

**Editor's note: Reconsideration denied by Order dated July 27, 1993**

MARY HERALD  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 90-153

Decided July 14, 1992

Appeal from a decision of Administrative Law Judge David Torbett, affirming issuance of Cessation Order Nos. 89-84-136-004 and 89-84-136-017 to Mary Herald.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

Sec. 528(2) of SMCRA, P.L. 95-87, 91 Stat. 445, 514 (1977), formerly provided that the Act would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." Under 30 CFR 700.11(b), the exemption does not apply where the operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control."

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof

A person challenging OSM's jurisdiction to issue a CO on the grounds that its mining activities fell within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

The permittee of a surface mining operation is ordinarily responsible for violations of SMCRA and the

regulations committed by the operator on the permitted site. The issuance of a CO to the holder of a 2-acre permit for failure to obtain a permit under the Act and reclaim the highwall as required under the Act which is predicated on the mining of physically related sites under common control totalling in excess of 2 acres within 12 months will be reversed where the record establishes that the permittee of the 2-acre site had no ownership or control of operations on the physically related sites.

APPEARANCES: Shelby C. Kinkead, Jr. Esq., Lexington, Kentucky, for appellant; Margaret H. Poindexter, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Mary Herald has appealed from a November 29, 1989, decision of Administrative Law Judge David Torbett upholding Cessation Order (CO) Nos. 89-84-136-004 and 89-84-136-017. The former CO was issued to Herald for "mining without a valid surface disturbance permit due to relatedness." The corrective action required was to either obtain a permanent program permit covering the operation or to reclaim all disturbance to permanent program standards. The latter CO was issued for failure to abate the violation cited in the former CO.

On May 19, 1983, Mary Herald was issued 2-acre Surface Disturbance Mining Permit No. 897-0025 by the Kentucky Bureau of Surface Mining Reclamation and Enforcement for a 1.95-acre site in Perry County, Kentucky. Her permit application disclosed that she owned the surface of the land and held a lease of the right to mine the coal from Virginia Iron, Coal and Coke (VICC) (Exhibit (Exh.) R-1). On December 10, 1983, Herald entered into a contract with James Davidson, by which Davidson acquired the right to mine the permitted property and agreed to pay Herald a royalty of \$3 per ton of coal mined from permit No. 897-0025 (Exh. A-1). <sup>1/</sup> Under this agreement, Davidson agreed to abide by all State and Federal regulations. The mine license for the site was obtained by Davidson Coal Sales, owned by Davidson (Tr. 17; Exh. R-26).

Davidson entered into an agreement with G & E Johnson Construction (G & E) to do the actual mining. G & E paid Davidson 50 cents per ton of mined coal for the lease (Tr. 56). G & E also employed Davidson to mine the Herald site, paying him an hourly wage (Tr. 56). It is not certain

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<sup>1/</sup> We note that Judge Torbett's decision and filings by both parties give a date of Dec. 10, 1984, for the contract between Herald and Davidson. However, the copy of the contract marked Exhibit A-1 shows a date of Dec. 10, 1983. It appears from the testimony that mining occurred during late 1983 and was completed by Mar. 21, 1984 (Tr. 36, 41).

from the testimony when Herald learned that G & E was the mine operator, or when she became aware that G & E was doing the actual mining (Tr. 63). It is clear that Herald's royalty checks came from G & E (Tr. 64).

It appears from the record that mining at the Herald site was completed by March 21, 1984, when the site was listed as "A-2" (Tr. 41). <sup>2/</sup> Office of Surface Mining Reclamation and Enforcement (OSM) inspector Sharon Hall testified that she had found nothing to indicate completion of the mining prior to the March 21 listing as A-2 (Tr. 41). OSM inspector Gary Hall testified that he found the site reclaimed to 2-acre standards when he did a January 30, 1986, inspection (Tr. 12). However, Gary Hall did a relatedness investigation at the time of that inspection and determined that six other operations were related to Herald's by virtue of time, distance, and common control (Tr. 15-16; Exh. R-2). <sup>3/</sup>

Following his inspection, Inspector Gary Hall issued Ten-Day Notice (TDN) No. 86-84-061-006 to the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE), citing G & E for mining without a valid surface disturbance permit (Exh. R-3). The TDN listed Herald's permit No. 897-0025 as among the related sites under G & E's control (Tr. 19; Exh. R-3). In response to the TDN, DSMRE cited G & E Construction Company d.b.a. Mary Herald for violation of KRS 350.060 in connection with the mining of related permits (Exh. R-4). In a settlement reached at the time of the scheduled hearing on the DSMRE citation, DSMRE and George Johnson, the President of G & E Johnson Construction Company, entered into an Agreed

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<sup>2/</sup> "A-2" status indicates mining has ceased but reclamation has not been completed.

<sup>3/</sup> The related sites identified by Gary Hall in his narrative inspection report (Exh. R-2) and in his testimony (Tr. 15-16) were: (1) Versie Campbell, permit No. 897-0108 (issued June 6, 1984; site seeded on Feb. 25, 1985 (Exh. R-18)); (2) Lillie Mae Campbell, permit No. 897-0092 (issued Apr. 9, 1984; site seeded on Oct. 28, 1984, (Exh. R-18)); (3) Lena Couch, permit No. 897-0081 (issued Dec. 27, 1983, graded Apr. 19, 1984 (Tr. 39; Exh. R-18)); (4) Muriel Feltner, permit No. 897-0091 (issued Mar. 20, 1984; listed as A-2 May 14, 1984 (Exh. R-18)); (5) Betty Pigman, permit No. 897-0198 (issued Mar. 25, 1985; coal removal ceased July 2, 1985 (Exh. R-18)); and (6) Gregory Stocking, permit No. 897-0157 (issued Oct. 15, 1984; listed A-2 on Mar. 14, 1985 (Exh. R-18)). The Jan. 30, 1986, narrative inspection report and testimony of Gary Hall indicated that all six sites were mined and licensed by G & E (Tr. 15-16; Exh. R-2). Further, the minerals at all sites except that of Stocking were owned by VICC. Id.

Inspector Sharon Hall confirmed in her testimony (Tr. 35-40) that Herald's site was related to the sites of Versie Campbell, Muriel Feltner, and Lena Couch. She found it was also related to the Nadean Witt site, permit No. 897-0146 (issued Dec. 5, 1984; coal removal stopped during the summer of 1985 (Exh. R-18)) and the Dorse Campbell site, permit No. 897-0133 (issued Oct. 2, 1984; coal removal ceased in the spring of 1985 (Exh. R-18)). The latter two were also mined by G & E (Tr. 37-39).

Order on March 26, 1987, by which G & E Johnson Construction and George Johnson individually admitted liability for the Herald site, agreed to pay the outstanding fine, and agreed to obtain a permanent program permit for the Herald site (Tr. 23; Exh. R-22).

On October 25, 1988, OSM inspector Sharon Hall reinspected the Herald site (Tr. 32-34; Exh. R-7). Nothing had changed--the highwall remained, and the site had been reclaimed only to the 2-acre standard (Tr. 33-34). Sharon Hall issued CO No. 89-84-136-004 on January 11, 1989, citing both Herald and G & E for mining without a valid surface disturbance permit in violation of section 506(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1256(a) (1988), and 30 CFR 843.11(a)(2) (Exh. R-9). The corrective action required by the CO was either to reclaim the site to permanent program standards by March 1, 1989, or to secure a permanent program permit by April 30, 1989 (Tr. 44; Exh. R-9). During a March 28, 1989, followup inspection, inspector Sharon Hall found the Herald site unchanged (Exhs. R-10, R-25). Accordingly, on April 4, 1989, she issued failure to abate CO (FTACO) No. 89-84-136-017 to Herald and G & E (Exh. R-11). As G & E had not received the original CO, both the CO and the FTACO were modified as to the abatement dates and reissued (Tr. 47; Exhs. R-13, R-14).

Herald sought temporary relief and a formal review of the two CO's on June 6, 1989. After a hearing and submission of posthearing briefs, Judge Torbett issued his decision of November 29, 1989, holding that OSM had made a prima facie case as to the validity of both CO's, that Herald had failed to rebut the fact that her site was subject to OSM's jurisdiction, and that Herald was a responsible party under SMCRA. This appeal followed. <sup>4/</sup>

In her statement of reasons, appellant does not dispute Judge Torbett's factual findings. Appellant admits that G & E operated related permits during the period that her permit was operated. She admits that, as the named permittee for permit No. 897-0025, she is responsible for mining activities on her permit and states she does not seek to avoid responsibility for violations confined to the operation of her permit. Appellant does contest OSM's assignment of responsibility to her for violations that arose by reason of the activities of her lessee's contract operator on properties owned by others.

[1] Section 528(2) of SMCRA, P.L. 95-87, 91 Stat. 445, 514 (1977), provided at the time this mining occurred that SMCRA would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." <sup>5/</sup> This exemption was implemented by regulations found at 30 CFR 700.11(b) which provided that the exemption

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<sup>4/</sup> The only issue before the Board in this appeal is the propriety of issuance of the two CO's to Mary Herald. We have no appeal by G & E.

<sup>5/</sup> This 2-acre exemption was eliminated by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300.

did not apply where "the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." The regulation then in effect also provided that operations were to be deemed related "if they occur within twelve months of each other, are physically related, and are under common ownership or control." 30 CFR 700.11(b)(2).

The issue before us is whether appellant may be held responsible for violations resulting from activities on other sites solely because she is the permit holder for one of the related sites. Appellant argues that, although G & E may be held liable for relatedness violations and be charged with responsibility for abating those violations on each of the subject sites because it had control over all of them, she should not be held liable for relatedness violations because she had no ownership or control over other operations found to be related to her permit. Thus, she argues that, at least in regard to her responsibilities as permittee, she and her site fail the relatedness test of 30 CFR 700.11(b)(2).

[2] In a proceeding on review of a CO, OSM has the burden of going forward to establish a prima facie case as to the validity of the order, while the ultimate burden of persuasion rests with the applicant for review. 43 CFR 4.1171. OSM's initial burden is limited to a prima facie showing that the party named in the CO was "engaged in a surface coal mining operation and failed to meet Federal performance standards." W. D. Martin v. OSM, 120 IBLA 279 (1991), W. D. Martin v. OSM, appeal filed, Civ. No. 91-01-63-B (W.D. Va. Sept. 30, 1991); Titan Coal Corp. v. OSM, 78 IBLA 205 (1984); Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). We find that OSM has met that burden through the testimony of its inspectors and the exhibits introduced in evidence. It is clear from the evidence that surface coal mining operations were conducted within 12 months of each other on separate but physically related sites exceeding 2 acres in total. Further, it was established on the record that these operations were all conducted by G & E, thus establishing the element of common control over the operations.

Once OSM has made such a showing, the ultimate burden of persuasion shifts to the applicant for review. 43 CFR 4.1171(b). The applicant must then prove entitlement to an exemption from regulation under the 2-acre rule as promulgated at 30 CFR 700.11(b). Cumberland Reclamation Co., 102 IBLA 100 (1988), *aff'd*, Cumberland Reclamation Co. v. Secretary of Interior, 925 F.2d 164 (6th Cir. 1991); OSM v. C-Ann Coal Co., 94 IBLA 14 (1986); Harry Smith Construction Co., 78 IBLA 27 (1983), *aff'd*, United States v. Harry Smith Construction, Civ. No. 84-208 (E.D. Ky. Feb. 7, 1986).

Conceding that several physically related sites with a combined acreage of greater than 2 acres were mined by G & E, appellant argues that she had no control over the operations outside the boundaries of her permit. Since it is not the operation of the Herald site itself, but the operation of physically related sites under common control which constitutes the violation, appellant asserts that her lack of control over the related operations establishes the absence of a key element in the citation against her. On the other hand, OSM argues that as the permittee for the site, appellant

is responsible for any violations. OSM notes that under section 521(a)(5) of SMCRA, 30 U.S.C. § 1271(a)(5) (1988), notices of violation and CO's issued pursuant to that section are to be served on the "permittee" or his agent.

[3] As a general rule the permittee is a proper party to be cited under section 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1988), for a violation of the Act, regardless of the fact that the coal was removed by a third party. Clark Coal Co. v. OSM, 102 IBLA 93 (1988). In that case the Board held that a purported assignment of a permittee's rights under the permit will not suffice to relieve the permittee of liability for violations of the Act in the absence of approval of the assignment of the permit. Similarly, in Wilson Farms Coal Co., 2 IBSMA 118, 87 I.D. 245 (1980), the permittee was held responsible. In Wilson Farms, the permittee leased his land to Kitov Corporation which agreed to assume all obligations and responsibilities. Kitov Corporation assigned the lease to Shannon Coal Corporation. The Department held that an agreement with a third party assigning mining rights under the permit will not relieve a permittee of its obligations under the Act. Thus, the permittee was responsible for violations committed by Shannon Coal because the permit was never assigned; as in the present case the landowner merely entered into a lease. However, the Clark and Wilson cases are distinguishable from the present appeal in one critical aspect: In Clark and Wilson all of the violations of the Act occurred on the permit. Relatedness violations, on the other hand, involve more than one permit and require a showing of common control.

Appellant contends that "relatedness" violations "have as their essence the element of control" and that she had no control over G & E's other mining operations. In this regard, we note that the preamble to the regulation defining related coal operations at 30 CFR 700.11(b) stated that "[t]he most important aspect of this section is the definition of 'control.' If one person exercises sufficient authority over another (whether by contract, lease, other agreement or implied authority) to determine how that person mines, handles, sells or disposes of coal from a site, there is 'control.'" 47 FR 33428 (Aug. 2, 1982). In this case we find that the key to holding the permittee of a 2-acre site liable for a CO based on a relatedness violation is a finding that the permittee controlled the operations on related sites such that the total acreage affected on the sites exceeds 2 acres. The record here indicates that appellant lacked control over operations at the related sites 6/ and, hence, the decision affirming issuance of the CO's to Herald must be reversed.

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6/ The regulation itself defines control to mean ownership of 50 percent or "any relationship which gives one person the ability in fact or law to direct what the other does; or any relationship which gives one person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of." 30 CFR 700.11(b)(2)(iii) (emphasis added). OSM has presented no evidence to rebut appellant's contention that she had no authority or control over G & E's activities at different sites.

Accordingly, 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 reversed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge