

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 6, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY
	:	PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-210-M
Petitioner	:	A.C. No. 23-00759-05519
	:	
v.	:	
	:	Southwest Quarry
SOUTHWEST QUARRY AND	:	
MATERIALS, INC,	:	
Respondent	:	

**DECISION**

Before: Judge Manning

The Secretary filed a petition to assess a civil penalty of \$9,500 against Southwest Quarry and Materials, Inc., (“Southwest Quarry”) in this case. This penalty was proposed for Citation No. 4458601, which alleges that Southwest Quarry denied duly authorized representatives of the Secretary the right to inspect its quarry on December 11, 2001, in violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (“Mine Act”). Southwest Quarry filed an answer to the Secretary’s petition which states that it assumes that the proposed penalty is a “misprint.” It further answered as follows:

We went to Federal Court and settled this matter. If you people think that I’m going to keep paying you, you had better think again.

The answer did not deny the allegations contained in the citation. This case was set for hearing.

On November 20, 2002, the Secretary filed a motion for summary decision. In the motion, the Secretary states that the precise issue contested by Southwest Quarry in this case was “actually and necessarily decided” by the United States District Court for the Eastern District of Missouri in *Chao v. Chester McDowell*, 198 F.Supp.2d 1093 (2002). As a consequence, the Secretary argues that, under the doctrine of collateral estoppel, the fact that Southwest Quarry denied entry on December 11, 2001, may not be relitigated before the Commission. The Secretary also contends that the statutory criteria used to assess a civil penalty were either addressed by the district court or are not in dispute. Accordingly, she contends that a violation of section 103(a) of the Mine Act has been established and she seeks

the assessment of an appropriate civil penalty.

On November 21, 2002, in response to the Secretary's motion, I issued an order canceling the hearing. I also ordered Southwest Quarry to file a response to the motion. In the order, I advised Southwest Quarry of the provisions contained in the Commission's procedural rule on motions for summary decision and stated that, if it did not respond to the Secretary's motion, a decision may be entered against it. I also enclosed a copy of 29 C.F.R. § 2700.67 with the order. Southwest Quarry did not respond to the Secretary's motion or to my order to respond.

In his memorandum and order, District Court Judge Webber explained that on November 24, 1998, the district court entered a permanent injunction which enjoined Quarry Superintendent Chester McDowell and Southwest Quarry, their agents and employees, from directly or indirectly denying inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") entry into the quarry for purposes of carrying out the provisions of the Mine Act. 198 F.Supp.2d at 1094. The injunction also set forth remedies in the event that Southwest Quarry violated the terms of the injunction. The injunction provided that if Chester McDowell was not present when MSHA inspectors arrived, another person shall be designated as the person in charge. *Id.* at 1095.

Judge Webber described in detail the events that occurred at the quarry on December 11, 2001, when Larry Feeney and Michael Davis, two authorized representatives, arrived to inspect the quarry. *Id.* at 1095-96. An employee of Southwest Quarry, Virginia Gaddy, informed the inspectors that the inspection could not proceed because Chester McDowell was not present. When they asked for Troy Gaddy, an employee listed as a walk-around representative, Ms. Gaddy responded that he was operating the crusher so he could not accompany them. The inspectors waited for McDowell, but when he did not appear and the inspection was again prohibited by Ms. Gaddy, they issued the subject citation. Apparently, McDowell was on the property in his pickup truck and, when the citation was given to him by Ms. Gaddy, McDowell became furious and tore it up. McDowell approached the inspectors, threw the torn citation into Feeney's face, and verbally abused them. *Id.* at 1096. The inspectors issued a section 104(b) order of withdrawal because Southwest Quarry refused to comply with the citation and left the quarry. Judge Webber's description of these events provides more detail. The judge also described previous incidents in which Southwest Quarry refused entry to MSHA inspectors. *Id.* at 1096-98.

Judge Webber determined that the Secretary had met its burden to adduce clear and convincing evidence that Southwest Quarry\* had violated the November 1998 injunction. The court noted that it was "struck by the gravity" of the situation, that Southwest Quarry had

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\* The respondents in the district court case were Chester McDowell, Virginia Gaddy, and Southwest Quarry & Materials, Inc. I refer to them collectively as Southwest Quarry in this decision.

impeded the ability of MSHA “to conduct normal, regulatory inspections” of the quarry on four separate occasions, and that McDowell had “threatened physical harm” to MSHA inspectors. *Id.* at 1100. Judge Webber imposed civil contempt sanctions on Southwest Quarry in the amount of \$100,000 and sentenced Mr. McDowell to a “thirty-day period of incarceration” *Id.* The judge suspended both sanctions so long as Southwest Quarry complies with the court’s injunction of November 24, 1998. The judge ruled that if Southwest Quarry “should, in the future, impede in any fashion a lawful inspection conducted by MSHA inspectors” the suspension will be removed. *Id.* Southwest Quarry did not appeal the district court’s order.

There can be no dispute that the Secretary and Southwest Quarry fully adjudicated the events that lead to the issuance of Citation No. 4458601 in the district court proceeding. Southwest Quarry was represented by counsel and the court entered detailed findings of fact. Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit may preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit. *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) *citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Identity of issues is a fundamental element that must be satisfied before collateral estoppel may be applied. “[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.” *U.S. v Mendoza*, 464 U.S. 154, 158 (1984). Collateral estoppel serves “the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation.” *Parkland Hosiery* 439 U.S. at 326. The district court determined that Southwest Quarry violated the terms of the injunction by prohibiting a lawful inspection of the quarry on December 11, 2001.

I find that collateral estoppel should be applied because the issues in the two cases are identical, the district court judgment was a final adjudication on the merits, the two cases involve the same parties, and Southwest Quarry was given a full and fair opportunity to be heard in the district court action. Jurisdictional issues are subject to collateral estoppel in Mine Act cases. *See Mechanicsville Concrete, Inc.*, 17 FMSHRC 483 (March 1995) (ALJ); *Associated Electric Cooperative, Inc.*, 20 FMSHRC 424 (April 1998) (ALJ). The district court held that the quarry is a mine subject to inspection by duly authorized representatives of the Secretary and that Southwest Quarry unlawfully impeded an MSHA inspection when it refused to allow the inspectors to enter the quarry on December 11, 2001, to carry out an inspection. These are the same issues that must be resolved in this case when determining whether Southwest Quarry violated section 103(a) of the Mine Act. Consequently, I find that Southwest Quarry is precluded from relitigating the issue of whether it violated section 103(a) of the Mine Act when it refused to allow Inspectors Feeney and Davis entry into the quarry on December 11, 2001. The Secretary satisfied the Commission’s requirements for summary decision. 29 C.F.R. § 2700.67.

Although the parties did not directly litigate what civil penalty should be assessed, taking into consideration the criteria set forth in section 110(i) of the Mine Act, the district

court's findings and conclusions preclude relitigating any of the court's findings that bear directly on the penalty criteria. In addition, by failing to respond to the Secretary's motion for summary decision and by failing to respond to my order of November 21, 2002, Southwest Quarry waived its right to present evidence on the civil penalty criteria. Accordingly, I enter the following findings with respect to the six statutory penalty criteria.

MSHA's records presented with the Secretary's motion show that no citations were issued to Southwest Quarry between December 11, 1999, and December 10, 2001, but that 56 citations had been issued prior to that time. MSHA's records show that the quarry worked 10,875 production hours in 2001 indicating that it is a relatively small mine operator. The violation occurred in the face of a permanent injunction that was issued by the district court in November 1998. In the contempt proceeding, the district court determined that Mr. McDowell engaged in a "pattern of persistent interference with the lawful actions of MSHA inspectors." 198 F.Supp.2d at 1100. Consequently, Southwest Quarry's negligence was high. Southwest Quarry did not make good faith efforts to abate the condition that gave rise to the citation as evidenced by the fact that the Secretary was forced to issue a section 104(b) order after Southwest Quarry continued to refuse entry to the inspectors. *Id.* at 1096. Southwest Quarry did not present any evidence as to its ability to continue in business if required to pay the Secretary's proposed penalty. Finally, the violation was serious because, by denying MSHA inspectors the right to conduct a lawful inspection, Southwest Quarry exposed its employees to hazards that would have been corrected if the inspection had been conducted. The district court recognized the gravity of the violation. *Id.*

### **ORDER**

For good cause shown, the Secretary's motion for summary decision is **GRANTED**. Southwest Quarry violated section 103(a) of the Mine Act on December 11, 2001, when it denied entry to MSHA inspectors. Citation No. 4458601 is **AFFIRMED** as written. Taking into consideration the penalty criteria in section 110(i) of the Mine Act, especially the negligence, gravity, and good faith criteria, I find that the Secretary's proposed penalty of \$9,500 is reasonable and appropriate. Consequently, Southwest Quarry & Materials, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$9,500 within 40 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

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