

**UNITED STATES OF AMERICA**

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

**HILDA L. SOLIS**, Secretary of Labor,  
United States Department of Labor,

Complainant,

v.

**WESTERN GRAIN MARKETING, LLC**,

Respondent.

OSHRC Docket No. 11-2725

Judge Patrick B. Augustine

**STIPULATION AND SETTLEMENT AGREEMENT**

Complainant, **HILDA L. SOLIS**, the Secretary of Labor, United States Department of Labor, and Respondent, **WESTERN GRAIN MARKETING, LLC**, pursuant to Rule 100 of the Commission, hereby agree and stipulate to the full Settlement of this matter as follows:

**I**

Complainant hereby withdraws Citation 1, Item 1 and Citation 1, Item 2.

**II**

Respondent has no objection to the Complainant amending the Citation and Notification of Penalty as set forth in paragraph I above.

**III**

Respondent hereby withdraws its Notice of Contest to the Citation and Notification of Penalties, as amended herein. Respondent makes the following representations and assurances to Complainant:

a. The conditions alleged in the Citation and Notification of Penalties have been addressed and/or will be addressed within 60 days of the date the Order Approving Settlement

becomes a Final Order of the Occupational Safety and Health Review Commission. Respondent shall provide verification to the Peoria Area Office that the following actions have been taken.

Respondent agrees that in accordance with the applicable provisions of 29 CFR 1910.272 and other identified provisions, it will develop and implement a sweep auger policy consistent with the following safety principles:

1. In accordance with 29 CFR 1910.272, no employee shall enter a grain bin until after completion of a bin entry permit which confirms there are no engulfment and/or atmospheric hazards present inside the storage bin, or unless the employer or the employer's representative who would otherwise authorize the permit remains present during the entire entry. The grain bin hazard evaluation shall be completed by a qualified person.
2. Before entering the bin to set up or dig out the sweep auger, the subfloor auger and the grain entry points must be de-energized and locked out.
3. Before operating the sweep auger, the grate/guard on the sub-floor auger must be in place and secured.
4. Employees operating the sweep auger cannot walk on the grain, if the depth of the grain presents engulfment hazard.
5. It shall require that the sweep auger is provided with guards and covers per the manufacturers design, and the only unguarded portion of the sweep auger is the point of operation.
6. A rescue trained and equipped observer, in accordance with 1910.272(g), must always be positioned outside the storage bin monitoring the activities of all workers inside the bin.
7. If a worker is to enter the bin while the sweep auger is energized, the employer must utilize engineering controls within the grain bin to prevent workers from coming into contact with the energized sweep auger. The use of only administrative controls without the use of an engineering control is not a sufficient means of worker protection. Acceptable engineering controls may include:
  - a. Sweep auger equipped with an attached guard which prevents the workers contact with the unguarded portion of the auger in accordance with 1910 subpart O.
  - b. Sweep auger equipped with a control mechanism, such as a dead-man switch or other similar device, which will allow for the sweep auger's operation only when the operator is in contact with device. If this method is utilized as a means of worker protection, the worker must be positioned

at least seven feet from the auger at all times it is energized; moreover, if worker(s) in addition to the operator of the sweep auger are in the bin, additional engineering controls (such as those described in section 7 of this criteria) must be used to protect those worker(s).

- c. Portable guardrails are permissible, provided they are placed at least seven feet behind the sweep auger. Note: the use of a warning line, or other easily removable device, other than a portable guardrail, is not considered sufficient engineering controls.
- 8. The auger must be provided with a positive speed control mechanism or bin stop device that prevents the uncontrolled rotation of the sweep auger.
- 9. Workers are prohibited from using their hands, legs or other similar means to manipulate the sweep auger while it is operating.
- 10. If maintenance/adjustments are necessary to the sweep auger, the sweep must be unplugged, with the person making the adjustments maintaining the control of the plug, or locked-out in accordance with lock-out/tag-out procedures.

b. To the best of Respondent's knowledge and belief, Respondent is currently complying, and in the future will in good faith continue to comply, with the provisions of the Act, and applicable standards promulgated pursuant thereto.

#### IV

Based on the aforesaid assurances and representations by Respondent, Complainant has no objection to the withdrawal of the Notice of Contest.

#### V

Except for proceedings brought by or on behalf of the Secretary, matters arising out of these proceedings, and any other OSHA proceedings between the parties hereto, none of the foregoing agreements, statements, findings, and actions taken by Respondent shall be deemed an admission by the Respondent of the allegations contained within the Citation and Notification of Penalty and the Complaint. The agreements, statements, findings and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated.

**VI**

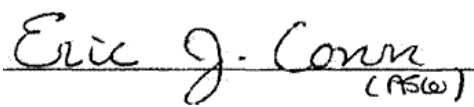
Respondent certifies that there is no authorized employee representative at Respondent's workplace. It is hereby further certified by Respondent that this Settlement Agreement has been served on employees, by posting this agreement on **11/28/12**, in a place where the citation is required to be posted, in accordance with Rules 7 and 100 of the Commission's Rules of Procedure.

**VII**

The Complainant and Respondent agree that this settlement agreement, which amends the Citations and Notification of Penalties, as set forth above, shall become a final and enforceable order of the Review Commission, with no costs, fees or other expenses to be amended or awarded to any of the parties in this litigation.

Dated: **11/27/12**

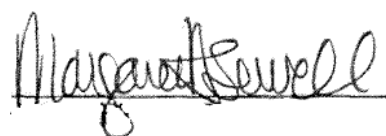
**WESTERN GRAIN MARKETING, LLC**

By:   
ERIC J. CONN  
Counsel for WESTERN GRAIN MARKETING, LLC

Epstein Becker & Green, P.C.  
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Washington, D.C. 20037  
(202) 861-5335

**M. PATRICIA SMITH**  
Solicitor of Labor

JANET M. GRANEY  
Acting Regional Solicitor

  
By: MARGARET A. SEWELL  
Trial Attorney

230 South Dearborn Street  
Suite 844  
Chicago, Illinois 60604  
(312) 353-3481

## **NOTICE**

Any party (including any authorized employee representative of affected employees and any affected employee not represented by an authorized representative) who has any objection to the entry of an order as set forth in this agreement, must communicate such objections within ten (10) days of the posting of this agreement to the Honorable Patrick B. Augustine, Occupational Safety and Health Review Commission, U.S. Custom House, 721 19th Street, Room 407, Denver, Colorado, 80202, with copies to attorneys for Complainant and Respondent.



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
United States Customs House  
721 19<sup>th</sup> Street, Room 407  
Denver, Colorado 80202-2517

Phone: (303) 844-0418

Fax: (303) 844-3759

SECRETARY OF LABOR,  
Complainant,

v.

WESTERN GRAIN MARKETING, LLC,  
Respondent

OSHR DOCKET

NO.: 11-2725

**ORDER APPROVING STIPULATION AND SETTLEMENT AGREEMENT**

The Commission has jurisdiction over the subject matter of the case and over the parties by virtue of the filing of a timely notice of contest.

The *Stipulation and Settlement Agreement ("Agreement")* between the parties filed on November 27, 2012, has been considered. The *Agreement* has been served on all parties and authorized employee representatives and posted in the manner prescribed by Commission Rule 7(g).<sup>1</sup> Ten (10) days have since service and posting and no objection to the *Agreement* has been filed.

The *Agreement* is approved under 5 U.S.C. §554(c)(1) and Commission Rule 100(c) as in compliance with those sections. The terms of the *Agreement* are incorporated, in their entirety, by reference in this order.

The order shall become final thirty (30) days from the date of its docketing by the Executive Secretary, unless review thereof is directed by a Commission Member within that time. 29 U.S.C. §661(j).

SO ORDERED.

Dated: December 10, 2012  
Denver, Colorado

*/s/ Patrick B. Augustine*

Patrick B. Augustine  
Judge, OSHRC

<sup>1</sup> Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R §2200.1 -.212, as amended, 55 Fed. Reg. 22780-4 (June 4, 1990).



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

Phone: (202) 606-5400

Fax: (202) 606-5050

Secretary of Labor,  
Complainant,  
v.  
Western Grain Marketing, LLC,  
Respondent.

Region: 5  
OSHRC Docket No.: 11-2725  
OSHA Inspection No.: 98026

**Notice of Docketing  
Of Administrative Law Judge's Decision**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on 12/10/2012. The decision of the Judge will become a final order of the Commission on 1/9/2013 unless a Commission member directs review of the decision on or before that date.

Any party desiring review of the judge's decision by the Commission must file a petition for discretionary review. Any such petition shall be received by the Executive Secretary on or before 12/31/2012 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91. All further pleadings or communications regarding this case shall be addressed to the Executive Secretary with a copy to the DOL Solicitor at the address below.

**Executive Secretary**  
**Occupational Safety and Health Review Commission**  
**1120 20th St., N.W., Suite 980**  
**Washington, D.C. 20036-3419**

**Charles F. James, Counsel for Appellate Litigation**  
**Heather R. Phillips, Counsel for Appellate Litigation**  
**Office of the Solicitor, U.S. DOL**  
**Room S4004**  
**200 Constitution Avenue, N.W.**  
**Washington, D.C. 20210**

If directed for Review by the Commission, then the Counsel for Appellate Litigation will represent the Department of Labor. If you have questions, please call me at (202) 606-5400.

Ray H. Darling, Jr.  
Executive Secretary

Date: December 10, 2012

/s/  
James Alvino, Legal Clerk

This notice has been sent to:

**For the Complainant:**

Janet M. Graney  
Acting Regional Solicitor  
Office of the Solicitor, U.S. DOL  
Federal Office Building  
230 South Dearborn Street, Room 844  
Chicago, IL 60604-1502

**For the Respondent:**

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1227 25th Street, NW, Suite 700  
Washington, DC 20037