

NOTE: This disposition is nonprecedential.



United States Department of the Interior
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Interior Board of Land Appeals
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February 19, 2016

IBLA 2015-91, <i>et al.</i>)	Hearings Division Docket No.
)	NX-2015-05-R; Cessation
M.L. JOHNSON FAMILY)	Order No. C14-081-538-001;
PROPERTIES, LLC, <i>ET AL</i>)	Permit No. 898-0944
)	
v.)	Surface Mining
)	
OFFICE OF SURFACE MINING)	Motion to Dismiss Granted and
RECLAMATION AND ENFORCEMENT,)	Petition for Stay Denied as Moot
ENFORCEMENT, <i>ET AL.</i>)	in 2016-38; Order to Show Cause
)	IBLA 2015-91 and IBLA 2015-92

ORDER

M.L. Johnson Family Properties, LLC (Johnson or Johnson LLC), has appealed from and petitioned for stay of an October 30, 2015, Decision (2015 Decision) of Administrative Law Judge (ALJ or Judge) Harvey C. Sweitzer, upholding a decision by the Office of Surface Mining Reclamation and Enforcement (OSM) to terminate Cessation Order (CO) No. C14-081-538-001. OSM issued the CO on or about July 17, 2014, upon determining that Kentucky Permit No. 898-0944 (Permit) and Amendment 1 to the Permit, issued to Premier Elkhorn Coal Company (Premier) for the extraction of coal by surface mining methods at the “Sycamore Branch and Bob’s Branch Mine” (Mine), did not meet the minimum permitting requirements of section 510(b)(6) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1260(b)(6) (2012), and its Kentucky counterpart, 405 KAR 8:030 Sec. 4 (2014).¹

¹ Premier’s Permit No. 898-0944 includes multiple tracts, but the CO at issue relates only to Tract 46. Specifically, OSM concluded that Premier had not established that it had a valid right of entry to extract coal from Tract 46, a 550.40-acre portion of the Mine. See Order, IBLA 2015-73 (Mar. 13, 2015), at 5-8 for a detailed discussion of the terms of the CO, options for Premier’s abatement of the violations defined in the CO, and Premier’s steps for abatement.

BACKGROUND

The dispute in this matter concerns whether Premier has established a valid right of entry for the extraction of coal by surface mining methods under section 510(b)(6) of SMCRA, 30 U.S.C. § 1260(b)(6) (2012), and the Kentucky program. See 405 KAR 8:030 Sec. 4 (2014). Johnson “has never consented to surface mining on Tract 46.” ALJ Sweitzer’s Decision dated Dec. 19, 2014 (2014 Decision) at 6. Section 510(b)(6) of SMCRA provides that “[n]o permit or revision application shall be approved unless the application affirmatively demonstrates, and the regulatory authority finds in writing,” that:

(6) in cases where the private mineral estate has been severed from the private surface estate, the application has submitted to the regulatory authority—

(A) the written consent of the surface owner to the extraction of coal by surface mining methods; or

(B) a conveyance that expressly grants or reserves the right to extract coal by surface mining methods; or

(C) if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law; *Provided*, That nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

30 U.S.C. § 1260(b)(6) (2012). OSM’s termination of the CO, and ALJ Sweitzer’s affirmance of that termination, raises issues specific to subsection (C) of § 1260(b)(6) (2012). See 30 C.F.R. § 778.15; 405 KAR 8:030 Sec. 4 (2014).

By way of background, in his 2014 Decision at pages 6-7, ALJ Sweitzer reviews the administrative proceedings before the Kentucky Office of Administrative Hearings concerning Premier’s right to mine Tract 46. While such proceedings were pending, on April 18, 2014, Johnson sent the Secretary of the Interior a notice of intent to initiate a civil action under the citizen suit provisions of section 520 of SMCRA, 30 U.S.C. § 1270 (2012). That notice claimed that Premier’s permit for mining on Tract 46 failed to meet the minimum Federal permitting requirements. OSM issued a 10-day notice to the Kentucky Department of Natural Resources pursuant to 30 U.S.C. § 1271(a)(1) (2012). On May 13, 2014, Johnson supplemented its notice of intent to sue, stating that it intended to immediately file suit against the Secretary of the Interior for failing to conduct an immediate inspection. On the following day, Johnson filed a complaint against the Secretary in the U.S. District Court for the Eastern District of Kentucky (District Court) seeking

declaratory and injunctive relief. The Secretary OSM, opposed the requested relief and argued that Premier's permit contained the necessary documentation. On June 13, 2014, the District Court issued a Memorandum Opinion and Order granting Johnson's motion for preliminary injunction and ordering Premier to cease mining pending an inspection by the Secretary. *M.L. Johnson Family Properties LLC v. Jewell [Johnson v. Jewell]*, 27 F. Supp. 3d 767 (E.D. Ky. 2014), *vacated*, No. 14-5867 (6th Cir. Oct. 31, 2014).

The District Court determined that Johnson was likely to succeed on the merits of its challenge to Premier's right to mine Tract 46 because the permit did not contain all the information required by section 510(b)(6) of SMCRA, 30 U.S.C. § 1260(b)(6) (2012). Specifically, the District Court concluded that Kentucky had approved the permit application under subsection (A) of § 1260(b)(6), which required Premier to submit "the written consent of the surface owner to the extraction of coal by surface mining methods." 30 U.S.C. § 1260(b)(6)(A) (2012); *see Johnson v. Jewell*, 27 F. Supp. 3d at 771. Relying on canons of statutory interpretation, the District Court concluded that subsection (A) requires the consent of all surface owners—thus, the consent of a single surface owner would not suffice. *Id.* at 771-73.

In accordance with the District Court's Order, OSM conducted an inspection of Premier's permit for Tract 46 and issued a Federal Inspection Report dated July 17, 2014. *See* 2014 Decision at 7. In that Report, OSM cited the District Court Opinion that found Premier's original permit application did not comply with subsection (A) of § 1260(b)(6). OSM also reviewed Minor Revision #2 to Premier's permit, issued during the pendency of the District Court proceeding, and found that the revision was procedurally flawed for failing to provide notice and an opportunity to object. *Id.* Based upon these findings, OSM issued the disputed CO.

To abate the violations listed in the CO, OSM required Premier to take one of three actions: (1) immediately commence reclamation of the disturbed area on Tract 46; (2) obtain the written consent of each surface owner for Tract 46 and apply for a permit in accordance with the approved Kentucky program; or (3) take action in accordance with the approved Kentucky program to establish a right of entry to mine Tract 46 under "alternate means," and comply with the notice and comment process required for revisions. 2015 Decision at 7-8.

Both Premier and the Commonwealth of Kentucky Energy and Resources Cabinet (Kentucky) filed Applications for Review with this Department's Office of Hearings and Appeals (OHA) challenging OSM's issuance of the CO. Those Applications for Review were consolidated and Johnson intervened as a full party in the consolidated proceeding.

Meanwhile, during the pendency of the proceeding before OHA, Kentucky approved Minor Revision #3 in order to satisfy the remedial measures set forth in the CO. 2014 Decision at 7. Premier submitted Minor Revision #3 based on the third remedial option.

Johnson objected to Permit Revision #3, and after responding to those objections in writing, Kentucky approved it on September 18, 2014. OSM determined, based upon Kentucky's approval, that the violations listed in the CO had been abated. OSM filed with OHA a motion for approval to terminate the CO pursuant to 30 C.F.R. § 843.11(f).

On December 19, 2014, ALJ Sweitzer issued his 2014 Decision in which he ruled that OSM's issuance of the CO was a valid exercise of OSM's oversight and enforcement authority. *See* 2014 Decision at 5-12; *see also* 2015 Decision at 5-9; Order, IBLA 2015-73 (Mar. 13, 2015), at 2-11. He also granted OSM's "motion for approval to terminate the CO." 2014 Decision at 21, 27. Johnson, Kentucky, and Premier separately appealed ALJ Sweitzer's Decision; their appeals were docketed by the Board as IBLA 2015-73, IBLA 2015-91, and IBLA 2015-92, respectively. Johnson petitioned for a stay. By Order dated March 13, 2015, this Board vacated ALJ Sweitzer's Decision to the extent he granted OSM's motion for approval to terminate the CO, on the basis that he was without jurisdiction to enter that ruling. The Board dismissed Johnson's appeal and denied Johnson's petition for stay as moot. The appeals filed by Kentucky and Premier, which involve the question of whether ALJ Sweitzer properly ruled that OSM had the oversight and enforcement authority to issue the CO, remain pending before this Board.

On March 24, 2015, following this Board's Order vacating ALJ Sweitzer's 2014 Decision and dismissing Johnson's appeal in IBLA 2015-73, OSM issued a letter terminating the CO. OSM's termination letter attached and relied on the reasoning contained in the termination document previously prepared by OSM on October 24, 2014. 2015 Decision at 8. OSM determined that Kentucky's approval of Permit Revision #3 had abated the violations cited in the CO. Johnson filed an Application for Review of the termination and requested temporary relief on March 28, 2015. The parties agreed to waive an evidentiary hearing and to proceed with a resolution on the merits based upon the written record and briefing. The parties submitted opening, response, and reply briefs along with additional exhibits to be included as part of the record in the proceeding. *Id.* at 9. On October 30, 2015, ALJ Sweitzer issued his Decision upholding OSM's termination of the CO, and Johnson's present appeal followed.

On November 30, 2015, the Board received Johnson's Petition for Stay of ALJ Sweitzer's 2015 Decision. On December 8, 2015, OSM, Premier, and Kentucky filed a joint request for an extension of time until December 21, 2015, to file a

response to Johnson's Petition for Stay. The reason for the request was that the parties were in discussions regarding a negotiated solution to the Petition for Stay, and required additional time to conclude those discussions and propose the solution to the Board. By Order dated December 10, 2015, the Board granted the parties' joint request for an extension. Kentucky filed its Response with the Board on December 21, 2015; OSM filed its Response on December 24, 2015; and Premier filed its Response on December 28, 2015.

JOHNSON'S MOTION TO DISMISS

On January 21, 2016, Johnson filed with the Board a Motion to Dismiss for Lack of Jurisdiction (Motion to Dismiss), relying upon 43 C.F.R. § 4.21(c). Johnson asserts that ALJ Sweitzer's 2015 Decision "became final agency action subject to judicial review on January 15, 2016, when this Board failed to grant or deny Johnson LLC's petition for a stay" within the 45-day period specified in 43 C.F.R. § 4.21(b)(4); the Board's jurisdiction ended when ALJ Sweitzer's Decision "became final agency action subject to judicial review, especially after [Johnson] has actually commenced a civil action for judicial review of that decision" in the District Court District Court; and the filing of Johnson's complaint in District Court "vested exclusive jurisdiction to review Judge Sweitzer's decision in district court and consequently terminated this Board's jurisdiction to conduct further substantive proceedings in this appeal." Motion to Dismiss at 1-2.

As discussed below, we grant Johnson's Motion to Dismiss. However, in doing so we deem it important to correct Johnson's erroneous assertion that this Board's jurisdiction to rule on the Petition for Stay and the merits of its appeal ended when this Board did not rule on the Petition for Stay within the 45-day period specified in 43 C.F.R. § 4.21(b)(4).

Under 43 C.F.R. § 4.21(a)(3), "[a] decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section." (Emphasis added.) Subsection (b)(4) of 43 C.F.R. § 4.21 provides that "[t]he Director or an Appeals Board shall grant or deny a petition for a stay pending appeal, either in whole or in part, on the basis of the factors listed in paragraph (b)(1) of this section, within 45 days of the expiration of the time for filing a notice of appeal." (Emphasis added.)

Subsection (c), cited by Johnson in support of its argument, provides:

(c) *Exhaustion of administrative remedies.* No decision which at the time of its rendition is subject to appeal to the Director or an

Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, *unless a petition for a stay has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section* or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.

43 C.F.R. § 4.21(c) (emphasis added).

Johnson is mistaken in its assertion that this Board's jurisdiction to rule on its Petition for Stay terminated at the end of the 45-day period specified in 43 C.F.R. § 4.21(b)(4). This view was rejected by the Director of OHA in *David M. Burton*, 11 OHA 117 (1995), in which counsel for the Bureau of Land Management (BLM) petitioned the Director for review of an order by the Board granting a stay of a BLM decision after the 45-day period specified in 43 C.F.R. § 4.21(b)(4) had run. BLM, through counsel, argued before the Director that § 4.21(b)(4) "requires IBLA to grant or deny a petition for stay within 45 days from expiration of the time for filing a notice of appeal and does not provide authority to do so after the time has passed." 11 OHA at 118. BLM maintained that "[n]o provision is made for the *subsequent* granting of a stay pending appeal," and that "[t]he Director or an Appeals Board is without authority to issue a stay pending appeal after the expiration of the 45 day period, and any attempt to issue such a stay is beyond the authority of the regulation." *Id.* at 120 (quoting Petition for Review at 2; emphasis in original).

The Director rejected BLM's argument. He stated that BLM improperly assumed that the Board's authority to rule on a stay derives from 43 C.F.R. § 4.21:

IBLA's authority derives from authority delegated to the President and the Secretary of the Department of the Interior by Congress. The Secretary delegates his authority to various offices and officials within the Department, including OHA. Among other matters, the Secretary has authorized IBLA "to exercise, pursuant to regulations published in the *Federal Register*, the authority of the Secretary in deciding appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources." 211 DM 13.5. IBLA's authority is also part of the broad authority delegated to OHA. As set forth at 43 [C.F.R. §] 4.1:

The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining,

as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary.

See The Moran Corp., 120 IBLA 245, 249-53 (1991); *United States Fish & Wildlife Service*, 72 IBLA 218, 220-21 (1983); *Blue Star, Inc.*, 41 IBLA 333, 335 (1979); *see also Eastern Associated Coal Corp.*, 5 IBMA 74, 87-96, 82 I.D. 392, 398-402 (1975).

The Director concluded that “[a]uthority to decide appeals necessarily includes authority to issue orders, including stays, as needed for the proper functioning of the review process.” *Id.* (citing *Larson v. Utah*, 50 IBLA 382, 392 (1980)).

In the present case, upon receipt of the joint request for an extension of time to respond to the Petition for Stay, filed by OSM, Kentucky, and Premier, the Board suspended its consideration of Johnson’s Petition for Stay pending receipt of the Responses. As noted, the last of those responses to be filed was that of Premier on December 28, 2015. Contrary to Johnson’s argument, the Board’s authority to rule on its Petition for Stay did not terminate upon the expiration of the 45-day period provided for in 43 C.F.R. § 4.21(b)(4). Pursuant to *David M. Burton*, “there would remain the authority OHA has always held to place a decision into effect or issue a stay at any time while an appeal is pending.” 11 OHA at 127 (citing 43 C.F.R. § 4.1; *In re Eastside Salvage Timber Sale*, 128 IBLA 114, 115 (1993); *Robert E. Oriskovich*, 128 IBLA 69, 70 (1993)).

At the same time, we recognize that in *David M. Burton*, the Director also stated: “The primary consequence of IBLA failing to rule upon a stay request within 45 days is that the decision becomes effective. 43 [C.F.R. §] 4.21(a)(3). In addition, the decision becomes subject to judicial review under 5 U.S.C. § 704 (1994). 43 [C.F.R. §] 4.21(c).” 11 OHA at 125; *see* 43 C.F.R. § 4.21(c) (citing *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA 257, 259 n.3 (1994)). The Director concluded: “Neither provision prohibits granting or denying a stay after the time has passed or suggests that OHA loses authority to rule upon the stay petition or jurisdiction over it.” 11 OHA at 125. Thus, even though Judge Sweitzer’s 2015 Decision became effective and subject to judicial review upon expiration of the 45-day period for ruling on the Petition for Stay pursuant to 43 C.F.R. §§ 4.21(b)(4) and 4.21(c), the Board still held the authority to issue or deny that Petition at any time while the appeal is pending.

Nonetheless, given that Johnson has filed a Complaint in District Court challenging ALJ Sweitzer’s 2015 Decision, we will grant Johnson’s Motion to Dismiss its appeal. Johnson “seeks judicial review and vacatur of Judge Sweitzer’s erroneous decision, together with reinstatement of the cessation order.” Complaint and Petition

for Judicial Review (Complaint), Motion to Dismiss (Exhibit (Ex.) 1), at 1. Johnson argues that ALJ Sweitzer's Decision upholding OSM's termination of the CO is "arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law." *Id.* at 5. In its Complaint, Johnson provides the following summary of the errors made by OSM in terminating the CO, and made by ALJ Sweitzer in upholding that termination:

OSM terminated the cessation order based on the agency's conclusion that [Kentucky] had lawfully approved Minor Revision #3 to Premier Elkhorn's mining permit to authorize surface mining of Johnson LLC's land despite the requirement of either **unanimous surface owner consent** pursuant to 30 U.S.C. § 1260(b)(6)(A) and its Kentucky regulatory counterpart, 405 KAR 8:030 § 4(2)(a), or an **implied right to extract coal by surface mining methods** created by Kentucky's law governing "the surface-subsurface legal relationship" between mineral and surface owners, *see* 30 U.S.C. § 1260(b)(6)(C) and its Kentucky regulatory counterpart, 405 KAR 8:030 § 4(2)(c). Judge Sweitzer concluded that this permit revision cured Premier Elkhorn's prior failure to establish its right to extract coal from Tract 46 by surface mining methods. In doing so, Judge Sweitzer: (1) misinterpreted 30 U.S.C. § 1260(b)(6)(C); (2) failed to apply Kentucky's "Broad Form Deed Amendment," *Ky. Const.* § 19(2), as the controlling state law for determining "surface-subsurface legal relationship" between owners of Kentucky mineral and surface estates; (3) unlawfully adjudicated the state-law property rights dispute between Johnson LLC and Premier Elkhorn; and (4) unlawfully gave effect to Kentucky's proposed state program amendment on the issue even though the Secretary has yet to approve the measure, in violation of 30 C.F.R. § 732.17(g).

Id. at 2 (emphasis in original). It is clear that a ruling by the District Court on the merits of Johnson's Complaint will dispose of Johnson's appeal on the merits before this Board. Accordingly, we dismiss Johnson's appeal and deny its Petition for Stay as moot.²

² On Feb. 9, 2016, OSM filed with this Board a Response to Johnson's Motion to Dismiss. OSM states: "If the Appellant was merely requesting a voluntary dismissal it would not merit opposition, but the motion is mislabeled because the Appellant actually seeks an erroneous declaration that the Board has lost jurisdiction under its own rules through inaction." Response at 1. We agree, and our preceding discussion corrects the error in Johnson's Motion to Dismiss.

(continued ...)

ORDER TO SHOW CAUSE

We further order Kentucky and Premier to show cause why their appeals from ALJ Sweitzer's 2014 Decision, docketed by the Board as IBLA 2015-91 and IBLA 2015-92, should not also be dismissed.

In its appeal from ALJ Sweitzer's 2014 Decision, Kentucky argues that "the ALJ erred in his holding that it was proper for OSM to issue [Premier] a CO for mining without a valid permit" Kentucky's Brief, IBLA 2015-91, at 2. Kentucky argues that "OSM's oversight and enforcement authority do not extend to reviewing [Kentucky's] permitting decisions in a piecemeal fashion," and that in this case OSM was required to "follow the procedural requirements of 30 U.S.C. § 1271," which OSM did not do. *Id.* at 3. Kentucky seeks reversal of ALJ Sweitzer's 2014 Decision upholding what Kentucky refers to as an "invalid CO which was improperly issued by OSM," and asks the Board to vacate that invalid CO. *Id.* at 29.

Similarly, Premier challenges ALJ Sweitzer's 2014 Decision to the extent he held that Premier's permit to mine Parcel 46 was invalid. Premier also argues that OSM did not have the authority to conduct the inspection upon which the CO was based, and that the CO itself was invalid. *See* Premier's Notice of Appeal,

(...continued)

OSM provides a cogent review of a series of Fourth and Sixth Circuit decisions which emphasize the reasons for, and the importance of, exhaustion of administrative remedies in cases arising under SMCRA. *See Mullins' Coal Company v. Clark*, 759 F.2d 1142, 1145 (4th Cir. 1985) (Under 30 U.S.C. § 1276(b), "it is plain that . . . judicial review will occur only after an administrative record has been compiled and an administrative decision rendered."); *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1090 (6th Cir. 1981) (A court's review of an order or decision of OSM shall be based solely on the record made before the Secretary as required by 30 U.S.C. § 1276(b) (2012)); *see also Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 298-99 (1981); *Southern Ohio Coal Co. v. OSM*, 20 F.3d 1418, 1423 (6th Cir. 1994). A record in the present case has been made. What remains in the administrative review process is the Board's ruling on Johnson's Petition for Stay and a ruling on the merits of the underlying challenges to the ALJ's 2014 and 2015 Decisions. Given the current posture of this matter, we now defer to the District Court's jurisdiction.

On Feb. 18, 2016, Johnson filed a Reply Memorandum in Support of its Motion to Dismiss. The contents of that pleading were considered in the issuance of this Order.

IBLA 2015-92, at 2. Premier argues that OSM “did not conduct an independent review of Kentucky’s permitting decision,” but issued the CO largely in reliance upon the District Court’s “reasoning that, in fact, was never binding.” Premier’s Brief, IBLA 2015-92, at 1. Premier finds it significant that the Sixth Circuit subsequently vacated the preliminary injunction issued by the District Court. *Id.*; see *Johnson v. Jewell*, No. 14-5867 (6th Cir. Oct. 31, 2014).³ Premier argues that ALJ Sweitzer erred in concluding that OSM “may use its **enforcement** authority under Section 1271(a)(2) to review a primacy state **permitting** decision.” Premier’s Brief, IBLA 2015-92, at 14 (emphasis in original).

Johnson’s Complaint necessarily implicates the fundamental question of whether OSM held the authority to issue the CO. Johnson requests the District Court to “direct[] the Secretary to require OSMRE to reinstate the cessation order.” Complaint (Motion to Dismiss, Ex. 1) at 8. Johnson further asks the District Court to

direct[] the Secretary to refrain from terminating the cessation order in the future unless and until Premier Elkhorn first obtains and submits to Kentucky a final, unappealable judicial order declaring that, pursuant to Kentucky law governing the interpretation of mineral severance instruments, the company has legal authority to extract coal from Tract 46 by surface mining methods.

Id. Findings by the District Court that OSM had the authority to issue the CO and that the CO was properly issued in the first instance are predicates to the relief Johnson seeks.

We are inclined, in the interests of judicial economy and the avoidance of piecemeal litigation, to dismiss the appeals of Kentucky and Premier from ALJ Sweitzer’s 2014 Decision (IBLA 2015-91 and IBLA 2015-92, respectively), so that the entire matter may be decided by the District Court. Accordingly, we direct the parties to show cause, within 10 days from receipt of this Order, why the appeals of Premier and Kentucky in IBLA 2015-91 and IBLA 2015-92, should not be dismissed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Johnson’s Motion to Dismiss its appeal in IBLA 2016-38 is granted; Johnson’s Petition for Stay in IBLA 2016-38 is

³ We note that the Sixth Circuit specifically stated that in vacating the District Court’s Order it was “tak[ing] no position on the merits of this lawsuit.” *Johnson v. Jewell*, No. 14-5867 (6th Cir. Oct. 31, 2014), at 3.

denied as moot; and the parties are directed to show cause why the appeals of Kentucky and Premier in IBLA 2015-91 and IBLA 2015-92 should not also be dismissed.

_____/s/
James F. Roberts
Deputy Chief Administrative Judge

I concur:

_____/s/
Amy B. Sosin
Administrative Judge