

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 23, 1996

BERWIND NATURAL RESOURCES, CORP., : CONTEST PROCEEDINGS
KENTUCKY BERWIND LAND COMPANY, :
KYBER COAL COMPANY, : Docket No. KENT 94-574-R
JESSE BRANCH COAL COMPANY, : through KENT 94-797-R
Contestants : and
v. : KENT 94-862-R
:
SECRETARY OF LABOR : AA & W Coals, Inc.
MINE SAFETY AND HEALTH : Elmo No. 5 Mine
ADMINISTRATION (MSHA), :
Respondent : Mine I.D. No. 15-16856
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-682
Petitioner : A. C. No. 15-16856-03544
v. :
Docket No. KENT 95-690
BERWIND NATURAL RESOURCES, CORP., : A. C. No. 15-16856-03542
Respondent :
Docket No. KENT 95-694
A. C. No. 15-16856-03547
:
Docket No. KENT 95-698
A. C. No. 15-16856-03545
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Docket No. KENT 95-706
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Docket No. KENT 95-711
A. C. No. 15-16856-03543
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Docket No. KENT 95-716
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Docket No. KENT 95-779
A. C. NO. 15-16856-03549
:
AA&W Coals, Inc.
Elmo No. 5 Mine
SECRETARY OF LABOR, : Docket No. KENT 95-681
MINE SAFETY AND HEALTH : A. C. No. 15-16856-03544
ADMINISTRATION (MSHA), :
Petitioner : Docket No. KENT 95-691
v. : A. C. No. 15-16856-03542
:

KENTUCKY BERWIND LAND COMPANY
Respondent

: Docket No. KENT 95-695
: A. C. No. 15-16856-03547
:
: Docket No. KENT 95-700
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: A. C. No. 15-16856-03546
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: Docket No. KENT 95-777
: A. C. No. 15-16856-03549
:
: AA&W Coals, Inc.
: Elmo No. 5 Mine
:

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

: Docket No. KENT 95-689
: A. C. No. 15-16856-03544
:
: Docket No. KENT 95-692
: A. C. No. 15-16856-03542
:

KYBER COAL COMPANY,
Respondent

: Docket No. KENT 95-697
: A. C. No. 15-16856-03547
:
: Docket No. KENT 95-701
: A. C. No. 15-16856-03545
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: Docket No. KENT 95-707
: A. C. No. 15-16856-03548
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: Docket No. KENT 95-713
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: Docket No. KENT 95-715
: A. C. No. 15-16856-03546
:
: Docket No. KENT 95-776
: A. C. No. 15-16856-03549
:
: AA&W Coals Inc.
: Elmo No. 5 Mine
:

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

: Docket No. KENT 95-688
: A. C. No. 15-16856-035444
:

	Petitioner	:	Docket No. KENT 95-693
v.		:	A. C. No. 15-16856-03542
		:	
JESSE BRANCH COAL COMPANY,		:	Docket No. KENT 95-696
Respondent		:	A. C. No. 15-16856-03547
		:	
		:	Docket No. KENT 95-699
		:	A. C. No. 15-16856-03545
		:	
		:	Docket No. KENT 95-709
		:	A. C. No. 15-16856-03548
		:	
		:	Docket No. KENT 95-712
		:	A. C. No. 15-16856-03543
		:	
		:	Docket No. KENT 95-732
		:	A. C. No. 15-16856-03546
		:	
		:	Docket No. KENT 95-778
		:	A. C. No. 15-16856-03549
		:	
		:	AA&W Coals, Inc.
		:	Elmo No. 5 Mine

PARTIAL DECISION
and
DECISION

Appearances: Marco M. Rajkovich, Esq., Robert Cusick, Esq., Mindy G. Barfield, Wyatt, Tarrant & Combs, Lexington, Kentucky, for Contestants/Respondents; Timothy M. Biddle, Esq., Thomas C. Means, Esq., Edward M. Green, Esq., Crowell & Moring, Washington, D.C., for Contestants/Respondents; Stephen D. Turow, Esq., Mark Malecki, Esq., U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Barbour

These contest and civil proceedings are brought under sections 105 and 110 of the Federal Mine Safety and Health Act of

1977 (Mine Act or Act, 30 U.S.C. §§ 815, 820). They involve approximately 225 citations and orders issued for alleged violations of mandatory safety and health standards, and arise out of an explosion that occurred on November 30, 1993, at the Elmo No. 5 Mine of AA&W Coals, Inc. (AA&W). The explosion took the life of one miner.

Following an investigation of the accident, the Secretary's Mine Safety and Health Administration (MSHA) issued the citations and orders to AA&W, Kyber Coal Co. (Kyber), Jesse Branch Coal Company (Jesse Branch), Berwind Land Company and Berwind Natural Resources Corporation (Berwind) (collectively, the Contestants in the contest proceedings and the Respondents in the civil penalty proceedings).¹

AA&W operated the Elmo No. 5 Mine pursuant to a contract with Kyber. Kyber, Jesse Branch and Kentucky Berwind are subsidiaries of Berwind. The Contestants contend they are not operators within the meaning of the Mine Act and therefore that the contested citations and orders were issued invalidly. The Secretary responds that the Contestants are liable jointly and severally as operators of the mine.² AA&W does not dispute the Secretary's jurisdiction.

The contest proceedings were bifurcated so that the jurisdictional status of Berwind, Kentucky Berwind, Kyber and Jesse Branch could be resolved prior to addressing the individual merits of the cases. Following extensive discovery, the parties filed 302 joint stipulations of fact (JSF) and cross-motions for summary decision. The Secretary's motion was denied. The Contestants' motion was granted in part Berwind Natural Resources, Corp., 17 FMSHRC 684 (April 1995)).

In ruling on the motions, I outlined the background and relationships of the Contestants:

AA&W

AA&W is a corporation chartered in Kentucky. The corporation is closely held by Jim and Harold Akers, the company's president and vice president. The

¹ Subsequently, and upon the unopposed motion of counsel for the Secretary, Kentucky Berwind Land Company (Kentucky Berwind) was substituted for Berwind Land Company in the contest proceedings (Order Substituting Parties (January 20, 1995)).

² The parties raise essentially the same contentions in the civil penalty proceedings.

brothers are the sole shareholders (JSF 3-7). AA&W operates several mines, in which it extracts coal owned and/or leased by others (JSF 10).

In the past, AA&W has operated various mines pursuant to contracts with Kyber and Jesse Branch. The Elmo No. 5 mine was one of those mines (JSF 20). At the Elmo No. 5 mine, AA&W employed approximately 20 miners who produced between 180,000 and 200,000 tons of coal per year (JSF 16, 18).

KYBER

Kyber is a corporation chartered in Kentucky (JSF 22). Its officers consist of a board chairman, president, vice president, vice president of operations, vice president of engineering, treasurer, assistant treasurer, secretary, and controller (JSF 23). Kyber's name is an amalgam of "Kentucky" and "Berwind" (JSF 25).

Kyber leases land and coal reserves from Kentucky Berwind and contracts out the mining of the coal. Kyber owns a preparation plant. Almost all coal mined by Kyber's contractors is blended, sized and washed at the plant. The coal then is sold by Kyber's sales agent, Berwind Coal Sales, Inc., a wholly owned subsidiary of Berwind (JSF 22, 31).

JESSE BRANCH

Jesse Branch is a corporation chartered in Kentucky (JSF 23, 34). Jesse Branch has the same officers as Kyber and the same people serve in the same offices in both corporations, including the mutual president of Jesse Branch and Kyber, Jimmy Walker (JSF 23, 34).

Like Kyber, Jesse Branch leases land and coal reserves from Kentucky Berwind and contracts with others to mine the coal it leases. Jesse Branch also owns a preparation plant, and almost all coal mined by Jesse Branch's contractors is blended, sized and washed at the plant. The coal is then sold (JSF 32-34). Jesse Branch never has extracted coal (JSF 36).

RELATIONSHIP BETWEEN KYBER AND JESSE BRANCH

The companies share a president, Jimmy Walker; a vice president of operations, Steve Looney; a vice president, Randolph Scott; and a controller, Bob Bond.

In the past, the companies also have shared the same treasurers and assistant treasurers (JSF 23, 34). Each of these people performs duties on behalf of the two companies and as agreed to between the companies (JSF 39).

The companies share one office (JSF 40). It was at this common office that AA&W obtained its weekly "ticket," listing the amount of coal received by Kyber during the week. AA&W was paid by Kyber based on its production as listed on the "ticket" (JSF 49).

Jesse Branch provided map drafting and surveying services to AA&W. Kyber paid Jesse Branch for the services in a fee based on the tons of coal produced by AA&W (JSF 41).

Occasionally, coal produced at Kyber contract mines is processed at the Jesse Branch preparation plant (JSF 42). Also, occasionally Jesse Branch and Kyber use each others equipment (JSF 48).

Kyber's secretarial tasks sometimes are performed by Jesse Branch's employees. A Jesse Branch employee monitors the amount of coal received by both companies from their contract mines and arranges for its transportation to the companies' preparation plants (JSF 47, 48).

Kyber, Jesse Branch, and the vast majority of other Berwind-related companies, are members of the same employee pension plan. This arrangement is common to many corporate groups (JSF 46).

KENTUCKY BERWIND

Kentucky Berwind is a Kentucky corporation. It is a wholly owned subsidiary of Berwind (JSF 50, 51). Its principal place of business is Charleston, West Virginia, but it maintains an office in Kentucky. Kentucky Berwind owns approximately 90,000 acres of coal reserves in Pike County, Kentucky, some of which is leased to Kyber (JSF 50-53).

The chairman of the board of Kentucky Berwind also is the chairman of the board of Kyber and Jesse Branch. The vice president of Kentucky Berwind is the vice president of Kyber and Jesse Branch. Those serving as treasurer, assistant treasurer, secretary and controller of Kentucky Berwind serve in the same capacities for Kyber and Jesse Branch (JSF 23, 34, 55).

Steve Dale, chief mine inspector and lands manager of Kentucky Berwind, supervises two other company mine inspectors, Richard Belcher and Bryan Belcher (JSF 56, 57).

BERWIND

Berwind is a holding company incorporated in Delaware and located in Philadelphia, Pennsylvania. Berwind is the sole shareholder of Kyber, Jesse Branch and Kentucky Berwind (JSF 58, 63). Berwind's business as a holding company is to oversee the operations of its subsidiaries. Berwind is involved also in decisions that affect the general direction of business of its subsidiaries, and Berwind, as sole shareholder, has the power unilaterally to replace the officers of its subsidiaries (JSF 64, 66).

C.G. Berwind, Jr. is chairman of the board of Berwind. Thomas Falkie is president of Berwind and chairman of the board of Kyber, Jesse Branch and Kentucky Berwind. Berwind's vice president is also vice president of the three subsidiaries. Berwind's chief financial officers acted in the same capacity for Kyber, Jesse Branch and Kentucky Berwind. Its assistant secretary acted as secretary for the three subsidiaries and its controller acted as controller for Kentucky Berwind (JSF 23, 34, 54, 60).

Berwind's board approved the election of Jimmy Walker as president of Kyber and Jesse Branch. Walker hired Steve Looney as vice president of operations for Kyber and Jesse Branch. Falkie, president of Berwind, was aware of Walker's decision to hire Looney and approved [of it] "in general terms" (JSF 67). Bob Bond, the controller of Kyber and Jesse Branch, also was hired by Walker, and Berwind's board approved (Id.). The president of Kyber and Jesse Branch and the president of Kentucky Berwind report to Berwind's president (Falkie) (JSF 69).

Berwind's three subsidiaries are required to submit financial statements to Berwind. These statements are reviewed by Berwind's vice president and chief financial officer and are used to project Berwind's cash flow (JSF 70-72). The financial officer also receives production reports from Kyber and Jesse Branch to determine whether projected revenues will be met (JSF 73).

Falkie and Richard Rivers, Berwind's vice president, who is also vice president of Kyber,

Jesse Branch and Kentucky Berwind, monitor Kentucky Berwind's lease-holding activities and are aware generally of the economic performance, personnel, coal sales and coal quality of Kyber and Jesse Branch (JSF 75). Falkie receives monthly reports from Kyber and Jesse Branch regarding coal production at each mine in which contract mining is conducted. At times, Falkie also receives daily reports on the amount of coal processed at Kyber's and Jesse Branch's preparation plants (JSF 76, 77). In addition, Berwind's board receives reports from Kyber and Jesse Branch that summarize the production of the subsidiaries' individual contract operators (JSF 78)(17 FMSHRC at 685-689).

I also described the mine, the lease under which Kyber gained the right to mine coal, the contract between Kyber and AA&W, and numerous aspects of the operation of the mine as they related to the Contestants (17 FMSHRC at 689-697).

In delineating Kentucky Berwind's and Berwind's relationship to the mine, I stated:

Kentucky Berwind never funded any of AA&W's mining operations. Neither loans nor advances of money were made by Kentucky Berwind to AA&W or to its officers and directors for operations at the mine. Kentucky Berwind did not pay any debts for AA&W nor did it pay wages, benefits or bonuses to any AA&W employees (JSF 237-241).

Kentucky Berwind did not provide or sell supplies, machinery or tools to the mine. It did not require AA&W to obtain approval for the purchase, lease or use of mining machinery or equipment. It did not own any of the equipment used by AA&W (JSF 242-245).

Kyber annually provided Kentucky Berwind with current mine maps and on a monthly basis provided Kentucky Berwind with reports of the amount of coal mined (JSF 256). Kentucky Berwind received monthly royalties from Kyber for the coal (JSF 257).

Kentucky Berwind had no labor management issues or activities connected with AA&W (JSF 246-248). It did not share directors or officers or offices with AA&W (JSF 249-250). The only Kentucky Berwind employees who worked in the mine were those who quarterly entered the mine, or who entered upon request, to examine the workings in order to insure coal was being recovered properly and to check seam heights and tonnages to confirm royalties (JSF 252-254).

Steve Dale, Kentucky Berwind's chief mine inspector and manager of lands, was required to protect the surface interests of Kentucky Berwind by preventing unauthorized encroachment on mine property and the theft of timber and other surface property (JSF 258) (17 FMSHRC at 697-698).

* * *

Berwind never provided funding, loans or advances to AA&W. In addition, Berwind never lent money to any of AA&W's officers, directors or employees, or paid any of the company's wages, benefits, bonuses or debts (JSF 259-263).

Berwind did not provide any supplies, materials, machinery, or tools to AA&W for use at the mine. AA&W was not required to obtain Berwind's approval before it obtained machinery or equipment (JSF 264-266).

Berwind had no role in labor management relations connected with AA&W. It did not hire, fire or discipline AA&W employees. It did not supervise or train them. It did not exchange employees with AA&W and it did not share directors, officers or shareholders. Berwind employees did not work underground at the mine (JSF 268-271, 274).

Berwind had no input into the development of the specific contract between Kyber and AA&W. It received no production reports or financial reports from AA&W. It provided no financial analysis or advice to AA&W (JSF 275, 277-278).

Kyber mailed monthly reports to Berwind listing the projected tonnage and the amount of coal actually mined for all Kyber contract mines, including the Elmo No. 5 Mine. The reports contained small maps of areas of contract mines that had been mined (JSF 281). Kyber also delivered monthly financial reports to Berwind specifying the money generated by mining operations involving Kyber's leased reserves (JSF 282).

Berwind reviewed the budgets submitted by its subsidiaries. If the Berwind board approved the budgets, Berwind allocated capital to each subsidiary as necessary to meet the subsidiary's budget. Expenditures by subsidiaries that were beyond those set forth in the budgets were subject to approval by Berwind (JSF 281-283).

Neither Jesse Branch nor Kyber is profitable. Berwind provides funds to them for their operating expenses and capital expenditures. Significant capital expenditures, such as the purchase of coal preparation plants and expenditures for face-up work to open new mines, are approved by Berwind (JSF 284). In this regard, Berwind approved the expenditure of funds by Kyber to do the face-up work to open the Elmo No. 5 Mine (JSF 286).

Kyber is one of 21 coal lessees of Kentucky Berwind in Pike County, Kentucky. Berwind never . . . received a dividend as a shareholder of Kyber. However, Kentucky Berwind pays dividends to Berwind out of its earnings, which are attributable in part to royalties received from its lessees, including those paid by Kyber on coal mined at the Elmo No. 5 Mine (JSF 287-288). Berwind also receives a management fee from its subsidiaries for legal, financial and administrative services (JSF 289) (17 FMSHRC at 698-699).

THE CROSS-MOTIONS FOR SUMMARY DECISION

In ruling on the parties' motions for summary decision, I noted the parties' agreement that AA&W exercised most of the aspects of control and supervision at the mine:

AA&W hired, fired, disciplined, trained, supervised, directed and paid its employees (JSF 132-135). AA&W developed and submitted all of the plans required under the Act and instituted all of the measures necessary to comply with dust and noise sampling programs (JSF 116, 118). For all practical purposes, AA&W furnished and maintained all of the equipment, machinery, tools and materials used in the mine, as well as all of the machinery, equipment and structures for stockpiling coal on the surface (JSF 136-140). AA&W participated in all MSHA inspections and conferences. AA&W decided to contest violations. AA&W decided how to abate violations. AA&W paid the civil penalties assessed for violations (JSF 206-208). Finally, although Kyber could request that AA&W increase production, AA&W ultimately determined whether it would comply with such a request (JSF 105). The debate . . . is whether the Contestants' involvement in what was left was sufficient to make them operators (17 FMSRHC at 706).

After reviewing the evidence of operator status contained in the joint stipulations, I concluded that additional evidence was needed before I could rule regarding the status of Kyber and

Kentucky Berwind (17 FMSHRC at 706-710, 712-715). On the other hand, I concluded that the undisputed material facts established that Jesse Branch and Berwind were not "operators" within the meaning of the Act (17 FMSRHC at 710-712, 715-716).

Subsequently, and pursuant to notice, a hearing was convened in Pikeville, Kentucky.

ADDITIONAL STIPULATIONS

At the commencement of the hearing the parties agreed upon eleven additional stipulations:

1. Harold Coleman became the Superintendent of the . . . [mine] in approximately August or September of 1993. During the time that the [m]ine operated prior to that, he was a supervisory electrician there.

2. Prior to the time that . . . Coleman became the Superintendent, he was not responsible for, nor involved in the general operation of the mine.

3. As Superintendent . . . Coleman did not enter the [m]ine on a daily basis.

4. After August 1993, Norman Stump, the mine foreman, occasionally contacted Jim Akers directly to discuss issues relating to mining operations.

5. It was not . . . Coleman's responsibility, even as Superintendent, to assure that mining was conducted pursuant to projections.

6. Coleman saw Jimmy Walker at the [m]ine three or four [times], always on the surface, and doesn't know why he was there. Walker never gave any instructions about how mining should be performed.

7. Coleman saw Steve Looney at the [m]ine five or six times. The only communication Coleman remembers between him[self] and Steve Looney related to AA&W's request to change the direction of mining.

8. Coleman saw Randy Scott at the [m]ine twice. On one of those occasions, Scott was there to get information to determine where the next entry should be driven.

9. As Superintendent, . . . Coleman did not have authority to change the direction of mining without permission from someone from Jesse Branch or Kyber

. . . , which . . . Akers would request and communicate back to Coleman.

10. Coleman never discussed with Kyber or Kentucky Berwind . . . where and when to begin pillaring.

11. Maps provided to AA&W by Kyber never showed exactly where pillaring would begin (Tr. 11-12).

THE SECRETARY'S POSITION AT TRIAL

In ruling on the parties' motions, I held that to prove the Contestants were "operators," the Secretary had to establish that directly or indirectly they substantially participated in the day-to-day operations of the mine, or had the authority to do so (17 FMSHRC at 705). At the hearing, Counsel for the Secretary stated that although the Secretary did not agree with this formulation of his burden, the Secretary's evidence would establish that Berwind and Kyber in fact did substantially control or have the authority substantially to control the day-to-day operations of the mine, and thus were "operators" within the meaning of the Act. According to counsel, each of the entities set "numerous mining parameters that had a substantial effect over the day-to-day operation, and took a great deal of subjective control from AA&W, the production operator" (Tr. 28).

Further, the Secretary maintained that the activities of Jesse Branch should be attributed to Kyber and that the collective activities of Jesse Branch and Kyber should be considered when determining whether Kyber operated the mine (Tr. 28).

Regarding the status of Kentucky Berwind, counsel for the Secretary argued that the company played a role in determining where AA&W was going to mine in that it was occasionally consulted regarding whether or not it was possible to mine an area. Counsel also asserted that Kentucky Berwind had the authority to impose a lost coal penalty on Kyber and that its determination in this regard influenced whether or not AA&W continued mining in a particular direction, or mined elsewhere (Tr. 469-470). In counsel's view, all of this constituted substantial involvement by Kentucky Berwind and amounted to statutory control because it helped to determine where AA&W would mine coal (Tr. 471).

Finally, Counsel maintained that the mine was an "integrated mining operation" and each of the Contestants, together with AA&W were operators of the mine (Tr. 28-29).³

³ Although I concluded the undisputed material facts to which the parties stipulated established that Jesse Branch and

The fact that no prior enforcement action apparently was taken against the Contestants did not, in counsel's opinion, bar the Secretary from enforcing the Act as he believed necessary. In addition, counsel pointed out that the facts regarding the relationships of a contract operator and companies allegedly controlling it are almost exclusively within the knowledge of the contract operator and the companies. Frequently, the Secretary can not know the facts until after an extensive investigation (Tr. 618).

THE CONTESTANTS' POSITION AT TRIAL

Counsel for the Contestants maintained that Kyber and Kentucky Berwind did not control the day-to-day operations of the mine, and had no authority to dictate how the mine was operated. Essentially, Kentucky Berwind's role was that of an auditor "to give notice to Kyber, its lessee, of potential areas or situations in which claims by Kentucky Berwind against Kyber for lost coal might be avoided" (Tr. 31, 468-469).

Although Kyber occasionally requested AA&W to work on a Saturday so that Kyber could fill orders for coal, it was AA&W's decision whether or not to work, and in general, AA&W always produced as much coal as it could (Tr. 35-36).

Indeed, all of AA&W's involvement with Kyber and Kentucky Berwind was through arms-length transactions that insured AA&W's independence and its contractual right to control day-to-day mining (Tr. 36).

AA&W had authority over the number of entries, the pillar sizes, the sequence of cuts, the pillar recovery plans, the type of ventilation, the manner of blasting coal at the faces, the size and model of the mine fan, the roof control system plan, the haulage system, the belt types and configurations, the belt drives, the underground electric power distribution system, the fire detection and suppression system, and the equipment used. In other words, AA&W rather than Kyber or Kentucky Berwind had complete control over the day-to-day operations of the mine (Tr. 34-35).

Finally, counsel questioned whether making multiple companies liable as operators for violations of a contract operator -- as the Secretary seeks to do here -- enhances safety. In counsel's opinion, the issue should be resolved through rulemaking, rather than litigation (Tr. 621).

Berwind were not operators, I entertained the Secretary's arguments and testimony with regard to Jesse Branch's and Berwind's status in order to afford the Secretary the opportunity to make his case in full.

THE TESTIMONY

NORMAN STUMP

Norman Stump, AA&W's mine foreman, was called to testify by the Secretary and by the Contestants. Stump worked at the mine from May 1990, until the date of the explosion, as a laborer, as a section foreman, and, ultimately, as the mine foreman (Tr. 38-39, 135).

Stump stated that Jim Akers was "above [him]," and he initially reported to Akers (Tr. 40). After Harold Coleman became the superintendent of the mine, Stump reported to Coleman (Tr. 40-41).

Stump testified that coal was mined by the conventional method, approximately five days a week, one shift a day (Tr. 42, 121). Saturdays usually were used to perform "dead work," which Stump described as "whatever needed to be done . . . to get ready for Monday" (Tr. 42-43).

There were times when coal was produced on Saturday. "[T]hey'd call from the tippie and either tell Jim [Akers] or Harold [Coleman]. . . that they need[ed] the coal, that they had orders . . . to fill" (Tr.44). (Stump believed the tippie was operated by Kyber (Tr. 45)). When informed that the tippie needed more coal, Stump told the production crew and the crew usually worked on Saturday to mine the coal. There was no established pattern when Saturday production was requested (Tr. 46).

Stump testified that an additional reason to mine coal on Saturday was to make up for lost production. For example, if a holiday occurred in the middle of the week, or if the mine shut down for some other reason during the week, a Saturday production shift might be required (Tr. 132-133). AA&W did not always produce coal when Kyber requested it (Tr. 48-49, 130-131).

Regarding the amount of coal produced, Stump testified that Jim Akers told him the mine had to produce a certain amount of coal a day. Most of the time the mine met the production goal (Tr. 51). However, in 1991, there was a four month period when Kyber was unable to take all of the coal the mine produced. This resulted in the mine cutting back on work days and only producing coal two, three, or four days a week (Tr. 51).

The mine was developed on the basis of projections. Stump explained that projections showed the direction of mining, the entries and headings to be developed, the crosscuts, and, at times, the distance to be mined (Tr. 55-56). The projections also showed the centering to be used as mining progressed

(Tr. 56, 60).

Stump was not involved in the development of the projections (Tr. 73). Rather, he directed mining so that it followed the projections. If the projections were changed (as in one instance when the projections were altered to turn the entries to the right, rather than to continue them straight (Tr. 105-106)), he followed the changes (Tr. 106). Stump stated, "[I]f we were projected to go somewhere, we had to follow . . . [the projections] unless we . . . could show . . . the reason that we couldn't" (Tr. 107).

As the foreman, Stump believed he had discretion to mine as far as he could within the scope of the projections (Tr. 139-140). However, there were times when Stump discontinued mining an entry even though continued development was projected. One reason for "dropping" an entry was poor roof (Tr. 223). There were other times when mining could not be conducted as projected because of low coal or water (Tr. 81). If he wanted to discontinue mining a projected area, he believed that Jim Akers contacted Kyber and that Steve Looney "or somebody" came to the mine to review the situation (Tr. 154). Kentucky Berwind also was consulted about dropping or adding entries (Tr. 155).

However, if Stump wanted to discontinue mining or change direction because of a safety-related reason, he believed he had the authority to do so (Tr. 66-67). In general, he discontinued mining as projected on his own initiative, although he might tell Jim Akers. If conditions improved, he resumed following the projections (Tr. 67-68). Also, if he encountered roof control problems, he had discretion temporarily to change the type of roof bolts he was using. Kyber and Kentucky Berwind had nothing to do with his decisions in this regard, and had nothing to do with the mine's roof control plan or ventilation plan (Tr. 149, 191).

Stump stated that when mining was in progress he carried "a little pocket map," which he understood was obtained from Kyber's engineering department (Tr. 63-64). The pocket map projected mining eight to ten cross cuts ahead of the area being mined (Tr. 64). When Stump wanted to change the direction of mining because of conditions that did not present an immediate safety concern, Kyber personnel had to "come in and do the projections . . . [T]hey'd have to get us a new map with projections on it, and then we'd have to go with the projections" (Tr. 216). Looney was the person who usually came. Although, at times, Walker might come too (Tr. 84). Stump added, "[w]hen you run into bad conditions, you've got to call in somebody and let them look at them . . . [a]nd if they felt the conditions were bad enough to pull off, then they'd let you pull off. If they didn't, you'd have to try to mine as long as they wanted you to mine" (Tr. 224).

Once, when Walker visited the mine, Stump recalled Walker telling Akers to keep mining in the one particular panel (Tr. 192, 87-88). Stump stated, "He thought we could mine it . . . a little farther" (Tr. 193). Subsequently, mining went ahead and when low coal was encountered Steve Looney was called. He came to the mine and discussed the situation and the decision was made to discontinue mining in the section (Tr. 193). Following that, when mining again came to a halt in the particular area because of roof conditions, Looney came to the mine and agreed the area could not be mined. An instruction was given to change the direction of mining in order to avoid the unmineable area (Tr. 89).

Stump stated that decisions whether areas were to be mined straight ahead or whether they were to be pillared were made by Jim Akers and Kyber. The specifics of how to conduct pillaring (for example, the mining sequence to follow) were made by Coleman and Akers. Kyber and Kentucky Berwind had no input into these decisions (Tr. 181, 184-185). In addition, Stump had authority to decide whether particular pillars could be mined (Tr. 118).

Spad setters came to the mine when requested by AA&W, which was approximately one time a week (Tr.79; see also Tr. 100-101, 142-143). The only time engineers came to the mine on their own was when they had to "run elevations" (Tr. 142). Stump was not certain about the purpose of the elevation measurements, but he thought they might have been used to indicate how far the area mined was above or below creek level (Tr. 211-212).

Stump recalled one particular area where he thought seven entries could be driven, but "engineering" projected five entries because the area was under a hollow. As a result only five entries were driven (Tr. 71). This involved the same area where mining had been turned to the right (Tr. 145). Stump was asked to whom the term "engineering" referred. He replied, "I don't know whether it was Kyber or Jesse Branch . . . because . . . they're all associated with each other" (Tr. 71). He stated, "[t]hey're both . . . the same company but just different parts of it" (Tr. 72). However, Stump admitted that he knew nothing about the corporate structure and business dealings of the Contestants (Tr. 130).

With regard to persons from Kentucky Berwind who came to the mine, Stump stated that there were three, including Steve Dale, the chief mine inspector and lands manager of Kentucky Berwind. The Kentucky Berwind personnel would "look at a section, and measure the [seam] height and . . . more or less look at the seam of coal" (Tr. 98). They took a "fast look" and they departed (Tr. 191).

JIM AKERS

Jim Akers, the vice president of AA&W, was also called to testify by the Secretary and by the Contestants. Akers stated that he had been the vice president of AA&W for approximately 15 years (Tr. 226).

Akers agreed with Stump that coal was produced at the mine five days a week, one shift a day, nine hours a shift, and that Saturdays were reserved usually for "dead work" (Tr. 228). Approximately 18 miners worked at the mine when coal was produced and eight worked when "dead work" was performed (Tr. 229).

There were Saturdays when the mine produced coal. Akers stated, "[s]omeone . . . would call and say they needed to run coal on Saturday" (Id.). Akers understood that the coal was needed to fill a order at the tipple (Tr. 230). Usually, the "someone" who called was Steve Looney (Tr. 230). Akers believed that AA&W would comply approximately 80 percent of the time Saturday production was requested by Kyber or Jesse Branch (Tr. 231).

Akers was asked why he mined coal on Saturdays. He explained that AA&W hoped to maintain a good relationship with Kyber and to contract with Kyber to operate another mine (Tr. 235). He stated, "[w]e were there to try to run as much coal as we could, to keep the relationship going, to prove to them that we were a good contractor" (Tr. 233). "[I]f you have an order out there to fill, if you don't fill it, somebody else will, some other company. So it's best from my interest . . . to try to fill that order" (Tr. 291-292).

The contract under which the mine operated specified a minimum production of 5,000 tons of coal a month(Tr. 233). Generally, AA&W met the requirement (Tr. 236). Regardless of the minimum requirement, AA&W wanted to produce as much coal as possible for economic reasons (Tr. 234).

Akers stated that the purpose of projections was to detail the way in which the mine was to be developed for the next six months to a year (Tr. 241). Akers understood AA&W to be required to mine in accordance with the projections and to the best of his knowledge AA&W did (Tr. 261).

The projections showed mining direction, mining distance, the number of entries and the location of the cross-cuts. Akers could not say that AA&W was "involved" in developing the projections (Tr. 241-243). In Aker's opinion, Jesse Branch was the "person" responsible for projecting the number of sections, entries and headings. Akers stated that AA&W could make requests for changes (Tr. 244-245). Akers recalled a time when AA&W wanted to increase the number of entries but the company was advised that there was too much "cover" to add more entries (Tr.

246). The decision was made by Randy Scott. Akers described Scott as an engineer and an employee of Jesse Branch. He stated that Scott, "knew the conditions . . . knew the structure . . . [and] . . . knew how much cover we had" (Tr. 247). In addition, a Jesse Branch "spad group" set the spads in the mine. AA&W followed the spads (Tr. 248-249).

On the other hand, AA&W developed the mine's ventilation plan and system, and other required plans such as the fire fighting plan, the miner training plan, the smoking articles search plan, and the fan stoppage plan (Tr. 289-290). AA&W was also responsible for developing the mine's haulage system and for maintaining the pre-shift and on-shift examination books (Tr. 290-293). Only Stump and Coleman assigned jobs to the miners (Tr. 293).

Akers testified that when the coal seam got too narrow and AA&W wanted to change the direction of mining in order to more easily extract coal, Akers called Steve Looney or Scott. One or both came to the mine and looked at the condition and, "they [told] me whether I could go that way or not" (Tr. 250). If AA&W requested a change of mining direction based on safety concerns, Kyber and Jesse Branch always agreed (Tr. 284-285). Akers testified, "[i]t's not 'you do this' or 'you do that.' No it's not like that. They listened." (Tr. 285).

Akers recalled one instance when Jesse Branch decided that AA&W should discontinue mining straight ahead, should make a perpendicular turn and should drive under a creek and a hollow. AA&W followed the instructions (Tr. 256). Akers believed the turn was made so that more coal could be mined on the right side of a ridge (Tr. 257).

Akers also consulted Looney when he believed a panel could not be driven any further and it was time to begin retreat mining. The decision was based on the condition of the roof and he and Looney never disagreed (Tr. 263-265). Akers believed that he probably discussed with Randy Scott the method of pillaring that would be used during retreat mining (Tr. 265). AA&W initiated the plans for retreat mining and Jesse Branch drafted them (Tr. 293-294). Stump and Coleman implemented the plans (Tr. 294). For example, the foreman and superintendent decided on the number of cuts to be made in each block of coal (Tr. 295).

According to Akers, there came a time when AA&W wanted to use a continuous mining machine, rather than to mine conventionally, but Walker and Looney did not agree because a continuous miner could not cut the size and quality of coal they needed (Tr. 272).

JACK TISDALE

Jack Tisdale, is a senior MSHA official with a long and distinguished career in the mining industry. He played a major role in selecting the personnel who investigated the accident at the mine. He also provided oversight and advise to the investigation team.

Tisdale described the general nature of the mining process and gave his opinion regarding control of the process. He testified that the person or organization that decides the direction in which a mine is developed controls the mine. Such person or organization has "the authority to require changes in direction to suit whatever needs they have, as opposed to the needs and desires of the contract mine operator" (Tr. 313). (However, later he appeared to modify this view when he agreed that control over the direction of mining would not necessarily indicate control over the day-to-day operation of the mine (Tr. 368-369).)

Tisdale was asked to assume that Kyber had the authority to designate the direction of mining, the minimum production level, the areas to be mined, and the number of entries. He was asked if this would constitute substantial day-to-day control of mining operations. He answered that it would, "[b]ecause Kyber [would control] significant elements of the mining process" (Tr. 329). He explained that in an integrated mining operation, areas of the business such as sales, engineering, finance, purchasing, operations, human resources and corporate development, are generally headed by a vice-president of the company. If the departments are separate corporate entities, collectively they constitute an operator of the mine. In addition, each entity is an operator in its own right (Tr. 341-342, 348-349, 351).

He maintained that this is different from a land company that engages in leases to various mine operators and has no involvement other than monitoring extraction in order to ensure that it is paid proper royalties. Also, it is different from an engineering consulting firm that provides engineering services to various mines, but has no other involvement or interaction with other controlling groups at the mine (Tr. 351). In his opinion, Kyber, Jesse Branch, Kentucky Berwind and Berwind provided all of the functions of an integrated mining company except one -- that of a contract mine operator (Tr. 331-333).

Tisdale was asked how the activities of Jesse Branch that were contracted for by Kyber advanced the mining process. He responded that Jesse Branch provided engineering services to Kyber (Tr. 335). As for Kentucky Berwind, it filled the role of corporate development and to some extent financed the mining operation (Tr. 336). Jim Akers had the same authority that a mine foreman or a mine superintendent had in an integrated company (Tr. 337).

STEVEN F. LOONEY

Steven F. Looney, vice president of operations for Kyber and Jesse Branch, was called to testify by the Secretary and by the Contestants.

Looney stated that he was the person who represented Kyber if there was an issue that AA&W wanted to raise (Tr. 376-377). Looney explained that there were times when AA&W believed it could not continue to mine economically along a projection because of the diminishing height of the coal seam. When this happened, Looney went to the mine to look at the situation. He stated, "[w]e had a contract with them to mine a particular reserve and . . . if [AA&W] felt that there was an area that's too low for them to economically mine . . . we went out and looked at it. And in 99% of the cases, we didn't have any objection at all from them pulling out of an area" (Tr. 380). However, if Kyber instructed AA&W to continue mining, AA&W either had to comply or had to cease mining for Kyber (Tr. 382). He summarized, "[i]t's our obligation to . . . get the coal mined as effectively and efficiently as we can" (Tr. 402).

He stated that there also were occasions when Kyber requested that Kentucky Berwind to look at a projected area that AA&W and Kyber agreed AA&W could stop mining. Kyber wanted Kentucky Berwind to confirm that the area was not mineable (Tr. 383). If Kentucky Berwind believed AA&W was abandoning coal, Kentucky Berwind could make a claim against Kyber (Tr. 384). Therefore, when a contract operator, such as AA&W, wanted to change mining direction, Kyber would usually go to the mine to view the area. Looney stated that Kyber needed to monitor the situation to ensure the contract operator mined efficiently and did not just "butcher up [the] reserve block that we're responsible for" (Tr. 403).

Looney testified that Kyber, in consultation with AA&W, determined the number of entries to be used in a particular area of the mine (Tr. 396). Kyber had the right to reject decisions made by AA&W if it believed the decisions would not lead to the efficient extraction of coal (Tr. 396-397).

With regard to retreat mining, Looney recalled an occasion when Jimmy Akers stated that it was no longer economical to continue retreat mining in a particular area. Kyber told Akers to begin mining in another area. Rather than do as Akers requested, AA&W began mining elsewhere (Tr. 387-388). Kyber discussed the decision with Akers and told Akers that AA&W should have mined where Kyber indicated. When Akers stated that the area indicated by Kyber could be mined from a different direction, Kyber did not disagree (Tr. 389-390). Kyber did not advise Kentucky Berwind of this change because Kyber accepted

AA&W's explanation, and believed that no coal would be lost (Id.).

According to Looney, Jesse Branch employed Randy Scott and himself as engineers (Tr. 392). One of their jobs was to determine for AA&W the height and nature of the cover above AA&W's mining operations. The cover effected how mining could be conducted. When the cover was especially high, an independent consultant was hired to study how many entries could be mined safely. Scott made the arrangements for the consultant to come to the mine (Tr. 394). The consultant brought to the situation expertise that Jesse Branch's engineers did not have (Tr. 400).

Looney stated that at one time Akers expressed interest in using a continuous mining machine. Kyber did not want coal to be extracted with a continuous machine and Akers dropped the idea. Looney stated that, "Akers was well aware of the fact that we'd made a significant investment in a preparation plant based on the past production of other contractors with conventional equipment and that we were in a unique market for the product produced by conventional equipment" (Tr. 397). Akers "was aware of [it] before he signed the contract" (Tr. 398).

Looney described his main duty as a vice president of Kyber as "obtain[ing] and maintain[ing] contract operators to mine the coal quantity and quality pursuant to the sales orders that [Kyber] may endeavor in" (Tr. 516).

Looney testified concerning his interpretation of provision 4.c. of the Kyber/AA&W contract. The provision required AA&W to mine in accordance with mining plans and projections prepared by Kyber's engineers in consultation with AA&W and approved by Kyber.⁴ He stated that the provision meant, "[t]hat [Kyber] sat down with the contractor that we're ready to sign the contract with, show[ed] him the reserve area, show[ed] him potentially the coal heights . . . [and showed him] where the projections [were] going in order to stay in that high coal" (Tr. 517). It was important to point out the heights because Kyber wanted the contractor to mine the high coal to maximize production (Tr. 517-518). Put another way, when asked about the direction of mining

⁴ Paragraph 4.c. states in part that the contract operator will:

Conduct all mining operations . . . in compliance with all mining and safety laws and regulations . . . and . . . in accordance with mining plans and projections proposed by Kyber Coal Company's engineers, such plans and projections to be made in consultation with Contractor and Kyber Coal and approved by Kyber Coal (JSF, Exh. C).

and Kyber's input into it, Looney stated, "[w]e sat down . . . in conference with them and laid out the projections from time to time" (Tr. 520).

Looney maintained that Akers and Randy Scott, the chief engineer for Jesse Branch, had input into the initial projections, and that Kyber approved them once they were developed (Tr. 521, 541). AA&W might initiate subsequent changes in the projections depending on the seam thickness and on the overburden (Tr. 526-529).

Kyber never ordered AA&W to mine according to the original projections if AA&W insisted that a projected area was unsafe to mine (Tr. 530). However, Kyber usually was notified if AA&W did not mine an area as projected (Tr. 536-537).

Looney was asked if Kyber had any input into the roof control plan, the type of roof bolts, the length of roof bolts, the spacing of roof bolts, the smoking material search plan, the evacuation plan, the coal haulage plan, the electrical plan, the respirable dust control and suppression plan, the pillaring plan, the pillaring cut sequences, the belt line size, the belt motor drive sizing, the location of the belt drive, the ventilation plan, the size of the ventilation fan, and the hiring, firing, training and disciplining of employees. To each of these, he answered, "No" (Tr. 518-520; see also Tr. 524, 529).

Looney also testified about the role of surveyors and spad setters in the mining process. He stated that their job was to keep the on-site operator "in a straight line" so that the "belt lines or entries won't run into each other" (Tr. 524). In the Elmo No. 5 Mine, Jesse Branch's surveyors went into the mine approximately one time a week. In addition to setting spads and recording the location of mining, they measured coal heights in order to record the information on the mine map (Tr. 525). In Looney's view, the surveyors and spad setters had neither the authority nor ability to supervise AA&W employees (Tr. 526).

Looney agreed that at times Kyber asked Akers to produce more coal. When this happened, the mine would operate on Saturdays. There were times when Kyber's request was denied. Looney stated, "I had the authority to ask them to work Saturday's[,] but I did not have the authority to direct them to work Saturdays" (Tr. 534). According to Looney, Kyber's records showed that in 43 months the mine operated on 31 Saturdays. Looney testified that one summer when Kyber had a lot of orders for coal, and one of its other mines was not productive, the Elmo No. 5 Mine produced coal on four Saturdays in a row. The rest of the time, "whether or not they would work or whether or not we would ask them [to work]" was erratic (Tr. 532).

STEVE DALE

Steve Dale, the manager of lands for Kentucky Berwind, was called to testify by the Secretary and by the Contestants. Dale heads a three person staff that examines properties leased by Kentucky Berwind (Tr. 409). Dale is supervised by Robert Hunt, the vice president of Kentucky Berwind. Dale estimated that approximately 20 percent of his time is spent inspecting leased mines. Because the Elmo No. 5 Mine is one of 20 or 25 leases, Dale believed that he spent a very small percentage of his time there (Tr. 439, 441-442).

Dale testified that when he went to a mine to look at an area a contract operator did not want to mine, he could tell the lessee it would not be subject to a lost coal penalty, but he could not tell the lessee such a penalty would be imposed. Hunt made the decision to impose the penalty (Tr. 411). Dale maintained that Kentucky Berwind never formulated mine plans for its lessees and never was consulted about any plans for Elmo No. 5 Mine. In addition, he never saw projections for the Elmo No. 5 Mine (Tr. 443-444).

Dale estimated that he, or one of the other Kentucky Berwind inspectors, was asked by Kyber to come to the mine to observe conditions about four times. Kentucky Berwind's inspectors never disagreed with Kyber about the conditions (Tr. 444-445).

JIMMY WALKER

Jimmy Walker, the president of Kyber and Jesse Branch, was called to testify by the Secretary and the Contestants.

Walker maintained that when he went to the Elmo No. 5 Mine, it was to check the coal seam height. He wanted to assure himself that AA&W "had not quit and wasted any of the assets that we had" (Tr. 451).

Walker also stated that at one time Akers felt that it might become necessary to use a continuous mining machine to extract coal at the mine. He and Akers discussed the problems that the Kyber tipple might have in processing coal from coal mined with such a machine. Coal extracted by a continuous mining machine would include more rock than that mined by conventional methods, which would result in processed coal with a higher ash content than Kyber's coal consumers would want (Tr. 453-455).

According to Walker, Jesse Branch offered surveying services (which included mapping, spad setting and cover analysis) at mines where either Kyber or Jesse Branch engaged contract operators (Tr. 457, 459). Kyber exclusively used Jesse Branch (Tr. 459).

Kyber had three to five employees. They were the superintendents of the preparation plant and the other employees who operated equipment, such as end loaders at the plant. Kyber never extracted coal on a day-to-day basis. Rather, the company's business was to process and to sell coal, mainly in the industrial and metallurgical market (Tr. 475-476).

Jesse Branch also operated a preparation plant. It was a larger facility than Kyber's, but it processed smaller size coal (Tr. 476-477).

The contracts that Kyber entered into with its contract operators were basically the same. The form of the contracts was common in the industry (Tr. 477).

Walker described projections as "lines on a map or piece of paper, which basically designates how an area is being mined or projected to be mined" (Tr. 478). He distinguished projections from a mine plan, in that a mine plan entails the total mining operation, including things such as the roof control plan, the ventilation plan, the number of employees, the type of equipment, the amount of equipment, and the size and number of belts (Tr. 478-479). Essentially, Walker testified that Kyber had nothing to do with the mine plan at the Elmo No. 5 Mine (Tr. 479-480). Walker agreed, however, that any ventilation plan submitted to MSHA by AA&W would have been prepared for AA&W by employees of Jesse Branch (Tr. 497). He also agreed that projections were a part of a total mine plan (Tr. 509).

According to Walker, the initial projections for the Elmo No. 5 Mine were the result of the joint efforts of Kyber and AA&W. The projections showed the number of entries, the entry centers, the entry widths and the direction of the entries (Tr. 481). Once the projections were determined, it was AA&W's job to implement them (Tr. 485). The mine map was prepared by Jesse Branch based on the projections (Tr. 483-484).

Walker described a time when he received a telephone call from Akers regarding a change in mining direction: "[Akers] called to say that they needed to move off the pillar line . . . [a]nd I told him that . . . would be fine. Obviously, if he needed to, he needed to. But . . . for him to move back to the closest rooms off the mains to the left. And [Akers] said, '[w]ell I'm glad because we've already started'" (Tr. 485). According to Walker, he and Akers discussed how AA&W planned to extract the coal that was not being mined. Akers explained that AA&W would mine it from a different direction (Tr. 485). Kyber agreed. Kyber did not notify Kentucky Berwind because Kyber did not believe there was a potential lost coal claim (Tr. 486).

Walker stated that contract provision 4.c. meant that AA&W and Kyber jointly agreed on the projections. Although the

provision referred to "plans and projections," it was only implemented with respect to projections. According to Walker, Kyber, "never, ever looked at any mine plans" (Tr. 487).

In Walker's view, the provision of the contract which stated that AA&W be capable of mining and delivering at least 5,000 tons of coal per month, was included to insure that AA&W had the equipment necessary to produce at least that tonnage of coal (Tr. 505). In fact, AA&W's production averaged much more than the contractual minimum (Tr.491).

Finally, Walker testified that when one of Kyber's customers needed coal on an expedited basis, Kyber might request that AA&W extract coal on Saturday. When AA&W did not respond to Kyber's request, Kyber did not retaliate (Tr. 491-492).

DONALD H. VISH

Donald H. Vish, an attorney practicing law in Kentucky and specializing in legal issues relating to the coal industry, testified on behalf of the Contestants and over the objections of the Secretary. Vish is a former associate solicitor for the U.S. Department of the Interior. In the course of his legal work, Vish developed a model coal lease and a model contract mining agreement. He described the lease between Kentucky Berwind and Kyber as "based on my form . . . published in the American Law of Mining in 1984" (Tr. 563-564). He described the contract under which AA&W mined Kyber's leased coal as "obviously based on some of my ideas" (Tr. 564). Vish was permitted to testify concerning his opinions regarding contract mining in general, and the subject contract and lease in particular (Tr. 565-566).

Vish explained that since the late Nineteenth Century, American coal deposits have almost never been sold. Rather, they have been transferred by lease. Traditionally, the lease transfers title to the coal and spreads out payment over the period when the coal is extracted (Tr. 574). Vish described the Kyber/Kentucky Berwind lease as "a classic, traditional coal lease . . . negotiated between two parties bargaining at arms length" (Tr. 573). The lease conveyed to the lessee a property interest in coal in place. The property interest was contingent only in the sense that the lessee's interest could be forfeited for breach of condition. He characterized the concept of control over the day-to-day operations of the mine as inimical to the lease (Tr. 574).

Vish described the Kyber/AA&W contract as "very much like the mining contracts . . . in which the coal lessee wishes to engage an independent mining contractor and specify the ultimate objective of that work, leaving the details of that work to the contractor" (Tr. 579). Vish was asked why the contract included

a provision like paragraph 4.c. He stated that such a provision was necessary to avoid the contract being viewed as conveying a possessory interest to the contract operator (Tr. 583-584). In addition, the provision was to meet the lease's requirement that the lessee exercise adequate supervision to make certain the lease's terms were not violated. This is to protect the lessor from the legal fiction in Kentucky that if there is a trespass, it is commanded by the lessor (Tr. 583).

In Vish's opinion, the provision reflects the fact that when an entity engages someone to carry out work that is hazardous (such as mining), the entity has the duty to include in the contract adequate provisions for its own involvement in order to protect itself from charges of negligence (Tr. 587-588). In his view, the provision was an attempt to protect Kyber from possible negligence charges, while at the same time preserving the independent contractor relationship (Tr. 602-605).

Vish did not believe that under the contract, Kyber had the authority to control substantially the day-to-day operations of the mine (Tr. 590).

THE LAW

The issue of whether the Contestants are "operators" must be resolved within the context of the statutory definition of that word (30 U.S.C. § 802(d)). To put the matter in its simplest terms, either they meet the definition or they do not. Those that do were properly cited for the contested citations and orders. Those that do not are entitled to dismissal of the charges against them.

As I have noted previously, analysis of the Contestants' status begins with the words of the statutory definition and the assumption that the Act's drafters carefully chose the words to mean what they say (Order, 17 FMSHRC at 703; see also Southern Minerals, Inc., 17 FMSHRC __, slip op. at 13 (December 13, 1995)). The Act defines an "operator" as "[a]ny owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction work at such mine" (30 U.S.C. § 802(d)). The clause, "who operates, controls, or supervises a coal or other mine," describes and qualifies each noun in the preceding phrase "any owner, lessee, or other person." Thus, the definition requires "owners, lessees or other person[s]" to participate in and/or have authority over the operation, control, or supervision of a mine (see Elliot Coal Mining Company, Inc., v. Director, Office of Workers Compensation, 17 F.3d 616, 629-630 (3d Cir. 1994)). The purpose of the statutory definition is to place responsibility for health and safety upon those entities that create the conditions at the mine or that have actual authority over the conditions on the theory that such responsibility will further compliance. Control may be either

direct or indirect, but it must be actual. In other words, an operator must "call the shots" at a mine regarding its day-to-day operation, or have the authority to do so see Southern Minerals, slip op. at 13 (citing National Industrial Sand Ass'n v. Marshall, 601 F.2d 698, 701 (3d Cir. 1979) ("Designation . . . as operators . . . requires substantial participation in the running of the mine" (emphasis in original))).

For these reasons, I concluded previously -- and state again here -- that, in order to establish an entity as an "operator" subject to the Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control or supervision of the day-to-day operations of the mine, or had the authority to do so Berwind, 17 FMSRHC at 705; Southern Minerals, slip op. at 16).

Because the forms of participation and authority vary from entity to entity, the question of whether an entity meets the statutory definition of "operator" must be resolved on a case-by-case basis (17 FMSRHC at 705; Southern Minerals, slip op. at 14)).

The Commission's decision in W-P Coal Company, 16 FMSRHC 1407, 1411 (July 1994), provides guidance. There, the Commission gauged a lessee's involvement with its contract operator by looking to specific indicia of operator status -- characteristics such as an entity's involvement in a mine's engineering, financial, production, personnel and safety affairs. Echoing the court's requirement that a cited entity exhibit "substantial participation in the running of the mine" National Industrial Sand, 601 F.2d at 7801), the Commission determined that the lessee's "substantial" and "considerable" involvement in the operation of the mine warranted the Secretary proceeding against it (16 FMSRHC at 1411, n.3). By implication, the Commission's decision recognized that an entity's involvement in the day-to-day operation of a mine could be so infrequent or minimal, i.e., so insubstantial, inconsiderable, or removed from mining, that operator status would not vest (17 FMSRHC at 705; Southern Minerals, slip op. at 14)).

This approach to determining jurisdictional status not only reflects what the Act requires, it has the added virtue of being in harmony with the way the coal industry operates. In the East especially, where contract mining is common, leased coal reserves often are mined not by lessees, but by entities with whom lessees contract. The details of these lessee/contractor relationships may differ. By looking to the specific indicia of operator status to determine whether there is substantial control over the day-to-day operation of the contractor's mine, or whether there is the authority to exercise such control, the differences are accounted for and compliance is fostered.

Those who control day-to-day mining, and/or who have the authority to do so, are those who do or should control the conditions and practices that insure compliance with the Act and the mandatory safety and health regulations promulgated pursuant to it. They should be held responsible when the conditions and practices fall short. (In this regard, the Secretary does not appear to disagree, as witnessed by the statement of his counsel, that the intent of the Act is to hold liable "those who do have the ability to control and supervise, and who actually do control and supervise" (Tr. 61)).

In addition, because I believe the Commission has recognized that an entity's involvement in the day-to-day operation of a mine may be so infrequent, minimal or removed, i.e., so insubstantial, inconsiderable or remote from actual mining, that operator status does not vest, I view the issue as one of the degree of an entity's control and supervision. A minimal or insubstantial degree of involvement is not sufficient for an entity to be deemed an operator (see Southern Minerals, slip op. at 14-15).

I do not subscribe to the Secretary's theory that multifaceted corporate entities are of necessity statutory operators solely because they together function as a unitary entity performing all of the aspects of mining, from the acquiring of the mineral rights to the extraction and processing of the mining. Parts of the industry have functioned in this way for years and, as far as can be determined from this record, the Secretary never has had a policy of citing all corporate entities involved in the operation of a mine for the production operator's violations (see Tr. 617-619; see also Southern Minerals, slip op. at 15). While this does not stop the Secretary from electing to cite the Contestants for violations allegedly committed by AA&W - - provided those cited are "operators" within the meaning of the Act -- it certainly raises questions about the validity and wisdom of a "unitary" approach to enforcement.

Further, and as I have noted previously, a "unitary entity" theory of operator status may fly in the face of the entities' corporate rights to be treated separately and may be used to extend jurisdiction without a logical limit (see Southern Minerals, slip op. at 15-16).

Therefore, I reiterate that the issue before me is whether the Secretary has established that each of the Contestants either directly or indirectly, substantially participated in the operation, control or supervision of the day-to-day operations of the Elmo No. 5 Mine, or had the authority to do so.

THE CONTESTANTS AS OPERATORS

THE STATUS OF BERWIND

Based upon the stipulations and the parties' cross-motions for summary decision, I concluded that the Secretary had not established that Berwind was an "operator" within the meaning of the Act (17 FMSHRC 715-716). Nothing subsequent has caused me to conclude otherwise, and I affirm my prior holding.

Tisdale testified that he considered Berwind to be an operator because it was one of the entities that together provided all of the functions of an integrated mining operation, with the exception of the actual extraction of coal (Tr. 333). I do not agree, and I reject the position that Berwind is liable solely because it is part of a group that worked together to make possible the operation of the Elmo No. 5 Mine.

Separate corporate entities are entitled to be treated on their own merits provided they function separately, and those acting for them do so in a manner consistent with their distinct nature. Here, Berwind and its officers did just that. The record contains no suggestion that those who acted for Berwind actually were controlling and supervising the Elmo No. 5 Mine, or were attempting to do so. Indeed, Berwind had virtually nothing to do with the day-to-day operations of the mine.

Tisdale believed that Berwind "provided the financial wherewithal so that the operation could continue" (Tr. 336), and it is true that Berwind allocated capital to its subsidiaries to meet their budgets, and that expenditures beyond those in the budgets were subject to Berwind's approval (JSF 281-283). It is also true that Berwind approved the expenditure of funds by Kyber to do face-up work prior to opening the Elmo No. 5 Mine (JSF 286).

However, as I have noted, an entity's activities may be so remote from mining that operator status does not vest. Such is the case here where Berwind's fiscal involvement with the Elmo No. 5 Mine is simply too far removed from the mine's day-to-day operation, to conclude that Berwind used it to play a substantial role in controlling and supervising the day-to-day operation of the mine, or to have the authority to do so. The record simply does not support finding that Berwind met the statutory definition.

For these reasons, and for the reasons I set forth previously, I conclude that Berwind is not an operator of the Elmo No. 5 Mine.

THE STATUS OF KENTUCKY BERWIND

Based upon the stipulations and the parties' arguments, I denied both the Secretary's and the Contestants' motions for summary decision with respect to Kentucky Berwind. While I acknowledged that Kentucky Berwind owned the mineral rights

at the mine and leased those rights to Kyber, I rejected the Secretary's assertion that ownership of the mineral rights was necessarily an indication of statutory control of the day-to-day operation of a mine. I stated that it all depended on what the owner of the mineral rights did with respect to the rights (17 FMSHRC at 712).

I did not find the lease provisions that enumerated Kyber's responsibilities to Kentucky Berwind to indicate that Kentucky Berwind reserved to itself substantial participation in the day-to-day operations of the mine. Rather, I found the provisions to be consistent with those one would expect an owner of mineral rights to insist upon in order to insure its coal was mined efficiently and without waste (17 FMSHRC at 713).

I also rejected the Secretary's contention that the report forms completed by Kentucky Berwind personnel after they were inside the mine were evidence of control. In my view, the information recorded was consistent with Kentucky Berwind's interests as the owner of the mineral rights, and I noted the lack of linkage of the information on the forms to substantial participation by Kentucky Berwind in the day-to-day operations of the mine or to the authority to participate (17 FMSHRC at 713).

What the stipulations did not make clear was the role Kentucky Berwind played when AA&W wanted to deviate from its mining projections. I requested the parties supplement the record in this regard, as well as present evidence concerning whether or not Kentucky Berwind used its role to dictate where and how AA&W would mine (17 FMSHRC at 713-714).

The testimony reveals little more than the stipulations, namely that the Kentucky Berwind employees who entered the mine did so to examine the workings to insure coal was being recovered properly and to check seam heights and tonnages in order to confirm royalties (JSF 252-254). Steve Looney testified that when Kyber called Kentucky Berwind inspectors to the mine it was to confirm that mining could be discontinued along a particular projection without Kyber being held liable for wasting coal reserves, that Kentucky Berwind personnel had to confirm that Kyber was not abandoning a mineable area (Tr. 383-384). Steve Dale, Kentucky Berwind's lands manager, who on occasion went to the mine at Kyber's request, agreed that this was the sole purpose of his visits. He and other Kentucky Berwind employees never disagreed with Kyber and AA&W about the propriety of discontinuing mining in the area in question (Tr. 411, 443-445).

Dale further testified that Kentucky Berwind had no input into the formulation of projections for the mine (Tr. 443-444). Norman Stump testified that Kentucky Berwind had nothing to do with the roof control and ventilation plans under which the mine

operated (Tr. 149, 191). Nor did Kentucky Berwind have anything to do with decisions regarding the sequences in which pillars were mined (Tr. 181). Rather, and as Jim Akers confirmed, these decisions were within the province of the foreman (Tr. 295).

Although Tisdale stated that he believed Kentucky Berwind "to some extent" financed the operation at the Elmo No. 5 Mine (Tr. 336), no additional testimony was proffered in this regard and, in fact, the parties stipulated that Kentucky Berwind had no financial dealings with AA&W. Kentucky Berwind never funded any of AA&W's mining operations. Kentucky Berwind never leased money or made advances of money to AA&W or to its officers and directors. Kentucky Berwind did not sell supplies or tools to AA&W or require AA&W to purchase, lease or use any equipment see 17 FMSRHC at 697 (citing JSF 237-241).

Finally, I disagree with the Secretary's assertion that Kentucky Berwind could exert substantial control over the direction of mining through its determination whether or not to impose a lost coal penalty (Tr. 469-471). As I stated in denying the parties' motions for summary decision, a lost coal penalty provision is fully consistent with the protection of the owner's property interest in its mineral rights. The provision is not aimed at allowing the owner to control or have the authority to control day-to-day mining. Rather, its purpose is to insure that the owner's mineral is mined to the maximum extent possible. To hold otherwise would be to make Kentucky Berwind (and, I suspect almost all other similarly situated owners of coal rights) liable because it seeks to effectuate those rights see 17 FMSHRC at 714).

For these reasons, and the reasons I have set forth previously, I conclude Kentucky Berwind is not an operator of the Elmo No. 5 Mine.

THE STATUS OF KYBER

Based on the stipulations and the parties' arguments I denied the parties' motions regarding Kyber. In so doing, I rejected the proposition that contract mining invariably places an entity such as Kyber in the position of being an "operator" of its contract mine. In my view, the important things to consider were the ways in which the parties actually carried out their contract and related to one another within the indicia of operator status (17 FMSHRC at 706-707).

Looking at the indications of Kyber's control and supervision through its involvement in projections, I found that I could not determine from the stipulated facts whether Kyber used the projections substantially to control day-to-day mining. I indicated that I believed testimony was needed regarding the use of the projections, Kyber's and AA&W's understanding of the

impact of the projections on mining, as well as instances in which the projections were changed and the results of such changes on mining (17 FMSHRC at 707).

The witnesses generally agreed that projections for the mine showed things such as the direction of mine development, the number of entries to be developed, the centering to be used for the entries, the position of the cross-cuts and, in some instances, the overall distance to be mined see Tr. 55-56, 241-243, 481). They agreed further that under the contract AA&W was required to mine in accordance with the projections and that the projections were prepared by Kyber in consultation with AA&W and were approved by Kyber see SJF Exh. C, Paragraph 4(c); Tr. 107, 396-397).⁵

Walker stated that the projections were mutually agreed to by AA&W and Kyber (Tr. 481-482). This is true, as far as it goes, for Stump and Akers testified that in general AA&W agreed with the projections. However, it is also clear that Kyber had the authority to insist upon the projections it wanted, and that once the projections were approved by Kyber, AA&W could not unilaterally modify them (Tr. 261).

Looney stated that if there was a disagreement between Kyber and AA&W regarding an area that was projected to be mined and Kyber instructed AA&W to mine it, AA&W's choice was either to mine the area or to "leave the mine" (i.e., to cease being the contract operator) (Tr. 402). In fact, Kyber had the right to reject what AA&W wanted if Kyber believed AA&W's proposal or request would not lead to the efficient extraction of coal (Tr. 396-397). Kyber kept ultimate control in order to prevent contractors from inefficiently mining its leased coal reserves. As Looney put it, to prevent contractors from "butcher[ing] up a reserve block [of coal]" (Tr. 403). He added, "[i]t's our obligation to get coal mined as effectively and efficiently as we can" (Tr. 402). The point is that Kyber kept ultimate control.

The effect of this arrangement was that Kyber, not AA&W, had the bottom line authority for determining mining direction, and that AA&W implemented Kyber's directional decisions see Tr. 295). The Kyber-AA&W relationship was such that AA&W had considerable discretion to deviate from the projections for reasons of safety. Stump testified that he could depart from the projections if he encountered "an emergency" (Tr. 155). Akers

⁵ Although Paragraph 4.c. of the contract refers to "plans and projections," the testimony is clear the provision was implemented only with respect to projections. There is no basis for finding Kyber, or any of the other Contestants, had anything to do with mining plans at the Elmo No. 5 Mine.

essentially agreed that although AA&W had an obligation to consult with Kyber, Kyber never challenged AA&W's opinion that mining should be discontinued because of safety concerns such as poor roof (Tr. 254-255, 258-259, 284-285). Akers' testimony in this regard was supported by Looney (Tr. 530).

However, in situations that did not involve safety concerns -- for example where AA&W believed the coal seam height was too low to permit efficient mining -- Kyber was called to look at the situation and to approve a change in direction or in the type of mining (for example, to approve a change to retreat mining) (Tr. 154, 216, 223, 250, 263-265). Stump added that if Kyber did not conclude the conditions warranted the change, AA&W had to mine along the original projections (see, e.g., Tr. 245). While Looney believed that "99 percent" of the time Kyber agreed to the non-safety related changes AA&W wanted, it is certain that Kyber did not always agree (Tr. 380).

For example, I credit Stump's testimony that in one instance he thought the coal seam in a certain panel was becoming too low to mine, that Walker looked at that panel, that Walker thought it could be mined further and Stump was directed to continue mining (Tr. 192-193). It is equally certain that whether exercised or not, Kyber retained the authority to dictate the particular direction of mining (Tr. 380).⁶

I recognize that the owner or lessee of mineral rights has the right to protect its asset and to try to insure the asset is developed to the maximum extent possible consistent with sound safety and environmental practices. Consistent with this right, when the owner or lessee contracts the mining of its mineral, it is permissible for the entity, in conjunction with its contract operator, to project an overall course of mine development. However, once overall projections have been agreed to, the owner or lessee must give leeway to the contractor to act independently within the general constraints of the projections. If it does not afford the contract operator such autonomy, the lessee or mineral right owner may retain control sufficient to make it an operator for Mine Act purposes.

In my view, Kyber's relationship with AA&W illustrates such a situation. Except for conditions relating to safety, AA&W could not change the direction of mining without Kyber's

⁶ While I also credit Looney's testimony regarding the instance in which AA&W mined in a direction different than that approved by Kyber, I conclude this was a rare exception to the rule. AA&W's exercise of independence was only ratified after Kyber became convinced the coal it believed AA&W missed could be extracted from a different direction (Tr. 387-390, 448, 485).

approval. The fact that Kyber frequently agreed with the non-safety related changes AA&W wanted does not alter the fact that Kyber had the authority to forbid the changes or to insist on something else. When it exercised its authority, the choice faced by AA&W was either to mine as Kyber wished or to cease mining -- period (Tr. 402). In dictating the course mining had to take and in having the authority to dictate that course Kyber denied AA&W autonomy of action within the overall constraints of the projections. The owner or lessee of mineral rights can not deny its responsibility for the actions of its contract operator, when the contract operator is not free to choose the course of mining it believes best in this regard.

I recognize Kyber's dilemma. It is a conundrum that was aptly described by Vish. The exercise or reservation of too little control over the contractor may make the owner or lessee liable for negligence and wasting its mineral assets. The exercise or reservation of too much control may make the owner or lessee liable under the Mine Act (Tr. 603-604).

Balancing these concerns is difficult, but not impossible. In striking the balance, the owner or lessee of the coal must afford its contractor autonomy to change direction and development as the contractor believes best within the general constraints of the projections. Here, it did not, and I conclude that Kyber's active participation and its authority to actively participate in the decision making process regarding the daily development of the mine through the projections made it an "operator" within the meaning of the Act.

In denying the parties' cross-motions for summary decision, I also concluded that the stipulations did not make clear whether Kyber exercised control over the day-to-day operations of the mine with regard to production (17 FMSHRC at 709). Having considered the testimony, I find that Kyber's requests for Saturday work and the provision in the contract requiring AA&W to produce a minimum amount of coal were not indications of Kyber's status as an operator under the Act.

Saturday work was not the rule. I credit Looney's testimony that Kyber's records show that the mine operated on 31 of approximately 162 Saturdays (Tr. 532). I credit Stump's testimony that there were times when AA&W did not produce coal on Saturday, even though Kyber requested it to do so (Tr. 48-49, 130-131), as well as Aker's implication that AA&W turned down Kyber's requests approximately 20 percent of the time (Tr. 231). Complying with Kyber's requests was clearly in AA&W's self interest (Tr. 291-292), and AA&W retained its autonomy to decide whether or not to accede.

Finally, Walker testified persuasively that the contractual production requirement was included in the contract to ensure the

contract operator used the equipment necessary to yield the amount specified not to control day-to-day production. In any event, the record establishes that the requirement had no practical effect on daily production in that AA&W produced coal far in excess of the required amount (Tr. 491).

For the reasons set forth above, I conclude that Kyber was an operator of the Elmo No. 5 Mine.

STATUS OF JESSE BRANCH

In granting the Contestants' motion for summary decision, I concluded, based upon the stipulations, that the Secretary had not established Jesse Branch was an operator of the mine. With respect to Jesse Branch's involvement in engineering, I found no indication that Jesse Branch controlled, or had the authority to control, the day-to-day operations of the mine when it provided surveying and spad setting services to the mine or when it provided map preparation services. I stated:

I do not find the nature of surveying and spad setting to be, ipso facto, an indication of substantial control over the day-to-day operation of the mine. Mines must be developed faithful to their boundaries and projections. To accomplish this, surveying and spad setting is a necessity. Frequently, on-site operators lack in-house capacity for the tasks. Consequently, they contract for the services. There is nothing unusual about such arrangements. There is no indication in the stipulated facts or the record that in providing the services Jesse Branch was acting so as to control the day-to-day operation of the mine, or that it had the authority to exercise such control.

* * * *

Few operators employ workers who have map drafting expertise. Thus, the contracting of map making is common. The stipulated facts indicate the purpose of the maps was compliance with federal regulations. There is no indication in the stipulations or the supporting record that in providing the maps for AA&W Jesse Branch was acting so as to substantially control the day-to-day operation of the mine, or that it had the authority to exercise such control (17 FMSHRC 711-712).

The parties stipulated that Kyber paid Jesse Branch a fee to perform surveying and map drafting for the mine (JSF 149, 151). The maps were certified by Jesse Branch engineer and

vice president Randy Scott (JSF 155). The stipulations also confirmed that employees of Jesse Branch did the spad setting at the mine (JSF 160-164).

The testimony reveals that Jesse Branch's engineers did more. They provided AA&W with the technical expertise AA&W lacked. Akers believed Jesse Branch was "responsible" for projecting the sections, entries and headings (Tr. 244-245). However, Aker's testimony confirms that in reality Jesse Branch's responsibility consisted of the engineers advising AA&W when the cover was too much to sustain the number of entries AA&W wanted to drive or when the cover would allow more or wider entries (Tr. 244-245). As Akers stated, Randy Scott, "knew the conditions . . . knew the situation . . . [and] knew how much cover we had" (Tr. 247). When the question at issue was beyond Jesse Branch's expertise, Jesse Branch, through Scott, called on outside engineers to evaluate the situation (Tr. 394, 400). In addition to section entries and headings, the decision to mine on 40 foot centers was made on the basis of Jesse Branch's assessment of the cover (Tr. 252-253).

Thus, it is clear from the stipulations and the testimony that Jesse Branch participated in drafting and mapping the overall projections and providing AA&W with technical expertise when AA&W had questions regarding the on-site implementation of the projections.⁷ I do not find any indication in the record that Jesse Branch denied AA&W autonomy of decision-making within the confines of the projections or reserved for itself the authority for such decision-making. When it "weighed in" on a question of direction or configuration it was on the basis of expertise AA&W did not have and for which Kyber paid see for example Tr. 256). Although Akers testified that Jesse Branch dictated the "ultimate direction" in which the mine developed (Tr.254), the specific instances he described to illustrate Jesse Branch's "dictation" involved Jesse Branch's engineers giving opinions based on geological conditions beyond AA&W's knowledge. It would have been just as accurate for Akers to state that the cover, or seam height, or location of an overhead creek dictated the overall direction of the mine. Jesse Branch was the entity that informed AA&W of these determinants.

Tisdale correctly described Jesse Branch as providing engineering services to Kyber (Tr. 335). Through Kyber those

⁷ I discount Aker's testimony that in one instance, Jesse Branch "initiated" turning the entries to the right (Tr. 256). Akers admitted he did not know that conditions at the faces before the turn was made, and Jesse Branch's participation in the turn seems to have been to determine that the cover was not sufficient to permit seven entries after the turn was made and mining progressed under a creek (Tr. 70-71).

services were provided to AA&W. Providing the services did not place Jesse Branch in the position of controlling the day-to-day operation of the mine.

For these reasons, and for the reasons I have set forth previously, I conclude Jesse Branch is not an operator of the Elmo No. 5 Mine.

THE CIVIL PENALTY CASES

Subsequent to the docketing of the contest proceedings, the Secretary filed civil penalty proceedings for the violations alleged in the contested citations and orders. The petitions were filed with respect to each of the Contestants (Respondents in the civil penalty cases).

Berwind and Jesse Branch moved to dismiss the civil penalty proceedings on the grounds that they were not operators. They noted that I had ruled in their favor in the cross-motions for summary decision filed in the contest proceedings. Because the status of Kentucky Berwind (Kentucky Berwind Land Company in the civil penalty proceedings) and Kyber was not determined in the order denying the cross-motions, Kentucky Berwind and Kyber moved to stay the civil penalty proceedings relating to them, pending a decision in the contest proceedings.

The Secretary responded that the activities of all of the Respondents constituted control, operation and supervision of the mine and that together they acted in a coordinated fashion to exercise such control, operation or supervision. In other words, the Secretary maintained the Respondents were "operators" within the meaning of the Act. The Secretary also noted that the order denying the cross-motions "did not result in the immediate dismissal" of the Respondents in the civil penalty proceedings.

The merits of the alleged violations aside, it is clear from the pleadings that the parties agree the threshold issue is the status of the Respondents as operators. Obviously, the Secretary lacks jurisdiction to seek the assessment of civil penalties against any of the entities that did not operate, control or supervise the Elmo No. 5 Mine.

The issue now has been tried and decided. I have concluded that Berwind, Kentucky Berwind, and Jesse Branch are not operators within the meaning of the Act and that Kyber is an operator. None of the parties has indicated that it would bring to the civil penalty proceedings evidence or stipulations that would change my conclusions. Certainly, further litigation of the issue would be duplicative and needlessly would tax the parties' and the Commission's resources.

Therefore, and for the reasons set forth above, I again conclude that Berwind, Kentucky Berwind, and Jesse Branch are not operators within the meaning of the Act and that the subject civil penalty proceedings were brought invalidly against them by the Secretary. I also conclude again that Kyber is an operator and that the subject civil penalty proceedings were validly brought against it. The merits of the violations allegedly committed by Kyber remain at issue.

ORDER

The contests of Berwind, Kentucky Berwind and Jesse Branch are **GRANTED** and the contest and civil penalty proceedings are **DISMISSED** with respect to them. Kyber's contests are **DENIED**, as is its motion to stay the civil penalty proceedings.

NOTICE OF HEARING

The parties are advised that barring Commission review of the issue, the contest proceedings and civil penalty proceedings involving Kyber are consolidated and are scheduled to be heard commencing on Tuesday, April 30, 1996, in Pikeville, Kentucky. (The specific hearing site will be designated later.) The matters of law and fact are as stated in the pleadings except that no further argument will be entertained on the status of Kyber as an operator under the Act.

The parties are reminded that any person planning to attend the hearing who requires special accessibility features and/or the use of auxiliary aids (such as sign language interpreters) must request those in advance (see 29 C.F.R. §§ 2706.150(a)(3) and 2706.160(d)).

In preparation for the hearing, the parties are directed to complete the following on or before April 2, 1996: (a) confer on the possibility of settlement and stipulate as to all matters that are not substantial dispute; (b) stipulate the issues and fact and law remaining for the hearing, and, if unable to stipulate the issues, exchange written statements of the issues as contended by the respective parties; (c) exchange lists of exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) stipulate as to those exhibits which may be admitted into evidence without objection, and as to others indicate whether the exhibit is accepted as an authentic document; and (e) exchange witness lists with a synopsis of the testimony expected of each witness.

The parties are directed to file on or before April 16, 1996, prehearing reports stating (a) lists of exhibits and witnesses together with the parties' synopses of expected testimony; (b) stipulations entered into; (c) statements of the

issues; and (d) a memorandum of law on any legal issue raised with citations to the principal authorities relied upon.

CERTIFICATION

The Contestants/Respondents remain subject to continuing citation by MSHA at the Elmo No. 5 Mine, and at other mines with which they are involved, on the same theories that the Secretary here has argued. Accordingly, it is **CERTIFIED**, in accordance with Rule 54(b), Fed. R. Civ. P.:

(1) That I have directed the entry of final judgement in the contest proceedings brought by Berwind, Kentucky Berwind and Jesse Branch, and in the civil penalty proceedings brought by the Secretary against Berwind, Kentucky Berwind and Jesse Branch.

(2) That my conclusion Kyber is an operator within the meaning of the Act is final; and

(3) That I have determined there is no just reason for delay.

David F. Barbour
Administrative Law Judge

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