

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGE  
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FALLS CHURCH, VIRGINIA 22041

June 12, 1995

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, :  
v. : and  
SECRETARY OF LABOR : KENT 94-862-R  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : AA & W Coals, Inc.  
Respondent : Elmo No. 5 Mine  
: Mine I.D. No. 15-16856

## ORDER DENYING MOTION IN LIMINE

On April 24, 1995, I issued an Order and Notice of Hearing in these cases. In the order, I denied the Secretary's motion for summary decision with respect to all of the Contestants (17 FMSHRC 684 (April 1995)).

I granted the Contestants' motion for summary decision with regard to two of the Contestants: Berwind Natural Resources Corp. (Berwind) and Jesse Branch Coal Company (Jesse Branch). I stated:

[T]he undisputed material facts establish that Jesse Branch and Berwind did not substantially participate in the control or supervision of the day-to-day operations of the mine or have the authority to do so (17 FMSHRC at 717).

I also denied the Contestants' motion with regard to Kentucky Berwind Land Company (Kentucky Berwind) and Kyber Coal Company (Kyber). I stated:

I cannot find the undisputed material facts establish that Kyber and Kentucky Berwind substantially participated in the control or supervision of the day-to-day operations of the mine or had the authority to do so. Nor can I find such facts establish they did not so participate. Additional evidence is needed about the mining projections and the

relationships between AA&W, Kyber and Kentucky Berwind as they relate to the projections and to the day-to-day operations at the mine. Additional information also is needed regarding the interpretation and implementation of the provisions in the Kyber-AA&W contract that relate to production (17 FMSHRC 716-717).

In order to afford the parties the opportunity to augment the record with the necessary additional evidence, I noticed the cases for hearing and stated, "at the hearing the parties should be prepared to offer evidence regarding the particular issues specified above," i.e., the issues stated regarding Kyber and Kentucky Berwind (17 FMSHRC at 717).

In response to the notice of hearing, the parties, as directed, have exchanged lists of exhibits, witnesses and synopses of testimony. As a result, counsel for the Contestants has moved in limine for an order precluding the Secretary from offering certain testimony and evidence at the hearing. Counsel states that the parties' prehearing preparations reveal the Secretary's intent to present evidence beyond the scope of the issues that remain in the cases.

Counsel for the Secretary opposes the motion stating, in effect, that all issues are open for litigation ("The denial of summary decision only signifies that there are facts in dispute. As a result, all issues raised in the motions are open to litigation" (Response to Motion in Limine 4)). As set forth more fully below, I do not agree with counsel for the Secretary, although I decline to grant the Contestants' motion outside a hearing and without proffers, where necessary, from counsel for the Secretary.

Generally, when a case is not fully adjudicated upon a motion for summary decision, the judge may ascertain what material facts are controverted or are yet to be ascertained and may enter an order accordingly. Upon trial of the action, the facts shall be deemed established and the decision rendered (See Fed. R. Civ. P. 56(d)). If the judge denies the motion and does not specify those facts that are not controverted or at issue, all of the issues, as framed in the pleadings, are open for trial. However, when the judge specifies the facts needing resolution, trial is only necessary on those issues required for a decision (See Moore's Federal Practice, & 56.20 [2](1995)). In such instances, contrary to the Secretary's contention, all issues are not open for litigation.

In my view, the order and notice of hearing of April 24 1995, contemplated that to resolve the remaining issues the hearing should be limited to evidence regarding whether Kyber used mining projections substantially to control day-to-day mining at the Elmo No. 5 Mine (17 FMSCHRC at 707), whether Kyber exercised control over the day-to-day operations of the mine through the Kyber-AA&W contract provisions relating to production (17 FMSCHRC at 709) and whether Kentucky Berwind used its involvement with mining projections substantially to control the day-to-day mining at the Elmo No. 5 Mine (17 FMSCHRC at 714). On May 1, 1995, I stated this view in a letter to Stephen D. Turow, counsel for the Secretary.

Counsel for the Contestants requests that I exclude proposed expert or factual testimony on 13 issues in the Secretary's May 26, 1995 letter to Timothy M. Biddle, counsel for the Contestants. I decline to do so in the abstract and outside the context of the hearing. However, while the ruling sought by the Contestants is **DENIED**, the Secretary is on notice that I intend to conduct the hearing consistent with my view of the issues remaining to be resolved.

David F. Barbour  
Administrative Law Judge

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