

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

February 25, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-306-M
Petitioner	:	A.C. No. 23-00759-05521
	:	
v.	:	
	:	
SOUTHWEST QUARRY & MATERIALS,	:	
INCORPORATED,	:	
Respondent	:	Southwest Quarry & Materials

## DEFAULT DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Southwest Quarry & Materials, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$1,096.00. For the reasons set forth below, I affirm the citations and assess the penalty proposed.

On December 18, 2003, counsel for the Secretary filed a Motion to Deem Admissions Admitted and Motion for Summary Decision. However, because the operator, who is not represented by counsel, failed to respond to the Secretary's motion or to file a required prehearing statement, an Order to Show Cause was issued instead.<sup>1</sup>

The Secretary's motion stated that discovery requests, including requests for admissions to each citation, were served on the Respondent on October 27, 2003. When the Respondent did not object or respond to the requests, counsel for the Secretary sent the company a letter on November 28, 2003, pointing out the failure to respond and advising that failure to respond "could result in the matter being deemed admitted." The Operator had not responded to the discovery requests as of the date the Secretary filed the motion. As noted above, the company also did not respond to the Secretary's motion.

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<sup>1</sup> The case was scheduled for hearing on January 13, 2004. The Order to Show Cause continued the hearing.

In addition, the Notice of Hearing in this case required the parties to file a preliminary statement concerning the matters to be considered at the hearing with the judge so that it was “**RECEIVED** not later than **5:00 p.m. ET** on **January 2, 2004.**” No statement was received from the Respondent.

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), provides that: “When a party fails to comply with an order of a Judge or these rules . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal.” Additionally, Commission Rule 66(c), 29 C.F.R. § 2700.66(c), states that: “When the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate penalties and directing that such penalties be paid.”

Accordingly, on January 7, 2004, Southwest Quarry and Materials, Inc., was ordered to show cause, within 21 days of the date of the order, why it should not be held in default, the nine citations at issue in this case affirmed and ordered to pay a civil penalty of \$1,096.00. The order directed that the Respondent could comply by filing, within the 21 days provided, a proper response to the Secretary’s discovery requests, with a copy of the response filed with the judge, or it could furnish any other reasons it deemed appropriate as to why it should not be held in default.

On January 26, 2004, an undated letter was received from the Respondent. It was signed by Chester McDowell, Vice-President, and stated:

I am sending you a copy of a letter that I sent to Lydia A. Tzagoloff. She said that I haven’t done anything about this matter. I have called her and sent two faxes to her. I am sending the next letter to her registered. Also I am sending you a copy of pictures of my backhole [*sic*] with the guard that has always been on it.

The questions in my letter to Tzagoloff sured [*sic*] be answered.

After you read my letter, you will see that MSHA has no ground to stand on. This case should be dropped.

The enclosed letter was also undated. It contained questions about the inspectors’ qualifications and statements about the citations.

Since the Respondent apparently did not respond to the discovery requests and only marginally addressed why it should not be defaulted, I had my Legal Assistant instruct counsel for the Secretary to set-up a telephone conference call with Mr. McDowell. After several days of unsuccessfully attempting to contact Mr. McDowell, counsel called my Legal Assistant to give an update. At that time, my Legal Assistant called the Respondent and left a message that it was

very important that Mr. McDowell contact the judge and counsel for the Secretary. As of the date of this decision, the Respondent has not been heard from.

It is apparent that the operator is intent on not participating in this proceeding. The company has failed to respond in a meaningful way to any orders or to the Secretary's discovery requests. Accordingly, I find that the Respondent is in default in this matter.

**Order**

In view of the above, Citation Nos. 6217087, 6217088, 6217089, 6217090, 6217091, 6217092, 6217093, 6217094 and 6217095 are **AFFIRMED** and Southwest Quarry & Materials, Inc., is **ORDERED TO PAY** a civil penalty of **\$1,096.00** within 30 days of the date of this decision.

T. Todd Hodgdon  
Administrative Law Judge  
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Distribution: (Certified Mail)

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