COALEX STATE INQUIRY REPORT – 148
August 7, 1990

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TOPICS: CONTRACTOR LIABILITY FOR VIOLATIONS; OWNERSHIP AND CONTROL OF OPERATIONS

INQUIRY: Virginia statutes and regulations require applications for mining permits (or significant revisions) to be denied if it is determined that the applicants own or control other operations currently in violation of SMCRA. Please locate Interior administrative decisions as well as federal and state cases which interpret the phrase "own and control" in the context of SMCRA. What are the facts and circumstances of these opinions?

SEARCH RESULTS: A number of relevant opinions were identified using the COALEX Library and the other materials available in LEXIS. The retrieved opinions are listed below. Copies are attached.

Discussed first are the opinions whose fact situations are the most similar to those in the inquiry [Section I], followed by opinions which discuss related issues, e.g., which party controls an operation, owns a company or is responsible for violations and civil penalties [Section II].

SECTION I

PENNSYLVANIA ENVIRONMENTAL HEARING BOARD DECISIONS

1. WILLIAM J. MCINTIRE COAL CO. v COMMONWEALTH OF PA., DEPT. OF NATURAL RESOURCES (DER), Docket No. 83-180-M, slip op (July 7, 1986).

The Board upheld DER's refusal to renew the mining license of R.G. McIntire Coal Co, Inc. because Ronald McIntire, sole officer and shareholder of the corporation at the time of the denial, "was in violation of the Commonwealth's mining laws by virtue of his being a partner in the partnership which [was] responsible for the violations existing at the Heilman mine."

In addition, the transfer of stock to Mrs. McIntire was "a sham transaction designed to circumvent the requirements" of SMCRA.

William J. Mcintire Coal Co., Inc. was the permittee of the Heilman mine. The mining operations at Heilman were subcontracted to M & M Coal Co., a partnership of the brothers William and Ronald McIntire. The Board ruled that the permittee, William J. McIntire Coal, and the subcontractor, M & M Coal were "jointly and severally liable" for all violations of SMCRA associated with surface mining at the Heilman mine. "Since M & M [was] a partnership, any legal responsibility attributable to it [was] attributable to its partners", William and Ronald McIntire, both of whom "personally supervised the day-to-day operations" at the site.

Cites to BLACK FOX MINING AND DEVELOPMENT CORP. v COMMONWEALTH OF PA., and KEYSTONE MINING COMPANY, INC. v COMMONWEALTH OF PA., below.

2. CONCERNED CITIZENS OF JEFFERSON TOWNSHIP V COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES AND GRINDSTONE COAL CO., Docket No 83-269-G, slip op (March 5, 1986).

The Board ruled that the Concerned Citizens failed to meet the burden of proof on their claim that DER had not been given all of the information it needed to make an informed decision on the Grindstone Coal permit application. The Concerned Citizens claimed that Thomas Firestone, as the person in charge of Grindstone's daily operations, should have been listed on the permit application. Had he been listed, Firestone's "past conduct would have precluded issuance of the permit under the requirements" of SMCRA. The Concerned Citizens tried to prove that the corporate officers of Grindstone served "in name only" and that is was Thomas Firestone who actually carried out the "normal corporate functions."

3. KEYSTONE MINING COMPANY, INC. V COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1985 EHB 542, Docket No. 83-241-G (June 19, 1985).

Keystone, as a subcontractor for Calvin Smith Coal Co., was cited for failure to complete reclamation of the minesite which it had previously mined. Keystone subsequently breached the agreement it made with DER to reclaim the property. The Board granted DER's summary judgement in the appeal of DER's denial of a surface mining license to Keystone, stating: "DER must deny the license if it finds that the applicant has demonstrated [and admitted] a lack of ability or intention to comply with the Act as indicated by past or continuing violations."

Cites to BLACK FOX MINING AND DEVELOPMENT CORP. V COMMONWEALTH OF PA., below.

4. PARKER SAND AND GRAVEL v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1893 EHB 557, Docket No. 83-134-G (September 9, 1983).

The Board granted Parker's petition for supersedeas. DER had denied Parker's application for renewal of its sand and gravel surface mining license. DER claimed that Byron Henderson, the sole owner and principal officer of Parker, "engaged in unlawful conduct" while manager of supervisor day-to-day operations of Lucinda Coal, Inc.: during his tenure at Lucinda, it received

a number of citations for violations of its mining permits. Henderson was also responsible for a number of "environmentally positive accomplishments". Balancing these facts, the Board determined that it did "not believe that DER (at a hearing on the merits of this appeal) [would] be able to sustain its burden of showing that Henderson engaged in unlawful conduct."

STATE CASE LAW

5. JANE BURNS, et al. v GEORGE DIALS, COMMISSIONER, 378 SE 2d 665 (W Va 1989).

The court determined that, pursuant to state regulations, the application form used to apply for a mining permit under SMCRA "must require the applicant to list environmental violations committed by 'any subsidiary, affiliate or persons controlled by or under common control with the applicant'....[the] form used by the Commissioner and completed by [the two coal mining companies] falls short of the requirements" of the state regulations.

SECTION II

INTERIOR OFFICE OF HEARINGS AND APPEALS
IBLA AND IBSMA DECISIONS (includes some companion ALJ Decisions)

6. CLARK COAL CO. v OSM, 102 IBLA 93, IBLA 86-627, 87-348 (1988).

Clark, the permittee, was held responsible for violations despite the fact that the coal was removed by Brooks-Long Coal Co. Clark had an agreement with Brooks-Long to remove coal; there was no request for approval of a transfer or assignment of the permit. In addition, the permit had been renewed in the name of Clark Coal. Cites WILSON FARMS COAL CO., see below.

7. SHELBIANA CONSTRUCTION CO. v OSM, SAMMY GOFF v OSM, 102 IBLA 19, IBLA 85-88, IBLA 87-307 (1988). SAMMY GOFF v OSM, Docket Nos. NX 5-49-R, NX 5-102-R (1987).

The Board affirmed the ALJ's decision, ruling: "Where the evidence in a case shows the complete merger of the ownership and control of a corporation, such that the corporation is merely acting as the individual's alter ego, the individual cannot be allowed to escape responsibility for the statutory requirement to eliminate highwalls by hiding behind the corporate entity."

One tract was individually owned by Goff; The coal in the contiguous tract was leased to Shelbiana Construction. Goff, the sole officer and sole shareholder of Shelbiana, took no salary or fee from the corporation and had "absolute authority over what was done". He used his equipment without rental fee for work on the Shelbiana property, commingled assets, owned the coal being mined and had total "control over the entire minesite". Goff was "the Shelbiana permittee for purposes of the Act." Cites S & M COAL CO. v OSM, see below.

8. TENNESSEE CONSOLIDATED COAL CO.(TCC) v OSM, 99 IBLA 274, IBLA 85-351 (1987). TENNESSEE CONSOLIDATED COAL CO. AND WALNUT COAL COMPANY, INC. v OSM, Docket Nos. NX 1-87-R, NX 1-147-P (1985).

TCC owned the minesite; Walnut Coal was lease holder, permittee and operator. TCC owned a 60% interest in Walnut's stock and provided technical assistance to Walnut. Walnut sold its coal to TCC. Walnut maintained its own equipment, payroll and insurance. The ALJ determined that Walnut, alone, was responsible for the violations of SMCRA; he ruled that: "mere ownership of a substantial interest in a particular corporation is not enough to shift responsibility to the owners absent some specific regulatory device or some abuse of the corporate form which will allow a piercing of the corporate veil."

The Board dismissed OSM's appeal: Walnut had corrected the violation and paid the civil penalty, and the Board failed "to see how consideration of whether or not TCC was properly dismissed from the proceeding advances the purposes of SMCRA...." The question of whether TCC was properly charged with violations and civil penalties, the Board stated, will be more appropriate in the future if a new operator applies for a permit to mine that site. Cites to S & M COAL CO. v OSM.

9. MCWANE COAL CO., INC., 95 IBLA 1, IBLA 85-621 (1986).

The Board ruled that McWane Coal was the operator and was responsible for paying outstanding reclamation fees. Omega Fuels, Inc., the coal producer, was McWane's "agent". Regarding the definition of "operator", the Board quoted from the preamble to the 1977 reclamation fee regulations: "We believe that Congress intended the burden of fee payment to fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal...The identification of operators will be made in light of the realities of the business world and will not turn solely on a literal interpretation of the word 'removes.' 42 FR 62713 (December 13, 1977)."

After comparing the McWane facts to US v RAPOCA ENERGY CO. and S & M COAL CO. v OSM (see below), the Board concluded that "the business reality of the contractual arrangement between McWane and Omega belies McWane's characterization of Omega as an 'independent contractor'": McWane's superintendents controlled Omega' day-to-day operations; McWane had the right of first refusal to the coal fines Omega removed; and McWane's pricing restricted Omega's ability to sell coal rejected by McWane on the open market.

10. S & M COAL CO. & JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620, 82-20 (1984).

Jewell owned the coal which S & M mined pursuant to an oral lease; there was no valid mining permit. S & M had day-to-day control over the operations and sold coal "to parties other than Jewell"; however, Jewell had the right to exercise control over the operations "by virtue of the ability to terminate the [oral] lease without cause". The Board held that if there was a question as to who was the permittee in determining responsibility for compliance with performance standards, it was "proper for the inspector issuing the notice of violation to cite all of the parties

who may be responsible. If a cited party can submit sufficient proof that it is not responsible for compliance, the violation will not be considered a violation by that party....[Here,] both the party extracting the coal and the lessor can be considered to be permittees, as both have the ability to exercise control over the operations."

The mining operations were found to disturb less than two acres and the NOV was vacated.

Cites to WILSON FARMS COAL CO.

11. KIMBERLY SUE COAL CO., INC., 74 IBLA 170, IBLA 83-619, 82-19 (1983).

Kimberly Sue and High Point Coal Company received similar violations for failure to maintain a haul road. Kimberly Sue argued that because it was "economically integrated with High Point", High Point was the responsible party. Kimberly Sue sublet the minesite from High Point, paid royalties to High Point for coal removed and was charged for use of High Point's engineers. Each company was independently owned. The Board ruled there was no economic integration between companies; each was liable for its own violation.

12. VIRGINIA FUELS, INC., 4 IBSMA 185, IBSMA 82-18 (1982). MOLE COAL CO., INC. AND VIRGINIA FUELS, INC. v OSM, Docket Nos. CH 2-21-R, CH 2-33-R (1982).

The total disturbed area of the minesite owned by Virginia Fuels was greater than two acres; therefore, Virginia Fuels was found liable for violations of SMCRA performance standards. The IBSMA affirmed the ALJ's determination that there was insufficient evidence to find Mole Coal, a contract miner, liable for the violations.

13. PIERCE COAL AND CONSTRUCTION, INC., 3 IBSMA 350, IBSMA 81-33 (1981).

The Board affirmed the ALJ decision finding Pierce Coal the permittee of record. Pierce signed an "Application for Operator Reassignment" with MLM Corp., the operator. There was no indication that this document was approved by the State of West Virginia. The Application contains a notation, signed by the president of Pierce, stating that "this application transfers the mining rights only and that this permit is non-transferable." The Board cites to the WILSON FARMS COAL CO. and discusses cases relating to the Coal Mine Health and Safety Act which ruled that "the owner or lessee of a mine may be liable for actions of a construction company".

14. WILSON FARMS COAL CO., 2 IBSMA 118, IBSMA 80-33 (1980). WILSON FARMS COAL CO. v OSM, Docket No. NX 9-88-R (1980).

The Board affirmed the ALJ decision which determined that Wilson Farms, the permittee, was the proper party to be issued an NOV. The lease agreement between Wilson Farms and Kitov Corporation did not "relieve the permittee from its responsibilities under the Act" even though the agreement stated that the lessee [Kitov, and later Shannon Coal] was responsible for all "obligations and responsibilities of the lessors, including compliance with all present and future

state and Federal laws." Wilson had not assigned the permit to Kitov. In addition, Wilson had paid Kentucky civil penalties on the same lands.

INTERIOR OFFICE OF HEARINGS AND APPEALS
ADMINISTRATIVE LAW JUDGE OPINIONS

15. H.C. BOSTIC COAL CO., INC. AND WAYNE BOSTIC v OSM, Docket Nos. NX 88-8-R, NX 88-33-R, NX 88-34-R, NX 88-38-R, NX 88-46-R (1988).

Wayne Bostic, vice president of Bostic Coal, owned the mineral rights to the area being mined and leased mining rights to Hansonville Enterprises, the permit holder. All coal mined was delivered to Bostic's tipple; Hansonville had to absorb losses for coal rejected by Bostic; securing permits and bonds, paying taxes and reclamation were Hansonville's responsibility. Bostic provided engineering assistance and equipment; retained "all depletion and depreciation allowances"; Wayne Bostic was the "holder of a power of attorney given by Hansonville". The ALJ denied temporary relief from enforcement of the NOV and CO concluding the following: "[I]n serving the citations at issue on Wayne Bostic and H.C. Bostic Coal Company, Inc., OSMRE has served the 'operators'...as that term is defined in section 701(13) of the Act, as well as having served those citations upon the 'permittee,' as that term is defined in section 521(a)(3) of the Act. This because of the relationship of the applicants and the named and nominal permittee, Hansonville Enterprises, Inc., has been shown to be such that the latter firm was merely the instrumentality, or the alter ego, by and through which the applicants acted in order to attain the maximum financial advantages or removing the coal in question without assuming any of the concomitant environmental obligations imposed under the provisions of the Act and the implementing regulations."

Cites to US v RAPOCA ENERGY and US v DIX FORK COAL CO., see below.

16. ROY E. MEHAFFEY v OSM, Docket No. NX 7-35-R (1987).

In sustaining the CO, the ALJ held that the agreement Rich Mountain Coal, the permittee, had with Diamond Capitol was a royalty agreement, not a sale or permit assignment; therefore, Rich Mountain was liable for violations. Mehaffey, as a partner in Rich Mountain, was liable for its acts even though he sold his interest in Rich Mountain before mining operations began. He was responsible because there was no evidence of sale and he signed the permit application.

17. BERNOS COAL CO. AND EXCELLO LAND MINERAL CORP. v OSM, Docket Nos. NX 1-118-R, NX 3-10-P (1985).

The ALJ ruled that the CO was properly issued to Bernos, the permittee, and Excello. Excello leased the mine site and was in complete charge of the mining operations. The ALJ determined that Excello was an agent of Bernos and as such "could be required to alleviate an imminent danger, which the agent had created....In terms of agency law, an agent of a corporation in addition to the principal is liable for wrongful acts committed by the agent on behalf of the principal."

See US v DIX FORK COAL, below.

18. GRUNDY MINING CO. AND TENNESSEE CONSOLIDATED COAL CO. v OSM, Docket No. NX 1-146-P (1985).

The NOV was properly issued to both Grundy, the permittee, and Tennessee Consolidated, its agent in charge of the mining operations. The ALJ explained: "The liability of Tennessee Consolidated in relation to the Act must be determined by its factual relationship to Grundy Mining and Tennessee Consolidated's participation in the acts which led to the issuance of the violation in question."

The employees at the minesite were paid by Grundy and were seen "being directed in their work by Tennessee Consolidated employees." Tennessee Consolidated performed such services as water and coal analyses; hired the contractor "to do the work that resulted in the subject violation"; and dealt with the OSM inspectors. Tennessee Consolidated functioned as an agent for Grundy Mining. See WILSON FARMS COAL CO., above and US v DIX FORK COAL CO., below.

19. Q & G COAL CO., INC. v OSM, Docket No. CH 1-200-P (1982).

Q & G requested an amended permit substituting Little Moe Coal Corp. as the operator and approving the use of an additional area for slate disposal. Little Moe began its operation prior to the receipt of the amended permit. Q & G was held responsible for the NOV. The ALJ stated: "[N]o coal mining operation (which includes a slate dump) may begin until a permit has been issued...a substitute operator will not be recognized as a permittee until its permit is issued -- not merely filed....The permittee [Q & G] must be held liable because if this were not so, any permittee could escape liability for performance standard violations by having a succession of 'independent' operations mine the coal on their permit and claim 'I didn't do it!'...Little Moe simply became an alter ego for petitioner leaving petitioner with full liabilities under the Act."

20. L & R MINING CO., INC. v OSM, Docket No. CH 1-222-P (1982).

L & R, the permittee, sold its mine and equipment to Continental Enterprises, which was conducting the mining operations at the time the NOV was issued. The permit was later changed from L & R to Continental. The ALJ determined that L & R was responsible for the NOV, stating: "L & R cannot escape liability by selling assets to another corporation."

PENNSYLVANIA ENVIRONMENTAL HEARING BOARD DECISIONS

21. BLACK FOX MINING AND DEVELOPMENT CORP. V COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1985 EHB 172, Docket No. 84-114-G (April 29, 1985).

Black Fox was held to be responsible for the violation - mining without a permit - despite the fact that it was a subcontractor under the direct control of the operator, Allegheny River Mining

Company. Allegheny River had not applied for a mining permit nor had Black Fox inquired as to the existence of a mining permit before beginning its operations. Black Fox's subcontractor relationship with Allegheny River was "no defense to the DER actions appealed here, which were taken in response to a clear violation of the law". The Board noted that a "better practice" would have been the issuance of compliance orders to both Black Fox and Allegheny Mining.

STATE CASE LAW

22. DRESSLER COAL CORP. v DIVISION OF RECLAMATION, slip op (Ohio Ct App 1984).

Dressler Coal leased land from P.D.H Farms and obtained a strip mining license. Subsequently, Dressler Coal executed an agreement assigning the P.D.H. lease to Muskingum Valley Augering Corp. No attempt was made to have the mining license transferred to Muskingum Valley. Requests to modify the license, prepared reports and other documents were signed by employees of Dressler Coal. On appeal, the Board found Dressler Coal responsible for violations even though the actual mining and reclamation was performed by Muskingum Valley Coal: "A permittee cannot transfer reclamation liability through private agreement." Cites to WILSON FARMS COAL CO., above.

FEDERAL CASE LAW

[In order of relevance.]

23. US v RAPOCA ENERGY CO., 613 F Supp 1161 (D C VA 1985).

The court ruled that "a large coal company that contracts with independent companies to produce coal that it owns or leases is an "operator" responsible for the payment of reclamation fees." The independent contractor "owned no economic interest in the coal in place but merely enjoyed an economic advantage derived from production, through a contractual relation to [the] coal company".

This case met the two test that determine whether an agency relationship has been established: (1) The independent contractor was an agent subject to the principal's control; though the "right to control" not actual control "is determinative." (2) "[T]he work was done on the business of the principal or for his benefit."

24. US v DIX FORK COAL CO., 692 F2d 436, 13 ELR 20244 (6th Cir 1982).

Using the definition of "agent" from a "parallel statutory framework embodying a similar policy, purpose and structure", the Coal Mines Health and Safety Act, the court ruled that Wilford Niece was an agent of Dix Fork Coal and was "subject to any 'appropriate' district court order."

25. INTERNATIONAL UNION v FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, 840 F2d 77 (D C Cir 1988).

The court reversed a decision of the Federal Mine Safety and Health Review Commission when it ruled that a mine owner is liable to miners for wages lost as a result of the Secretary of Labor's closing of a mine for safety reasons under Section 111 of the Federal Mine Safety and Health Act of 1977. The owner, "concededly an 'operator' under the meaning of the Act", is liable despite "the Secretary's decision to cite only the independent contractor operating the mine for the safety violation that prompted the closure."

26. ANNOTATION. "Who is 'operator' of coal mine within the meaning of the Federal Coal Mine Safety and Health Act (30 USCS Sec. 802(d))", 54 ALR Fed 792 (1989).

ATTACHMENTS

1. WILLIAM J. MCINTIRE COAL CO. v COMMONWEALTH OF PA., DEPT. OF NATURAL RESOURCES (DER), Docket No. 83-180-M, slip op (July 7, 1986).
2. CONCERNED CITIZENS OF JEFFERSON TOWNSHIP v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES AND GRINDSTONE COAL CO., Docket No 83-269-G, slip op (March 5, 1986).
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19. Q & G COAL CO., INC. v OSM, Docket No. CH 1-200-P (1982).
20. L & R MINING CO., INC. v OSM, Docket No. CH 1-222-P (1982).
21. BLACK FOX MINING AND DEVELOPMENT CORP. v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1985 EHB 172, Docket No. 84-114-G (April 29, 1985).
22. DRESSLER COAL CORP. v DIVISION OF RECLAMATION, slip op (Ohio Ct App 1984).
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