SECRETARY OF LABOR, Complainant, v. E. J. SCIABA CONTRACTING CO., INC., Respondent.	DOCKET No. 03-0814

APPEARANCES:

Kathryn A. Joyce, Esq.
Office of the Solicitor of Labor
U.S. Department of Labor
Boston, Massachusetts
For Complainant

Matthew Daley, *pro se*
E. J. Sciaba Contracting
For Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act").

Following an inspection of a work site in Winthrop, Massachusetts on December 27, 2002, the United States Department of Labor, Occupational Safety and Health Administration ("OSHA") issued to E. J. Sciaba Construction Company, Inc. ("Sciaba") two citations alleging various violations of section 5(a)(1) of the Act as well as a number of safety and health standards appearing in Part 1926 of Title 29 of the Code of Federal Regulations; the citations proposed civil penalties

totaling $ 9,000. Upon receipt of a faxed letter on May 3, 2003, from Respondent, the Commission docketed the case as a contested matter. The Secretary then filed a motion to dismiss. An initial Notice of Hearing was issued on July 24, 2003. On July 25, 2003, the Secretary filed a more detailed Motion to Dismiss Notice of Contest along with a supporting memorandum.

An initial question of whether the Commission has jurisdiction has been raised by Complainant's Motion to Dismiss Notice of Contest. A plenary evidentiary hearing was conducted in Boston, Massachusetts on August 19, 2003. Both parties appeared and were offered the opportunity to present evidence and argument.

Discussion

The following facts are undisputed. A postal receipt indicates that Respondent received the citations on February 5, 2003. No written notice of contest was filed. On February 27, 2003 an "informal" settlement conference was held at the OSHA district office. Present were a representative of Respondent and several OSHA officials. The discussions were clear and no duress was applied to obtain Respondent's agreement to the settlement. Respondent's representative appeared to completely understand the nature of the proceedings and willingly and freely entered into the settlement and was authorized by Respondent to do so. Respondent was not unfamiliar with OSHA proceedings having had other contacts with the OSHA area office. On that date, the parties executed a written "informal" settlement agreement whereby OSHA, among other things, reduced the proposed penalties and Respondent agreed to payment by March 13, 2003. On April 23, 2003 a letter was mailed to Respondent demanding payment of the entire amount of the proposed penalty due to the fact that the reduced amount previously agreed upon had not been received. On May 2, 2003, Respondent faxed a letter to OSHA and to the Commission stating, in pertinent part;

> I am writing you to inquire about the above referenced case. I recently received a notice stating we were in default and would to (sic.) pay a fine levied in this case. I ask that you revisit this case and allow us the opportunity to provide and represent our company's position.
>
> * * *
>
> One outstanding factor is that our Safety officer left our company earlier this year and unfortunately failed to return this documentation. Due to this fact we never received any information or a phone call

listing a date for this conference.

As previously indicated, on the basis of this letter, the Commission docketed the case as a contested matter. The Secretary filed a Motion to Dismiss Notice of Contest along with a supporting memorandum.

The Secretary argues that Respondent's letter dated May 2, 2003 is "not an appropriately or timely filed notice of contest" inasmuch as it was not received by OSHA within fifteen working days of Respondent's receipt of the citation. The Secretary also maintains that the informal settlement agreement includes a provision that the citation became a "final order not subject to review by any court or agency." Finally, the Secretary argues that such a settlement is entitled to finality and must remain undisturbed in the absence of evidence of "duress, harassment or overbearing conduct" on the part of the government.

Respondent's letter dated May 2, 2003 is not a notice of contest on its face nor can it be reasonably construed as an attempt to contest. Thus, the result in this matter is mandated by section 10(c) of the Act, (29 U.S.C. 659(c)), under which the Commission's jurisdiction attaches upon the filing of a timely notice of an employer's intention to contest a citation. Under Commission precedent, a writing clearly expressing an intent to dispute the terms of a citation may be deemed a valid notice of contest. See, *Juan Moctazuma*, 02-0873, 20 BNA OSHC 1132 (ALJ, Feb. 21, 2003). In this case, Respondent's letter of May 2, 2003 does no such thing. It does ask for an opportunity to discuss the matter and present the company's position. Essentially, the letter seeks to reopen negotiations which led to the informal settlement agreement. It does not contest the underlying citation. In the absence of any notice of contest having been filed in this matter, the Commission lacks jurisdiction *ab initio.*

Moreover, even if I were to find the May 2, 2003 letter an intent to contest, the result would be the same. The letter was not filed within the fifteen working day limitation, thus grounds would have to be established for accepting the untimely filed notice of contest. Respondent would have to demonstrate that the late filed notice of contest resulted from "mistake, inadvertence, surprise or excusable neglect" cognizable under the Commission's interpretation of Rule 60(b), Fed. R. Civ. P. 60(b). There is no claim and no evidence that any of the possible elements exist here. Thus, even if Rule 60(b) "relief" is applicable in Commission proceedings, it would not be available here.

Finally, the May 2, 2003 letter and the record in this case does not establish an appropriate bases for considering the reopening of a signed settlement agreement. The documents in evidence as part of pleadings as well as testimonial evidence of record clearly establishes that there were virtually no misunderstandings or misconceptions as to the settlement terms or conditions. Accordingly, even under the Commission's most recent "test" of whether there was "a genuine agreement between the parties and a true meeting of the minds on all provisions" of the settlement, there are no grounds to reopen the agreement. See, *84 Components Co.*, 02-0363, 2003 OSHARC Lexis 39 (Direction for Review and Remand Order, April 18, 2003)(Unpublished).

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

The Commission lacks subject matter jurisdiction.

ORDER

This matter is dismissed.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Date: September 25, 2003
Washington, D.C.