United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Copomon Enterprises, LLC, Respondent.	OSHRC Docket No.: **13-0709**

ORDER

The Secretary and Copomon Enterprises, LLC, have each moved for summary judgment in this proceeding. Each party has filed a response in opposition to the other's motion. For the reasons that follow, the undersigned DENIES the Secretary's Motion for Summary Judgment and GRANTS Copomon's.

Background

Previous Citation and Notification of Penalty

Copomon distributes and markets hair straightening and smoothing products. On March 8, 2011, the Occupational Safety and Health Administration (OSHA) conducted an inspection of one of Copomon's facilities in Coral Springs, Florida. As a result of OSHA's inspection, the Secretary issued a three-item Citation and Notification of Penalty to Copomon on September 8, 2011. The Commission docketed this proceeding as Docket No. 11-2575.

The crux of all three items was the failure to adequately label and to adequately update material safety data sheets (MSDSs) for hair care products allegedly containing formaldehyde. Item 2 alleged a serious violation of 29 C.F.R. § 1910.1048(m)(4)(i), for failing to comply with the requirements of the Hazard Communication Standard to update MSDSs for Natural Keratin Smoothing Treatment, Natural Keratin Smoothing Treatment Blonde, and Express Blow Out to reflect the content of formaldehyde. Item 3 alleged a serious violation of 29 C.F.R. § 1910.1200(e)(1) for failing to develop a written hazard communication program that addressed the use of keratin-based smoothing products, such as Natural Keratin Smoothing Treatment, Natural Keratin Smoothing Treatment Blonde, and Express Blow Out. Item 1, which bears most significantly on the instant proceeding, alleged a serious violation of 29 C.F.R. §

1910.1048(m)(3)(i), for failing to assure that hazard warning labels were updated to reflect the hazards associated with formaldehyde exposure for containers of Natural Keratin Smoothing Treatment, Natural Keratin Smoothing Treatment Blonde, and Express Blow Out.

Settlement Agreement and Agreed Label Language

Copomon timely contested the Citation. In its Answer, Copomon asserted that the cited products do not contain formaldehyde. The parties entered into settlement negotiations in April 2012, facilitated by Judge Stephen J. Simko (who has since left the Commission). The parties reached a settlement agreement. Paragraph 5 of the Stipulation and Joint Motion filed by the parties on May 29, 2012, states in pertinent part:

> Respondent agrees to revise the labeling on all hair smoothing and straightening products at issue in this case to include the language agreed upon by the parties in the April 25, 2012, voluntary mediation in compliance with 29 C.F.R. § 1910.1048(m)(3)(i).
>
> The language to which the Secretary and Copomon agreed was:
>
> Hazard Warning
>
> OSHA Compliant. Product is safe if used as directed. If not used as directed may cause irritation and sensitization of the skin and respiratory system, eye and throat irritation, acute toxicity, and carcinoma per IARC. Physical and health hazard information is readily available at [Company address and phone number] and MSDS.

The language to which the parties agreed does not assert the cited products contain formaldehyde nor does it refer to formaldehyde by name. On June 1, 2012, Judge Simko issued an Order Approving Settlement ordering, among other actions, that "the terms of the settlement are approved and incorporated as part of this order." The parties did not petition for review and the Commission did not direct review of the Order, which became a Final Order on July 5, 2012.[1]

[1] Copomon filed a Request for Judicial Notice with its Motion for Summary Judgment, asking the undersigned to take judicial notice of documents filed under Docket No. 11-2575, including the Complaint, the Answer, the Stipulation and Joint Motion, and the Notice of Decision and Order Approving Settlement. Fed. R. Evid. 201 provides a judge may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably be questioned. All of the documents discussed have been filed with the Commission and remain part of the case file for Docket No. 11-2575. The undersigned takes judicial notice of the Docket No. 11-1275 documents.

Instant Citation and Notification of Penalty

Just three months later, OSHA conducted an inspection of one of Copomon's facilities in Boca Raton, Florida. As a result of the inspection, the Secretary issued a one-item Citation and Notification of Penalty to Copomon on April 4, 2013. Item 1 of the Citation alleges a repeat violation of 29 C.F.R. § 1910.1048(m)(3)(ii) for failing to "ensure that the labels of formaldehyde-containing products such as but not limited to Express Blow Out, Natural Keratin Smoothing Treatment Blonde and Natural Keratin Smoothing Treatment were updated to indicate that the products contained formaldehyde." The Secretary proposed a penalty of $200.00 for this item.

The Secretary justifies the classification of the violation as repeat in the last paragraph of the Citation:

> Copomon Enterprises, LLC, was previously cited for a violation of this occupational safety and health standard or its equivalent standard (29 CFR 1910.1048(m)(3)(i)), which was contained in OSHA inspection number 315351593, citation number 1, item number 1 and was affirmed as a final order on 06/29/2012, with respect to a workplace located at 4377 NW 124th Ave, Coral Springs, FL 33065.

Copomon timely contested the Citation and Notification of Penalty. In its June 4, 2013, Answer, Copomon again asserts the cited products do not contain formaldehyde. Copomon also asserts the affirmative defenses of res judicata and collateral estoppel, based on the Final Order approving the settlement agreement issued under Docket No. 11-2575.

On July 16, 2013, the Secretary filed a Motion for Leave to Amend the Citation. The Secretary sought to amend the classification of Item 1 from repeat to other-than-serious. The Secretary stated the proposed amendment "does not change the legal theory or operative facts of the case or the respective burdens of the parties." Copomon objected to the motion, charging that the Secretary was acting in bad faith and that the proposed amendment would cause undue prejudice to Copomon. Specifically, Copomon claimed the Secretary "now has buyer's remorse regarding the settlement it reached with Respondent on the first citation and that the instant Complaint was nothing more than a bad faith attempt to unravel that settlement reached after many hours of negotiation with Judge Simko." Copomon perceived the Secretary's Motion as an attempt to dodge the effects of res judicata and collateral estoppel by minimizing the similarity between the instant alleged violation and the previous alleged violation. On August 7, 2013, the undersigned issued an Order granting the Secretary's Motion to Amend the Citation.

On November 18, 2013, the Secretary and Copomon each filed a Motion for Summary Judgment. The Secretary contends there is no genuine dispute as to any material fact and that "the undisputed evidence establishes that Copomon violated 29 C.F.R. § 1910.1048(m)(3)(iii) because the Secretary has met each" of the elements of his burden of proof. Copomon contends it is entitled to summary judgment because the same claim (that the labels of the cited products do not warn that the products contain formaldehyde) was resolved following the 2011 Citation and Notification of Penalty with a settlement agreement which was approved by Judge Simko and which became a Final Order.

Law

Fed. R. Civ. P. 56(a) provides, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Commission historically has not favored summary judgment, a position reinforced most recently in *Ford Motor Company—Buffalo Stamping Plant,* 23 BNA OSHC 1593 (No. 10-1483, 2011), where the Commission reversed the ALJ's order granting summary judgment to the employer and remanded the case to the ALJ for further proceedings.

In *Ford,* the Commission set forth the standards for judges considering summary judgment motions:

> In reviewing a motion for summary judgment, a judge is not to decide factual disputes. . . . Rather, the role of the judge is to determine whether any such disputes exist. . . . When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. . . . Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them. . . . These principles are not altered when both parties move for summary judgment, and each party's motion must be independently evaluated under them.

Id. (citations and footnote omitted.)

Analysis

The Secretary's Motion for Summary Judgment

In order to show there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law, the Secretary must prove four elements:

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to

> the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

(1) Applicability of the Cited Standard

The § 1910.1048 standard addresses formaldehyde in the workplace. Section 1910.1048(a) provides the standard "applies to all occupational exposures to formaldehyde, i.e. from formaldehyde gas, its solutions, and materials that release formaldehyde."[2]

Section 1910.1048(m)(1)(i) provides:

> The following shall be subject to the hazard communication requirements of this paragraph: Formaldehyde gas, all mixtures or solutions composed of greater than 0.1 percent formaldehyde, and materials capable of releasing formaldehyde into the air, under reasonably foreseeable conditions of use, at concentrations reaching or exceeding 0.1 ppm.

Section 1910.1048(m)(2) provides:

> Manufacturers and importers who produce or import formaldehyde or formaldehyde containing products shall provide downstream employers using or handling these products with an objective determination through the required labels and MSDSs if these items may constitute a health hazard within the meaning of 29 CFR 1910.1200(d) under normal conditions of use.

The cited standard, § 1910.1048(m)(3)(ii), requires specific hazard warning labels on products "capable of releasing formaldehyde at levels of 0.1 ppm to 0.5 ppm."

In its responses to the Secretary's Requests for Admissions, Copomon admits that it markets and distributes the cited products and intends them to be used by professional stylists in hair salons. The directions for using the products instruct the stylists to apply the selected product to the customer's hair and then to blow-dry and flat-iron the hair at temperatures between 380º and 430º F.

Copomon commissioned a report by a company called Exponent to assess potential exposure to formaldehyde associated with the normal use of its products. The Exponent Report, dated March 4, 2011, concludes that when the keratin-containing smoothing products are used by a professional stylist in the manner directed, the products release formaldehyde at levels of 0.14 ppm to 0.24 ppm. In its Response to Request for Admission No. 7, Copomon admits that "under

[2] On March 26, 2012, the Secretary issued a final rule amending § 1910.1048. The final rule became effective on May 25, 2012. 77 FR 17574 (March 26, 2012). Section 1910.1048(m) (captioned "Hazard Communication" under the previous standard and "Communication of Hazards" under the new) has been reconfigured; § 1910.1048(m)(3), the subsection at issue here, no longer exists. Instead, the labeling requirements are addressed in §§ 1910.1048(m)(1)(iii), (2)(i), and (2)(ii). The Secretary cited Copomon under the previous standard.

conditions where its products are heated, formaldehyde may be released into the air at levels of 0.1 ppm to 0.5 ppm."

Copomon thus admits, in the formulation of § 1910.1048(m)(1)(i), the cited products are "capable of releasing formaldehyde into the air, under reasonably foreseeable conditions of use, at concentrations reaching or exceeding 0.1 ppm." It is determined the cited standard applies to the cited products.

(2) Compliance with the Terms of the Standard

The Secretary alleges Copomon committed an other-than-serious violation of § 1910.1048(m)(3)(ii), which provides:

> As a minimum, for all materials listed in paragraph (m)(1)(i) capable of releasing formaldehyde at levels of 0.1 ppm to 0.5 ppm, labels shall identify that the product contains formaldehyde; list the name and address of the responsible party; and state that physical and health hazard information is readily available from the employer and from material safety data sheets.

At first blush, it appears Copomon was in violation of the terms of § 1910.1048(m)(3)(ii). The labels on the cited products do not identify that the products contain formaldehyde, even though the products are capable of releasing formaldehyde at levels exceeding 0.1 ppm. This proceeding, however, has not occurred in a vacuum. The prior Settlement Agreement, in which the Secretary agreed to the language of the very labels he now alleges are in violation of the cited standard, must be taken into account.

Copomon contends it cannot be found to be in violation of the terms of the cited standard when the Secretary participated in drafting the labels for which it is being cited:

> [T]he Secretary knew of the Exponent report and the standards to apply when the parties were sitting around the settlement table in April 2012 jointly drafting the agreed language for the product labels so critical to the resolution of [the 2011 Citation]. The evidence that formaldehyde could be released into the air at levels between .1 and .5 ppm was as undisputed then as it is now. The controversy so highly contested in [the 2011 Citation] was the word "contain" (the same controversy as in [the instant Citation]. That the Secretary agreed to the label language without the words "contains formaldehyde" under the most current applicable standards is proof that Respondent's labels are compliant. Indeed, dispositive of the issue are the words "OSHA Compliant." Certainly, the Secretary would never have agreed to the term "OSHA Compliant" if it wasn't true. Therefore, the Secretary cannot show that the standard applies "to *this* employer at *this* workplace." . . . [T]he agreed language for the product labels makes it impossible for the Secretary to carry his burden that Respondent did not comply with the standard. Respondent changed its labels verbatim to the

> language drafted with the assistance of and agreed to by the Secretary. The recent changes to standards regarding product labels were incorporated into the agreed language to ensure Respondent was in compliance with the most up-to-date requirements. Respondent did what the regulator asked. By definition, that equals compliance.

(Copomon's Opposition to Secretary's Motion for Summary Judgment, pp. 6-7).

Copomon's argument is persuasive. When considering a summary judgment motion, the judge is required to resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. The undersigned finds it is a reasonable inference that in agreeing to the use of the phrase "OSHA Compliant" on the labels and permitting Copomon to omit the phrase "contains formaldehyde," the Secretary recognized the negotiated labels were in compliance with the terms of § 1910.1048. This inference creates a controversy between the parties, rendering this proceeding unsuitable for a finding of summary judgment in the Secretary's favor.

There is also a genuine factual dispute regarding the chemical composition of the cited products. Section 1910.1048(m)(3)(ii) addresses materials "capable of releasing formaldehyde," which Copomon agrees includes the cited products. But the standard requires that the label of such a product "shall identify that the product *contains* formaldehyde." Copomon is adamant that the cited products do not contain formaldehyde. Copomon contends the cited products are capable of releasing formaldehyde only after the contents of the product containers are released from the containers and heated to a certain temperature.

The Secretary heightens the factual dispute with his choice of language in the alleged violation description (AVD) for the Item at issue. Instead of describing the cited products as only "capable of releasing formaldehyde," the Secretary goes further and declares Copomon "did not ensure that the labels of *formaldehyde-containing products"* were properly labeled (emphasis added). As Copomon states, this was the central dispute during the settlement negotiations for the 2011 Citation. It is a dispute the undersigned cannot decide based on the motions and attached exhibits currently before me.

It is determined there exist genuine disputes to material facts regarding compliance with the terms of the cited standard in this proceeding. Accordingly, the Secretary's Motion for Summary Judgment is denied.

Copomon's Motion for Summary Judgment

Copomon moves for summary judgment based on the related doctrines res judicata (claim preclusion) and collateral estoppel (issue preclusion) with regard to the prior Final Order Approving Settlement.

Res Judicata

In the Eleventh Circuit, where this case arises, res judicata bars a subsequent suit when "(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." *Ragsdale v. Rubbermaid, Inc.,* 193 F. 3d 1235, 1238 (11th Cir. 1999). Although the Commission has not directly addressed the applicability of res judicata to its proceedings, it has declined to review cases in which ALJs have applied the doctrine. *See Georgia Power Co.,* 4 BNA OSHC 1497 (No. 16092, 1976), *Kaiser Engineers, Inc.,* 6 BNA OSHC 1845 (Nos. 77-3949 and 78-236, 1978).

Administrative agencies have applied the doctrine of res judicata in their proceedings:

> Res judicata applies to judgments by courts and by administrative agencies acting in an adjudicative capacity. *United States v. Utah Construction & Mining Co.,* 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed. 2d 642 (1966). Settlement may also have preclusive effect. *May v. Parker Abbot Transfer and Storage, Inc.,* 899 F.2d 1007, 1009 (10th Cir. 1990).

Greenberg v. Bd. Of Governors of Fed. Reserve Sys., 968 F.2d 164, 168 (2d Cir. 1992).

It is undisputed that Judge Simko had jurisdiction to issue the order approving settlement under Docket No. 11-2575, that the order became a Final Order of the Commission, and that the Secretary and Copomon were the identical parties in the prior proceeding. The Secretary contends, however, that the Final Order was not a judgment on the merits and that the cause of action was not the same in the two proceedings.

Judgment on the Merits

The Secretary contends the July 5, 2012, Final Order was not a judgment on the merits but was rather "only a *pro forma* acceptance of the agreement between the parties to settle their controversy for reasons undisclosed; it was not a determination raised by the pleadings" (Secretary's Response in Opposition to Respondent's Motion for Summary Judgment, pp. 5-6). The Secretary cites *United States v. International Building Co.,* 73 S.Ct. 807 (1953), in support of his position. *International Building Co.,* however, supports Copomon's argument with regard

to res judicata ("A judgment is an absolute bar to a subsequent action on the same claim." *Id.* at 808). *International Building* calls into question whether a final order is a judgment on the merits only in cases involving collateral estoppel ("But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Id.* at 808-809).

Commission Rule 100(b) expressly provides that, unless the settlement agreement states otherwise, the withdrawal of a notice of contest "will be with prejudice." Paragraph 7 of the May 29, 2012, Stipulation and Joint Motion states, "Respondent hereby withdraws the Notice of Contest as to the aforementioned Citation and Notification of Penalty." Paragraph 3 of the June 1, 2012, Order Approving Settlement orders that "the respondent hereby withdraws its notice of contest." Copomon's withdrawal of its Notice of Contest was with prejudice.

The Court of Appeals for the Eleventh Circuit considers a case settled with prejudice to be a case in which judgment on the merits has been rendered. "The principles of res judicata and collateral estoppel apply to consent decrees as well as to ordinary judgments entered by a court. These doctrines prevent the attack of a prior judgment by parties to the proceeding [.]" *U.S. v. Jefferson County,* 720 F.2d 1511, 1517-1518 (11th Cir. 1983). "A consent decree, although founded on the agreement of the parties, is a judgment.' *U.S. v. City of Miami,* 664 F.2d 435, 439 (5th Cir. 1981) (en banc). It therefore has the force of res judicata [.]" *Paradise v. Prescott,* 767 F.2d 1514, 1525 (11th Cir. 1985).

> [D]ismissal of a complaint with prejudice satisfies the requirement that there be a final judgment on the merits. The phrase "with prejudice" and "on the merits" are synonymous terms, both of which invoke the doctrine of claim preclusion. . . . *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp,* 405 F.2d 958, 960 (5th Cir. 1968): "It is clear that a stipulation of dismissal with prejudice . . . at any stage of a judicial proceeding, normally constitutes a final adjudication on the merits which bars a later suit on the same cause of action."

Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498, 1501 (11th Cir. 1990).

In *Ragsdale v. Rubbermaid, Inc.,* 193 F.3d at 1238, the Court treats the settlement agreement as conclusive evidence that a judgment on the merits was rendered:

> From the record it is clear that the first three requirements [of the elements of proof for res judicata] are met. First, there was a final judgment on the merits in Rubbermaid I. The parties reached a settlement agreement and executed a dismissal, barring a later suit on the same cause of action.

Here, the Secretary and Copomon had the option ("unless the settlement agreement states otherwise") of inserting language in the settlement agreement rendering the withdrawal of the notice of contest without prejudice. They declined to do so. Instead, paragraph 11 of the Stipulation and Joint Motion provides, "The agreements herein are not intended to be used for purposes *other than actions or proceedings arising under the Occupational Safety and Health Act of 1970."* (Emphasis added). Thus, the parties' prior settlement agreement is a final judgment on the merits and it can be used in proceedings, such as the instant one, arising under the Act.

Same Causes of Action

The Secretary argues the cause of action in the present case is not the same as the one at issue in Docket No. 11-2575. He points out that the two proceedings involve different subsections of the § 1910.1048 standard and that the hazard warning label cited in the 2011 Citation is different from the warning label cited in the instant proceeding.

The Court of Appeals for the Eleventh Circuit does not require the causes of action to be identical:

> In determining whether the causes of action are the same, a court must compare the substance of the actions, not the form. It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, the two cases are really the same "claim" or "cause of action" for purposes of res judicata.

In re Piper, 244 F.2d 1289, 1297 (11th Cir. 2001).

In 2011, the Secretary cited Copomon for a violation of § 1910.1048(m)(3)(i), which provides:

> The employer shall assure that hazard warning labels complying with the requirements of 29 CFR 1910.1200(f) are affixed to all containers of materials listed in paragraph m(1)(i), except to the extent that 29 CFR 1910.1200(f) is inconsistent with this paragraph.

Currently, the Secretary has cited Copomon for a violation of § 1910.1048(m)(3)(ii), which provides:

> As a minimum, for all materials listed in paragraph (m)(1)(i) capable of releasing formaldehyde at levels of 0.1 ppm to 0.5 ppm, labels shall identify that the product contains formaldehyde; list the name and address of the responsible party; and state that physical and health hazard information is readily available from the employer and from material safety data sheets.

Both subsections address hazard warning labels for formaldehyde-containing products. Paragraph (m)(3)(i) refers to § 1910.1200(f), which requires chemical distributors to label containers with the "(i) Identity of the hazardous chemical(s); (ii) Appropriate hazard warnings; and (iii) Name and address of the chemical manufacturer, importer, or other responsible party." Paragraph (m)(3)(ii) lists two of the same requirements on the hazard warning labels: "identify that the product contains formaldehyde" and "list the name and address of the responsible party." It has an additional requirement not found in paragraph (m)(3)(i): "state that physical and health hazard information is readily available from the employer and from material safety data sheets." The Secretary, however, did not cite Copomon for failing to state the hazard information is readily available from the employer and from material safety data sheets. The AVD in the instant proceeding states Copomon "did not ensure that the labels of formaldehyde-containing products . . . were updated to indicate that the product contained formaldehyde." The AVD from the 2011 Citation states Copomon "did not ensure that containers of formaldehyde-containing keratin-based smoothing products were updated to reflect the hazards associated with formaldehyde exposure."

The 2011 case and the current case arise out of the same nucleus of operative fact: The labels on Copomon's keratin-based products do not state that the products contain formaldehyde. They are based on the same factual predicate: Copomon's keratin-based products are capable of releasing formaldehyde into the air, under reasonably foreseeable conditions of use, at concentrations reaching or exceeding 0.1 ppm, and they are not labeled as containing formaldehyde. Both citations specify the products as Natural Keratin Smoothing Treatment, Natural Keratin Smoothing Treatment Blonde, and Express Blow-Out.

Indeed, the Secretary believed the two causes of action were sufficiently similar to initially cite Copomon for a repeat violation in the present proceeding. The Secretary states in the AVD that Copomon "was previously cited for a violation of this occupational safety and health standard or its equivalent standard (29 CFR 1910.1048(m)(3)(i)) [.]" The amendment to the Citation only changed the classification of the violation from repeat to other-than-serious; it did not alter the AVD. In order to establish a repeat violation, the Secretary must show that at time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.,* 6 BNA OSHC 1061, 1063 (No. 16183, 1979). The assertion in the AVD demonstrates the Secretary finds the two causes of

action "substantially similar." The undersigned determines the cause of action is the same in both proceedings.

Res judicata protects parties "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 99 S.Ct. 970, 973-974 (1979). Here, Copomon entered into settlement negotiations in good faith with the Secretary. Together, the parties drafted the language they agreed would appear on the hazard warning labels of the hair care products at issue. Together, they determined the hazard warning labels would include the words "OSHA Compliant" and would exclude the words "contains formaldehyde." OSHA Assistant Regional Administrator of the Department of Labor Benjamin Ross participated in the settlement negotiations.

Under such circumstances, an employer should be able to rely on the representations of the agents of the Department of Labor. By permitting the phrase "OSHA Compliant" to appear on the approved label, the Secretary signaled to Copomon that the use of the approved label would bring the company into compliance with the subsections of the § 1910.1048 standard that address hazard warning labels.[3] Failure to label the products with the agreed-on language would have been a violation of the settlement agreement. Copomon was acting in strict compliance with a Commission Final Order. Had Copomon unilaterally changed the language of the hazard warning label, the company would have opened itself up to a citation for failure to abate. The instant Citation places Copomon in an untenable position.

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[3] In his Response in Opposition to Respondent's Motion for Summary Judgment, the Secretary contends:

> [T]he settlement agreement cannot have the effect of barring the Secretary from ever citing Respondent again for any labeling violation in the future. Indeed, the standards applicable to formaldehyde (29 C.F.R. § 1910.1048) and hazard communications (29 C.F.R. § 1910.1200) have both been amended since the issuance of Citation 1. Clearly, the settlement of Citation 1 has no bearing on whether Respondent is currently in compliance with any of these amended applicable standards.

(p. 6). The Secretary is being disingenuous here. First, both citations were issued under the previous version of the § 1910.1048 standard. That is the version that is at issue both in the 2011 proceeding and in the instant proceeding. Compliance with "any of these amended applicable standards" is not a question before the undersigned. Second, the Secretary published the final rules amending §§ 1910.1048 and 1200 on March 26, 2012. The parties began settlement proceedings in April 2012 and signed the Stipulation and Joint Motion on May 29, 2012. Copomon states the amended standards "were incorporated into the agreed language to ensure Respondent was in compliance with the most up-to-date requirements." Copomon's Opposition to Secretary's Motion for Summary Judgment, p. 7. The Secretary was aware during settlement negotiations that he had amended his own standards. It is expected that he took these amendments into consideration when drafting the language of the hazard warning labels. It would be remarkable if he did not. His concern that he may never again cite Copomon for a labeling violation is unwarranted.

The undersigned is well-aware the Commission does not favor summary judgments. The unique circumstances of this case, however, warrant such an action. It would work an injustice to require Copomon to defend itself at hearing against the same charge it had previously settled with the Secretary.

It is determined that Copomon has established res judicata with regard to Item 1 of the Citation and Notification of Penalty under Docket No. 11-2575. The Secretary is precluded from pursuing Item 1 of the Citation and Notification of Penalty in the instant proceeding. Accordingly, Copomon's Motion for Summary Judgment is GRANTED.[4]

SO ORDERED.

/s/

Date: January 28, 2014

Judge Sharon D. Calhoun
1924 Building, Suite 2R90
100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104
Phone: (404) 562-1640 Fax: (404) 562-1650

[4] The undersigned would also grant Copomon's Motion for Summary Judgment based on collateral estoppel.

> A party asking the court to apply estoppel must establish that (1) the issue at stake is identical to the one involved in the earlier proceeding; (2) the issue was actually litigated in the earlier proceeding; (3) the determination of the issue must have been a critical and necessary part of the earlier judgment; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue.

Tampa Bay Water v. HDR Engineering, Inc., 731 F. 3d 1171, 1180 (11th Cir. 2013). The Court of Appeals for the Eleventh Circuit recognizes that a settled case "forces a twist in the traditional analysis" because the requirement of actual litigation is missing. *Barber v. International Brotherhood of Boilermakers,* 778 F.2d 750, 757 (11th Cir. 1985). The Court nevertheless allows final orders approving settlement agreements to meet the "actually litigated" requirement: "The central inquiry determining the preclusive effect of a consent decree is the intention of the parties as manifested in the decree or otherwise." *Id.* The undersigned determines Copomon established that the language of the settlement agreement and the circumstances surrounding the settlement negotiations meet the requirements of collateral estoppel.