FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 7, 1995

SOUTHERN MINERALS, INC.,	:	CONTEST PROCEEDINGS
TRUE ENERGY COAL SALES, INC.,	:	
FIRE CREEK, INC.,	:	Docket Nos. WEVA 92-15-R
Contestants	:	through WEVA 92-116-R
v.	:	
	:	Fire Creek No. 1 Mine
SECRETARY OF LABOR,	:	Mine ID 46-07512
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
Respondent	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. WEVA 92-786
Petitioner	:	through WEVA 92-791
v.	:	
	:	Fire Creek No. 1 Mine
SOUTHERN MINERALS, INC.,	:	
TRUE ENERGY COAL SALES, INC.,	:	
FIRE CREEK, INC.,	:	
Respondents	:	

ORDER DENYING CROSS MOTIONS FOR SUMMARY DECISION
AND
NOTICE OF HEARING

These consolidated civil penalty and contest proceedings arise under section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. ' 815. They involve 101 alleged violations of mandatory safety standards for underground coal mines for which aggregate civil penalties of $576,681 have been proposed. They also involve 102 contests of citations and orders.

The cases arise out of a fatal explosion on January 16, 1991, at Fire Creek, Inc's (Fire Creek) No. 1 Mine. Following an investigation, the Secretary of Labor, through his Mine Safety and Health Administration (MSHA), issued the contested citations and orders to Fire Creek, Southern Minerals, Inc. (Southern Minerals) and True Energy Coal Sales, Inc. (True Energy) (collectively, the Contestants). The Secretary

contends that the three entities are liable jointly and severally as operators of the mine. Southern Minerals and True Energy respond that they are not operators within the meaning of the Mine Act and therefore should not have been cited for the alleged violations. Fire Creek does not dispute the Secretary's jurisdiction.

The proceedings were bifurcated so that the jurisdictional status of Southern Minerals and True Energy would be resolved prior to addressing the individual merits of the cases (See Notice of Bifurcated Hearing (September 30, 1994)).

Following extensive discovery, the Secretary, Southern Minerals and True Energy filed cross motions for summary decision on the jurisdictional issues. For the reasons that follow, the motions are **DENIED**.

Summary Decision

Under the Commission's rules, a motion for summary decision shall be granted only if the entire record shows, (1) no genuine issue as to any material fact, and (2) the moving party is entitled to summary decision as a matter of law (29 C.F.R. '2700.67).

The parties have not stipulated to undisputed facts. Rather, the Secretary has set forth 122 "findings of fact" in a memorandum in support of his motion (Sec. Mem.), and the Contestants have incorporated "material facts" into their motion (Conts. Mot.). By referencing the parties' factual assertions to the record, it is possible to glean a factual basis to rule upon the motions.

GENERAL FACTUAL BACKGROUND

Fire Creek's No. 1 Mine is an underground coal mine located in McDowell County, West Virginia. On September 3, 1991, following an investigation of the accident, MSHA issued the contested citations and orders, jointly naming the

Contestants as the operators of mine (Sec. Mem. 1-2; Conts. Mot. 3-4). The operators filed timely notices of contest and the Secretary filed the subject civil penalty petitions.

The Contestants are closely held corporations that share some common officers and directors. Fire Creek was organized in 1988 by D.L. "Jack" Bowling, Brenda Bowling (Jack Bowling's wife) and David Harold. The Bowlings and Harold were the corporation's only share holders. David Harold was president and director of Fire Creek and Ronda Harold (David Harold's wife) was secretary/treasurer. In July 1989, Ronald Lilly obtained 10 percent of the stock from Jack Bowling and Lilly became secretary/treasurer. Harold left Fire Creek in October 1990, and the corporation bought back his shares (Sec. Mem. 7-8, citing to Exh. K, Interrog. 3). Also, in October 1990, W. "Fred" St. John became president of Fire Creek. He and Jack Bowling served as directors (Sec. Mem. 8, citing to Exh. K, Interrog. 3)

Southern Minerals was organized in 1987 with Jack Bowling as the sole stock holder. In October 1989, stock was divided between Jack Bowling, his son, his daughter and St. John. Jack Bowling served as president and director, St. John served as vice president and director and Brenda Bowling acted as secretary/treasurer (Sec. Mem. 8, citing to Exh. 0).

True Energy was organized in 1986. At that time, Jack Bowling and his daughter and son were the corporation's shareholders. In October 1989, St. John acquired 20 percent of Jack Bowling's stock, leaving Jack Bowling with 60 percent. The other 20 percent continued to be owned by Bowling's daughter and son. Bowling served as president and director, St. John served as vice president and director, and Brenda Bowling served as secretary/treasurer (Sec. Mem. 8-9, citing to Exh. P).

Southern Minerals had no employees. In general, it held coal leases and subleases, contracted with others, including Fire Creek, to mine leased coal, and monitored coal production for royalty purposes. Southern Minerals bought the coal and sold it to True Energy. Fire Creek operated the No. 1 Mine pursuant to a contract with Southern Minerals.

Coal from the Fire Creek Mine was processed by an unrelated company pursuant to a contract with True Energy and True Energy sold the processed coal. True Energy also provided various administrative and technical services to Southern Minerals' contractors, including Fire Creek.

When Harold left Fire Creek in October 1990, Ward Bailey, an employee of Fire Creek, took over as mine manager. Bailey contacted MSHA officials after the explosion at the mine. Neither Bailey, nor any other Fire Creek officials, notified Southern Minerals or True Energy. Southern Minerals and True Energy were not represented at the meetings conducted by MSHA during the investigation of the explosion. Neither Southern Minerals nor True Energy received a citation or order from MSHA regarding any aspect of the operations at the mine until seven months after the explosion, when the contested citations were issued (Conts. Mot. 10-11). Fire Creek is out of business and may not be capable of paying any penalties for any violations found to have existed (Sec. Mem. 27).

Specific Facts Involving Relationship of Parties

Southern Minerals leased the mineral rights to the land on which the mine is located from Pocahontas Land Company (Pocahontas). Southern Minerals then contracted with Fire Creek. Southern Minerals paid Fire Creek a royalty payment based on the amount of coal produced at the mine. Southern Minerals also loaned funds to Fire Creek to purchase mining equipment. At times Fire Creek obtained advances from Southern Minerals to cover operating expenses, such as payroll and supplies. The funds were authorized by St. John, in his capacity as vice president of Southern Minerals. In general, advances were secured by future coal production.

Administrative services provided by True Energy to Fire Creek involved handling Fire Creek's business and financial records, i.e., maintaining payroll and personnel files, monitoring workers' compensation, medical insurance and other employee benefits, depositing semi-monthly cash receipts, maintaining accounts receivable files, maintaining accounts payable files, monitoring cash flow, drafting checks to pay vendor invoices on a semi-monthly basis, preparing required reports to regulatory agencies, and preparing financial information for monthly financial statements and tax returns. There also came a time when Fire Creek's liability and other insurance was arranged and paid for by True Energy (Sec. Mem. 11-12, citing to Exh. K, Interrog. 29).

Technical services provided by True Energy to Fire Creek

involved surveying, spad setting, map preparation and map certification. True Energy began surveying for Fire Creek in January 1990. At that time, True Energy hired two spad setters to work at the mine. Until July 1990, Fire Creek paid True Energy for the technical services (Sec. Mem. 12-13).

Also in January 1990, True Energy hired a person to prepare and certify maps for Fire Creek. According to the Secretary, the person was paid by True Energy (Sec. Mem. 12-14).

PARTIES' ARGUMENTS

The Secretary first argues that Fire Creek was responsible for the day-to-day operation and supervision of the mine. Therefore, Fire Creek was an operator (Sec. Mem. 32).

The Secretary next argues that Southern Minerals possessed the legal power to exercise control over numerous aspects of the mine's operations via its contract with Fire Creek. In addition, Southern Minerals exercised significant direct and indirect control over the mine via its control of engineering, finances, production and other matters. As such, Southern Minerals met the statutory definition of "operator" (Sec. Mem. 33, 35-39).

Finally, the Secretary argues that True Energy also exercised control over the mine. The control arose "via the common ownership and control [True Energy] shared with the mine's owner-operator, Southern Minerals, and the mine's contract operator, Fire Creek" (Sec. Mem. 43). Additionally, True Energy had control over "essential engineering matters," all financial matters, administration of payroll and personnel and occasionally over production, personnel and safety (Id. 44, 47, 48).

The Contestants counter that the problem with the Secretary's approach to jurisdiction is that Southern Minerals and True Energy were "passive" entities who did not exercise the type of control or supervision envisioned by the statute. In the Contestants' view, "control" refers to control of the mine, not to control of the company. Further, "operates" and "supervises" are words of action and "control" should be understood likewise to require active participation in mining (Conts' Mot. 22).

Such control is required because, under the Act's enforcement scheme, it makes sense for those who can prevent or abate violations to be responsible for them (Conts. Mot. 24-25). Thus, to be an "operator" within the meaning of section 3(d) of the Act, one must have both status as an "owner," "lessee" or "other person" and actively engage in "operat[ing]," "control[ling]" or "supervis[ing]" a mine (Id. 26). The Contestants assert that since the inception of the Act the Secretary enforced it against those who actually mined, or those whose activities were so closely allied with those who mined that the activities produce hazards of a distinctly mining-related character (Id. 29).

The Contestants also raise procedural challenges. They argue that the Secretary's citation of Southern Minerals and True Energy was such a clear departure from previous Secretarial practice, it required rulemaking and a reasoned explanation before implementation (Conts. Mot. 34-38, 38-40). Finally, they argue that the Secretary's interpretation of the statute was unconstitutionally vague. It was not implemented with fair warning to those who become the targets of enforcement, and the lack of standards or guidelines for enforcement deprived the Contestants of procedural due process (Id. 45, 49-52).

THE ACT

The meaning of the statutory definition of "operator" is central to the resolution of the motions. Once the meaning is understood, the question of whether undisputed material facts establish liability or whether they preclude such a finding may be sorted out.

Analysis of the definition begins where it must, with the words of the Act and with the assumption that the Act's drafters carefully chose the words to mean what they say. Analysis also is undertaken with the understanding that when the words and their grammatical structure are clear, it is not the province of administrative bodies and ajudictors to interpret the words to the contrary. They must avoid conclusions based on what they think Congress might have meant, but did not state.

Section 3(d) defines an "operator" as, "[a]ny owner, lessee, or other person who operates, controls, or supervises a ... 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 or qualifies each noun in the preceding phrases "any owner, lessee, or other person" (See, Elliot Coal Mining Company, Inc. v. Director, Office of Workers' Compensation Program, 17 F.2d 616, 629-630 (3rd Cir. 1994)). The definition clearly requires "owners, lessees or other persons" to participate in and/or have authority over the operation, control or supervision of a mine. Accordingly, it is not correct to read the definition as to make owners or lessees operators in and of themselves. (I find it noteworthy in this regard that it was the definition of "mine," and not the definition of "operator" that Congress desired be given "the broadest possibl[e] interpretation" (S. Rep. 95-181, 95th Cong., 1st Sess., at 14, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess.; Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978)).

In addition to faithfully reflecting the statutory language, this interpretation supports and strengthens the purpose of the Act. Section 2(e) provides that the "operators" of the nation's mines have primary responsibility for preventing the existence of unsafe and unhealthful conditions (30 U.S.C. '801(e)). Throughout the Act, the entity charged with compliance is referred to simply as the "operator" (See, e.g. '814(a), '815(a), '820(a)). It makes no sense within this context to place liability on those who have not participated in creating the conditions in a mine or who have no actual authority over

and responsibility for those conditions. On the other hand, placing liability on an entity or entities who have participated or who have that authority provides a spur to compliance and to safer, more healthful working conditions.

Therefore, I agree with the Contestants that a purely "passive entity" would not meet the statutory definition of "operator" under the Act, provided the entity did not reserve to itself authority to control mining operations or to control the mine itself. In other words, in a contract mining situation, an entity that leased mineral rights and contracted with another entity to mine coal would subject itself to Mine Act liability if it made decisions with respect to how coal would be mined and how the mine would be staffed and run, or if it had the actual authority to make such decisions. It would not be enough, however, to simply establish the potential for control, for example, by establishing interlocking corporate relationships between parties and the normal business transactions attendant thereto.

In reaching this conclusion, I note that the legislative history of Titles I, II and III, unlike that of Title IV (the Black Lung provisions), contains no Congressional finding that operators were attempting to evade liability under the safety and health provisions of the Mine Act by manipulating corporate form and contractual relationships, and I cannot assume such a concern motivated the drafters of Titles I, II and III. Compair Elliot Coal Mining, 17 F.2d at 632.

Indeed, the words of the Act warrant an opposite assumption. When the Act was drafted, contractual arrangements between the owner or lessee of mineral rights and the on-site mine operator were common and they remain common today. The Act's initial legislators chose to condition an operator's status on its active participation (or, in my view, its authority to so participate) in the actual operation, control, or supervision of a mine. Congress has not chosen subsequently to amend that requirement. As the Contestants note, if Congress had intended to hold all owners or lessees of mineral rights liable, it could have simply stated that an "operator" includes both.

This brings the analysis back to where it began, to the words of the statute and to the requirements of Congress, as expressed in Section 3(d), that an owner, lessee, or other person operate, control, or supervise a mine. There is no inclusive statutory definition of the aspects of participation or authority necessary to make an entity a statutory operator. Nor has the Secretary engaged in rule-making to set forth the aspects. Lacking a statutory or regulatory definition and given the fact that the forms of operation, control, or supervision may vary from case to case, whether an entity meets section 3(d) of the Act must be resolved on a case-by-case basis.

In this regard, the Commission has provided guidance. In W-P Coal Company, the Commission gauged the owner-operator's involvement with its contract operator by looking to things such as involvement in the mine's engineering, financial, production, personnel and safety affairs in order to determine whether there was sufficient involvement for the Secretary to proceed against the owner-operator (16 FMSHRC 1407, 1411 (July 1994)). A similar approach is applicable here, with the proviso that involvement be viewed both in terms of actual participation and in terms of the authority to participate.

THE CONTESTANTS AS OPERATORS

FIRE CREEK

The parties agree that the actual day-to-day operation of the mine was conducted by Fire Creek, Inc. There is no dispute that Fire Creek was an operator within the meaning of the Act.

SOUTHERN MINERALS

Involvement in Engineering

The Secretary states, as fact, that when Harold was president of Fire Creek, Jack Bowling, in his capacity as president of Southern Minerals, met with Harold, Pocahontas personnel and others to work on the mining projection maps for the Fire Creek mine. Moreover, he states that Jack Bowling contributed to the development of mining projections for the mine and that he reviewed the mining projections before they

were submitted to MSHA or to the state. He also states that Southern Minerals approval was required for all mining plans, projections and maps of the mine.

In support of these statements, the Secretary cites to a September 9, 1988, engineering invoice (Sec. Mem., Exh. D) and to Harold's deposition (Id., Exh. R at 55). In the deposition, Harold states that although he mostly prepared Fire Creek's mining projections, they were reviewed by Bowling before they were submitted to MSHA and that Bowling had input into the projections (Id. 55-56).

The Secretary also points to the contract between Fire Creek and Southern Minerals, which states in part that "[Fire Creek] shall present to [Southern Minerals] each quarter a certified mine map of all mining operations conducted by [Fire Creek]" (Sec. Mem., Exh. W, Para. 5). The Secretary does not note fact that the contract also states, "[i]t is ... understood by the parties ... that [Southern Minerals] right to approve mining plans, projections and maps is expressly and solely for the purpose of coordinating the overall mining operations on [Southern Minerals] leasehold property and is not for the purpose of directing [Fire Creek's] overall or daily conduct of its mining operations. The direction and control of all mining rests solely with ... [Fire Creek]" (Id.).

The Secretary further states that Southern Minerals was responsible for obtaining state and federal permits necessary to initiate mining. The Secretary points out that the contract provides that "[Southern Minerals] shall obtain, in its name, the initial permits, and provide the bonding required to initiate mining activity; and [Fire Creek] shall be bound by the terms thereof ... . Any modification to any permit shall be made ... only after having received [Southern Minerals] written permission" (Sec. Mem., Exh. W, Para. 3).

I cannot determine from the present record whether Southern Minerals' involvement in the engineering aspect of the mine was such as to constitute the control envisioned by the statute. The contract between Southern Minerals and Fire Creek clearly states that Southern Mineral's involvement with mine projections and maps was to coordinate its overall mining operations on leasehold property. If this was in fact the purpose of Southern Mineral's involvement with mine projections and map preparation, it would not be an indicia of control over the mine.

Further, the fact that Jack Bowling and St. John, along with Harold and officials of Pocahontas, met with MSHA officials

to discuss changes in MSHA policy affecting the mine's ventilation plan does not, without more, establish that Southern Minerals was exercising control over the mine. The full nature of the discussions is not revealed, nor are the proposed changes explained. I note, as well, St. John's statement in his deposition that his purpose at the meetings was to act as an intermediary between Pocahontas and Fire Creek and not to provide technical expertise on the mine's ventilation (Sec. Mem., Exh. Q 56-57).

In like manner, I cannot determine from the present record whether the fact that Southern Minerals obtained initial federal and state permits that allowed Fire Creek to initiate mining is an indication that it was acting as an operator of the mine. While I assume Fire Creek could not have operated without the permits, there may have been reasons relating solely to Southern Minerals status as lessor of mineral rights that required it to obtain the permits and to retain, in effect, a veto power over their modification.

Involvement in Finance

It is apparently true that Fire Creek obtained operating capital from Southern Minerals. The Secretary cites the deposition of David Harold, who agreed that Southern Minerals regularly advanced Fire Creek funds to buy equipment, purchase supplies and possibly to pay the miners (Sec. Mem. Exh. R, 64-65). Harold stated that Southern Minerals, in effect, paid the bills when Fire Creek could not cover expenses, that he knew this would be done and that he did not have to request the funds (Id. at 66). According to Southern Minerals own statements, advances between July 1-15, 1988 and October 19, 1990, totaled at least $1,358,000 (Id., Exh. Q, Dep. Exh. 12). The Secretary also states that Harold discussed expenditures of more than $5,000 with Jack Bowling (Sec. Mem., Exh. R, 13-17).

The advancement of funds to cover expenses might or might not be an indication of control over mining operations. The funds might have been provided solely to allow mining to proceed so that Southern Minerals could benefit from its contract. Certainly, the maximization of profit is not prohibited by the Act. In other words, it is not clear, on the basis of the record as it now exists, that Southern Minerals used its financial leverage to control how mining was done at the mine or to control the mine itself.

It is similarly not clear whether Harold's discussions with Bowling regarding expenditures of more than $5,000 are proof that Bowling, and through Bowling, Southern Minerals, was trying to control how mining was done or to control the mine. More needs to be know about the discussions, i.e., their overall purpose, to what they referred and the context in which they occurred.

Involvement in Production

In his deposition, Harold stated that he had a daily telephone conversation with Bowling in that Bowling always called to get a report of the number of tons of coal mined the previous day (Sec. Mem., Exh. R 12-13). Harold stated that at times during the conversations Bowling would offer suggestions to problems Fire Creek was encountering in carrying out underground mining. However, Harold also stated that Bowling did not give specific directives in terms of what he did or did not want done (Id., Exh. R. 17-21).

In his deposition, Bowling agreed that he discussed production with Harold and that he went to the mine on occasion to check on production and to visit with Harold (Sec. Mem., Exh. S 6-7). According to Bowling, Harold had the reputation of being "one of the [best] -- if not the best -- coal miner[s] in southern West Virginia" and Bowling stated he "talked to [Harold] and listened to him, but [Harold] made all of the decisions" (Id. 8). Bowling also stated that he never told Harold that he wanted something done in a certain way (Id. 9-10). In addition, Bowling never went underground at the mine.

I cannot find this indicates such control of actual mining, or of the mine itself, so as to make Southern Minerals an operator. If the discussions of production included specific directives from Bowling on how and where to mine that would be one thing, but suggestions on such topics could have been nothing more than normal conversations between the on-site operator and the party for whom it contracted to mine. Obviously, Southern Minerals, which marketed all of the coal produced by Fire Creek, had a vital interest in the status of production. The present record raises unresolved questions of content and context.

Involvement in Employment

The Secretary states that Harold talked to Bowling about potential employees he was considering hiring in order to determine what kind of miners they would make and that he discussed with Bowling the possible termination of some employees. Harold, however, could not recall if Bowling ever had a say in a person being fired or terminated (Sec. Mem., Exh. R 9-11). Harold further stated that he did not discuss other personnel matters with Bowling unless it was "really something important" (Id. 11).

Again, I cannot determine if Bowling's involvement on behalf of Southern Mineral in Fire Creek's personnel matters was indicative of operator status. Was he trying to control who was hired and fired? Or, was he simply being asked for and possibly offering an opinion on whether someone he knew was a reliable worker or whether someone should be let go? In addition, what were the "really ... important" personnel matters Harold and Bowling discussed?

TRUE ENERGY

Involvement in Administrative Services

The Secretary states that True Energy provided Fire Creek with the various administrative services indicated above (Sec. Mem., Exh. K, Interrog. 29). The Secretary notes that Harold stated that Fire Creek met monthly with True Energy, Southern Minerals and the other companies mining under contract with

Southern Minerals to discuss the fee for the administrative services (Id., Exh. R 37) and that beginning August 1989, Fire Creek paid True Energy monthly fees for the administrative services (Sec. Mem., Exh. Q 30-31). The last such fee was paid in July 1990 (Id. 120-121).

The Secretary also states that True Energy recommended, procured and paid for liability insurance policies for Fire Creek and other contractor companies and developed recommendations for medical insurance coverage. The Secretary maintains that True Energy's insurance recommendations were always accepted by Fire Creek (Sec. Mem., Exh. Q 24-25, 27, 80, 85). Although St. John stated that the cost of the liability insurance was built into the administrative fee True Energy charged Fire Creek, there came a point after July 1990 when True Energy alone paid for the policies (Id. 85).

I can not find that True Energy's involvement in the administrative aspect of Fire Creek's business is necessarily indicative of True Energy's operator status. It is not unusual for a small to medium size operator to contract for administrative services. It would come as a great surprise for contractors to learn that by providing such services they were subjecting themselves to Mine Act liability for any and all violations arising at a on-site operator's mine.

While, I suppose, it is conceivable that the administrative services provided were used by True Energy to control how mining was carried out or how the mine was operated, I cannot conclude as much on the basis of the present record.

Involvement in Finance

The Secretary asserts that when St. John, as vice president of True Energy, determined that Fire Creek did not have sufficient funds to cover operating expenses, he advanced necessary funds from Southern Minerals account into Fire Creek's account. St. John described True Energy's situation as that of a contractor to Fire Creek. He stated that one of the things True Energy contracted to do was to advance funds secured by Fire Creek's coal production (Id. Exh. Q 101-103, 107).

It is possible that funding an on-site operator might be an indication of actual control over mining operations and over the mine itself, but it does not necessarily follow that such is always the case. In my opinion, there must be evidence that the money actually was used to compel Fire Creek to mine in a manner True Energy dictated or to run the mine as True Energy wanted it run. I can not determine on the basis of the present record if this in fact happened.

Involvement in Engineering

St. John stated in his deposition that from 1990 until January 1991, True Energy provided Fire Creek with surveying to align entries and with spad setting (Sec. Mem., Exh. Q, 33-34). Surveying was done at 5 to 10 day intervals and, according to Harold, True Energy hired engineering personnel to come to the mine twice a week on the average to set spads (Id., Exh. R 49).

Surveying and spad setting frequently are contracted-out by operators. In my opinion, surveying of sight lines and setting of spads does not, in and of itself, make the contractor an operator for all purposes. There must be evidence that the contractor was controlling or intending to control the actual mining operations at the mine itself. I do not find such evidence in the record as it exists to date.

Survey data was plotted on the mine maps (Sec Mem., Exh. K., Interrog. 33). After January 1, 1990, John E. Caffrey, a retired engineer who was on retainer to True Energy, certified these maps for Fire Creek (Id. Exh. Q 58-59). True Energy paid him to certify the maps of August 30, 1990 and October 5, 1990 (Id. 48). The maps were submitted to MSHA as part of the ventilation plan. St. John had no knowledge that anyone from True Energy or Southern Minerals reviewed the maps or the plan. (Id. 51).

As with surveying and spad setting, it is not unusual for an on-site operator to contract-out the certification and preparation of its maps. While it is conceivable that in providing this service a contractor could control the way an on-site operator actually conducted mining operations or controlled the mine itself, I do not find evidence of this in the record as it exists to date. I cannot conclude that because True Energy provided this service to Fire Creek, it was an operator for all purposes under the Act.

RULING ON THE MOTIONS

Because I cannot find that the undisputed material facts establish Southern Minerals and True Energy exercised such control over mining or the mine itself so as to make either or both statutory operators, the Secretary's motion for partial summary decision is **DENIED**.

Conversely, because I also cannot find, on the basis of the present record, that the material facts establish that Southern Minerals and True Energy did not exercise such control over mining or the mine itself, the Contestants' motion also must be **DENIED**.

Therefore, a hearing on the issue of liability will be necessary. The burden of proof will be on the Secretary. He must establish by substantial evidence of record that Southern Minerals and/or True Energy exercised actual control over the mining operations at the mine, or over the mine itself, or had the power to exercise such control.

CONTESTANTS' OTHER ARGUMENTS

The Contestants argue that even if the Secretary properly cited Southern Minerals and True Energy, the Contestants are entitled to a dismissal of the proceedings because the citations represent a significant departure from past practice. According to the Contestants, rulemaking was required before the Secretary could act (Conts. Mot. 33-38). They further assert that, even if the Secretary could proceed without rulemaking, the cases must be dismissed because the Contestants relied on the Secretary's previous policy not to cite those with "no practical connection to mining operations" (Id. 42).

These arguments are rejected. The central question is whether the Contestants were operators as defined by the statute. If they were and, if upon inspection or investigation, the Secretary believed any mandatory health or safety standards had been violated, the Act required they be cited. The Secretary certainly may proceed by adjudication to test the parameters of his statutory authority, as indeed he has done frequently in the past.

The Contestants point to no official policy enunciated by MSHA upon which they have relied to their detriment. Even were there such a policy, the consequence of their reliance arguably would not be violative of due process. Section 110 of the Act would mitigate significantly the consequences of such reliance by providing that monetary civil penalties arising from citations be ameliorated by the operators' lack

of negligence (30 U.S.C. '820).

Finally, because of my conclusions regarding the meaning of section 3(d), I need not reach the Contestants other arguments (Conts. Mot. 43).

NOTICE OF HEARING

The parties are advised that these matters will be called for hearing in Princeton, West Virginia, at 8:30 a.m. on **May 2, 1995**. (A specific site will be designated later.) The issue of the Contestants liability will be decided on the basis of the present record and such additional and specific evidence as the parties shall present showing the Contestants control over the actual mining operations at the Fire Creek No. 1 Mine, over the mine itself, or the Contestants actual authority to exercise such control.

David F. Barbour
Administrative Law Judge
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