UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WRANGLER PUMPING, INC. dba GARBAGE GATORS Respondent.	OSHRC DOCKET NO. 18-0876

Appearances:

For Complainant: Jennifer J. Johnson, Esq., Trial Attorney, Office of the Solicitor, Dallas, TX

For Respondent: Willis Malone, Pro Se, Amarillo, TX

Before: Judge Patrick B. Augustine – United States Administrative Law Judge

DECISION AND ORDER

This matter comes before the Court on *Complainant's Opposition to Relief Under Rule 60(B)*("Complainant's Brief"). Complainant contends Respondent waived its rights to contest the Citation and Notification of Penalty ("Citation") issued in Inspection Number 1227121 when it signed an Informal Settlement Agreement ("ISA") after a post-citation meeting with local Occupational Safety and Health Administration ("OSHA") officials. Respondent filed a second late *Notice of Contest* on May 1, 2018, which the Court deems as Respondent seeking relief under Fed.R.Civ.P. 60(B). Essentially, Respondent is requesting the ISA be set aside and the matter be reopened for adjudication on the merits.

Jurisdiction

The Commission has jurisdiction to determine if the requested relief can be granted due to the second late *Notice of Contest* filed by Respondent on May 1, 2018. *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). *See also* 29 U.S.C. § 659(c).

Background and Factual Finding

On April 24, 2017, the OSHA Lubbock Area Office conducted an inspection of Respondent's workplace located at 2764 E. FM 1151, Amarillo, Texas. *See* Citation for Inspection No. 1227121, dated October 5, 2017. The Citation alleged twenty (20) violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 615-678 ("Act"). Specifically, OSHA alleged one serious violation with a proposed penalty of $64,462.00 and one other-than-serious violation with a proposed $406.00 penalty.

On November 15, 2017, OSHA held an informal conference with Respondent's representatives Willis Malone and Kathy Malone. Also in attendance was Respondent's safety consultant, Eddie Fuentes, of Eclipse Safety Solutions, LLC. *See* Ex. A, attached to Comp't Brief at ¶ 6. No agreement was reached at the informal settlement conference. Following the informal settlement conference, Respondent submitted its first *Notice of Contest* to the Citation. *See id. See also* Attachment 4 to Ex. A attached to Comp't Brief. The parties continued to engage in settlement discussions and ultimately reached settlement on all items. *See* Ex. A, at ¶ 7 attached to Comp't Brief. The parties executed the Informal Settlement Agreement on December 6, 2017. *See id. See also*, Attachment 5 to Ex. A (ISA) attached to Comp't Brief. The ISA became a final order on December 15, 2017. *See* Attachment 5 to Ex. A attached to Comp't Brief.

On May 1, 2018, Respondent submitted a second late *Notice of Contest*. *See* Respondent's second contest letter attached as Ex. B to Comp't Brief. The second late *Notice of Contest* was filed more than four months after the ISA had become final. In filing its second late *Notice of Contest*, Respondent stated "I have proof that will let you know why I request this appeal and ask for dismissal of charges and fines." On September 25, 2018, the Court issued an Order to Respondent directing Respondent to provide the Court with its proof and other arguments Respondent wishes to make as it relates to this statement. On October 16, 2018, Respondent provided the Court its response to the Order ("Respondent's Reply"). Respondent's main argument centers around whether it was properly served within the statute of limitations period. Respondent alleges at the informal settlement conference, Ms. Routh (the Area Director) informed the Respondent the statute of limitation issue raised by Respondent's counsel would not be discussed and refused to look at a letter written by its counsel or listen to what Respondent had to say about the situation. Respondent states at that time, "I felt beat, had no options and were left at Ms. Routh's mercy." Resp't Reply dated October 16, 2018.

The Court's September 25, 2018, Order also directed Complainant to address the ISA and whether any performance under the ISA had been undertaken by Respondent. Complainant responded on October 16, 2018 ("Complainant's Reply"). Complainant, in his response, verified that an informal settlement conference was held on November 15, 2017, wherein the parties discussed, among other things, (i) the Citation and alleged violations; (ii) abatement; (iii) Respondent's right to contest the Citation and penalties; and (iv) settlement. Indeed, Respondent after the informal settlement conference filed its first *Notice of Contest*.

Prior to the informal settlement conference, OSHA received a letter of representation from Jeremi K. Young, an attorney with Young and Newsom,. P.C. *See A*ttachment A attached to Comp't Reply. The letter from Mr. Young was dated November 14, 2017. Mr. Young advised OSHA that he would not be attending the informal conference and Respondent would be represented by safety consultant, Eddie Fuentes. *Id.*

During the informal settlement conference Respondent provided abatement documentation and also represented that it had moved to a different building. *See* Ex. A. at p. 2 attached to Comp't Reply. OSHA accepted the abatement documentation for all items of the Citation. No agreement was reached at the November 15, 2017, informal settlement conference.

The parties continued settlement discussions and ultimately reached an agreement. The terms of that agreement were incorporated into the ISA. Respondent evidentially had the benefit of counsel (Mr. Young) and Mr. Fuentes during settlement discussions. In fact, Respondent's attorney represented to OSHA the Citations had been abated. *See* Ex. A at. p.2 of Comp't Reply. Complainant represents during settlement discussions Respondent was represented both by an attorney and a safety consultant. Complainant also states these professionals had the opportunity to review and advise Respondent on the ISA.

In summary, Respondent contends it felt beat and had no options but to settle. Complainant contends Respondent was represented by an attorney and a safety consultant during the settlement process which took place from November 15, 2017 to December 6, 2017. Therefore, the argument is Respondent was not forced to do anything it did not want to do, was not pressured to sign an agreement on November 15, 2017, had the benefit of counsel and the safety consultant to advise him during the negotiation period, and that Mr. Malone voluntarily executed the ISA which is now a final order, valid and enforeable.

Therefore, before this Court can determine whether relief under Fed.R.Civ.P. 60(B) is justified, it must first determine if it is deprived of subject matter jurisdiction in the first instance due to the ISA being valid and enforceable.

Controlling Law and Analysis

A. The ISA is Valid and Enforceable.

"Settlement agreements are contracts. As such, they are binding and enforceable under familiar principles of contract law, and are not subject to unilateral recision [sic]." *Zantec Dev. Co. Inc*., 16 BNA OSHC 2102 (No. 93-2164, 1994) (ALJ) (citing *Phillips 66 Co*., 16 BNA OSHC 1332, 1336 (No. 90-1459, 1993)). Through settlement "[e]ach party agrees to extinguish those legal rights it sought to enforce through litigation in exchange for those rights secured by the contract." *Village of Kaktovik v. North Slope Borough*, 689 F.2d 222, 230 (D.C. Cir. 1982). In construing a written contract, the primary concern is to determine the parties' intentions as expressed in the agreement. *Lawyers Title Ins. Co. v. Doubletree Partners, LP*, 739 F.3d 848, 858 (5th Cir. 2014). "All of the provisions of the policy must be considered with reference to the whole instrument, so that no single provision alone is given controlling effect." *Id.* (internal citations omitted*); see also Foster Wheeler Energy Corp. v. An Ning Jiang MV*, 383 F.3d 349, 354 (5th Cir. 2004).

While Respondent alleges it felt it had no option but to settle, the facts indicate otherwise. First, when an agreement was not reached at the informal settlement conference Respondent preserved its right to contest the validity of the Citation, including pursuing its statute of limitation argument, by filing its first *Notice of Contest.* By filing of the *Notice of Contest*, Respondent signaled its understanding of the process and that it had the right to pursue its arguments and

defenses. Second, there is no indication in the record that if a settlement was not reached on November 15, 2017 the day of the informal settlement conference, OSHA would not entertain settlement in the future. Indeed the contrary seems to be the case. The evidence indicates when an agreement was not reached on November 15, 2017, the parties continued to discuss settlement. Settlement was ultimately achieved and memorialized with the ISA. Third, any pressure Respondent may have felt was balanced by its representation by an attorney and safety consultant familiar with OSHA law. These individuals were involved and were available for counsel to prevent any overreaching or pressure from OSHA to settle on certain terms. It appears Respondent consulted with these professionals and relied on their advice. Finally, the evidence supports there was deliberation and consultation on both sides during the period of November 15, 2017, and December 6, 2017 when the ISA was executed. This nearly three week period allowed for time to consider its options, discuss its positions and render a decision that was both informed and voluntary. Thus, Respondent was not pressured or rushed into settling the case on terms it did not like or consequences it did not understand.

Finally, parties to a contract can agree to mutually rescind the contract, and such an agreement can be inferred from the behavior of the parties. *Village of Kaktovik*, 689 F.2d at 230 (citing Corbin on Contracts § 1236 n.60 (1964 and Supp. 1981). There is nothing in the record to indicate that there is a mutual agreement to rescind the ISA either through formal agreement or through the actions of the parties.

For the above reasons, the Court concludes the ISA is valid, enforceable and a final order of the Commission subject to enforcement. The Court concludes the ISA was entered into voluntarily after a reasonable period for deliberation and consultation with its counsel and safety consultant

B. The Validity of the ISA Dislodges this Court of Subject Matter Jurisdiction.

The Court determines that it lacks subject matter jurisdiction due to there being no current dispute as to the Citation. *St. John's United Church of Christ v. City of Chicago,* 507 F.3d 616, 626 (7th Cir. 2007)("When the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome, the case is (or the claims are) moot and must be dismissed for lack of jurisdiction")(internal quotes omitted) The Court can determine at any time that it lacks subject matter jurisdiction and dismiss the action. Fed.R.Civ.P. 12(h)(3).

In order to invoke this Court's jurisdiction, Respondent must demonstrate that it possesses a legally cognizable interest in the outcome of this action. *See Camreta v. Greene*, 563 U.S. 697,701 (2011)(quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009)). This requirement ensures that the Court confines itself to a limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved. A corollary to this case-or-controversy requirement is that an "actual controversy must be extant at all stages of review, not merely at the time the complainant is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (quoting *Preiser v. Newkirk*, 422 U.S. 395 (1975)). If an intervening circumstance deprives the plaintiff of a personal stake in the outcome at any point during litigation, the action can no longer proceed and must be dismissed as moot. *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477-478 (1990)(internal quotation marks omitted).

Courts have consistently adhered to this principle in a variety of labor disputes, in addition to OSHA. In *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), the Supreme Court reviewed a Fair Labor Standards Act action brought by an employee on behalf of herself and "other employees similarly situated" for various alleged violations. During the pendency of the case, the

district court determined that the employee's claims had been fully satisfied and that the employee's case was, therefore, rendered moot. 133 S.Ct. at 1526.

Ultimately, the Court concludes the filing of the second late *Notice of Contest* is the paradigmatic example of buyer's remorse. Complainant presented clear and convincing evidence of an executed Informal Settlement Agreement, signed by Respondent which fully resolved this case and waived Respondent's right to subsequently contest the proposed violations or penalties. Respondent's arguments are post-hoc rationalizations intended to void a binding agreement which Respondent later decided it did not like. The Court is leery of the precedent that would be set if a party could unilaterally withdraw from an informal settlement agreement as Respondent proposes here. *See Zantec Dev. Co. Inc.*, 16 BNA OSHC 2102 ("[T]o allow employers to unilaterally withdraw from previously agreed-upon settlements would deprive the Secretary of the finality of settlement agreements necessary for the efficient enforcement of the Occupational Safety and Health Act of 1970."), citing *Pennsylvania Steel Foundry & Machine Company*, 13 BNA OSHC 1417, (3rd Cir. 1987) and *Secretary of Labor*, 13 BNA OSHC 1197 (No. 85-1257, 1987).

ORDER

The Court finds the ISA is binding and enforceable, including the negotiated penalty reductions as outlined in the ISA. The second late *Notice of Contest* has been rendered moot by Respondent entering into the ISA which is valid and enforceable. Accordingly, with respect to the above-referenced docket, Respondent's late second *Notice of Contest* is hereby VACATED. This

case is hereby dismissed with prejudice for lack of subject matter jurisdiction.

SO ORDERED.

Date: November 23, 2018
Denver, CO

/s/
Patrick B. Augustine
JUDGE - OSHRC