

Editor's Note: Reconsideration denied by Order dated January 15, 2002.

KENTUCKY RESOURCES COUNCIL, INC.
NATIONAL WILDLIFE FEDERATION

IBLA 95-545

Decided September 28, 2001

Appeal from the decision of the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, affirming a determination of the Lexington Field Office of no control under 30 CFR 773.5.

Reversed, federal inspection ordered.

1. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Generally

When a lessor that owns or controls coal requires a lessee to submit the lessee's mining plan for approval or disapproval, the lessor has the authority to determine the manner in which the lessee conducts the surface coal mining operation and is presumed to control the lessee under the definition in 30 CFR 773.5(b)(6).

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, and Thomas J. Fitzgerald, Esq., Frankfort, Kentucky, for petitioners; J. Niklas Holt, Office of the Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Kentucky Resources Council, Inc., and the National Wildlife Federation (petitioners) have appealed the July 20, 1994, decision of the Assistant Director, Field Operations, Office of Surface Mining (OSM), denying the relief they requested on review of the determination of OSM's Lexington Field Office Director that the Kentucky Department for Surface Mining Reclamation and Enforcement took appropriate action in response to a ten-day-notice from OSM. OSM sent the ten-day-notice based on allegations in petitioners' citizen's complaint that Beth-Energy Corporation controlled Darlene Collins Quality Coal Company (Darlene), whose operations under Kentucky permit number 867-5029 were responsible for several uncorrected surface mining violations. The Kentucky department had concluded that Beth-Energy did not control Darlene and the Lexington Field Office Director concurred.

Several developments concerning OSM's rules defining ownership or control, 30 CFR 773.5(a)(3) and 773.5(b)(6)(2000), caused the parties to postpone briefing the issues on appeal. Those included our decision in

James Spur, Inc. v. OSM, 133 IBLA 123, 102 I.D. 32 (1995), the decision of the Director of the Office of Hearings and Appeals (OHA) on review of that decision, James Spur, Inc. v. OSM, 12 OHA 133 (1996), and the issuance of Solicitor's Opinion M-36986, approved by Secretary Babbitt on December 5, 1996, which stated that the reasoning in this Board's and the OHA Director's decisions in Spur should not be followed in future applications of OSM's rules. ^{1/} Because we are bound by the Solicitor's Opinion, as approved by the Secretary, see 209 DM 3.2A(11), we review the OSM Assistant Director's July 20, 1994, decision in accordance with the analysis in that Opinion.

OSM's Lexington Field Office Director determined that although Beth-Energy owned the coal that was being mined by Darlene under a 1984 lease when the violations occurred, the presumption of control under 30 CFR 773.5(b)(6) had been rebutted. ^{2/} The lease did not contain language requiring Darlene to sell the coal it mined to Beth-Energy or giving Beth-Energy the right to receive the coal, the Field Office Director observed. Although he acknowledged that the lease contained language that Beth-Energy had the right to approve Darlene's mining plan, he stated that "[t]his language is generally the type used by a lessor to insure that the lessee mines all marketable coal rather than controlling day-to-day operations and reclamation." Record at 19. He noted that if Beth-Energy objected to Darlene's plan, the lease provided that Darlene could continue mining while the dispute was being arbitrated. "This does not establish an ability to control the manner in which the permittee conducts surface coal mining and reclamation operations," the Field Office Director concluded. Id.

Petitioners sought informal review of the Field Office Director's decision by the Director of OSM under 30 CFR 842.15. The 1984 lease, they argued, confirmed that Beth-Energy had "the authority directly or indirectly to determine the manner in which [Darlene Collins] conducts surface

^{1/} Departmental regulation 30 CFR 773.5(b)(6) was carried forward in the Department's interim final rule, published in April 1997 following the decision in National Mining Association v. U.S. Department of the Interior, 105 F.3d 691 (D.C. Cir. 1997). 62 FR 19451, 19458 (April 21, 1997). The validity of that provision was not challenged in National Mining Association v. U.S. Department of the Interior, 177 F.3d 1, 6 n.6 (D.C. Cir. 1999).

^{2/} The 1984 contract was actually between Bethlehem Steel Corporation, the parent of Beth-Energy, and Magnum Quality Coal Company, Inc., which, according to Bethlehem, was a fictitious name for Darlene. Record at 39. Petitioners argue that Darlene was operating under a 1970 lease, as assigned and amended, and urge us to reverse OSM's reliance on the 1984 lease on procedural and evidentiary grounds. (SOR at 13-15.) However, they also contend that both leases establish that "Beth-Energy and its affiliates had the capacity to control the lessee's operations." (SOR at 15.) Regardless of the history of the earlier lease, it is clear that in 1993, when petitioners filed their citizen's complaint, the 1984 lease was in place, and Darlene has not challenged OSM's conclusion that it was operating under that lease at the relevant time. For the sake of simplicity and clarity, we refer to Beth-Energy and Darlene as the parties throughout our discussion because the different parties do not make a difference in the analysis of the issue of control.

coal mining operations." Id. at 13. Paragraph 8 required Darlene to submit its mining plan to Beth-Energy for approval or disapproval and did not limit Beth-Energy's reasons for disapproving. It also allowed Beth-Energy to enter Darlene's operations to inspect, to ascertain the condition of the mines, the methods practiced, and the amount of coal mined, and to carry out any other activity pertinent to administration of the lease. Paragraph 10 required Darlene to notify Beth-Energy of areas it believed could not be mined and required arbitration if Beth-Energy disagreed. Paragraph 18 required Darlene's compliance with all applicable laws governing mining and paragraph 14 gave Beth-Energy authority to declare the lease forfeited if Darlene was determined in default of this requirement. "Contrary to [the Lexington Field Office Director's] conclusion," petitioners argued, "the provisions of the lease described above confer on [Beth-Energy] the authority to determine the manner in which Darlene Collins mined coal. * * * While the motive for exercise of control is irrelevant under 30 CFR 773.5, [the Lexington Field Office Director's] characterization of [Beth-Energy's] motives in this case as purely production-oriented is simply not supported by the language of the lease." Id. at 14.

The OSM Assistant Director's July 20, 1994, decision "ratified, confirmed, and adopted" the Lexington Field Office Director's decision and stated: "Finally, the complainants rely upon certain provisions of the mineral lease as establishing control within the meaning of 30 CFR 773[.5](a)(3). However, those provisions are equally consistent with, if not more persuasive of, the view that [Beth-Energy] merely sought to protect its economic interests. A mineral owner is not required to abandon taking reasonable measures to guarantee that its minable and merchantable coal is being removed and that it is receiving proper royalty payments." Id. at 3-4.

On appeal to us, petitioners argue that the OSM Assistant Director's decision is inconsistent with the principle C established in S & M Coal Co. v. OSM, 79 IBLA 350, 91 I.D. 159 (1984), explained in the preamble to OSM's rules, and re-affirmed in the Solicitor's Opinion C that it is the authority to directly or indirectly determine the manner in which a surface coal mining operation is conducted that governs whether there is an ownership or control relationship. They argue that the contracts involved in this case gave Beth-Energy that authority.

Although the Solicitor's Opinion states that it is to govern all decisions by OSM, IBLA and other Departmental decisionmakers in the future (Solicitor's Opinion at 15-16), OSM's answer ignores that Opinion. OSM states that Beth-Energy "did not exert or retain sufficient control over [Darlene] to be held responsible under the regulations for violations and unpaid debts" and that Beth-Energy "produced adequate evidence demonstrating its legitimate purposes for the contract provisions allowing for approval and inspection." Answer at 8, 14. OSM suggests we should affirm its July 20, 1994, denial of federal inspection and enforcement of petitioners' citizen's complaint. Id.

[1] The Solicitor's Opinion states that the presumption of control that arises under 30 CFR 773.5(b)(6) from owning or controlling the coal

to be mined and having the ability to control the conduct of mining operations cannot be rebutted by showing there were "legitimate purposes" for the elements of a relationship that establish the presumption of control. Solicitor's Opinion at 24. The Opinion quotes from the preamble to OSM's rules: "To the extent that a coal company controls or can exercise control over a contract operator it should be held responsible for any outstanding violations of the Act which it could have prevented or corrected." Id. at 22-23, quoting 53 FR 38877 (Oct. 3, 1988). "[O]nce OSM proves facts which support a presumptive ownership or control link under section 773.5(b), an applicant must show that it 'does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted.' 30 CFR 773.5(b)." Id. at 24. (The Opinion states that an "applicant" refers to a "presumptive controller." Id. at 13.)

It is not disputed that Beth-Energy owned the coal that Darlene mined under the 1984 lease, so the first element of the presumption in 30 CFR 773.5(b)(6) is established. The question is whether the provisions of the lease gave Beth-Energy authority, directly or indirectly, to determine the manner in which Darlene conducted the mining operation. We need go no further than the initial provisions of paragraph 8 of that lease to find such authority. That paragraph reads in part: "Before the commencement of any mining operations pursuant to this lease, Lessee shall provide to Lessor a copy of its mining plan, as submitted to the appropriate department of the Commonwealth of Kentucky. Within thirty (30) days after receiving said copy of such mining plan, Lessor shall either approve or disapprove said mining plan, and if Lessor shall make no objections to said mining plan within said thirty (30) days, it shall be considered approved by Lessor." Record at 75-76. In our view, the authority to approve or disapprove a mining plan constitutes the authority to control the conduct of a mining operation. We observe that "[e]xtensive involvement in the formulation of plans has obvious negligence ramifications and creates potential liability under the Federal Mine Safety & Health Act and environmental laws." 4 American Law of Mining 132.05[6][a](2nd ed., 2000). We believe the authority to approve or disapprove a plan exceeds extensive involvement in the formulation of a plan and is presumptive evidence of control.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals, 43 CFR 4.1, the OSM Assistant Director's July 20, 1994, decision is reversed and this matter is remanded to OSM for a federal inspection and appropriate enforcement action.

Will A. Irwin
Administrative Judge

I concur:

T. Britt Price
Administrative Judge