-17
No. 4 Cols. 23-27
No. 4 Cols. 18-22
No. 6 Cols. 28-34
23 Straight Run Fractionator
Cols. 104, 105, 108, 109, 111, 117
N-Butane Treater
2.1 Minalk Treater
13 Front end clean-up
NGL Train Rack
NGL Truck Rack
Above Ground Propane Storage and Loading
RAW NGL Feed System
E/P Caverns and Handling
Propane Caverns and Handling
Above Ground IC4 Storage and Handling
Above Ground NC4 Storage and Handling
Isobutane Caverns and Handling
N-Butane Caverns and Handling
De-ethanized NGL Feed System
Alky Feed Caverns and Handling
Above Ground 1C5 Storage and Handling
Above Ground NC5 Storage and Handling

5.	Complete actions recommended by process hazard/process safety management analyses.	As soon as practicable, but within two years from completion of the process hazard/process safety management analysis on each unit

3. Upon request by OSHA, Phillips shall make available to OSHA any documents prepared pursuant to this Appendix "A" including verification of corrective actions taken.

4. The parties recognize that circumstances may cause delays to occur, such as construction or design problems and delays in obtaining necessary permits. If the timetable contained herein cannot be met, Phillips will communicate that information to OSHA, including the reason(s) for the delay and the expected completion date(s). The parties agree that all undertakings by Phillips pursuant to this Appendix "A" are part of a settlement of a dispute between the parties and do not constitute an abatement of any unsafe condition.

5. All documents or other information made available by Phillips under this Appendix shall be handled in accordance with Section 15 of the OSH Act, 29 U.S.C. § 644, 18 U.S.C. § 1905, and 29 C.F.R. § 1903.9. Phillips will have the obligation to identify the document, information, or portion thereof that contains proprietary or confidential information. No later than six (6) months following Phillips' verification that it has completed all of the actions enumerated herein, OSHA shall return to Phillips all copies of Phillips' process hazard/process safety management analyses, written management responses, and other safety analyses. OSHA shall not thereafter retain any such copies.

6. OSHA agrees not to issue citations to Phillips for any working conditions identified in the process hazard analysis or any other analysis required by this Appendix, provided such conditions are being or will be addressed in good faith in accordance with this Appendix (including correction, if necessary). Phillips agrees to allow OSHA access to the above facilities to determine progress and compliance with

this Appendix. OSHA agrees that, assuming good-faith implementation of this Appendix by Phillips, it shall not conduct general schedule inspections, except that OSHA may conduct monitoring inspections to determine compliance with this Agreement. OSHA retains the right to conduct all other types of inspections permitted under the OSH Act.

DATED August 22, 1991.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. PHILLIPS 66 COMPANY, Respondent. OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND ITS LOCALS 4-227 AND 2-578, Authorized Employee Representative.	Docket No. 90-1549

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

On October 23, 1989, an explosion and fire occurred at Phillips 66 Company's ("Phillips") plant called the Houston Chemical Complex ("HCC") causing fatalities and numerous injuries. The Department of Labor's Occupational Safety and Health Administration ("OSHA") inspected the plant and issued numerous citations on April 19, 1990. In addition to citing Phillips for violations of general industry standards concerning emergency exit plans, respirator use, and hazard communication, the Secretary also cited the company for serious, willful violations of the "general duty clause," 29 U.S.C. § 654(a)(1), section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, for failure to furnish 566 employees with a workplace reasonably free of hazards. The citations proposed penalties amounting to over $5.6 million and required "immediate" abatement of many conditions. The balance of the violative conditions were to be abated in a matter of months. Phillips filed a timely notice of contest, and settlement negotiations

ensued. Although the authorized employee representative, the Oil, Chemical and Atomic Workers International Union and its Locals 4-227 and 2-578 ("OCAW" or "the union") was invited to take part in these discussions, it chose not to participate at that stage. On August 22, 1991, seventeen months after the citations had been issued, the Secretary of Labor and Phillips reached an agreement ("Main Agreement"). The Main Agreement not only settled the contested citations for conditions at the HCC plant, but also established a corporate-wide process safety management ("PSM") program[1] covering the cited plant and several other, non-cited plants as well. The timetables for implementing various stages of this program ranged from one to six and a half years.[2]

The settling parties submitted their agreement to the judge for approval. On September 5, 1991, before the end of the 10-day period specified in Commission Rule 100(c) for considering employee objections to settlement agreements, the administrative law judge approved this Main Agreement. The union, which had elected party status, filed a letter with the Commission objecting to the reduction of penalties and claiming that it had been deprived of its opportunity to review the agreement for the reasonableness of the abatement periods. The Secretary concurred that the judge had approved the settlement prematurely.

The Commission, treating the union's letter as a petition for discretionary review, set aside the judge's approval order and remanded the case to him for "development of the necessary factual record and determination of the merits of the union's objection to the abatement periods prescribed by the settlement agreement." In response to the Secretary's contention that the union would have no standing to object to portions of the settlement agreement involving non-cited plants, the Commission stated, "[w]e express no opinion on the merits of that contention at this time," directing the parties to present their positions to the judge.

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[1] The PSM plan requires the completion of process hazard analyses for each location to prevent the incidence and mitigate the consequences of a release of various harmful chemicals. The employer must also examine its safety procedures during each phase of its operations. Corrective actions may include development of contingency and emergency response planning, control over ignition sources, detonation traps, location of physical facilities, employee training, and assignment of management authority and responsibility.

[2] Although at the time of the inspection the Secretary had not issued a standard governing process safety management, a PSM standard has since been promulgated. 29 C.F.R. § 1910.119.

On remand, however, the union settled with the Secretary and with Phillips by way of two separate "Supplemental Agreements," thereby eliminating the need for a hearing. Under the terms of these agreements, the union agreed to withdraw its objections to the Main Agreement (including its extended abatement schedule) in exchange for notice of, and an opportunity to attend, all meetings between OSHA and Phillips regarding the implementation of the corporate-wide PSM program. In keeping with the terms of the Supplemental Agreements, the union filed a "withdrawal of objections" in a November 5, 1991 letter to the judge and asked that the Main Agreement be approved immediately.

One week later, however, on November 12, 1991, the union notified the judge that it wished to *rescind* that withdrawal of objections, claiming that it had made a mistake in entering into the Supplemental Agreement with Phillips because, in the union's view, the agreement inadvertently failed to refer to the attendance of an International union representative at certain meetings. According to the union's lawyer,[3] earlier that November 12th morning, Phillips' lawyer called off the first PSM strategy meeting under the Main Agreement, because, in the company's view, the union had breached the Supplemental Agreement by sending a representative of the International union to the meeting. The company maintained that the only designated representative under the agreement was the local union official, while the union claimed that someone from the International union was also entitled to attend.[4] The union did not ask the judge (or any other court) to enforce the Supplemental Agreement as the union interpreted it, but sought instead to have the contract voided altogether on the grounds of mistake.

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[3] We would emphasize that no evidentiary hearing was held in this case. The only "evidence"-- other than a batch of citations and three settlement agreements -- is the "certification" of the Union's lawyer (signed under penalty of perjury) as to what happened during the supplemental settlement negotiations and what happened on November 12, 1991 at the first PSM strategy meeting under the Main Agreement. We have no sworn testimony from Phillips or the Secretary as to what transpired.

[4] Under the Supplemental Agreements, Phillips and the Secretary agree "to provide OCAW's designated representatives with notice of and opportunity to attend all meetings." The agreements also state: "The designated representatives of OCAW are the Chairman of the Phillips plant group Workmen's Committee (HCC) and the President of OCAW Local 2-578 (Woods Cross)." Woods Cross was the non-cited plant in Utah. Elsewhere in the agreements, OCAW *international* union officials are listed as being permitted to discuss confidential information with the designated representative.

Despite resistance on the part of the Secretary and Phillips, who moved for enforcement of the Main Agreement, the judge summarily granted the union's motion to rescind, thus halting the implementation of the Main Agreement and again requiring a hearing on the union's objections. By order of December 18, 1991, the judge directed the parties to prepare for a hearing on the reasonableness of the abatement periods in the Main Agreement. The Secretary sought interlocutory review of this order, but the Commission denied review.

In preparation for the hearing on the reasonableness of the abatement periods, the judge issued an order on March 12, 1992, defining the scope of the issues and allocating the burden of proof. When the union discovered from this order that the only subject of the hearing was the abatement periods for those conditions actually cited at the HCC plant (to which the union had no objection), that the corporate-wide PSM program was not to be an issue at all, and that the burden was to be on the union to prove the abatement periods were unreasonable, it informed the judge that a hearing would "not serve any useful purpose" and asked for a final order so it could appeal to the Review Commission. On April 6, 1992, the judge issued an order approving the Main Agreement.

The union petitioned for discretionary review of the judge's April 6, 1992 settlement approval order which, in keeping with his earlier order, had effectively rebuffed the union's objections to the extended abatement schedule in the Main Agreement. The Secretary cross-petitioned for review of the judge's December 18, 1991 order. Commissioner Montoya directed the case for review in two directions for review dated March 23 and May 7, 1992. Oral argument was heard on November 17, 1992.

I. Jurisdiction

The Secretary and Phillips ultimately seek Commission approval of their Main Agreement, while the union requests that the Commission withhold its approval until the union has had an opportunity to challenge the abatement dates in the agreement. These contentions raise the threshold question of whether the Commission's authority extends to agreements covering actions to be taken to change conditions that are not actually the

subject of any citation.[5] Neither the parties nor the judge addressed the jurisdictional issue below, but we raised it *sua sponte* at oral argument.

We conclude that under Commission precedent, our jurisdiction does extend to such matters. In *Davies Can Co.*, 4 BNA OSHC 1237, 1976-77 CCH OSHD ¶ 20,704 (No. 8182, 1976), the Commission assured a reluctant administrative law judge that he could have approved a corporate-wide settlement (covering both cited and non-cited conditions) in full. The employer in *Davies Can* had admitted in the settlement agreement that noise levels in its Florida plant, as well as in its Ohio and Pennsylvania plants, exceeded the levels permitted by the applicable standard. The judge approved the agreement as to the cited Florida plant, but declined--for lack of jurisdiction--to approve the portions relating to plants not mentioned in the citation. On review, the Commission drew on powers analogous to a court's "ancillary jurisdiction" to ratify the entire agreement as a whole. The Commission explained:

> In its simplest terms, the concept of ancillary jurisdiction provides that once jurisdiction attaches to the primary dispute, a court is considered to have jurisdiction over 'subsidiary' or 'subordinate' matters 'even though it might not independently be able to adjudicate them.' The analogy holds up so long as the subject matter is within the framework of the Commission's adjudicative duties under the Act.

Id. at 1238, 1976-77 CCH OSHD at 24,828, (citing *Jersey Land & Dev. Corp. v. United States* 342 F. Supp. 48, 52 (D.N.J. 1972)). Since the Secretary would be empowered to cite the employer concerning the plants, and the employer would have a right to contest the citations, the Commission saw the matter as falling within the scope of its authority. The decision in *Davies Can* is factually similar to the case now on review and provides clear Commission precedent on point. In fact, at oral argument, counsel for the Secretary characterized *Davies Can* as being "on all fours" with the case now under consideration.

The concept of ancillary jurisdiction enables adjudicative bodies to serve both the parties' interests and the public's interest in judicial economy at the same time:

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[5] This question is related to, but not the same as, the question of whether employee representatives have standing to challenge abatement dates set forth in such agreements. That question is addressed in *Oil, Chemical and Atomic Workers Intl. Union (IMC Fertilizer)*, Docket 91-3349 (August 20, 1993) also issued today.

> It is clear that the district court has the power to enforce settlement agreements reached by the parties in federal cases because otherwise the court would be frustrated in its effort to resolve cases over which it has been given explicit jurisdiction by Congress. But it is equally true that the court's jurisdiction to enforce a settlement agreement must derive from its original jurisdiction over the complaint. Federal courts do not have common law contracts jurisdiction, and they cannot enforce settlement agreements except insofar as those agreements are ancillary to the resolution of cases over which they do have jurisdiction.

United States v. Orr Constr. Co., 560 F.2d 765 (7th Cir. 1977). Since the parties have chosen to incorporate non-cited matters in an agreement they want treated as a whole and as a final order, the non-cited matters are ancillary to the resolution of a case over which even the parties agree we do have jurisdiction.

The parties do not want the Commission to approve only those portions of the settlement agreement related to citations, nor does the Commission have any interest in severing settlement agreements or approving them in piecemeal fashion. Because we cannot know what each party considers to be a satisfactory *quid pro quo*, our approving anything less than the parties' complete, integrated agreement would inevitably leave one party, or both, bound by a reformed contract they never intended to make. This would only deter other parties from attempting to negotiate settlements, a result that would far from serve the interests of the employees the Act seeks to protect.

The Act provides a single, orderly enforcement scheme: If a violation is found during an inspection, the Secretary *must* issue a citation and may propose a penalty, sections 8 through 10(a) of the Act, 29 U.S.C. §§ 657 through 659(a); the Secretary may prosecute contested citations in enforcement proceedings before the Commission, section 10(c) of the Act, 29 U.S.C. § 659(c); the Commission has sole authority to assess penalties, section 17(j) of the Act, 29 U.S.C. § 666(j); the Secretary may seek enforcement of Commission orders, section 11(b) of the Act, 29 U.S.C. § 660(b). *See Donovan v. OSHRC (Mobil Oil)*, 713 F.2d 918, 926 (2d Cir. 1983). The Act offers only one way to obtain summary enforcement of a Commission final order, whether that order be the result of litigation or settlement, and that is to follow the enforcement scheme set forth in the Act. With the authority to litigate a case comes the authority not to. The Secretary's power to settle claims advances the central

purpose of the Act, which is to "reduce safety hazards and improve working conditions." *Donovan v. Intl. Union, Allied Indus. Workers (Whirlpool)*, 722 F.2d 1415, 1420 (8th Cir. 1983), (citing *Dale M. Madden Constr., Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). Under the Act's enforcement scheme, the Secretary is not entitled to claim final order status for a settlement agreement unless potential parties are accorded an opportunity to exercise rights granted under section 10 of the Act. This cannot occur in the absence of Review Commission jurisdiction.

Looking at the issue from a slightly different perspective, we consider *Local No. 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), a case which stands for the proposition that a court is not barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial. In that case, which the Secretary commended to us pending oral argument, certain minority firefighters lodged a discrimination complaint against the city. The Supreme Court upheld a settlement agreement that provided relief benefiting individuals who could not have maintained their own action in court. The Secretary apparently offers this case to support his argument that the Commission and the courts may approve settlement agreements like the one in this case that encompass more than citations. We conclude that applying *Local No. 93* requires the same result as *Davies Can*. If there had been a hearing on the citations in *Davies Can*, the Commission could not have ordered the company to abate noise hazards beyond those listed for the Florida plant in the formal citation, *i.e.*, hazards at the Ohio and Pennsylvania plants, but the Commission could, and did, approve a settlement agreement accomplishing just that. In this case, had the matter gone to a hearing on the citations, the Commission could not, of its own accord, have affirmed an order compelling Phillips to implement a PSM plan at any plant, because not all the hazards the corporate-wide PSM plan is intended to abate were among the hazards formally listed in the citation. However, the Commission can, and in this decision, does, approve a settlement agreement accomplishing just that.

The Supreme Court in *Local No. 93* cautioned that "[t]his is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based." *Id.* at 526. In this case, in light of our resolution of the "rescission

issue," *i.e.*, the union's attempts to rescind the agreement on the basis of mistake. *See infra*, we do not reach the ultimate issue of whether the parties have agreed to take action that conflicts with the OSH Act by seeking approval of the Main Agreement without having first defended the reasonableness of the abatement periods challenged by the employee representative. That issue is addressed in *Oil, Chemical and Atomic Workers Intl. Union (IMC Fertilizer)*, Docket 91-3349 (August 20, 1993).

We conclude that the Commission does have jurisdiction to review settlement agreements as a whole, including those which cover actions to be taken to change conditions that are not actually the subject of any citation.

II. Did the Judge Err in Granting the Union's Motion for Rescission?

In his December 18, 1991 "Ruling on Post-Remand Motions," the judge--without taking any evidence--granted the union's motion to rescind its November 5, 1991 withdrawal of objections to the Main Agreement. As counsel for the union acknowledged at oral argument, "I must say . . . one of our handicaps in this case is that, there is no record . . . . There is no transcript. And we have said in our brief that, if the Commission is not ready to affirm the judge's decision on rescission, then it should be remanded for a hearing, so we have a factual record to go on." For the following reasons, and subject to the following rulings, we remand this case to the judge for further evidentiary proceedings to develop the relevant facts and resolve the remaining issues as outlined below.

A. Validity of the Union/Secretary Agreement

As a preliminary matter, we must resolve the issue of the impact of the Union/Secretary agreement on this case. The union promised, in both Supplemental Agreements, to withdraw its objections to the Main Agreement in exchange for the opportunity to participate in the PSM plan meetings. As the Secretary points out, "[n]o infirmities or misunderstandings have been alleged" as to the Union/Secretary agreement; the union claimed that only the Union/Phillips agreement was based on a mistake. In other words, the Secretary is arguing that the Union/Secretary agreement, technically left unassailed by the union, remains intact regardless of whether the Union/Phillips agreement stands or falls. The Secretary cites federal cases supporting the principle that settlement agreements are contracts, and as such are binding and enforceable under familiar principles

of contract law, not subject to unilateral rescission. *Village of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982), *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978), *Strange v. Gulf & S. Am. S.S. Co.*, 495 F.2d 1235 (5th Cir. 1974).

The union argues, on the other hand, that "[n]o agreement has ever existed between Phillips and the Secretary whereby the Secretary can require Phillips to allow for the union's participation. Instead, both the Secretary and Phillips must contemporaneously perform their respective duties to the union in order for the union to receive its due consideration." It argues that without cooperation among the Secretary, Phillips and the union, no party would receive the benefit of the bargain it had struck. Drawing on the traditional contract principle of "mutuality of obligation," the union contends that the Commission should not look at the Union/Secretary agreement in a vacuum, as if the Union/Phillips agreement did not exist. According to the union, "an agreement with the Secretary is worthless without a concurrent agreement with Phillips."

The judge's decision offers no clue as to how he viewed the interplay of the two Supplemental Agreements. We conclude that while the two supplemental agreements are drafted so that neither one refers to the other, the parties nevertheless intended to bind themselves in a tripartite agreement, with interdependent rights and obligations. We therefore find that the two supplemental agreements must be construed as one.

B. Abuse of Discretion Based on Factual Error

The union argued, in its brief in support of its rescission motion before the judge, that the Supplemental Agreement was based on a mutual mistake and should therefore be voided. The Secretary and Phillips countered that there was no such mistake and that the language of the agreement was clear, unambiguous, and legally binding.

1. Judge's Ruling and Parties' Positions

The judge's ruling on the rescission motion did not address the parties' contract law arguments or their policy arguments favoring the finality of settlements. Instead, the judge seemed to focus solely on *how fast* the union had discovered the problem. Although one week had passed between the time the union agreed to withdraw its objections and the time it tried to rescind that withdrawal, the judge came under the misimpression that the union had changed its mind only thirty-six minutes later. Documents in the record show that at

12:56 p.m. on November 12, 1991, the Secretary had faxed the judge a copy of the union's November 5, 1991 letter withdrawing its objections. Thirty-six minutes later, at 1:32 p.m. on November 12, the union faxed the judge a letter attempting to rescind the November 5th withdrawal. The judge concluded that if the union so quickly found reason to rescind its withdrawal, "it is clear that no mutual meeting of the minds was reached." He also stated that "the essence of a settlement agreement is, of course, the uncoerced agreement of the parties to the terms of the document" and that "the emergence of a mutually satisfactory settlement agreement is the overriding consideration in these circumstances." The judge voided the Supplemental Agreements and reinstated the union's objections, thus halting the implementation of the Main Agreement.

The Secretary argues that because the judge appeared to be so impressed with the 36-minute time lapse, his decision was based substantially on clear, factual error. He contends that the judge abused his discretion and must be reversed. ***See, e.g., Sealtite Corp.***, 15 BNA OSHC 1130, 1134 n.7, 1991 CCH OSHD ¶ 29,398, pp. 39,582-83 n.7 (No. 88-1431, 1991).

2. Analysis

The question "How soon was the mistake discovered and notice given?" is among the dozen or so factors traditionally considered in determining whether a contract should be voided on the basis of mistake. (Others include whether the mistaken fact was of substantial importance; whether both parties, or only one, was mistaken and whether that party was negligent; whether one party knew or had reason to know of the other's misunderstanding; and whether either party, or a third party, changed its position, precluding a return to the status quo.) ***See*** 3 ***Corbin on Contracts***, § 597 (1960). However, the time-lapse factor is by no means dispositive of the issue of whether a mistake existed, or if so, what remedy is appropriate. Although the judge was mistaken as to the exact amount of time it took for the trouble with the agreement to emerge, this does not mean that his decision must be reversed for factual error. For the judge, the "overriding consideration" was the absence of a "mutually satisfactory settlement agreement." We therefore conclude that the judge's misunderstanding of the timing of the withdrawal does not, by itself, require reversal of his order.

C. Rescission on Grounds of Mistake

We turn finally to the issue of whether the Supplemental Agreement was properly rescinded on grounds of mistake. Mistake, along with fraud, illegality, and accident, are generally accepted grounds for invalidating a contract. As counsel for Phillips, however, explained at oral argument:

> [The contract] is to be performed in Texas and Utah. It was negotiated in Washington, D.C. Phillips 66 signed it, in Oklahoma. A representative of the International Union was supposed to sign it in Denver. And it was drafted by both myself and Mr. Wodka [counsel for the union]; myself, in Texas, and Mr. Wodka, in New Jersey.
>
> Now, I would not want to figure out that conflict of law problem, and I do not think it is necessary to.

These representations raise questions as to whether state law or federal common law governs, but neither the union nor the Secretary explicitly addresses the choice of law issues that this case presents.

1. Choice of Law

The union seems to rely heavily on Texas state law, citing two Texas cases to support the notion that without a "meeting of the minds," there can be no contract. *Volpe v. Schlobohm*, 614 S.W.2d 615 (Tex. Civ. App. 1981) and *Smulcer v. Rogers*, 256 S.W.2d 120 (Tex. Civ. App. 1953). The union also cites a legal treatise for the proposition that relief is only appropriate in exceptional circumstances, where a mistake of both parties upsets the very basis for the contract in such a way as to have a material effect on the agreed exchange of performances.

The Secretary expresses no position on choice of law, but Phillips makes an argument in another context, also relevant here, that the enforceability of settlement agreements in disputes based on federal law is itself determined under federal law, citing *Orr*. The court in that case, construing a settlement agreement of an action brought under the federal Miller Act, stated:

> It would be anomalous to utilize state law to determine the validity of the settlement agreement reached by the parties in this case when federal law governs the substantive rights of the parties and provides the basis on which the parties were able to bring the matter into federal court in the first place, and when jurisdiction over the settlement agreement only exists as a derivative

> of the original federal action. We therefore hold that the enforceability of the . . . agreement must be decided as a matter of federal law.

Id. at 769.

Other circuits concur. *E.g., Snider v. Circle K Corp.*, 923 F.2d 1404, 1406 (10th Cir. 1991) ("[a]lthough Title VII settlement agreements are contracts, they are inextricably linked to Title VII. Federal common law governs the enforcement and interpretation of such agreements because the 'rights of the litigants and operative legal policies derive from a federal source'"); *Ibarra v. Texas Employment Commn.*, 823 F.2d 873, 877 (5th Cir. 1987) (court applies federal law to dispute involving consent decree under FUTA); *Gamewell Mfg. v. HVAC Supply, Inc.*, 715 F.2d 112, 115 (4th Cir. 1983) ("*Gamewell*") (court applies federal law to resolve dispute over settlement of federal patent law case). Accordingly, we find that disputes involving settlements of OSHA litigation are to be resolved in accordance with federal common law principles.

2. Considerations on Remand

Because there is a scant record in this case, the Commission knows very little about the intentions of the parties other than what appears in the documents. According to the union lawyer's "certification" (the only evidence we have in this case other than the documents, *see supra* note 3), the union "felt that if it could gain full access to the oversight, review, and other consultations between OSHA and Phillips during the abatement period, it might be able to encourage Phillips and OSHA to accelerate the abatement of those hazards which the union believed were posing the greatest urgency for correction." The union's lawyer continued in this submission with his version of what happened:

> For purposes of efficiency, the agreement designated a local union official as a contact point for OSHA and Phillips to use in sending correspondence to the union and in making arrangements for meetings, but this person is not the only union representative who may attend the meetings. In the last paragraph of [the agreement], Phillips agreed to pre-approve several International Union officials, including the assigned International Representative, to receive the company's confidential information. *The union understood this paragraph as Phillips' agreement to the possible attendance of these International Union officials at the meetings between Phillips and OSHA. Apparently, the union was mistaken on this point.*

(Emphasis added).

The Secretary characterizes the position taken by the union in this submission as "indefensible" and "unsupportable," maintaining that neither he nor Phillips had any reason to suspect that the union was interpreting "designated representatives" as meaning someone other than the two local officials specified in the agreement. Under the plain terms of the contract, he argues, "there is no plausible basis . . . for asserting that a mistake has occurred, preventing a meeting of the minds." We find this contention particularly compelling on its face. Phillips emphasized this point at oral argument, and the union offered nothing in the way of explanation or rebuttal. On remand, the clear language of the agreement, particularly the stated definition of "designated representative" in the Supplemental Agreements, shall weigh heavily in the judge's consideration.

It is generally true that if the language of a settlement agreement is unambiguous, its meaning must be discerned within the "four corners" of the agreement. *United States v. ITT Cont. Baking Co.*, 420 U.S. 223, 236 (1975). However, parol evidence, *i.e.*, extrinsic oral or written testimony, is admissible to prove fraud, illegality, accident or *mistake*, even if the testimony contradicts the terms of a complete integration in writing. *See* 3 *Corbin*, § 580. In the case now under consideration, the definition of "designated representative" and the role of the designated representative in the PSM plan seems to us to be unambiguously set forth in the contract. On remand, relevant parol evidence, if any, will be admissible.

III. Order

We remand this case to the judge for an evidentiary hearing on the issue of whether the Supplemental Agreement was based on a mistake requiring rescission under principles of federal common law.

If the judge finds reason to rescind the Supplemental Agreement, thus releasing the union from its terms, the judge shall then conduct a hearing on the merits of the union's substantive claims of unreasonable abatement periods, in accordance with our decision in *IMC Fertilizer.*[6] If, on the other hand, the judge finds no cause to rescind the Supplemental

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[6] In any such hearing, the burden of proving reasonableness of the abatement periods shall rest with the Secretary. *See Kawecki-Berylco Indus.*, 1 BNA OSHC 1210, 1971-73 CCH OSHD ¶ 15,682 (No. 1942, 1973), and Commission Rule 38(a).

Agreement, the union's objections to the Main Agreement will be automatically withdrawn as agreed to in the Supplemental Agreement. The judge shall then review and approve the Main Agreement, as already sought by the parties, in accordance with *IMC Fertilizer*.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: August 20, 1993

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Secretary of Labor, Complainant, v. PHILLIPS 66 COMPANY, Respondent. OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND ITS LOCALS 4-227 and 2-578, Authorized Employee Representative.	Docket No. 90-1549

NOTICE OF COMMISSION DECISION AND REMAND ORDER

The attached Decision and Order of Remand by the Occupational Safety and Health Review Commission was issued on August 20, 1993. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

Ray H. Darling, Jr.

August 20, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1549

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Secretary of Labor,
Complainant,

v.

Docket No. 90-1549

Phillips 66 Company,
Respondent.

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 13, 1991. The decision of the Judge will become a final order of the Commission on October 15, 1991 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, 1991** 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
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 13, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1549

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

LYNN MARTIN, Secretary of Labor, United States Department of Labor, Complainant, V. PHILLIPS 66 COMPANY, Respondent.	§ § § § § § § § § § §	OSHRC Docket No. 90-1549

ORDER APPROVING SETTLEMENT AGREEMENT

A Stipulation and Settlement Agreement has been filed in this case which disposes of all issues pending before the Review Commission. Upon consideration, it is ORDERED:

1. The Stipulation and Settlement Agreement is approved and its terms are incorporated into this Order.

2. The citations are affirmed as modified in that Agreement.

Dated this 5th day of September, 1991.

Louis G. Lebuhn
JUDGE

0045575

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

LYNN MARTIN, Secretary of Labor, United States Department of Labor, Complainant, V. PHILLIPS 66 COMPANY, Respondent.	§ § § § § § § § § §	OSHRC Docket No. 90-1549

STIPULATION AND SETTLEMENT AGREEMENT

Phillips 66 Company ("Phillips") and Lynn Martin, Secretary of Labor, United States Department of Labor ("Secretary" or "OSHA"), in settlement of the captioned case, pursuant to 29 C.F.R. § 2200.100, hereby agree to the following. This Agreement disposes of any and all issues contained in that case.

1. To supplement and enhance existing safety practices and procedures, Phillips agrees to implement process safety management procedures at its Houston Chemical Complex ("HCC") pursuant to the terms of this Agreement. The goal of the process safety management system is to prevent the incidence and mitigate the consequences of uncontrolled releases of highly hazardous chemicals. The process safety management system shall: (1) provide a systematic approach to identifying, evaluating, and controlling hazards in the processes listed herein;

(2) provide a management structure to address the findings of the process hazard analysis; (3) recommend corrective action; and (4) confirm and document completion or other disposition of recommended corrective actions. The core component of the process safety management system at HCC shall be a process hazard analysis for each process that has the potential for an uncontrolled release of highly hazardous chemicals, and separate process safety management analyses to assess factors bearing on the overall safety of the HCC. The processes subject to this Agreement are as follows: (1) polyethylene units; (2) developmental unit; (3) polypropylene unit; (4) K-Resin unit; and (5) neohexene unit.

2. The process hazard analysis shall be conducted by Phillips or under its direction utilizing a methodology that will best address the hazards of the particular process at issue. The process hazard analysis shall include, but not be confined to, (1) a human factors analysis of working conditions that may adversely impact the safety performance of HCC personnel and potentially contribute to accident event sequences, and (2) an analysis of the safety effectiveness of process hardware, piping, valving, and instrumentation, especially during maintenance operations or upset/emergency conditions. The process hazard analysis shall be performed by individuals with expertise in engineering and in process operations. The team shall include at least one person with experience and knowledge specific to the hazard or process under evaluation, and be led by an independent consultant. Such independent consultant has been retained by Phillips.

3. In addition to the process hazard analysis, Phillips will address the following issues in separate process safety management analyses to ensure that these areas conform with applicable OSHA standards or generally accepted industry practices: (a) the adequacy of its safety permit and hot work permit procedures, including enforcement; (b) compliance with OSHA's standard regarding lockout/tagout of energy sources during maintenance operations; (c) proper classification of hazardous locations and control over the introduction of ignition sources into such hazardous locations; (d) contingency planning for upset conditions and emergency response planning; (e) upset and emergency condition detection systems, and systems to mitigate the scale of hazardous chemical releases; (f) the siting, separation, design and configuration of physical facilities and equipment to ensure that the facilities are designed, maintained, inspected, tested and operated in a safe manner; (g) the training of operators, technicians, and maintenance personnel, including HAZCOM training; (h) the safety of existing Standard Operating Procedures and maintenance procedures; and (i) the assignment of authority and responsibility to identify and correct hazardous conditions.

4. Phillips agrees that the process safety management system will promptly address the findings of each process hazard analysis and process safety management analysis and develop appropriate recommendations. This management system shall (1) implement and document any actions taken pursuant to the process hazard/process safety management analyses; (2) communicate such actions to

operations, maintenance or other personnel who work in the facility, including contractor employees whose working conditions are affected by the findings and recommendations of an analysis; and (3) assure that all corrective action is implemented according to this Agreement.

Phillips management will prepare written responses to each process hazard analysis. If, upon consideration of the recommendations contained in the process hazard analysis, management determines that corrective action is required, that action will be taken. If management disagrees with a hazard assessment or recommendation contained in a process hazard analysis, the written response shall explain and justify the disagreement.

5. Within thirty (30) days after execution of this Agreement, Phillips shall provide the OSHA Houston Area Office with the name of a management contact person for HCC. The management contact person shall meet with the OSHA Houston Area Director within sixty (60) days thereafter, and as necessary to review actions planned or undertaken by HCC pursuant to this Agreement. Such meetings can be requested by OSHA or Phillips.

6. Phillips agrees to provide the OSHA Houston Area Office with a certified copy of the process hazard/process safety management analyses and any management responses thereto, and to review with OSHA any comments or recommendations it may have upon request.

7. Phillips agrees to conduct the process hazard/process safety management analyses required by this Agreement, provide copies of such analyses and management responses to OSHA, and address any recommended corrective actions contained in or arising from such analyses, in accordance with the following schedule:

	Task	Completion Date
1.	Identify process hazard/process safety management analysis staff.	30 days from date of final Commission Order
2.	Complete process hazard/process safety management analyses.	1 year from same
3.	Provide OSHA Houston Area Office with process hazard/process safety management analyses.	1 year from same
4.	Provide OSHA Houston Area Office with management responses.	30 days from completion of analyses
5.	Complete actions recommended by process hazard/process safety management analyses.	As soon as practicable, but within 2 years from completion of Step 2

8. If the schedule contained herein cannot be met, OSHA will not unreasonably deny a timely-filed petition for modification of abatement. 29 C.F.R. ¶ 1903.14a.

9. Phillips further agrees that on or before the scheduled completion date for each numbered task in Paragraph 7 above, it will transmit written verification to the OSHA Houston Area Office that the task has been completed as scheduled.

10. Phillips further agrees to provide to OSHA an evaluation, to be conducted by an independent consultant, of the adequacy of settling leg maintenance procedures performed while polyethylene reactors are in operation. This evaluation will be forwarded to the OSHA Houston Area Office no later than six (6) months from the date of a final Commission Order.

11. If OSHA disagrees with Phillips' determination of (1) the assessment of a process safety hazard, (2) the need for corrective action, or (3) an appropriate time frame for executing corrective action, OSHA will state its points of disagreement, and the reasons therefor, in writing so that Phillips may review them. OSHA and Phillips will then engage in good faith discussions to resolve the disagreement. This paragraph shall not limit OSHA's right to use, as appropriate, enforcement methods provided by the OSH Act.

12. Phillips agrees to develop and maintain a compilation of written safety information to enable Phillips and all exposed employees, including contractor employees, to identify and understand the specific hazards posed by the processes involving highly hazardous chemicals present at HCC. This safety information will be communicated to all exposed employees, including contractor employees, and shall describe the hazards of the highly hazardous chemicals used in the process, as well as information pertaining to the equipment and technology involved in the process. In addition, Phillips agrees to develop and implement written operating procedures to provide clear instructions for safely conducting process and

maintenance operations consistent with the process safety information it develops. The steps required by this paragraph shall be completed within 90 days of the completion of the process hazard/process safety management analyses required under ¶ 7.

13. Phillips agrees to train each employee involved in a covered process or maintenance operation in an overview of the process and in pertinent operating procedures for that process. The training will emphasize the specific safety and health hazards of the process, and safe operating procedures and practices applicable to the process. Refresher and supplemental training shall be provided at least annually in the event the process does not undergo significant change, or concomitantly with any process change or modification to ensure understanding and adherence to the current operating procedures of the process or maintenance operation. Such training will be completed prior to assigning an employee to a process or maintenance operation.

14. Phillips agrees to inform any contractor performing work on, or near, a process, of the known potential fire, explosion or toxic release hazards related to the contractor's work and the process, and ensure that contractor employees are trained in the work practices and emergency procedures necessary to safely perform their job.

15. Phillips will implement a process safety management system at its Borger Refinery & NGL Process Center, Philtex/Ryton Complex, Sweeny

Refinery & Petrochemical Complex, and Woods Cross Refinery in accordance with the terms and timetable provided in Appendix "A," which is incorporated herein by reference.

16. All documents or other information made available by Phillips under this Agreement shall be handled in accordance with Section 15 of the OSH Act, 29 U.S.C. § 644, 18 U.S.C. § 1905, and 29 C.F.R. § 1903.9. Phillips will have the obligation to identify the document, information, or portion thereof that contains proprietary or confidential information.

17. OSHA agrees not to issue citations to Phillips for any working conditions identified in the process hazard analysis or any other analysis required by this Agreement, provided such conditions are being or will be addressed in good faith in accordance with this Agreement (including correction, if necessary). Phillips agrees to allow OSHA access to HCC to determine progress and compliance with this Agreement. OSHA agrees that, assuming good-faith implementation of this Agreement by Phillips, it shall not conduct general schedule inspections, except that OSHA may conduct monitoring inspections to determine compliance with this Agreement. OSHA retains the right to conduct all other types of inspections permitted under the OSH Act.

18. No later than six (6) months following Phillips' verification that it has completed all of the actions enumerated in Paragraphs 1 through 14 of this Agreement, OSHA shall return to Phillips all copies of Phillips' process hazard

analyses, written management responses, and other safety analyses. OSHA shall not thereafter retain any such copies.

19. OSHA amends Citation No. 1, Inspection No. 106612433 issued April 19, 1990, to delete any characterization of the alleged violations contained therein.

20. Phillips agrees to pay the amount of FOUR MILLION DOLLARS ($4,000,000.00) in settlement of Citations Nos. 1 and 2, as amended, Inspection No. 106612443 issued April 19, 1990, within thirty (30) days of a final Order of the Commission.

21. The parties agree that this Settlement Agreement shall become the final Order of the Commission and an agreed Order is attached hereto. The terms hereof shall be subject to enforcement under § 11(b) of the Act. Phillips consents to the entry of such an Order by the Circuit Court of Appeals.

22. The parties agree that the Citation as amended and Notification of Proposed Penalty, Complaint, Answer, Stipulation and Settlement Agreement, Phillips' Notice of Contest, Phillips' failure to continue to contest, Phillips' abatement of the alleged violations, Phillips' payment provided herein and the Commission's Final Order entered herein shall not constitute any evidence or admission on the part of Phillips of any violation of the Occupational Safety and Health Act or regulations or standards promulgated thereunder. None of the foregoing shall be admitted into evidence, in whole or in part, in any proceeding or

litigation in any court, agency or forum, except in proceedings brought directly under the Act by the Secretary. The contents of the Stipulation and Settlement Agreement are for the exclusive benefit of the parties hereto, and none of the foregoing constitute evidence or an admission on the part of Phillips that any of the conditions alleged in the Citations or Complaint existed or were a cause, proximate or otherwise, of any accident, or damages, if any, resulting therefrom. Phillips is entering into this Settlement Agreement without any prejudice to its rights to raise any defense or argument in any future or pending cases before the Commission or in any other proceedings, including but not limited to the right to assert that any future conditions identical or similar to those alleged in the original Citations or the Complaint do not violate the Occupational Safety and Health Act or any standard promulgated thereunder. By entering into this Settlement Agreement Phillips does not admit the truth of any alleged facts, any of the characterizations of Phillips' alleged conduct or any of the conclusions set forth in the Citations or Complaint issued in this matter regarding the standards cited therein.

23. Phillips certifies that the names and addresses of all authorized employee representatives of affected employees are:

Oil, Chemical and Atomic Workers
International Union, AFL-CIO
Local Union No. 4-227 (clerical group)
F. G. Bunch
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

Oil, Chemical and Atomic Workers
International Union, AFL-CIO (clerical group)
Joe Campbell
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

Oil, Chemical and Atomic Workers
International Union, AFL-CIO
Local Union No. 4-227 (plant group)
B. G. Martinez
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

Oil, Chemical and Atomic Workers
International Union, AFL-CIO (plant group)
Joe Campbell
2306 Broadway
Houston, Texas 77012
Telephone No. (713) 649-2714
Facsimile No. (713) 645-2426

International Brotherhood of Electrical Workers
Local Union No. 716
G. G. Welch
1475 North Loop
Houston, Texas 77008
Telephone No. (713) 869-8900
Facsimile No. (713) 868-6342

International Brotherhood of Electrical Workers, AFL-CIO
J. D. Muhl
1475 North Loop
Houston, Texas 77008
Telephone No. (713) 869-8900
Facsimile No. (713) 868-6342

Phillips further certifies that there are no other unions representing affected employees except as set forth above.

24. The Secretary certifies that service of the ~~fully executed~~ Saw mRD Settlement Agreement was made on each authorized employee representative by facsimile transmission on August 21, 1991. Affected employees have not raised objections to the reasonableness of any abatement period specified herein.

25. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

DATED August 22, 1991.

FOR PHILLIPS 66 COMPANY

By John K VanBuskirk
John VanBuskirk
Senior Vice President

Marion R. Froehlich
Marion R. Froehlich
Counsel for Phillips 66 Company

FOR U.S. DEPARTMENT OF LABOR

ALAN C. McMILLAN
Deputy Assistant Secretary
Occupational Safety and Health
Administration

ROBERT P. DAVIS
Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

JACK F. OSTRANDER
Counsel for Occupational
Safety and Health

SUE ANN WOLFF
Senior Trial Attorney

BRIAN L. PUDENZ
JANICE L. HOLMES
Trial Attorneys

APPENDIX "A" TO
STIPULATION AND SETTLEMENT AGREEMENT
BETWEEN PHILLIPS 66 COMPANY AND LYNN MARTIN,
SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Phillips 66 Company ("Phillips") and Lynn Martin, Secretary of Labor, United States Department of Labor ("Secretary" or "OSHA"), hereby agree to the following:

1. Phillips agrees to implement a process safety management system at its Borger Refinery & NGL Process Center, Philtex/Ryton Complex, Sweeny Refinery & Petrochemical Complex, and Woods Cross Refinery. This system will be a comprehensive process safety management system which includes but is not limited to the steps described in the Agreement to which this Appendix "A" is attached.

2. Phillips agrees to abide by the following timetable:

	Task	Completion Date
1.	Identify process hazard/process safety management analysis staff.	30 days from date of final Review Commission Order
2.	Complete process hazard/process safety management analysis on the following units:	Two and one-half years from date of final Review Commission Order

Sweeny:

26.1	ARDS Unit, A Train
30	HF Alkylation Unit
26.1	ARDS Unit, Trains A and B
28.1	DEA Regenerators and Sour Water Strippers
28.2	Sulfur Unit

15	Hexane Isom
3	FCC Unit
4	FCC Gas Plant
27.1	HOC Unit
27.2	HOC Gas Plant
43	Copper Treater
10ABC	NGL Fractionation
17	Light Aromatics Recovery
19	Benzene Hydrogenation

Borger:

43	Sulfur Recovery Unit
22	HF Alkylation
9	Crude Unit
10	Crude Unit
34	Sulfur Recovery Unit
42	ARDS
11	Ethane Recovery Unit
29	Cat Cracker
28	Crude Unit
40	Cat Cracker
35	Amine Treater & H_2S Dryers
41	Hydrogen Unit
44	Amine & Sour Water Treater
6	Hexane Isom

Philtex:

Propylene Unloading and Storage
H_2S System
SO_2 Unloading and Storage
Butadiene Unloading and Storage

Woods Cross:

7	HF Alkylation
10	Solvent Deasphalting
11	Straight Run Gas Plant
62	Propane Pit

3.	Complete process hazard/process safety management analysis on the following units:	Four and one-half years from same

Sweeny:

15	Benzene Hydrogenation
56	Waste Water System
22	Ethylene Plant
10D	NGL Fractionation
21	NGL Fractionation
11	Catalytic Reformer
14	Catalytic Reformer
24	Ethylene Plant
18	Propylene Fractionation
7	Heavy Aromatics Recovery
26.2	Hydrogen Purification Unit
20	Pentane Isomerization
25.2	Distillate HDS

Borger:

19.2	Reformer
7	Reformer
2.2	NGL HDS
19.1	Naphtha HDS
19.3	Distillate HDS
36	HDS Treater
1.6	Propane Treater
4	Butane Isom
5	Pentane Isom
6	Benzene Hydrogenation
26	Light Ends Recovery & Alky Feed Treater

Philtex:

Dimethyl Sulfide Blending and Storage
Methyl Mercaptan Reaction and Storage
Propane Storage and Processing
Butane Storage and Processing
Anhydrous HCl Storage

Woods Cross:

4	TCC
6	Reformer
12	NHDS
68	Pressurized HC Storage
86	Pressurized HC Truck Loading/Unloading
87	Pressurized HC Railroad Loading/Unloading
5	Vacuum
8	Crude
13	C5/C6 Isomerization

4. Complete process hazard/process safety management analysis on the following units: — Six and one-half years from same

Sweeny:

62	Clemens Terminal
68	Sweeny Tank Farm, #1 Pumphouse
88	Freeport Terminal #1
89	San Bernard Terminal
86	Truck Loading Rack
87	Tank Car Loading Rack
6	MTBE Unit and Hydroisom Unit
58	Pipelines
25	Crude Unit
9	Crude Unit
51	Steam Plants
52	Water Treater
90	Jones Creek Terminal
92	Freeport Terminal #2

Borger:

12	Pantex Cryogenic Gas Plant
No. 7	Cols. 35-42, 45

No. 1 Cols. 7, 9-12
No. 1 Cols. 13-17
No. 4 Cols. 23-27
No. 4 Cols. 18-22
No. 6 Cols. 28-34
23 Straight Run Fractionator
Cols. 104, 105, 108, 109, 111, 117
N-Butane Treater
2.1 Minalk Treater
13 Front end clean-up
NGL Train Rack
NGL Truck Rack
Above Ground Propane Storage and Loading
RAW NGL Feed System
E/P Caverns and Handling
Propane Caverns and Handling
Above Ground IC4 Storage and Handling
Above Ground NC4 Storage and Handling
Isobutane Caverns and Handling
N-Butane Caverns and Handling
De-ethanized NGL Feed System
Alky Feed Caverns and Handling
Above Ground 1C5 Storage and Handling
Above Ground NC5 Storage and Handling

5.	Complete actions recommended by process hazard/process safety management analyses.	As soon as practicable, but within two years from completion of the process hazard/process safety management analysis on each unit

3. Upon request by OSHA, Phillips shall make available to OSHA any documents prepared pursuant to this Appendix "A" including verification of corrective actions taken.

4. The parties recognize that circumstances may cause delays to occur, such as construction or design problems and delays in obtaining necessary permits. If the timetable contained herein cannot be met, Phillips will communicate that information to OSHA, including the reason(s) for the delay and the expected completion date(s). The parties agree that all undertakings by Phillips pursuant to this Appendix "A" are part of a settlement of a dispute between the parties and do not constitute an abatement of any unsafe condition.

5. All documents or other information made available by Phillips under this Appendix shall be handled in accordance with Section 15 of the OSH Act, 29 U.S.C. § 644, 18 U.S.C. § 1905, and 29 C.F.R. § 1903.9. Phillips will have the obligation to identify the document, information, or portion thereof that contains proprietary or confidential information. No later than six (6) months following Phillips' verification that it has completed all of the actions enumerated herein, OSHA shall return to Phillips all copies of Phillips' process hazard/process safety management analyses, written management responses, and other safety analyses. OSHA shall not thereafter retain any such copies.

6. OSHA agrees not to issue citations to Phillips for any working conditions identified in the process hazard analysis or any other analysis required by this Appendix, provided such conditions are being or will be addressed in good faith in accordance with this Appendix (including correction, if necessary). Phillips agrees to allow OSHA access to the above facilities to determine progress and compliance with

this Appendix. OSHA agrees that, assuming good-faith implementation of this Appendix by Phillips, it shall not conduct general schedule inspections, except that OSHA may conduct monitoring inspections to determine compliance with this Agreement. OSHA retains the right to conduct all other types of inspections permitted under the OSH Act.

DATED August 22, 1991.