



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

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Synopsis

Table with 2 columns: Section Number and Page Number. Includes sections for Introduction, Background, MSHA's Enforcement Policy, Corporate Owners, and Conclusion.

§ 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.¹

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.² McAteer's comments, along with MSHA litigation efforts, demonstrate that the Mine Safety

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)*,³ 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)*,⁴ 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.”⁵ 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

³ No. KENT 94-574-R (A.L.J. Barbour, Apr. 24, 1995)(order granting partial summary judgment).

⁴ No. WEVA 92-15-R (A.L.J. Barbour, March 7, 1995)(order denying cross motions for summary decision).

⁵ See, e.g., Secretary’s Motion for Partial Summary Decision at 45, *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).