Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Paul Simkus, Affected Employee Mr. Simkus, v. Secretary of Labor, Respondent, IBT Local Union 781, Authorized Employee Representative, United Airlines, Inc., Party.	)	OSHRC Docket No. 15-1756 Petition for Modification of Abatement Period Per 29 C.F.R. § 2200.38 EXPEDITED PROCEEDING PER 29 C.F.R. § 2200.103
		CONSOLIDATED
Secretary of Labor, Complainant, v. United Airlines, Inc., Respondent, Paul Simkus, Party, IBT Local Union 781, Authorized Employee Representative.	)	OSHRC Docket No. 15-2019

ORDER GRANTING SECRETARY'S MOTION TO DISMISS AFFECTED EMPLOYEE'S CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION, DENYING THE SECRETARY'S MOTION FOR A PROTECTIVE ORDER AS MOOT, AND DENYING MR. SIMKUS' MOTION FOR SANCTIONS

I. FACTS

On about March 23, 2015 and May 23, 2015, United Airlines, Inc. (United) employee, Paul Simkus (Mr. Simkus), filed complaints with the Occupational Safety & Health Administration (OSHA) against United for alleged violations of asbestos abatement during renovation or remodeling of classrooms 8101, 8103, 8104, and 8105 (and other places) in United's Training Center located at 1200 East Algonquin Road, Elk Grove, Illinois (United's Training Center).

OSHA conducted Inspection No. 1049817 of United's Training Center between March 30, 2015 and September 21, 2015. [redacted] issued two citations under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (the OSH Act), consisting of three items to United on September 28, 2015 as result of its inspection. The first citation included two items, both Serious. Item 1 was for a failure to keep necessary records concerning the presence, location, and quantity of asbestos-containing material or presumed asbestos-containing material for classrooms 8101, 8103, 8104, and 8105 of the subject facility.[1] Item 2 was for a failure to clean up spills and sudden releases of material containing asbestos in

[1] Citation 1, Item 1, states:

> Type of Violation: **Serious**
>
> 29 CFR 1910.1001(j)(2)(ii): Installed Asbestos Containing Material. Building and facility owners did not maintain records of all information required to be provided pursuant to this section and/or otherwise known to the building owner concerning the presence, location and quantity of ACM and PACM in the building/facility.
>
> a) United Airlines Inc. - The employer did not ensure that records of all information concerning the presence, location and quantity of ACM and PACM in the building/facility for classrooms 8101, 8103, 8104 and 8105 were maintained.
>
> In accordance with 29 CFR 1903.19(d), abatement certification is required for this violation (using the CERTIFICATION OF CORRECTIVE ACTION WORK.SHEET), and in addition, documentation demonstrating that abatement complete must be included with your certification. This document may include, bet is not limited to, evidence of the purchase or repair of the equipment photographic or video evidence of abatement, or other written records.
>
> Date by Which Violation Must be Abated: 11/16/2015

classrooms 8103 and 8104 as soon as possible.[2] Citation 1, Item 2, did not identify when the alleged spills and sudden releases of material containing asbestos occurred. OSHA also cited United for failure to maintain certain training records at Citation 2, Item 1.

The Citation and Notification of Penalties required United to abate the cited conditions by November 16, 2015. The Citation and Notification of Penalties also included a "Notice to Employees" that stated:

> The law gives *an employee* or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above and postmarked within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this Citation and Notification of Penalty. (emphasis added).

OSHA held an informal conference with United on October 8, 2015 wherein United provided OSHA with verification that all of the cited conditions had been abated. United acknowledged that the records related to asbestos removal in the training classrooms identified in the first citation were missing, and that the records could not be reconstructed. United provided additional evidence that it had initiated a comprehensive asbestos survey for all

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Proposed Penalty: $7000.00

[2] Citation 1, Item 2, states

Type of Violation: **Serious**

29 CFR 1910.1001(k)(2): All spills and sudden releases of material containing asbestos were not cleaned up as soon as possible.

a) United Airlines Inc. - Releases of material containing asbestos in classrooms 8103 and 8104 were not cleaned as soon as possible.

In accordance with 29 CFR 1903.19(d), abatement certification is required for this violation (using the CERTIFICATION OF CORRECTIVE ACTION WORKSHEET), and in addition, documentation demonstrating that abatement complete must be included with your certification. This document may include, bet is not limited to, evidence of the purchase or repair of the equipment photographic or video evidence of abatement, or other written records.

Date by Which Violation Must be Abated: 11/16/2015
Proposed Penalty: $7000.00

buildings at the subject facility. United further indicated at the informal conference that classrooms 8103 and 8104 were subject to renovation in October, 2014. The contractor for the October, 2014 renovation, according to United, stated that it removed fiberglass insulation from those classrooms. United further stated that the classrooms were closed in May, 2015 in response to employee concerns, and that it hired a second contractor to find and remove any asbestos-containing debris, which the second contractor did in May, 2015, roughly two months after OSHA opened its inspection. Finally, United provided verification that all but two maintenance employees received training, that those employees would be trained, and that it now has a system to track training requirements for maintenance employees. OSHA considered these measures adequate abatement for all of the subject citations and items.

On October 15, 2015, [redacted] received a facsimile from Mr. Simkus, with a petition dated October 12, 2015, with a subject line "Notice of Request to Contest and Participate."[3] In his October 12, 2015 Petition, Mr. Simkus "contest[ed]" the proceedings and OSHA's investigative findings "in its entirety." He further stated that he contested "OSHA's the [sic] investigative findings and abatement plan designed by OSHA, it is **completely inaccurate**, insufficient and highly unreasonable." (emphasis in bold in the original).[4]

[3] In the Petition's "Re" line, Mr. Simkus referred to Inspection No. 1049817, and his two earlier complaints to OSHA by number.

[4] On about October 19, 2015, Mr. Simkus submitted to OSHA a "Notice of Contest to all Citations and Proposed Penalties." The Notice's "Re" line also referred to Inspection No. 1049817, and his two earlier complaints to OSHA by number. Mr. Simkus requested "to invoke party status." Mr. Simkus repeated the matters he had contested in his October 12, 2015 petition and "contest[ed]" the proceedings and OSHA's investigative findings "in its entirety." He further stated that he contested "OSHA's the [sic] investigative findings and abatement plan designed by OSHA, it is **completely inaccurate**, insufficient and highly unreasonable." (emphasis in bold in the original). In his Response to the Secretary's November 6, 2015 Motion to Dismiss, Mr. Simkus characterized his October 19, 2015 notice as an "Amended Petition and Notice of Contest" and as an "Amended Notice of Contest and Petition to OSHA's proposed abatement plan and dates for citation 1, item

By letter dated October 19, 2015, the International Brotherhood of Teamsters (IBT) and its Local Union 781 informed the Occupational Safety and Health Review Commission (Commission) that they wished to elect party status in the matter pertaining to OSHA Inspection No. 1049817. They are the authorized bargaining agent for United's employees and the Authorized Employee Representative (AER). This letter was received by the Commission on October 22, 2015.

On October 20, 2015, United submitted its Notice of Contest to the Citations and Notifications of Penalty for the violations alleged by OSHA to have occurred at United's Training Center. United's Notice of Contest stated: "Respondent contests each and every alleged citation, item, classification, proposed penalty, abatement date and proposed method of abatement." OSHA received United's Notice of Contest on October 20, 2015.

On October 21, 2015, [redacted] forwarded Mr. Simkus' October 12, 2015 Petition to the Commission. Mr. Simkus' October 12, 2015 Petition was received by the Commission on October 21, 2015.

On October 22, 2015, the Commission docketed Mr. Simkus' October 12, 2015 Petition as *Paul Simkus, Affected Employee, v. Secretary of Labor*, Respondent, Docket No. 15-1756.

On October 22, 2015, [redacted] timely filed OSHA's statement of reasons the abatement period was not unreasonable with the Commission. *See* Commission Rule 38(a); 29 C.F.R. § 2200.38(a). [redacted] indicated "on October 8, 2015, the employer [United] provided OSHA with written abatement documentation for each violation."

1, citation 1, item 2 and citation 2, item 1."

By Order dated October 27, 2015, Chief Judge Covette Rooney granted the AER's request for party status in OSHRC Docket No. 15-1756.

By Order dated October 29, 2015, the Court set a Pre-Hearing Scheduling Conference to be conducted on November 3, 2015 in Docket No. 15-1756.

On October 30, 2015, Mr. Simkus timely filed his response to OSHA's Statement of Reasons (Response to OSHA's Statement of Reasons). *See* Commission Rule 38(b); 29 C.F.R. § 2200.38(b). He objected "to the proposed abatement plan and abatement period designed by OSHA it is unreasonable because the abatement plan was based on false information that was procured through fraud which will continue to cause United Airlines employees and others to be exposed to airborne asbestos." He stated that he objected "to the abatement plan and abatement dates in its entirety" for a myriad of reasons outlined in Mr. Simkus' Response to OSHA's Statement of Reasons. He asserted that he contested OSHA's proposed abatement date and abatement plan. He again requested to invoke "Party Status."

By letter to the Chief Judge and the Court dated November 2, 2015, United elected party status in Docket No. 15-1756.

The court held a recorded pre-hearing conference call on November 3, 2015 during which all four parties participated. During the November 3, 2015 conference, the Court stated that it was not going to set a hearing date in Docket No. 15-1756; and instead was giving the Secretary the opportunity to file by November 6, 2015 his Motion to Dismiss for the various reasons addressed by the Secretary and United during the conference.

On November 6, 2015, Respondent, Thomas E. Perez, Secretary of Labor, U.S.

Department of Labor (Secretary or Secretary of Labor), filed his Motion to Dismiss Employee's Petition for Modification of Abatement Period (November 6, 2015 Motion to Dismiss).

On November 24, 2015, the Commission received United's Notice of Contest of the citations. On that date, the Commission docketed the matter as *Secretary of Labor, Complainant, v. United Airlines, Inc., Respondent*, in Docket No. 15-2019.

On about December 1, 2015, Mr. Simkus filed his Response and Opposition to Respondent's Motion to Dismiss Employee's Petition For Modification of Abatement Plan and Request for A Hearing (Resp. to November 6, 2015 Motion to Dismiss).

On December 3, 2015, the Court GRANTED, IN PART, and DENIED, IN PART, WITH PREJUDICE, the Secretary's November 6, 2015 Motion to Dismiss. The Court dismissed with prejudice all of the claims and allegations Mr. Simkus made in his petition in Docket No. 15-1756 that are outside the scope of the OSH Act and the Commission rules for employee contests pertaining to the reasonableness of the abatement date. These included Mr. Simkus' contest of: 1) any alleged OSHA decision to exclude Mr. Simkus from the October 8, 2015 conference, 2) these proceedings in general, 3) OSHA's investigative findings, 4) the way OSHA conducted its inspection and investigation, and 5) the proposed abatement plan.[5] The Court ruled it had no jurisdiction to hear such claims. Only Mr. Simkus' contest of the reasonableness of the period of abatement remained.

The Court further found: 1) Mr. Simkus has standing to file his notice of contest since he is an "affected employee", 2) Mr. Simkus' Notice of Contest is not subject to dismissal to the extent it contests the reasonableness of the period of abatement set forth in the citations at issue,

and 3) Mr. Simkus' Notice of Contest contesting the reasonableness of the period of abatement is not moot.[6] The Court further ordered that the parties to this action shall meet and confer and advise the Court by December 21, 2015 on whether or not Docket No. 15-1756 and United's contest, Docket No. 15-2019, should be consolidated for discovery and trial purposes.

On December 3, 2015, the Secretary of Labor filed his complaint in Docket No. 15-2019.

On December 7, 2015, Mr. Simkus elected party status in Docket No. 15-2019.

On December 11, 2015, IBT Local 781 filed a request for party status as the AER in Docket No. 15-2019.

During a pre-hearing scheduling conference call in Docket No. 15-2019 conducted on December 21, 2015, the Secretary and United advised the Court that they did not object to the Court consolidating Docket Nos. 15-1756 and 15-2019 for discovery and hearing purposes.[7] Neither Mr. Simkus nor IBT Local Union 781 advised the Court by December 21, 2015 on whether or not Docket Nos. 15-1756 and 15-2019 should be consolidated for discovery and trial purposes. The Secretary of Labor and United Airlines also indicated that they had no objection to Mr. Simkus or IBT Local 781 obtaining party status in Docket No. 15-2019.

On December 22, 2015, the Court granted party status to Mr. Simkus in Docket No. 15-2019.

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[5] The Court also ruled the Commission lacked jurisdiction to adjudicate any alleged violations of criminal statutes.

[6] The Court determined that Mr. Simkus' only remaining cognizable claim that the abatement period was unreasonable was not moot because United had contested the citation, including the abatement date, in the employer contest case (Docket No. 15-2019) and that the eventual abatement date, if any, could be extended depending on the outcome of that case. (Dec. 3, 2015 Order, at p. 18). The Court concluded that Mr. Simkus' claim was not moot so long as he could challenge "the reasonableness of whatever abatement date, if any, eventually arises concerning these citations." (*Id.*). This court also noted that the order did not take into account the effect of any eventual settlement agreement between the Secretary and United. (*Id.,* at p. 18 n. 24).

[7] The Secretary and United also informed the Court that they had reached a settlement in Docket No. 15-2019.

On December 23, 2015, the Secretary and United were ordered to submit their proposed settlement agreement to the Court within thirty days.

On December 29, 2015, the Court granted IBT Local 781 party status as the AER in Docket No. 15-2019.

On December 30, 2015, the Court ordered Docket Nos. 15-1756 and 15-2019 consolidated for discovery and hearing purposes; including date, time, duration, and place of any hearing.

On January 25, 2016, the Secretary of Labor and United submitted their executed settlement agreement for the Court's review and approval (proposed January 25, 2016 settlement agreement). The proposed January 25, 2016 settlement agreement includes a provision that states that conditions alleged in the amended Citations and Notification of Penalties have been abated. The Secretary of Labor stated that IBT Local Union 781 had no input to, and did not oppose, the settlement agreement. IBT Local Union 781 elected not sign the proposed January 25, 2016 settlement agreement. The Secretary of Labor also stated that Mr. Simkus provided input to the proposed settlement agreement that OSHA considered, but chose not to accept. Mr. Simkus elected not to sign the proposed January 25, 2016 settlement agreement.

On February 4, 2016, the Secretary of Labor advised the Court that the proposed January 25, 2016 settlement agreement did not include the statement required by 29 C.F.R. § 2200.100(b) when an affected employee with party status objects to the reasonableness of the abatement dates. The Secretary of Labor advised the Court of his willingness to submit a revised settlement agreement reflecting Mr. Simkus' objection if the Court prefers.

On February 9, 2016, Mr. Simkus filed his Objection to the Secretary of Labor's proposed January 25, 2016 Settlement Agreement and Simkus' Motion for the Court to Issue

an Order Scheduling this Matter for Hearing (Simkus Objection and Motion for Scheduling Order). In it, Mr. Simkus noted his objection to the proposed January 25, 2016 settlement agreement and the reasons why he objected. He asserted that "the abatement periods are completely **unreasonable** and **no** abatement has occurred [emphasis in the original]." He further alleged that the settlement agreement resulted in him and other affected employees being harmed by causing them to remain in a zone of danger. He also alleged that the Secretary of Labor denied his requests for discovery.[8] Mr. Simkus asserted that as a party to the employer-initiated case at Docket No. 15-2019 he can now challenge all matters related to the citations. Mr. Simkus requested: 1) a scheduling Order to allow the cases to proceed to a hearing, 2) an order requiring the Secretary of Labor to comply with his requests for discovery, and 3) a telephone conference with the Court to address his objections to the Settlement Agreement.

In its Order Re: Employee Simkus's Objection to the Secretary of Labor's [proposed January 25, 2016] Settlement Agreement and Simkus's Motion for the Court to Issue an Order Scheduling This Matter for Hearing, dated February 11, 2016, the Court: 1) ordered the Secretary of Labor to promptly submit a revised settlement agreement reflecting Mr. Simkus' objection to the settlement agreement as required by 29 C.F.R. § 2200.100(b), 2) denied Mr. Simkus' request that the Court issue a scheduling Order to allow the cases to proceed to a hearing as moot, 3) denied without prejudice Mr. Simkus' motion for an order requiring the Secretary to comply with his discovery requests,[9] and 4) scheduled a telephone pre-hearing

[8] Mr. Simkus alleged that his discovery requests to the Secretary of Labor for pleadings, OSHA's investigation file, and abatement documents including: a) certifications of corrective action worksheets, b) comprehensive asbestos survey(s), and c) documents that describe the means and methods used by United to abate each citation violation, were ignored.

[9] The Court allowed Mr. Simkus to renew his motion to compel discovery after he meets and confers with the

conference with the parties pursuant to Commission Rule of Procedure 51, 29 C.F.R. § 2200.51 (2013), to discuss a specific schedule in preparation for and the conduct of the hearing in these matters.

On February 17, 2016, the Secretary conferred with Mr. Simkus and advised him that the Secretary and United would be filing a substantively identical settlement agreement with the additional notice of Mr. Simkus' previous objections to the reasonableness of the abatement period.

On February 17, 2016, the Secretary and United filed an updated version of the settlement agreement signed by the Secretary and United on February 16, 2016 (Updated Settlement Agreement).[10] In the cover letter accompanying the Updated Settlement Agreement, the Secretary and United stated:

> Consistent with U.S. Department of Labor policy and applicable case law, all parties were provided the opportunity to provide input into the final settlement agreement and to sign it. The Union had no input and did not oppose the agreement, including the reasonableness of the abatement time. Mr. Simkus provided input, which was considered by OSHA, and ultimately determined to be outside the scope of the instant settlement agreement and litigation, and what is permitted by law. Mr. Simkus did raise an objection to the reasonableness of the abatement time notwithstanding the fact that both the Secretary and the employer in this matter agree that the conditions cited in the citations at issue have already been abated.

The Updated Settlement Agreement states (in part):

> III.
>
> Respondent wholly withdraws its Notice of Contest to the Citations and Notification of Penalties as amended herein, including its contest of the abatement method and period.

Respondent makes the following representations and assurances to Complainant:

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parties and complies with Court's certification requirements regarding motion filings.

[10] Neither the Union nor Mr. Simkus elected to sign the Updated Settlement Agreement.

a. The conditions alleged in the amended Citations and Notification of Penalties have been abated.

b. Respondent is currently complying, and in the future will continue to comply with all applicable provisions of the Occupational Safety and Health Act, and the applicable safety and health standards promulgated pursuant to the Occupational Safety and Health Act.

c. Within 30 days of the full Execution of this Stipulation and Settlement Agreement, Respondent shall pay in full the proposed total penalty of $12,000.00….

IV

Based upon the assurances and representations by Respondent set forth above, Complainant has no objection to the withdrawal of the Notice of Contest and considers the violative conditions cited in the amended citation to be abated.

V

Except for these proceedings, and matters arising out of these proceedings, and any other subsequent OSHA proceedings between the parties, none of the foregoing agreements, statements, findings, and actions taken by Respondent shall be deemed an admission by the Respondent of the allegations contained within the Citations and Notifications of Penalty and the Complaint. The agreements, statements, findings, and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated….

VII

The Complainant and the Respondent agree that an order should be entered which:

a. Amends the Citations and Notifications of Penalty, as set forth above.

b. Allows Respondent to withdraw its Notice of Contest to the Citations and Notifications of Penalty, as amended herein.

c. Affirms the Citations and Notifications of Penalty, as amended, as a final and enforceable order of the Review Commission, and affirms the penalty in the amount proposed with no costs, fees or other expenses to be assessed or awarded to any of the parties in this litigation….

On February 22, 2016, Mr. Simkus filed a document styled as "Employee Simkus's Objection to the Secretary of Labor's [Updated] Settlement Agreement and Simkus's Motion for the Court to Issue an Order Scheduling this Matter for Hearing" (Simkus Objections to the Updated Settlement Agreement). Mr. Simkus made many of the same objections that he

had previously raised in his employee contest case, Docket No. 15-1756.[11] He rejected the Updated Settlement Agreement "in its entirety" and insisted "the Secretary withdraw the proposed settlement agreement…." (*Id.,* at p. 2). He asserted that the abatement periods were "completely unreasonable" and "no abatement has occurred." (*Id.*).

On February 24, 2016, the Court conducted a pre-hearing scheduling conference.

On February 26, 2016, the Court issued its order scheduling a hearing beginning on June 21, 2016.

On March 21, 2016, the Secretary filed his Motion to Dismiss Affected Employee's Claims for Lack of Subject Matter Jurisdiction (Motion to Dismiss). The Secretary requests, pursuant to Commission Rules 2(b) and 40, 29 C.F.R. §§ 2200.2(b) and 2200.40, and Rule 12(b)(1) of the Federal Rules of Civil Procedure, an order dismissing Mr. Simkus' claims associated with Docket Nos. 15-1756 and 15-2019 as moot and outside of the Commission's subject-matter jurisdiction. The Secretary seeks an order approving the Updated Settlement Agreement and cancelling the June 21, 2016 hearing. The Secretary asserts Mr. Simkus' claims should be dismissed in their entirety since his only remaining claim, which relates to the reasonableness the of abatement date, is moot because OSHA considers all cited violative conditions in the subject Citation and Notification of Penalty abated and United wholly withdrew its associated Notice of Contest in Docket No. 15-2019 pursuant to the Updated Settlement Agreement. The Secretary further asserted there is no proposed abatement period at issue because he considers the violative

[11] In Simkus Objections to the Updated Settlement Agreement, he stated "[t]he reasons Simkus objected to the abatement periods in OSHRC Docket No. 15-156 [*sic*] are the same reasons why he objects to the abatement periods in the Secretary's [updated] settlement agreement because the abatement periods are completely **unreasonable** and no abatement has **occurred**. Simkus also objects on grounds not previously available to him." (emphasis in original) (Simkus Objections to the Updated Settlement Agreement at p. 2).

conditions abated and affected employees may not challenge the Secretary's determination violative conditions are abated.

On March 21, 2016, the Secretary also filed his Motion for Protective Order that the Discovery not be had or, in the alternative, for Stay of Discovery Pending Decision on Secretary's Motion to Dismiss (Motion for Protective Order). The Secretary seeks an order that discovery not be had in these matters, or alternatively that discovery be stayed until the Court issues its order relating to the Secretary's Motion to Dismiss. The Secretary asserts the Commission now has no subject-matter jurisdiction over any of Mr. Simkus' claims in either case and there is no discovery left to be conducted.

On April 4, 2016, United filed its Response in Support for the Secretary's Motion to Dismiss Consolidated Cases and Motion for Protective Order. United asserts that Mr. Simkus inappropriately seeks to thwart a settlement of these matters agreed to by the Secretary and United. United states that the hearing sought by Mr. Simkus is not permitted by the rules governing Commission proceedings and an affront to Congress's grant of prosecutorial power to the Secretary of Labor. United argues that the Commission rules do not provide a procedure for employees or their representatives to challenge or contest the means or methods of abatement, nor do they allow for challenges with respect to the ultimate question of whether abatement has been accomplished. United states that the Updated Settlement Agreement eliminates Mr. Simkus' only claim that remained following the Court's December 3, 2015 order. United asserts that Mr. Simkus' claims are moot and the consolidated matters should be dismissed.

On April 4, 2016, Mr. Simkus filed his Affected Employee Simkus's Motion for Sanctions

Against the Complainant ("Secretary of Labor") (Motion for Sanctions).[12] Mr. Simkus seeks sanctions against the Secretary of Labor because the Secretary's counsel is allegedly "guilty of unethical conduct" for attaching the Declaration of [redacted] to his Motion to Dismiss, and for allegedly refusing to provide Mr. Simkus any discovery, and for not providing Respondent's answer to the Secretary's Complaint in Docket No. 15-2019. Mr. Simkus alleges that [redacted] declaration is false. In his Motion for Sanctions, Mr. Simkus also states that he "strongly objects" to the Secretary's Motion to Dismiss.[13] He asserts that his claim is not moot and the Court must allow him to present his objections over the unreasonableness of the abatement period because it is in the best interest of the public and affected employees. Mr. Simkus did not address any of the case law the Secretary or United cited in their filings.

On April 12, 2016, the Secretary filed his Response to Affected Employee's Motion for Sanctions. The Secretary asked the Court to deny Mr. Simkus' Motion for Sanctions, characterizing it as "baseless." The Secretary stated that he had asserted legitimate objections to Mr. Simkus' written discovery requests and noted that Mr. Simkus had not filed a Motion to Compel discovery with the Court.[14] The Secretary further asserted that he had no duty to provide Mr. Simkus with a copy of United's answer in Docket No. 15-2019; especially since United has never filed any answer in that case because the Secretary and United had advised the Court that they had reached a settlement before any answer was due. Lastly, the Secretary denied he, or anyone acting in his behalf, has made any false statements or otherwise engaged in any unethical conduct in these matters. The Secretary described Mr. Simkus' accusations that [redacted] declaration was false as

[12] No meet and confer certification accompanied Mr. Simkus' Motion for Sanctions.

[13] The Court considers Mr. Simkus' Motion for Sanctions to include his response in opposition to the Motion to Dismiss. Mr. Simkus again failed to comply with Commission Rule 40(a) that states that "[a] motion shall not be included in another document such as a brief or a petition for discretionary review, but shall be made in a separate document." *See* 29 C.F.R. § 2200.40(a).

[14] The Secretary had also filed his Motion for Protective Order on March 21, 2016.

"specious."

The Union does not oppose either the Motion to Dismiss or the Motion for Protective Order.

II. DISCUSSION

A. The Court lacks subject-matter jurisdiction over these cases, which are now moot.

The filing of the Updated Settlement Agreement, together with OSHA's determination that all of the violative conditions at issue in the citations are abated, render all of Mr. Simkus' claims moot and divest the Commission of its jurisdiction over such claims. *See St. John's United Church of Christ v. City of Chicago*, 507 F.3d 616, 626 (7th Cir. 2007) ("[W]hen the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case is (or the claims are) moot and must be dismissed for lack of jurisdiction.") (citation and internal quotations omitted); *see also* Fed. R. Civ. P. 12(h)(3).[15] Claims must remain live throughout litigation. Otherwise, the court must dismiss them as moot where the law or facts provide no ongoing cognizable claim or controversy.

Affected employees may not challenge the Secretary's determination in a settlement agreement that violative conditions have been abated. *Am. Cyanamid*, 647 F.2d 383, 385-88 (3rd Cir. 1981) (Commission lacked jurisdiction to consider a Union's challenge to the fact of abatement where the settlement agreement asserted that the condition which led to the citation had already been abated); *Oil, Chem., and Atomic Workers Int'l. Union v. OSHRC (Am. Cyanamid Co II)*, 671 F.2d 643, 650 (D.C. Cir. 1982) ("Thus, employees may not contest the representation of a settlement agreement that abatement has occurred.") (citation omitted); *see also Heinz Pet Prods.*, 1998 CCH OSHD 31660 (No. 98-0558, O.S.H.R.C.A.L.J. Sept. 18,

[15] Rule 12(h)(3) states:
(3) **Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

1998) (rejecting Union's assertion that it was entitled to review underlying materials upon which the Secretary had based his assessment that all conditions were abated);[16] *Sec'y of Labor v. Calvin L. Sisson*, 17 BNA OSHC 1528 (No. 95-1041, O.S.H.R.C.A.L.J. Sept. 15, 1995) (dismissing employee objections as moot because employee cannot contest whether conditions have been adequately abated**);** *L. H. Sowles Co.*, No. 2770, 1973 WL 4278, at * 9 (O.S.H.R.C.A.L.J. Dec. 5, 1973) (consolidated) (the contest of the reasonableness of the abatement date was deemed to have become moot as of the time of hearing through the accomplishment of abatement prior to hearing).

It is the Secretary's "exclusive prosecutorial discretion" to issue a citation. Only the Secretary may determine that a hazardous or unsafe condition will be abated by implementation of specific procedures. *Mobil Oil Corp.*, 713 F.2d 918, 927 (No. 911, 2nd Cir. 1983), *Oil, Chem. and Atomic Workers Int'l. Union v. OSHRC,* 671 F.2d at 650 (an employee "may not argue that a particular method of abatement would be inefficacious."). The Secretary has not conceded its prosecutorial discretion to an affected employee because an employer elects to contest a citation. "Prosecutorial discretion in the enforcement of the OSH Act is vested solely in the Secretary." *Boise Cascade Corp.*, 14 BNA OSHC 1993, 1995 (No. 89-3087, 991) (consolidated) (discretion to settle a case pending before the Commission is the Secretary's and Congress did not intend employees "to constitute a separate and distinct enforcement authority under the Act."). The public rights created by the OSH Act are to be

[16] In *Heinz Pet Prods.,* the then late Chief Judge Irv Sommer stated that the Third Circuit Court of Appeals in *Marshall v. OCAW (Am. Cyanamid Co.),* 647 F.2d at 387-88 (3rd Cir. 1981) had noted that a Commission decision refusing to approve a settlement agreement where the union claimed the cited condition had not been abated infringed upon the Secretary's prosecutorial discretion and the union's remedy, if it believed abatement had not occurred, was to file another complaint with the Secretary.). *See* 29 C.F.R. § 1903.11. An employee may also bring a writ of mandamus action in federal district court against the Secretary for his failure to enjoin an imminent danger at the employee's workplace. 29 U.S.C. § 662(d).

protected by the Secretary. *Mobil Oil Corp.*, 713 F.2d at 927. Enforcement of the OSH Act is the sole responsibility of the Secretary. (*Id*.; *Oil, Chem. and Atomic Workers Int'l. Union v. OSHRC,* 671 F.2d at 649 (same)). The Secretary has unfettered discretionary authority to withdraw or settle a citation issued to an employer. (*Id*.). Continuation of Commission proceedings after an employer has agreed to withdraw its notice of contest so that an employee may present objections at a hearing to a settlement agreement puts off the day when abatement should occur and prevents the Secretary from taking steps to compel abatement. (*Id.)*.

The Secretary and United have now reached settlement in Docket No. 15-2019. They have agreed that the violative conditions have been abated. United has withdrawn its Notice of Contest.[17] The court must now dismiss all of Mr. Simkus' remaining claims in both of these consolidated cases for lack of subject matter jurisdiction and because they are moot. In its December 3, 2015 Order, the court determined that it was not yet appropriate to find that Mr. Simkus' claims with regard to the reasonableness of the abatement period were moot because United had contested the citations including the associated abatement period. (Dec. 3, 2015 Order, at pp. 18-19). The order also did "not take into account . . . the effect of any settlement agreement that may be reached between the Secretary and United concerning these citations." (*Id.*). The effect of the Updated Settlement Agreement in these consolidated cases, including the employee contest case, strips Mr. Simkus of any further cognizable claims because those claims are either outside of the scope of what he may assert in the first instance, or are now moot. In this instance, the Updated Settlement Agreement has divested the Commission of

[17] A party may withdraw its notice of contest at any stage of a proceeding. 29 C.F.R. § 2200.102.

subject matter jurisdiction over Mr. Simkus' claims and objections in these matters.[18]

B. Sanctions against the Secretary are not warranted.

Commission judges have the discretion to impose sanctions on parties who violate their orders. *See NL Industries, Inc.* 11 BNA OSHC 2156, 2168 (No. 78-5204, 1984). Considerable discretion is vested in judges to decide whether to impose sanctions and what form they should take. *See Media Duplication Services, LTD., v. HDG Software, Inc.*, 928 F.2d 1228, 1241 (1st Cir. 1991)(Attorney could be sanctioned under Rule 16(f) for his failure to comply with a pretrial order by failing to appear to present his client's position.). Mr. Simkus has alleged that the Secretary has committed "fraud on the court." Such allegations should not be made by anyone lightly. The factors a court must consider when determining whether to sanction a party based upon the perpetration of a fraud upon the Court are as follows: (1) whether the misconduct was the product of intentional bad faith; (2) whether and to what extent the misconduct prejudiced the other party; (3) whether there is a pattern of misbehavior, rather than an isolated instance; (4) whether and when the misconduct was corrected; and (5) whether further misconduct is likely to continue in the future. *Intelli-Check, Inc. v. Tricom Card Technologies, Inc.,* No. CV03-3706, 2005 WL 3533153, at * 11 (E.D.N.Y., Dec. 22, 2005), *McMunn v. Memorial Sloan-Kettering Cancer Center,* 191 F.Supp.2d 440, 461 (S.D.N.Y.2002). Additionally, in order for the court to grant sanctions based upon an alleged submission of falsified evidence or material misstatements to the Court, the movant must show that the party at fault has "set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to

[18] *See Allied Indus. Workers of Am.*, 760 F.2d 783, 785 (7th Cir. 1985) (Once a settlement agreement is reached and the employer withdraws its notice of contest to the citation, the Commission is ousted of jurisdiction to review employee objections); *see also Donovan v. Int'l. Chemicalworkers Union,* 748 F.2d 1470, 1472 (11th Cir. 1984) (Commission has no jurisdiction to review a settlement agreement that calls for an immediate abatement of the hazardous condition.). Here the Updated Settlement Agreement says the hazardous conditions have already been

adjudicate the action." *Scholastic, Inc. v. Stouffer,* 221 F.Supp.2d 425, 439 (S.D.N.Y. 2002) (citations omitted), *aff'd* 81 Fed. Appx. 396 (2d Cir.2003). *See also McMunn v. Memorial Sloan-Kettering Cancer Center,* 191 F.Supp.2d at 445 (stating that the essence of fraud upon the court is "when a party lies to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process").

Here, Mr. Simkus has failed to show any misconduct by the Secretary in these cases. At this point, his allegation that [redacted] declaration is false represents an advocate's view of the evidence. Mr. Simkus alleges [redacted] declaration is false and the Secretary says it is not. [redacted] declaration recounts an informal conference to which Mr. Simkus was not a party and reiterates OSHA's determination, based on representations made by United at that informal conference, that the violative conditions subject to the citations in this matter have been abated. It is unclear how Mr. Simkus would know that representations of what occurred at an informal conference that he did not attend were in fact "completely false and totally inaccurate" or, similarly, how counsel for the Secretary would know them to be inaccurate. *See Skywark v. Isaacson,* 1999 WL 1489038, at *17-18 (S.D.N.Y., Oct.14, 1999) (imposing sanctions pursuant to Court's inherent authority only where misconduct had so distorted the record that a fair trial was impossible).

The Secretary had no duty to provide Mr. Simkus with a copy of United's answer in Docket No. 15-2019; especially since United has never filed any answer in that case because the Secretary and United had advised the Court that they had reached a settlement before any answer was due. Likewise, Mr. Simkus has not made a case that any sanctions are due against the Secretary for failure to respond to any of Mr. Simkus' discovery requests. Mr. Simkus has not

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abated.

filed a motion to compel discovery. Instead of doing so, he came quickly to the Court and filed a Motion for Sanctions. Before doing so, he did not meet and confer with the Secretary about discovery matters.[19] On March 21, 2016, the Secretary had also filed his Motion for Protective Order seeking an order curtailing or staying discovery in view of the settlement agreement between the Secretary and United.

The Court agrees with the Secretary that Mr. Simkus has not made a colorable claim to form a basis for any sanctions against the Secretary. The Court finds Mr. Simkus' Motion for Sanctions is wholly without merit and no sanctions of any kind against the Secretary are appropriate.

III. CONCLUSION

The Court lacks subject-matter jurisdiction over all of Mr. Simkus' remaining claims. These cases are now moot. There are no further issues before the court that require discovery or a hearing. All of Mr. Simkus' claims and objections must be dismissed, the June 21, 2016 hearing cancelled and the Updated Settlement Agreement approved.[20] Mr. Simkus' Motion for Sanctions lacks merit.

IV. ORDER

UPON CONSIDERATION OF THE ABOVE MATTERS, WHEREFORE, IT IS ORDERED THAT:

A) the Secretary's Motion to Dismiss is GRANTED,

B) Mr. Simkus' Notice of Contest in Docket No. 15-1756 is DISMISSED WITH PREJUDICE,

[19] Mr. Simkus failed to comply with Commission Rule 40(a) and the Court's Order dated February 26, 2016 that required him to certify that he had met and conferred with all of the other parties before he filed his Motion for Sanctions. *See* 29 C.F.R. § 2200.40(a).

C) United's Notice of Contest in Docket No. 15-2019 is WITHDRAWN,

D) the June 21, 2016 hearing is CANCELLED,

E) the Updated Settlement Agreement shall be APPROVED by separate order,

F) the Secretary's Motion for Protective Order that the Discovery not be had or, in the alternative, for Stay of Discovery Pending Decision on Secretary's Motion to Dismiss, is DENIED, as moot, and

G) Mr. Simkus' Motion for Sanctions is DENIED as lacking merit and for failure to comply with Commission Rule 40(a) and the Court's Order dated February 26, 2016 that required Mr. Simkus to certify that he had met and conferred with all of the other parties before he filed his Motion for Sanctions.[21]

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: April 25, 2016
Washington, D.C.

[20] The Updated Settlement Agreement will be approved by separate order.

[21] The Court Order stated:
All motions must state the basis of the request, identify authority in support of the request and be accompanied by an order prepared for the judge's signature. Motions will not be entertained unless accompanied by moving counsel's certification that the parties have discussed the matter and that there is either no objection to the motion or that the parties have made a good faith effort to settle the matter and have been unable to do so. The certificate must include, *inter alia,* the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any. The Court will generally ignore correspondence from counsel that should properly be the subject of motion practice.