

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 11, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2002-80
Petitioner	:	A.C. No. 36-07456-03532
	:	
v.	:	Docket No. PENN 2003-10
	:	A.C. No. 36-07456-03533
D & F DEEP MINE BUCK DRIFT,	:	
Respondent	:	Docket No. PENN 2003-38
	:	A.C. No.36-07456-03534
	:	
	:	Buck Drift Mine

**ORDER GRANTING IN PART AND DENYING IN PART  
PETITIONER’S MOTION TO LIMIT TRIAL ISSUES**

The Secretary of Labor has filed a paper captioned “Motion to Limit Trial Issues,” in essence, a motion for partial summary decision, arguing that Respondent is precluded from litigating the issues of whether it violated section 103(a) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 813(a), with respect to the citations at issue in Docket Nos. PENN 2003-10 and PENN 2003-38. As grounds for the motion, the Secretary asserts that those issues were fully litigated in related federal civil proceedings, that the Secretary prevailed on those issues, and that Respondent is bound by the outcome. Respondent filed an opposition to the motion, challenging the Secretary’s assertion that the violation alleged in PENN 2003-10 was actually litigated, but conceding that it is bound by the federal court’s finding that it violated the Act with respect to the citation at issue in PENN 2003-38. For the reasons that follow, the Secretary’s motion is granted as to PENN 2003-38 and is denied as to PENN 2003-10.

On November 19, 2001, a citation was issued to Respondent charging a violation of 30 C.F.R. § 75.203(a), i.e., that it was mining excessively wide entries. Respondent was given until 8:00 a.m., the following day to abate the violation. On November 21, 2001, Jack McGann, an inspector employed by the Secretary’s Mine Safety and Health Administration (“MSHA”), appeared at the mine, apparently for purposes of conducting an inspection to determine if the violation had been abated. Respondent’s foreman, Randy Rothermel, Jr., refused to allow the inspection, and McGann issued Citation No. 7003551, charging Respondent with denying entry to the mine, a violation of section 103(a) of the Act.

The Secretary filed a civil action in the U.S. District Court for the Middle District of Pennsylvania against Randy Rothermel, Jr. and Cindy Rothermel, Respondent’s principals, seeking temporary and permanent injunctive relief, barring them from interfering with the

Secretary's efforts to enforce the Act.<sup>1</sup> On November 23, 2001, after a hearing, the District Judge found that "it appear[ed]" that the Rothermels had violated the Act and issued a preliminary injunction barring the Rothermels from, *inter alia*, "interfering with, hindering or delaying the Secretary of Labor from carrying out the provisions of the Act."<sup>2</sup> Pursuant to the injunction, MSHA inspected the mine the following day and the denial of entry citation was terminated. The Secretary then requested that the preliminary injunction be lifted and the federal court action was later withdrawn, or voluntarily dismissed. A proposed civil penalty in the amount of \$750.00 was assessed for the violation charged in Citation No. 7003551. Respondent contested the citation and penalty, and the Secretary's petition for assessment of civil penalty was assigned Commission Docket No. PENN 2003-10.

On January 30, 2002, another MSHA inspector arrived at Respondent's mine to conduct a respirable dust survey. Randy Rothermel refused to allow the inspector to enter the mine to conduct the survey. Citation No. 7003958 was issued, charging Respondent with denying entry to an authorized representative of the Secretary in violation of section 103(a) of the Act. Again the Secretary sued the Rothermels in federal court, seeking temporary and permanent injunctive relief.<sup>3</sup> The Rothermels defended, challenging the Secretary's legal authority to conduct respirable dust surveys. The Secretary prevailed in that action. A permanent injunction was entered on April 25, 2002, enjoining the Rothermels from "delaying, hindering, and/or denying entry to authorized representatives of the Secretary who are attempting to conduct inspections and/or sampling or otherwise fulfill the responsibilities of the Secretary and/or her authorized representatives under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*" Ex. F to the Secretary's motion, at p. 9. The Rothermels appealed that decision, which was affirmed. *Chao v. Rothermel*, 327 F.3d 223 (3rd Cir. 2003). A proposed civil penalty in the amount of \$1,500.00 was assessed for the violation charged in Citation No. 7003958. Respondent contested the citation and penalty and the Secretary's petition for assessment of civil penalty was assigned Commission Docket No. PENN 2003-38.

The Secretary contends that the doctrine of collateral estoppel, or issue preclusion, bars Respondent from relitigating issues adjudicated in the prior federal court actions, specifically, the lawfulness of the denials of entry to MSHA inspectors on November 21, 2001, and January 30, 2002. Respondent does not oppose the motion as to the January 30, 2002, denial of entry, recognizing that the legality of that action was litigated to a final judgment, affirmed on appeal, in the 2002 federal court action. Respondent opposes the motion as to the November 21, 2001,

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<sup>1</sup> U.S. District Court for the Middle District of Pennsylvania, action No. 3:CV-01-2228.

<sup>2</sup> Order, dated November 23, 2001, granting preliminary injunction, exhibit B to the Secretary's motion.

<sup>3</sup> U.S. District Court for the Middle District of Pennsylvania, action No. 3:02cv202.

denial of entry.<sup>4</sup>

The Secretary relies on cases from the Third Circuit that establish four prerequisites for application of issue preclusion: (1) the issue sought to be precluded is the same as that involved in the prior action; (2) the issue was actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment. *See, e.g., National Railroad Passenger Corp. v. Penn. Public Utility Comm.*, 288 F.3d 519 (3rd Cir. 2002). I accept this as an accurate statement of the law to be applied in this proceeding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992).

The Secretary contends that the lawfulness of Rothermel's denial of entry to inspector McGann on November 21, 2001, was litigated in both of the federal court actions and that Respondent is precluded from relitigating that issue in this case. The lawfulness of the November 2001 denial of entry was directly at issue in the 2001 federal lawsuit. However, that issue was not litigated to a final and valid judgment. The Secretary prevailed on a motion for a preliminary injunction by demonstrating a probability of success on that issue.<sup>5</sup> However, the preliminary injunction was later lifted at the Secretary's request and no final judgment was ever entered in that action.

The 2002 federal injunctive action was litigated to a final and valid judgment. Directly at issue in that case was the lawfulness of Rothermel's denial of entry on January 30, 2002, and the Secretary's authority to conduct respirable dust surveys. The Secretary contends that the lawfulness of the November 2001 denial of entry was also raised and litigated in that case. The transcripts of the hearings on the preliminary injunction motion and the request for permanent injunctive relief reveal that, although the November 2001 denial of entry was discussed, it was far from a focus of attention. The April 25, 2002, Memorandum and Order granting the permanent injunction notes in the "Background" section that: "On November 19-21, 2001, the Rothermels prevented representatives of the Secretary from conducting a roof plan inspection of the Rothermels' Buck Drift Mine." Ex. F to the motion, at pp. 1-2. In discussing the "balance of equities" factor, the court noted, *inter alia*, that "the Rothermels' frequent denial of entry to MSHA inspectors is a drain on the resources of MSHA and a potential danger to other miners." *Id.* at p. 8. The latter passage was apparently based upon testimony given in response to a

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<sup>4</sup> The Rothermels were named as individual defendants in the federal actions in their capacities as operators and controllers of the D & F Deep Mine Buck Drift. They actively litigated the issues in those cases. Application of preclusion principles to Respondent here, based upon the outcome of those cases, comports with due process considerations. Respondent does not contend otherwise.

<sup>5</sup> As the District Judge found, "it *appears* that Randy Rothermel and Cindy Rothermel violated the Federal Mine Safety and Health Act . . . by refusing to allow the authorized representative of the Secretary of Labor access to the mine." (emphasis added). Order dated November 23, 2001, in U.S. District Court for the Middle District of Pennsylvania, action No. 3:CV-01-2228, exhibit B to the Secretary's motion.

question addressed to MSHA's assistant district manager regarding his belief that MSHA inspectors would be denied access to the mine in the future. He replied, in part, "Well, the reason is because he's denied us entry several times already, and I have worked in this district nine years, and it's just the nature of this operator's attitude." Transcript of March 13, 2002, hearing in action No. 3:02cv202, Ex. E to the motion, at p. 39.

After reviewing the transcripts of proceedings and decision entered in the 2002 federal court action, I must conclude that the lawfulness of the November 21, 2001, denial of entry was not actually litigated in that proceeding. The fact of the denial was noted in the court's discussion of the background of the controversy. It was also most likely included in the reference to "frequent" denials of entry, the third of three factors discussed in the court's balance of equities analysis. However, nowhere does it appear that the lawfulness of that denial of entry was actually litigated and determined. Moreover, because of the reference to "several" or "frequent" denials of entry, it does not appear that a determination of the lawfulness of that particular denial of entry was an essential element of the final judgment entered in that case. Consequently, application of the doctrine of issue preclusion as to the lawfulness of Respondent's denial of entry on November 21, 2001, would not be appropriate.

### **ORDER**

Based upon the foregoing, the Secretary's Motion to Limit Trial Issues is **GRANTED** as to the lawfulness of the denial of entry on January 30, 2002, and is **DENIED** as to the lawfulness of the denial of entry on November 21, 2001. Respondent is precluded from relitigating the fact that it violated the Act as alleged in Citation No. 7003958. Respondent may, however, litigate the appropriateness of the gravity and negligence determinations, as well as the amount of the civil penalty.<sup>6</sup>

Michael E. Zielinski  
Administrative Law Judge

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<sup>6</sup> This order addresses only the issues raised by the Secretary's motion, i.e., whether the outcome of the federal court proceedings precludes Respondent from litigating the lawfulness of the November 21, 2001, and January 30, 2002, denials of entry. Both the Commission and the courts have recognized that the Secretary's authority to conduct inspections of mines under section 103(a) of the Act is extremely broad. *Donovan v. Dewey*, 452 U.S. 594 (1981); *Tracey & Partners*, 11 FMSHRC 1457 (Aug. 1989). It appears that there are few, if any, factual disputes regarding the November 2001 incident, and it is possible that discovery responses, affidavits or similar evidence might have established that there was no genuine issue as to any fact material to that issue, thereby making disposition by summary decision appropriate. At present, however, such a determination cannot be made.

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