UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. INTERNATIONAL SHIPBREAKING LIMITED, LLC, Respondent.	DOCKET NOS. 14-0031 14-0032

Appearances:

Josh Bernstein, Esq. and Lindsay Wofford, Esq., Office of the Solicitor, Dallas, Texas
For Complainant

Jefferson R. Tillery, Esq. and P. J. Kee, Esq., Jones Walker, New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

(RESPONDENT'S MOTION FOR SUMMARY JUDGMENT)

This matter comes before the Court on Respondent's *Motion for Summary Judgment to Enforce the Settlement Agreement or Equitably Estop Complainant* ("*Motion*"). After reviewing the parties' respective motions and memoranda in support, the Court ordered the parties to appear at an evidentiary hearing pursuant to Federal Rule of Evidence 104.[1] The hearing was held on March 17, 2015, in San Antonio, Texas.

I. Jurisdiction

Jurisdiction over this action is conferred upon the Commission pursuant to section 10(c) of the Occupational Safety Health Act, 29 U.S.C. § 659(c), ("Act") by Respondent filing a

1. If granted, the Motion is dispositive. For this reason, in addition to providing the Court with an opportunity to assess credibility as it relates to the *prima facie* elements, the Court held an evidentiary hearing.

Notice of Contest and *Answer*. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5).

II. Procedural History

The Occupational Safety and Health Administration ("OSHA") conducted an investigation of International Shipbreaking Limited, L.L.C. ("Respondent") that began on July 16, 2013, at Respondent's worksite located at 18501 R.L. Ostos Road, Port Of Brownsville, TX (Inspection No. 920962 – USS Vancouver) and on July 23, 2013 at 18501 R. L. Ostos Road, Port of Brownsville, TX (Inspection No. 924965 – USS Wichita). *See Complaint and Citation and Notification of Penalty*. As a result of the inspection of the USS Wichita, on December 5, 2013 OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging one serious violation with two items with a total proposed penalty of $7,000.00. As a result of the inspection of the USS Vancouver, on December 5, 2013, OSHA issued a Citation to Respondent alleging one serious violation with five items and a total proposed penalty of $15,300.00. Respondent timely contested the Citation items. In its *Answers* to the *Complaints* Respondent asserted as an *Affirmative Defense* that Complainant is equitably estopped from pursing these actions. (Affirmative Defense No. 8).

Respondent contends that Complainant should be equitably estopped from pursuing the instant litigation because Complainant abrogated the terms of a settlement agreement dated June 27, 2013 ("Agreement"), which provided Respondent a 60-day abatement period to address electrical violations.[2] Before the abatement period had lapsed, Complainant conducted

2. Respondent also sought enforcement of the Agreement; however, the Court denied that portion of Respondent's *Motion* due to lack of jurisdiction. As a final order of the Commission, the "appropriate relief for enforcing that settlement agreement should have taken place before the Fifth Circuit Court of Appeals." (Tr. 8). *See also* 29 U.S.C. § 660.

inspections of Respondent's worksite, wherein Complainant identified and cited multiple violations of the maritime and general industry electrical standards. (Exs. J-2, J-3). Complainant argues that the Citations at issue were not covered by the abatement period provided for in the Agreement and, therefore, he should not be estopped from pursuing them. Further, Complainant argues that estopping him from pursuing this litigation would, in effect, be giving Respondent a "free ride" to violate the Act, during the abatement period. The Court has reviewed the parties' respective filings, the transcript of the evidentiary hearing, and the joint exhibits submitted at the hearing. Based on what follows, the Court finds that Complainant breached the terms of the Agreement and abrogated Respondent's statutory right to abatement. Accordingly, the Court finds Respondent is entitled to judgment as a matter of law.

III. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. The Supreme Court has held that a party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact as to the issue(s) raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only if it might affect the outcome of the case, and thus precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the Court is required to resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the nonmoving party. *Id*. at 255. If there is any evidence in the record from which a reasonable inference in favor of the nonmoving party can be drawn, summary judgment is improper.

Celotex, 477 U.S. 317. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is appropriate. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). The judge's function in summary judgment cases is to determine whether there are genuine, material, disputed issues for trial; it is not to weigh the evidence. *Anderson*, 477 U.S. at 249. The Court finds, based on the pleadings and joint exhibits, there are no genuine, material disputed facts. The evidentiary hearing provided the parties an opportunity to present their positions on how the Agreement impacted the validity of the *Citations*, which goes to the elements of the *Affirmative Defense*.

IV. Statement of Undisputed Facts

A. The 2011 Inspection

In 2011, Complainant conducted two inspections of Respondent's shipbreaking operations, which resulted in the issuance of two Citations and Notifications of Penalty on November 22, 2011.[3] (Exs. J-8, J-9). The Citation items that were issued as a result of those inspections alleged PPE, fall protection, fire prevention, and electrical violations, amongst others. Over the ensuing year-and-a-half, the parties engaged in litigation and settlement discussions, which ultimately resulted in the Agreement dated June 27, 2013. (Ex. J-7).

In exchange for Complainant withdrawing all of the Citation items issued on November 22, 2011, Respondent agreed, as is relevant to this case, to the following provisions of the Agreement:

> 6. Respondent promises to grant Complainant access to the subject workplace after the abatement date for the specific and limited purpose of determining if the conditions described in the Citation have been corrected.

3. Inspection Nos. 315488791 and 315488783.

> 7. Respondent promises to continue its good-faith efforts to comply with the Occupational Safety and Health Act (the Act), 29 U.S.C. § 651, *et seq.*
>
> 8. Respondent promises that within sixty days of signing this Agreement it will: (a) institute an electrical safety check program; (b) designate a person to inspect outlets and the outer insulation of cords for tears, exposed wires, etc.; (c) have an electrician, whose certification is from an American state or territory, on staff; and (d) institute an "assured equipment grounding conductor program" such as the one found in construction standard 29 C.F.R. § 1926.404(b)(iii). At a minimum this program requires that electric equipment is inspected quarterly and that such inspections are documented.
>
> 9. The parties agree that the specific abatement measures set forth in paragraph 8 of this agreement shall be considered required abatement . . . .

(Ex. J-7). The Agreement was executed by the Solicitor's Office and counsel for Respondent on behalf of their clients. Although neither Area Director Michael Rivera nor Assistant Area Director Antonio Fuentes signed the Agreement itself, both admitted that they had participated in the settlement process and proposed the language found in paragraph 8 of the Agreement. (Tr. 43–44, 90–91; Ex. J-7, *supra*). The Agreement was approved by Judge John Schumacher on July 17, 2013. (Ex. J-10).

B. The 2013 Inspection

On July 15, 2013, two weeks after the parties executed the Agreement and two days prior to Judge Schumacher's approval of the same, Complainant initiated the first of two new inspections of Respondent's shipbreaking operations, which are the subject of the current litigation.[4] According to the deposition testimony of AAD Michele Shields, these inspections would have been scheduled the Friday before the inspections took place, or approximately July 11 or 12, 2013. (Tr. 185–86). According to Complainant, these inspections were conducted pursuant to the National Emphasis Program on Shipbreaking ("NEP"). (Ex. J-4). The NEP requires that "[e]ach Navy and MARAD vessel undergoing shipbreaking operations must be

4. The inspection of the U.S.S. Vancouver began on July 15, 2013. (Ex. J-1). The inspection of the U.S.S. Wichita began on July 23, 2015. (*Id.*).

inspected annually . . . ." (*Id.*). The Maritime Administration facilitates this requirement by sending a letter to Complainant, indicating that a particular vessel is designated for shipbreaking, the date the vessel will be arriving at one of the locations listed in the NEP, and the date the shipbreaking operations are expected to be complete. (Ex. J-4). In this case, Complainant was notified on March 14, 2014, that the Vancouver and the Wichita would be arriving at Respondent's facility between April 15 and April 18, 2013. (Exs. J-5, J-6). Those letters also indicated that the contract for shipbreaking operations ended eleven months later, in March 2014. (*Id.*).

As a result of the July 2013 Inspections, Complainant issued two Citations, alleging seven violations of the Act. (Exs. J-2, J-3). Even though the NEP has a 21-point list indicating the areas of emphasis for inspections conducted under the program, each of the Citation items in the July 2013 Inspections were based on violations of the electrical standards found in Parts 1910 and 1915. (Exs. J-2, J-3, J-4). Electrical violations are not listed as one of the 21 items of "Inspection Focus" in the NEP. (Ex. J-4). During informal settlement negotiations, Respondent addressed its disagreement with Complainant issuing electrical citation items during the agreed-upon period of abatement for previously cited electrical violations as set forth in the Agreement. Notwithstanding this apparent discrepancy, Complainant determined that the issuance of the electrical Citation items was not in error. The parties could not reach a settlement, and Respondent filed its *Notice of Contest*.

Complainant contends that neither the Area Director nor Assistant Area Directors were notified that the Agreement had been executed by the Solicitor's Office and Respondent's counsel prior to the July 2013 Inspections. (Tr. 68, 93).[5] However, as noted above, both AD

5. The Court finds that Complainant had knowledge of the Agreement not only on the basis set forth in the narrative but through agency law. The Solicitor had knowledge of the Agreement; thus, that knowledge is imputed to

Rivera and AAD Fuentes had input into the settlement negotiations, going so far as to recommend the language contained in paragraph 8 of the Agreement. (Tr. 91–92). Further, as the following passage illustrates, AD Rivera knew that a settlement had been reached in June 2013:

> Q. You're aware that on the eve of trial, right before the trial was set, the government withdrew its citations, true?
>
> A. I knew the citations were withdrawn, yes.
>
> Q. Yet, you did not know, had no clue that the government had entered into this settlement agreement with your language in it until October of 2013 -- many, many, many, many months later, right?
>
> A. I didn't know the 60-day period. No.
>
> Q. That wasn't what your lawyer asked you. Your lawyer asked you did you know about the settlement agreement. He pulled out Exhibit 12, and you said, "No, I didn't know about it." So you only didn't know about the 60-day period? You knew about everything else but the 60-day period?
>
> A. We had discussed in general the -- the -- paragraph 8, but no. I didn't know when the 60-day period was.
>
> Q. No, no, sir. You knew though. True, you knew in June of 2013. You knew then in June of 2013, International Shipbreaking and OSHA entered into a settlement agreement that contained the language in paragraph 8 that you were involved in, true?
>
> A. No, I didn't know when it was signed.
>
> Q. You knew it was signed sometime in June of 2013?
>
> A. I knew a -- that I was -- we had a discussion with the solicitor's office and *I knew that the settlement had been reached* -- there was a settlement that had been reached. Now, the particulars of the 60-day period or any of those, those I did not know.

(Tr. 79–80) (emphasis added). So, while it may be the case that AD Rivera was unaware of the specific date when the Agreement had been *signed*, he was at least aware that an agreement had

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Complainant. Notice of an attorney is notice to the client. *See Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962) ("[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

been reached, the previous citation items had been withdrawn, and that a 60-day period of abatement had been provided. *See OSHA Field Operations Manual* ("FOM"), Ch. 8, p.3 (April 22, 2011) ("If a settlement is later requested by the employer, the Area Director will communicate the proposed terms to the RSOL, who will then draft and execute the agreement."). As the foregoing passage illustrates, it appears that the only meaningful gap in AD Rivera's knowledge was the trigger date for the running of the abatement period. This is important because the Agreement itself states that Respondent promises to complete the required abatement "within 60 days *of signing this agreement*." (Ex. J-7) (emphasis added). Notwithstanding the foregoing, there is no question that the Area Office was aware of the Agreement prior to issuing the Citations on December 5, 2013, and that the conditions that formed the basis for the issuance of the Citations occurred within the sixty (60) day abatement period provided in the Agreement. (Ex. J-12).

While the parties generally agree that the tenor of the July 2013 inspections were, to say the least, acrimonious, there is some debate over what was said and what *the inspectors* knew about the Agreement that had recently been executed. The Court finds that any debate over what the inspectors were aware of at the time of the July 2013 inspections is not material to the issue of whether Complainant should be estopped from pursuing the instant litigation. The decision to schedule the inspections, as well as to issue Citations, rested with the management of the Corpus Christi Area Office.

V. Controlling Case Law

A. Equitable Estoppel Prima Facie Elements

"[E]quitable estoppel responds to the unfairness inherent in denying the claimant some benefit after it has reasonably relied on the misrepresentations of the adverse party." *U.S. v.*

Marine Shale Processors, 81 F.3d 1329, 1348 (5th Cir. 1996). Courts have universally noted that "[e]quitable estoppel is a doctrine that is rarely valid against the government" and is applied "in only the narrowest of circumstances." *U.S. v. Bloom*, 112 F.3d 200, 205 (5th Cir. 1997). Thus, courts have required that a party seeking to estop the United States show some sort of "affirmative misconduct," an element normally not required to estop private parties." *Marine Shale Processors*, 81 F.3d at 1349. In addition to proving affirmative misconduct, the moving party must also establish: (1) that the government was aware of the relevant facts; (2) that the government intended its act or omission to be acted upon; (3) that the party seeking estoppel had no knowledge of the relevant facts; and (4) reasonably relied on the government's conduct and as a result of his reliance, suffered substantial injury. *Robertson-Dewar v. Holder*, 646 F.3d 226, 229 (5th Cir. 2011).

As a preface to the Court's analysis, as well as the ensuing discussion of the subsequent elements of an estoppel claim, the Court would like to point out a slight discrepancy between Commission case law and Fifth Circuit case law. In contrast with the five-element test laid out above, the Commission has applied a four-element test to a claim of estoppel against the government: (1) a misrepresentation by another party; (2) which the claimant reasonably relied upon; (3) to his detriment; and (4) affirmative misconduct. *Erie Coke Corp*., 15 BNA OSHC 1561 (No. 88-611, 1992). Commission ALJs are bound by both Commission precedent and by the precedent of the circuit wherein the controversy arose. *See Brooks Well Servicing, Inc.*, 20 BNA OSHC 1286 (No. 99-0849, 2003) ("When the law of the circuit to which a case would likely be appealed differs from the Commission's case law, we apply the law of that circuit . . . ."). In light of the possibility that this case could be appealed to the Fifth Circuit, the Court shall apply Fifth Circuit precedent. That said, the Court finds that elements (2), (3), and (4) of the

Fifth Circuit test are essentially a breakdown of the Commission's first element—a misrepresentation by another party. Accordingly, the Court's conclusion would be the same under either test.

B. Settlement Agreements Are a Creature of Contract Law

Settlement agreements "are in the nature of contracts." *Makins v. District of Columbia,* 277 F.3d 544, 546 (D.C. Cir. 2002). The Court recognizes that settlement agreements are enforced according to "federal common law principles." *Horizon Homes, Inc.*, 2007 WL 2265138 at *2 (No. 06-0095, 2007), *Phillips 66 Co.*, 16 BNA OSHC 1332, 1336 (90-1549, 1993). Where the language of an agreement is clear and unambiguous, its meaning must be determined "solely from that language." *Lumex Med. Prods., Inc.*, 18 BNA OSHC 2002 at *4 (No. 97-1522, 1999) (citing *Phillips 66 Co.*, *supra*). Also, where the language of a settlement agreement is unambiguous, its meaning is discerned within the "four corners" of the agreement. *U. S. v. ITT Cont. Baking Co.*, 420 U.S. 223, 233 (1975). However, parol evidence, *i.e.* extrinsic oral or written testimony, is admissible to prove fraud, accident or mistake, even if the testimony contradicts the terms of a complete integration in writing." *Phillips 66 Co.*, 16 BNA OSHC at 1338.

In this matter, there are no arguments that the Agreement is ambiguous. While there is also no argument that the Agreement is invalid or illegal, there are allegations by Respondent that Complainant engaged in affirmative misconduct: (i) by entering into the Agreement, which provided Complainant with enhanced abatement for the violations being vacated that he could not have received by solely upon relying on individual citations; and (ii) when having that Agreement in hand, by ignoring the provisions that inured to the benefit of Respondent. While

the Court finds the Agreement is valid, enforceable, and unambiguous, it will permit the introduction of parol evidence to determine if the *Affirmative Defense* will prevail.

VI. Equitable Estoppel Discussion

A. Affirmative Misconduct

Respondent contends Complainant engaged in affirmative misconduct by breaching the Agreement—"that is, by promising to give [Respondent] a sixty-day abatement period to establish an 'electrical safety' program but then seeking to penalize [Respondent] for 'electrical safety' issues that allegedly existed during the sixty-day abatement period." *Respondent's Memorandum in Support of its Motion for Summary Judgment* at 8–9. Complainant, on the other hand, contends that "it was purely coincidence due to resources and scheduling that the team came out shortly after they signed the agreement."[6] (Tr. 223). Contrary to Complainant's argument, however, the Court finds that there are simply too many coincidences to be coincidental.

"Although courts have been less than forthcoming in defining what a government official must do to satisfy the affirmative misconduct element of an estoppel defense, the cases support the conclusion that at minimum the official must intentionally or recklessly mislead the estoppel claimant." *Marine Shale Processors*, 81 F.3d at 1350. To qualify as affirmative misconduct, a "party must allege more than mere negligence, delay, inaction, or failure to follow an internal agency guideline." *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987).

In *Fano*, the claimant had been denied permanent resident alien status because there was a delay in processing his application. *Fano*, 806 F.2d at 1265. According to Fano, the INS "willfully, wantonly, recklessly, and negligently" delayed processing his application. *Id.* This

6. This coincidence could have been rectified by Complainant not issuing the Citations once he had received notification that the Agreement was a Final Order of the Commission since conducting an inspection does not necessarily have to result in the issuance of citations.

allegation was premised on INS's failure to timely process an expedited request pursuant to an internal agency policy. *Id.* at 1263. Further, Fano alleged that the INS had a "common practice of expediting applications such as his", which suggested that his application was singled out for discriminatory treatment. *Id.* at 1265. Although the question of whether INS actually committed affirmative misconduct was not before the court—the INS had filed a motion for summary judgment—the court determined that Fano's allegations were "broad enough to encompass the type of conduct sufficient for estoppel." *Id.* at 1266.

Although there are many more cases wherein the courts have refused to estop the government due to a lack of evidence regarding affirmative misconduct, those cases nonetheless provide contour and shape to the concept of affirmative misconduct. *See Marine Shale*, 81 F.3d at 1350 (holding that company failed to prove letter issued by government agency contained anything more than a negligent interpretation of the governing regulation); *Bloom*, 112 F.3d at 205–206 (holding that a failure to act does not rise to level of affirmative misconduct); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Prgrms, U.S. Dep't of Labor*, 976 F.2d 934, 938 (5th Cir. 1992) (holding that Commissioner's interpretation of his power under the governing statute was merely negligent—scope of governing statute had not previously been tested, rendering claim of affirmative misconduct unlikely); *Robertson-Dewar v. Holder*, 646 F.3d at 230 ("[Petitioner] has not shown affirmative misconduct by the government that goes beyond mere negligence or delay. He has no evidence that the government delayed ruling on his application with the intent of not acting therein until after he had aged out of the statute.").

In this case, Complainant emphasizes that, pursuant to the NEP, he is required to perform inspections on every single vessel that is scheduled for shipbreaking operations. Neither the Court, nor Respondent for that matter, takes issue with Complainant's obligation under the NEP.

Respondent's President, Jason Glasscock, went so far as to say that he recognized that the Wichita and the Vancouver would be subject to likely inspection. (Tr. 144). He also stated, however, that Complainant has not come out to inspect every vessel, which was confirmed by AAD Shields.[7] (Tr. 144, 199–200). While there is no dispute that Complainant's policy required inspections of each Navy and MARAD vessel, the circumstances surrounding the inspections of the Vancouver and Wichita call into question why: (1) they were scheduled at that particular time;[8] (2) involved a drastic increase in the number of inspectors; and (3) those particular NEP-mandated inspections, guided by a 21-point focus list (which does not include electrical), only yielded violations of the Part 1910 and 1915 electrical standards.

The Vancouver and the Wichita were scheduled to arrive at Respondent's facility on April 15th and 17th, respectively. (Exs. J-5, J-6). The contract for shipbreaking operations was to last approximately 11 months for each ship. (*Id.*). That means Complainant could have scheduled an inspection in the three months leading up to the execution of the Agreement or in the six months following the conclusion of the 60-day abatement period.[9] Instead, Complainant scheduled an inspection—pursuant to the NEP—at a time when the Area Office knew that a settlement had been reached and that the Agreement contained a 60-day abatement period for electrical safety issues.

7. This testimony shows the insincerity of Complainant's main argument in scheduling the inspections. Complainant argues that he must inspect every ship that is scheduled for ship breaking and thus it was necessary to inspect the Wichita and Vancouver when the inspections were conducted. When there is history of Complainant ignoring the NEP in not inspecting every ship that has come to port for shipbreaking, the Court is then perplexed as to why it should accept Complainant's argument as a credible explanation of his actions.

8. As the Area Director evidently used his discretion in the past to entirely forego inspections of ships—even though required by the NEP—he could have used that same discretion to honor the terms of the Agreement and schedule the Vancouver and Wichita inspections accordingly.

9. Pursuant to the plain language of the Agreement, the period of abatement ran for 60 days from the *signing* of the Agreement or from June 27, 2013 to August 27, 2013. That left six whole months, between the end of August 2013 and the beginning of March 2014, within which to complete the inspection.

Regardless of whether Complainant knew about the specific contents of the Agreement at the time the disputed inspections took place, Complainant admits that it still would have ordered the inspections to take place and issued the disputed citation items. (Tr. 66). Concluding that the hazards cited in the July 2013 inspection were not covered by paragraph 8 of the Agreement, AD Rivera stated, "Well, the—the programs as they were called, the electrical safety programs that—that we had required in the settlement agreement were for inspection purposes. They were for purposes of attempting to discover electrical issues. They were not for any particular electrical hazards." (Tr. 72). In other words, Complainant contends that the content of the Agreement's electrical abatement provisions does not encapsulate the specific violations at issue here and thus did not control its decision to cite. The Court finds that this interpretation is an intentional misinterpretation of paragraph 8 of the Agreement in an apparent act to justify the actions taken in conformity therewith, which deprived Respondent of a mutually bargained-for right. *See also* 29 U.S.C. § 658(a) ("[T]he citation shall fix a reasonable time for the abatement of the violation.").

To recap, the Agreement provided that within 60 days of signing the Agreement, Respondent will:

> a) institute an electrical safety check program; (b) designate a person to inspect outlets and the outer insulation of cords for tears, exposed wires, etc.; (c) have an electrician, whose certification is from an American state or territory, on staff; and (d) institute an "assured equipment grounding conductor program" such as the one found in construction standard 29 C.F.R. § 1926.404(b)(iii). At a minimum this program requires that electric equipment is inspected quarterly and that such inspections are documented.

(Ex. J-7). Complainant contends that the foregoing is not applicable to the citation items issued as a result of the July 2013 inspection because they only address inspection-related issues and do not encompass specific violations of Parts 1910 and 1915.

Complainant cites to a number of cases for the proposition that "[a]batement requiring Respondent to complete programmatic abatement measures does not exempt Respondent from citations for actual electrical hazards." *Sec'y Response to Resp't Motion for Summary Judgment* at 6. In *Alden Leeds v. OSHRC*, cited by Complainant, the Third Circuit was presented with the issue of whether "the 33 infractions cited in 1995 may properly be penalized as a 'failure to abate' the violations cited in 1993, where none of the 13 specific instances of improper storage listed in the 1993 citation was cited in the 1995 notification but all of the infractions listed on both occasions related to the improper storage of oxidizers." 298 F.3d 256, 260 (3d Cir. 2002). Ultimately, the court held that, because the language of the citation items referred to discrete "violations", the 1993 citations did not give the respondent adequate notice that it would be subject to an FTA notification if it did not correct the more general categories of improper storage practices. *Id.* at 263.

Clearly, citation items alleging a specific hazard are different from items alleging a violation of an inspection requirement, which is designed to identify and prevent the occurrence of such hazards. The Commission has held that the presence of a specific hazard does not, in and of itself, establish a failure to inspect. *See, e.g.*, *Martin Construction, Inc.*, 21 BNA OSHC 2187 (No. 06-0700, 2007) (ALJ); *Century Steel Erectors, Inc.*, 13 BNA OSHC 1484 (No. 86-1509, 1987). Accordingly, Complainant alleges that the "reverse" is true; namely, that "the existence of a safety program does not guarantee that no violative conditions will exist on the site." *Sec'y Response to Resp't Motion for Summary Judgment* at 7. That the presence of a specific hazard does not, by itself, prove a failure to inspect is not surprising—it is an evidentiary issue regarding the quantum of proof required to establish an inspection violation. Complainant is also correct that the presence of a safety program is not a guarantee of a violation-free workplace. However,

Complainant would also be hard-pressed to say that a properly implemented electrical inspection program does not serve to reduce the incidence of hazards—else why would such requirements be included in the Agreement, the focus of which was specific electrical hazards (amongst others) identified during the 2011 inspections?

The Court elects to read and give plain meaning to the clear and unambiguous language of paragraph 8 as it appears in the Agreement. Undoubtedly, the abatement measures contained in paragraph 8 are broad and were intended by the parties to be so broad. This interpretation gives credence to the testimony of Mr. Rivera, that he bargained for, and received, abatement far in excess of what is allowed by the standards for shipbreaking. (Ex. J-7 at ¶ 8). The "assured equipment grounding conductor program" is a construction standard and, thus, inapplicable to maritime activities. This much was admitted by AD Rivera—"Well, an assured equipment conducting—conductor program isn't required, so I wouldn't have allowed the citation." (Tr. 73). The broad scope of paragraph 8 also explains why Respondent agreed to implement far-reaching and comprehensive abatement measures—Glasscock estimated that the cost to implement the proposed abatement was roughly 1.25 million dollars—in exchange for a 60-day abatement period and Complainant vacating the 2011 citation items. (Tr. 115; Ex. J-7). Given the breadth of the abatement provisions, the Court finds that the only reasonable interpretation is that paragraph 8 of the Agreement is applicable to electrical violations generally.

For example, the "assured equipment grounding conductor program" requires, at a minimum: (a) a written description of the program; (2) designation of a competent person; (3) cord sets, attachment caps, plugs and receptacles of cord sets, and any equipment connected by cord and plug shall be visually inspected for damage or defects before each day's use, and any such defective equipment shall be taken out of service; (4) the timing and type of tests that shall

be performed on all cord sets; and (5) that such tests shall be recorded. 29 C.F.R. § 1926.404(b)(1)(iii). In essence, this is a reiteration of, and expansion upon, the other three abatement provisions in paragraph 8 of the Agreement, which require an electrical safety check program, a designated person to inspect outlets and insulation, and the appointment of a qualified electrician. (Ex. J-7).

If such expansive inspection, testing, and out-of-service requirements were put in place to address specific electrical hazards discovered in the first set of inspections, then how can the abatement provisions of the Agreement be interpreted in any other way but to address prospective electrical hazards? The 2011 inspections unveiled multiple specific hazards resulting from violations of electrical standards, including:

- Flexible cords with missing/broken insulation, exposing bare copper conductors in violation of 1910.303(b)(1);
- Inoperative ground fault circuit interrupter receptacles and incomplete conduit in violation of 1910.303(b)(2);
- Improperly marked utility boxes in violation of 1910.303(f)(2);
- Conductors connected to outlet in reverse order, creating shock hazard in violation of 1910.304(a)(2);
- Flexible electrical cord with 110-volt plug without ground prong in violation of 1910.304(g)(5);
- Failure to effectively close unused openings in electrical boxes in violation of 1910.305(b)(1)(ii);

(Exs. J-8, J-9). These violations, with the possible exception of those issued pursuant to 1910.303(b)(1), which is an examination provision, all address specific electrical hazards.[10]

In lieu of requiring specific abatement of the identified electrical hazards, Complainant bargained for the implementation of a comprehensive electrical program, which is clearly

10. Though it should be noted that 1910.303(b)(1) was cited in both the 2011 and 2013 inspections. (Exs. J-2, J-8).

designed to uncover any electrical hazard in the first instance. In that respect, Complainant has taken inconsistent positions with respect to the effect of paragraph 8. On one hand, such broad-reaching, inspection-focused abatement provisions were viewed as sufficient to abate specific hazards found in the 2011 inspections. On the other, Complainant argues that those same abatement provisions are too broad to apply to the violations identified in July 2013, even though in many respects the 2013 violations were similar to the 2011 violations in terms of the hazards presented. (Exs. J-2, J-3). The former position comports with the language of paragraph 6 of the Agreement, which states, "Respondent promises to grant Complainant access to the subject workplace after the abatement date for the specific and limited purpose of determining if the conditions *described in the Citation* have been corrected." (Ex. J-7) (emphasis added). In other words, if Complainant viewed the broad-based, inspection-focused abatement measures as sufficient to abate the specific conditions described in the 2011 Citations, then he is, at the least, being disingenuous when he claims that those same measures do not apply with equal force to the specific hazards alleged in the 2013 Citations. *See Kiewit Western Co.*, 16 BNA OSHC 1689, 1694 (No. 91-2578, 1994) ("[T]he remedial purpose of the Act does not give license to disregard . . . plain meaning . . . . The Secretary should not be permitted to rely on the purpose of the Act to require what may have been intended but was not clearly stated . . . .").

Complainant counters that "we were charging them with instituting a method to—to inspect electrical equipment. But it was not and—and it—it did not relieve them of their responsibility to correct hazards on their work site." (Tr. 77). This was echoed by Complainant's counsel, who repeatedly characterized Respondent's argument as a request for a "free ride". (Tr. 76, 77, 147). Respondent does not claim, nor does the Agreement imply, that it was entitled to a free ride or that the abatement provisions somehow relieved them of their obligations under the

Act.[11] In fact, in the section of the Agreement addressing abatement, Respondent agreed to both grant Complainant access to the workplace after the abatement period to determine if the conditions in the Citation had been corrected[12] and to "continue its good-faith efforts to comply with the [Act]." (Ex. J-7). For what other reason would such a provision be placed in the Agreement but to reaffirm Respondent's responsibility to correct hazards and comply with the Act during the period of abatement? Given the expense involved and the comprehensive nature of the abatement, the 60-day period could hardly be classified as a free ride.[13] Further, the implementation of the abatement provisions listed in paragraph 8 of the Agreement not only requires inspection of electrical equipment but also mandates its repair or removal from service if deficiencies or damage is identified. *See* 29 C.F.R. § 1926.404(b)(1)(iii). (Ex. J-7). It stands to reason that if a condition of abatement is the implementation of a comprehensive electrical program, then a certain amount of time will be required not only to implement the plan itself, but to address the hazards at which the plan is targeted.[14] (Tr. 115–16).

11. As a side note, the Court is concerned with Complainant's characterization of the abatement period as a free ride. The abatement period is a statutory right. *See* 29 U.S.C. § 658(a) (statute requires that citation shall fix a "reasonable time for abatement of the violation"); *see also* 29 C.F.R. § 1903.19 ("*Abatement* means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by OSHA during an inspection."). Further, to the extent that Complainant perceives this period of time as a free ride of sorts, it could have implemented interim requirements to ensure the safety of Respondent's employees. In fact, Complainant stopped just short of this by including a provision that required Respondent to "continue its good faith efforts to comply with the [Act]."

12. With respect to this provision of the Agreement, Complainant's counsel bemoaned that paragraph 6 was the result of "poor lawyering" and should not have been included. (Tr. 216). Whether that is the case does not change the provision's import—Respondent bargained for and agreed to a 60-day abatement period.

13. In providing Respondent 60 days to abate, Complainant has defined the reasonable time for abatement to occur, which is afforded to Respondent by statute. Providing a reasonable time for abatement to be accomplished, therefore, is not a free ride, as alleged by Complainant. 29 U.S.C. § 658(a). This much is clear when read with Respondent's obligation set forth in paragraph 7 of the Agreement, which required Respondent to abate hazards that it discovered during its abatement period. Setting forth the timeframe for abatement is within the discretion the Area Director, who chose to exercise that discretion through the provisions of the Agreement. The Area Director had the authority to do so under the FOM, Ch. 3, p. 8-1.

14. Further, to the extent that Respondent failed to abate within the time allowed by the Agreement, Complainant has the power to issue a failure-to-abate notice (FTA), which imposes a penalty of $7,000 for each day during which the failure or violation continues. 29 U.S.C. § 666(d).

The Court is also troubled by the number of inspectors allocated to the inspection of the Vancouver and the Wichita. The 2011 inspections involved two ships, two inspectors, and resulted in a wide range of violations pursuant to the NEP. (Tr. 155; Exs. J-8, J-9). The 2013 inspections involved the same number of ships, six inspectors, and, though pursuant to the NEP's 21-point Inspection Focus, resulted only in electrical violations.[15] (Exs. J-1, J-2, J-3). Complainant contends that the threefold increase in inspectors was due to the need for training some of the CSHOs that were new to the office. (Tr. 200).[16] According to Glasscock, during his time as a consultant and with Respondent, he had never seen that many inspectors at one time. (Tr. 124–25).

The fact that Complainant conducted an inspection—purportedly pursuant to the NEP—that resulted in only electrical violations further supports the Court's conclusion that Respondent acted recklessly, if not intentionally, in scheduling the inspection in close proximity to the signing of the Agreement and subsequently issuing only electrical citation items that were clearly covered by the abatement provision. The 2013 Inspections had three times as many inspectors to cover the same 21-point Inspection Focus list on the same number of ships as the 2011 Inspections and only managed to find violations of the electrical standards, which, as has already been stated, is not a specified point of focus for the NEP program. (Ex. J-4).

Compared to the case law discussed above, this case does not involve a delay in processing an application, an understandable misinterpretation of a previously untested statute or regulation, nor does it involve Complainant's failure to act in accordance with a self-generated

15. As previously established, the NEP has set forth a 21-point Inspection Focus, which constitutes part of a comprehensive NEP inspection. The Court wonders how a comprehensive inspection as required by the NEP could be accomplished in only one day for each vessel. (J-2, J-3). In 2011, when OSHA issued Respondent three citations consisting of 14 items, the inspection took place from May 26, 2011 through November 18, 2011.

16. Since the Vancouver and Wichita were in port until March 2014, the Court finds there was sufficient time for the Area Director to schedule training for these new employees over the course of that timeframe versus sending them in all at once to locate electrical violations. The Court questions how comprehensive the training could have been when all that was looked at and cited as violations were electrical.

enforcement policy. *See Marine Shale*, 81 F.3d at 1350; *Bloom*, 112 F.3d at 205–206; *Ingalls Shipbuilding, Inc.*, 976 F.2d at 938; *Robertson-Dewar v. Holder*, 646 F.3d at 230; *see also Fano*, 806 F.2d at 1265, *supra*. Complainant knew that the 2011 Citations had been vacated, that a settlement had been reached in the 2011 cases, that Respondent had a 60-day abatement period covering electrical standards, and nevertheless conducted inspections and issued citations limited to the sole issue addressed in the abatement provisions—electrical. Whether through the scheduling of the inspection, or issuance of the citations, Complainant targeted a discrete subset of violations that were clearly covered under the terms of the comprehensive abatement provisions of the Agreement. Complainant acted recklessly, if not intentionally, in depriving Respondent of a mutually bargained-for right to reasonable abatement. By characterizing this right as a "free ride" or as somehow absolving Respondent of its statutory obligations, Complainant displays a certain animus that undermines its claims of coincidence.

As the Supreme Court stated in *Heckler*, estoppel may be appropriate when the "public interest in ensuring that the Government can enforce the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with the Government." 467 U.S. at 60. Were the Court to accept Complainant's arguments, it would be tacitly approving Complainant's view that an abatement period is nothing more than a free ride, which undermines not only an agreed-upon right in this case, but a right that is recognized in the Act itself. The Court declines this invitation and finds that Complainant committed affirmative misconduct.

B. Complainant was Aware of Relevant Facts

As to the relevant facts of which Complainant was aware, the Court finds that there are a couple that are germane to the present analysis. First, as established above, the Court finds

Complainant was aware that a settlement had been reached in June and that the terms included comprehensive electrical abatement and a 60-day abatement period. Second, Complainant was also aware that two ships—the Vancouver and the Wichita—were scheduled for shipbreaking operations at Respondent's facility starting in April 2013. (Exs. J-5, J-6). Third, Complainant was aware that it had the authority to schedule an inspection of the Wichita and Vancouver at any time, pursuant to the NEP. These facts, while relevant, were also known to Respondent. Glasscock admitted that Complainant had the authority to come in to inspect at any time. (Tr. 144).

What Complainant knew, and Respondent did not know, however, is that Complainant had no intention of complying with the plain meaning of the abatement provisions contained in the Agreement. Instead, as testified to by AD Rivera and AAD Shields, they did not view the comprehensive electrical abatement program, with its attendant 60-day abatement period, as encapsulating specific violations of the electrical standards—as opposed to inspection or testing violations. (Tr. 77, 194). This was reflected not only in the decision to inspect Respondent notwithstanding AD Rivera's knowledge that a settlement had been reached, but also Complainant's decision to cite Respondent pursuant to those specific electrical standards after Complainant received a copy of the Agreement and its attendant abatement language.

Along those same lines, the Court finds that Complainant intended to inspect the Vancouver and Wichita during the sixty day abatement period.[17] His rationale for doing so

17. At the hearing, the Area Director testified that he was prohibited under section 17(f) of the Act and 29 C.F.R. § 1903.6 from providing advanced notice of inspections; thus, the reason Respondent could not be advised of the intentions of Complainant to inspect the Wichita and Vancouver. While this testimony is true, it is not a complete and accurate statement of the authority of the Area Director in providing notice. The FOM recognizes that there may be occasions when advanced notice is necessary to conduct an effective investigation. The FOM recognizes that these occasions are narrow exceptions to the statutory provision against advanced notice. The FOM vests with the Area Director or his designee the authority to provide advanced notice in four identified instances. Three of the instances identified in the FOM could have been used as the basis for notifying Respondent of the intention of Complainant to inspect the Vancouver and Wichita during the 60 day abatement period. *See* FOM, Ch. 3, p. 3-4.

included the previously discussed interpretation of the Agreement, as well as his claim that he had to do an inspection during that timeframe because the NEP required each ship scheduled for ship breaking to be inspected and due to scheduling issues. These arguments fail the reasonableness test. First, while the NEP requires inspections of every ship scheduled for ship breaking, as previously noted, Complainant could have done so from April 17, 2013 until June 27, 2013, and from August 27, 2013 until March 2014. Complainant did not have to inspect during the abatement period to comply with the NEP. In fact, Complainant had nearly ten months while the Vancouver and Wichita were in port to address any scheduling issues or conflict. Also, there have been past instances where the Area Director did not (or was unable to) comply with the NEP's requirement that *every* ship scheduled for ship breaking be inspected. The Court finds that this element has been satisfied.

C. Complainant Intended its Act or Omission to be Acted Upon

Complainant, in the Agreement, agreed that Respondent would have 60 days to implement the agreed-upon abatement. The Agreement was reached after months of litigation and settlement discussions and was designed to bring Respondent into compliance with the maritime, general industry, and, to a limited extent, construction electrical requirements. *See Marine Shale Processors*, 81 F.3d at 1351 ("Although the district court made no findings as to intent, the fact that LDEQ issued its letter in the context of negotiations allegedly designed to bring MSP into compliance with RCRA's storage regulations suggest that LDEQ intended for MSP to rely on the letter."). This was not merely a letter or some off-hand remark by a CSHO; it was a formal Agreement, negotiated by the parties, that lays out the respective obligations and

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However, doing so would have likely resulted in Respondent not entering into the Agreement which provided Complainant more comprehensive abatement than it could ever get relying solely on the specific citations themselves. Thus, Complainant had good reason to not want Respondent to know their intentions to inspect during the abatement period.

rights of both Complainant and Respondent. Indeed, paragraph 9 of the Agreement describes the consequences of noncompliance, which solidifies the Court's determination that Complainant intended that Respondent would act in accordance with the Agreement's provisions. (Ex. J-7). The Court finds that this element has been satisfied.

D. Respondent Had No Knowledge of Relevant Facts

As noted above, there are many facts that were available to both parties regarding the inspections, citations, and agreement at issue. What Respondent did not know, indeed could not have known, was that Complainant would interpret the Agreement in such a way as to render moot the inclusion of a 60-day abatement period. The following colloquy between Glasscock and Respondent's counsel is illustrative:

> Q. So I guess my – my next question would be if you knew that OSHA had this belief that they could come in within the 60-day period of time and still cite you for certain electrical violations, would you have even entered into this agreement?
>
> A. It would have been of no benefit to me.

(Tr. 116). In other words, Respondent did not know that Complainant interpreted the abatement provisions of the Agreement such that it could issue electrical citations during the abatement period. If that were the case, as stated by Glasscock, Respondent would not have entered the Agreement in the first place. There is nothing in the Agreement, the Act, or case law to support Complainant's strained interpretation of the abatement provisions. In fact, as described above, the plain language of the Agreement, when coupled with the Act's recognition of a statutory right to abatement, compels the opposite conclusion. As such, there was nothing available to Respondent to place it on notice of Complainant's interpretation. Further, as discussed in Section VI.B, *supra*, the Court also finds that Respondent was also unaware of Complainant's intent to schedule an inspection during the abatement period. Though Respondent may have

been aware of the possibility of an inspection as a general proposition, based on the language of the Agreement and terms of the NEP (which does not include electrical), it could not have known that an inspection targeted at electrical violations would take place during the abatement period. Accordingly, the Court finds that Respondent had no knowledge of the relevant facts.

E. Respondent Reasonably Relied on Complainant's Representations to its Detriment

"When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in its position." *Heckler*, 467 U.S. at 62. However, it is not enough for Respondent to merely suffer a detrimental change in position. The Court must also determine that it was reasonable for Respondent to rely on the representations of Complainant. As stated by the Supreme Court:

> It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority, and that those who seek public funds act with scrupulous exactitude, argues strongly for the conclusion that an estoppel cannot be erected on the basis of the oral advice that underlay respondent's cost reports.

Id. at 65. *See also Erie Coke*, 15 BNA OSHC 1561 at *10 (noting that a party is less justified in relying on oral, as opposed to written, advice). Further, "a citizen's first defense to misstatements from a government official regarding the scope and applicability of a particular law is self-help, that is, her own research to discover the applicable legal principles." *Marine Shale Processors*, 81 F.3d at 1350.

There are a number of reasons why Respondent's reliance was reasonable. First, Complainant represented to Respondent, in a written Agreement, that Respondent would have 60 days to implement a comprehensive electrical program. This was not the oral advice of a CSHO

or even a letter from an agency representative acting outside the bounds of his authority.[18] *See, e.g.*, *Erie Coke*, 15 BNA OSHC 1561 at *10; *Ingalls Shipbuilding, Inc.*, 976 F.2d 934. The Agreement and the provisions contained therein were the product of lengthy negotiations and reflects the considered judgment of both parties. Second, given the comprehensive nature of the abatement, the size of the worksite, and the cost involved, it was reasonable for Respondent to assume that it had bargained for and received 60 days to implement the "required abatement." (Tr. 115–16, 152; Ex. J-7). Third, there is no statute, standard, or principle of law that would have alerted Respondent to Complainant's strained and unreasonable interpretation of the Agreement's abatement provisions. *See Heckler*, 467 U.S. at 65–66 ("[T]he regulations governing the cost reimbursement provisions of Medicare should and did put respondent on ample notice of the care with which its cost reports must be prepared . . . . Yet respondent prepared those reports on the basis of an oral policy judgment by an official who, it should have known, was not in the business of making policy."). The Act not only grants employers the right to a "reasonable time for the abatement of the violation", but it also provides employers the opportunity to litigate the reasonableness of the abatement proposed in a Citation. *See* 29 U.S.C. §§ 658(a), 659(c). Respondent obtained, in the form of a written Agreement, a period of time to abate, which the Act provides. To the extent that Respondent was allowed to complete the required abatement within the period of time provided, it would have complied with its obligations under the Agreement. Finally, as stated by Glasscock, Respondent did not believe it was receiving a "free ride" or that it would not be inspected at all; rather, Respondent believed it would receive the benefit of its bargain with Complainant—a reasonable amount of time to implement the required, comprehensive electrical abatement. There was simply no objective

18. In fact, the Area Director is specifically vested with the authority to enter into legally binding settlement agreements. *See* FOM, Ch. 8.

evidence—whether through the agreement, the law, or otherwise—to suggest that Respondent's reliance on Complainant's representations was unjustified.

The Court also finds that Respondent suffered a detriment by relying on Complainant's representations. As noted above, Respondent allocated significant funds ($1.25 million) and resources to implement the agreed-upon abatement. Respondent also agreed to implement construction-based standards into its comprehensive electrical program even though construction standards do not apply to Respondent's worksite. (Ex. J-7). Notwithstanding Respondent's efforts, and the reasonable assumption that it had 60 days to abate, Complainant initiated a purported NEP inspection two weeks after the Agreement was signed. This inspection was performed with three times the number of inspectors that came in 2011 and, as illustrated by the citations that were issued, focused solely on electrical violations. Respondent's right to a reasonable period of abatement is enshrined in the Act and was memorialized in the parties' Agreement. This was disregarded by Complainant when he initiated the targeted inspections in July 2013 and again when he decided to issue the Citations. As such, Respondent was, "deprived of something to which it was entitled of right . . . ." *Heckler*, 467 U.S. at 62.

VII. Conclusion

The Court has found the Agreement is unambiguous. There is no doubt in the Court's mind that the Agreement reflects the settlement reached by the parties. Paragraph 8 sets forth the comprehensive electrical safety abatement, which Complainant expected Respondent to implement. To ensure that the comprehensive steps in paragraph 8 were considered abatement—so that if Respondent did not give Complainant what he wanted the Agreement could be enforced at the Court of Appeals—paragraph 9 made clear that paragraph 8 was considered "required abatement". Only after the abatement date set forth in paragraph 8 had passed,

paragraph 6 then provided Complainant with the right to access Respondent's workplace to verify abatement.[19] And finally, during this period of time, pursuant to paragraph 7, Respondent promised to use its good faith efforts to comply with the Act. By its ruling, the Court is doing nothing more than recognizing the plain terms of the Agreement through the doctrine of equitable estoppel.

As noted above, the Supreme Court has stated that estoppel may be appropriate when the "public interest in ensuring that the Government can enforce the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with the Government." 467 U.S. at 60. Complainant maintains that "it was purely coincidence due to resources and scheduling that the team came out shortly after they signed the agreement." (Tr. 223). The Court has found otherwise.

Among the coincidences claimed by Complainant: (1) an inspection scheduled two weeks after the Agreement was signed, even though AD Rivera was aware of the settlement; (2) a threefold increase in the number of inspectors as compared to previous inspections; and (3) every citation item related to the inspection of the Vancouver and Wichita was issued pursuant to an electrical standard, even though the NEP has a 21-point "Inspection Focus" list, which does not include electrical hazards amongst the "identified hazards and workplace activities" in the NEP. These "coincidences", when coupled with Complainant's patently unreasonable interpretation of the Agreement's abatement provisions and his repeated characterization of the abatement period as a "free ride", illustrate that Complainant recklessly, if not intentionally, misrepresented its intent to abide by the terms of the Agreement. In so doing, Complainant has

19. As previously stated, Complainant's counsel stated that the inclusion of this paragraph was "bad lawyering". Under the FOM, the Solicitor is charged with drafting the Agreement. Regardless of whether the inclusion of this provision does, in fact, constitute bad lawyering, that does not justify ignoring the clear mandates of the Agreement. *See,* FOM, Ch. 8, p.3. (The Area Director will communicate the proposed terms of the settlement to the RSOL, who will then draft and execute the Agreement).

fallen short of any standard of decency, honor, or reliability in its dealings with Respondent, no matter how minimal.

In light of the foregoing, Complainant shall be estopped from pursuing the above-captioned cases. Accordingly, each of the Citations found in Docket Nos. 14-0031 and 14-0032 are hereby VACATED.

SO ORDERED.

/s/ Patrick B. Augustine

Date: June 23, 2015
Denver, Colorado

Patrick B. Augustine
Judge, OSHRC