

CCASE:  
SOL (MSHA) V. ALAMO CEMENT  
DDATE:  
19870415  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF  
YALE E. HENNESSEE,  
COMPLAINANT

v.

ALAMO CEMENT COMPANY,  
RESPONDENT

ALAMO CEMENT COMPANY,  
CONTESTANT

v.

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

DISCRIMINATION PROCEEDINGS

Docket No. CENT 86-151-DM  
MSHA Case No. MD 86-35

Docket No. CENT 87-16-DM  
MSHA Case No. MD 86-35

1604 Quarry & Plant

CONTEST PROCEEDINGS

Docket No. CENT 87-17-RM  
Citation No. 2661516; 11/19/86

Docket No. CENT 87-18-RM  
Order No. 2661517; 11/19/86

Docket No. CENT 87-19-RM  
Citation No. 2661518; 11/19/86

1604 Quarry & Plant

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

v.

ALAMO CEMENT COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 87-43-M  
A.C. No. 41-03019-05507

Docket No. CENT 87-44-M  
A.C. No. 41-03019-05508

1604 Quarry & Plant

DECISIONS APPROVING SETTLEMENTS  
AND  
ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Proceedings

The captioned proceedings were initiated by a discrimination complaint filed by MSHA on behalf of Yale E. Hennessee (complainant) against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(1). The complainant was discharged by the respondent on April 22, 1986, for insubordination because of his alleged refusal to perform a work assignment. The complainant claimed that his refusal to perform the work in question was based on his belief that the work could not be done safely, and that his work refusal was protected activity under the Act.

Docket No. CENT 86A151-DM concerns an Application for Temporary Reinstatement filed by MSHA on September 10, 1986, seeking the complainant's temporary reinstatement pending the adjudication of the merits of his complaint. Docket No. CENT 87A16-DM is the discrimination complaint filed by MSHA on November 18, 1986. As part of its relief, MSHA proposed a \$1,600 civil penalty assessment against the respondent for the alleged violation of section 105(c) of the Act.

A hearing on MSHA's Application for Temporary Reinstatement was held in San Antonio, Texas, on October 23, 1986, and on November 6, 1986, I issued a decision ordering the complainant's temporary reinstatement pending further adjudication of the merits of his complaint, 8 FMSHRC 1649 (November 1986). The respondent appealed my temporary reinstatement order to the Commission, and while the appeal was pending, filed a request with me for modification of my order. Since the matter was on appeal, no dispositive ruling was made with respect in the request.

On December 8, 1986, the Commission issued an order affirming my temporary reinstatement order, and remanded the matter for further adjudication, 8 FMSHRC 1857 (December 1986). Subsequently, on December 30, 1986, I issued an order denying the respondent's request for modification of my November 6, 1986, temporary reinstatement order, and the respondent was again ordered to reinstate the complainant pending the adjudication of his complaint. The respondent filed a petition with the Commission seeking review of my denial of its request for modification, and on February 2, 1987, the Commission issued an order denying the respondent's request for further review, and ordered the respondent to comply forthwith with my previously issued temporary reinstatement order. Thereafter, on February 18, 1987, I issued a Notice of Hearing advising the parties that a hearing would be held during April 21-23, 1987, in San Antonio, Texas, on all matters then pending before me in these proceedings.

The captioned contests concern two section 104(a) citations and one section 104(b) order served on the respondent because of its alleged failure to comply with my temporary reinstatement order of November 6, 1986. The captioned civil penalty proceedings are the companion civil penalty proposals filed by MSHA in connection with the contested citations and order.

By motion filed with me on April 7, 1987, MSHA seeks my approval of a proposed settlement agreement executed by the parties, including the complainant Yale E. Hennessee, with respect to the discrimination and civil penalty proceedings. Upon approval of the proposed settlement, MSHA requests that all of the captioned proceedings be dismissed. A copy of a Release in Full executed by Mr. Hennessee, and a Memorandum of Understanding between MSHA and the respondent, setting forth the complete terms of the settlement agreement are included as part of MSHA's motion.

#### Discussion

In support of its proposed settlement disposition of these matters, MSHA states that they have been settled to the mutual satisfaction of the parties, including Mr. Hennessee. With regard to the discrimination cases, CENT 86-151-DM and CENT 87-16-DM, MSHA states that they were resolved by agreement of the parties whereby Mr. Hennessee received a payment of \$21,000 (less withholdings) in full payment of all claims arising from his discharge and his agreement to forego his claim for reinstatement. In agreeing to the settlement of Mr. Hennessee's discrimination claims, MSHA agrees to waive the civil penalty assessment requested in the complaint.

As further consideration for the settlement of Mr. Hennessee's discrimination claims, MSHA agrees to waive its proposed civil penalty assessment of \$500 for Citation No. 2661516 (CENT 87-43-M), and to accept a civil penalty payment of \$1,000 by the respondent in compromise of section 104(b) Order No. 2661518, a daily assessment of \$1,000 for which a total assessment of \$2,000 was proposed (CENT 87-44-M).

MSHA states that the settlement disposition of the civil penalty proceedings is primarily based on the fact that they are derivative of and inextricably bound to the discrimination proceeding. MSHA points out that while Citation No. 2661516 was issued to enforce compliance with the ordered reinstatement of Mr. Hennessee, he has relinquished any right to reinstatement for value received. With regard to Order No. 2661518, MSHA states that it was issued in further enforcement of Mr. Hennessee's ordered reinstatement. However, as a result of the issuance of the order, the respondent entered into negotiations resolving all claims of Mr. Hennessee.

MSHA submits that the purpose of the Mine Act's requirement of assessment of civil penalties have been satisfied by the respondent's prompt settlement of the discrimination claims and by MSHA's agreement to compromise the proposed assessment and accept payment of \$1,000.

#### Conclusion

After careful review and consideration of the settlement, including the terms and conditions agreed to and executed by the parties, I conclude and find that it reflects a reasonable resolution of the complaint and that it is in the public interest. Since it seems clear to me that the parties, including Mr. Hennessee, have mutually agreed to settle their dispute, I see no reason why it should not be approved.

#### ORDER

In view of the foregoing, MSHA's motion IS GRANTED, and the settlement IS APPROVED. If it has not already done so, the respondent IS ORDERED to fully comply forthwith with the terms of the settlement agreement, and upon such compliance, the discrimination proceedings are dismissed.

Respondent IS FURTHER ORDERED to remit forthwith to MSHA the sum of \$1,000, in full satisfaction of MSHA's initial proposed civil penalty assessments, and the payment thereof shall be deemed to be dispositive of the captioned civil penalty matters. Upon receipt of payment by MSHA, those proceedings are dismissed. In view of the settlement, the captioned contests ARE DISMISSED.

George A. Koutras  
Administrative Law Judge