



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

**REVIEW COMMISSION**

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 31, 1978

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC #436

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

K. A. BARKER CONSTRUCTION CO., INC.

RESPONDENT

ORDER OF REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of March 8, 1978, is presently before this Commission for Review, pursuant to a Joint Petition for Discretionary Review filed by the parties.

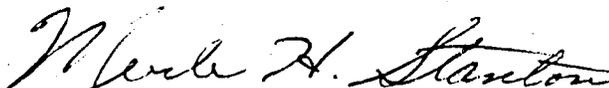
The basic issue in this case is the inclusion of exculpatory language in settlement agreements. This problem has been presented to the Commission before and we thought that our position had been made clear.

The Commission's Rules of Procedure, Section 51, encourage settlement, "where such settlement is consistent with the provisions and objectives of the Act." In fulfilling our duties under the Act, and in compliance with our own Rules of Procedure, this Commission will refuse to accept any settlement that does not clearly indicate on its face, that the agreement can be used against the Respondent in future Occupational Safety and Health proceedings as a basis for a repeat violation designation, or a failure to abate or for other purposes consistent with the Department of Labor's enforcement powers.

This Commission is not concerning itself with exculpatory language intended to preclude reference to the settlement by third parties and we disagree with the Hearing Officer's refusal to accept the same. We do not find that a settlement constitutes an admission of the citations.

The wording of Paragraph 3 of this settlement, "That Complainant may make reference to the citations which may occur under the provisions of KOSHA and KRS Chapter 338." is not clear and sufficient to insure future use of the settlement and is unacceptable to this Commission as inconsistent with the provisions and objectives of the Act.

Accordingly it is ORDERED that this case is REMANDED to the Hearing Officer. The parties shall have fifteen (15) days from date of this Order in which to submit a settlement consistent with the requirements of this opinion or to make a motion to the Hearing Officer for a full hearing on the merits.

  
Merle H. Stanton, Chairman

/s/ Charles B. Upton  
Charles B. Upton, Commissioner

/s/ John C. Roberts  
John C. Roberts, Commissioner



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 23, 1978

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC # 436

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

K. A. BARKER CONSTRUCTION COMPANY, INC.

RESPONDENT

NOTICE OF RECEIPT OF  
RECOMMENDED ORDER, AND  
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

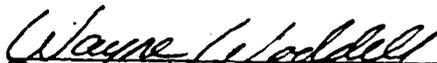
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Frederick G. Huggins  
Assistant Counsel

Hon. Carl Arthur Henlein (Certified Mail #457580)  
Middleton, Reutlinger & Baird  
501 South Second Street  
Louisville, Kentucky 40202

Mr. Bill Waggoner (First Class Mail)  
K. A. Barker Construction Co., Inc.  
1710 South Floyd Street  
Louisville, Kentucky 40217

This 23rd day of June, 1978.

  
Wayne Waddell  
Counsel  
KOSH REVIEW COMMISSION

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC NO. 436

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

RECOMMENDED ORDER

K. A. BARKER CONSTRUCTION COMPANY, INC.

RESPONDENT

\* \* \* \* \*

On March 8, 1978, your Hearing Officer made a recommended order to the Commission in this action. The basic issue on review concerns the exculpatory language in the Settlement Agreement.

Your Hearing Officer, at the original hearing, which resulted in the Order of March 8, 1978, was concerned with two (2) basic problems with the Settlement Agreement which were as follows:

1. Whether the Agreement contained sufficient language for the Department of Labor to use in any subsequent proceeding which may be commenced against the Respondent for the same violation or the same regulation, in other words whether they had a right to consider this Stipulation and Settlement Agreement as an admission for the purpose of establishing a repeat violation.

2. Whether or not the Commission could, or should, attempt to limit the admissibility of the agreement in any other action which may be commenced by any other party in any subsequent proceeding.

Under date of May 31, 1978, the Review Commission, with directions, remanded the case back to your Hearing Officer, giving

the parties fifteen (15) days from the date of the Order in which to submit a settlement consistent with the requirements of the opinion and the parties have complied with that order of the Commission and have submitted to the Hearing Officer, within the time allotted a Stipulation Agreement of Settlement which is currently before the Hearing Officer for Recommended Order.

The language of paragraph 3 of the Stipulation Agreement of Settlement dated June 9, 1978, makes clear the first question that your Hearing Officer had and that is that the withdrawal and Stipulation Agreement of Settlement may be used by the Department of Labor as the basis for a repeat violation or failure to abate or for other purposes consistent with the Department's enforcement powers.

An additional portion of paragraph 3 states that the Stipulation Agreement of Settlement may be used by the Department of Labor only and that no other party or entity may make reference to it in any other claim or proceeding which now exists or which may arise in the future.

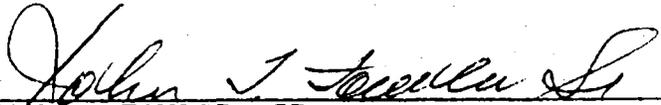
The Commission, I feel, mandated the Hearing Officer in its opinion stating that the Commission was not concerned with exculpatory language which intended to preclude reference to the settlement by third parties and therefore disagreed with the Hearing Officer's refusal to accept the same on that basis, additionally the Review Commission determined that a settlement did not constitute an admission of the citation.

It is impossible for me to see how an agreement between the Department of Labor and this Respondent could be binding on any other party, not actually a party to this action, or on any other court or tribunal, which is not at this time concerned with the disposition of this case, and I would, therefore, think that such language is surplusage.

However, realizing that this Hearing Officer is merely an arm of the Review Commission, and derives his authority both to hear and to decide cases from the Commission, and is, I feel, under an absolute duty to follow the mandates of the Commission and to be consistent therewith, the following recommended order is made:

RECOMMENDED ORDER

IT IS ORDERED that the Stipulation Agreement of the parties, dated June 9, 1978, and the language contained therein, are made a part of this Recommended Order as if copied herein at length. IT IS FURTHER ORDERED AND ADJUDGED that paragraphs 1 and 2 of the Recommended Order of the Hearing Officer of March 8, 1978, are, in accordance with the Order of the Review Commission, affirmed.

  
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JOHN T. FOWLER, SR.  
Hearing Officer

Dated: June 23, 1978  
Frankfort, Kentucky  
DECISION NO. 583