

INTERIOR BOARD OF LAND APPEALS

Gary N. Cobb

v.

Office of Surface Mining Reclamation and Enforcement

143 IBLA 274 (April 8, 1998)

Title page added by:
ibiadecisions.com

GARY N. COBB
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-515

Decided April 8, 1998

Appeals from a decision of Administrative Law Judge David Torbett affirming in part and reversing in part a decision by the Acting Director, Office of Surface Mining Reclamation and Enforcement, that an individual owned or controlled a company engaged in surface coal mining operations.

Affirmed in part as modified, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Ownership and Control

The OSM properly determines that an individual "owned or controlled," within the meaning of 30 C.F.R. § 773.5(b), a corporate entity engaged in surface coal mining operations, when the individual fails to rebut the presumption of ownership or control that derived from his status as director, officer, and record owner of 50 percent of the shares of the company.

2. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Ownership and Control

The presumption that an individual owned or controlled a corporation, based on evidence of various factors set forth in 30 C.F.R. § 773.5(b), cannot be rebutted by evidence that the individual terminated his employment with the corporation and, thereafter, did not exercise control over the corporation, when the record shows that he continued to have the ability to control the corporation.

APPEARANCES: Herschel W. Cleveland, Esq., Paris, Arkansas, for Gary N. Cobb; Mary Ellis Richardson, Esq., and John Austin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

In a Decision dated May 10, 1993, the Acting Director, Office of Surface Mining Reclamation and Enforcement (OSM), held that Gary N. Cobb owned or controlled Midwest Coal and Energy Corporation (Midwest), within the meaning of 30 C.F.R. § 773.5, and that certain surface coal mining permits issued to corporations owned or controlled by Cobb were improvidently issued or transferred in error.

Cobb appealed that Decision to this Board and the appeal was docketed as IBLA 93-415. By Order dated June 25, 1993, the Board referred the question of whether Cobb owned or controlled Midwest, and all related matters, to the Hearings Division, Office of Hearings and Appeals (OHA), for a hearing and issuance of an initial decision subject to appeal to this Board. 1/

In a March 14, 1994, Decision, Administrative Law Judge David Torbett found that Cobb owned or controlled "Midwest and Poteau Corporations" and that Cobb was properly listed in OSM's Applicant Violator System (AVS); 2/ however, he ruled that the period of ownership or control ended on May 31, 1979. (Decision at 13-14.) Judge Torbett made no ruling regarding the Acting Director's holding that certain surface coal mining permits had been improvidently issued or transferred to corporations owned or controlled by Cobb, and, thus, that issue is not before us.

Cobb and OSM have each appealed Judge Torbett's Decision. Cobb takes issue with the findings on ownership and control. The OSM charges that Judge Torbett erred in ruling that the period of ownership or control ended on May 31, 1979.

Factual Background

In 1978 and 1979, Midwest engaged in surface coal mining operations on 34.76 acres of land in Sebastian County, Arkansas, as the permittee and operator under surface coal mining permit No. 189 (Kimwyn No. 5 Mine), and as the operator for Poteau on two other surface coal mining permits,

1/ Under the current regulatory scheme, requests for review of OSM ownership and control decisions are filed with the Hearings Division, OHA. 43 C.F.R. § 1381. Any party may file a petition for discretionary review by this Board of the decision issued by an administrative law judge in such a case. 43 C.F.R. § 4.1387.

2/ The AVS is a computerized system, established and maintained by OSM, that identifies and tracks ownership and control links. See *Pittston Co. v. Lujan*, 798 F. Supp. 344, 345 (W.D. Va. 1992), *aff'd*, 66 F.3d 714 (4th Cir. 1995). The system allows OSM or a state regulatory authority to "block" issuance of a permit to an applicant where there is an identified link between the applicant and anyone with an outstanding SMCRA violation, or unpaid civil penalties or abandoned mine land (AML) reclamation fees. See *Fincastle Mining, Inc. v. Babbitt*, 842 F. Supp. 204, 206 (W.D. Va. 1993). It also allows OSM or the state, based on AVS links, to suspend or rescind improvidently issued permits.

No. 194 (Kimwyn No. 6 Mine), and No. 8-79-212 (Kimwyn No. 7 Mine). ^{3/} Midwest shut down all of its mining operations in October 1979 and declared bankruptcy.

In 1979, OSM issued several notices of violation (NOV's) and failure-to-abate cessation orders (CO's) for various violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (1994), and its implementing regulations, that arose as a result of Midwest's mining activities at the Kimwyn Nos. 5, 6, and 7 mines. ^{4/} Following issuance of the NOV's and CO's, OSM assessed Midwest civil penalties, but the company failed to pay them. In addition, Midwest failed to pay AML fees that accrued as a result of its surface coal mining operations. The United States secured judgments against Midwest in the U.S. District Court for the Western District of Arkansas (Docket Nos. 81-2128 and 81-2202) for those unpaid civil penalties and AML fees.

On February 25, 1983, Cobb, acting through a corporate entity, Seven C's Construction, Inc. (Seven C's), applied to ADPCE for a permit (No. P-334-M-CO) to conduct surface coal mining operations. ^{5/} By letter dated March 30, 1983, OSM recommended that ADPCE deny the permit application "because of Mr. Cobb's former official association and shareholder interest in Midwest Coal Company," which was responsible for "unabated violations." (OSM Ex. 22 at 1.) The OSM stated that it had evidence that "Mr. Cobb's official involvement with [Midwest] extends well beyond the July 1, 1979, date of his claimed resignation as vice president of th[e] company." Id. The OSM later withdrew its objection to issuance of the permit. (Tr. 178-79, 407.) And, on August 5, 1983, ADPCE issued the permit, with the following condition:

This permit is being issued in the shadow of a controversy between [OSM] * * * and Gary Cobb, the principal. However, the nature and history of the immediate and surrounding area indicates the area is in dire need of complete reclamation, which can

^{3/} The State of Arkansas Department of Pollution Control and Ecology (ADPCE) issued the permits on June 19, 1978, Aug. 8, 1978, and July 6, 1979, respectively.

^{4/} The NOV's and CO's that were issued are as follows: NOV and CO No. 79-4-3-4, issued Apr. 10, and July 25, 1979 (Permit No. 189); NOV No. 79-4-3-10 and CO No. 79-4-12-1, issued July 25, and Sept. 19, 1979 (Permit No. 8-79-212); NOV No. 79-4-12-3, issued Aug. 30, 1979 (Permit No. 8-79-212); NOV No. 79-4-12-6, issued Sept. 19, 1979 (Permit No. 8-79-212); and NOV No. 79-4-12-7 and CO No. 79-4-12-2, issued Sept. 19, and Oct. 31, 1979 (Permit No. 194).

^{5/} Cobb and his wife, Jonita Cobb, were the principal shareholders of Seven C's, which had been incorporated in the State of Arkansas on Nov. 10, 1982. (OSM Ex. 14 at 10.) They were also the sole members of its Board of Directors and, respectively, President and Vice-President. (OSM Ex. 14 at 10.)

best be accomplished by issuing this permit with the understanding that no future permits will be granted as long as a controversy exists between Gary Cobb and OSM.

(OSM Ex. 14 at 8.)

The ADPCE issued another permit (No. P-390-M-CO) to Seven Cs on August 26, 1988, and, effective January 23, 1990, ADPCE also approved the transfer of renewed permit No. P-328-M-CO to United States Energy Resources, Inc. (U.S. Energy), of which Cobb, at that time, was owner.

The OSM later determined, as explained in the Acting Director's Decision at 5, that all three permits had been issued or transferred in error because of Cobb's link to Midwest.

The OSM notified Cobb, by letter dated December 23, 1991, that he was presumed to "own or control" Midwest. (Administrative Record at 0073.) ^{6/} The OSM afforded Cobb an opportunity to rebut the presumption. He responded, submitting a considerable amount of material, including an October 21, 1982, affidavit in which he stated that he was an officer of Midwest until "[o]n or about July 1, of 1979," surrendered all of his stock in the corporation "[i]n September of 1979," and thereafter "had no further relationship with the corporation as an officer, agent, owner, or employee." (Administrative Record at 0063.)

After reviewing the materials submitted, OSM notified Cobb, by letter dated June 16, 1992, that he had failed to rebut the presumption that he owned or controlled Midwest throughout the period of his affiliation with the company, but that October 10, 1979, the date of a minesite hearing, would be considered the date his ownership or control ceased. ^{7/} The letter stated: "We agree that you terminated your association with this entity. We propose an ending date, for purposes of the Applicant/Violator System, of October 10, 1979, which is the last date we can place you on the site." (Administrative Record at 0037-0038; see also Tr. 232-33.) The OSM also afforded Cobb an additional opportunity to rebut the presumption. He responded on July 14, 1992, asserting that OSM was barred from pursuing him because it had "elected its remedy" by suing Midwest. (Administrative Record at 0021.)

^{6/} The "Administrative Record" is a single bound compilation of documents described therein as documents "supporting the Agency's final decision of May 10, 1993." It was not introduced as an exhibit at the September 1993 hearing, but is considered part of the administrative record in this case. Since the document is paginated, citations will be by page number.

^{7/} The OSM apparently arrived at this date based on an Oct. 10, 1979, report to "OSM Files" discussing a minesite hearing held on that date in connection with SMCRA violations at the Kimwyn Nos. 6 and 7 mines. (OSM Ex. 7E.)

In his Decision dated May 10, 1993, the Acting Director, OSM, found that Cobb was a 50-percent shareholder, an officer, a director, and mine superintendent of Midwest; that Midwest was an operator on Poteau permit Nos. 194 and 8-79-212; that October 10, 1979, was the ending date of Cobb's relationship with Midwest; that reclamation fees were owing from coal produced prior to July 1, 1979, from a mine operated by Midwest; and that NOV's and CO's were issued to Midwest's permit No. 189 and to Poteau's permit Nos. 194 and 8-79-212 prior to October 10, 1979. The Acting Director concluded that Cobb was linked to Midwest, pursuant to 30 C.F.R. §§ 773.5(b)(1) and 773.5(b)(5), as an owner and controller and that Midwest was a violator responsible for unpaid AML fees; that Cobb was linked to Midwest, pursuant to 30 C.F.R. §§ 773.5(b)(1) and 773.5(b)(5), as an owner or controller and that Midwest was a violator responsible for unpaid civil penalties for the NOV's and CO's issued prior to October 10, 1979; and that Cobb was linked to Midwest, pursuant to 30 C.F.R. §§ 773.5(b)(1), 773.5(b)(2), and 773.5(b)(5), as an owner or controller and that Midwest, as an operator on Poteau's permit Nos. 194 and 8-79-212, was a violator responsible for unpaid civil penalties for NOV's and CO's issued to the above-mentioned permits before October 10, 1979. He also concluded, based on Cobb's relationship to Midwest, that two permits (Nos. P-334-M-CO and P-390-M-CO) were improvidently issued to Seven Cs and permit No. P-328-M-CO was transferred in error to U.S. Energy.

On appeal, Judge Torbett found, in his March 14, 1994, Decision that "[t]here is no doubt that, at one time, [Cobb] was an officer, director, and shareholder of Midwest." (Decision at 10.) However, much of Judge Torbett's discussion in his Decision centered on an analysis of when Cobb's relationship with Midwest terminated. He found that "[t]estimony and physical evidence demonstrate that [Cobb] was not on the mine site or connected with Midwest as an officer or director after May of 1979." *Id.* at 12. Judge Torbett determined that Cobb's continued interest in the corporation as a shareholder was not sufficient to link him to the company because Cobb "did not exercise control over the company through his role as a stockholder." *Id.*

Judge Torbett further found that "Midwest was the operator on the Poteau mine sites," but that because the violations at those minesites, which resulted in civil penalties, occurred after Cobb "left Midwest by the end of May 1979, Cobb could not "be held responsible for violations which occurred after that date." (Decision at 13.)

Finally, Judge Torbett denied a motion to dismiss filed by Cobb, which was, in essence, a request for summary disposition of the case, because OSM allegedly failed to notify Cobb of the CO's issued to Midwest, as required by 30 C.F.R. § 843.11(g). That regulation requires that OSM provide written notice within 60 days of issuing a CO to any person identified as an owner or controller under 30 C.F.R. §§ 773.17(i) and 778.13(c). Judge Torbett pointed out that 30 C.F.R. § 773.17(i) specifically refers to 30 C.F.R. § 843.11, a permanent program regulation. He concluded that the

written notice requirement of that permanent program regulation did not apply to CO's such as those in this case, which had been issued under the interim program.

In his appeal, Cobb states that it is his "contention that the issue of ownership and control is not relevant because the Government failed to provide notices required by 30 C.F.R. 843.11(g)." (Cobb Brief at 3.) He asserts that Judge Torbett erred in denying his motion to dismiss for lack of notice because there is no evidence in the record that during the time in question "the Federal Government was operating the program on an inter[i]m basis." (Cobb Brief at 8.) In the alternative, he argues that he did not own or control Midwest and/or Poteau. Although he acknowledges that Midwest was an operator of Poteau, Cobb contends that he was merely an employee of Midwest and had no control over any of its operations. He argues that the record shows that he rebutted the presumption that he was an owner or controller of Midwest. He states that "Judge Torbett did not err in holding Gary Cobb's ending date with Midwest was May 31, 1979." (Cobb Brief at 7.)

In its appeal, OSM states that Judge Torbett properly held that Cobb was an owner or controller of Midwest and an owner or controller of Poteau. However, OSM alleges that Judge Torbett erred in finding that Cobb's relationship with Midwest terminated at the end of May 1979. The OSM asserts that the evidence in the case shows that, as a 50-percent shareholder in Midwest, Cobb was an owner and controller of Midwest, even beyond the date (October 10, 1979) found by the Acting Director, OSM, "through the date of the hearing." (OSM Brief at 28.)

On January 31, 1997, the United States Court of Appeals for the District of Columbia issued a decision in National Mining Association v. United States Department of the Interior, 105 F.3d 691 (D.C. Cir. 1997), which involved, inter alia, a challenge to OSM's ownership and control rule. The Court described the rule, as follows at page 693:

In 1988, OSM issued the ownership and control rule. See 53 Fed. Reg. 38,868 (1988); see also 30 C.F.R. § 773.5, 773.15(b). Section 773.5 states that certain relationships constitute ownership and control of mining operations and that other relationships are presumed to constitute ownership or control. See 30 C.F.R. § 773.5. Under section 773.15(b)(1), if OSM or the state regulatory authority concludes that "any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant" is currently in violation of SMCRA, it "shall not issue the permit." Id. § 773.15(b)(1). Together, these regulations "track ownership up and down a corporate chain," 53 Fed. Reg. at 38,875-- as well as across the chain--so long as control is present.

The Court found that in section 510(c) of SMCRA, 30 U.S.C. § 1260(c) (1994), Congress spoke precisely to the question at issue—namely, whose violations are relevant before an applicant's permit can be blocked. On this question, therefore, there is no gap for the agency to fill—once OSM (or the state regulatory authority) has determined who the "applicant" is, it may only consider the violations of operations owned or controlled by the applicant. The ownership and control rule, however, sweeps much more broadly, blocking permits if an operation owned or controlled "by either the applicant or by any person who owns or controls the applicant" is currently in violation of SMCRA, 30 C.F.R. § 773.15(b)(1) (emphasis added). Because the ownership and control rule conflicts with the plain meaning of section 510(c), it is unlawful.

Id.

Thereafter, on March 28, 1997, the United States Court of Appeals for the District of Columbia denied petitions for rehearing in the National Mining Association case. On April 21, 1997, OSM issued an interim final rule, effective April 3, 1997, inter alia, to "cure" the "defect" in the ownership and control rule identified by the Court. 62 Fed. Reg. 19450 (Apr. 21, 1997).

In an Order dated June 5, 1997, this Board directed OSM to brief the Board on the effect of the National Coal Association decision and OSM's subsequent rulemaking on this case. The OSM responded by asserting that

[n]one of the issues reviewed by Judge Torbett or appealed to the Board by either of the parties are affected by the National Mining decision or by the new ownership and control regulations. Simply put, the National Mining decision and the April 21, 1997 changes to the ownership and control regulations only affect matters that occur after the ownership and control determination is made by OSM and reviewed administratively by OHA.

(OSM Response at 3.) Cobb disagrees, asserting that the National Coal Association case "is directly on point in the case at bar." (Cobb Response at 2.) 8/

[1] Section 510(c) of SMCRA, 30 U.S.C. § 1260(c) (1994), requires that, as a condition of obtaining a new surface coal mining permit, a permit applicant must submit proof that any existing SMCRA violation, caused by surface coal mining operations, which it "owned or controlled," has

8/ The OSM filed a motion seeking leave to reply to the Response filed by Cobb. The OSM filed its reply with its motion. The motion is granted and the reply is included as part of the record in this case.

been corrected or is in the process of being corrected, to the satisfaction of the appropriate regulatory authority. The effect of section 510(c) of SMCRA, and its implementing regulations, is not to make an applicant personally liable for the SMCRA violation, including any unpaid civil penalties and AML fees, of another individual or entity, but rather, by withholding a permit, to provide a powerful incentive for the applicant, who is deemed partially responsible by virtue of ownership or control of the offending party at the relevant time, to remedy the violation. See 53 Fed. Reg. 38868-75 (Oct. 3, 1988); Arch Mineral Corp. v. Babbitt, 894 F. Supp. 974, 986 (S.D. W. Va. 1995), appeal pending, No. 95-2793 (4th Cir. Sept. 27, 1995). ^{9/}

What constitutes ownership or control by an applicant is defined by 30 C.F.R. § 773.5, which provides that "[o]wned or controlled and owns or controls mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition." ^{10/} Paragraph (a) of 30 C.F.R. § 773.5 identifies those relationships that are conclusively deemed to constitute ownership or control. That paragraph is not at issue in this case; paragraph (b) is.

Paragraph (b) sets forth relationships that create a rebuttable presumption that an applicant "owns or controls" an individual or entity. It provides:

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(1) Being an officer or director of an entity;

^{9/} It is clear that Judge Torbett erred in his decision when he stated that, by linking Cobb to Midwest, OSM was attempting to "hold [Cobb] personally liable for a debt [Midwest's unpaid civil penalties and AML fees] not discharged in his bankruptcy." (Decision at 13.) In its brief, OSM states that "[a]s a matter of law and regulation, OSM is not attempting to hold Mr. Cobb personally liable for a debt or personally responsible for a liability of Midwest." (OSM Brief at 21-22.) Judge Torbett's Decision is modified accordingly.

^{10/} Following issuance of the National Mining Association decision, OSM issued its interim final rule, effective Apr. 3, 1997. It repromulgated 30 C.F.R. § 773.5 without any change, reasoning in the preamble that "the definition itself presents no conflict with the court's interpretation of section 510(c) of the [SMCRA]." 62 Fed. Reg. 19452 (Apr. 21, 1997). It further stated: "The rationale for the text of the definition is set forth in detail in the preamble to the 1988 rulemaking at 53 FR 38868-80 (October 3, 1988)." Id.

- (2) Being the operator of a surface coal mining operation;
- (3) Having the ability to commit the financial or real property assets or working resources of an entity;
- (4) Being a general partner in a partnership;
- (5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or
- (6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

"Paragraph (b) of the definition includes those persons, who by virtue of their relationship to an entity, would ordinarily be in a position to exercise control over that entity." 53 Fed. Reg. 38871 (Oct. 3, 1988). Where one or more of the relationships set forth in paragraph (b) exists, a presumption arises, and the ultimate burden to overcome the presumption is on the party challenging it. *Id.* It may do so by presenting a preponderance of evidence. See James Spur, Inc. v. OSM, 133 IBLA 123, 178, 102 Interior Dec. 32, 59 (1995). 11/

The evidence in the record shows the following regarding Cobb's relationship to Midwest. 12/ Midwest was originally incorporated in the State

11/ The OSM petitioned for review by the Director, Office of Hearings and Appeals, of the Board's Spur Decision. On April 15, 1996, Director Barry Hill issued a Decision, James Spur, Inc. v. OSM, 12 OHA 133, 103 I.D. ____ (1996), affirming Spur. Subsequently, Solicitor John D. Leshy issued an M-Opinion on Dec. 5, 1996, concurred in by the Secretary, modifying in part the Director's Spur Decision, stating that "some of the reasoning contained in the opinion is flawed * * * and should not be followed in future applications except consistent with the analysis provided below." The Solicitor's analysis related to 30 C.F.R. § 773.5(b)(6), which he referred to as the "contract mining" provision of the rules. Paragraph (b)(6) is not at issue in the present case.

12/ The OSM determined that there was an "ownership or control link" from Cobb to Midwest and Poteau. Cobb's link to Poteau was based on his link to Midwest and, in turn, its link to Poteau, which was based on the presumption arising from Midwest's status, now admitted by Cobb, as the "operator" under Poteau's permits. 30 C.F.R. § 773.5(b); see Acting Director's Decision at 4, 6; Cobb Appeal Brief at 7, 14-16. The OSM held that this presumption had not been rebutted by Cobb, noting that he had made no effort to do so: "No evidence was presented to show that Midwest was not an owner or controller of the Poteau permits." (Acting Director's Decision at 4.) Thus, Judge Torbett properly concluded that Midwest owned or controlled Poteau. We focus on Cobb's relationship to Midwest.

of Arkansas on March 23, 1977, by James Gunnells and Cobb, who elected themselves the corporation's first Board of Directors. (OSM Ex. 1 at 2-3; see also Tr. 51, 417.) According to Midwest's "By-Laws," the Board of Directors had "general control of the property and business" of the corporation. (OSM Ex. 1 at 8.) The officers of the corporation were: Gunnells, President; Cobb, Secretary/Treasurer; and Richard Carpenter, the corporation's attorney, Vice President. (OSM Ex. 1 at 5.) 13/ See also Tr. 51, 417. Gunnells and Cobb each received 50 percent (500 shares) of the total outstanding shares of the company. (OSM Ex. 1 at 6, 22, 23; Tr. 51; Administrative Record at 0089.) 14/ At the first annual meeting of the shareholders on April 15, 1978, Gunnells and Cobb, according to the minutes of that meeting, reelected themselves to the Board. (OSM Ex. 1 at 21.) Thus, it is clear, as Judge Torbett found, that Cobb was, at one time, a 50-percent shareholder, a director, and an officer of Midwest.

Judge Torbett also found, however, that Cobb was "not * * * connected with Midwest as an officer or director after May of 1979." (Decision at 12.) He also ruled that while Cobb retained his 50-percent stockholding in Midwest, Cobb "did not exercise control over the company through his role as stockholder," and, thus, was an owner or controller of Midwest only through the last day of May 1979. Id. at 12-13. We conclude, for the following reasons, that Judge Torbett erred in establishing the ending date for Cobb's relationship with Midwest.

Much of the testimony in the record regarding when Cobb terminated his relationship with Midwest relates not to his status as an officer or director of the company but to Cobb's status as an employee of the company. Emma Jennings, who had worked as Midwest's secretary in its main offices in Fort Smith, Arkansas, from February 1978 until she herself quit before the end of June 1979, testified that Cobb quit a few weeks before she did. (Tr. 375-76, 379-80, 382-83; see also Administrative Record at 0065, 0130.) L.B. Gilbow, an employee of Midwest, placed it "on or about the middle of June, 1979." (Administrative Record at 0134.) Floyd G. Durham, Chief, Surface Mining and Reclamation Division, ADPCE, in 1979 and at the time of the hearing, testified that Cobb quit in the summer 1979. (Tr. 164- 65, 194.) Also, the record contains a May 30, 1979, report by Donna J. Griffin, an OSM inspector, regarding a May 16, 1979, inspection of one of Midwest's mines, which states: "No company personnel were present; the superintendent has resigned, and the acting superintendent was unavailable." (Cobb Ex. 12 at 1.) Gunnells testified that Cobb would have been

13/ There is evidence that Cobb also assumed other roles as an officer of the corporation. Thus, at various times in 1978 and later, he personally held himself out to be Vice President. See OSM Ex. 4 at 5; OSM Ex. 13B; Administrative Record at 0058.

14/ Midwest was authorized, by its articles of incorporation, to issue 10,000 shares of stock. (OSM Ex. 3 at 3.) However, Gunnells testified that there were never any more than 1,000 shares outstanding, and that no shares were ever held by anyone other than he and Cobb. (Tr. 51.)

the superintendent who had resigned. (Tr. 74.) Thus, the record supports a finding that Cobb quit his employment with Midwest at the latest by May 31, 1979.

However, such a finding is not dispositive of when he resigned as an officer and/or a director of Midwest. Despite a claim by Cobb in an affidavit dated October 21, 1982, that he submitted, "on or about July 1, 1979," his "written notice of resignation as an officer of the corporation" (OSM Ex. 14 at 2), he testified at the hearing that he did not do so in writing. (Tr. 419.) Rather, when asked when he resigned as a director and an officer, Cobb testified that he verbally told Gunnells in May 1979 simply that he "quit everything." (Tr. 419.) Cobb fixed the date as "right around between the 1st and 15th of May. First part of May." (Tr. 411.) Thus, Cobb contends, and Judge Torbett found, that his resignation as an officer and director of Midwest coincided with his termination of employment. Our review of the record does not support Cobb's contention or Judge Torbett's finding.

Judge Torbett stated that "[t]estimony and physical evidence demonstrate that the Applicant was not on the mine site or connected with Midwest as an officer or director after May of 1979." (Decision at 12.) However, OSM points to the October 1, 1982, Cobb affidavit, which Cobb submitted in conjunction with Seven C's 1983 permit application in which Cobb stated that "[o]n or about July 1, of 1979," he submitted his written notice of resignation as an officer of Midwest; that he had no managerial responsibility or control of the affairs of Midwest after that date; that he had "surrendered" all this stock back to Midwest in September 1979, as evidenced by an attached letter; and that after September 1979, he had no further relationship with Midwest as an officer, agent, owner, or employee. (OSM Ex. 14 at 2.) 15/

We agree with OSM that this 1982 affidavit should be given more weight than Cobb's testimony at the hearing regarding a date at which he terminated his role as an officer and/or director of Midwest. It is more likely than not that Cobb's recollection regarding termination of his relationship was clearer 3 years thereafter than at the time of the hearing, 14 years later. Moreover, at the time he prepared his 1982 affidavit he was not

15/ The letter referred to by Cobb, addressed to Gunnells and dated Sept. 1, 1979, did not amount to a surrender. Rather, it advised Gunnells of Cobb's offer to sell his stock to Gunnells at a predetermined price. (Administrative Record at 0064.) There is no evidence in the record that the stock was ever sold to Gunnells or anyone else. In fact, in a 1983 personal bankruptcy petition, Cobb listed the stock among his assets, although he assigned it a value of \$0. See Decision at 13.

attempting to rebut an AVS link. In addition, in a July 7, 1983, deposition given by Cobb in connection with two civil suits against Midwest, he stated, in response to the question of when he departed the company: "The first part of July 1979." (Administrative Record at 0090.) Also, his wife prepared an affidavit in 1983 addressing Cobb's cessation of employment with Midwest. (OSM Ex. 26.) She stated therein that he terminated his employment in early July 1979. She did not distinguish therein between his roles as employee, officer, director, and shareholder of Midwest. Nevertheless, the affidavits support a finding of ownership or control beyond the date selected by Judge Torbett.

[2] Regarding Cobb's stock ownership, OSM argues that the Judge properly recognized that there was a rebuttable presumption that Cobb's ownership or control continued after May 31, 1979, by virtue of his continued ownership of 50 percent of the stock of Midwest. However, OSM asserts that the Judge erroneously concluded that Cobb had rebutted that presumption where there was no proof that he had ever actually exercised authority to determine the manner in which mining operations were conducted through his stockholder interest. Rather, OSM argues that this presumption could only be rebutted by proof that Cobb lacked the authority itself, and states that not only was there no such proof, but that the evidence was to the contrary.

We clearly rejected in James Spur, Inc. v. OSM, 133 IBLA at 181, 102 I.D. at 61, the assertion that the "authority to determine the manner in which mining operations were conducted must have been exercised in order for there to have been `control,'" and thus held that the Administrative Law Judge had applied an "incorrect standard of law" where he had required such a showing. Rather, we held: "The regulation is clear that it is enough that the party have `authority' to take such action. It is not required that such authority actually have been exercised." Id.

In arguing that Judge Torbett utilized an incorrect standard in this case, OSM refers to the following passage in his decision:

The undersigned finds that Applicant did not exercise control over the company through his role as stockholder. Gunnells' attitude toward Cobb's power as a stockholder is demonstrated by the fact that he cut off all communication with Applicant after Applicant quit in [May] 1979. There is no record of a shareholder's meeting in 1979 or at anytime before the company declared bankruptcy. Gunnells testified that he did not see Cobb and did not inform him that the company was about to declare bankruptcy. It is clear that Cobb had no influence over Midwest from the day he quit.

(Decision at 12-13 (emphasis added).) The OSM makes particular reference to the underscored language. See OSM Brief at 18. This language clearly refers to Cobb's failure to exercise control over Midwest through his role as a shareholder. However, it is wrong to state that the Judge looked only

at whether Cobb actually exercised control. The concluding sentence in the quoted passage reflects the Judge's finding that Cobb lacked such authority, or "influence," as demonstrated by all the evidence that, after Cobb quit in May 1979, Gunnells effectively precluded his ability to exert any authority, by not involving him at all in any company affairs. Thus, we conclude that Judge Torbett did evaluate the evidence based on the proper legal standard.

The only question is whether his evaluation of the evidence was flawed when he found, essentially, that Cobb no longer had the ability to control Midwest after he severed his relationship with the company in 1979. We hold that he made a proper evidentiary finding with regard to Cobb's ability, but not as to the date. The record taken as a whole demonstrates that Cobb lost any ability to control Midwest in 1979. However, based on our discussion above, and for the following reasons, we date that loss of control from October 10, 1979, rather than May 31, 1979, as ruled by Judge Torbett.

The record contains a report to "OSM Files," dated October 10, 1979, by Earl Bandy, Jr., an OSM Reclamation Specialist (OSM Ex. 7E), discussing a minesite hearing that occurred that day at two sites, the Kimwyn #6 mine and the Kimwyn #7 mine, regarding violations at those minesites. The report lists Gunnells "(Supt.)," Cobb ("stockholder"), and three other individuals as the "Co. Representatives" attending the hearing, along with two OSM officials and three representatives of the state regulatory authority. *Id.* at 1. Attached to the report of the minesite hearing is a sign-up sheet bearing the signatures of each of those 10 individuals listed in the report. The sheet bears the signature "Gary N. Cobb," next to which appears, in the same handwriting, the designation "Stockholder." *Id.* at 3. The report does not record any statement made by Cobb, but this is understandable considering that it notes, at the outset, that Gunnells was the "spokesman for the company." *Id.* at 1. Although Bandy testified at the hearing in 1993 that he had no independent recollection of Cobb's presence at the 1979 minesite hearing (Tr. 257-58), he stated that, based on his review of the records of that minesite hearing in preparation for the hearing, Cobb "had signed in as shareholder." (Tr. 234.) Cobb states that he was not there, and denies signing the sheet. (Tr. 408-09.) Despite Cobb's denial, a comparison of the Cobb signature on the minesite hearing sign-up sheet with other documents in the case record, on which his signature appears, clearly shows that the signature on the minesite hearing sign-up sheet is his. *See* Tr. 302-303.

The minesite hearing report and sign-up sheet are persuasive evidence that contradicts Judge Torbett's statement that "Gunnell's attitude toward Cobb's power as a stockholder is demonstrated by the fact that he cut off all communication with Applicant after Applicant quit in 1979." (Decision at 12.) It is clear that Gunnells did not "cut off all communication" with

Cobb, having decided to attend the October 10, 1979, minesite hearing. Accordingly, we reverse Judge Torbett's finding on the date of loss of control. 16/

Cobb alleges that ownership and control is not even an issue in this case because Judge Torbett erred in denying his motion to dismiss OSM's finding of an AVS link, on the basis that OSM had failed, as required by 30 C.F.R. § 843.11(g), to notify him in writing, within 60 days of issuance of the CO's, that they had been issued and that he had been identified as an owner or controller. As noted above, Judge Torbett did so based on his conclusion that such notice was not required by that permanent program regulation because the CO's were issued in 1979 under the interim program regulations, and the interim program regulations did not require such notice.

The notice requirement is found only in the inspection and enforcement procedural regulations (30 C.F.R. Subchapter L) of the permanent program. The State of Arkansas permanent program was approved on January 22, 1982. 30 C.F.R. § 904.10. The CO's in this case were issued prior to that date. As a matter of law, the permanent program requirements apply only to cessation orders issued after adoption of the permanent program. The CO's in this case were issued under the interim program. As such, they were subject to the interim program regulations. Those regulations did not include a notice requirement such as that included in 30 C.F.R. § 904.10.

Cobb complains that there is no evidence in the record that OSM was operating the program on an interim basis. The OSM was not required to introduce evidence at the hearing concerning the date that the State of Arkansas adopted the permanent program. That date is found in the regulations and all persons are deemed to have knowledge of the Department's regulations. See Donaldson Creek Mining Co. v. OSM, 111 IBLA 289, 296 (1989), aff'd, No. 89-0314-P (CS) (W.D. Ky. July 18, 1991). Judge Torbett properly denied Cobb's motion to dismiss. 17/

Cobb has raised various issues related to due process, laches, or estoppel contending that a combination of those doctrines precludes a finding that he owned or controlled Midwest. Cobb had ample opportunity before Judge Torbett and this Board to present his case challenging OSM's determination of ownership or control. To the extent his due process

16/ We find no support for extending the date of control to the date of the hearing as urged by counsel for OSM.

17/ The OSM has moved to strike Cobb's "Appeal Brief," alleging that it was not filed, as required by 43 C.F.R. § 4.1273(a), on or before 30 days after he filed a notice of appeal, and no extension of time had been granted. It also seeks to strike the cover letter that accompanied Cobb's appeal brief. There is no evidence that OSM was prejudiced by those filings. The motion to strike is denied.

arguments raise constitutional questions, this Board is not the proper forum to rule on those questions. Slone v. OSM, 114 IBLA 353, 357-58 (1990). Laches is not applicable in this case. See United States v. Summerlin, 310 U.S. 414, 416 (1940); Fremont Coal Co. v. OSM, 135 IBLA 94, 99 (1996). And, we find no affirmative misconduct by OSM in this case, which would be critical to invoking estoppel. See Schweiker v. Hansen, 450 U.S. 785, 788-89 (1981); United States v. River Coal Co., 748 F.2d 1103, 1108 (6th Cir. 1984); McNabb Coal Co. v. OSM, 105 IBLA 29, 37 (1988).

Finally, we find that the Decision in National Mining Association does not control any of the issues related to ownership or control under 30 C.F.R. § 773.5 raised on appeal in this case. Whether or not that Decision would affect the determination of the Acting Director, OSM, in this case that certain surface coal mining permits issued to corporations owned or controlled by Cobb were improvidently issued or transferred in error is not before us.

We conclude that Judge Torbett properly upheld OSM's determination that Cobb owned or controlled Midwest and Poteau, within the meaning of 30 C.F.R. § 773.5, but that his ruling that such ownership or control ended on May 31, 1979, must be reversed because the record shows that Cobb had the ability to control Midwest, within the meaning of the regulation, up to and including October 10, 1979. 18/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part, as modified, and reversed in part.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

T. Britt Price
Administrative Judge

18/ Cobb requested oral argument in this case. Because we believe the positions of the parties were adequately presented in their written submissions, we conclude that no useful purpose would be served by granting oral argument. The request is denied.