United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. HORIZON HOMES, INC., Respondent.	OSHRC Docket No. 06-0095

APPEARANCES:

Oscar L. Hampton III, Attorney; Michael A. Stabler, Regional Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

Robert E. O'Connor, Jr., Esq.; Omaha, NE

For the Respondent

REMAND ORDER

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

In an order dated January 16, 2007, Administrative Law Judge Benjamin R. Loye denied a request from Horizon Homes, Inc. ("Horizon") to withdraw from a settlement agreement ("Agreement") with the Secretary. Horizon petitioned the Commission for review of the judge's order claiming, in part, that it had mistakenly signed the Agreement. On March 12, 2007, Chairman Railton directed this case for review. For the following reasons, we remand this case to the judge for further proceedings consistent with this opinion.

Background

In November 2005, the Occupational Safety and Health Administration ("OSHA") inspected a worksite operated by Horizon, the general contractor, and two of its subcontractors. Thereafter, OSHA issued to Horizon one serious citation that included, among other items, an alleged violation of the guardrail standard set forth at 29 C.F.R. § 1926.451(g)(4)(i). Separately, according to Horizon, OSHA issued a citation to one of Horizon's subcontractors for the

identical alleged violation—i.e., under the same guardrail provision for the same alleged violative condition. Horizon maintains that in a subsequent settlement agreement with the subcontractor, the Secretary withdrew the subcontractor's guardrail citation item because the height of the scaffold in question failed to trigger the cited standard's applicability to the alleged violative condition. The Secretary does not take issue with Horizon's explanation of the status of the citation issued to the subcontractor.

During settlement negotiations between the Secretary and Horizon, counsel for Horizon sought a withdrawal of the guardrail citation item issued to Horizon because the Secretary had withdrawn the same citation item issued to the subcontractor. Nevertheless, in the terms of the parties' executed Agreement submitted to the judge for approval on December 14, 2006, the original citation—including the guardrail citation item—"remained as issued" to Horizon but all proposed penalties were reduced.

On December 21, 2006, Horizon filed a Position Statement with the judge seeking to withdraw from the Agreement. In the Position Statement, counsel for Horizon admitted his "error in not seeing" the inclusion of the guardrail citation item in the Agreement but asserted Horizon's objection to a settlement that attributes guilt and establishes a penalty "for something that did not occur." In response, the Secretary denied knowledge of having any conversations with Horizon agreeing to withdraw the guardrail citation item. The Secretary further stated that on December 22, 2006, she sent by facsimile to Horizon's counsel a proposed amended settlement agreement withdrawing the guardrail citation item, but had received no response from Horizon.

In denying Horizon's request for withdrawal, the judge noted that the contractual nature of a settlement agreement precludes unilateral rescission, absent "duress, harassment or overbearing conduct." He then concluded that Horizon had set forth no recognizable basis for withdrawal from the Agreement.

Discussion

The Commission recognizes that settlement agreements are contracts to be enforced "in accordance with federal common law principles." *Phillips 66 Co.*, 16 BNA OSHC 1332, 1338, 1993 CCH OSHD ¶ 30,191, p. 41,543 (No. 90-1549, 1993). Thus, in determining whether a settlement agreement is enforceable, the language of the written settlement agreement controls unless the language is ambiguous, or there is fraud, duress, or *mistake*. *Id.*; *see also Callen v.*

Penn. R.R. Co., 332 U.S. 625, 630 (1948) ("One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."); *Anzueto v. Washington Metro. Area Transit Auth.*, 357 F. Supp. 2d 27 (D.D.C. 2004) (agreement that inadvertently, on plaintiff's part, settled previously filed Title VII claim was enforceable where there was no evidence of mutual mistake, or unilateral mistake caused by other party).

Here, we find that the record raises the question of whether a rescission of the Agreement is warranted. *See Phillips 66 Co.*, 16 BNA OSHC at 1339, 1993 CCH OSHD at p. 41,543 (case remanded to determine whether an agreement "was based on a mistake requiring rescission under principles of federal common law"). Specifically, the record suggests that the parties may have mistakenly included the guardrail citation item in their Agreement. Indeed, subsequent to the execution of the Agreement, the Secretary apparently provided counsel for Horizon with an amended settlement agreement withdrawing this very citation item. The judge, however, did not address in his ruling whether mistake warranted rescission.

Accordingly, we set aside the judge's order and remand the case to him. On remand, the judge shall review all relevant evidence in the record, including the Secretary's claim to have provided Horizon's counsel with an amended settlement agreement, and determine whether the parties made a mistake in executing the Agreement.

SO ORDERED.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

/s/
Horace A. Thompson III
Commissioner

Dated: April 3, 2007

SECRETARY OF LABOR, Complainant, v. HORIZON HOMES, INC., Respondent.	OSHRC DOCKET NO. 06-0095

DECISION AND ORDER

The parties have filed a Stipulation and Settlement Agreement in the above-captioned matter. The content of that Stipulation and Settlement Agreement is incorporated by reference in this Order.

To date, Respondent has not complied with this judge's January 16, 2007 Order denying its motion to set aside the signed Settlement Agreement and directing posting of the agreement in accordance with Rule 7. Rather, in its January 22, 2007 filing, Respondent indicates its intent to appeal the January 16, 2007 Order.

The Stipulation and Settlement Agreement is, therefore, approved so as to become a final Order of the Commission for purposes of appeal.

SO ORDERED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: April 3, 2007