United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. LUMEX MEDICAL PRODUCTS, INC., Respondent.	:	Docket No. 97-1522

DECISION

Before: ROGERS, Chairman; VISSCHER, Commissioner.

BY THE COMMISSION:

At issue in this case is a notification by the Secretary alleging that Lumex Medical Products, Inc. ("Lumex") failed to abate violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") at 12 power presses in its facility. Administrative Law Judge Michael H. Schoenfeld dismissed the Secretary's notification of failure to abate ("FTA") on the ground that these presses had never been the subject of any citation for violations issued in accordance with the Act's enforcement procedures. We affirm the judge's decision.

After an inspection on March 26, 1996, the Secretary issued a citation alleging that Lumex had failed to comply with section 1910.217(b)(6)(i) in that the two-hand trip device on its press no. 353 was not arranged so as to require concurrent operation by both hands and section 1910.217(c)(2)(i)(*a*) in that the point of operation on presses nos. 353 and 361

was not fully enclosed so as to prevent entry of hands or fingers.[1] Lumex contested this citation, and the parties settled these two items in an agreement which provides in pertinent part as follows:

1.

The Complainant hereby amends the Notification of Penalty issued in conjunction with Citation No. 1, Items 1 and 2, issued pursuant to Inspection No. 112873260, so that the penalties are as follows:

Citation No.	Item No.	Original Proposed Penalty	Amended Proposed Penalty
1	1	$900.00	$450.00
1	2	$1,125.00	$563.00

[1]The cited provisions require as follows:

§ 1910.217 Mechanical power presses
(a) *General requirements.*
. . . .
(b) *Mechanical power press guarding and construction, general—*
. . . .
(b)(6) *Two-hand trip.* (i) A two-hand trip shall have the individual operator's hand controls protected against unintentional operation and have the individual operator's hand controls arranged by design and construction and/or separation to require the use of both hands to trip the press and use a control arrangement requiring concurrent operation of the individual operator's hand controls.
. . . .
(c) *Safeguarding the point of operation*—(1) *General requirements*.
. . . .
(c)(2) *Point of operation guards.* (i) Every point of operation guard shall meet the following design, construction, application, and adjustment requirements:
(*a*) It shall prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard;
. . . .

> Based on the above amendment and modification, Respondent . . . hereby withdraws its notice of contest as to Item Nos. 1 and 2 of Citation No. 1.
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> . . . .
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> 4.
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> Respondent represents that the violations alleged in Citation No. 1, Items Nos. 1 and 2, issued with respect to Inspection No. 112873260, as amended, have been abated.
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> 5.
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> Respondent further represents that it will implement the Schedule for Power Press Abatement attached hereto as Exhibit "A", and agrees that this schedule will be included as part of the Order issued by the Occupational Safety and Health Review Commission approving this Stipulated Settlement Agreement.
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> 6.
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> Respondent also represents that power press safety training will be provided to all power press operators. . . .
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> 7.
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> Respondent agrees to permit OSHA to make monitoring inspections of its facility to determine compliance with the terms of the Schedule for Power Press Abatement attached as Exhibit "A" to this Stipulated Settlement Agreement for the period of time included for abatement as stated in Exhibit "A".

The "Schedule for Power Press Abatement" ("Schedule") attached to the settlement agreement sets forth what are termed "abatement dates" for 57 additional presses not included in the original citation allegations, divided into six groups, each group having a different prescribed abatement date. The agreement was approved and incorporated as part of a final Commission order entered by Chief Administrative Law Judge Irving Sommer on September 24, 1996.

Between February 12 and August 8, 1997, the Secretary conducted a reinspection.[2] The Secretary determined that the violation with respect to 12[3] of the presses covered by the Schedule had not been timely abated and issued an FTA carrying a penalty of $178,500.[4] Although no standard had been specified in the settlement agreement or Schedule for these additional presses, the FTA notification alleged that the presses lacked guards which fully enclosed the point of operation, contrary to section 1910.217(c)(2)(i)(*a*). Lumex contested the FTA, and after the parties filed their pleadings and conducted some discovery, Lumex moved for summary judgment as to the FTA. In granting Lumex's motion, Judge Schoenfeld relied on section 10(b) of the Act, 29 U.S.C. § 659(a), which provides in pertinent part that "[i]f the Secretary has reason to believe that an employer has failed to correct a violation *for which a citation has been issued* within the period permitted for its correction . . . the Secretary shall notify the employer . . . of such failure and of the penalty proposed to be assessed . . . ." (emphasis added). Based on this statutory language, the judge held that "civil penalties for failure to abate may be levied only in those instances where there is a failure to correct violations for which a citation had previously been issued under section 9(a) of the Act." The judge acknowledged the Secretary's assertion that the settlement agreement read together with the citation could establish a sufficient predicate for an FTA. The judge construed this contention as an argument that the citation should be deemed *amended* to include the additional 12 presses, and he rejected that argument as a "fiction." Since the language of the citation itself did not include the 12 presses which are the subject of the

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[2]These inclusive dates are subsequent to all the abatement dates set forth in the Schedule.

[3]One press listed in the FTA, no. 151, does not appear in the Schedule. It is unclear whether this discrepancy is due to clerical error.

[4]Under section 17(d) of the Act, 29 U.S.C. § 666(d), a penalty of up to $7000 may be assessed for each day "a violation for which a citation has been issued" is uncorrected.

FTA, the judge concluded that under section 10(b) of the Act, the Secretary could not issue an FTA as to those presses.[5]

On review, the parties concur that the issue before us is whether the working conditions or operations to which the FTA pertains have previously been charged as violations of the Act in a citation issued in accordance with the Act's enforcement procedures. The parties further agree that Lumex's power presses which are the subject of the FTA here were not expressly included in the original citation. The Secretary, however, contends that when the parties settled that citation they agreed to amend the citation to include the presses at issue here. We are asked to decide the narrow question of whether the settlement agreement can reasonably be interpreted as the Secretary argues.

The Secretary bases her argument on the language of the settlement agreement. Specifically, the Secretary refers to paragraph 4 of the agreement, which establishes that the presses covered by the original citation were not properly guarded and violated the Act, and to paragraph 5, in which Lumex "further represents" that it will implement the Schedule. In the Secretary's view, the term "*further*" links the two paragraphs so as to establish one continuous requirement for abatement of all the presses when the two paragraphs are read together. As the Secretary puts it in her review brief, since the two provisions are connected, the Schedule "envisioned the correction of the same violative conditions as those cited," and the Secretary therefore concludes that the presses in the Schedule are, in effect, incorporated into the citation. The Secretary also asserts that the terms "abate" and "abatement" used throughout the settlement agreement are understood by those conversant with the Act to

[5]The judge also concluded that since none of the presses in the Schedule had ever been the subject of a finding that they were in violation of any particular standard and Lumex had not made any admission of such a violation, the FTA action was, as Lumex argued, an attempt to enforce the settlement agreement rather than an enforcement of a citation.

refer to the "correction of a condition that has been deemed to be in violation of the Act," *i.e.*, through the entry of a final order affirming a citation.

We are unable to agree with the Secretary's argument that the settlement agreement amended the original citation. At the outset, it is obvious that "further" is used in paragraph 5 as a transition word to demarcate one of a series of stipulations by Lumex. That sequence commences with paragraph 4 in which Lumex "represents" that the citation items themselves have been abated. The phrase "further represents" in paragraph 5 denotes the next promise made by Lumex, that it will implement the Schedule. That this language is intended to convey a sequence of actions to be undertaken by Lumex is supported by the next paragraph, paragraph 6, which the Secretary does not acknowledge in her argument. That paragraph concludes the sequence by using the phrase "also represents" in setting forth Lumex's additional agreement to provide safety training. This various terminology has no particular significance except insofar as it defines the structure of the settlement agreement. Certainly the context in which the word "further" appears is consistent with its commonly-understood meaning as a term setting forth a series or sequence, synonymous with "additionally" or "moreover." *Webster's Third New International Dictionary* (1986). The Secretary's argument that paragraph 5 of the settlement agreement substantively amends the citation addressed in the prior paragraph because "further" is used to connect the two paragraphs stretches the meaning of that word beyond any interpretation that it could reasonably be given. We cannot adopt an interpretation which is unsupported by the natural and plain meaning of the words used. *Bunge Corp.*, 12 BNA OSHC 1785, 1791, 1986-87 CCH OSHD ¶ 27,565, p. 35,806 (Nos. 77-1622, 1986) (consolidated).

Preceding paragraphs of the settlement agreement also militate against the Secretary's position that an amendment of the citation results from the use of the word "further." In paragraphs 1 and 3, the parties expressly agree to amend the notification of proposed penalty and explicitly use the word "amendment" and "amended" to describe the reduction in the penalties to which they have agreed. Paragraph 5, which sets forth Lumex's agreement to

implement the Schedule, does not contain the terms "amend" or "amendment." Where the drafter of language uses a particular term in one place but omits that term in another place, it is assumed that the drafter acted intentionally, and the term in question is not to be implied where it is not used. *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281 (4th Cir. 1984), *cert. denied*, 427 U.S. 1008 (1985); *United States v. Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972); *Albemarle Corp.*, 18 BNA OSHC 1730, 1732, 1999 CCH OSHD ¶ 31,816, p. 46,736 (No. 93-848, 1999) (consolidated), *petition for review filed*, No. 99-60425 (5th Cir. June 22, 1999). The same principle applies to private contractual agreements as well as to statutory or regulatory language. *E.g.*, *Delta Mining Corp. v. Big Rivers Elec. Corp.*, 18 F. 3d 1398, 1404 (7th Cir. 1994).

The use of "abatement" in that portion of the settlement agreement pertaining to the Schedule also does not support the Secretary's position. As the Secretary correctly points out, and contrary to Lumex's argument, the term "abatement" is not used indiscriminately throughout the Act but rather appears only with reference to the abatement requirement of a citation in sections 9 and 10.[6] However, we cannot conclude that merely by referring to the power press Schedule as an "abatement" schedule the settlement agreement makes the Schedule part of the citation. The Secretary's argument assumes that "abatement"is a term of art which refers *exclusively* to the requirement to eliminate hazardous conditions prescribed in a citation. However, the Act does not define "abatement" in this manner, and indeed the Act contains no definition for the term "abatement." There is no language in the Act dictating that the *only* way in which an abatement requirement can be imposed is

[6]The only places this term appears in the Act are in section 9(a) describing the content of a citation ("the citation shall fix a reasonable time for abatement of the violation") and section 10(c) setting forth employees' right to contest "the period of time fixed in the citation for abatement of the violation" and the employer's right to petition for modification of the "abatement requirements" of the citation. The Act does not use the word "abate."

through a citation.[7] Furthermore, the terms "abate" and "abatement" have a commonly understood meaning. In ordinary parlance, they refer, among other things, to the reduction or elimination of a condition or practice. *Webster's Third New International Dictionary* (1986). The characterization of the Schedule referred to in the settlement agreement as an "abatement" schedule is consistent with this common meaning of the term and therefore does not compel the conclusion that the parties intended to adopt the formal citation mechanism of the Act.

Beyond the language of the settlement agreement itself, the Secretary also contends that the Commission should take into consideration "the circumstances under which the settlement agreement was executed." The Secretary bases this argument on the proposition that because abatement of hazardous working conditions is central to OSHA's purpose under the Act, and is equally important to Lumex as well, the settlement agreement must be interpreted so as to contain an enforceable abatement requirement through the FTA mechanism.

Both the Secretary and Lumex, however, agree that the normal rules of contract interpretation apply to settlement agreements. *See Phillips 66*, 16 BNA OSHC at 1336,

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[7]Section 10(c) of the Act, which sets forth the Commission's authority, provides that the Commission may issue two types of orders. The Commission may issue an order, based on findings of fact, "affirming, modifying, or vacating the Secretary's citation or proposed penalty," or the Commission may order "*other appropriate relief*" (emphasis added). The Commission has decided several other cases in which the Secretary and employer entered into a settlement agreement in which the employer agreed to institute measures to correct hazardous conditions at locations other than those which were the subject of the Secretary's citations. *Oil, Chem. & Atomic Workers Intl. Union*, 16 BNA OSHC 1339, 1993-95 CCH OSHD ¶ 30,190 (No. 91-3349, 1993); *Phillips 66 Co.*, 16 BNA OSHC 1332, 1993-95 CCH OSHD ¶ 30,191 (No. 90-1549, 1993); *Davies Can Co.*, 4 BNA OSHC 1237, 1976-77 CCH OSHD ¶ 20,704 (No. 8182, 1976). In all of these cases, the Commission concluded that the "other appropriate relief" provision of section 10(c) gave the Commission the authority to order that hazardous working conditions be corrected in accordance with the terms of the settlement agreement even if those conditions were not alleged as violations of the Act in a citation.

1338, 1993-95 CCH OSHD at pp. 41,541-43 (settlement agreements are enforced according to "familiar principles of contract law" as dictated by federal common law). We do not resort to extrinsic sources of interpretation where the language of the parties' agreement is unmistakable and unambiguous. *E.g.*, *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 173 (7th Cir. 1996); *Delta Mining*, 18 F. 3d at 1402; *Pennsylvania Ave. Dev. Corp. v. One Parcel of Land*, 670 F.2d 289 (D.C. Cir. 1981). As the court held in the latter case, "the plain and unambiguous meaning of a written agreement is controlling, in the absence of some clear evidence indicating a contrary intention," *id*. at 292 (quoting *Vogel v. Tenneco Oil Co.*, 465 F.2d 563, 565 (D.C. Cir. 1972)). Similarly, the Commission held in *Phillips 66* that where the language of a settlement agreement is unambiguous, its meaning must be determined solely from that language. 16 BNA OSHC at 1338, 1993-95 CCH OSHD at p. 41,543.[8] *See Kiewit Western Co.*, 16 BNA OSHC 1689, 1693-95 & n.10, 1993-95 CCH OSHD ¶ 30,396, pp. 41,940-42 & n.10 (No. 91-2578, 1994) (plain wording of a standard controls its interpretation where that language is not ambiguous).

The Secretary contends that the settlement agreement is ambiguous because it does not explicitly preclude the Secretary from pursuing an FTA in the event Lumex fails to meet the dates set forth in the Schedule. The absence of an express prohibition against an FTA, however, does not make the agreement ambiguous on whether the FTA procedure is available. A settlement agreement embodies an agreed-upon bargain and exchange on terms which each party considers to be a satisfactory *quid pro quo*. *Phillips 66*, 16 BNA OSHC 1335, 1993-95 CCH OSHD at p. 41,540. As we have said, if the parties here had intended to preserve the option of an FTA procedure, they would have used language to effectuate

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[8]In *Phillips 66* the Commission cautioned that extrinsic evidence is admissible to show that assent to a settlement agreement was due to fraud, illegality, accident, or mistake regardless whether the language of the agreement is otherwise unambiguous. 16 BNA OSHC at 1338, 1993-95 CCH OSHD at p. 41,543. There is no contention that any of these factors are present in this case.

that intent. Simply put, an FTA is unambiguously foreclosed in the circumstances here because the settlement agreement by its plain terms fails to amend the citation to include the presses which are the subject of the FTA. We cannot disregard the plain wording of the settlement agreement simply to accommodate the Secretary's contention that the parties must have intended to provide for an enforceable abatement requirement through the FTA procedure. As the Commission stated in *Kiewit Western*, *id.* at 1694, 1993-95 CCH OSHD at p. 41.941, "the remedial purpose of the Act does not give license to disregard . . . plain meaning . . . .The Secretary should not be permitted to rely on the purpose of the Act to require what may have been intended but was not clearly stated . . . ."

In any event, there is even less justification for adopting a strained interpretation of the settlement agreement here where, contrary to the Secretary's argument, such an interpretation is not necessary to satisfy the remedial objectives of the Act. Section 11(b), 29 U.S.C. § 660(b), provides that the Secretary "may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office . . . ." If the employer has not separately sought review of the Commission's order, that order "shall be conclusive in connection with any petition for enforcement which is filed by the Secretary . . . ."[9] As Judge Schoenfeld noted in his decision, since the settlement agreement had been approved by a Commission order, its terms are judicially enforceable under section 11(b).[10]

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[9]Although the Secretary contends that the "very significant potential penalties associated with a failure to abate citation" is a more effective remedy than a section 11(b) enforcement action, we note that judicial enforcement action carries other potential sanctions, principally the judicial power to hold an employer in contempt, which could be more severe in the appropriate case.

[10]We do not at this time decide whether the Commission could properly approve a settlement agreement which purported to preclude the Secretary from using the terms of the

(continued...)

Accordingly, the judge's order granting Lumex's motion for summary judgment is affirmed, and this matter is remanded for further proceedings consistent with this opinion.[11]

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: December 9, 1999

[10](...continued)
agreement in *any* future proceeding under the Act. *But see Farmers Export Co.*, 8 BNA OSHC 1655, 1980 CCH OSHD ¶ 24,569 (No. 78-1708, 1980) (dicta in lead and concurring opinions that Commission would accept exculpatory language preventing a settlement agreement from being used as the basis for any further enforcement action).

[11]When the Secretary conducted her reinspection and issued the FTA which is before us here, she also issued additional citations. Although these citations do not pertain to any of the presses included in the FTA and have no bearing on the question at issue, they remain before the judge for disposition.