

LEROY B. LACKEY, JR.
v.
OFFICE OF SURFACE MINING

IBLA 96-460

Decided January 15, 2003

Appeal from a decision by Administrative Law Judge David Torbett vacating a determination of control under 30 CFR 773.5 by the Office of Surface Mining Reclamation and Enforcement.

Reversed.

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

A person who controls an entity that has incurred obligations under the Surface Mining Control and reclamation Act before the time the person had control of the entity is properly linked to those obligations in the Applicant Violator System.

APPEARANCES: John Austin, Esq., Knoxville Field Office, Office of the Solicitor, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement; Leona A. Power, Esq., London, Kentucky, for Leroy B. Lackey, Jr.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Acting under 30 CFR 773.5(b) (1) and (b) (3) (2000), which in 1992 defined "controlled" in terms of rebuttable presumptions that a person controlled an entity if the person was an officer or director of the entity (773.5(b) (1)), or had "the ability commit [its] financial or real property assets or working resources" (773.5(b) (3)), the Office of Surface Mining Reclamation and Enforcement (OSM) issued a final determination in November 1992 that Leroy B. Lackey, Jr., controlled Patrick Mining Company (Patrick), which had not paid abandoned mine reclamation (AML) fees, and listed Lackey in the Applicant Violator System (AVS). ^{1/} Lackey appealed the determination, and the appeal was referred for hearing.

^{1/} The AVS is the computer system maintained by OSM to identify ownership or control links involving permit applicants, permittees, and persons cited in violation notices. 30 CFR 773.5 (2000). See Gary N. Cobb v. Office of Surface Mining Reclamation and Enforcement, 143 IBLA 274, 275 n. 1 (1998).

By decision dated January 31, 1996, Administrative Law Judge David Torbett held that Lackey had rebutted the presumption that he controlled Patrick. He therefore dissolved the AVS link between Lackey and Patrick and vacated OSM's determination. OSM has appealed Judge Torbett's decision. 2/

OSM faults Judge Torbett for framing the issue as whether Lackey controlled Patrick "during the two quarters in which AML fees were not paid," i.e., the last quarter of 1981 and the first quarter of 1982. (Decision at 3.) In OSM's view, the issue is whether one who controls an entity that has obligations that arose before the person had control is properly linked to those obligations. (Brief in Support of OSM's Appeal of Decision dated January 31, 1996, at 21.) Lackey acknowledged his ability to control Patrick after May 1982. Tr. at 4-6, 8. In the fall of 1982, after Patrick had ceased mining, Lackey made decisions to sell or transfer equipment in an attempt to eliminate Patrick's debt. (Tr. 120-121; Decision at 3.) Thus, OSM argues, Lackey had the ability to commit Patrick's financial assets at that time, but chose not to commit any of them to paying the unpaid AML fees:

Lackey should be linked to any SMCRA [Surface Mining Control and Reclamation Act] problem of Patrick which he was in a position to cause to be corrected at any time after those violations arose. The preamble to the ownership and control rule explains the congressional intent expressed in § 510(c) of the Act in this way:

* * * [S]ection 510(c) is intended to induce persons to correct, or be in the process of correcting, violations. For the rules to accomplish that purpose, an applicant should be denied a permit when it, its owners or controllers, or the entities they own or control, **are or have been in a position to have outstanding violations corrected, and did not do so.**

fn. 1 (continued)

In December 2000, OSM amended its definition of control, eliminating the presumption contained in the regulations involved in this case but retaining the concept of the ability to commit financial or real property assets or working resources. See (4) under "control" or "controller" in 30 CFR 701.5, 65 FR 79582, 79595, 79662 (Dec. 19, 2000).

2/ Judge Torbett stated that OSM had established a rebuttable presumption of control by showing that Lackey was an officer of the board of Patrick during the last quarter of 1981 and first quarter of 1982. (Decision at 4.) Because the presumption based on a person's status as officer or director of an entity, 773.5(b)(1), was invalidated in National Mining Association v. United States Department of the Interior, 177 F.3rd 1, 6-7 (D.C. Cir. 1999), OSM does not pursue its appeal of this aspect of Judge Torbett's decision. OSM's Supplemental Brief, filed November 16, 2001, at 14, n. 8.) Rather, as discussed below, it focuses on 773.5(b)(3).

53 Fed Reg. * * * at 38869 [October 3, 1988], emphasis added.
 * * * [U]nder the Secretary's ownership and control regulation,
 a controller is properly linked to any violation which he could
 have prevented **or** corrected by payment of money:

For any entity with unabated violations or unpaid penalties or fees, some person is responsible for the occurrence of the violation **or the failure** to abate the violation or **to pay monies owed**. In some cases, more than one person may be in control, such as in a partnership composed of two individuals.

[Id.] at 38871, emphasis added.

(Brief in Support of OSM's Appeal of Decision dated January 31, 1996, at 21-22.)

[1] In our view, it is clear that Lackey had the ability to correct Patrick's failure to pay AML fees after May 1982. Indeed, he does not argue otherwise. He should be held responsible for any outstanding violations of the Act he could have corrected. Kentucky Resources Council, Inc. 155 IBLA 354, 357 (2001).

"The failure to exercise one's ability to control in order to prevent or to abate violations can be at least as damaging to the environment or as dangerous to the public as actively causing violations. Accordingly, once OSM proves facts which support a presumptive ownership or control link under section 773.5(b), [a presumptive controller] 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 C.F.R. § 773.5(b)."

Solicitor's Opinion M-36986, dated December 6, 1995, entitled "'Control' of Surface Coal Mining Operations under the Surface Mining Control and Reclamation Act," at 24); see 65 FR 79582, 79595 (Dec. 19, 2000). Lackey has not shown he did not have the ability to pay Patrick's unpaid AML fees after May 1982. It does not matter that he might not have been able to do so when the fees were incurred in late 1981 and early 1982. The link between Lackey and Patrick's unpaid AML fees was correctly made and must be restored.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 31, 1996, decision of Administrative Law Judge Torbett is reversed,

OSM's November 1992 determination is reinstated, and the link between Lackey and Patrick in the AVS is restored.

Will A. Irwin
Administrative Judge

I concur:

T. Britt Price
Administrative Judge