



COALEX STATE INQUIRY REPORT – 131
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TOPIC: INDIVIDUAL LIABILITY OF CORPORATE OFFICER, DIRECTOR OR AGENT

INQUIRY: Is the "participation theory" a viable alternative to "piercing the corporate veil" when a regulatory agency is attempting to hold a corporate officer, director and/or agent individually or personally liable for reclaiming a mine site and/or civil penalties assessed against the corporation for its violations of the surface mining laws? Please locate Interior Board of Land Appeals (IBLA) and Administrative Law Judge (ALJ) decisions, state administrative decisions, and/or state and federal court decisions which are relevant to this issue.

SEARCH RESULTS: Research was conducted using the COALEX Library and the state and federal decisions available in LEXIS. The majority of the state and federal court decisions retrieved involve Pennsylvania cases. Pennsylvania is the only state identified which "officially" recognizes the "participation theory". Copies of the materials discussed below are attached.

STATUTES AND REGULATIONS

SMCRA Sec. 518(f), 30 U.S.C. Sec. 1268(f).

"Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program...or Federal enforcement of a State program...or fails or refuses to comply with any order...any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section."

KY. REV. STAT. ANN. Sec. 350.990(9) (Michie/Bobbs-Merrill 1988).

"Whenever a corporate permittee violates any provision of this chapter or regulation issued pursuant thereto or fails to or refuses to comply with any final order issued by the secretary, any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered or carried out such violation, failure or refusal shall be subject to the same civil penalties, fines, and imprisonment as may be imposed upon a person pursuant to this section."

25 PA. CODE Sec. 86.1 (1982). Protection of Natural Resources. Definitions.



"Person" -- Any natural person, partnership, association or corporation, or any agency, instrumentality or entity of Federal or State Government. Whenever used in any clause prescribing and imposing a penalty, or imposing a fine or imprisonment, or both, the term 'person' shall not exclude the members of an association and the directors, officers, or agents of a corporation.

Policy Statement of the Dept. of Environmental Resources: Civil Penalty Program (1985). Introduction.

"Corporation officers, directors and agents may be subject to individual civil penalties in all cases in which violations of the corporate permittee lead to the issuance of a failure to abate cessation order. Individual civil penalties against corporate officers, directors and agents will be assessed in accordance with provisions contained herein for violations which were willfully and knowingly authorized, ordered or carried out."

ALJ DECISIONS [NOTE: No relevant IBLA decisions were identified]

ALJ's have held directors, officers or agents liable for civil penalties when the following conditions have been demonstrated:

"(a) a corporate permittee violated a condition of its permit, or failed or refused to comply with any order contained in any section 521 NOV [Notice of Violation] or CO [Cessation Order], (b) that petitioner was a director, officer, or agent of such corporation, and that (c) petitioner will fully and knowingly authorized, ordered, or carried out such violation, failure or refusal."
RUDALPH WILLIAMS (LAKE COAL CO., INC.) v OSM, Docket No. NX 5-12-P (Sept. 23, 1986).

FAILURE OR REFUSAL TO COMPLY WITH AN ORDER.

WILLIAMS v OSM.

Lake, the corporate permittee, was correctly cited for "delinquent reclamation efforts" and failure to "comply with abatement provisions" of the Act. Williams held the position of Vice President and General Manager and was determined to be Lake's "agent" and "the person within Lake's corporate organization who was responsible for all or part of [the minesite's] operation and the attendant reclamation activities."

BERT BANKS (LAKE COAL CO.) v OSM, Docket No. NX 5-14-P (Oct. 31, 1986).

Lake's violations, here, were for improperly constructing a hollow fill and failing to install proper drainage systems. In a ruling similar to WILLIAMS, above, the ALJ found that Banks, as Vice President of Engineering at the time the NOV was issued "was a director, officer or agent for Lake, for the purposes of satisfying section 518(f) of the Act."

GRUNDY MINING CO. AND TENNESSEE CONSOLIDATED COAL CO. v OSM, Docket No. NX 1-146-P (June 14, 1985).

NOVs were properly issued for lack of sediment control and an improperly constructed bench. "The record show[ed]" that "Tennessee Consolidated was very actively involved in the



actual operation of [the minesite]. From the time the notice of violation was issued, Tennessee Consolidated acted as the party responsible."

BERNOS COAL CO. AND EXCELLO LAND MINERAL CORP. v OSM, Docket Nos. NX 1-118-R and NX 3-10-P (July 26, 1985).

A cessation order (CO) was issued to Bernos and Excello. The ALJ affirmed the violation underlying the CO, failure to "establish final graded slopes which do not exceed the approximate premining slopes". Although Bernos was the permittee, the record showed that "Excello was in complete charge of the operation of the subject mine...Excello leased the mine site from Bernos...extracted coal from the site...and performed all the reclamation work on the site...."

DIRECTOR, OFFICER OR AGENT OF A CORPORATION.

All of the ALJ decisions included here cite to U.S. v DIX FORK COAL CO., 692 F. 2d 436 (6th Cir., 1982) in defining "agent".

In DIX FORK, "the Court found that Section 521(c) of the Act, 30 U.S.C. Section 1271(c) authorized the issuance of an order against both a permittee and its agent. In order to reach this conclusion, the Court first had to define 'agent.' As the Act contained no definition of agent, the Court used what it considered to be an appropriate definition taken from the Coal Mine Safety and Health Act, 30 U.S.C. Section 801 et seq. There, agent is defined at 30 U.S.C. Section 802(e) as follows: 'Agent means any person charged with the responsibility for the operation of all or a part of a coal mine, or of the supervision of the miners in a coal mine.'"

Using this definition the Court found that an agent had been delegated the responsibility of insuring the permittee's compliance with the Surface Mining Act." GRUNDY MINING v OSM.

In GRUNDY, the ALJ held the "agent", another corporation, liable. He concluded: "[T]his case should not be construed to say that in an appropriate case the corporate veil of a particular permittee could not be pierced and some other person held liable for a civil penalty...The Act made no change in corporate law or corporate immunity, other than it did set its own criteria as to when an agent, director or officer of such corporation could be assessed a civil penalty in what is perhaps a contradiction of the general agency law."

THE DEFINITION OF "WILLFULLY AND KNOWINGLY".

The ALJ in BERNOS COAL v OSM utilized Black's Law Dictionary definition of the phrase: "consciously and intentionally." [NOTE: In BERNOS COAL, like GRUNDY, the "agent" was a corporation.]

In BANKS v OSM, the ALJ employed the "careless disregard" standard in ruling that OSM had successfully shown that Banks "knew that his conduct was prohibited by the Act or has demonstrated that [Banks] either intentionally disregarded the statute (Act) or was plainly indifferent to its requirements."



"Knowingly" was defined as "equivalent, for purposes of assessing civil penalties, to "knew or should have known."

STATE COURT AND STATE ADMINISTRATIVE DECISIONS

COLLEGE WATERCOLOR GROUP, INC. v WILLIAM H. NEWBAUER, INC. AND WILLIAM H. NEWBAUER, 468 Pa. 103, 360 A.2d 200 (Pa., 1976).

"The accepted rule in Pennsylvania is that a corporation is an entity distinct from its shareholders even if the stock is held entirely by one person."

ZUBIK v ZUBIK, 384 F.2d 267 (3rd Cir., 1967), cert. denied, 390 U.S. 988 (1968).

The court affirmed the judgments against the corporation and reversed those against the individual defendant. The court determined "that the corporation had a separate existence." Although much of the defendant's finances and activities were "intertwined with that of the corporation", the corporation was not found to be the "alter ego" of the defendant.

CHESTER-CAMBRIDGE BANK AND TRUST CO. v Rhodes, 346 Pa. 427, 31 A.2d 128 (Pa., 1943).

The officers of the trust company "at the most" could be "charged with nonfeasance, and not with misfeasance or malfeasance" in the "technical breach of trust by the corporate fiduciary". The court ruled "in this case...with nonfeasance, no individual liability attaches."

DONSCO, INC. v CASPER CORP., 587 F.2d 602 (3rd Cir., 1978).

The Casper Corporation was found liable for unfair competition and false advertising. Casper Pinsker, acting as agent for the corporation, authorized and approved the acts of unfair competition. "This is sufficient actual participation in the wrongful acts to make Pinsker individually liable."

"The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility."

"A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort."

"This liability is distinct from the liability resulting from the 'piercing of the corporate veil' as that term is commonly used. The effect of piercing a corporate veil is to hold the owner liable. The rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity. Pinsker is liable here as an actor rather than as an owner. His liability is in no way dependent on a finding that Casper Corporation is inadequately capitalized, that the corporation is a mere alter ego of Pinsker, that the corporate form is being used to perpetrate a fraud, or that corporate formalities have not been properly complied with."



WICKS v MILZOCO BUILDERS, INC., 503 Pa 614, 470 A.2d 86 (Pa., 1983).

The court held that a cause of action had been stated against the corporate officers of Milzoco Builders, Inc., the developers of Monroe Acres, "on the theory that they personally participated in the alleged tortious acts committed on behalf of the corporations."

"[T]he individual Apelles actually knew that the location of the proposed Monroe Acres Development created, at least, an unreasonable risk of the drainage problems which occurred and that, having the power to do so, they deliberately ordered the work to proceed."

"Pennsylvania law recognizes the participation theory as a basis of liability.

"The general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor; but that an officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done or participated, or cooperated therein...Liability under this theory attaches only where the corporate officer is an actor who participates in the wrongful acts. Therefore, corporate officers may be held liable for misfeasance...[C]orporate officers and directors may not be liable for mere nonfeasance."

U.S. v PARK, 421 U.S. 658 (1975).

This case involves the criminal prosecution of the President of Acme Markets, Inc. for violation of section 301(k) of the Federal Food, Drug, and Cosmetic Act (Act). Food shipments being held in Acme's Baltimore warehouse were exposed to rodent contamination.

"The Act imposes upon persons exercising authority and supervisory responsibility reposed in them by a business organization not only a positive duty to seek out and remedy violations but also and primarily, a duty to implement measures that will insure that violations will not occur." [This is labelled "statutory duty" in LUCKY STRIKE v DER, see below.]

"[T]he trial court's instructions were not misleading and provided a proper guide for the jury's determination. The charge adequately focused on the issue of respondent's authority respecting the conditions that formed the basis of the alleged violations, fairly advising the jury that to find guilt it must find that respondent "had a responsible relation to the situation"; that the "situation" was the condition of the warehouse; and that by virtue of his position he had "authority and responsibility" to deal therewith."

LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 119 Pa. Commw. 440, 547 A.2d 447 (Pa. Commw. Ct., 1988). DER v LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI, EHB Docket No. 80-211-CP-W, slip op. (Pa. EHB, 1987).

The Commonwealth Court upheld the Pennsylvania Environmental Hearing Board's (EHB) determination that Beltrami, President of Lucky Strike, was individually liable for civil penalties under the "common law theory of participation." Beltrami was "in charge of the day-to-day



operations of the sizing plant" and knew that the plant was discharging industrial waste, due to an inoperative pump, in violation of Pennsylvania's Clean Streams Law. The EHB found Beltrami "made a business decision to continue to operate the sizing plant, regardless of the polluttional consequences."

"This degree of activity is sufficient to hold Beltrami personally liable for all 23 discharges under common law. In any event, because of his relation to the situation, and by virtue of his authority as President and Chairman, the Board also would not hesitate to find Beltrami personally liable under the statutory-duty participation theory."

JOHN E. KAITES AND JOHNSTOWN COAL AND COKE, INC. v DER, 108 Pa. Commw. 269, 529 A.2d 1148 (Pa. Commw. Ct., 1987). JOHN E. KAITES et al. v DER, Docket No. 84-104-G, slip op. (Pa. EHB, 1986). JOHN E. KAITES et al. v DER, Docket No. 84-104-G, 1985 E.H.B. 625 (1985).

The Commonwealth Court reversed an EHB finding that Kaites, "as president and chief executive officer of Johnstown" was "individually responsible for complying with an abatement order issued by DER." Kaites and Johnstown Coal were cited for acid discharges in violation of the Pennsylvania Clean Streams Law (CSL) and the Coal Refuse Disposal Control Act (CRDCA).

"[W]e do not believe that [Kaites] may be held personally liable for violating the statutes absent some positive proof of wrongful conduct...Aside from inference and [Kaites'] status as a corporate officer, however, there is no specific evidence demonstrating [Kaites'] intentional neglect or misconduct which would support imposing individual liability on him for violating the CSL and CRDCA."

"[S]everal distinguishing factors exist between [U.S. v PARK] and the matter sub judice including the special nature of the public interest involved under the [Federal Food, Drug and Cosmetic Act (FFDCA)]. Though we recognize the high public interest which justifiably exists in abating acid mining discharges into the waters of this Commonwealth, we do not believe that Pennsylvania law supports application of the type of individual liability which the United States Supreme Court has interpreted the FFDCA, through a long line of cases, as requiring in the federal criminal law context. We conclude that, under Pennsylvania law, the public interest will not be violated by requiring specific evidence of acts of intentional neglect or misconduct before imposing individual liability on a corporate officer for abating a public nuisance under the CSL or CRDCA."

DER V BLACK CARBON FUEL, 86 C.D. 1987 (July 14, 1989).

The equity holding corporate officer was held personally liable for reclaiming an abandoned strip mine site based on the finding that the officer had "participated" in the violation: the individual had participated in establishing the mine. The individual "knew or should have known" that the mine had to be reclaimed. (Unpublished opinion.)



ATTACHMENTS

- A. KY. REV. STAT. ANN. Sec. 350.990(9) (Michie/Bobbs-Merrill 1988).
- B. 25 PA. CODE Sec. 86.1 (1982). Protection of Natural Resources. Definitions.
- C. Policy Statement of the Dept. of Environmental Resources: Civil Penalty Program (1985). Introduction.
- D. RUDOLPH WILLIAMS (LAKE COAL CO., INC.) v OSM, Docket No. NX 5-12-P (Sept. 23, 1986).
- E. BERT BANKS (LAKE COAL CO.) v OSM, Docket No. NX 5-14-P (Oct. 31, 1986).
- F. GRUNDY MINING CO. AND TENNESSEE CONSOLIDATED COAL CO. v OSM, Docket No. NX 1-146-P (June 14, 1985).
- G. BERNOS COAL CO. AND EXCELLO LAND MINERAL CORP. v OSM, Docket Nos. NX 1-118-R and NX 3-10-P (July 26, 1985).
- H. U.S. v DIX FORK COAL CO., 692 F.2d 436 (6th Cir., 1982).
- I. WILFORD NIECE v OSM, Docket No. NX 5-2-P (Oct. 27, 1986).
- J. COLLEGE WATERCOLOR GROUP, INC. v WILLIAM H. NEWBAUER, INC. AND WILLIAM H. NEWBAUER, 468 Pa. 103, 360 A.2d 200 (Pa., 1976).
- K. ZUBIK v ZUBIK, 384 F.2d 267 (3rd Cir., 1967), cert. denied, 390 U.S. 988 (1968).
- L. CHESTER-CAMBRIDGE BANK AND TRUST CO. v RHODES, 346 Pa. 427, 31 A.2d 128 (Pa., 1943).
- M. DONSCO, INC. v CASPER CORP., 587 F.2d 602 (3rd Cir., 1978).
- N. WICKS v MILZOCO BUILDERS, INC., 503 Pa 614, 470 A.2d 86 (Pa., 1983).
- O. U.S. v PARK, 421 U.S. 658 (1975).
- P. LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 119 Pa. Commw. 440, 547 A.2d 447 (Pa. Commw. Ct., 1988).
- Q. DER v LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI, EHB Docket No. 80-211-CP-W, slip op. (Pa. EHB, 1987).
- R. JOHN E. KAITES AND JOHNSTOWN COAL AND COKE, INC. v DER, 108 Pa. Commw. 269, 529 A.2d 1148 (Pa. Commw. Ct., 1987).
- S. JOHN E. KAITES et al. v DER, Docket No. 84-104-G, slip op. (Pa. EHB, 1986).
- T. JOHN E. KAITES et al. v DER, Docket No. 84-104-G, 1985 E.H.B. 625 (1985).
- U. DER v BLACK CARBON FUEL, 86 C.D. 1987 (July 14, 1989).