

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 26, 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 JOINT MOTION FOR SUMMARY DECISION

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 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.**

For such a relatively non-complex matter, these dockets have been handled very poorly. To begin, 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 Department of Labor Attorney assigned to this matter (“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.

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.**

April 24, 2020 email to the parties.

May 8th came and went, all without any compliance to the Court’s email. On May 20, 2020, the Court 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 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, as repeated below.”

An apology followed on May 21st, admitting the filing had been overlooked. The Court accepted the apology. A promise to file the motions that same day accompanied the DOL Attorney’s apology. The motions were filed but were woefully inadequate, in small and large, aspects.¹ 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

¹ The entirety of both motions, differentiated only by the docket numbers, stated: “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.” JOINT MOTION OF THE PARTIES TO REQUEST THAT RESOLUTION OF THIS MATTER BE MADE BY SUMMARY DECISION at 1-2.

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.”

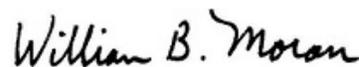
Of particular importance here, 29 C.F.R. § 2700.67, subsection (c) details the “Form of motion,” providing that “[a] **motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying 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 added).

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 be sure that the motion complies with 29 CFR 2700.67.” 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.



William B. Moran
Administrative Law Judge

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