Liability of Owners Under the Federal Mine Safety and Health Act of 1977

David J. Hardy
Maris E. McCambley
Jackson & Kelly
Charleston, West Virginia

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§ 7.01. Introduction.

Explosions, roof falls, and other mishaps in the nation’s mines will have a resounding impact in boardrooms hundreds of miles away if the federal Mine Safety and Health Administration (MSHA) is successful in its efforts to extend its enforcement reach beyond the minesite, in an attempt to hold multi-tiered corporations automatically liable for violations committed at a mine by independent contractors hired by a subsidiary of the corporation. With limited exceptions, however, MSHA has been unsuccessful in its attempt to impose per se liability on corporations with no direct and active involvement in on-site mining operations.  

Assistant Secretary of Labor Davitt McAteer characterized MSHA’s enforcement stratagem as a response to the growing use of contract miners and has clearly indicated that the use of contractors by remote owners, lessees, or corporate entities is viewed by enforcement officials as an attempt to evade responsibility under the Mine Act.  

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§ 7.02. MSHA’s Enforcement Reach: Per Se Liability

MSHA’s effort to impose per se liability on remote owners, lessees, or corporate entities is viewed by enforcement officials as an attempt to evade responsibility under the Mine Act.  

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1 The exceptions are illustrated by Secretary of Labor v. W-P Coal Co., 16 FMSHRC 1407 (Rev. Comm. 1994), in which the Commission indicated that, if MSHA can prove the type of facts used to “pierce the corporate veil,” a corporation may be held liable for violations committed by independent contractors. See Southern Minerals, Inc. v. Secretary of Labor, No. WEVA 92-15-R (A.L.J. Barbour, March 7, 1995)(order denying cross motions for summary decision).

2 Following a March 1995 address at a Mine Safety and Health Special Institute sponsored by the Eastern Mineral Law Foundation, Assistant Secretary of Labor McAteer was quoted in Mine Safety and Health News:

We have difficulties with contract mining. . . . We have a difficulty because the industry has changed and operates to a contract mining system. We’re an enforcement agency. Enforcement agencies always lag behind. The police are always one step behind catching the new way of crooks ... This industry, the mining industry, has changed the way they operate. Nothing wrong with it, that’s the way it is. We, however, have the job of enforcing a statute in a changed atmosphere. We are going to adapt to that changed atmosphere. We are going to look at again the statute ... The statute keys to the authority on the mine itself. That responsibility should follow that authority. That’s the way we’re going to try to develop our enforcement with regard to contract problem. We’re going to look at the authority, who has the authority, who has the control, who can affect health and safety and production . . . . 1 Mine Safety and Health News 147 (March 25, 1994).
and Health Administration will attempt to reach into the board room by arguing that passive business entities that do not participate in the day-to-day oversight of a mine automatically fall within the definition of “operator” under the Mine Act.

In *Berwind Natural Resources, Corp. v. Secretary of Labor (Berwind)*, MSHA argued that Philadelphia-based Berwind Natural Resources Corp., and three of the corporation’s wholly owned subsidiaries, were “operators” that could be held liable for a fatal explosion at a mine operated by independent contractor AA&W Coals, Inc. In *Southern Minerals, Inc. v. Secretary of Labor (Southern Minerals)*, MSHA argued that three closely-held corporations were all “operators” who could be liable for a fatal explosion at a mine operated by one of the corporations.

MSHA’s argument in those cases was replete with suggestions that an entity like Berwind adopts a corporate structure “to insulate itself from its responsibilities and obligations as a mine ‘operator’ under the Mine Act.” Corporate managers and safety-conscious mine companies disagree with MSHA’s assessment that entities use either incorporation or contractors to evade Mine Act responsibilities. Incorporation presents significant business and tax advantages, while the use of independent contractors enhances the goal of safety. Typically, contractors are retained because they are specialists who can perform jobs more safely and efficiently than the person, company, or corporation who hires them.

The administrative law judge responsible for deciding the *Berwind* and *Southern Minerals* cases rejected MSHA’s argument that corporate structure alone was sufficient to make an entity an “operator” under the Mine Act. As the following discussion makes clear, the conclusion of Administrative Law Judge David F. Barbour — that is, that the Mine Act has always contemplated that those held liable for violations have some


input into the day-to-day operations of the mine — is supported by the history, language, and intent of the Mine Act and cases decided thereunder.

§ 7.02. Background.


The Federal Coal Mine Health and Safety Act of 1969 (1969 Coal Act) defined an “operator” as “any owner, lessee, or other person who operates, controls, or supervises a coal mine.” Independent contractors were not included in the definition. Early in the enforcement of the 1969 Coal Act, the question arose as to whether an independent contractor could be an “operator,” and whether the Mine Enforcement Safety Administration (MESA) could take enforcement action against such contractors. While the Interior Department’s Board of Mine Operations Appeals (Board) concluded that contractors could fit within the definition of “operator” under the 1969 Coal Act, the Board eventually conditioned liability for either owner-operators or contractors upon either party’s ability to prevent the violation.

The first of the Board’s decisions came in Laurel Shaft Construction Co., in which the Board held that an independent contractor could be an “operator” under the 1969 Coal Act. The next year, the Board concluded in Affinity Mining Co. (Affinity) that only the operator responsible for the violation and the safety and health of the affected employees could be served with notices and orders, or assessed penalties; however, if an owner-operator “materially abetted” an independent contractor’s violations, or actually committed the violations, the owner-operator could be assessed a penalty. This “endangerment-preventability” test was expanded in Peggs Run Coal Co. (Pegg’s Run), to hold owner-operators liable for violations committed by contractors when the owner’s employees were endangered.

7 30 U.S.C. § 802(d).
10 Peggs Run Coal Co., 5 I.B.M.A. 175 (1975).
by the violation and the owner could have prevented the violation “with a minimum of diligence.”


The most significant decisions decided under the 1969 Coal Act regarding the liability of owner-operators and independent contractors was that by the District of Columbia Circuit Court of Appeals in Association of Bituminous Contractors, Inc. v. Andrus (ABC II), the Fourth Circuit in Bituminous Coal Operators’ Ass’n v. Secretary of Interior (BCOA), and the Federal Mine Safety and Health Review Commission in Secretary of Labor v. Republic Steel Corp. For purposes of this discussion, however, the proceedings in the lower federal courts are particularly relevant and thus are addressed in some detail.

[a] — The ABC I Case and Secretarial Order No. 2977.

In 1975, the Association of Bituminous Contractors, Inc. (ABC), an organization representing companies that typically worked as independent contractors at mine sites, challenged the Affinity decision. ABC brought a declaratory judgment action in the Federal District Court for the District of Columbia seeking a declaration that, contrary to the decision in Affinity, an independent contractor-construction company was not an “operator” under the 1969 Act. The district court granted the injunction, concluding that mine construction companies were not “operators” who could be cited for violating the 1969 Act, since they were not in control of a “total” coal mine.

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11 Id. at 183. See West Freedom Mining Corp., 5 I.B.M.A. 329 (1975); Armco Steel Corp., 6 I.B.M.A. 64 (1976).
13 Bituminous Coal Operators’ Ass’n. v. Secretary of Interior (BCOA), 547 F.2d 240 (1977).
Pursuant to the district court’s injunction, the Acting Secretary of Interior issued Secretarial Order No. 2977 (August 21, 1975). That order directed MESA enforcement personnel to cite only owner-operators for violations of the 1969 Act committed by independent contractors. The Board subsequently upheld enforcement actions initiated pursuant to the order. According to the Board, the order was a department-wide policy directive, binding on the Board and administrative law judges as well as enforcement personnel; therefore, the Board was compelled to hold a coal mine owner responsible for contractor violations regardless of the particular facts surrounding a violation. This conclusion by the Board was challenged, and eventually led to the Commission’s decision in *Secretary of Labor v. Republic Steel Corp.*

[b] — Secretarial Order No. 2977 and the BCOA Case.

After Secretarial Order No. 2977 was issued, the Bituminous Coal Operators’ Association (BCOA) filed a declaratory action in the Federal District Court for the Western District of Virginia that challenged the order, sought a judgment that coal mine operators were not responsible for violations created by independent contractors, and requested an injunction restraining the Secretary from enforcing the order. The district court held that construction contractors were not “operators” under the 1969 Act, but concluded they were “statutory agents” of operators and, thus, operators could be held responsible for violations of their “agent” contractors. The court dismissed the complaints for declaratory and injunctive relief, and the BCOA appealed.

The Fourth Circuit Court of Appeals, in *Bituminous Coal Operators’ Ass’n v. Secretary of Interior (BCOA)*, disagreed with the district court and concluded that construction companies performing services at a mine

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19 *Bituminous Coal Operators’ Ass’n v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977).
fit within the statutory definition of “operator,” because “when a construction company is sinking a shaft, excavating a tunnel, or building a tipple, it is controlling or supervising a coal mine, for the facility on which it is working is to be used in the extraction or processing of coal.”

However, the court agreed that a construction contractor could be considered the statutory agent of an owner of lessee, which owner or lessee could be held responsible for violations of its agents. Thus, the court concluded that either or both the construction contractor and the mining company that hires the contractor could be cited for violations committed by the contractor.

Importantly, however, the court indicated that which party should be cited would depend upon the facts of the given case, and would be decided based upon either regulations promulgated by the Secretary or through litigation:

In sum, we conclude that the Act does not prohibit the secretary from holding a mining company and a construction company jointly or severally liable for violations committed by the construction company. This opinion presents no occasion, however, for determining the proper allocation of liability in view of the myriad factual situations that may arise. Such determination, we believe, is a responsibility that can best be initiated by the Secretary through regulations and adjudication.

Thus, the court’s opinion in BCOA does not support an argument for automatic or per se liability; rather the court indicated that such determinations would depend upon the “myriad factual situations” presented by individual cases, as influenced by pertinent regulations promulgated by the agency.

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20 Id. at 246.
21 Id. at 247. The court found, however, that liability under the 1969 Coal Act was not dependent upon common law agency principles. Id.
22 Id. at 246.
23 Id. at 247.
The next significant case discussing which entities were liable as “operators” under the 1969 Coal Act was *Association of Bituminous Contractors, Inc. v. Andrus (ABC II).* 24 In that case, the Federal Court of Appeals for the District of Columbia Circuit reversed the district court and concluded that independent contractor construction companies are “operators” under the Mine Act that could be cited for violations, along with owners, lessees, or others exercising control. According to the court:

There is always an owner of a coal mine, yet the statute includes lessees and “other persons” within the definition of operator as well. So there must be some cases where the person who operates, controls, or supervises is not the owner. In those cases, the definition of operator must encompass the owner *and* such other person. 25

The court indicated that an entity’s involvement in the actual operation, control, or supervision of a mine or part of a mine determines whether the entity could be considered an operator. The importance of an entity’s “hands-on” dealings at a mine site is demonstrated by the following passage:

(A)n “operator” of a “coal mine” may be the “owner,” and he may be the “lessee,” and he may be an “other person” (emphasis added in original). In this context “other person” is to be read *ejusdem generis* to refer to other similar person, “of like kind and character to the designated ’owner[s or] lessee[s] designated.’” In so defining “operator,” since the statute employs the general words “other person,” following the specific words “owner, lessee,” the words “other person” are to be read *ejusdem generis* to refer to other persons of the same class as those enumerated by the specific words. Thus, the other persons must be similar in nature to owners and lessees. That would include independent contractors who

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25 *Id.* at 862.
operate, control or supervise a “coal mine,” as defined in the statute.26

[d] — Republic Steel.

Secretary of Labor v. Republic Steel Corp. (Republic Steel)27 dealt with two consolidated cases litigated under the 1969 Coal Act. In the first case, Secretary of Labor v. Republic Steel Corp. (Republic I),28 the administrative law judge had held that the owner-operator (Republic) was not the proper party to cite for the acts of an independent contractor that led to the issuance of a withdrawal order. The Board reversed the judge’s finding, based only on Secretarial Order No. 2977 and ABC I. The Board did not analyze the facts of the case. Republic appealed to the Federal Court of Appeals for the District of Columbia Circuit. Decision on a similar issue presented by Secretary of Labor v. Republic Steel Corp. (Republic II)29 was stayed pending an outcome in Republic I.

On the same day that the court of appeals remanded ABC II, the court vacated the Board’s decision in Republic I as being erroneously based solely upon Secretarial Order No. 2977, and remanded the case to the Board/Commission with the following instructions:

The Board may then determine what enforcement action it will follow: whether to proceed, as in the past, only against construction contractors, and therefore dismiss the present action against Republic; or to proceed against Republic on the basis of the Board’s own interpretation of how best to effectuate the purposes of the Act. (Emphasis added.)30

Upon remand, the Commission consolidated Republic I with Republic II. The decisions issued by the majority and dissent in Republic Steel

26 Id. at 861.
27 Secretary of Labor v. Republic Steel Corp. (Republic Steel), 1 F.M.S.H.R.C. 5 (1979).
30 Republic Steel, 581 F.2d at 870.
highlighted the essence of today’s debate over owner-operator liability for violations committed by independent contractors, and demonstrated the extent to which the Commission’s decision to hold owner-operators strictly liable for any violations occurring on a mine site veered from prior caselaw.

According to the Commission, the question presented for review was “clearly framed” as follows:

Can Republic, as owner of the involved mine, be held responsible for violations of the 1969 Act created by its independent contractors even though none of Republic’s employees were exposed to the violative conditions and Republic could not have prevented the violations.

The Commission examined the cases discussed above and, based upon its analysis of that precedent, answered the question in the affirmative. Furthermore, the Commission specifically rejected any Board precedent indicating that an operator must have had some ability to prevent a violation in order to be held liable. According to the Commission:

It is consistent with the Act’s language and the intent of Congress to hold an owner responsible for its contractors’ violations without regard to the owner’s ability to prevent the violations. Insofar as the decisions of the Board held to the contrary, we decline to follow them.

We also can find no support for the assertion that the Act permits an owner to avoid responsibility for a contractor’s violations simply because the only miners endangered by the violative conditions at its mine are employees of the contractor. The Act seeks to protect the safety and health of all individuals working in a coal mine. 30 U.S.C. §§ 801(a) and 802(g). Employer-employee is not the test. The duty of an operator, whether owner or contractor, extends to all miners. Again, to the extent the decision of the Board held to the contrary, we decline to follow them.

31 Republic Steel, 1 F.M.S.H.R.C. at 5.
32 Id.
33 Id. at 10-11 (citing legislative history).
Commissioner Backley disagreed with the majority’s interpretation of the ABC and BCOA cases and dissented from the majority’s conclusions. He specifically disagreed that the two cases support the imposition of liability on owner-operators for contractor violations “should the enforcement body, not the reviewing authority, so determine.”

According to Backley’s reading of the ABC and BCOA decisions, a determination regarding the proper allocation of liability was to be based upon the policy considerations enunciated in those cases, i.e., how to best effectuate the purposes of the Act; furthermore, the Secretary’s decision to hold one or more entities liable was to be subject to review by the Board/Commission. In those cases, Backley opined, the courts were not supporting a policy determination to impose strict liability upon owner-operators regardless of the factual circumstances in a given case.

The Commissioner wrote:

The decision of the circuit courts (in BCOA and ABC) do not purport to state which party should be held liable in a specific factual situation; rather, they provide guidance as to which party can be held liable as an “operator” consistent with the proper statutory construction . . . .

I am convinced that the Act’s purpose of assuring the health and safety of miners can best be accomplished by placing the responsibility for their health and safety on the person most able to prevent violations or hazards and to correct them quickly should they occur. In most situations that person would be the party who controls or supervises the work activity in that portion of the mine where the violation or hazard occurred.

34 Republic Steel, 1 F.M.S.H.R.C. at 16.
35 The Commission appeared undecided as to whether such enforcement decisions by the Secretary were subject to review. See id. at 11: “We need not decide in this case the scope of Commission review, if any, over the secretary’s choice in proceeding against the owner, the independent contractor, or both, for a contractor’s violation.” (Emphasis added).
36 Republic Steel, 1 F.M.S.H.R.C. at 16.
37 Id. at 17.
Commissioner Backley also disagreed with the majority’s inference that operators use independent contractors to avoid legal liability or responsibilities:

[T]here is no evidence that mine owners, either in this case or any other case, establish contractual relationships with independent construction contractors so as to “exonerate” themselves from the contractors’ violations. Rather, in the normal situation an owner of a coal mine contracts with a construction company to perform services that are beyond his area of expertise. . . . 38

Importantly, even though the Commission in Republic Steel held that owner-operators could be held strictly liable for violations committed by independent contractors, the Commission stated in a footnote that “[w]e are not suggesting that the Act requires that an owner must be proceeded against whenever a contractor violates the Act. . . .” 39


The Federal Mine Safety and Health Act of 1977 (Mine Act), 40 at § 3(d), 41 expanded the definition of “operator” to include independent contractors. Section 3(d) provides that “‘operator’ means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.”

The legislative history of the Mine Act indicates that the definition was amended to resolve the question raised under the 1969 Coal Act of whether Congress intended to treat independent contractors as “operators” who could be held liable under the safety legislation. For example, the Senate Committee Report states:

38 Id. at 18.
39 Id. at 11, n.13 (emphasis added).
The definition of mine “operator” is expanded to include “any independent contractor performing services or construction at such mine”. It is the Committee’s intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the [1977 Act]. In enforcing this Act, the Secretary should be able to assess civil penalties against such independent contractor as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in *Bituminous Coal Operators’ Assn. v. Secretary of Interior*, 547 F.2d 240 (C.A. 4, 1977).

Similarly, the Conference Committee Report stated:

The Senate bill modified the definition of “operator” to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine.

The Mine Act took effect on March 9, 1978, and the Commission was soon faced with its first case regarding contractor liability under the new legislation.

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[a] — Secretary of Labor v. Old Ben Coal Co.

In Secretary of Labor v. Old Ben Coal Co. (Old Ben), the Commission reiterated its opinion in Republic Steel that either owner-operators or independent contractors can be held strictly liable for violations committed by the independent contractor, and made that holding applicable to Mine Act cases. Three important features distinguish Old Ben from the Commission’s prior decision, however.

First, the Commission emphasized that direct enforcement against contractors is “a vital part of the 1977 Act’s enforcement scheme.” Thus, even though the Commission concluded that the Secretary’s decision to proceed against the owner-operator based upon an interim policy to prosecute “owners only” was appropriate to avoid “unpredictability, confusion, and potential unfairness” during the period of transition under the 1977 Mine Act, the Commission noted that unduly prolonging such a policy “would not be consistent with the Act’s purpose and policies.”

Second, the Commission abandoned the equivocal stance taken in Republic Steel regarding its authority to review the Secretary’s decisions regarding which entity should be cited, and held that the Commission’s review authority extended to “determining operator responsibility and liability” for violations of the Act.

Third, the Commission adopted Commissioner Backley’s suggestion that the standard of review for enforcement decisions regarding independent contractors be “whether the Secretary’s decision to proceed against an owner for a contractor’s violation was made for reasons consistent with the purpose and policies of the 1977 Act.” In this regard, the Commission stated:

(S)ome latitude must be given to the Secretary’s determination as to how to enforce the Act for contractor violations. The

45 Id. at 2179.
46 Id. at 2179.
47 Id. at 2181.
48 Id. at 2180.
49 Id.
Secretary, by virtue of his enforcement responsibilities, has direct experience with the nature of the working relationships of owners and contractors on the jobsite. The experience makes it possible for the secretary to be apprised of the diverse economic and technical considerations that should be taken into account in formulating a policy on liability for contractor’s violations . . . .

The Old Ben case is most notable for purposes of this discussion, however, because the Commission recognized that, in many circumstances, an independent contractor’s control over the work site puts the contractor in the best position to protect miners’ lives. The Commission appears to have endorsed the Secretary’s proposed independent contractor regulations by which the Secretary would have proceeded against contractors for violations they committed. According to the Commission:

We note that the interim policy being pursued by the Secretary is not in line with the view expressed in his proposed regulations of how best to enforce the 1977 Act. Also, we have doubts concerning the necessity of the Secretary’s blanket “owners only” enforcement policy even on an interim basis. In many circumstances, as in the present case, it should be evident to an inspector at the time that he issue(s) a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring. Thus, we fail to see the overriding need for adherence to a uniform policy in instances where it is clear that proceeding against a contractor is a more effective method of protecting the safety and health of miners.

Commissioner Backley, once again dissenting, chastised his colleagues for recognizing the importance of proceeding against contractors but nevertheless deferring to the Secretary’s interim policy, and reiterated his

50 Id.
52 Id. at 2181.
stance that “(a)pplication of the concept of absolute liability of the owner-operator regardless of the facts can produce only unreasonable results as this case clearly demonstrates.” According to the Commissioner:

[T]he Secretary of Labor and this Commission have an obligation to determine under what circumstances imposition of the statutorily permissible concept of absolute liability will best promote the safety and health of miners. . . . I would impose liability on the person most able to prevent the violation and to correct it quickly should it occur. In my opinion that person would be the party who has functional control of, or supervision over, the work activity in that portion of the mine where the violation occurred.53

[b] — NISA.

The next important case regarding independent contractors under the Mine Act involved MSHA regulations that imposed upon mining companies an obligation to provide training for the employees of independent contractors.54

In National Industrial Sand Ass’n v. Marshall (NISA),55 the Third Circuit Court of Appeals considered a general challenge to MSHA’s Part 48 training regulations and the requirement that production-operators train the employees of independent contractors.56 In its decision, the court indicated that, in amending the definition of “operator” in the Mine Act to include independent contractors, “Congress was clearly concerned with the permissive scope of the secretary’s authority, not with the mandatory imposition of statutory duties on independent contractors.”57 In addition, the court stated that congressional citation to the BCOA case “indicates that allocation of responsibility for training programs between mining

53 Id. at 2182.
56 Id. at 704-707.
57 Id. at 703.
companies and independent contractors was also best left to the initiative of the Secretary.” 58

Significantly, the court did not hold that deference was due the decisions of the Secretary regarding “allocation(s) of responsibility”; rather, the court’s decision can best be characterized as support for regulatory initiatives of the Secretary designed to clarify the relative liabilities and responsibilities of owner-operators and independent contractors. Indeed, the court specifically indicated that it would look with disfavor upon a policy by which owner-operators were held absolutely liable for training violations of independent contractors. In an important footnote, the court stated:

[W]e note that we are not called to pass upon specific cases in which mining companies are directed by the Secretary to provide training to the employees of independent contractors. Both NISA and CCP pose the extreme hypothetical of small mining companies required to provide extensive training to the employees of specialized independent contractors when the very purpose for which the contractors were hired was their specialized skills and abilities. We are not troubled by this prospect. But we think that these issues are not now before us for review, and we believe that such concerns can be adequately accommodated in the Secretary's current rulemaking endeavors which pertain to the standards to be employed in designating independent contractors as operators. 59

This language by the court implies that the “rulemaking endeavors” of the Secretary regarding independent contractors would attempt to alleviate any inequities presented by an attempt to hold production-operators absolutely liable in all cases for any training violations by independent contractors. The court’s implication is supported by the following explanatory language accompanying MSHA’s final Part 48 training regulations:

58 Id.
59 Id. at 705 n.54 (emphasis added).
Accordingly, except with respect to those independent contractors that may be identified as operators under rules currently being developed, operators will be primarily responsible for training workers on mine property.60


The Secretary was never able to develop formal rules that categorically differentiated the compliance responsibilities of operators and independent contractors. The Secretary had intended to set forth, in the final rule, criteria and guidelines (to be) applied on a job-by-job basis. Each independent contractor identified as an operator pursuant to the proposed rule would then have been held responsible for compliance with the Act . . . with respect to its activities at that particular mine. At those mines where an independent contractor performing work had not been identified as an operator under the proposed criteria and guidelines, the independent contractor would generally not have been cited for violations.61

However, the Part 45 independent contractor regulations finally promulgated consisted only of registration requirements. Nevertheless, comments contained in the “Supplementary Information” accompanying the final rule demonstrated that the Secretary still believed — as first stated by Commissioner Backley in Republic Steel —

. . . that the interest of miner safety and health will be best served by placing responsibility for compliance with the Act, standards and regulations upon each independent contractor. Thus, as a general rule, MSHA will issue citations and, where appropriate, orders to independent contractors for violations of the Act, standards and regulations committed by them and their employees. This policy is based on the 1977 Act’s

60 30 C.F.R. §§ 48.12.
61 45 Fed. Reg. 44494 (July 1, 1980).
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definition of “operator,” and the final rule does not restate or interpret that provision.62

For these reasons, the Secretary set forth as an appendix to the final rule, enforcement guidelines indicating that proceeding against a production-operator for violations committed by an independent contractor would be appropriate only “when the production-operator by either an act or omission has contributed to the occurrence or continued existence of the violations.”63 More specifically, “Appendix A — Enforcement Policy and Guidelines for Independent Contractors” which follows the final published rule,64 provides that it is appropriate to issue citations and orders to both the production-operator and the independent contractor for contractor violations when:

(1) The operator has contributed by act or omission to the occurrence of a violation during a contractor’s work;
(2) The operator contributes by act or omission to the continued existence of a violation committed by a contractor;
(3) The operator’s miners are exposed to the hazard; and
(4) The operator has control over the conditions needing abatement.65

7.03. MSHA’s Enforcement Policy Against Owners.

The regulatory history of the Part 45 independent contractor regulations, and the Secretary’s own pronounced Enforcement Policy and Guidelines for Independent Contractors, demonstrate that when MSHA considers, from a policy-making perspective, the question of an owner-operator’s liability under the Mine Act for violations committed by independent contractors, the agency recognizes that liability should be imposed only upon entities that have some role in the day-to-day running of a mine.

62 Id.
63 Id. at 44496.
64 30 C.F.R. Part 45 Independent Contractors.
For example, when MSHA published the proposed independent contractor regulations in August, 1979, the agency stated in the rationale accompanying the regulations that the definition of “operator” requires “substantial participation in the running of the mine,” and that a “similar degree of involvement in mining activities is required of independent contractors before they are designated as operators.”

This stance differs greatly from that taken by the Secretary in litigation. Cases decided since MSHA published its comments regarding the independent contractor regulations demonstrate that the agency has attempted to distance itself from the logical and fair proposition set forth in the initial comments that, in order to be an “operator” for purposes of Mine Act liability, an entity must have “substantial participation in the running of the mine.” Indeed, in recent cases, the Secretary has argued not only that owner-operators may be cited despite minimal or non-existent involvement in day-to-day supervision of a mine, but that the decision to cite or not cite owner-operators is a matter within the agency’s unreviewable discretion. For the most part, such arguments by the Secretary have had little appeal for administrative law judges, the Commission, and the courts.

[1] — Significant Litigation Developments
Restricting MSHA’s Enforcement Discretion.

The courts, Commission, and administrative law judges, while recognizing that MSHA has discretion to cite either owner-operators or independent contractors or both, also have held that the exercise of such discretion is subject to review. In addition, the cases demonstrate that the more removed an entity is from the day-to-day work at a mine, the less inclined reviewing bodies are to consider the entity an “operator” who may be held liable under the Mine Act.

For example, in *Cyprus Indus. Minerals Co. v. FMSHRC*, the Ninth Circuit Court of Appeals indicated that one reason to support the

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67 Id. at 47,748.
68 Id.
69 Cyprus Indus. Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981).
Secretary’s decision to cite the owner-operator in that case was because “the owner is generally in continuous control of conditions at the entire mine.”

The Review Commission, in *Secretary of Labor v. Phillips Uranium Corp.*, rejected the agency’s decision to cite only the owner-operator in that case, when the owner-operator’s only involvement in the work performed by the contractor was to conduct quality control inspections. The Commission concluded that the choice of which company should be cited resulted from the application of the “owners-only” policy adopted by MSHA pursuant to the *ABC I* decision and continued during the independent contractor rulemaking proceedings. According to the Commission:

The test applied by the Commission in reviewing the Secretary’s choice is “whether the Secretary’s decision to proceed against an owner for a contractor’s violation was made for reasons consistent with the purposes and policies of the 1977 Act.

The Secretary’s insistence on proceeding against Phillips appears to be a litigation decision resting solely on considerations of the Secretary’s administrative convenience, rather than on a concern for the health and safety of miners. In choosing the course that is administratively convenient, the Secretary has ignored Congressional intent, the Commission’s clear statements in *Old Ben*, and the intent of his own regulations, and has subjected the wrong party to the continuing sanctions of the Act.

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70 Id. at 1119.


In *Phillips Uranium*, . . . the Commission reaffirmed the principles enunciated in *Old Ben* and indicated that in choosing the entity against whom to proceed, the Secretary should look to such factors as the size and mining experience of the independent contractor, the nature of the task performed by the contractor, which parties contributed to the violation,
The Fourth Circuit Court of Appeals, in *Old Dominion Power Co. v. Donovan*, 73 reviewed and rejected the Secretary’s determination that an electric utility with minimal contacts at a mine site was an “operator” that could be cited under the Mine Act. According to the court:

> [K]ey passages of legislative history make clear Congress’ intent to define as “operators” only those independent contractors who are engaged in mine construction or the extraction process, and who have a “continuing presence” at the mine. Old Dominion, whose contacts are rare and remote from the mine construction or extraction process, does not meet this definition of “operator.” 74

The court, quoting the following passage from *NISA*, indicated that there may be a point at which a company’s contacts with a mine site are so *de minimis* that the company cannot properly be considered an “operator” under the Mine Act:

> There may be a point, at least, at which an independent contractor’s contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed. Such a reading of the statute is given color by the fact that other persons deemed operators must “operate, control, or supervise” a mine. Designation of such other persons as operators thus *requires substantial participation in the running of the mine*; the statutory text may be taken to suggest that a similar degree of involvement in mining activities is required of independent contractors before they are designated as operators. 75

Examination of the foregoing cases demonstrates that MSHA’s categorization of an entity as an “operator” under the Mine Act has always

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73 *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985).
74 *Id.* at 97.
75 *Id.* (emphasis in original)(quoting *National Industrial Sand Ass’n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979)).
been subject to review, as has the agency’s decision to hold an entity liable for Mine Act violations. However, the Secretary has argued before the Commission that he has unreviewable enforcement discretion to cite a production-operator, the production-operator’s independent contractor, or both, for violations of the Mine Act committed by the contractor. The Secretary based his argument upon the court’s decision in *Brock v. Cathedral Bluffs Shale Oil Co.*, and non-Mine Act cases regarding enforcement discretion.


The Secretary argued that, under *Brock v. Cathedral Bluffs Shale Oil Co.* (*Cathedral Bluffs*), he has unreviewable discretion to cite owner-operators, independent contractors, or both, for violations committed by contractors.

In *Cathedral Bluffs*, the court addressed the single issue of whether the Secretary’s Enforcement Policy and Guidelines for Independent Contractors (Enforcement Policy) constituted a legally binding, substantive regulation that the Secretary was required to apply and follow in all cases. The court concluded that the policy, which was published in the *Federal Register* but not in the Code of Federal Regulations, and which contained permissive rather than mandatory language regarding its application, did not rise to the level of a regulation or legally binding norm that the Secretary was required to follow in all instances.

The basis for the Secretary’s argument that his application of the Enforcement Policy not only was discretionary, but also non-reviewable, was the following passage from the court’s decision:

Our decision on this point is reinforced by the fact that the statement here in question pertains to an agency’s exercise of its enforcement discretion — an area in which the courts have

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76 See Brief for the Secretary of Labor, Secretary of Labor v. Mingo Logan Coal Co., Docket No. WEVA 93-392 (filed May 24, 1995).
78 796 F.2d 533 (D.C. Cir. 1986).
79 See id. at 534, 538.
80 Id. at 538-39.
traditionally been most reluctant to interfere. . . . We think that policies underlying that restraint extend as well to interference by a quasi-judicial agency that has no enforcement responsibilities, such as the Federal Mine Safety and Health Review Commission.\textsuperscript{81}

What the Secretary failed to point out was that when the court referred to “(o)ur decision on this point,” the justices were not referring to a decision that the Secretary’s enforcement choices were unreviewable. Rather, the court was referring to its conclusion that the Secretary, in publishing the Enforcement Policy, “did not establish a ‘binding norm,’ but merely ‘announced [his] tentative intentions for the future,’ . . . leaving himself ‘free to exercise his informed discretion’ . . .”\textsuperscript{82}

Moreover, the court went on say in the sentence following that quoted by the Secretary: “At the very least the Commission, and we in our review of the Commission, must be reluctant to find a secretarial commitment to refrain from enforcement where none clearly appears.”\textsuperscript{83}

When read in context, the language relied upon by the Secretary does not stand for the proposition he advanced. Rather, the court was stating merely that the Commission and courts should be reluctant to construe the Enforcement Policy as a legal commitment or “binding norm,” when the language used by the Secretary evidenced an intent to retain discretion. The court was \textit{not} saying that the Commission and courts should be reluctant to review the Secretary’s exercise of that discretion.

\section*{[3] — Effect of Cathedral Bluffs.}

Neither administrative law judges nor the Commission have interpreted the court’s decision in \textit{Cathedral Bluffs} as limiting their authority to review the Secretary’s enforcement decisions. While wide discretion has been accorded agency decisions regarding what party will be held responsible

81 Brief for the Secretary of Labor, at 18, Secretary of Labor v. Mingo Logan Coal Co., Docket No. WEVA 93-392 (filed May 24, 1995)(citing \textit{Cathedral Bluffs} at 538)(emphasis added by Secretary).
82 \textit{Cathedral Bluffs}, 796 F.2d at 538 (citations omitted).
83 \textit{Id}.
for Mine Act violations, the facts of each particular case have always played an important part in upholding or negating the Secretary’s decisions to cite owner-operators, the contractors they retain, or both.


The administrative law judge in Secretary of Labor v. AMAX Coal West Inc. (AMAX), emphasized, in the following excerpt from that decision, that the Commission and its administrative law judges retain review authority:

Were it not for the Commission’s statement in W-P Coal that Commission review guards against an abuse of discretion by the Secretary in issuing a citation, one might conclude from the most recent cases that the Secretary is free to cite the operator, the independent contractor, or both, as he sees fit. However, by stating that it will guard against an abuse of discretion the Commission has clearly implied that there is some limit to the Secretary’s enforcement decisions. While the Commission has never set out what that limit is, and the term “discretion” indicates the absence of a hard and fast rule, it does mean that the Secretary cannot act arbitrarily or capriciously.

Further, while failing to follow his own guidelines concerning enforcement against independent contractors was not binding on the Secretary, not following them may well be an indication of an abuse of discretion.

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87 Langnes v. Green, 282 U.S. 531, 541 (1931).
88 Id. at 2496-97.
At issue in AMAX were citations issued to the production-operator for violations committed by two independent contractor companies hired by customers for AMAX and doing work over which AMAX exercised no control. The administrative law judge, noting that AMAX had “virtually no involvement” with the contractors, vacated the citations based upon testimony by the inspector that “he issued the citations to Amax, rather than to CBS or NALCO, because ‘the contractor was not on the mine property that I could issue the citation to. The production operator was.’”

According to the judge:

It seems obvious from these facts that either CBS or NALCO (the two contractors) should have been the recipient of the citations. The question in this case is whether Amax could be issued the citations. Amax argues that the inspector abused his discretion in issuing it the citations and that they should, therefore, be vacated and the civil penalty petition dismissed. I conclude that Amax is correct.

The administrative law judge in Secretary of Labor v. Fluor Daniel, Inc., examined the ownership and control issues involved in that case, and upheld the citations issued to both the operator and an independent contractor after a fatal accident involving a forklift.

Fluor was the independent contractor performing services at the Ridgeway Mine operated by Kennecott Ridgeway Mining Company. An employee for the contractor was killed when the brakes failed on a forklift owned by Kennecott. The administrative law judge upheld an imminent danger withdrawal order and citations issued to the contractor, and rejected Fluor’s argument that MSHA failed to cite the appropriate party. According to the judge:

89 Id. at 2496.
90 Id. at 2490.
91 Id. at 2491 (emphasis in original).
93 Id. at 2049-50.
While I recognize that the respondent was not responsible for the forklift’s maintenance and repair, it had a duty to ensure the safe operation of this potentially dangerous vehicle. While long-standing maintenance problems may have been a contributing factor, the respondent, who had possession and control of this vehicle on April 21, 1993, from 9:00 a.m. until the brake failure at approximately 2:30 p.m., had the opportunity to prevent this accident if proper unsophisticated preshift brake inspections had been performed. Having failed to perform such tests, the respondent must be held accountable. **It should be noted that, while not the subject of this proceeding, Kennecott, as the forklift owner, was also cited by MSHA for its culpability in this matter.**

The Commission demonstrated, in *Secretary of Labor v. Lang Bros., Inc.*, that the specific facts of individual cases continue to play a determinative role in upholding or negating the Secretary’s designation of particular parties as “operators” subject to Mine Act liability.

In that case, the question presented was whether Lang Brothers, Inc., a company that performed gas well cleaning and plugging services, was an “operator” under the Mine Act. Both the administrative law judge and the Commission concluded that the company was an operator that could be cited for violations of the Mine Act committed while performing services for the production operator.

Lang Brothers argued that its contacts with the mine were so infrequent and *de minimis* that it did not amount to the performance of services at a mine. The Commission disagreed, stating:

> In cleaning and plugging the gas wells, Lang performed services clearly related to the extraction process, at what amounted to a surface work area of . . . (the) coal mine. The

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94 The citations were issued for the alleged failure to properly inspect or maintain the forklift and braking systems.
95 *Id.* at 2059 (emphasis added).
97 *Id.* at 413.
overriding purpose of the plugging work was to ensure that gas did not seep into the mine after (the production operator) mined through the area. Lang’s work thus directly affected the safety of miners involved in the extraction of coal.

Notwithstanding the relatively limited period — seven to 10 days — during which Lang provided services at the mine to clean and plug a well, we conclude that the contact was not *de minimis*. An independent contractor’s presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence.98

These decisions indicate that the Commission and its administrative law judges believe that existing precedent supports their continued review of the Secretary’s enforcement decisions to assure that, by citing a given “operator,” the Secretary is acting to further the protective purposes of the Mine Act. That same precedent militates against the Secretary’s assertion in recent cases that, as a matter of law, liability may be imposed upon any corporate entity that has an interest in a mining operation — no matter how remote the entity or how passive the interest — since such an interest makes the corporation an “owner” and thus an “operator” under the Mine Act.

§ 7.04. Corporate Owners as “Operators” Under the Mine Act: Rejection of the Secretary’s *Per Se* Rule.

The controversy regarding the liability of corporate entities was forecast by Administrative Law Judge Joseph B. Kennedy in *Secretary of Labor v. Bethlehem Mines Corp.*,99 when he stated:

> The legislative history of the Mine Safety Law shows Congress intended to place responsibility for compliance with the Act on those who control or supervise the operation of

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98 Id. at 420. *See also* Secretary of Labor v. Joy Technologies, Inc., 15 F.M.S.H.R.C. 2147, 2150-51 (A.L.J. Melick, 1993)(review granted Nov. 22, 1993)(Joy was an “operator” that could be cited under the Mine Act, because the company was an “independent contractor performing services . . . at such mine. . . “ which services were essential to the extraction of coal”).

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mines as well as on those who operate them on a day-to-day basis. S. Rep. 91-411, 91st Cong. 1st Sess. 39 (1969); S. Rep. No. 95-181, 95th Cong. 1st Sess. 40 (1977). Upper level management decisions such as those affecting capital expenditures, the basic nature and scope of corporate safety and health programs, the hiring of top mine management officials, and other policy matters have a profound effect upon safety and health conditions at individual mines. Civil penalties should therefore be structured to influence all levels of decisionmaking.\textsuperscript{100}

The Secretary argues that “all levels of decisionmaking” affecting health and safety at individual mines cannot be influenced unless remote, passive corporate entities are automatically held liable as “operators” under the Mine Act. To date, each court or judge considering the Secretary’s argument for \textit{per se} liability has rejected both the rule and the Secretary’s underlying rationale.

[1] — \textit{Elliot Coal Mining Co.}

In \textit{Elliot Coal Mining Co. v. OWCP,}\textsuperscript{101} the Third Circuit Court of Appeals rejected the Secretary’s argument that “the status of owner or lessee is sufficient in and of itself to make an owner or lessee an operator”\textsuperscript{102} liable under the Mine Act for paying black lung benefits. The court concluded that the term “operator” as used in § 3(d)\textsuperscript{103} refers to those owners or lessees who have retained a substantial right to control or supervise others’ mining operations on lands they own or lease.\textsuperscript{104}

The court supported its conclusions by examining the legislative and regulatory history of § 3(d),\textsuperscript{105} and applying principles of grammatical

\textsuperscript{100} \textit{Id.} at 101-102.
\textsuperscript{101} \textit{Elliot Coal Mining Co. v. OWCP,} 17 F.3d 616 (3d Cir. 1994).
\textsuperscript{102} \textit{Id.} at 629.
\textsuperscript{103} 30 U.S.C. § 802(d). That definition applies for purposes of determining liability for both black lung benefits and health and safety violations.
\textsuperscript{104} \textit{Elliot Coal,} 17 F.3d at 631.
\textsuperscript{105} \textit{Id.} at 631-634.
Finally, the court examined the factual record regarding Elliot’s business relations with the contract mining companies operating on its lands, and found that substantial evidence supported the judge’s conclusion that Elliot did not fit within the definition of “operator.” According to the court:

The record before us shows no interlocking corporate relationships between Elliot and any of the corporations or other persons from whom or to whom it had leased any of the coal lands . . . . There is evidence that the lease provisions concerning re-entry, minimum royalties and verification of tonnage were provisions that Elliot had to require of its lessees in order to avoid termination, at its own lessors’ hands, of its rights to mine coal or allow others to do so. . . .

The court held that whether an owner or lessee has the power to exercise substantial control is a question of fact to be resolved by an administrative law judge.


In Southern Minerals, Inc. v. Secretary of Labor, (Southern Minerals), Administrative Law Judge David F. Barbour denied motions for summary decision filed by the Secretary and Contestants in a case involving the fatal explosion on January 16, 1991, at the Fire Creek No. 1 Mine.

Contestants in the case were three closely-held corporations: Fire Creek, Inc.; Southern Minerals, Inc.; and True Energy Coal Sales, Inc. The facts presented in the motions established the following: the corporations share some common officers and directors. Southern Minerals had no employees; it simply held coal leases and subleases, contracts

106 Id. at 629-631.
107 Id. at 621.
108 Id. at 621.
110 Id. at 165-66.
with others — including Fire Creek — to mine coal, and monitored coal production for royalty purposes. Fire Creek operated the No. 1 Mine pursuant to contract with Southern Minerals. Coal from the mine was processed by an unrelated company under a contract with True Energy. True Energy sold the processed coal and provided administrative and technical services to Southern Minerals’ contractors, including Fire Creek.111

The Secretary argued that both Southern Minerals and True Energy could be held liable as “operators” because they exercised sufficient control over the Fire Creek No. 1 Mine. Specifically, the Secretary argued that Southern Minerals “exercised significant direct and indirect control over the mine via its control of engineering, finances, production and other matters.”112 True Energy, the Secretary contended, exercised control “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.”113

Contestants countered by arguing that Southern Minerals and True Energy were merely “passive” entities that did not exercise the type of control or supervision envisioned by the Mine Act.114 According to Contestants, “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.”115

The judge concluded that resolution of the motions would depend upon the meaning of “operator.”116 The judge relied upon the Third Circuit’s decision in *Elliot Coal Mining Co.*117 and legislative history to conclude:

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111 *Id.* at 467-68.
112 *Id.* at 469.
113 *Id.*
114 *Id.* at 470.
115 *Id.*
116 *Id.*
117 *Elliot*, 17 F.3d 616 (3d Cir. 1994).
(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.\textsuperscript{118}

One of the more important observations by the judge is his rebuttal of the assertion frequently propounded by the Secretary in recent times to the effect that the mining industry has utilized the corporate structure as a way to evade Mine Act responsibilities. According to the judge:

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. Compare Elliot Coal Mining, 17 F.3d 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

\textsuperscript{118} Southern Minerals at 472.
that requirement . . . (I)f Congress had intended to hold all owners or lessees of mineral rights liable, it could have simply stated that an “operator” includes both.\textsuperscript{119}

The judge concluded that the facts submitted with the motions were insufficient to enable him to determine whether Contestants had exercised, or had the right to exercise, the requisite control. Consequently, the judge denied the motions and set a hearing date.\textsuperscript{120}

[3] — \textit{Berwind}.

The arguments presented to Judge Barbour in \textit{Berwind Natural Resources Corp. v. Secretary of Labor (Berwind)},\textsuperscript{121} mirrored those in \textit{Southern Minerals}; however, the judge granted summary judgment to two of the corporations involved, because the facts established that those remote and passive corporate entities 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. He ordered a hearing for additional fact finding with regard to the remaining two companies.

The \textit{Berwind} case had its genesis in an explosion that occurred at the Elmo No. 5 mine on November 30, 1993, killing James Lyons, an inside laborer. At the time of the explosion, the mine was being operated by AA&W Coals, Inc. (AA&W), an independent contract mining company retained by Kyber Coal Company (Kyber). MSHA eventually issued 225 citations and orders to AA&W, Berwind Natural Resources Corporation (Berwind), Kentucky Berwind Land Company (Kentucky Berwind), Kyber, and Jesse Branch Coal Company (Jesse Branch).\textsuperscript{122}

Facts presented to the judge indicated that Berwind was a holding company incorporated in Delaware and located in Philadelphia, Pennsylvania. As a holding company, Berwind’s business was to oversee the operations of its three wholly owned subsidiaries: Kentucky Berwind, Kyber, and Jesse Branch.\textsuperscript{123}

\textsuperscript{119} \textit{Id.} at 472.
\textsuperscript{120} \textit{Id.} at 480-81.
\textsuperscript{121} Berwind Natural Resources Corp. v. Secretary of Labor, No. KENT 94-574-R (A.L.J. Barbour, Apr. 24, 1995)(order granting partial summary judgment).
\textsuperscript{122} Berwind at 1.
\textsuperscript{123} \textit{Id.} at 5.
Kentucky Berwind was a Kentucky corporation with offices in Kentucky and West Virginia, owning about 90,000 acres of coal reserves, some of which were leased to Kyber.\textsuperscript{124} Kyber was also a Kentucky corporation that leased land and coal reserves from Kentucky Berwind and contracted out the mining of coal, which coal was generally processed at a preparation plant owned by Kyber.\textsuperscript{125} Jesse Branch was another Kentucky corporation that leased land and coal reserves from Kentucky Berwind and contracted out the mining of coal, almost all of which was processed at a preparation plant owned by Jesse Branch.\textsuperscript{126} Kyber shared an office with Jesse Branch, and paid Jesse Branch for drafting and surveying services provided to AA&W, Kyber’s contractor.\textsuperscript{127} Certain people held offices in both the parent corporation and the subsidiaries, while others were officers in one or more of the subsidiaries.\textsuperscript{128}

These and other relationships were examined by the judge, as were the facts relating to each entity’s involvement — or lack thereof — in day-to-day mining operations on lands leased by the entities. For example, the judge examined what parties were responsible for permits, licenses, mine plans, training, tax payment, mine site preparation; employment, pay, and insurance for miners; mining equipment machinery and supplies, etc. The judge also considered the parties’ authority regarding mining production and directions, visits and inspections made by corporate representatives, etc.

In arguments to the judge, the Secretary contended that a corporate entity was an “operator” if it operates, controls, or supervises a mine — either directly or indirectly — or had that power, regardless of whether the power was ever actually exercised. Contestants countered by arguing that only the entity that managed the mining process, directed the workforce, and owned the equipment had the ability to establish and maintain a safe and healthful working environment; therefore, the “hands on” entity should bear the responsibility for compliance.\textsuperscript{129}

\textsuperscript{124} Id. at 4.
\textsuperscript{125} Id. at 3.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 3-4.
\textsuperscript{128} Id. at 3-6.
\textsuperscript{129} Id. at 18.
The judge rejected the Secretary’s contention that indirect or potential control was sufficient to make one an “operator” under the Mine Act. According to the judge:

[I]t makes no sense to place responsibility on an entity who has not participated in creating the conditions in the mine or who has no actual authority over those conditions. On the other hand, placing liability on an entity who has participated or who has such authority provides a spur to compliance. . . .

I conclude, therefore, that in order to establish that an entity is 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.\textsuperscript{130}

According to the judge, a corporate entity that leases or owns mineral rights subjects itself to liability if it substantially participates in making decisions with respect to how a mineral is mined and how a mine is staffed and run, or if it retains the authority substantially to participate in the making of such decisions. The judge further held that the Secretary had the burden of proving either “substantial participation” in decision making, or the retention of decision making authority.\textsuperscript{131} “It is not enough for the Secretary to establish interlocking corporate relationships between entities and the normal business transactions attendant thereto when these transactions fall short of what the Act requires.”\textsuperscript{132}

The judge advised the Secretary to look to Secretary of Labor v. W-P Coal Co.,\textsuperscript{133} for guidance in meeting his burden of proof. The judge observed that in W-P, “the Commission gauged a lessee’s involvement with its contract operator by looking to specific indicia of operator status — characteristics such as involvement in the mine’s engineering, financial, production, personnel and safety affairs.”\textsuperscript{134}

\textsuperscript{130} Id. at 21-22.
\textsuperscript{131} Id. at 22.
\textsuperscript{132} Id.
\textsuperscript{133} Secretary of Labor v. W-P Coal Co., 16 F.M.S.H.R.C. 1407 (Rev. Comm. 1994).
\textsuperscript{134} Id.
Finally, the judge denied the Secretary’s motion for summary judgment against Berwind, and granted Contestants’ motion, because:

[W]ere I to grant the Secretary’s motion . . . I would be ruling effectively that Berwind was an operator by nature of its corporate structure and corporate relationship. . . . Not only would such a holding fall outside the letter of Section 3(d), there is no need for it . . . . [W]hen a separate legal entity is used to protect fraud or subvert public policy, the corporate veil may be pierced and corporations, or even the individuals who control the corporations, may be held liable.135

The Secretary’s motion for summary judgment against Jesse Branch was also denied, and Contestants’ was granted. Motions for both parties filed with regard to Kentucky Berwind and Kyber were denied, and a hearing was scheduled for additional fact finding regarding the involvement of those two entities in day-to-day operations at the mine.136

§ 7.05. Conclusion.

The above analysis demonstrates that the term “operator” as used in the Mine Act denotes the person — legal or real — that has some involvement in the actual operation of a mine, and not an entity that has only an indirect or passive involvement or interest in the mining process. Thus, “automatic” or “per se” liability may not be imposed upon a corporation or its directors, officers, or shareholders; a corporate owner or lessee is not an “operator” for purposes of Mine Act liability unless the corporate entity somehow controls or supervises the mine. As Berwind points out, such determinations are fact-dependent and must be made on a case-by-case basis.

Although the Secretary argued that the purposes of the Mine Act could best be effectuated by imposing per se liability upon passive, corporate entities, the fact remains that Congress adopted

136 Id. at 34.
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a definition of “operator” that tied liability under the Mine Act to “control” and “supervision” of a mine. Congress is capable of writing legislation that imposes per se liability, and has done so in the past. The fact that Congress chose not to impose such liability under the Mine Act is reason enough to reject the Secretary’s arguments to the contrary.
