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SOL (MSHA) V. PLATEAU RESOURCES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEST 83-79-M
A.C. No. 02-02126-05501

v.

Portable Crusher No. 1

ASPHALT MINING & CONCRETE
COMPANY

DENIAL OF MOTION TO DISMISS
ORDER TO SUBMIT INFORMATION

In a Motion to Dismiss filed on September 12, 1983, the Solicitor advises that subsequent to filing his penalty petition Respondent paid the full amount of the proposed assessment for the six citations involved in this matter. The proposed assessments were \$20 apiece for a total of \$120.

captioned matter as provided in the Order of March 28, 1983, it is ORDERED that said notice of contest be, and hereby is DISMISSED with prejudice and that the operator pay the amount of the penalties proposed, \$144.00, on or before Friday, October 14, 1983.

Joseph B. Kennedy
Administrative Law Judge

of Salt Lake City, Utah as her counsel. Neither Swensen nor her attorney appeared at the hearing. Jensen stated that he had received a letter dated June 17, 1983 (Ex. R-2) from Wilcox advising him that Wilcox represented Swensen and requesting Emery compensate Swensen for five days lost wages. Jensen wrote a letter to Wilcox dated August 19, 1983 (Ex. R-1) agreeing to pay the five days of compensation in full settlement of the compensation claim. Jensen reported that he received a telephone call in the evening of August 22, 1983, the day prior to the date of the hearing, advising him that Swensen had agreed to accept the proposal set forth in Jensen's letter of August 19.

At the hearing, in view of the fact that neither attorney had entered a prior appearance in the record in this case, nor was Swensen present in the courtroom to confirm the agreement, I continued the matter and advised the parties to submit a settlement agreement for my approval.

On September 14, 1983, I received a joint motion by the parties for an order of dismissal with prejudice of this case supported by a release and settlement agreement dated August 31, 1983. The settlement amount is in the sum of \$469.84.

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WHEREFORE, for the reasons herein before given it is ordered:

(A) The parties settlement agreement is approved.

(B) The complaint of discrimination in this case is hereby dismissed with prejudice.

Virgil E. Vail
Administrative Law Judge

were required, and that if the respondent failed to follow this standard a violation of section 77.1605(k) would result. While the petitioner's argument suggests that the respondent accepted the 22 inch "mid-axle" height guideline and therefore constructed its berms to exceed that height to insure compliance,

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there is no evidence to support such a conclusion. In my view, if the respondent had constructed all of its berms to a height of 20 feet, Inspector Sarke would still have issued the citation because of the "mid-axle height" guideline he was following, and petitioner would, it is Ordered that the Solicitor's motion to dismiss be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine appropriate penalty amounts sufficient to justify settlement. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge