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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>ALUMINUM SHAPES, LLC,<br><br>Respondent. | OSHRC Docket No. 17-1380 & 17-0646 |

APPEARANCES:

Brian A. Broecker, Attorney; Charles F. James, Counsel for Appellate Litigation; Edmund Baird, Associate Solicitor; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Matthew W. Horn; Kimberly A. Herring; SmithAmundsen LLC, Chicago, IL
For the Respondent

**ORDER**

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

On April 17, 2020, Respondent timely filed a Petition for Interlocutory Review, seeking review of Administrative Law Judge Keith E. Bell's April 10, 2020 Order denying its motion for summary judgment and granting the Secretary's cross-motion for partial summary judgment.[1] On April 24, 2020, the Secretary timely filed an opposition to the petition. Pursuant to 29 C.F.R.

[1] Respondent also filed a Petition for Interlocutory Review of the judge's order granting in part and denying in part Respondent's motion to suppress evidence. This petition will not be granted. *See* 29 C.F.R. § 2200.73(b) (petition denied if not granted within 30 days of receipt).

§ 2200.73(a), we grant Respondent's petition and remand the matter to the judge for further proceedings consistent with this order.

In May 2016, the parties executed a stipulated settlement agreement resolving citations stemming from an April 2015 inspection of Respondent's facility in Delair, New Jersey. In relevant part, this settlement agreement states:

> Respondent will permit OSHA to enter its facilities and conduct two monitoring inspections between July 15, 2016 and January 31, 2017 to verify compliance with the stipulated settlement. The scope of the OSHA monitoring inspections shall be limited to the verification of compliance with this [settlement agreement] unless other non-compliant conditions are observed in the plain view of OSHA during the verification visit. If OSHA determines that Respondent is not or may not be in compliance with any portion of this stipulated settlement, OSHA shall promptly notify Respondent in writing of its findings. Respondent shall have 30 days from receipt of OSHA's notification to provide a written response to OSHA. Within 30 days of receipt of Respondent's written response, the Parties will enter into good faith discussions to attempt to resolve the issue(s). If the parties are unable to resolve the issue within 30 days of entering into such discussions, the Parties may, by agreement, extend such time frame or the Complainant shall determine the appropriate course of action. Nothing herein shall limit OSHA's authority to enter and inspect in response to a complaint or referral.

On January 23, 2017, OSHA arrived at Respondent's facility to conduct an inspection. As a result of the inspection that proceeded on January 23 and 24, as well as thirteen subsequent inspections that occurred on or after February 1, 2017 (initiated as a result of complaints and referrals), OSHA issued Respondent four citations alleging 51 items with a total proposed penalty of $1,922,895.[2]

Respondent contested these citations, and, in its Answer, asserted "Breach of Settlement Agreement/Equitable Estoppel" as an affirmative defense to all the citation items. Subsequently, Respondent and the Secretary filed cross-motions seeking summary judgment with respect to this affirmative defense. In his Order, the judge denied Respondent's motion and granted the Secretary's motion. The judge found that because the settlement agreement became a final order of the Commission on July 5, 2016, and because Commission final orders are only reviewable by federal circuit courts, *see* 29 U.S.C. § 660, he lacked jurisdiction to consider the affirmative defense.

[2] These citations are docketed with the Commission as Docket 17-1380. The citations in Docket 17-0646, which has been consolidated with Docket 17-1380, are unrelated to both the settlement agreement and the cross-motions for summary judgment at issue here.

Equitable estoppel is a valid defense before the Commission. *See Erie Coke Corp.*, 15 BNA OSHC 1561 (No. 88-611, 1992), *aff'd*, 998 F.2d 134 (3d Cir. 1993); *Miami Indus., Inc.*, 15 BNA OSHC 1258, 1264 (No. 88-671, 1991), *estoppel finding rev'd in part*, 983 F.2d 1067 (6th Cir. 1992); *see also Int'l Shipbreaking Ltd.*, 25 BNA OSHC 1631 (No. 14-0031, 2015) (consolidated) (ALJ). Although Respondent's equitable estoppel defense is based on an alleged breach of the settlement agreement, the company is not asking the judge to review or enforce that settlement agreement—which, as the judge correctly pointed out, the Commission does not have jurisdiction to do once it becomes a final order.[3] *See, e.g.*, *Marshall v. Sun Petroleum Prods. Co.*, 622 F.2d 1176, 1185 (3d Cir. 1980) (Commission may only review a settlement prior to its final order date on limited grounds). Rather, the company is asking the judge to consider the Secretary's alleged failure to adhere to the agreement as evidence of affirmative misconduct, which is an element of the estoppel defense. *See Erie Coke Corp.*, 15 BNA OSHC at 1568-70 (discussing elements of equitable estoppel defense).

We pass no judgment on the merits of either motion. Our decision to grant interlocutory review permits the judge to correct a legal error that may not be adequately remedied by subsequent Commission review.[4] Accordingly, we remand for the judge to reconsider the cross-motions for summary judgment under the applicable standard of review. Specifically, the judge must determine whether, with respect to the equitable estoppel defense, there is "no genuine dispute as

[3] Because the judge did not mention "equitable estoppel" in his Order, it appears he may have conflated jurisdiction to review a breach of the settlement agreement with jurisdiction to consider equitable estoppel.

[4] Recent amendments to Rule 73, which governs interlocutory review, went into effect on June 10, 2019. As revised, Rule 73(a), 29 C.F.R. § 2200.73(a), reads, in relevant part:

> A petition for interlocutory review may be granted only where the petition asserts and the Commission finds: (1) That the review involves an important question of law or policy that controls the outcome of the case, and that immediate review of the ruling will materially expedite the final disposition of the proceedings or subsequent review by the Commission may provide an inadequate remedy . . . .

to any material fact" and therefore one of the parties "is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ford Motor Co. – Buffalo Stamping Plant*, 23 BNA OSHC 1593, 1594 (No. 10-1483, 2011).

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: May 15, 2020

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THREE-PART ORDER

GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO SUPPRESS ALL EVIDENCE OBTAINED DURING THE INSPECTION,

DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON ITS

FIRST
**AFFIRMATIVE DEFENSE OF BREACH OF CONTRACT/EQUITABLE**

**ESTOPPEL, and**

GRANTING SECRETARY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This three-part Order resolves the dispute about the nature and scope of Respondent's consent on January 23, 2017 for inspection number 1206035, and cross motions for summary judgment. A two-day evidentiary hearing was held on September 24 and 25, 2019, in Greenbelt, Maryland, narrowly limited to the nature and scope of consent provided January 23, 2017. Both parties submitted post-hearing briefs.

## I. MOTIONS

### A. Respondent's Motion to Suppress

On February 1, 2019, Respondent filed Respondent's Motion To Suppress All Evidence Obtained During the Inspection (Motion to Suppress), which requested the suppression of all evidence obtained during the inspection initiated on January 23, 2017. On February 15, 2019, the Secretary submitted Secretary's Opposition To Respondent's Motions For Summary Judgment and To Suppress Evidence.

On May 15, 2019, the undersigned issued an Order For Supplemental Facts Regarding January 23, 2017 Consent To Inspect. The Order required the parties to submit additional facts related to the nature and scope of consent provided on January 23, 2017 or advise the undersigned of the need for an evidentiary hearing to develop this evidence.

For the reasons set forth below, evidence obtained during the January 23 and 24, 2017 inspection related to violations outside the scope of a monitoring inspection and not found in plain view is suppressed.[5] The Secretary may present evidence for the January 23 and 24, 2017 plain view citations, along with the evidence related to OSHA inspection entries on or after February 1,
2017, at a hearing on the merits.

### B. Respondent's Motion For Summary Judgment

On February 1, 2019, Respondent filed a Motion For Summary Judgment On Its First

Affirmative Defense For Breach of Contract/Equitable Estoppel (Respondent's Motion for

Summary Judgment). On February 15, Secretary submitted Secretary's Opposition To Respondent's Motions For Summary Judgment And To Suppress Evidence.

For the reasons set forth below, Respondent's Motion for Summary Judgement is denied for lack of jurisdiction.

[5] On September 23, 2015, OSHA issued a citation and notification of penalty to Aluminum Shapes for inspection number 1059368, which was contested and docketed with the Commission as Docket 15-1746 (2015 Citations).

### C. Secretary's Motion for Partial Summary Judgment

On February 1, 2019, the Secretary submitted its Motion for Partial Summary Judgment requesting Respondent's affirmative defense of breach of settlement agreement/equitable estoppel be stricken. On February 15, 2019, Respondent filed Respondent's Response To Secretary's Motion For Partial Summary Judgment.

For the reasons set forth below, Secretary's Motion for Partial Summary Judgment is granted.

## II. PROCEDURAL HISTORY

### A. Docket 17-0646

On February 27, 2017, the Occupational Safety and Health Administration (OSHA) issued a citation and notification of penalty to Respondent for inspection number 1175993 with three citation items for a total proposed penalty of $95,063. Respondent filed a timely notice of contest bringing the matter before the Occupational Safety and Health Review Commission (Commission or OSHRC) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970 (the Act). 29 U.S.C. § 659(c). The case was docketed with the Commission as Docket 17-0646 on April 13, 2017.

### B. Docket 17-1380

On July 20, 2017, OSHA issued a citation and notification of penalty to Respondent for inspection number 1206035 with fifty-one citation items for a total proposed penalty of $1,922,895. Respondent filed a timely notice of contest bringing this matter before the Commission pursuant to § 10(c) of the Act. 29 U.S.C. § 659(c). The case was docketed with the

Commission as Docket 17-1380 on August 14, 2017.

On August 21, 2017, Dockets 17-1380 and 17-0646 were consolidated for purposes of settlement and hearing.

## III. Background Facts

### A. Inspection 1206035 begins January 2017

In January 2017, Area Director (AD) Paula Dixon-Roderick assigned Compliance Officers

(CO) Jacob Ladd, Marie Lord, and Tracy Townsend[6] to conduct a follow-up inspection at Aluminum Shapes. (Tr. 15, 107; Roderick Dep., p. 48). The inspection was planned because of
Aluminum Shapes' general citation history[7] and to follow-up on the citation items issued

September 23, 2015 for inspection number 1059368 (2015 Citations). (Roderick Dep., pp. 49, 67).

On January 23, 2017, OSHA Compliance Officers (COs) Jacob Ladd, Marie Lord, and

Tracy Townsend[8] arrived at Respondent's facility to conduct the follow-up inspection. (Tr. 14,

107, 167). OSHA's team lead for the inspection was CO Ladd. (Tr. 110). The COs met with

Aluminum Shapes' managers, including Vincent Gatto, Director of Operations, and Gary Harvilla,

[6] Respondent argues that, at the hearing, Ms. Townsend stated the January 23 entry was both a follow-up and monitoring inspection, which was a change from her deposition statement that the inspection was simply a follow-up. (R. Br. 14-15). This argument is unsupported. Ms. Townsend's testimony shows she knew the citation that had occurred in the saw house was under a monitoring inspection because its abatement date was after the January 23 inspection date. (Tr. 30-31).

Respondent also asserts that CO Lord's hearing testimony conflicted with her deposition testimony. (R. Br. 12-14). This assertion is unsupported. CO Lord's testimony at both hearing and deposition show that at the time of the January 23 inspection she had no understanding of what a monitoring inspection was and that she relied on COs Townsend and Ladd for the inspection type. (Tr. 175; Lord Dep., pp. 39, 72). CO Lord's hearing and deposition testimony are consistent.

[7] Prior to the assignment, OSHA was advised by its attorneys that it could proceed with a follow-up inspection, not a comprehensive inspection. (Kaplan Dep., pp. 120-28).

[8] COs Townsend and Ladd conducted the inspection that resulted in 2015 Citations and the 2016 Agreement. (Tr. 12)

Director of Human Resources,[9] in the Respondent's conference room for the inspection's opening conference. (Tr. 19-20). Generally, Mr. Gatto spoke for Respondent and Mr. Ladd spoke for
OSHA. (Tr. 110, 273).

**B. Disagreement about the inspection**

Mr. Ladd stated that OSHA was there to conduct a follow-up inspection.[10] (Tr. 110-11). Mr. Gatto objected and insisted that OSHA could only conduct a monitoring inspection as specified in the 2016 Settlement Agreement.[11] (Tr. 288-89, 332). The COs did not have a copy, so Mr. Gatto retrieved a copy of the Agreement from Respondent's administrative office. (Tr. 289).

Mr. Gatto believed that, until January 31, 2017, paragraph 8 of the Agreement limited

OSHA to two monitoring visits. (Tr. 289-90, 292, 297-98). Also, he believed the purpose of the Agreement was to provide protection for Aluminum Shapes to fix issues and complete abatement without additional citations. (Tr. 295, 297). Other than a monitoring visit, Mr. Gatto expected that, prior to January 31, 2017, OSHA would only inspect Aluminum Shapes in response to an injury referral or complaint. (Tr. 293).

Nevertheless, the COs stated they would not be conducting a monitoring inspection and instead were there to conduct a follow-up inspection. (Tr. 112, 177). Mr. Gatto continued to insist

that he would not consent to a follow-up inspection; he would only agree to a monitoring inspection under the Agreement. (Tr. 297-99).

[9] In addition, to Mr. Harvilla and Mr. Gatto, Cheryl Drach, Environmental Manager, Bridget Douglass, Director of Sales, and Wes Panei, union shop steward were present for various parts of the initial meeting on January 23, 2017. (Tr. 21, 110, 113)

[10] OSHA's Field Operations Manual (FOM) states the "primary purpose of a follow-up inspection is to determine if previously cited violations have been corrected." (Ex. J-4 at 61 of 280). A monitoring inspection is an inspection "conducted to ensure that hazards are being corrected and employees are being protected . . ." (Ex. J-4 at 61 of 280).

[11] On May 10, 2016, the parties, through counsel, memorialized and executed a stipulated settlement agreement (2016 Settlement Agreement or Agreement) related to the 2015 Citations.

### C. Attorneys were consulted

Because they had reached stalemate, the parties' attorneys were contacted. (Tr. 298).

Respondent called its attorney, Denise Keyser and OSHA called its attorney, Alex Kondo. (Tr. 2526, 111, 298). By phone, Ms. Keyser and Mr. Kondo discussed the dispute. (Tr. 214, 357-58, 380). Ms. Keyser informed Mr. Kondo the inspection could only be conducted according to the 2016 Settlement Agreement for the purpose of monitoring abatement efforts.[8] (Tr. 358, 380). Mr. Kondo maintained that OSHA planned to do a follow-up inspection. (Tr. 214-15).

By the end of the conversation, neither Ms. Keyser nor Mr. Kondo had changed their positions. Ms. Keyser did not agree to a follow-up inspection and Mr. Kondo did not agree to a monitoring inspection.[9] (Tr. 214, 230-31, 360-61, 386). However, they agreed the COs could enter the facility to verify abatement of the 2015 Citations. (Tr. 214-15, 380). Ms. Keyser specified that

[8] Ms. Keyser participated in the negotiation of the 2016 Settlement Agreement.

[9] When cross-examined by Respondent's counsel, Mr. Kondo testified: Q: Did [Keyser] refer to the settlement agreement?

A: Yes

Q: Okay. In response, you told her that OSHA understood this inspection to be a follow-up inspection. A: Correct.

Q: And after you told her that it was a follow-up she never agreed to the characterization of the inspection as a follow-up. Is that correct?
A: Correct.

Q: She never agreed that Aluminum Shapes should be able to receive citations as a result of the inspection. Is that correct?
A: Correct.

Q: During your conversation a dispute remained regarding the characterization of this inspection as monitoring or follow-up. Is that correct?
A: That's correct.

Q: And after your phone call with Ms. Keiser[sic], that dispute still remained? A: Correct.
(Tr. 230-31)

the COs could enter for monitoring under the limits of paragraph 8 of the 2016 Settlement Agreement. (Tr. 361-62). Ms. Keyser and Mr. Kondo agreed to work out whether citations could be issued later. (Tr. 215, 380-81). Mr. Kondo testified that,

> "the disagreement was about what the legal effect if any OSHA discovering violations, what would happen afterwards. But I think we had a clear agreement that however characterized, the same physical result could happen that day that OSHA would be permitted to enter the premises and do the inspection."

(Tr. 233-34). After this phone call, they contacted their respective clients. (Tr. 111, 381).

### D. Inspection walk-through begins

The three COs had the impression they were proceeding with a follow-up inspection as originally planned. (Tr. 30, 111-12, 178, 183). Mr. Ladd again told Mr. Gatto they were conducting a follow-up inspection. (Tr. 145-46). Mr. Gatto reiterated that he only agreed to a monitoring inspection under the Agreement. (Tr. 299, 321). Mr. Ladd put his hands in the air and remarked, that's up to the attorneys. (Tr. 145-46, 299-300, 337).

To verify abatement of the 2015 Citations, the COs and Aluminum Shapes' managers planned the route for the walk-through. (Tr. 34, 113). CO Townsend advised Respondent they would also address any violations that were in plain view. (Tr. 34). The inspection walk-through began after an attorney from Ms. Keyser's office, Steve Millman, arrived to accompany the inspection group. (Tr. 36, 410).

The inspection continued the next day, January 24, 2017. Because the COs were only inspecting the areas related to the 2015 Citations, Mr. Gatto did not object during the inspection walk-through on either January 23 or January 24. (Tr. 345).

### E. OSHA's diary sheet

OSHA's investigation file included a diary sheet that recorded key inspection events but was not written contemporaneously. (Tr. 124, 148-49, 158, 160; Ex. R-9). The diary sheet consolidated the notes of COs Ladd, Lord, and Townsend. (Tr. 148-49). CO Lord made the diary sheet's first entry, which stated that on January 23, 2017, OSHA

"opened inspection based on monitoring as per stip for inspection number 1059368." (Tr. 170-71,

179; Ex. R-9). She stated that "stip" referred to a stipulated settlement agreement. (Tr. 172). CO

Lord did not know why she wrote that it was a monitoring inspection. (Tr. 171-72, 175, 179-81). She believed it was follow-up in nature and, at the time of the inspection, did not know what a monitoring inspection was.[12] (Tr. 175, 179-81).

As the team lead, CO Ladd signed off on each diary sheet entry including the January 23 entry made by CO Lord. (Tr. 126, 173, 194). He did not know why CO Lord wrote "monitoring" on the diary sheet; the January 23, 2017 entry should have noted that the inspection was a followup. He simply missed this error during his review of the file. (Tr. 126-27).

**F. 2016 Settlement Agreement**

On May 10, 2016, the parties, through counsel, memorialized and executed a stipulated settlement agreement (2016 Settlement Agreement or Agreement) related to the 2015 Citations. In the Agreement, Respondent accepted forty-five violations and agreed to pay fines totaling $170,000. The abatement date for forty-four of the violations was July 15, 2016; the remaining violation's abatement date was January 31, 2017. The Agreement also required Respondent to implement other "enhanced" abatement measures by December 31, 2016. A copy of the 2016 Settlement Agreement is at Attachment A of this Order.

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Respondent based its January 23, 2017 consent on the terms of paragraph 8 of the Agreement. Paragraph 8 states:

> Respondent will permit OSHA to enter its facilities and conduct two monitoring inspections between July 15, 2016 and January 31, 2017 to verify compliance with the stipulated settlement. The scope of the OSHA monitoring inspections shall be limited to the verification of compliance with this [Agreement], unless other noncompliant conditions are observed in the plain view of OSHA during the verification visit. If OSHA determines that Respondent is not or may not be in compliance with any portion of this stipulated settlement, OSHA shall promptly notify Respondent in writing of its findings . . . the Parties will enter into good faith discussions to attempt to resolve the issue(s) . . . Nothing herein shall limit OSHA's authority to enter and inspect in response to a complaint or referral.

(Ex. J-1, ¶ 8).

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[12] In her deposition, CO Lord stated that, at the time of this inspection, she had no experience with or understanding of what a monitoring inspection was. (Lord Dep., p. 39). However, she heard Mr. Gatto mention a monitoring inspection during the January 23, 2017 opening conference. (Lord Dep., pp. 69-70).

The undersigned cannot enforce the 2016 Settlement Agreement between the Secretary and Respondent.[13] However, the Agreement provides context for the consent provided on January 23 and 24, 2017.

## IV. Analysis

### A. Motion To Suppress

Respondent asserts the evidence obtained on January 23 and 24, 2017, must be excluded because there was no consent for a follow-up inspection. Respondent asserts that its consent was limited to a monitoring inspection under the 2016 Settlement Agreement. The Secretary contends there was full voluntary consent for a follow-up inspection.

OSHA's Field Operations Manual (FOM) states the "primary purpose of a follow-up inspection is to determine if previously cited violations have been corrected." (Ex. J-4 at 61 of 280). A monitoring inspection is an inspection "conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance." (Ex. J-4 at 61 of 280). The FOM also states that "[m]onitoring inspections shall be conducted in the same manner as follow-up inspections." (Ex. J-4 at 150 of 280).

#### 1. Suppression as remedy for Fourth Amendment violation

The Fourth Amendment protects an individual against unreasonable search and seizure. Fla. v. Jimeno, 500 U.S. 248, 250 (1991). This Fourth Amendment protection extends to searches of an employer's worksite by OSHA officials. See Marshall v. Barlow's, Inc., 436 U.S. 307, 32324 (1978) (Barlow's). OSHA officials must either obtain a warrant for the inspection or obtain the employer's voluntary consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (Schneckloth).

The Commission recognizes suppression of evidence as a remedy where the government "acted improperly in obtaining a right of entry." Sanders Lead Co., 15 BNA OSHC 1640, 1650 (No. 87-260, 1992) (Sanders). Suppression is an appropriate remedy "where

[13] See Donovan v. OSHRC, 713 F.2d 918, 931 (2d Cir. 1983) (Mobil Oil) ("absent a clear indication of congressional intent to the contrary, we will not read into the Act an authorization [for the Commission] to review settlements"); see also, Marshall v. Sun Petroleum Prods. Co., 622 F.2d 1176, 1185 (3rd Cir. 1980) (Sun Petroleum) (Commission may only review a settlement prior to its final order date and only for the abatement period).

suppression of evidence can be expected to deter the Secretary from engaging in similar misconduct in the future." Smith Steel Casting Co., 12 BNA OSHC 1277, 1280 (No. 80-2069, 1985) (consolidated) aff'd in relevant part, 800 F.2d 1329, 1334 (5th Cir. 1986). Here, the parties agree that Respondent did not request a warrant and permitted the COs to conduct a walk-through inspection on January 23 and 24, 2017. The nature and scope of Respondent's consent is disputed.

The Secretary argues that Respondent consented to a follow-up inspection and the consent was fully informed because Respondent was represented by its attorney and knew of its right to refuse entry. (S. Br. 20-23). Also, the Secretary argues that Respondent's cooperation and lack of objection during the two-day walk-through demonstrated its consent to a follow-up inspection. (S. Br. 32). Finally, the Secretary maintains that it did not misrepresent the purpose of its inspection to obtain consent. (S. Br. 23-24).

**2. Consent must be voluntary**

The Secretary must show consent was "freely and voluntarily given." Schneckloth, 412 U.S. at 222; see also, Donovan v. A. A. Beiro Constr. Co., Inc., 746 F.2d 894, 901 (D.C. Cir. 1984) (Beiro) (consent is invalid if "coerced by threats or force, or granted only in submission to a claim of lawful authority"). The Secretary bears the burden of establishing the search was conducted within the purview of the consent received. Sanders, 15 BNA OSHC at 1648; see also, U.S. v. Melendez, 301 F.3d 27, 32 (1st Cir. 2002) (citations omitted) ("a consensual search may not exceed the scope of the consent given").

**3. Voluntariness determined by totality of the circumstances**

Consent is "judged against an objective standard." Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). Whether or not the consent was voluntary is a question of fact determined by the totality of the circumstances. Schneckloth, 412 U.S. at 248-49; see also, U.S. v. Givan, 320 F.3d 452, 459 (3d Cir. 2003) ("totality of the circumstances inquiry as including the setting in which the consent was obtained, the parties' verbal and non-verbal actions, and the age, intelligence, and educational background of the consenting individual").

### a. Respondent's attorney did not consent to a follow-up inspection

The Secretary asserts that because Respondent had advice from counsel and knew of its right to refuse entry, it provided fully informed consent for the follow-up inspection. (S. Br. 2023). This assertion is unsupported. Respondent provided consent for an inspection; however, neither its managers nor its attorney agreed to a follow-up inspection. Both Mr. Gatto and Ms. Keyser specified that only a monitoring inspection subject to the Settlement Agreement was allowed. Mr. Kondo acknowledged that Ms. Keyser had not agreed to a follow-up inspection. (Tr. 233-34). The presence of Respondent's attorney, Ms. Keyser, did not transform the limits of the consent.

### b. Respondent was not required to continue its objection

The Secretary argues that Respondent's lack of objection during the two-day walk-through shows Respondent's consent to a follow-up inspection. This argument is unsupported. The evidence reveals that Respondent repeatedly voiced its objection to OSHA's follow-up inspection and limited its consent to a monitoring inspection under the Agreement. The Secretary was aware of these objections before the COs began the walk-through. Cooperation with OSHA officials is not implied consent. Beiro, 746 F.2d at 900-01 (finding acquiescence and cooperation alone do not constitute consent). Respondent was not required to continue to object and restate the limited nature of its consent throughout the two-day walk-through inspection. See Id. at 901 (employer not required to continue to resist and object "after initially objecting to and physically preventing the inspection"). Respondent had no cause to continue to object because the areas inspected by the CO were within the parameters of a monitoring inspection. Respondent's cooperation did not revoke its limited consent.

### c. Consent for entry was not induced by deceit, trickery or misrepresentation

Respondent asserts the Secretary misrepresented its intentions in an attempt to obtain entry to conduct a follow-up inspection. (R. Br. 21-23). Consent induced by deceit, trickery, or misrepresentation renders a search unreasonable. See Sanders, 15 BNA OSHC at 1649 citing U.S.
v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977). The burden is on Respondent to demonstrate such impropriety. See Sanders Lead Co., 17 BNA OSHC 1197, 1198-99 (No. 87-260, 1995) (adopting the "judge's findings that [Respondent] failed to carry its burden of showing any affirmative misrepresentation on the Secretary's part"); see also U.S. v. Wuagneux, 683 F.2d 1343, 1347 (11th Cir. 1987) ("party alleging ineffective consent on this ground must show affirmative acts by the agent that materially misrepresent the nature of the inquiry").

The record does not show deceit, trickery, or misrepresentation by the Secretary. However, the evidence here reveals that there was general confusion and lack of clarity between the parties regarding the nature of the January 23 and 24 walk-through inspection. There is no evidence the Secretary or his representatives took an affirmative action to represent they would only conduct a monitoring inspection. Just as Respondent did not agree to a follow-up inspection, the Secretary did not agree to a monitoring inspection. Inexplicably, the parties' attorneys agreed to proceed with the walk-through without resolving the disagreement. Consent to enter Respondent's facility was not adduced by deceit, trickery, or misrepresentation.

**4. OSHA was required to stay within limits of the consent**

"An individual's consent restricts the permissible boundaries of a search in the same manner as the specifications in a warrant." U.S. v. Strickland, 902 F. 2d 937, 941 (11th Cir. 1990); see U.S. v. Williams, 898 F.3d 323, 330 (3d Cir. 2018) (Williams) ("it is the subject of the consensual search who decides the terms of the search"). Respondent limited its consent to what it believed were the terms of the 2016 Settlement Agreement.[14] This limited consent was stated

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when OSHA arrived at Respondent's facility on January 23, reiterated by Respondent's attorney, and restated by Mr. Gatto before the walk-through. See Williams, 898 F.3d at 329 (citations omitted) ("a person may delimit as he chooses the scope of the search to which he consents").

[14] "Respondent will permit OSHA to enter its facilities and conduct two monitoring inspections between July 15, 2016 and January 31, 2017 to verify compliance with the stipulated settlement. The scope of the OSHA monitoring inspections shall be limited to the verification of compliance with this [Agreement], unless other non-compliant conditions are observed in the plain view of OSHA during the verification visit. . . . Nothing herein shall limit OSHA's authority to enter and inspect in response to a complaint or referral." (Ex. J-1 at ¶ 8, pp. 3-4).

If the Government does not conform to the limitations placed upon the right granted to search, the search is impermissible. U.S. v. Blake, 888 F. 2d 795, 800 (11th Cir. 1989) (officer exceeded scope of consent for physical search); U.S. v. Roark, 36 F. 3d 14, 17 (6th Cir. 1994) (officers exceeded scope of consent given). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." Jimeno, 500 U.S. at 251. As with voluntariness, the consent's scope is a question of fact to be evaluated under the totality of all the circumstances. See U.S. v. Thurman, 889 F.3d 356, 368 (7th Cir. 2018).

The parties agreed to a walk-through inspection; however, each party maintained their opposing positions on the nature of the inspection. Respondent consented to a monitoring inspection with the belief there would be no citations related to the 2015 Citations but understood that it could be cited for other violations in plain view. On the other hand, the COs believed they were conducting a routine follow-up inspection where citations would be issued for the nonabatement of the 2015 Citations, as well as other conditions that were in plain view. The attorneys agreed to proceed with the inspection without resolving the disagreement about the nature and effect of the inspection. This results in an evidentiary stalemate as to the nature of the inspection— there was no agreement as to the inspection's nature.

**5. Secretary did not prove consent for a follow-up inspection**

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The Secretary failed to prove that Respondent consented to a follow-up inspection. See Stanley Roofing Co., Inc., 21 BNA OSHC 1462, 1464 (No. 03-0997, 2006) (the Secretary did not meet the burden of proof on a matter where the "evidence is essentially in equipoise"). Rather, the evidence shows Respondent's consent was limited to a monitoring inspection.

### 6. Evidence for January 23 and 24 "plain view" citations allowed

Respondent knew that during a monitoring inspection, it was subject to citation for other violations in plain view.[15] Evidence obtained for alleged violations that were in "plain view" on
January 23 and 24, 2017, may be submitted as proof in a hearing on the merits. See Ackermann Enters., Inc., 10 BNA OSHC 1709, 1711-12 (No. 80-4971, 1982) ("if the inspector is granted permission to be in a particular area, his observation of objects in plain view from that area is not a constitutional violation") (citation omitted).

### 7. Evidence for inspection entries on or after February 1, 2017 allowed

OSHA returned to Respondent's facility an additional thirteen times, on or after February 1, 2017, in response to complaints and injury referrals. These thirteen subsequent entries were distinct events and the issue of consent for these thirteen entries is not at issue here. These subsequent entries were administratively combined under the same inspection number as the January 23 and 24, 2017 walk-through.

Because the entries on or after February 1, 2017, were distinct and unrelated to the consent provided for January 23 and 24, 2017, the related evidence for these violations may be submitted at a hearing on the merits. See Nix v. Williams, 467 U.S. 431, 443 (1984) ("The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of

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any constitutional violation.").

### 8. Secretary does not qualify for good faith exception

The Secretary asserts that it qualifies for the good faith exception to the exclusionary rule because it had an "objectively reasonable, good faith belief" that Respondent had consented to a follow-up inspection. (S. Br. 43). The Secretary has the burden of proof for this exception.
Sanders, 15 BNA OSHC at 1651.

In Sanders, the Commission adopted a good faith exception to the exclusionary rule for inspections conducted pursuant to a warrant. Sanders, 15 BNA OSHC at 1651 ("where the government held a good faith belief that it was acting lawfully, there is nothing to be gained by suppressing the evidence, for there is no misconduct that must be

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[15] The 2016 Settlement Agreement specified that Aluminum Shapes would be cited for any violation in plain view during an abatement monitoring visit.

deterred") citing U.S. v. Leon, 468 U.S. 897, 907-08 (1984) (Leon). However, it did not determine whether the good faith exception applied where the inspection was based on consent rather than a warrant. Sanders, 15 BNA OSHC at 1651, n. 19. ("Remaining for consideration on remand is whether the good faith exception applies in this case of a warrantless inspection.")

Nonetheless, even if a good faith exception is available for a warrantless inspection, here the Secretary has not demonstrated an objectively reasonable, good faith belief that it received consent for a follow-up inspection. When applying the good faith exception in Leon, the Supreme Court determined it served no purpose to exclude evidence where the officer had conducted the search in good faith based on a warrant issued by a neutral, third party magistrate. Here, there was no reliance on a neutral, third party.

The sole purpose of the exclusionary rule is to deter future Fourth Amendment violations. Davis v. U.S., 564 U.S. 229, 236–37 (2011). Respondent expressed its objection to a follow-up inspection and agreed only to a monitoring inspection. The Secretary went forward with the follow-up inspection knowing Respondent expected it to be a monitoring inspection. Thus, the Secretary's actions show it did not have an objectively reasonable, good faith belief that consent to a follow-up inspection was provided.[16]

### B. Motions for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure (Rule 56), governs motions for summary judgment in matters before the Commission. [17] See Commission Rule 2(b), 29 C.F.R. § 2200.2(b). To win a case on summary judgment, the moving party must show there is no genuine dispute as to any material fact, and that the party must be entitled to a judgment as a matter of law. Ford Motor Co. – Buffalo Stamping Plant, 23 BNA OSHC 1593, 1594 (No. 10-1483, 2011). "In reviewing a motion for summary judgment, a judge is not to decide factual disputes… Rather, the role of the judge is to determine whether any such disputes exist." Id. (citation omitted).

#### 1. Respondent's Motion for Summary Judgment

For Docket 17-1380, Respondent asserted that Secretary committed two breaches of the 2016 Settlement Agreement and requested relief based on breach of contract/equitable estoppel as an affirmative defense. The undersigned denies Respondent's Motion for Summary Judgment due to lack of jurisdiction.

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[16] Secretary also asserts there was a compelling public policy for the inspection because the employee safety concerns were urgent and there were grave hazards at stake. (S. Br. 43). This assertion is unsupported. The Secretary provided no evidence of an urgent situation existed at Respondent's facility. To the contrary, the January 23 inspection was planned and was not in response to an injury or complaint.

[17] Commission Rule 2(b) states: "Applicability of Federal Rules of Civil Procedure. In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure." 29 C.F.R. § 2200.2(b).

The 2016 Settlement Agreement became a final order of the Commission on July 5, 2016. A Commission final order is reviewable by a federal circuit court. See 29 U.S.C. § 660(b) ("Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c)

of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit").

The Commission does not have jurisdiction to review or enforce a final order of the Commission. See Mobil Oil, 713 F.2d at 931; see also, Sun Petroleum, 622 F.2d at 1185. Because the 2016 Settlement Agreement is a final order of the Commission, Respondent's breach of contract claim cannot be considered. Respondent's Motion for Summary Judgment is denied.

**2. Secretary's Motion for Partial Summary Judgment**

Secretary's Motion for Partial Summary Judgment asks the undersigned to dismiss Respondent's affirmative defense of "Breach of Settlement Agreement/Equitable Estoppel" asserted in Docket 17-1380 and Respondent's affirmative defenses of estoppel and breach of settlement agreement in Docket 17-0646.

In Docket 17-0646, Respondent was cited for violations resulting from a fatality referral.[18]

In its answer, Respondent asserted that the 2016 Settlement Agreement barred "[s]ome or all of Complainant's claims" as an affirmative defense. The violations cited in Docket 17-0646 were not related to the 2015 Citations or the 2016 Settlement Agreement. Therefore, Respondent's affirmative defense that "[s]ome or all of Complainant's claims are barred under the Stipulated Settlement in OSHRC Docket No. 15-1746, paragraph 8 and other paragraphs as applicable" is
stricken.

For Docket 17-1380, Respondent asserted Breach of Settlement Agreement/Equitable

Estoppel at Affirmative Defense I in its answer. As discussed above, the undersigned does not

[18] Respondent did not offer an argument to dispute Secretary's Motion for Partial Summary Judgment with respect to striking this affirmative defense for Docket 17-0646.

have jurisdiction to review the 2016 Settlement Agreement, which is final order of the Commission. Respondent's Affirmative Defense I, Breach of Settlement Agreement/Equitable Estoppel is stricken.

ORDER

1. Respondent's Motion to Suppress is GRANTED for evidence obtained on January 23 and 24, 2017, not solely based on plain view observations within the scope of a monitoring inspection and related to abatement of 2015 Citations. Respondent's Motion to Suppress is DENIED for evidence related to citations solely based on plain view observations within the scope of a monitoring inspection on January 23 and 24, 2017, and for citations based on entries on or after February 1, 2017.

2. Respondent's Motion For Summary Judgment On Its First Affirmative Defense For Breach of Contract/Equitable Estoppel is DENIED.

3. Secretary's Motion for Partial Summary Judgment is GRANTED to the extent that Respondent's Affirmative Defense I, Breach of Settlement Agreement/Equitable Estoppel in Docket 17-1380 and Respondent's affirmative defense that "[s]ome or all of Complainant's claims are barred under the Stipulated Settlement in OSHRC Docket No. 15-1746, paragraph 8 and other paragraphs as applicable" for Docket 17-0646 are STRICKEN.

4. The parties will participate in a conference call to be held on Friday, May 1, 2020, at 10:00 a.m. EDT to discuss next steps.[19]

SO ORDERED:

**/s/ Keith E. Bell**

Keith E. Bell

[19] To join the conference call, the parties will dial: 1-(877) 446-3914; then dial 635930#.

Judge, OSHRC

Dated: April 10, 2020

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Notice/Order was sent to the parties listed below electronically using the Commission's E-Filing System on April 10, 2020.

Jeffrey S. Rogoff, Regional Solicitor
U.S. Department of Labor
Office of the Solicitor
201 Varick Street, Room 983
New York, NY 10014
Attention: Andrew Katz, Esq.
Email: Katz.andrew@dol.gov

Matthew W. Horn, Esq.
Smith Amundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, IL 60601
Email: mhorn@salawus.com

/s/ Elizabeth Voehl

Elizabeth Voehl, Legal Assistant

Post Office Address:
Judge Keith E. Bell
OSHRC
One Lafayette Center
1120 20th Str. N.W. - 9th Floor
Washington, D.C. 20036-3419
(202) 606-5405 FAX (202) 606-5409