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SECRETARY OF LABOR,
Complainant,

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND ITS LOCAL 4-786,
Authorized
Employee Representative.

Docket No. 91-3349

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

On May 1, 1991, a number of employees were injured or killed when an explosion occurred at an IMC Fertilizer Corporation plant in Sterlington, Louisiana. The Secretary inspected that plant, as well as two others adjacent to it. Before any citations were issued, the Secretary and IMC Fertilizer[1] entered into settlement negotiations. The authorized employee representative, the Oil, Chemical and Atomic Workers International Union and its local 4-786 ("OCAW" or "the union"), had been involved in the lengthy inspection, but was not a participant in the discussions leading up to the preparation of a "draft" agreement, nor was it informed that the discussions were taking place.

[1] The evidence indicates that Angus Chemical Company owned the plant and IMC Fertilizer operated it. Both employers are parties to the settlement agreement, and the "inextricable relationship" between the two was never resolved during the hearing. The issue of whether OCAW serves as the authorized employee representative for Angus employees is not on review. For convenience, we will refer to the employer, which, in any event, is not a party to this proceeding, as "IMC Fertilizer."

The Secretary's discussions with IMC Fertilizer resulted in the drafting of a document referred to by the Secretary as an "Informal Settlement Agreement."[2] As part of the execution of this agreement on October 31, 1991, the Secretary cited the company for specific violations of general industry standards concerning fire prevention, emergency exit plans, hazard communication, and respirator use, as well as for multiple 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 ("the Act"), 29 U.S.C. §§ 651-678, for failure to furnish 223 employees with a workplace reasonably free of hazards. The violations were left uncharacterized. IMC Fertilizer agreed not to contest the citations and to pay $10 million in penalties. The agreement covers identifiable citation items[3] as well as a commitment to take actions not addressed in any formal citation in that the company agreed to implement a corporate-wide process safety management ("PSM") plan[4] at its plants in Louisiana and Florida.[5] In other words, parts of the PSM plan responded to the alleged general duty clause violations contained in the citations for the Sterlington, Louisiana facility, while others were agreed to by IMC Fertilizer without a citation. The Secretary refers to the PSM implementation schedule only as "deadline dates for other remedial actions" or as "a phased-in time frame

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[2] According to the Secretary, "informal" refers only to the fact that a settlement was reached prior to any notice of contest; it does not mean that it not legally binding following execution.

[3] Citation Nos. 1 and 2, covering access to employee exposure and medical records, flammable and combustible liquids, hazardous waste operations and emergency response, respiratory protection, fire brigades, employee alarm systems, air receivers, powered industrial trucks, electric utilization systems, hazard communication, and the general duty clause, section 5(a)(1) of the Act.

[4] 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.

[5] OCAW does not represent employees at the Florida plant, and no employee representative at that plant filed a notice of contest. OCAW does not contend that it has any standing to contest any part of the settlement agreement involving the Florida plant, and we so find. Whether an employee representative at the Florida plant would have had standing to file a notice of contest in this action is not decided here.

for the completion of corrective actions (*i.e.*, elimination of hazardous conditions). The implementation schedule for this plan spans a 4-year time period.[6]

On October 29, 1991, two days before the date the parties were scheduled to sign the agreement, the Secretary provided the union with a copy of it, for their input. The union filed a notice of contest challenging the extended abatement periods set out in the agreement as to the plants at the Sterlington, Louisiana facility and requesting the judge to set aside the agreement on the grounds that the union had been deprived of its opportunity for input into the settlement negotiations under *Boise Cascade Corp.*, 14 BNA OSHC 1993, 1991 CCH OSHD ¶ 29,222 (No. 89-3087, 1991) (consolidated) ("*Boise Cascade*"). After an expedited hearing, the administrative law judge held that the only unexpired abatement dates in the agreement to which the union objected were beyond the scope of the original citation, and that *Boise Cascade* does not apply to this case. The judge concluded that even if *Boise Cascade* did apply, he lacked the authority to set aside the agreement because his jurisdiction was limited to the reasonableness of abatement dates fixed in citations.

The union petitioned for review, and Commissioner Montoya directed the case for review on March 23, 1992. Oral argument was heard on November 17, 1992.

I. Jurisdiction

Since no employer notice of contest was filed in this case, the Commission has no jurisdiction to set aside the agreement on that basis. The Secretary contends that the union's notice of contest as to the reasonableness of the abatement dates in the agreement does not provide an independent basis for the Commission to assert jurisdiction. He claims that the contest is either moot because the abatement dates in the citations have passed or invalid because the other time frames are not part of a citation.

It is by now well-settled that in the absence of an employer notice of contest, the Commission has no jurisdiction to review the Secretary's settlement of a citation and penalty,

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[6] 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.

except as to the reasonableness of the abatement dates.[7] Section 10(c) of the Act provides that an authorized employee representative may file a notice of contest "alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable." It is undisputed that IMC Fertilizer never contested the citations in this case; the question remains whether the union's contest here provides the jurisdictional basis for the Commission to review the agreement.

We find, as a preliminary matter, that the union's contest was not moot at the time of the hearing and is still not moot. The dates in the settlement agreement to which the union objects have not passed.[8] The PSM implementation schedule is still ongoing, with the latest deadline set in December 1995.

Because the union's contest is the only basis on which the Commission may rest its exercise of jurisdiction in this case, our resolution of the jurisdictional issue depends on our resolution of the validity of the union's challenge.[9] For the following reasons, we find that the union's contest is a valid one, as it concerns the reasonableness of abatement dates. The matter is therefore properly within our jurisdiction.

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[7] *Donovan v. Allied Indus. Workers (Archer Daniels)*, 760 F.2d 783, 785 (7th Cir. 1985); *Donovan v. Local 962, ICWU (Englehard)*, 748 F.2d 1470 (11th Cir. 1984); *Donovan v. Intl. Union, Allied Indus. Workers of America (Whirlpool)*, 722 F.2d 1415, 1418, 1422 (8th Cir. 1983); *Donovan v. United Steelworkers of America (Monsanto)*, 722 F.2d 1158, 1160 (4th Cir. 1983); *Donovan v. OSHRC (Mobil Oil)*, 713 F.2d 918, 931 (2d Cir. 1983); *Marshall v. Sun Petroleum Prods.*, 622 F.2d 1176, 1185 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980); *Dale M. Madden Constr., Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974).

[8] All other abatement dates had either passed by the time of the hearing, or are no longer contested. The only dates at issue in this case are those constituting the PSM implementation schedule.

[9] In *Phillips 66 Co.*, No. 90-1549 (August 20, 1993), also issued today, we rely in part on the concept of *ancillary* jurisdiction to review the entire settlement agreement in that case. There is no dispute in that case that the Commission has *primary* jurisdiction to review the settlement of employer-contested citations, and the non-cited matter (PSM plan) is viewed as ancillary or subordinate under *Davies Can Co.*, 4 BNA OSHC 1237, 1976-77 CCH OSHD ¶ 20,704 (No. 8182, 1976), and other cases. In this case, however, there is nothing to which even *primary* jurisdiction attaches unless we find that the subject of the employee contest is the reasonableness of abatement dates, or that the case is otherwise properly before us.

II. Validity of Union's Objection

The Secretary insists that by objecting to what in his view is an aspect of the agreement other than abatement dates, the union is attempting to infringe on his prosecutorial discretion. He argues that because the PSM plan schedule is not "fixed in a citation," it falls within the realm of his prosecutorial discretion and is not a permissible union objection. The Secretary maintains that the deadline dates are not "abatement dates fixed in a citation" because they cannot be traced directly to alleviation of hazardous conditions existing at a plant and were not cited in connection with actual violations observed during an inspection. The union contends to the contrary that the plan is essentially an extended abatement schedule anchored in an underlying citation which generated the settlement agreement in the first place. Acknowledging that the Secretary's literal interpretation might be plausible if seen in isolation, the union argues that "[w]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

In our view, the union's challenge addresses the reasonableness of an abatement date. Although the abatement dates are not fixed in an official "Citation and Notification of Penalty - OSHA-2 (Rev. 1/84)" form, their appearance does not change their nature. They are designed, as are other abatement dates, to ensure that certain conditions have been eliminated or analyses made within a specified time. In claiming that the deadline dates are not traceable to hazardous conditions at a plant, the Secretary chooses to ignore the reason for implementing PSM plans. As evidenced by the terms of the settlement agreements in this case and in *Phillips 66 Co.*, No. 90-1549 (August 20, 1993), as well as by the proposed PSM standard on which these settlements were based, *see supra* note 4, the plans are designed to identify and prevent at all IMC Fertilizer's plants the type of hazardous conditions that escalate into accidents such as the one that occurred at the Sterlington, Louisiana facility. Counsel for the Secretary at oral argument called the provisions in the settlement agreements a "mini-PSM . . . standard" and noted that if any deadline in the settlement agreement was more generous than its counterpart in the standard eventually issued, the agreement would conform to the standard. That the Secretary was able to

achieve corporate-wide implementation of a PSM plan through settlement instead of through litigation of citations under a specialized PSM standard, then still pending, has no bearing on the nature of the timetables involved. Counsel for the Secretary described the corporate-wide settlement mechanism as acting "to bring the entire company under the same obligations *as though the Secretary had cited violations in each plant*" (emphasis added). Thus, the Secretary requests that we give the other conditions agreed to by IMC the same effect under the Act as if they were set forth in the citations.

The Secretary's intention to have all parts of the agreement treated substantively as if they were citations, regardless of whether they are formally citations or not, is borne out in the document itself. The agreement includes a provision that "IMCF and ANGUS agree that this Agreement and the terms hereof shall become a final order of the Occupational Safety and Health Review Commission, and shall be enforceable under § 11(b) of the Act. IMCF and ANGUS consent to the entry of such an enforcement order by the United States Court of Appeals." Thus, the Secretary expects the entire agreement to be accorded the considerable benefits associated with citations that become final orders enforceable under color of section 11(b) of the Act. Such benefits include immediate enforcement by a United States court of appeals without review of the Commission's findings or a new trial on the merits. In addition to executing this summary enforcement procedure, the court may hold contempt proceedings, impose penalties under the Act, and invoke other available remedies to accomplish swift abatement of violations and payment of penalties. The Secretary intends the Commission to give final-order status and binding effect to both (1) the uncontested citations that become final orders by operation of law under section 10(a) of the Act and (2) the employer's promises to adhere to PSM plans. While the Secretary is correct that uncontested citations are deemed final orders by operation of what he calls the self-executing provisions of section 10(a) of the Act, this matter is not "uncontested."

The Secretary claims that both "the citations and settlement agreement" have become a final order under color of the Act and that the issue of whether that order is enforceable under section 11(b) of the Act is an appellate court enforcement matter rather than a Commission matter. We disagree. While the Secretary and an employer may be free to settle an action by agreeing to any terms that are not opposed to public policy, we are not

bound to enter an enforceable final order embodying the settlement. This Commission "is a judicial body, not a recorder of contracts." *Ho v. Martin Marietta Corp.*, 845 F.2d 545 (5th Cir. 1988) ("*Ho*") (citing *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc) (Rubin, J., concurring)).

Settlement agreements "have attributes both of contracts and of judicial decrees, or in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975). Here, that threatened or pending litigation arises under the provisions of the Act. The Act "created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved." *Atlas Roofing Co., Inc. v. OSHRC*, 430 U.S. 442, 461 (1977). 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. No provision of the Act specifically addresses pre-contest settlements, but with the authority to litigate a case comes the authority not to, and such settlements are not expressly prohibited. 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.

It is true that had this case been litigated instead of settled, the Secretary could not have demanded, and the Commission could not have ordered, IMC Fertilizer to implement a PSM plan at any or all of its plants, because the PSM plan provisions of the settlement agreement were not designated as part of the formal citations that were simultaneously issued and amended in the settlement agreement. With respect to actual citations, section 10(c) of the Act grants the Commission the power only to "issue an order . . . affirming, modifying, or vacating the Secretary's citation." Yet we see nothing to prevent the Secretary from extracting from IMC Fertilizer a promise to implement a PSM plan in exchange for something the company values, whether that be a decreased penalty, the absence of a serious or willful characterization of the violations, extended abatement dates, or something else. Moreover, the parties may reasonably expect, as they do here, that the agreement as a whole be treated as any other final order. Section 10(c) of the Act grants the Commission, in addition to power to dispose of citations themselves, power to "[direct] other appropriate relief." It is under this grant of authority that we review and approve settlements as enforceable final orders. *See, e.g., Ho* (a federal court's power to grant relief extends beyond its power of jurisdiction). However, for the settling parties to obtain the benefit of a final order, the "burden" must be borne as well. That may include defending the reasonableness of the abatement dates agreed upon in the settlement, even if those dates are not formally "fixed in the citation."

Pending oral argument, the Secretary commended to us *Local No. 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), 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, 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. In doing so, the Court did not rely on the concept of ancillary jurisdiction. The Secretary would prefer to have us read *Local 93* only to support his argument that the Commission should acknowledge, and the courts alone enforce, settlement

agreements like the one in this case covering more than citations. The case does support the proposition that the parties, with the help of the decision-maker, may accomplish more through settlement than through litigation. However, the Secretary seems to believe that the Secretary and the employer are the only parties whose rights and duties we are charged with adjudicating under the Act. The Secretary's narrow interpretation of *Local 93* fails to take into account how a two-party settlement agreement might affect third parties, namely, employees and their representatives, who are granted rights under the statute. The *Supreme* Court 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." *Local No. 93*, 478 U.S. at 526. Thus, by invoking *Local 93* here, the Secretary cannot expect the Commission to overlook the union's colorable objections to the terms of the settlement agreement.[10]

In summary, we conclude that the PSM plan implementation schedule, as incorporated into the settlement agreement, is an abatement period. The union may challenge the reasonableness of that period only as it applies to the plants at the Sterlington, Louisiana facility, and the Commission hear those objections, under section 10(a) of the Act. *See, e.g., Pan American World Airways, Inc.*, 11 BNA OSHC 2003, 1984-85 CCH OSHD ¶ 26,920 (No. 83-249, 1984) (collecting cases).

IV. Abuse of Discretion by the Secretary under Boise Cascade

Before remanding this case to the judge for consideration of the reasonableness of the abatement dates, we consider the union's allegation that it was deprived of an opportunity for input into the settlement negotiations as prescribed in *Boise Cascade*. Assuming, without deciding, that *Boise Cascade* applies in this case, we find that the

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[10] The Secretary raises the specter of unions attempting to interfere with his prosecutorial discretion and discouraging employers from ever entering into settlements. Citing *Mobil Oil*, 713 F.2d at 927, he contends that nothing in the statute indicates that Congress intended the Secretary's enforcement authority to be subordinate to employee rights. However, in *Mobil Oil*, the Second Circuit noted that the Act subordinates the prosecutorial discretion of the Secretary to the rights of employees in only two instances, one of which is the right to challenge an abatement period noted in a citation. It is that right that the union is exercising here.

Secretary's actions do not constitute an abuse of discretion such that the settlement must be set aside.[11]

The union was extensively involved in the inspection and submitted a report on its findings to the Secretary. However, the union was not informed that settlement negotiations were taking place. Two days before the Secretary's 6-month deadline for issuing citations resulting from the explosion, a copy of the 67-page settlement agreement was faxed to two union officials. The union's response showed that it was primarily concerned with the level of union involvement anticipated under the terms of the agreement. As a result of the union's comments, IMC Fertilizer wrote a letter to the union's president about the level of union involvement. The Secretary describes this document as "a letter agreement from IMCF outlining the level of union participation in the implementation phase of the agreement." The union maintains that the letter merely expresses a willingness on the part of the company to meet with the union to discuss the question of union involvement in process safety issues. Uncontradicted testimony indicates that before writing the letter, company representatives told the union that "this settlement . . . is final. We can't change one single word of this Agreement." In any event, the settlement agreement itself, unmodified, was executed less than forty-eight hours after it was disclosed to the union.

In *Boise Cascade*, the Commission expressed a hope and an expectation that the Secretary and employer would "make every effort to provide employees with the opportunity for input in the settlement process as much as practicable." We noted the Secretary's assurances at oral argument in the *Boise Cascade* case "that it is the policy of the Secretary to confer with employees or give them the opportunity to confer prior to the finalization of a settlement agreement." *Id.* at 1997, 1991 CCH OSHD at p. 39,123. We suggested that even though "input can be received at any time prior to the execution of the settlement agreement," it would "only be beneficial if it is received before the Secretary and employer

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[11] The judge made no findings on whether the opportunity for input on these facts was an abuse of the Secretary's discretion under *Boise*, since he found that *Boise* was inapplicable to this case. In the judge's view, *Boise* applies only to cases initiated by an employer's notice of contest, where the affected employees or authorized employee representative has elected party status, and where the Secretary and employer submit the settlement agreement to the Commission for approval. In light of our disposition, we need not determine whether the judge's analysis is correct.

have reached a final decision on the terms of the settlement." *Id.* at 1998 & n.6, 1991 CCH OSHD at p. 39,124 & n. 6. We noted, however, that the degree and method of input was a matter not for the judge, but for the Secretary, in his discretion, to determine on a case-by-case basis. At the same time, the Secretary was not given unfettered discretion, as the decision reserved the possibility of finding a "rare" abuse of discretion in "unusual or egregious cases where it appears that the Secretary has contravened his stated policy by denying employees an opportunity for input." *Id.* at 1998, 1991 CCH OSHD at p. 39,124.

The union argues that the Secretary's efforts to afford it an "opportunity for input" in this case were so inadequate as to constitute a constructive denial of that opportunity. The Secretary argues that if *Boise Cascade* applies, the union was given sufficient opportunity for input. The Secretary maintains, as he did in *Boise Cascade*, that it is OSHA's policy to encourage settlements, and to welcome employee input. He admits, however, that if an employer requests that a union be excluded from the discussions, OSHA tends to honor that request, and, in most cases, will only inform the union that settlement negotiations are going on and that it will eventually have the opportunity for comment.

The union's opportunity for input here was minimal at best. It had less than two full working days to review a lengthy agreement that had already been negotiated by the time its input was sought. However, when the union's role is viewed in context, from the time of the explosion to the issuance of the citations six months later, we cannot say that the Secretary abused his discretion in this case. The union worked closely with OSHA during OSHA's 3-month inspection, meeting with the OSHA team, gathering evidence and coordinating employee interviews. The union even issued a report analyzing the cause of the explosion that OSHA took into account in setting abatement dates, and the union attended the closing conference at which a list of proposed citations was read.

In this case, the union's participation early in the process, together with the supplemental letter from IMC Fertilizer acknowledging the union's concerns, offsets the limited opportunity for input that the union was given later in the process. Nothing in the record supports a finding of abuse of discretion in this case, so we deny the union's request that we set aside the settlement agreement on the grounds that *Boise Cascade* was violated.

V. Order

We remand this case to the judge for a determination of whether the PSM plan implementation schedule, as it applies to the plants at the Sterlington, Louisiana facility, is reasonable. The judge may conduct any further hearings he deems necessary. The Secretary shall submit a statement addressing the reasonableness of the timetable dates in accordance with Rule 38 and shall bear the burden of proof in showing that the dates are reasonable.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: August 20, 1993

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v.	:	Docket No. 91-3349
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND ITS LOCAL 4-786, Authorized Employee Representative.	:	

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

August 20, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-3349

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SECRETARY OF LABOR Complainant, v. OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, AND ITS LOCAL 4-786 Authorized Employee Representative.	OSHRC DOCKET NO. 91-3349

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 27, 1992. The decision of the Judge will become a final order of the Commission on March 30, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 18, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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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./sgr

Date: February 27, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-3349

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SECRETARY OF LABOR,
Complainant,

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, AND ITS LOCAL 4-786,
Authorized Employee Representative.

OSHRC Docket No. 91-3349-E

APPEARANCES:

For the Complainant:
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For the Authorized Employee Representative:
George H. Cohen, Esq., Bredhoff & Kaiser, Washington, D.C.

Before: Administrative Law Judge James A. Cronin, Jr.

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Following an investigation by the Occupational Safety and Health Administration (OSHA) of a May 1, 1991 explosion at a worksite of IMC Fertilizer, Inc. (IMCF) located in Sterlington, Louisiana, OSHA issued citations under section 9(a) of the Act to IMCF and Angus Chemical (Angus), the owner of the facility, on October 31, 1991. No notice

of contest to these citations were filed either by IMCF or Angus. Instead, the cited employers entered into a single informal settlement agreement with the Secretary of Labor dated October 31, 1991 and waived their rights to file notices of contest to the citations. Although the informal settlement agreement mentions IMCF's and Angus' consent to "entry of a final order," the agreement was never submitted to the Commission for approval. *See* Exhibit E-3 at pg. 13.

The Oil, Chemical and Atomic Workers International Union, AFL-CIO, for and on behalf of its Local 4-786 (OCAW), however, in its role as an authorized employee representative filed one notice of contest under section 10(c) of the Act to certain of the abatement dates in the citations issued on the IMCF and Angus inspections and also to some of the abatement dates set out in the informal settlement agreement. Additionally, the notice of contest requested that the informal settlement agreement be set aside in its entirety based on the Secretary's failure to comply with the Commission's ruling in *Secretary of Labor v Boise Cascade Corp. (Boise Cascade)*, 14 BNA OSHC 1993, 1991 CCH OSHD ¶29,222 (Nos. 89-3087 and 89-3088, 1991) that requires that affected employees or their authorized employee representative, who have elected party status in a case pending before the Commission, be afforded an opportunity "to provide input on all matters pertaining to the settlement before the agreement is finalized."

This case was received by this judge on January 21, 1992, and an expedited hearing was held on February 13, 1992, at Dallas, Texas. At the hearing this judge ruled that *Boise Cascade* was inapplicable to this case and denied OCAW's motion to set aside the Informal Settlement Agreement. After reconsideration, this judge reaffirms that ruling.

In this judge's view, the settlement procedures mandated by *Boise Cascade* apply only in a case initiated by an employer's notice of contest, where the affected employees or authorized employee representative have elected party status, and where the Secretary and employer submit the settlement agreement to the Commission for approval.

Commission jurisdiction under the Act arises in any one of four ways: (1) when an employer files a notice of contest within 15 days to a citation issued under section 9(a) of the Act (2) when an employer files a notice of contest within 15 days to a notification

of a failure to abate issued under section 10(b) of the Act (3) when an employer contests or files a petition to modify an abatement date in a citation. *See* section 10(c)of the Act and Commission Rule 37, or (4) when an affected employee or authorized employee representative files a notice of contest alleging that the period of time fixed in the citation for abatement of a violation is unreasonable.

In this case neither of the cited employers filed notices of contest to the citations which were issued to them under section 9(a) of the Act. The only notice of contest filed in this case was by OCAW and it is only through this notice of contest that the Commission attained jurisdiction. When only an employee notice of contest is filed, however, the Commission has jurisdiction over only the reasonableness of the abatement times set for the items contained in the citation. Also, it is well settled that in the absence of an employer notice of contest, employees lack standing to challenge anything other than the reasonableness of the abatement dates set forth in the citations. *See Donovan v International Union, Allied Industrial Workers of America* (Whirlpool), 722 F.2d 1415 (8th Cir. 1983).

The Commission also has held that when an employer files a notice of contest only to the reasonableness of the abatement period or simply requests an extension of the abatement period, the Commission does not gain jurisdiction over the entire citation. *See Druth Packaging Company*, 8 BNA OSHC 1999, 1980 CCH OSHD ¶24,729 (No. 77-3266, 1980); *Gilbert Manufacturing*, 7 BNA OSHC 1611, 1979 CCH OSHD ¶23,782 (No. 76-4719, 1979).

In this case the Commission was never invested with jurisdiction over the entire citations or over the cited employers, except with regard to the reasonableness of the abatement dates in the citations. This judge, therefore, lacks the authority to impose on the cited employers and the Secretary the settlement procedures mandated by *Boise Cascade*.

The Secretary and cited employers, however, may not deprive employees of their statutory right to contest the reasonableness of the abatement dates set forth in a citation through a settlement agreement. Once an authorized employee representative files a

notice of contest to the citation's abatement dates, the Secretary lacks the discretion to enter into an enforceable agreement with a cited employer to extend the abatement dates of the citation. Stated somewhat differently: a Commission final order regarding the reasonableness of the citation's abatement dates supersedes any agreement between the Secretary and IMC to extend a citation's abatement dates.

Because *Boise Cascade* was found to be inapplicable in this case, it is unnecessary for this judge to determine whether or not OCAW was afforded an opportunity to provide input on all matters pertaining to the informal settlement agreement. Evidence on that issue, however, is contained in the record for possible review by the Commission.

Finally, even if *Boise Cascade* was applicable to this case and it was found that OCAW was not given the opportunity for input, the Commission would lack the authority to set aside the informal settlement agreement. The courts have uniformly held that the Commission's jurisdiction over settlement agreements between the Secretary and cited employers is limited to employee challenges to the reasonableness of the abatement dates in the settlement agreement. Thus, the Commission cannot undo, or affect, a settlement agreement that the Secretary has concluded with a cited employer, except with respect to the reasonableness of the abatement dates. *See Whirlpool*, 772 F.2d at 1420.

Reasonableness of Abatement Dates

The only remaining issue before the Commission is the reasonableness of the abatement dates in the citation which have been challenged by OCAW and any abatement dates in the informal settlement agreement that extend those abatement dates. When the reasonableness of an abatement date is at issue, the burden of proving reasonableness by a preponderance of the evidence lies with the Secretary. *Druth Packaging Company, supra.*

In this case, OCAW's notice of contest challenged the reasonableness of the abatement dates set forth for items 3, 5, 9, 12, 13, 21, 22 and 23 of Citation No. 1. The

only abatement dates in the citation which have not yet expired are the March 1, 1992 dates for item 5 (hazardous substance training), item 12 (respirator users medical status) and item 13 (respirator fit tests). None of the provisions of the settlement agreement extended the March 1 abatement dates. With respect to items 3, 9, 21, 22 and 23, of Citation No. 2, the hazards created by those violations must be eliminated prior to the operational start up of the NP plant because the abatement dates have already expired.

Mr. James E. Rogers, the OSHA safety supervisor who led the OSHA investigative team, selected the three abatement dates at issue (Tr. 142). According to Mr. Rogers, OSHA generally takes into consideration such things as the employer's capacity to abate and the gravity of the violation or the danger to which the employees are exposed when selecting an abatement date, and this procedure was followed in this case (Tr. 142-143).

The standard at §1910.120 (p)(7)(i), in item 5, requires employers provide new employees exposed to health hazards or hazardous substances at treatment, storage, and disposal (TSD) facilities with 24 hours of initial training and, thereafter, with eight hours of refresher training annually. The objective of this training in this case is to acquaint employees with the nature of the hazardous waste generated at the NP plant and how to handle this hazardous waste in a safe and healthful manner so as not to endanger themselves or other employees.

When asked why he had selected the abatement date of March 1, 1992, Mr. Rogers explained that he considered the following factors: the number of employees to be trained, the fact that the NP plant would not come back on line before January 1,

1992, and the fact that during the months of November and December there was a high absenteeism rate at the plant due to the holidays and hunting seasons. Mr. Rogers testified that there also was a "problem" of the availability of people qualified to teach the training (Tr. 152-153). It should be noted in regard to that "problem" that OSHA required that the violation under item 6, which charged that the trainers who had taught the initial training lacked the necessary academic background, be abated "immediately."

Thirty-seven out of the forty-one employees on the emergency response team had not received the initial 24 hour training and according to Mr. Rogers, these employees continued to work at the plant during November and December, 1991 (Tr. 152,154). No attempt was made by OSHA to determine if they were available for training during that period (Tr. 218).

Finally, Mr. Rogers stated that this type of required training ranked "fairly low" in OSHA's priorities compared to the operator training on the new equipment which had a higher priority (Tr. 155-156).

Item No. 12 involves the standard at §1910.134(b)(10) which requires that persons should not be assigned to tasks requiring the use of respirators unless it has been determined that they are physically able to perform the work and use the equipment. Additionally, the standard requires that a respirator user's medical status should be reviewed periodically (for instance, annually). To comply with this latter requirement, respirator users must be physically examined by a doctor or specialized facility to determine whether the employee is physically capable of wearing a respirator (Tr. 158). Mr. Rogers conceded that item 12 was a "significant violation" (Tr. 201).

Again, Mr. Rogers reiterated that the date of March 1, 1992 was selected because of normally high employee absenteeism rate during the months of November and December, 1991, and because the plant was not projected to come back on line until the first of the year (Tr. 159). Mr. Rogers did not consider medical review a high priority item because there were a number of employees whose paper work was up to date. IMCF, therefore, had an adequate number of people qualified to use a respirator and that it would not "overly pose a hazard to employees" during January and February, 1992 (Tr. 160).

According to Mr. Rogers, there were 10 respirator users who had not had their medical status reviewed and these employees were working at the worksite (Tr. 160). Mr. Rogers agreed that in the case of an emergency, respirator users who were not physically capable of wearing a respirator or who did not have a properly fitted respirator, would be facing a serious hazard (Tr. 206).

Item 13, involves a violation of §1910.134(c)(5), which requires that facepiece to face seal tests be conducted for all employees who have to wear a respirator. Mr. Rogers testified these fit tests are relatively easy to conduct but that they cannot take place until after the medical status of the respirator user is determined (Tr. 165-166). The March 1, 1992 abatement date was selected in order to give IMCF sufficient time to abate both violations under items 12 and 13.

Mr. Rogers repeated that OSHA was more concerned with making sure that when the NP plant came back on line on January 1, 1992, none of the hazards that contributed to the catastrophic explosion would still exist (Tr. 167). As of the time of the hearing,

however, the NP plant was still not operating. It is Mr. Rogers' present opinion that there is nothing now to prevent IMCF from doing the medical status review and fit-testing at this time (Tr. 172-174).

Discussion

The evidence offered by the Secretary in support of the March 1, 1992 abatement dates for items 5, 12 and 13 of Citation No. 1, is unpersuasive and falls short of establishing the reasonableness of those abatement dates. Essentially, OSHA selected the March first dates based on its conclusion that IMCF lacked the knowledge, resources and ability to eliminate both the existing hazards under items 5, 12 and 13 and the hazards that contributed to the explosion. But no direct evidence was introduced to support that conclusion. No attempt was made to determine whether the employees, who required the 24 hour training, the medical status review, and the fit testing, were unavailable during the months of November and December, 1991. Also, no attempt was made to confirm IMCF's claim that it was unable to provide the required training, medical status review, and fit testing during that period.

In this judge's view, the gravity of the violations involved is high and the resulting hazards require elimination before the NP plant goes back into operation. There is no valid reason in this record for continuing to expose employees to these hazards for two more months after the plant commences operation. It would be unconscionable for an employer to expose employees to hazardous waste without proper training or to require an employee to wear a respirator when responding to emergencies such as fires, explosions, or the release of toxic substances without first determining whether the

employee is physically capable of wearing a respirator and fit testing the respirator to the employee.

Findings of Fact

All findings of fact relevant and necessary to a determination of the issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

Conclusions of Law

1. The Commission's holding in *Boise Cascade* is inapplicable to this case.

2. This Commission lacks jurisdiction to set aside the informal settlement agreement between the Secretary, Angus Chemical, and IMCF.

3. The Secretary failed to establish by a preponderance of the evidence that the March 1, 1992 abatement dates for items 5, 12 and 13 of Citation No. 1,, issued October 31, 1991, were reasonable.

4. A reasonable time for abating items 5, 12, and 13 of Citation No. 1 is before resuming production at the NP plant.

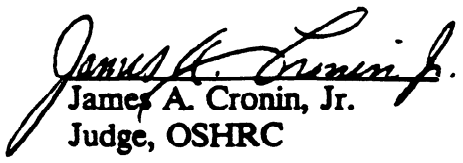
ORDER

Based upon the entire record, it is ORDERED:

1. OCAW's motion to set aside the informal settlement agreement is DENIED.

2. The abatement dates of March 1, 1992, for items 5, 12 and 13 of Citation No. 1, issued October 31, 1992, are VACATED.

3. The abatement of items 5, 12 and 13 of Citation No. 1, issued October 31, 1991, must be accomplished prior to commencement of production at the NP plant.



James A. Cronin, Jr.
Judge, OSHRC

Dated: February 25, 1992