

BLACK HAWK COAL CO. AND GARY YEANEY
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-177

Decided December 28, 1989

Appeal from a decision of Administrative Law Judge Joseph E. McGuire, denying application for review of Notice of Violation No. 85-121-145-2 and Cessation Order No. 85-121-145-3 in Docket No. CH 5-23-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Reclamation Fees: Liability

Under the enforcement scheme of the Act and regulations, a variety of procedures is available to OSMRE to collect delinquent reclamation fees from coal operators. These procedures include, among others, the institution of an action at law in a court of competent jurisdiction and, where appropriate, the issuance of notices of violation and cessation orders to compel payment of the debt.

APPEARANCES: Allan E. MacLeod, Esq., Coraopolis, Pennsylvania, for appellant; Wayne A. Babcock, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Black Hawk Coal Company, a limited partnership, and Gary Yeaney, its general partner, have appealed from a decision dated December 8, 1987, by Administrative Law Judge Joseph E. McGuire, denying an application for review of notice of violation (NOV) No. 85-121-145-2 and cessation order (CO) No. 85-121-145-3, issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) under section 521(a)(1) and (2) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1271(a)(1) and (2) (1982). Both citations charged Black Hawk and Yeaney with failure to pay reclamation fees as required under section 402 of the Act, 30 U.S.C. § 1232 (1982).

The facts are not in dispute. Gary Yeaney was the sole general partner of Black Hawk Coal Company (Black Hawk), a limited partnership formed in 1976 (Exh. R-12). Black Hawk held coal mining permit No. 3379134 for a tract of land in Jefferson County, Pennsylvania. On December 1, 1979, Black Hawk entered into an agreement with Pansy Hollow Contractors, Inc. (Pansy Hollow), whereby the latter would act as coal operator on permit No. 3379134 (Exhibit R-1). From the time of its formation in March 1980, until early in 1981, Gary Yeaney was Secretary-Treasurer of Pansy Hollow. Thereafter, he succeeded his brother, James A. Yeaney, as its President (Answer to Interrogatory 5). 1/

In February 1984, Richard C. Miller, a fee compliance officer with OSMRE, audited Pansy Hollow's records of its operation on permit No. 3379134. Miller found a failure to report coal removed and a failure to pay reclamation fees on coal removed for 14 of the 17 calendar quarters between October 1, 1979, and December 31, 1983 (Tr. 69-70; Exhs. R-2, R-11). Miller determined that \$17,916.26 in delinquent reclamation fees was owed (Tr. 71). The audit concluded with Yeaney agreeing with the audit findings and acknowledging liability for the reclamation fees by signing OSM-1 forms, which are quarterly coal production and reclamation fee reports (Tr. 71; Exh. R-11).

On March 29, 1984, Miller sent his audit report and work papers to OSMRE's Charleston Collection Unit, requesting immediate collection of the delinquent reclamation fees plus \$5,829.47 in interest (Exh. R-3). Thereafter, OSMRE instituted a collection action against Pansy Hollow in the United States District Court for the Western District of Pennsylvania. On November 5, 1984, the Charleston Collection Unit notified OSMRE's fee compliance office that a judgment had been obtained against Pansy Hollow "for delinquent AML [abandoned mine land] fees," and that "[e]nforcement measures are appropriate" (Exh. R-4).

On April 4, 1985, OSMRE issued a 10-day notice, advising the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), that Yeaney, doing business as Black Hawk, was delinquent in the payment of reclamation fees (Exh. 7). 2/ DER did not respond to the 10-day notice (Tr. 83).

1/ In August 1985, pursuant to 43 CFR 4.1139, OSMRE propounded a series of 11 written interrogatories. These interrogatories related to the legal nature of Black Hawk; Yeaney's status in that business; his relationship to Pansy Hollow; and the nature of Pansy Hollow's business. Answers to the interrogatories were filed on Oct. 9, 1985.

2/ The notice to DER actually listed "J. A. Yeaney" as the person doing business as Black Hawk. However, the NOV and CO correctly named Gary Yeaney.

On May 6, 1985, OSMRE reclamation specialist Richard Heuser issued NOV No. 85-121-145-2 to Black Hawk and Yeane, citing violations of 30 CFR 870.15 and 30 U.S.C. §§ 1232 and 1271 (1982), charging a failure to pay delinquent reclamation fees. The NOV required, by May 20, 1985, subsequently extended to May 24, 1985, either payment of the fees plus interest, or the securing of an installment payment agreement. Yeane contacted OSMRE and attempted to work out a payment schedule, but was unsuccessful (Tr. 87). On May 24, 1985, Heuser issued the CO for failure to abate the violation named in the NOV.

Black Hawk and Yeane filed a timely application for review of both the NOV and the CO. Judge McGuire conducted a hearing on the matter in Pittsburgh, Pennsylvania, on July 15, 1987. In his decision, Judge McGuire held that Yeane, as permittee, was the proper party to be issued the NOV and CO, and that OSMRE properly exercised enforcement jurisdiction against Yeane by issuing the NOV and CO, even after having commenced a court action for collection of the delinquent fees against Pansy Hollow. ^{3/}

On appeal, appellants raise only one issue. They charge that the civil action procedure prescribed by section 402(e) of the Act, 30 U.S.C. § 1232(e) (1982), is the exclusive remedy to be employed for the collection of such debts, and that the NOV and CO were therefore improperly issued. ^{4/}

OSMRE contends that NOV's and CO's are to be issued for any violation of the Act, and that nonpayment of reclamation fees is a violation. OSMRE asserts that the enforcement scheme of the Act and regulations contemplates not one, but a variety of methods by which reclamation fees may be collected.

[1] Section 402(e) of the Act, 30 U.S.C. § 1232(e) (1982), provides that "[a]ny portion of the reclamation fee not properly or promptly paid pursuant to this section shall be recoverable, with statutory interest, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts." The implementing regulation states: "OSM[RE] will bill delinquent operators on a monthly basis and initiate whatever action may be necessary to secure full payment of all fees and interest." 30 CFR 870.15(c). Subsection (e) of 30 CFR 870.15 provides that failure to pay reclamation fees may result in one or more of the following actions by OSMRE: (1) initiation of litigation; (2) reporting to the Internal Revenue Service; (3) reporting to state agencies responsible for taxation; (4) reporting to credit

^{3/} As noted below, the decision is binding on Black Hawk, as well as Yeane.

^{4/} Black Hawk and Yeane do not contest the fact of violation, i.e. the nonpayment of reclamation fees. Nor do they raise any issue regarding the entity responsible for the payment of such fees.

bureaus; or (5) referral to collection agencies. However, it further provides that "[s]uch remedies are not exclusive."

30 CFR 870.15(e) was promulgated

to provide notification of the action or actions [OSMRE] may take to enforce the requirements of section 402 of the Act when an operator fails to file production reports or pay reclamation fees. Such options are clearly within OSM[RE]'s statutory authority granted under section 412 of [the Act] as well as under governmental wide debt collection directives.

49 FR 27495 (July 5, 1984). The last sentence in 30 CFR 870.15(e): "Such remedies are not exclusive," was included in the regulation to allow OSMRE to "take enforcement action based upon breach of a permit condition for nonpayment of reclamation fees where such a permit condition exists." Id. 30 CFR 773.17(g) makes it a "permit condition" to pay all reclamation fees. The commentary associated with promulgation of that regulation states that "OSM[RE] will make use of every means available under the Act to ensure that fees are paid on coal produced including issuance of Notices of Violation and Cessation Orders, where appropriate, pursuant to section 521 of [the Act]." Id.

The question, however, is whether the issuance of notices of violation and cessation orders is, in fact, authorized by the Act for failure to pay reclamation fees, and if so, whether such action was appropriate in this case. Herein, the NOV and CO were issued in accordance with 30 U.S.C. § 521(a)(1) (1982) and the implementing regulations at 30 CFR 843.12(a)(2) and 30 CFR 842.11(b)(1). 30 CFR 843.12(a)(2) provides:

When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under §843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate enforcement action can be taken by the State. When the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate.

Thus, the law specifically allows the issuance of a notice of violation or cessation order, as appropriate, where there has been a violation of the Act. In this case, there was a clear violation of the Act. 5/

OSMRE's audit of Pansy Hollow's records, disclosed that a violation of section 402(a) of the Act, 30 U.S.C. § 1232(a) (1982), existed. 6/ There is no question that the fees required by that section were not paid, and Yeane admitted liability for their payment. When the Commonwealth of Pennsylvania failed to respond to OSMRE's 10-day notice, OSMRE, acting in accordance with section 521(a)(1) of the Act, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), issued the NOV and thereafter, the CO to Black Hawk, as the permittee. 7/

Appellants have cited no authority for the allegation that institution of a judicial action to collect delinquent reclamation fees is OSMRE's exclusive remedy. In McWane Coal Co., 95 IBLA 1, 93 I.D. 460 (1986), the appellant made a similar argument, which the Board specifically rejected. We held that OSMRE could collect delinquent reclamation fees by means of "administrative offset" pursuant to 31 U.S.C. § 3716 (1982). Id. at 12-14, 93 I.D. at 466-67. 8/ Thus, a variety of procedures is available to enforce debt collection, including the method adopted in this case, i.e., issuance of a notice of violation and a cessation order. 9/

5/ There is no evidence in the record that failure to pay the fees involved in this case constituted the violation of a permit condition. The regulation, 30 CFR 773.13(g), requiring that the payment of reclamation fees be a condition of a permit was not included in the regulations until 1984. Black Hawk's permit was issued sometime prior to its Dec. 1, 1979, coal mining agreement with Pansy Hollow.

6/ Under the regulations, OSMRE's audit of Pansy Hollow's record constituted a Federal inspection. See 30 CFR 870.16(c).

7/ There was no necessity for OSMRE to reinspect prior to issuance of the NOV in this case, since the violation was, in essence, a "paper-work violation." In such a situation, OSMRE may satisfy the reinspection requirement by ascertaining in some fashion whether or not the violative conditions, i.e. nonpayment, continued. See Turner Brothers, Inc. v. OSMRE, 92 IBLA 23, 29, 93 I.D. 199, 202 (1986), aff'd, Turner Brothers, Inc. v. OSMRE, No. 86-C-553-E (N.D. Okl. Aug. 23, 1988).

8/ The Board's decision in McWane was vacated and remanded to the Board for further administrative proceedings by the district court. McWane Coal Company, Inc. v. Hodel, No. CV 87-P-0045-S (N.D. Ala. July 2, 1987). By order dated December 30, 1987, the Board reinstated its decision in the case.

9/ The issuance of a CO comports generally with the objective of 4 CFR 102.9 of the Comptroller General's regulations, which provides general authority for executive agencies to suspend licenses and privileges for nonpayment of debts owed the United States.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified. 10/

Bruce R. Harris
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

10/ Judge McGuire's decision is modified to the extent that it refers to "Gary Yeaney d.b.a. Black Hawk Coal Company." As the Answers to Inter-rogatories, filed Oct. 9, 1985, and appellant's counsel, at page 3 of the hearing transcript, make clear, Black Hawk was a limited partnership. In addition, the record shows that Yeaney, who was the general partner in the Black Hawk limited partnership, was also properly named in and served with both the NOV and CO, and as general partner, Yeaney assumed unrestricted liability for the partnership's actions. See Exh. R-12 at paragraph 19.