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SOL (MSHA) V. SEVEN DAY CONCRETE
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 88-66-M
A.C. No. 41-02918-05509

v.

Ellinger Plant

SEVEN DAY CONCRETE, INC.,
RESPONDENT

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of \$2,680, for 16 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed an answer and notice of contest, and pursuant to notice issued on November 15, 1988, the case was scheduled for a hearing on the merits with two other civil penalty cases docketed for hearings during the term Tuesday, February 28, 1989, through Thursday, March 2, 1989. All of the cases originated from the Dallas Regional Solicitor's Office, and the instant case was scheduled for hearing on Thursday, March 2, 1989.

On Tuesday, February 21, 1989, while away from my office on other hearings, my Secretary received a copy of a letter addressed to the respondent by petitioner's counsel of record (Michael H. Olvera), concerning a proposed settlement of the case. Subsequently, Mr. Olvera telephoned my Secretary seeking a continuance of the hearing pending further consideration of the proposed settlement by the parties. Upon my return to

my office on Friday, February 24, 1989, petitioner's counsel was advised by telephone that the request for a continuance was denied as untimely, and he was advised that the hearing would proceed as scheduled and that the parties were expected to appear. Counsel was also advised that the parties would have an opportunity to present their settlement motion on the record at the scheduled hearing, and that the petitioner had the option of reassigning the case to the same counsel assigned to the two cases which would be heard in Houston on Tuesday and Wednesday, February 28 and March 1, 1989. Counsel Olvera's written motion for a continuance was subsequently received in my office on February 27, 1989, 4 days before the scheduled hearing and while I was in route to Houston.

On Tuesday, February 28, 1989, prior to the commencement of the hearing in one of the other cases, petitioner's counsel Brian L. Pudenz presented me with a Settlement Agreement and a Motion to Approve Settlement prepared by Counsel Olvera in this matter. Mr. Pudenz was advised that I would review the proposal and motion that same evening, and that the hearing scheduled for Thursday, March 2, 1989, would be advanced to Wednesday, March 1, 1989, at which time I would consider the matter further and issue a bench ruling and decision with respect to the proposed settlement. Mr. Pudenz was subsequently advised that after review of the settlement motion, the settlement agreement, and the pleadings filed by the parties, I would approve the settlement and render a bench decision. In view of my decision to advance the hearing date, Mr. Pudenz was requested to contact the respondent's representative and advise him that in light of my approval of the settlement, the respondent need not enter a personal appearance on Wednesday, March 1, 1989. Mr. Pudenz subsequently informed me that he contacted the respondent's representative and advised him that he was not required to personally appear at the rescheduled hearing regarding the settlement.

Discussion

On Wednesday, March 1, 1989, petitioner's counsel Pudenz was afforded an opportunity to formally present the proposed settlement for my consideration on the record, and he did so. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 C.F.R.		
		Section	Assessment	Settlement
3061567	10/20/87	56.14001	\$157.00	\$157.00
3061568	10/20/87	56.14001	\$157.00	\$157.00
3061570	10/20/87	56.14001	\$157.00	\$157.00

~435

3061573	10/20/87	56.11002	\$157.00	\$157.00
3061574	10/20/87	56.11001	\$157.00	\$157.00
3061575	10/20/87	56.14007	\$157.00	\$157.00
3061577	10/20/87	56.14001	\$157.00	\$157.00
3061578	10/20/87	56.12006	\$241.00	\$241.00
3061579	10/20/87	56.14001	\$157.00	\$157.00
3061580	10/20/87	56.12032	\$241.00	\$241.00
3061661	10/20/87	56.14001	\$157.00	\$157.00
3061662	10/20/87	56.14003	\$157.00	\$157.00
3061664	10/20/87	56.14001	\$157.00	\$157.00
3061665	10/20/87	56.14001	\$157.00	\$157.00
3061667	10/20/87	56.14001	\$157.00	\$157.00
3061668	10/20/87	56.9087	\$157.00	\$157.00

In the course of my bench decision, I took note of the fact that the proposed settlement disposition of this case requires the respondent to pay the full amount of the initial proposed civil penalty assessments for each of the violations in question, and that the respondent agreed to withdraw its notice of contest. After review of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement, including the available information of record with respect to the six statutory civil penalty criteria found in section 110(i) of the Act, I issued a bench ruling granting the motion, and a bench decision approving the settlement as reasonable and in the public interest. My bench decision in this regard is herein REAFFIRMED, and the motion IS GRANTED, and the settlement IS APPROVED.

I take note of the fact that the respondent has remitted a partial payment in the amount of \$670 to the petitioner in partial payment of the settlement, and that it has agreed to remit and pay the remaining amounts in accordance with a payment schedule agreed to by the parties. The remaining amount of \$2,010, will be paid by the respondent in 3 monthly installments of \$670, paid on the second day of each month, beginning April 2, 1989, and ending June 2, 1989. Payments are to be made by cashier's or certified check made payable to the Mine Safety and Health Administration, U.S. Department of Labor, and they are to be mailed to the Office of Assessments, Mine Safety and Health Administration, 4015 Wilson Boulevard, Arlington, VA 22203.

ORDER

The respondent IS ORDERED to pay the agreed-upon civil penalty assessments in the aforementioned amounts, and in accordance with the aforementioned payment schedule agreed to by the parties. This decision will not become final until

~436

such time as full payment is made by the respondent to the petitioner, and I retain jurisdiction in this matter until payment of all installments are remitted and received by the petitioner.

In the event that the respondent fails to make full payment, or otherwise fails to comply with the terms of the settlement, petitioner is free to file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the case.

IT IS FURTHER ORDERED that the petitioner inform the Commission when the respondent has fully complied with this order, including confirmation that full compliance by the respondent has been achieved. Upon receipt of this information, this case will be ripe for dismissal.

George A. Koutras
Administrative Law Judge