

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

September 17, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-592
Petitioner,	:	A.C. No. 15-09636-139419
	:	
v.	:	Docket No. KENT 2008-784
	:	A.C. No. 15-09636-144081
BLUE DIAMOND COAL COMPANY,	:	
Respondent,	:	
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2009-6
MINE SAFETY AND HEALTH	:	A.C. No. 15-09636-161762 A
ADMINISTRATION (MSHA),	:	
Petitioner,	:	
	:	
GARY L. JENT, Employed by BLUE	:	
DIAMOND COAL COMPANY,	:	
Respondent.	:	Mine: #77

**ORDER DENYING RESPONDENT’S DISPOSITIVE MOTION ON FINDINGS OF
FACT AND CONCLUSIONS OF LAW PREVIOUSLY DECIDED**

**ORDER DENYING RESPONDENT’S MOTION TO EXCLUDE
WITNESS MICHAEL GAUNA**

This proceeding is brought by the Secretary of Labor against Respondent, Blue Diamond Coal Company, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d), and 29 C.F.R. §§ 2700.25–.31. On July 23, 2010, Respondent filed its Dispositive Motion on Findings of Fact and Conclusions of Law Previously Decided (“Motion for Collateral Estoppel”). Respondent filed its prehearing report on August 3. Pursuant to a request by the Secretary, her prehearing report deadline was extended to August 11 due to counsel for the Secretary being out of town for several hearings. Due to a death in my family, I held a teleconference with counsel for all of the parties on August 9, 2010, to reschedule this matter’s hearing date for October 26–29, 2010. Given counsel for the Secretary’s hearing schedule coupled with the new October hearing date, I also permitted the Secretary to file both her prehearing report and response to Respondent’s motion by August 17, 2010. The Secretary filed her response on August 11 and her prehearing report on August 17. Respondent filed the Motion to Exclude Witness Michael Gauna (“Motion to Exclude Witness”) on August 23, 2010. The Secretary responded to the Motion to Exclude Witness on September 2, 2010.

I. MOTION FOR COLLATERAL ESTOPPEL

Respondent argues that collateral estoppel bars relitigation of whether it failed to maintain 9,000 cubic feet per minute (“CFM”) at the last open crosscut (“LOCC”). (Resp’t Mot. for Collateral Estoppel 3–4.) That issue underlies Order No. 4220150, which is in dispute in this case. In making its argument, Respondent relies on Administrative Law Judge Michael E. Zielinski’s opinion in *Blue Diamond Coal Co. (Blue Diamond I)*, 32 FMSHRC 581 (May 2010) (ALJ). Respondent stresses that *Blue Diamond I* considered whether the violation underlying Order No. 7521769 was highly likely to result in a fatal injury because the absence of the permanent stopping resulted in the failure to maintain 9,000 CFM at the LOCC. (Resp’t Mot. for Collateral Estoppel 2.) Respondent observed that Judge Zielinski made findings of fact and conclusions of law regarding the amount of air at the LOCC.¹ (*Id.* at 2–3.) Because Order No. 4220150 in this case alleges the failure to maintain 9,000 CFM at the LOCC, Respondent argues it should not have to relitigate this issue.² (*Id.* at 3–4.) Respondent further asserts that the remaining elements of collateral estoppel are satisfied. (*Id.* at 3.)

The Secretary responds that the issues presented in *Blue Diamond I* and in the present matter are not the same, as they involve different legal standards. (Sec’y Resp. to Mot. for Collateral Estoppel 4–5.) The Secretary emphasizes that *Blue Diamond I* evaluated Respondent’s missing and improperly constructed stoppings at several locations in the mine, whereas the underlying violation in this case concerns the ventilation at the face of the mine. (*Id.* at 5.) The Secretary also argues that Judge Zielinski purposefully chose not to resolve the facts at issue in Order No. 4220150. (*Id.* at 5–6.)

In assessing an assertion of collateral estoppel, the Commission has stated that the “[i]dentity of issue is a fundamental element that must be satisfied before collateral estoppel may be applied.” *Bethenergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) (citing *Continental Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 594 (7th Cir. 1979)). In the context of issue preclusion, “[i]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same.” 18 Charles Alan Wright et al.,

¹ In support of this contention, Respondent attached to its motion a copy of *Blue Diamond I* indicating the findings it believed were pertinent to resolving this issue. I have considered this information and do not agree that the issues involved in these two orders are the same for the purposes of collateral estoppel.

² Respondent also quoted Order No. 7521769, stating ““Order #4220150 is issued for failure to comply with the approved ventilation plan on the 011/MMU (failure to maintain 9,000 cfm at the last open crosscut).”” (Resp’t Mot. for Collateral Estoppel at 2.) Order No. 7521769’s mere reference to Order No. 4220150 for failure to maintain 9,000 CFM at the LOCC does not dispose of this issue. As discussed below, the issues involved in Order No. 4220150 and Order No. 7521769 are not the same.

Federal Practice and Procedure § 4417, at 449 (2d ed. 2002) (quoting *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971)).

To apply collateral estoppel, the issues in the previous and the present actions must be identical beyond reasonable doubt. In 2001, the Commission assessed whether collateral estoppel may apply to an order specifically alleging a failure to identify kettle bottoms by location based on a nearly contemporaneous citation for roof defects involving multiple conditions, such as kettle bottoms. *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1110–11, 1115 (Oct. 2001). The Commission reasoned that “it is apparent from comparing the uncontested citation and the contested orders . . . that there is a lack of identity of issues.” *Id.* at 1115.

Citing only general points of law regarding collateral estoppel, Respondent has not demonstrated the required identity of issues. Here, the previous order charged Respondent with failing to maintain permanent stoppings under 30 C.F.R. § 75.333(b)(2). The present order alleges that Respondent breached its ventilation plan under § 75.370(a)(1). Judge Zielinski discussed the air flow at the LOCC only insofar as it related to whether No. 7521760 constituted an S&S violation resulting from an unwarrantable failure to comply with § 75.333(b)(2). *Blue Diamond I*, 32 FMSHRC at 583–91. Judge Zielinski did not evaluate the breach of the ventilation plan alleged in the order at issue in this case. *Id.* at 584. He stated that “[Order No. 4220150] is not at issue in this proceeding.” *Id.* Instead, he discussed the airflow at the LOCC “in terms of the missing stopping” at issue in Order No. 7521760. *Id.* at 5. Because these two orders involve incongruent factual allegations and different legal standards, Respondent’s motion must be denied in accordance with *Eagle Energy*. Indeed, taken to its logical conclusion, to rule to the contrary would suggest that the Secretary has the broad power to invoke collateral estoppel against operators based on past related citations and orders.

II. MOTION TO EXCLUDE WITNESS

Respondent argues that one of the Secretary’s witnesses, Michael Gauna, should be excluded from the hearing. (Resp’t Mot. to Exclude Witness 1.) Respondent contends that the introduction of Mr. Gauna as a witness constitutes an unjustified, last-minute delay because the Secretary had not disclosed him as a possible witness until her August 17 prehearing report. (*Id.* at 1.) Moreover, the Secretary’s prehearing report is Respondent’s only source of information concerning Mr. Gauna. (*Id.* at 1–2.) According to Respondent, scheduling the witness depositions took great effort, and given the timing of Mr. Gauna’s disclosure, it would be prejudiced if I allowed Mr. Gauna’s testimony. (*Id.* at 2.)

The Secretary responds that she must rely on Mr. Gauna’s testimony to counter the testimony of Respondent’s expert witness, Dr. David Newman. (Sec’y Resp. to Mot. to Exclude Witness 2.) The Secretary had not even heard of Respondent’s intent to call Dr. Newman until July 2010 after Respondent had deposed all of the Secretary’s witnesses. (*Id.* at 1.) Within two weeks of receiving Respondent’s prehearing report identifying Dr. Newman as a witness, the Secretary concluded she would need Mr. Gauna to address Dr. Newman’s assertions. (*Id.* at 2.)

The Secretary argues that because I rescheduled this case's hearing for a later date, Respondent will not be prejudiced. (*Id.*) The Secretary further asserts that denying Mr. Gauna's testimony will hurt her response to Dr. Newman and preclude my consideration of relevant evidence. (*Id.* at 3.)

Under 29 C.F.R. § 2700.55, the administrative law judge has broad power to rule on evidentiary issues. Although the Secretary did not alert Respondent about calling Mr. Gauna until August 17, Respondent has more than a month before the hearing date to depose him. Moreover, the Secretary will call Mr. Gauna in response to Dr. Newman, of whom the Secretary did not receive formal notice until August 3. Barring the testimony of Mr. Gauna would limit the availability of relevant evidence that would be helpful to my understanding of the case. Based on these facts, I deny Respondent's motion.

I am, nevertheless, sensitive to the demands of scheduling depositions. I am also aware that Congress's recent supplemental appropriations bill has given the Secretary extra resources. Therefore, the Secretary shall make Mr. Gauna available for deposition as early as possible before the hearing date.

III. ORDER

Respondent's Motion for Collateral Estoppel is **DENIED**. Respondent's Motion to Exclude Witness is **DENIED**. In addition, the Secretary shall make Mr. Gauna available for deposition by Respondent at the earliest date possible.

Alan G. Paez
Administrative Law Judge

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