

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**MAR 9 - 2016**

AUSTIN POWDER COMPANY,  
Contestant,

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent,

**CONTEST PROCEEDINGS**

Docket No. PENN 2012-116-R  
Citation No. 7040091; 01/20/2012

Mine: River Hill Coal Co., Inc.  
Mine ID 36-00884 E24

Docket No. KENT 2011-213-R  
Citation No. 8257007; 10/22/2010

Mine: S-1 Hunts Branch  
Mine ID 15-18280 E24

Docket No. KENT 2011-214-R  
Order No. 8257009; 10/22/2010

Mine: S-1 Hunts Branch  
Mine ID 15-18280 E24

Docket No. KENT 2011-403-R  
Citation No. 8257016; 12/29/2010

Mine: S-4 Netley Branch  
Mine ID 15-17799 E24

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

AUSTIN POWDER COMPANY,  
Respondent.

**CIVIL PENALTY PROCEEDINGS**

Docket No. PENN 2012-172  
A.C. No. 36-00884-281523 E24

Mine: River Hill Coal Co., Inc.

Docket No. PENN 2012-77  
A.C. No. 36-09312-273298 E24

Mine: Allegheny Strips

Docket No. CENT 2013-213  
A.C. No. 23-02262-309819 E24

Mine: Hume #1

Docket No. KENT 2011-1011  
A.C. No. 15-17799-252893 E24

Mine: S-4 Netley Branch

Docket No. KENT 2012-684  
A.C. No. 15-18280-281484 E24

Mine: S-1 Hunts Branch

Docket No. KENT 2012-1030  
A.C. No. 15-17834-287578 E24

Mine: F-9 Prater Branch

Docket No. KENT 2013-274  
A.C. No. 15-19451-307263 E24

Mine: S-9 Findlay Branch

Docket No. KENT 2013-1078  
A.C. No. 15-19199-325351 E24

Mine: S-4 Calloway North

Docket No. SE 2012-128  
A.C. No. 01-03375-273206 E24

Mine: Johnson Mine

Docket No. VA 2012-542  
A.C. No. 44-07133-293119 E24

Mine: No. 26 Strip

Docket No. VA 2014-197  
A.C. No. 44-07098-343919 E24

Mine: S-5 Jones Fork

Docket No. WEVA 2014-157  
A.C. No. 46-00015-334165 E24

DBA: Greer Lime Company

**ORDER AFFIRMING “UNITARY OPERATOR” STATUS OF  
AUSTIN POWDER COMPANY**

Appearances: Stephen Turow, Esq., Office of the Solicitor, U.S. Department of Labor,  
Arlington, Virginia, on behalf of the Secretary of Labor

Christopher D. Pence, Esq., Hardy Pence, PLLC, Charleston, West  
Virginia, on behalf of Austin Powder Company

Before: Judge Andrews

This proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). Austin Powder Company (“APC”) is subject to the jurisdiction of The Federal Mine Safety and Health Commission (“FMSHRC”) and the undersigned Administrative Law Judge (“ALJ”) has the authority to hear this case and issue a decision.<sup>1</sup>

**Procedural History**

The above-captioned dockets were consolidated to provide for the efficient resolution of a threshold issue common to all of the citations for alleged violations of safety standards by Austin Powder divisional subsidiary LLCs. Each of the twenty citations and two orders listed Austin Powder Company as the operator based on a determination by the Secretary of Labor (“Secretary”) that the APC organization constituted a “unitary operator” for the purposes of the Mine Act. Austin Powder Company is the parent company and the owner of the divisional subsidiary LLCs. Respondent has objected to being charged on that basis since the subsidiary LLC - and only that entity – should be held liable for any violations committed by that subsidiary

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<sup>1</sup> For clarity throughout this decision, the following abbreviations and terms will be used:

Austin Powder Company, the Ohio Corporation, parent and owner of the subsidiaries will be “APC”;  
The Austin Powder Divisional Subsidiary Corporations will be “subsidiary LLC” or “LLC”;  
The entire Austin Powder organization, APC and LLCs, will be the “APC organization”; and  
The *Berwind* companies will be the “BNRC group”.

LLC. The secretary has responded that more than one entity in a company may be held liable based on the “unitary operator” theory first announced by the Commission in *Berwind Natural Resources, Corp., et al.*, 21 FMSHRC 1284 (Dec. 1999).

Early in the procedural history of this case, ALJ William Steele approved a partial settlement of the 104(a) citation in docket PENN 2012-172, leaving the issue of assignment of liability to be later adjudicated. Upon Judge Steele’s retirement, the docket was reassigned to another ALJ. The parties moved for Summary Decision, but the ALJ determined there were material facts in dispute and that the unitary operator issue must first be decided. The Secretary then moved for consolidation of all similar APC dockets, so the preliminary issue of the Secretary’s determination that the APC organization is a unitary operator could be resolved in one proceeding.

After reassignment of this docket to the undersigned, Austin Powder dockets with the unitary operator issue were ordered to be consolidated. Of the twelve consolidated dockets, PENN 2012-172 with Contest PENN 2012-116-R were designated the lead dockets.<sup>2</sup> In December 2014 the parties were ordered to file briefs limited to the unitary operator issue and the test to be applied for any determination of unitary operator status. The briefs were submitted and the matter was set for hearing. Conferences were also held with the parties on May 5, 13, and 21, 2015, in preparation for the hearing. The hearing was held on May 27, 2015, in Pittsburgh, Pennsylvania at which time the parties had the opportunity to present arguments and evidence in support of their respective positions. No witnesses were called; the evidence in this proceeding consists of numerous documents filed prior to the hearing and the exhibits admitted at hearing, all contained in the official file of the lead docket.<sup>3</sup> Oral argument replaced the need for post hearing briefs.<sup>4</sup>

At the outset, the Secretary objected to the admission of expert reports obtained by Respondent pertaining to APC and two of the subsidiary LLCs that concluded APC and the

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<sup>2</sup> PENN 2012-172 contains copies of all of the complete pleadings and documents filed in this proceeding.

<sup>3</sup> Before the hearing, the official file had become expanded to well over one thousand pages, mostly repetitive filings of the parties when seeking summary decision. In an effort to contain the record and limit duplicative submissions and exhibits, the documents already of record were marked for identification and reference as follows:

- The 28 exhibits attached to Respondent’s Motion for Summary Decision will be “RSD” with the exhibit number;
- The 4 additional documents submitted with the Respondent’s renewed motion will be RRMD-3, RRMD-21, RRMD-27 and RRMD-28;
- The 50 documents submitted with the Secretary’s Motion for Summary Decision will be “SSD” with the document number. The 8 CDs will be “SSCD” with a letter, A through H; and
- The 2 documents submitted with the Secretary’s renewed motion will be SRMD-1 and SRMD-2.

<sup>4</sup> At the hearing, additional exhibits were admitted into evidence. The Secretary’s exhibits were marked GX-1 through 6, and two diagrams, demonstrative only, were marked GXDE-1 and GXDE-2. Respondent’s exhibit (with ten attachments) was marked RX-A. Joint Stipulations have also been submitted and marked JX-1. All of the above documents are contained in six numbered file folders that comprise the official file for the lead docket. Each document and/or the pages cited in the Findings and Conclusions below have been compiled and placed in each of the consolidated dockets. In addition, all of the documents relevant to the preliminary issue are also available in electronic form in each of the consolidated dockets in the Commission’s e-CMS system.

LLCs should not be treated as a unitary operator. Counsel for Respondent explained the reports were offered for the limited purpose of understanding the corporate structure and corporate formalities, and not for the facts found or conclusions drawn by the author. The reports were admitted on the basis that there could be information helpful in the determination of the preliminary issue. However, much of the information was also contained in other documents, and I did not find the reports to be particularly relevant in reaching this decision.

The Secretary also objected to a letter dated September 26, 2008. Again, for the limited purpose of any helpful background information in the letter, it was admitted into evidence. However, the information was not needed for a determination in this matter.

### **Joint Stipulations**

The parties submitted Joint Stipulations:

1. The May 6, 2015, *Notice of Hearing, Pre-Hearing Order* addresses the "narrowly limited" scope of the May 27 hearing, stating that the hearing will be restricted to consideration of two discrete issues. The first issue is "Whether Austin Powder Company meets the definition of 'Operator' under Section 3(d) of the Mine Act." For purposes of the consolidated proceeding, the Secretary does not assert that Austin Powder Company (APC), an Ohio corporation and the parent company of various Austin Powder subsidiaries established pursuant to Delaware state law, alone had sufficient contact with mines at which the violations were issued to be an "operator" under Section 3(d) of the Mine Act.
2. For purposes of this hearing, APC does not contest that an APC subsidiary (Austin Powder Appalachia, LLC; Austin Powder MidSouth, LLC; Austin Powder Northeast, LLC; or Austin Powder Central States, LLC) was performing services at a mine, and thus met the definition of an "operator," under Section 3(d) of the Mine Act, at the time each of the violations in the consolidated proceeding was issued.
3. Beginning on or about December 21, 2004, Austin Powder Company made the business decision for reasons unrelated to the contractor identification issue to restructure the company and spin-off APC's corporate divisions performing services at mines into separate, legal entities, operating as wholly-owned subsidiaries and organized as limited liability companies pursuant to Delaware state law. The decision was formally adopted through an *Action by Unanimous Written Contract of the Board of Directors*, dated December 15, 2006. The *Action* is entered into evidence as SSD-9 and RRMD-21. This action was accomplished, in part, through the execution of *Limited Liability Company Agreements* for the respective subsidiaries and through the execution of formal certification documentation by Delaware state representatives. Each APC subsidiary executed substantially the same *Limited Liability Company Agreement* and substantially the same Delaware state certification

documentation was provided for each APC subsidiary. The documents specific to Austin Powder Northeast LLC are entered into evidence as SSD17, SSD18, and RSD-17.

4. Austin Powder Company and each Austin Powder Company subsidiary are parties to a series of formal, written contracts that specifically establish the duties and responsibilities of each party, including a *Capital Contribution Agreement*; *Employee Leasing Agreement*; *Assignment and Assumption of Contracts and Leases*; *Services Agreement*; *Transportation, Vehicle and Operational Support Services Agreement*; and *Supply Agreement* (collectively, "Contracts"). These Contracts were executed by and between the parties on or about January 1, 2007. The content of each of the Contracts between Austin Powder Company and each Austin Powder Company subsidiary is materially the same. The agreements specific to Austin Powder Northeast LLC are entered into evidence as SSD-10, SSD-11, SSD-12, SSD-13, SSD-14, SSD-16, and RSD-18, RSD-19, RSD-20, RSD-21, RSD-22, and RSD-23.

JX-1.

### **The Issue**

The issue presented is whether APC and its subsidiary LLCs constitute a “unitary operator” under the Commission decision in *Berwind*.

### **Contentions**

The APC organization performs blasting services for mines, and it contends that the purpose of the APC corporate restructuring was not to achieve lower penalties but to obtain ATF licenses for each of the LLCs.<sup>5</sup> As a result of the restructuring, each LLC has separate officers, managers, and physical office locations; each LLC Management team has full authority and responsibility over the leased APC employees and activities of the LLC and can make decisions on their own without permission from APC. Each LLC can hire, fire and set the pay of an employee. Each LLC shares only one officer, the Secretary and Treasurer, with APC. Further, each LLC operates in a distinct region of the United States, files its own state income tax return, and conducts its own training, corrects safety issues, and enforces health and safety policies to protect miners. Respondent also contends that while there is some interrelationship of operations and some common management, APC is vertically integrated with each LLC, the corporations are formed under state law, the conduct of business is governed by formal, written “arms-length” contracts setting the obligations of each entity, and the LLCs have operational independence.

Respondent further argues that viewing APC as one big company is overly simplistic and ignores corporate law and the facts of the case since the LLCs are separate and distinct legal business entities each with its own existence and identity. Also, APC is too far removed from the blasting activities to be considered a single entity with its LLCs. Further, each LLC can

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<sup>5</sup> ATF refers to the Bureau of Alcohol, Tobacco, and Firearms.

develop its own procedures based on regional geologic differences. Respondent also argues that MSHA has incorrectly cited APC for conditions that existed at a mine when APC does not have substantial involvement with the mine, does not exercise pervasive control over the LLC at the mine, and the Secretary's "unitary operator" theory is not supported under the law. The ultimate responsibility for implementing and enforcing safety policies and compliance with health and safety laws rests with the LLCs.

The Secretary contends that prior to December 2004, APC worked as a single company with ten regional divisions performing contract services at mines; APC manufactured blasting materials that were transferred to these regional divisions where the products were sold and used. From 2004 through 2007, APC reorganized and incorporated each of the wholly owned regional subsidiaries, but for the purposes of the Mine Act the company continued to operate as a single entity, making, transferring, storing, selling and using the blasting materials and supplies. Further, APC continues to relate to its subsidiaries in materially the same way as before the reorganization and there is significant evidence of stunning interrelationship and interdependence of operations, centralized control over health and safety, and a number of facts showing common management. The training programs are developed and distributed by APC and are required to be presented to and followed by its employees at the LLCs.

The Secretary also contends APC holds itself out as one company, and the wholly owned subsidiary LLCs could not and do not stand and function on their own. The formal agreements are in essence binding statements that dictate the way LLCs will operate. Further, there is no need to examine what work a particular subsidiary is performing at one of the 360 mines serviced by the company. The Secretary argues the facts overwhelmingly weigh in favor of the entities of the APC organization constituting a "unitary operator" under the four factor test, and consistent with the Mine Act MSHA has the authority to charge-issue a citation to-either APC or its subsidiary LLC.

### **Definitions**

For the purposes of the Mine Act:

"operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine....

"person" means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.

30 U.S.C. § 802(d),(f).

### **The *Berwind* proceedings**

The parties are essentially in agreement that the Commission's decision in *Berwind* controls, and under that precedent they should succeed in their respective positions.

The *Berwind* controversy arose as a result of over two hundred citations and orders issued by MSHA following an explosion at the Elmo No. 5 Mine in November 1993 that resulted in one fatality. *Berwind Natural Resources, Corp.*, 17 FMSHRC 684 (Apr. 1995) (ALJ). There were

five companies engaged in mining coal; Berwind Natural resources, Corp., (“BNRC”) a holding company, and its wholly owned subsidiaries: Kentucky Berwind Land Company (“Kentucky Berwind”) owner of coal reserves, Kyber Coal Company (“Kyber”) lessee of the Elmo No. 5 coal reserves, and Jesse Branch Coal Company (“Jesse Branch”) a contractor providing mapping and surveying services at the mine for Kyber. *Id* at 684, 686-689. AA&W Coals, Inc., (“AA&W”) operated the mine under a contract with Kyber. *Id* at 684. The citations and orders were issued to AA&W as operator; however, the Secretary also issued these citations and orders to each of the four BNRC entities in order to establish joint and several liability. *Id* at 684, 686.

Following a hearing the ALJ rejected the Secretary’s “Unitary Entity” theory offered to establish that multifaceted corporate entities are of necessity statutory operators. *Berwind Natural Resources, Corp.*, 18 FMSHRC 202, 233 (Feb. 1996) (ALJ). The Judge found that BNRC, Kentucky Berwind and Jesse Branch were not operators of the mine. Kyber, however, was found to have the authority to participate in decision making with AA&W and did retain such control and supervision of AA&W as to make Kyber an “operator” within the meaning of the Mine Act. *Id* at 233-243.

On review, a majority of the Commission affirmed that, of the four BNRC entities, only Kyber was an “operator” of the Elmo No. 5 Mine. This holding was based on Kyber’s “substantial involvement” in engineering, financial, production, personnel and health and safety matters. *Secretary v. Berwind Natural Resources, Corp., et al.*, 21 FMSHRC 1284, 1325 (Dec. 1999). The judge’s rejection of the Secretary’s “Unitary Entity” theory was vacated and a new test was established by modifying the four-part “Single Employer” doctrine developed under the National Labor Relations Act (“NLRA”), 29 U.S.C. § 141 *et seq.*, and Title VII of The Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.* to address the primary concern with the protection of health and safety of miners. *Id* at 1308-1317. The majority modified the single employer doctrine and announced the four-factor “Unitary Operator” test. This theory was considered to be a gap-filling measure designed to flesh out the definition of “operator” under the Mine Act. Upon application of the test, only Kyber and Jesse Branch were found to be a “unitary operator” functioning essentially as a single entity. *Id* at 1321, 1322. The combined Kyber/Jesse Branch entity therefore qualified as an “operator” under the Mine Act. *Id* at 1324, 1325.<sup>6</sup>

*Berwind* has been cited in one Commission decision, *Secretary of Labor (MSHA) v. National Cement Co. of California, Inc., and Tejon Ranchcorp*, 30 FMSHRC 668 (Aug. 2008). In this decision a majority of the Commission found that an entity must have “substantial involvement” with mine related activities, as defined in *Berwind*, to be considered a mine “operator”. *Id* at 682. In a dissenting opinion, Commissioner Jordan questioned the *Berwind* holding in light of the D.C. Circuit decision in *Sec’y of Labor v. Twentymile Coal Co.*, 456 F. 3d 151 (D.C. Cir 2006). *Id* at 689, footnote 13.<sup>7</sup>

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<sup>6</sup> While this combined entity could properly be charged as liable along with AA&W, any citations were found to be invalid on fair notice grounds.

<sup>7</sup> Commissioner Jordan wrote “In light of the D.C. Circuit’s decision in *Sec’y of Labor v. Twentymile Coal Co.*, 456 F. 3d 151 (D.C. Cir. 2006), one could question the vitality of the *Berwind* holding cited by my colleagues.”



Commission Judges have also cited *Berwind* in the application of the four-factor test and in discussing the statutory definition of “operator” status. *Sec’y of Labor OBO Reuben Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 894, 897 (Apr. 2012)(ALJ), 34 FMSHRC 1464, 1475 (Jun. 2012)(ALJ); *Fred Estrada v. Freeport McMoran Tyrone, Inc., and/or Runyan Construction*, 35 FMSHRC 3244, 3246 (Sept. 2013)(ALJ); *Sec’y of Labor (MSHA) v. Black Energy, Inc.*, 35 FMSHRC 2913, 2916 (Aug. 2013)(ALJ). Also, two commonly owned entities sharing the same address and equipment were considered a unitary operator in order to amend Petitions to include both as Respondents. *Sec’y of Labor (MSHA) v. Quality Materials and CDG Materials, Inc.*, 36 FMSHRC 2334-2336 (Aug. 2014). Recently, *Berwind* was discussed in the context of operational involvement at a mine and MSHA jurisdiction. *Sec’y of Labor (MSHA) v. Hammerlund construction, Inc.*, 37 FMSHRC 2611, 2620-22 (Nov. 2015).

Although both questioned and cited by the Commission, *Berwind* has not been modified or overruled.

In order to better understand whether and to what extent *Berwind* relates to the instant case, some pertinent information regarding each company, the APC organization and the BNRC group, is set forth below. It is not intended that these brief summaries be detailed or comprehensive.

### **The BNRC group**

The BNRC group was engaged in the business of production mining of coal at a single location, the Elmo No. 5 Mine. The holding company BNRC owned Kentucky Berwind, Kyber and Jesse Branch. The function of BNRC was to oversee the operations of its three subsidiaries by reviewing and approving their budgets and allocating funds to meet those budgets. BNRC shared common officers with its subsidiaries, and as sole shareholder had the authority to both approve and replace officers and management officials. Economic performance, coal production and quality were monitored through financial statements and reports received from the subsidiaries. BNRC did not have any direct relationship with contractor AA&W and did not exert control over operations at the mine. *Berwind*, at 1285.

Kentucky Berwind was the owner of coal reserves that were leased to Kyber, Jesse Branch and others. Kentucky Berwind did not fund the mining operations and did not support the mining with any supplies, machinery, equipment or tools. *Id* at 1286. Kentucky Berwind employees examined the mine workings periodically to ensure proper coal recovery and confirm royalties. Kentucky Berwind had no input into mining projections, or roof control or ventilation plans. *Id* at 1287, 1288.

Kyber contracted out preparation of the leased area and actual mining of coal at the Elmo No. 5 Mine. Kyber retained final approval of all aspects of mining projections, and Kyber employees visited the mine to insure that the coal reserves were being fully and properly mined. *Id* at 1287, 1288.

Jesse Branch was paid by Kyber for surveying services, including drafting mine maps and setting spads. Jesse Branch employees were generally at the mine weekly to perform the contract work. *Id* at 1286, 1287. Jesse Branch was a sister company with Kyber, and Jesse

Branch's engineering services played a key role in determining the areas to be mined and the direction of mining. *Id* at 1299, 1300. A high degree of interrelationship existed between these sister companies; they shared officers, board members, employees, offices, equipment and machinery. *Id* at 1319-1321. Together, Kyber and Jesse Branch exercised control over the operation of the Elmo No. 5 Mine. *Id* at 1322.

### **The APC organization**

APC is an Ohio corporation wholly owned by Austin Powder Holding Company. A large explosives company, APC provides contract blasting, drilling and related services to mining companies throughout the United States. APC's contract services are provided by twelve wholly owned divisional subsidiary LLCs to more than three hundred mine sites. The LLCs purchase from APC the nitrates, explosives, fuel oil and blasting accessories as well as other needed goods and products. The subsidiary LLCs store, sell and use the APC commercial explosive products. There is no evidence that Austin Powder either owns coal or other mineral reserves or owns or operates any mine. Prior to 2004 the LLCs were divisions under the corporate umbrella of APC. During the period from 2004 through 2007 the relationship between APC and its LLCs was defined by a series of contractual agreements executed pursuant to reorganization. The relationship is also illustrated by materials published by APC, restructuring documents, various communications, website information, and deposition testimony of record. The relationship is discussed at length below.

The APC organization today and the BNRC group of 1999 are very different business enterprises. The BNRC group was focused on mining coal at one location, the Elmo #5 mine. APC provides contract blasting services and supplies to industries including mining nation-wide, but does not own or operate any mines. Comparisons are difficult to draw and for this reason the wisdom of the *Berwind* four-factor test becomes obvious. Companies can and do differ greatly considering their organizational structure, conduct of their business, and the products and services offered. The four-factor test can be applied to companies that consist of two or more entities, and the relevant examination is the relationship between the entities. The unitary operator theory allowed the Secretary to issue each citation to the mine operator and to each of the BNRC entities; however, in the instant case the theory was used to cite APC for alleged violations of safety standards by the LLCs performing the contract services at mines. The Secretary stipulated that for this proceeding only APC is not an "operator" as defined by the Mine Act, and Respondent stipulated that the LLCs were contractors at mine sites and met the definition of "operator".

### **Findings and Conclusions**

Congress intended for the definition of "operator" to be as broad as possible. S. Rep. No. 91-411 at 44 (1969), 1 Coal Act Legis. Hist. at 170. However, in 1999 the definition had not been extended to multiple entities within a company engaged in mining or performing work at a mine. It was in this context that the Commission borrowed from and modified the "single employer" doctrine to craft the four-factor "unitary operator" test as a gap-filling measure to allow for joint and several liability of more than one entity of a company as an "operator". The *Berwind* majority began by upholding as reasonable under *Chevron II* analysis the Secretary's

interpretation of the Mine Act permitting two or more related entities to be designated a single operator. The unitary operator test established these factors:

- (1) Interrelation of operations,
- (2) Common management,
- (3) Centralized control over mine health and safety, and
- (4) Common ownership.

The majority further explained:

To demonstrate unitary operator status, not every factor need be present, and no particular factor is controlling. Instead, we will weigh the totality of the circumstances to determine whether one corporate entity exercised such pervasive control over the other that the two entities should be treated as one. (Citations omitted).

*Berwind*, at 1317.

The APC organization is currently treated as a unitary operator, providing the Secretary with the discretion to issue citations to the parent, APC, for alleged violations by its subsidiary LLC working at a mine. Therefore, the test must be applied to the APC organization to determine whether the exercise of the Secretary's prosecutorial discretion was proper. The initial task is to analyze the APC organization in each of the test factors. For each factor, the question of substantial involvement must be addressed. Whereas in *Berwind* the question was whether the entities of the group had *ceased* functioning as separate operations, in the instant case the question is whether APC and its subsidiary LLCs have *become* separate entities.

As indicated above, beginning in 2004 APC reorganized its regional subsidiaries as corporations under Delaware state law each as a limited liability company (LLC). The principle place of business for each was the APC corporate address in Cleveland, Ohio. Each LLC was granted an ATF license, and each license also listed the corporate address in Cleveland, Ohio. SSD-29, pp. 54, 55, 240. APC's interest in the LLCs was 100% of "profits, losses, cash distributions, capital accounts and other economic rights". Cash and any property not required by the LLC would flow to APC. A Board of Managers with decision making authority was created to manage and control each LLC. The individuals designated were David M. Gleason, Michael A. Gleason and David P. True. This Board of Managers elected the officers of the LLC. RSD-17.

In December 2006 all of the Members of the APC Board of Directors, David M. Gleason, Michael A. Gleason and David P. True, having already caused the formation of the LLCs, unanimously consented to enter into certain contractual agreements with each LLC. RRMD-21. Two of the agreements provided for the contribution of certain assets to the LLCs in exchange for the 100% ownership interest, and the assumption of certain liabilities by the LLC including listed contracts and leases. RSD-18, 20. The remaining agreements provided for employee, services, transportation and supply arrangements between the entities. RSD-19, 21, 22, 23. The parties stipulated that the content of each of the contracts between APC and each subsidiary LLC was materially the same. JX-1, No.4. Therefore, there is no need to refer to the many duplicative

documents in the official file. Respondent argues that the contractual agreements establish an “arms-length” relationship between the entities. However, those same agreements spell out how the business will be conducted and they also set the parameters for the operation of the LLCs.

### Interrelation of operations

Many services are furnished by APC to its LLCs: accounting, human resources, invoicing/collection, record keeping, general office services, insurance coverage, and IT for record keeping and financial reporting purposes. RSD-21. These services are centralized at APC with some shared responsibilities performed by the LLCs. The services are characterized by APC as administrative and support necessary to allow the LLC to run its business. *Id.* The agreement covering services does relieve each LLC of needing additional personnel to handle these essential business functions or of contracting for such services locally. While these provisions do support the subsidiary LLC it is also clear that the LLCs are largely *dependent* on APC for the services. Further, the services are not only provided by APC, but *controlled* by APC.

An important support service is in the area of human resources. The Employee Leasing Agreement provides that APC will lease employees to the LLCs. RSD-19. All employees, whether working at APC headquarters or at a subsidiary LLC in the field, are on the direct payroll of APC. *Id.* It is APC that performs the usual payroll functions of directly paying the leased employee, withholding taxes, and producing wage and tax statements. *Id.* Health and life insurance plans are provided by APC. Respondent contends the LLCs can hire, fire and set the pay of an employee. However, it is APC that has the authority to remove or replace any leased employee. RSD-19. LLC officials can recommend employment actions, but it is APC that conducts screening and approves the actions. SSD-29, pp. 94, 96, 99, 100. Employees are required to review the APC Employee Handbook during training, and they are issued a copy. SSD-41, p. 7. It is clear that all employees are governed by the personnel policies and guidelines published by APC. While the LLC may participate in personnel matters, it is APC that *controls* the policies governing human resources.

Invoicing and collection are accounting services provided by APC. RSD-21. It is APC that maintains the cost accounting allowing the LLCs to “pay” for services and supplies. SSD-29, pp. 126, 127. A single federal tax return is filed for the APC organization, and APC provides the information and documentation for each LLC to file state tax returns. RSD-17, No.9.7, SSD-29, pp. 45-47. This does not show that the LLCs are independent of APC, but the practical reality of regional locations. Further, the mine operators send payments to a national company bank account. SSD-29, p. 127. While the LLCs must participate with billing, record keeping and financial reports regarding its activities in connection with performing contracts, it is clear that the handling of revenues is *controlled* by APC. In addition, insurance policies are negotiated and maintained by APC, with the LLCs named as parties. Employee health and life, workers compensation, liability, vehicle and other needed insurance coverage are all held by APC. RSD-22; SSD-29, p. 86. Credit cards are provided to the LLCs, and APC is ultimately responsible for the charges. SSD-29, pp. 150-152. It is the IT service maintained by APC that relieves the LLC of obtaining and maintaining its own technology for communications, record keeping and

financial reporting. SSD-29, pp. 187, 222, 223, 233, 234. The websites<sup>8</sup> are also maintained by APC, not each of the LLCs. SSD-29, p. 187. The LLCs are *dependent* on APC for accounting, financial, insurance and technology functions.

Vehicles, some specialized, are needed for the LLCs to carry out the blasting work. APC provides the vehicles, carrier services and vehicle support services necessary for the LLCs to do the contract work. APC is also responsible for registration and maintenance of the vehicles, insurance coverage, and related accounting and tax services. The LLCs have the responsibility to comply with all applicable laws and obtaining any needed permits. RSD-22. APC also supplies the LLCs with the products needed for their work. This includes nitrates, explosives, fuel oil and blasting accessories. Under the Supply Agreement the LLC is to purchase all of its needs for products from APC. RSD-23. Respondent contends that the LLCs can also purchase supplies from other vendors; however, about 95 percent of the material used by the LLCs is manufactured and supplied by APC. SSD-29, p. 135. Of course, when using the vehicles and supplies, they are under the control of LLC personnel, who are employees of APC. This does not serve to functionally separate the entities; rather, the LLCs are *dependent* on APC for vehicles, equipment, supplies and related services.

The APC organization is not held out to the world as being comprised of separate and distinct corporations that function independently. The websites do not distinguish between APC and the subsidiary LLCs, referring to “Austin Powder”, “Austin Powder Company” or the “Austin team”. SSD-42, pp. 1, 7. The content of the websites shows that promotion, marketing, and technical support are all handled by APC. SSD-42, 43. Potential customers are directed to contact APC world headquarters. SSD-43. Further, the APC corporate organizational structure shows numerous divisions within APC, all connected and none designated as separate or independent.<sup>9</sup> RSD-4.

Respondent argues that the LLCs can make decisions without permission from APC, apparently denominating this as “operational independence”. The LLCs were given control over the personnel, equipment and supplies provided by APC. In the day-to-day conduct of business, in this instance at many mine sites across the country, decisions “on the ground” would need to be made locally. APC headquarters officials do not need to be and no doubt could not be at the many mine sites. Of necessity, the LLCs are tasked with the responsibility of safely and fully executing the contract work awarded to APC. Not adequately explained, however, is just how this day-to-day conduct of business is different from the time prior to the reorganization when the LLCs were divisions that performed the same work and were considered an integral part of APC. The responsibility placed on the LLCs to perform the work at mines does not vitiate the functional integration of the entities. I find for this factor of the test there is substantial involvement of APC in its LLCs.

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<sup>8</sup> The websites are [www.austinpowder.com](http://www.austinpowder.com) and [www.austinpowder.net](http://www.austinpowder.net).

<sup>9</sup> Not all divisions are wholly owned.

### Common management

I have found, above, that the relevant inquiry under the *Berwind* four-factor test is the relationship between APC and the LLCs, and not an examination of what work the LLC performs at a particular mine site. BNRC and Kentucky Berwind did not have a comprehensive relationship with AA&W, the mining company contracted by Kyber. Only Kyber and sister company Jesse Branch exercised substantial control over operations at the mine. In contrast, the wholly owned LLCs are the entities that perform the blasting work for owner APC and there is a direct relationship between these entities that includes comprehensive management control.

There is common management between APC and the subsidiary LLCs, and ownership control over the LLC managers and supervisors. David M. Gleason, Michael A. Gleason, and David P. True were all of the members of the APC Board of Directors during the time of the reorganization. These same Directors were also designated as a Board of Managers over each of the LLCs. RRMD-21, p. 3; RSD-17, p. 4. The Board of Managers had the authority “to manage, control and make all decisions affecting the business and assets” of the LLC. The Board of Managers also had the authority to both elect officers of the LLC and remove any LLC officer at any time with or without cause. *Id.* Therefore, the top-ranking Directors of the APC organization were designated to control all aspects of LLC operations which would include but not be limited to the areas of personnel, accounting and finances.

With respect to accounting and finances the person elected as Secretary and Treasurer of each LLC, Randal Wicks, was also the Secretary and Treasurer of the APC organization. SSD-29, pp. 50, 53, 54. As such, he would supervise accounting at both headquarters and the LLCs. SSD-29, pp. 144, 145. While the LLCs produced reports in each of the areas referenced in the paragraph above, these would be required by APC for corporate bookkeeping and management purposes and Mr. Wicks was responsible for making sure the reporting was accurate and up to date. SSD-29, p. 146. Also, he would oversee the LLC payables. SSD-29, p. 145. In *Berwind*, the financial involvement of BNRC with the mining activity was considered too far removed, but here the financial control over the LLCs operating as contractors is direct and interrelated with APC. In addition, although Respondent argues the Secretary and Treasurer is the only shared officer, the APC Board of Directors are also officers and they are not only shared with each LLC as a Board of Managers but have the authority to control all aspects of LLC operations. In this factor of the test I find substantial involvement of APC in its LLCs.

### Centralized control over mine health and safety

With respect to health and safety, it is acknowledged that blasting is a dangerous activity, and it is also acknowledged that APC places great emphasis on safety training and safe operations in conducting this work. Respondent contends it is the responsibility of each LLC to conduct training and enforce compliance with APC policies and applicable laws. While this is correct, the Secretary is also correct that APC exercises control over the training presented to APC employees and mandates that the LLCs enforce compliance.

The APC training materials are extensive, and the required orientation and training for new hires covers many topics and takes a full week to complete. The APC leader’s training guide directs how the program will be conducted, and sets forth that the program was developed to help standardize training and provide a systematic method that ensures all compliance training

requirements are met. SSD-41, pp. 3, 5, 6. DVDs are provided and form the structure of the training, with additional activities performed locally. *Id.* A participant training guide and the APC Employee Handbook are issued to each employee. *Id.*, pp. 6, 7. Multiple topics are presented covering requirements for ATF, OSHA, DOT-HAZMAT and MSHA regulatory compliance. *Id.*, pp. 9, 11-17. The topics include miner's rights, new miner training, hazard recognition, electrical hazards, shot safety, MSHA regulations, fall protection, lock out/tag out, hearing conservation, first aid and more. *Id.* The leader's guide stresses that all of the training activities are required, and upon completion a certification statement must be signed and sent with completion documents to Human Resources. *Id.*, pp. 3, 5, 6.

There are other important materials furnished by APC impacting health and safety. For example, APC provides software that records all blasts conducted by LLCs and maintains the data on a system server. SSD-29, pp. 60, 61, 63. On the server is the post-blast report required by state and federal authorities, *Id.*, p. 63. APC provides pre-blast software to the LLCs for analysis and presentation to customers. *Id.*, pp. 64, 65. Two or three technicians at each LLC have been trained to use this sophisticated pre-blast software. *Id.*, pp. 66, 67. The software has mine planning parameters that can virtually mine on a computer, giving depths, pounds per shot, number of benches, etc. *Id.*, pp. 67, 68. APC has also created and published Blaster Safety Tips and a Blaster's Guide. APC conducts in-depth, 50-hour blaster training for Austin Certified Blasters. SSD-42, pp. 8-10, 14, 15. These materials can be accessed on the APC websites or obtained by contacting an APC representative. *Id.*

APC employees who drive the vehicles provided to the LLCs are another safety concern. APC commercial vehicles cannot be operated until the Driver Candidate Program is completed and written approval is granted by Cleveland Safety and Compliance. Again, there is a leader's guide, DVDs are provided to augment training, and the driver candidate is issued a Driver Handbook which is a fundamental reference document that includes APC processes and practices required of the driver. SSD-38, pp. 3-6.

Research and development is necessary to produce and publish the training documents and software crucial to the safe conduct of blasting services at mines. On this record it appears that APC performs these functions, not its LLCs. In safely satisfying the contracts for blasting at mine sites, there must of necessity be close cooperation between the entities. The LLCs are dependent on APC to provide them with the materials, guidance and requirements for training APC employees and for enforcement of compliance with safety regulations. Although some responsibilities are divided between the geographically separated entities, this actually underscores the need for a high degree of interrelationship to achieve both safety and contract fulfillment goals. While it is understandable that regional geologic differences would be addressed by development of special procedures, this does not change the essential interdependence of the entities. When viewed from the perspective of how the APC organization performs contract blasting, it is clear that APC maintains *centralized control* over health and safety at its LLCs.

### Common ownership

This test is met since each subsidiary LLC is wholly owned by APC. RSD-17. In *Berwind*, the majority did not elaborate on this criterion. *Berwind*, at 1321. There is no need to

do so here, other than to point out that complete ownership by a company, however organized, of a subsidiary entity, however organized, establishes a controlling relationship flowing from the owner company to the owned entity. In the opinion of the undersigned, it is simply beyond question that a wholly owned entity must operate in a manner that is acceptable to the owner. The owner has a direct and immediate interest in the activities of the subsidiary to ensure and protect the success of the business enterprise. I find this to be substantial involvement.

Despite the restructuring that formed the wholly owned subsidiaries as corporations, the reality is that APC and its LLCs have never ceased functioning as an interrelated, interdependent, functionally integrated single business enterprise. Despite Respondent's argument of "operational independence", local decision making required to fulfill the contractual obligations at a mine site neither functionally separates the LLC from APC nor disturbs the close cooperation between the entities. APC must have field operations to perform the revenue generating work and the LLCs must have APC support, oversight, guidance, and control to efficiently, competently, safely and lawfully satisfy the obligations APC enters into with its client mine operators. Respondent also argues that viewing APC as a large single entity is simplistic and ignores corporate law. The majority in *Berwind* observed that corporate forms must not be ignored, but the form adopted by entities should not be exalted over the substance of interrelated and integrated operations. *Berwind*, at 1313.

After *Berwind*, there is no need to resort to the principles of corporate law to consider "alter ego" theory or the "identity rule" to "pierce the veil" of legally separate entities. We also do not need to determine whether there was an "intent to evade" the statutory obligations of the Mine Act. It does not matter that APC has chosen to create subsidiary corporations and define the relationship between entities with contracts rather than other forms of written or oral agreements. Companies are free to organize in any lawful manner, but if its activities bring it under the jurisdiction of the Mine Act the *form* of the company will be secondary to the *substance* of intra-organization relationships. The unitary operator test fully addresses the question of whether the separate corporate existence of two or more entities may be disregarded when their operations are so interrelated they function as a single entity. *Berwind*, at 1313-1316.

I have found substantial involvement of APC in its subsidiary LLCs under all of the *Berwind* "unitary operator" test factors. The remaining question is whether APC exercises *pervasive* control over the LLCs. Respondent contends that APC does not exercise pervasive control over the LLC at the mine. The Secretary contends that APC and the LLCs operate as a single entity and that the LLCs could not function on their own. For this determination the totality of the circumstances present in the instant case are weighed to ascertain whether APC and its LLCs should be treated as one entity. *Berwind*, at 1317. Here, the participation and involvement of APC in the personnel, financial, equipment, supplies and health and safety activities of the LLCs impacts virtually every important aspect of the conduct of the contract blasting business and is therefore extensive. This is sufficient to support a finding that APC's control over its LLCs is *pervasive*.

I have determined that the legal reorganization forming the APC subsidiaries as distinct corporations did not functionally separate APC from extensive involvement in its LLCs. I find the Secretary by a preponderance of the evidence has established that the reorganized APC and its wholly owned subsidiary LLCs have not become separate entities, but together meet the four-




factor test of *Berwind* and constitute a “unitary operator”. Therefore, I conclude that the Secretary may issue citations to either or both as “operators” as defined by the Mine Act. 30 U.S.C. § 802.

### ORDER

**The Secretary has correctly determined that Austin Powder Company and each of its wholly owned divisional subsidiary corporations constitute a “Unitary Operator”; therefore, both entities qualify as “Operators” for the purposes of the Mine Act.**

This order is preliminary, interlocutory in nature, with issues remaining to be adjudicated. These issues include those raised by Respondent regarding the authority of the Secretary to assign contractor numbers as well as any validity, gravity, negligence and penalty determinations to be adjudicated for each unsettled citation in the dockets.

  
Kenneth R. Andrews  
Administrative Law Judge

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