<u>Editor's note</u>: Reconsideration denied by Order dated June 28, 1991.

ROY E. MEHAFFEY
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-664 Decided January 31, 1991

Appeal from a decision of Administrative Law Judge David Torbett, affirming issuance of cessation order No. 86-091-283-003.

Vacated in part, affirmed in part.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

When, on the basis of a Federal inspection, the permittee is found to be in violation of any requirement of SMCRA, and the violation does not create an imminent danger to the health and safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air or water resources, the inspector shall issue a notice to the permittee or its agent fixing a reasonable time for abatement. If, when the period for abatement expires, the violation remains unabated, cessation of surface coal mining and reclamation operations shall be ordered.

Unless and until the permittee gives proper notice of a change or designation of a party or parties authorized to receive a notice of violation or cessation order, delivery of a notice of violation or cessation order to one of the parties named as owner or agent of the applicant in the application for a surface mining permit will constitute service of the notice of violation or cessation order.

2. Administrative Procedure: Hearings--Hearings--Rules of Practice: Appeals: Hearings

A second hearing will not be afforded if an appellant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

APPEARANCES: Joseph N. Clarke, Jr., Esq., Knoxville, Tennessee, for appellant; R. Anthony Welch, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of the Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Roy E. Mehaffey appeals from a decision of Administrative Law Judge David Torbett, dated July 8, 1987, affirming cessation order (CO) No. 86-091-283-003 issued to Rich Mountain Coal Company (RM Coal) pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271 (1988).

On June 18, 1979, RM Coal submitted an application for a surface coal mining permit to the Tennessee Division of Surface Mining (TDSM). This application was made on behalf of a partnership and signed by Mehaffey as partner. TDSM approved the permit on November 6, 1979. On May 6, 1986, Inspector William H. Harting, reclamation specialist with the Office of Surface Mining Reclamation and Enforcement (OSM), issued notice of violation (NOV) No. 86-091-283-008 for RM Coal's failure to submit surface water monitoring reports for February and March 1986, as required by 30 CFR 715.17(b) (Exh. R-1). 1/ The NOV called for abatement before 8 a.m., May 28, 1986. RM Coal took no action to abate the violation by the date cited in the NOV, and CO No. 86-091-283-003 was issued on October 28, 1986 (Exh. R-2). Both the NOV and CO were issued to "Rich Mountain Coal Company Permittee." The NOV and CO were both served on Mehaffey, who had signed the application as a partner in RM Coal.

On December 5, 1986, Mehaffey filed an application for temporary relief and formal review of the CO. At the hearing before Judge Torbett on December 17, 1986, Harting testified on behalf of OSM. Harting stated that after reviewing office records he determined that RM Coal had failed to submit water monitoring reports for February and March 1986; that he issued an NOV for failure to do so; that he subsequently issued a CO for failure to abate the NOV; that he looked at the permit package to establish who the permittee was; and that he did not find any successor interest application or any other indication of change of ownership in reviewing the permit file (Tr. 9-11).

Mehaffey did not dispute the existence of the violation at issue but argued that it was improper to serve the NOV and CO upon him because he had transferred his interest in RM Coal to Joe Ryan of Diamond Capital Mining, Inc. (Diamond), by the agreement dated March 20, 1979. 2/ Mehaffey testified that although he filed the application for the permit (Exh. R-3), the

1/ We note that while the NOV was written on a Permanent Regulatory Procedures form, the inspector cited a violation of 30 CFR 715.17(b) which is an initial program regulation. Since a Federal program became effective in the State of Tennessee on Oct. 1, 1984 (49 FR 38874), and the NOV was issued May 6, 1986, the Federal program regulation should have been cited. The permanent program regulation dealing with water monitoring reports is codified at 30 CFR 816.41(e); 30 CFR 942.816.

2/ It appears that Joe Ryan is connected with both Capital Coal Sales and Diamond. The relationship between these corporations is not known.

permit was issued after he sold his interest in the company (Tr. 14-15). Mehaffey referred to a letter to Ryan from Thomas P. Whitson of ETE Consulting Engineering dated May 8, 1979, in which Whitson informed Ryan that he was taking the necessary steps to obtain a permit. According to Mehaffey, this letter showed that Ryan had "taken over and was doing business with ETE Consulting Engineers towards obtaining the permit for Rich Mountain Coal Company" (Tr. 14; Exh. A-2). In response to a question as to whether he went through the State of Tennessee and reassigned the permit to Diamond, Mehaffey stated that he did not think that there was a provision for that at the time (Tr. 15-16).

Whitson, Staff Geologist with ETE Consulting Engineering, testified that Mehaffey told him in early 1979 that Mehaffey was selling his interest to Ryan, and that Ryan would probably pick up the permit application (Tr. 17). Whitson said that the permit was applied for in the name of RM Coal on a recommendation by the State of Tennessee that if the name were changed then it would be necessary to go through the public notice process and change the maps which would cause a delay (Tr. 17). Whitson testified that, to the best of his knowledge, there was no successor-of-interest, which was an "unheard of" term in 1979 (Tr. 17-18). Whitson stated that after May or June 1979, all dealings were through Capital Coal Sales, Inc. Whitson said that when he visited the site during mining operations, he indicated that "it was Joe Ryan and his foreman" who were in charge (Tr. 18).

In his decision Judge Torbett found that OSM proved with unrebutted evidence that the surface water monitoring reports were not submitted to OSM for the subject minesite in February and March 1986; that Mehaffey was liable for this violation as a partner of RM Coal and permittee of record; and that Mehaffey failed to prove that he validly assigned RM Coal's interest in the coal mining permit. Therefore, Judge Torbett concluded that CO No. 86-091-283-003 was validly issued.

In his statement of reasons (SOR), Mehaffey alleges that the Judge erred in his finding that he was liable for the violation on the basis that he was a partner of RM Coal. According to Mehaffey, there was no permit to be succeeded to nor any permit interest to be transferred to Diamond at the time he ceased to be a partner of RM Coal. Mehaffey asserts that his testimony and the testimony of Whitson prove that he had sold his partnership interest in RM Coal and had withdrawn as a partner at least 4 months prior to the issuance of the permit.

Mehaffey asserts that generally, upon the withdrawal or retirement by one partner from a continuing partnership, the partnership relation ends. Mehaffey concludes that since there was no permit in existence during the time he was a partner with RM Coal, he cannot be considered a responsible partner of the permittee for the purposes of the subject NOV and CO.

Mehaffey contends that the Judge abused his discretion in denying Mehaffey's motion to reopen the proceedings below for the purpose of taking additional evidence. Mehaffey points out that he proceeded pro se at

a hearing which involved issues of numerous legal concepts, including SMCRA which is a specialized area of administrative law. Also, Mehaffey asserts that in determining whether there was an abuse of discretion, the Board should consider the severity of the penalty ($22,500) and the relatively minor nature of the violation which was not abated (failure to submit surface water monitoring reports). In addition, Mehaffey notes that the Judge himself stated in his decision that there may be extenuating circumstances which explain Mehaffey's actions in this case. 3/

OSM contends that if appellant claims that he withdrew from the partnership on the date of execution of the March 20, 1979, document, he is still bound to the regulatory agencies by the act of signing the permit application as a partner on June 18, 1979. OSM asserts that if he claims he withdrew from the partnership subsequent to June 18, 1979, then he should have filed an amendment to the permit application. OSM notes that the permit package does not contain any evidence of transfer. According to OSM, there was a method available by which he could have severed his relationship to the partnership and to the permit. See Rules of Tennessee Department of Conservation, Division of Surface Mining, § 0400-3-2-01 (superseded) (repealed). 4/

Without faulting the Administrative Law Judge's determination, we first note that this case has been skewed from the outset by the nature of Mehaffey's arguments on appeal below and on appeal before this Board. The questions in this case are, and have always been, whether RM Coal was the permittee and whether the NOV and CO were properly served on the permittee.

No collection action has been undertaken and OSM has made no attempt to impose penalties (civil or otherwise) on the partnership, any partner, or any other entity or individual. To make a determination as to individual liability at this juncture is premature. Therefore, to the extent that the decision below finds or can be construed to find a collective or individual

3/ The issue of civil penalty is not before us. The civil penalty regulations, 30 CFR Part 723 or 845 (see note 1) provide the procedure for contesting the assessment of civil penalties.

4/ On July 27, 1987, appellant filed a notice of appeal with this Board. By order dated Sept. 16, 1987, the Board dismissed the appeal for failure of appellant to file a brief within 30 days of filing his notice of appeal pursuant to 43 CFR 4.1273(b). On Oct. 1, 1987, the Board received appellant's motion to reinstate his appeal including his SOR for appealing.

On Oct. 19, 1987, OSM filed a response opposing the motion which included OSM's answer to Mehaffey's SOR. By order dated Nov. 10, 1987, the Board reinstated Mehaffey's appeal and granted OSM 30 days to file a response to Mehaffey's brief. On Dec. 7, 1987, OSM responded to the Board's order stating that it had sufficiently briefed the issues in its response to Mehaffey's motion to reinstate the appeal received on Oct. 1, 1987, and therefore waived its opportunity to file another brief. The contentions set forth above were included in OSM's Oct. 15, 1987, brief filed on Oct. 19, 1987.

liability for any fine or penalty which may be assessed as a result of an NOV and CO having been issued against RM Coal, it is vacated.

Mehaffey represented himself as partner when he signed the application as "partner" (Exh. R-3 at 12). 5/ Based on the information in the application, including Mehaffey's statement that he was a partner of RM Coal, the State of Tennessee approved the permit on November 6, 1979. At that point, RM Coal became the permittee of record, and either partner could be served with the NOV and CO. There is nothing in the record to indicate that TDSM received formal notice at any time after the application was filed that either service should be made on any party other than those named in the application, or that the parties named in the application no longer served as agents for the permittee.

[1] Section 521(a)(3) of SMCRA, 30 U.S.C. § 1271(a)(3) (1988), provides, in pertinent part, that:

> When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or * * * during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.
>
> If, upon expiration of the period of time * * * the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. [Emphasis added.]

Thus, it is clear from the terms of the statute itself that RM Coal, the permittee, is properly cited for a violation of the Act and, in the event abatement of the violation is not timely achieved, a CO is properly issued. Clark Coal Co. v. OSMRE, 102 IBLA 93 (1988), appeal filed CIV No. 3-88-351 (E.D. Tenn. May 18, 1988). Wilson Farms Coal Co., 2 IBSMA 118, 87 I.D. 245

5/ In the general information section of the permit application, Mehaffey specified "Partnership" as the "applicant's legal structure" and listed his name and that of Bud Mullins as "owners" of the partnership (Exh. R-3 at 1). The record does not show that Mullins was served with copies of the NOV and CO, or that he sought to participate in this matter.

(1980). The Act also authorizes the assessment of a civil penalty against the permittee for a violation of the Act. 30 U.S.C. § 1268(a) (1988).

RM Coal obtained a permit based on information provided in the application which Mehaffey signed as partner. While Mehaffey represents that Diamond was the active operator under the permit, the records establish that he had filed the application on behalf of RM Coal, signing it as a partner. A permit was subsequently issued to RM Coal, and there is nothing in the record that would indicate that, at any time between the time the application was filed and the time that the CO was served on Mehaffey, any party authorized to do so notified either TDSM or OSM that Mehaffey could no longer accept service for RM Coal. Mehaffey has offered no evidence which supports his position that he was not the proper party to be served with the notice and the CO.

Mehaffey contends that OSM did not rely on the information included in the permit. It obviously did. Harting, the reclamation specialist who testified for OSM, stated that he reviewed the permit package to see who the permittee was when issuing the NOV and CO (Tr. 10). He also testified that he did not find any successor interest application or any other indication of a change of ownership (Tr. 11). OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved. Turner Brothers, Inc. v. OSMRE, 101 IBLA 327 (1988); Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986); see also Grafton Coal Co., 2 IBSMA 316, 323 n.3, 87 I.D. 521, 525 n.3 (1980). Similarly, OSM should be able to rely on the fact that the person who signed the permit application truthfully represents that he is a party responsible for complying with the terms of the permit. It matters not that Mehaffey sold his interest in RM Coal to Diamond. Unless and until the assignment of the permit issued to RM Coal is approved by the issuing agency, RM Coal is responsible for compliance with the permit terms. This approval must be granted for a party to be relieved of responsibility under the permit. A purported or actual transfer of the permit or the assets of the entity holding the permit to a third party will not suffice to relieve the permittee of record of liability for violations of the Act.

There is nothing in the record that would support a conclusion that either the NOV or the CO was improperly issued or that it was improper to complete service of either of those two documents by delivery to Mehaffey. Mehaffey had prepared and filed the application for a permit for RM Coal designating himself as a partner in that entity. Thus, unless and until otherwise informed, it was reasonable for TDSM and OSM to rely upon the statement made in the application that Mehaffey was an owner of RM Coal, a capacity sufficient to act as an agent for service of both an NOV and a CO. The decision below that the NOV and CO were properly issued and served is affirmed.

[2] Finally, we do not find that the Judge abused his discretion in denying Mehaffey's motion to reopen the hearing. Mehaffey asks the Board to consider the fact that he appeared pro se in a hearing involving complicated legal issues. In reviewing the transcript of the hearing we note that

Judge Torbett, at the outset of the hearing, discussed the pro se issue with Mehaffey. The Judge made it clear to Mehaffey that the Government would be represented by an attorney and that this was the only hearing to which he would be entitled. The following inquiry took place at the beginning of the hearing:

> JUDGE TORBETT: Mr. Mehaffey, are you representing yourself?
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> MR. MEHAFFEY: Yes, sir.
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> JUDGE TORBETT: Do you understand that the Government has a lawyer representing them and you may be at a disadvantage?
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> MR. MEHAFFEY: Yes, sir.
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> JUDGE TORBETT: Understanding that, do you still want to represent yourself?
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> MR. MEHAFFEY: I have no choice.
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> JUDGE TORBETT: There is no provision in the law for the Government to pay for an attorney, so if you want to represent yourself, you can. Is that what you want to do?
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> MR MEHAFFEY: Yes, sir.
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> JUDGE TORBETT: This case is both for temporary relief and permanent relief from the Cessation Order. Do you understand that, Mr. Mehaffey?
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> MR. MEHAFFEY: Yes, sir.
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> JUDGE TORBETT: In other words, this hearing--and I will explain your other rights as we go along--but, this is the only trial that is provided by law. Do you understand that?
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> MR. MEHAFFEY: Yes, sir.
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> JUDGE TORBETT: Any other rights that you have if you should not be successful in this hearing will be in the nature of an appeal. Do you understand that?
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> MR. MEHAFFEY: Yes, sir.
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> JUDGE TORBETT: Understanding that, do you still want to represent yourself?
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> MR. MEHAFFEY: Yes, sir.

(Tr. 4-5).

Because he proceeded without counsel, appellant now claims that the proceedings should have been reopened for the submission of further evidence in order to more fully develop all aspects of the case. The Board has held that a second hearing will not be offered where a party was given notice and an opportunity to appear at a hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. United States v. Holder, 100 IBLA 146, 148-49 (1987); United States v. Whitney, 51 IBLA 73, 88 (1980); United States v. Syndbad, 42 IBLA 313, 322 (1979); cf. United States v. Johnson, 33 IBLA 121 (1977). A petition to reopen a hearing for submission of further evidence will be denied when the party offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. United States v. Holder, supra. Since Mehaffey has offered no evidence to suggest that a rehearing would have produced a different result, we find that the Judge properly denied Mehaffey's request to reopen the hearing. Furthermore, we would point out that the amount of any penalty is not relevant to the issue of whether the hearing should be reopened.

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 vacated in part and affirmed in part.

Gail M. Frazier
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge