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June 12, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. GORHAM SAND & GRAVEL INC, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. YORK 2020-0027 A.C. No. 17-00661-503641 Mine: Unit #63 Portec 1047J Docket No. YORK 2020-0031 A.C. No. 17-00663-503642 Mine: Unit #65 Komatsu BR550 JG CRSHR

ORDER REGARDING THE JUNE 5, 2020 "JOINT MOTION OF THE PARTIES TO UTILIZE THE SUMMARY DECISION PROCESS PURSUANT TO 29 C.F.R. § 2700.67."

Before the Court is a most unusual submission from a trial attorney with the Department of Labor's Office of the Regional Solicitor, out of Boston, Massachusetts. Framed as the "JOINT MOTION OF THE PARTIES TO UTILIZE THE SUMMARY DECISION PROCESS PURSUANT TO 29 C.F.R. § 2700.67," hereinafter "June 5th Motion," it represents yet another misunderstanding on the part of the Solicitor's trial attorney ("DOL Attorney") regarding motions and the purpose of a motion.[1] This latest misunderstanding comes after the Court has now, *twice*, previously explained to the government attorney the requirements for filing a motion for summary decision of the judge, pursuant to the Commission's procedural rule, found at 29 C.F.R. §2700.67. In a nutshell, on this occasion the June 5th Motion is a *request* for the Court "to employ the Summary Decision process as the most expeditious way of resolving the two dockets here." Jt. Mot. at 3 (June 5, 2020). Translated, the June 5th Motion is nothing more than a *request* to file a motion for summary judgment, as distinct from actually filing a proper motion for summary decision. The distinction is significant, though apparently unrecognized by the DOL Attorney.

One doesn't file a motion *to request* employing the summary decision process; one files a motion *for* summary decision.

[1] As stated by the Supreme Court, "the term 'motion' generally means '[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.'" *Melendez v. United States*, 116 S. Ct. 2057, 2061 (1996) (citing Black's Law Dictionary 1013 (6th ed.1990), and Random House Dictionary of the English Language 1254 (2d ed.1987)).

Accordingly, the motion, utterly failing to comply with 29 C.F.R. §2700.67, presents nothing for the Court to rule upon.[2]

Background

Before addressing the vaporific *request* to file a motion for summary judgment, some history is in order. Regrettably, as set forth *infra*, the submissions from the DOL Attorney have been error-filled.

Both dockets were assigned to this Court on March 25, 2020. On April 24th, the Court emailed the parties, in response to an email on that same day from the DOL Attorney seeking resolution of these dockets through summary decision.

After the Court inquired about its inability to locate one of the dockets through e-CMS, the DOL Attorney advised that one docket number was incorrectly listed.[3]

With that problem solved, the Court advised on the same date, April 24, 2020, that:

> In a motion for summary judgment the parties will need to state what the salient agreed-upon facts are, all of them, and on that basis that there are NO factual disputes, leaving only a legal ruling on the applicability of the cited standard(s) for [the Court] to resolve and if the Secretary prevails [the Court] will then issue a penalty or penalties, as appropriate, following [its] ruling(s). **[The Court] will give the parties 2 weeks** to both determine and agree that there are no factual disputes ***and to submit the motion no later than May 8th***. **Please be sure that the motion complies with 29 CFR 2700.67.**

Email from the Court to the parties (Apr. 24, 2020) (emphasis added).

May 8th came and went, all without any compliance to the Court's email. Noticing this failure, the Court, on May 20, 2020 emailed the parties the following message:

> Re: Gorham Sand & Gravel Inc YORK 2020-2007 and YORK 2020-0031 (YORK 2020-2007 erroneously listed docket by the Secretary). The parties are

[2] Though the Court has already made note of it, in a previous order, it expressed awareness and appreciation that the Respondent, who is not an attorney, is simply challenging whether too many citations invoking a reporting requirement were issued. Here, the Court again reassures the Respondent, and the Labor Department Attorney as well, that none of the attorney's missteps will operate to influence the Court's eventual resolution of this matter, whether that comes about through a hearing or by way of a motion for summary judgment, that is to say, for the latter, once an appropriate, 29 C.F.R. §2700.67 compliant, motion is ever filed. Simply put, the Court, whether by a hearing or by a summary decision ruling, will determine the issue impartially, ignoring all the missteps.

[3] On April 24, 2020, in response to the Court's inquiry that it could not locate one of the listed docket numbers, the DOL Attorney informed that his listing one of the dockets as YORK 2020-2007 was erroneous.

> directed to respond to this Court … by tomorrow, May 21, 2020, why they have not responded to the Court, nor filed through e-CMS per the Court's directive to them on Friday April 24, 2020, [which earlier directive was then repeated in the email].

Email from the Court to the parties (May 20, 2020).

The following day, May 21, 2020, the Court received and responded to the Respondent's non-attorney representative, who advised:

> Good Morning, I have had correspondence with the lawyer [meaning the DOL Attorney, as the Respondent, a non-attorney, is proceeding *pro* se] and done everything they requested. Please let me know what I need to do. Respectfully, Gene S. Fadrigon III, Gorham Sand & Gravel.

Email from Resp't to the Court and DOL Attorney (May 21, 2020).

The Court responded to Mr. Fadrigon on May 21st, as follows:

> Dear Mr. Fadrigon: I am in receipt of your reply. Thank you for responding. I have yet to hear from [the DOL Attorney] or the Secretary of Labor generally. Your lawyer[4], seeing my message below, should know what to do. There was to be a motion filed, now quite late, for summary decision, per 29 CFR 2700.67. I have already made this clear in earlier emails. I may have no choice but to issue an Order to Show Cause. Regards, Judge William Moran

Email from the Court to the parties (May 21, 2020).

Later that same day, the DOL Attorney emailed the Court, stating:

> Dear Judge Moran, I write to apologize to the Court regarding the delay in filing the parties [sic] joint motion for Summary Affirmance.[5] These motions were drafted and sent to the Respondent on May 7, 2020, with a request that the Respondent review the text and make any changes necessary. I had understood that my office would file the motions the next day, May 8, per this Court's Order.

[4] At that time, the Court mistook the Respondent's reference to "the lawyer" to mean that the Respondent had an attorney. The Court later corrected that misunderstanding.

[5] The term "summary affirmance," seems to be the DOL Attorney's coinage. The Court is unaware of that term's presence in the Commission's procedural rules. It found only one Commission level case employed the term, and in a distinct context, referring to a judge citing the Board's [meaning the predecessor appeal board, the Interior Board of Mining Appeals] summary affirmance of a judge's decision. *Sec. v. Old Ben Coal Co.* 2 FMSHRC 2806 (Oct. 1980). Further, the Court located only a single administrative law judge decision employing the words, "summary affirmance." *Sec. v. Windsor Power House Coal*, 6 FMSHRC 2773, (Dec. 1974). In that instance as well, the term appears in the context of affirming a judge's decision.

> I have learned today, to my mortification, that the Motions were not in fact filed. I deeply regret this oversight. They will be filed today.
>
> It is of course my responsibility to ensure that these documents are filed in a timely matter. I regret this oversight and pledge to exercise greater vigilance in the future. As embarrassed as I am about my lapse, I do want the Court to understand that I did not disregard the filing deadline, but failed to follow-up as I should. Since I was acting for both parties as it were I should have double checked. Again, my apologies!

Email from DOL Attorney to the Court and Resp't (May 21, 2020).

The Court responded to the DOL Attorney the same day, stating, "Received your response. Mistakes happen. Apology accepted. I will look for the filing on e-CMS today. Regards, Judge William Moran" Email from the Court to the parties (May 21, 2020).

Later that same day, May 21, 2020, a "JOINT MOTION OF THE PARTIES *TO REQUEST* THAT RESOLUTION OF THIS MATTER BE MADE BY SUMMARY DECISION" was filed by the DOL Attorney. (emphasis added). The full text of the May 21st Joint Motion[6] provided:

> The undersigned counsel, after telephonic discussion, jointly request [sic] that this matter be resolved by means of the Commission's Summary Decision mode of resolution in lieu of a hearing. The parties share the view that the citations at issue are straightforward and well documented and accordingly are well-suited to the Summary Decision process. Further the parties assert that it would be more economical to proceed on the papers in this matter, as well as more practical, since the Regional Solicitor's Office in Boston, Massachusetts has been directed to work remotely until further notice during the current national health crisis. The Solicitor's Office suggests that the date for filing of the cross motions for summary decision be set not sooner than (30) thirty days from the date of the filing of the instant motion. For these reasons, the parties jointly urge the Court to grant this request as an efficient and time-saving alternative to a live hearing.

Jt. Mot. of the Parties to Request that Resolution of this Matter be Made by Summ. Decision, at 1-2 (May 21, 2020).

On May 26, 2020, the Court issued its "**ORDER REGARDING JOINT MOTION FOR SUMMARY DECISION**, which is repeated in relevant part here:

> Before the Court is a Joint Motion ("Motion") requesting that these matters be addressed by summary decision. The Motion was filed by an attorney for the Solicitor of Labor. The Respondent is not an attorney. Though not cited in the motion, summary decision is addressed under the Commission's procedural rules pursuant to 29 C.F.R. §2700.67, which is titled "Summary decision of the

[6] The entirety of both motions was identical, differentiated only by the separate docket numbers.

Judge." The Motion advises that the "parties share the view that the citations at issue are straightforward and well-documented and accordingly are well-suited to the Summary Decision process. Further the parties assert that it would be more economical to proceed on the papers in this matter, as well as more practical, since the Regional Solicitor's Office in Boston, Massachusetts has been directed to work remotely until further notice during the current national health crisis." Motion at 1.

The Motion also seeks to have the "the date for filing of the cross motions for summary decision be set not sooner than (30) thirty days from the date of the filing of the instant motion." *Id.* For the reasons which follow, the Court grants the request but only to the extent of allowing the parties to file an appropriate, 29 C.F.R. §2700.67 compliant, motion for summary decision. For the reasons set forth below, the submission of an appropriate, properly supported filing will be due by **Friday, June 5, 2020**. …

The motions were filed but were woefully inadequate, in small and large aspects. Docket No. YORK 2020-0027-M erroneously lists another judge as presiding and also gives the wrong assessment control number in the caption.

Of more concern, both Motions utterly failed to meet the requirements of § 2700.67, which as noted, speaks to the Summary decision by the Judge. That rule provides, in relevant part, that "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b), "Grounds."

Of particular importance here, 29 C.F.R. § 2700.67, subsection (c) details the "Form of motion," providing that "[**a**] **motion *shall* be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.**" (emphasis in original).

Neither motion complies with the procedural rule, subsection (c). The Court made it clear back on April 24, 2020 that it gave "the parties 2 weeks to both determine and agree that there are no factual disputes and to submit the motion no later than May 8th." It also expressly reminded the parties to "[p]lease <u>be sure that the motion complies with 29 CFR 2700.67</u>." April 24, 2020 email to the parties (emphasis added).

The Solicitor's attorney is a seasoned employee in that office, but even if the individual were not experienced, the Commission's procedural rules make the requirements for submission of a motion for summary judgment quite plain.

> At this point, despite being informed that a motion fully compliant with 29 CFR 2700.67 was to be filed by May 8th, and in the face of failing to file the motion by that date, now the DOL Attorney would like at least *another* 30 days to file the motion. Further dawdling is entirely unwarranted.
>
> **Accordingly, the parties are directed to file an appropriate, 29 C.F.R. §2700.67 compliant, motion for summary decision by Friday, June 5, 2020. SO ORDERED.**

Order (May 26, 2020).[7]

The history recounted above brings us to the June 5, 2020, Joint Motion filed by the DOL Attorney, which presented another disappointing submission. The entirety of the June 5th Motion, titled as "JOINT MOTION OF THE PARTIES TO UTILIZE THE SUMMARY DECISION PROCESS PURSUANT TO 29 C.F.R. § 2700.67, stated:

> The Parties, having discussed the merits of this matter, and pursuant to this Court's direction, now jointly request that in lieu of a hearing, that the dockets, YORK 2020-0027 and YORK 2020-0031, in issue be decided by means of the Summary Decision provision of 29 C.F.R. §2700.67. The Parties share the view that the use of Summary Decision here will be economical and efficient, and that each party will have a full opportunity to present its case using this process.
>
> A. The Use of Summary Decision Is Appropriate here.
>
> The Parties have discussed the merits of this matter thoroughly and believe that there is no genuine issue of material fact that is in dispute. To ensure transparency regarding the Secretary's case, counsel for the Secretary has provided the complete investigative file in each of the two dockets for review. The parties spoke this week about whether either party is aware of any fact that is in dispute in this matter. The Parties assert that in their joint view there is not any factual impediment to proceeding with Summary Decision here. Counsel for the Secretary has explained to Respondent that the Secretary will, by means of affidavit, introduce the core facts, and investigative documents which support the violations. Both parties understand that each party must also file a Memorandum in support of their respective position. Having reached their preliminary understandings, the Parties believe that the Summary Decision process will serve the ends of justice here.
>
> B. The Core Legal/ Factual Issue.
>
> The Respondent asserts that MSHA acted improperly in issuing two separate citations for late filing of one quarterly report. The operator has 6 mines

[7] While this Order explained, more than once, why a *request* for resolution of this matter by summary decision cannot be honored, it is plain why the request makes no sense. The Court cannot act on a request for resolution by summary decision until a proper motion is first filed and only then can it review the submission to determine if that method is appropriate.

> covered on one quarterly report and paid the original fins e for late filing. MSHA also sited **[sic]** the operator 2 more times for the same singular reporting violation operated by the Respondent. The operator had data loss when switching computer networks that effected **[sic]** the calendar reminders for quarterly reporting. This was immediately addressed, and the fine was paid for this reporting violation. The Respondent asserts that MSHA's issuance of two additional citations for the one singular reporting violation is improper. The Secretary asserts that the issuance of two citations was a proper action by the MSHA inspector.
>
> The Parties, after discussion, both believe that no complicated issues of law are presented by this case and that consequently that their respective memoranda will be succinct. Accordingly, the parties move that the Court grant their joint request to employ the Summary Decision process as the most expeditious way of resolving the two dockets here.

Jt. Mot. (June 5, 2020)

As noted at the outset of this Order, the shortcomings of the June 5th Motion were numerous. Of less importance, but still noteworthy, the June 5th Motion continued to incorrectly cite the wrong judge assigned to these dockets, referring to the Court's colleague, Judge Jacqueline Bulluck, who has not been assigned to either docket. Further, embarrassing himself, the DOL Attorney, in the section titled "The Core Legal/Factual Issue," states that "MSHA also *sited* the operator 2 more times for the same singular reporting violation operated by the Respondent." (emphasis added). MSHA inspectors cite, not site, violations. The next sentence, added "[t]he operator had data loss when switching computer networks that *effected* the calendar reminders for quarterly reporting." (emphasis added). Affected, not "effected," is the correct word.

While these three errors are not of a grand scale, they do reflect an overall sloppy approach to the DOL Attorney's actions in this matter, which, to recap, included originally citing an incorrect docket number, incorrectly listing the judge assigned to these dockets, notable grammatical errors, and failing to respond to the Court's May 8th submission deadline.

Were it not for the profound deficiencies in the latest submission from the DOL Attorney, the Court likely would have noted the errors just described, but moved on to the substantive issue. It is in this latter respect that the more grievous shortcomings must be discussed.

Despite the DOL Attorney being alerted and warned as far back as **April 24th** that the parties had until May 8th to both determine and agree that there are no factual disputes *and directed to* be sure that the motion complies with 29 CFR 2700.67, the May 8th deadline was missed and not addressed until the Court brought the failure to the attention of the DOL Attorney. There is some notable irony at work here, what with the Respondent being cited for untimely quarterly reporting, while the DOL Attorney himself practiced untimely responses.

These shortcomings became magnified with the latest submission from the DOL Attorney in the June 5th Motion. That Motion, as noted above, is a "request to employ the Summary Decision process." Jt. Mot. at 3 (June 5, 2020). It must be emphasized again that one

does not file a motion requesting "to *employ* the Summary Decision process," instead one files a motion *for* summary decision of the judge. But such a motion, as the Court has now explained more than once to the DOL Attorney, must comply with 29 C.F.R. § 2700.67.

Despite two attempts, the DOL Attorney has not met the requirements of the procedural rule for summary decision. The relevant subparts of this provision give clear instructions on the contents of such a motion.[8] They are set forth here:

> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.
>
> (c) Form of motion. A motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.
>
> (d) Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.
>
> 29 C.F.R. § 2700.67.

Summary:

Whether the DOL Attorney was dilatory or simply confused about the requirements for filing a motion for summary decision, the Court does not know. What the Court does know is that more than six weeks ago, on April 24, 2020, it clearly noted and explained the requirements for filing such a motion. With more than six weeks having elapsed, and following the apology for missing the first deadline, the DOL

[8] Substantively, the Commission's procedural rule for summary decision is in line with the Rule 56 of the Federal Rules of Civil Procedure.

Attorney has twice filed pointless, ineffective motions which do not meet the requirements for seeking summary decision.

Of course, the DOL Attorney does not have to utilize the summary decision motion process, though he has expressed several times that he wishes to do so. However, if opted, the process, per 29 C.F.R. § 2700.67, must be followed. It was back on April 24, 2020, that the DOL Attorney asked that "a deadline for the filing of Cross Motions and Memoranda be set at least 30 days from today." DOL Attorney E-mail, April 24, 2020. The Court, as recounted above, rejected the request that such motion be submitted "at least 30 days" from April 24th, requiring instead that it be submitted by May 8, 2020. Now, even 18 days *after* the date the DOL Attorney requested, no 29 C.F.R. § 2700.67 compliant motion has been filed.

With no 29 C.F.R. § 2700.67 compliant motion presented, the Court will set this matter for a hearing. A conference call to establish a hearing date will be held during the week of June 15, 2020. The hearing will be held without delay. Though many hearings are unsuitable for an electronic hearing, the Court believes this matter can be conducted through that method. Of course, the Court will consider a proper motion for summary decision should one ever be submitted, but again, per the applicable procedural rule, any such motion must be filed "**no later than 25 days before the date fixed for the hearing on the merits**."[9] 29 C.F.R. § 2700.67(a) (emphasis added).

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

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[9] 29 C.F.R. § 2700.67(a), titled, "Filing of motion for summary decision," provides that "[a]t any time after commencement of a proceeding and **no later than 25 days before the date fixed for the hearing on the merits,** a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt." (emphasis added).

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