FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	
Petitioner,	)	
	)	Docket No. LAKE 2010-128-M
v.	)	
BILL SIMOLA, employed by UNITED TACONITE LLC,	)	
Respondent.	)	

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF THE ISSUE PRESENTED

Whether the judge properly accepted the Secretary's interpretation of Section 110(c) of the Mine Act as applying to agents of limited liability companies.

STATEMENT OF THE CASE

A. Factual and Procedural Background

On October 1, 2008, MSHA issued two citations to United Taconite, LLC ("United Taconite") alleging significant and substantial violations of 30 C.F.R. § 56.11001 and 30 C.F.R. § 56.14107(a). MSHA alleged that the violations were the result of United Taconite's unwarrantable failure. United Taconite is a limited liability company ("LLC") organized in the State of Delaware.

On December 21, 2009, MSHA filed a petition for assessment of individual civil penalties against Bill Simola alleging that Mr. Simola was liable for the violations under Section 110(c) of the Mine Act. Mr. Simola is the Pellet Plant Coordinator at United Taconite's United Plant.

On February 26, 2010, Mr. Simola filed a motion for summary decision asserting that Section 110(c) does not apply to agents of operators doing business as limited liability companies.

B. The Judge's Decision

On April 6, 2010, the judge denied Mr. Simola's motion for summary decision. In so doing, the judge determined that Section 110(c) of the Mine Act is silent on the issue of whether it applies to agents of LLCs. The judge based his determination on his finding that mines did not operate as LLCs until after passage of the Mine Act in 1977 and that, as a result, Congress could not have considered the applicability of Section 110(c) to agents of LLCs. Dec. at 3.

The judge then determined that the Secretary's interpretation of Section 110(c) as applying to LLCs was entitled to Chevron deference because the Secretary's interpretation is consistent with Congress' intent and serves a permissible regulatory function. Id. In so determining, the judge found that the "purpose of section 110(c) is to pierce the corporate-like liability shield." Dec. at 2. The judge then concluded that the Secretary's interpretation of the provision as applying both to corporations and to LLCs "is manifestly reasonable and consistent with the intent of the legislation." Id.

On April 23, 2009, Mr. Simola filed a motion to certify the judge's April 6, 2010, decision for interlocutory review. The judge granted the motion on May

7, 2010. On June 23, 2010, the Commission granted interlocutory review on the issue of whether an agent of an LLC may be subject to individual liability under Section 110(c) of the Mine Act.

ARGUMENT

THE JUDGE PROPERLY ACCEPTED THE SECRETARY'S INTERPRETATION OF SECTION 110(c) AS APPLYING TO AGENTS OF LIMITED LIABLITY COMPANIES

Introduction

The LLC is a business entity first recognized in 1977 by the State of Wyoming. See Ribstein, The Emergence of the Limited Liability Company, 51 Bus. Law. 1 (1995). LLCs are corporate in nature in that members of an LLC, like owners of a corporation, have limited liability. Id. at 1-3; Bishop and Kleinberger, Limited Liability Companies: Tax and Business Law, ¶ 1.03 (2002). See also Abraham & Sons Enterprises v. Equilon Enterprises, LLC, 292 F.3d 958, 962 (9th Cir. 2002) (applying California law and stating that "the purpose of forming [LLCs and corporations] is to limit the liability of their shareholders and members"). At least one court has recognized that the feature that an LLC shares with a corporation -- a limitation on personal liability -- is the single most important characteristic of a corporation. In re Enron Creditors Recovery Corp., 380 B.R. 307, 315-316 (S.D.N.Y. 2008).

The status of LLCs under Section 110(c) is a significant issue under the Mine Act because, in recent years, the number of mine operators organized as LLCs has steadily increased. See 71 Fed. 38902 (July 10, 2006) (noting that 782 of the Nation's 7,287 active mine operators -- approximately 10 percent -- identified themselves as LLCs, and noting that the number actually may be significantly greater). In view of the increasing number of operators organized as LLCs, and to make the public aware of the Secretary's interpretation of Section 110(c), the Secretary issued an interpretive bulletin on July 6, 2006, setting forth her interpretation that Section 110(c) applies to agents of LLCs. Id. This case represents the first challenge to that interpretation.

A. Standard of Review

A determination of whether Section 110(c) applies to agents of LLCs requires the Commission to review the Secretary's interpretation of Section 110(c). "If the statute is clear and unambiguous, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Coal Employment Project v. Dole, 889 F.2d 1129, 1131 (D.C. Cir. 1989) (internal citations and quotation marks omitted). If the statute is silent or ambiguous with

respect to an issue, however, the agency's interpretation should be accepted as long as it is reasonable. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The Secretary's interpretation of a statutory provision that is silent or ambiguous is owed controlling deference and is entitled to affirmance as long as it is reasonable. Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 5 (D.C. Cir. 2003) (citing Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). "In the statutory scheme of the Mine Act, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard, and is therefore deserving of deference." Excel Mining, 334 F.3d at 5 (internal quotation marks and citations omitted).

B. The Secretary's Interpretation Must Be Accepted Because It Is Reasonable

1. Section 110(c) Is Silent Or Ambiguous On the Issue of Whether It Applies to Agents of LLCs

Section 110(c) of the Mine Act states as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act, . . . any director, officer, or agent of such corporation who 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 (d).

30 U.S.C. § 820(c).

By its terms, Section 110(c) applies when a "corporate operator" violates a Mine Act standard and a director, officer, or agent "of such corporation" knowingly authorized, ordered, or carried out the violation. The threshold issue is thus whether, in enacting Section 110(c), Congress unambiguously expressed an intent that Section 110(c) was not to apply to agents of LLCs. The Secretary believes that Congress did not express, and could not have expressed, any intent with respect to agents of LLCs because, when Congress enacted Section 110(c), LLCs effectively did not exist.

The courts have recognized that, over time, conditions may come into existence that Congress did not contemplate when it enacted a statute, but that implicate the concerns Congress was addressing when it enacted the statute. As the Supreme Court stated in Browder v. United States, 312 U.S. 335 (1941):

> There is nothing in the legislative history to indicate that Congress considered the question of use by returning citizens. Old crimes, however, may be committed under new conditions. Old laws apply to changed situations. The reach of the

> act is not sustained or opposed by the fact that it is sought to bring new situations under its terms.

312 U.S. at 339 (footnotes omitted). Accord Weems v. United States, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.")

When confronted with a question of statutory application with respect to which Congress did not express or could not have expressed an intent when it enacted the statute, courts have treated the question as one the resolution of which was delegated to the agency Congress authorized to administer the statute. See NBD Bank, N.A. v. Bennett, 67 F.3d 629, 632-33 (7th Cir. 1995); Robinson v. TI/US West Communications Inc., 117 F.3d 900, 904-07 (5th Cir. 1997) (where resolution of the question was not delegated to any agency, the court itself filled the void created by Congressional silence by examining the underlying policy concerns). Because Congress expressed no intent with respect to agents of LLCs, the question becomes whether an interpretation that Section 110(c) is applicable to agents of LLCs is reasonable. See Chevron, 467 U.S. at

842-43; Excel Mining, 334 F.3d at 6. The Secretary believes that it is.

Before the judge, Mr. Simola effectively argued that even though Congress could not have expressed an intent with respect to Section 110(c)'s applicability to agents of LLCs, the Secretary's interpretation that Section 110(c) applies to agents of LLCs can only be accepted if, in passing the Mine Act, Congress happened to use language that is consistent with that interpretation. As set forth above, Mr. Simola is wrong. See e.g., NBD Bank, N.A. v. Bennett, 67 F.3d at 632-33; Robinson v. TI/US West Communications Inc., 117 F.3d at 904-07.

Even if Mr. Simola's assertion were correct, moreover, the Secretary's interpretation still must be accepted. Black's Law Dictionary (8th ed. 2004) defines "limited liability corporation" as: "Limited-liability corporation. See limited-liability company under COMPANY." Under "company," Black's includes the following: "Limited-liability company. A company - statutorily authorized in certain states - that is characterized by limited liability, management by members or managers, and limitations on ownership transfer - abbr. L.L.C. also termed limited-liability corporation." (Emphasis added).

Moreover, LLCs fit within the legal definition of a "corporation." See Black's Law Dictionary (7th ed. 1999) at 341 (a "corporation" is "[a]n entity (usu. a business) having authority under law to act as a single person distinct from the shareholders who own it . . . ; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up [and] exists indefinitely apart from them . . ."). See also Webster's Third New International Dictionary (2002) at 510 (a "corporation" is "a group of persons . . . treated by the law as an individual or unity having rights and liabilities distinct from those of the persons . . . composing it . . .").

Accordingly, Congress' use of the terms "corporate operator" and "such corporation" in Section 110(c) to describe the types of business operations whose agents may be individually liable can reasonably be read as encompassing LLCs. See People of Puerto Rico v. Shell Co., 302 U.S. 253, 258 (1934) (interpreting a word expansively to include something that did not exist at the time the statute in question was enacted and stating that "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent

of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed"); Vermily-Brown v. Connell, 355 U.S. 377, 387 (1948) ("our duty as a Court is to construe . . . word[s] . . . as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind"). Cf. In re Enron Creditors Recovery Corp., 380 B.R. at 315-16 (interpreting an indenture's definition of "corporation" to include LLCs, even though LLCs were not included in the definition because the failure to include LLCs in the definition was "read[ily] answer[ed]" by the fact that LLCs did not exist when the indenture was drafted.)

2. The Secretary's Interpretation Is Consistent With the History and Purpose of Section 110(c)

Section 110(c) was carried over without significant change from Section 109(c) of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"). See 30 U.S.C. § 819(c)(1969). In passing Section 109 of the Coal Act, Congress explained that the provision was intended "to let the agent stand on his own and be personally responsible

for any penalties or punishment meted out to him." H.R. No. 563, 91st Cong., 1st Sess. 11 (1969). Congress made clear its intent "to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield." Id. at 12.

In re-enacting Section 109 of the Coal Act in Section 110(c) of the Mine Act Congress likewise stated:

> Civil penalties are not a part of the enforcement scheme of the Metal Act, but they have been part of the enforcement of the Coal Act since its enactment in 1969. The purpose of such civil penalties, of course, is not to raise revenues for the federal treasury, but rather, is a recognition that: "[s]ince the basic business judgments which dictate the method of operation of a coal mine are made directly or indirectly by persons at various levels of corporate structure, [the provision for assessment of civil penalties is] necessary to place the responsibility for compliance with the Act and the regulations, as well as the liability for violations on those who control or supervise the operation of coal mines as well as on those who operate them." In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

S. Rep. 95-191, 95th Cong., 1st Sess. 40 (1977), reprinted in Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 628

("Legislative History") (quoting S. Rep. No. 411, 91st Cong. 1st Sess. at 39 (1969)).

Congress' enactment of Section 110(c) thus reflected Congress' recognition that because a corporation generally serves as a shield against personal liability, corporate directors, officers, and agents generally are not personally liable for legal violations committed by the corporation. Corporate mine operators would therefore have a reduced incentive to comply with Mine Act standards because a corporation would shield the individuals who control and supervise the mine -- the corporation's directors, officers, and agents -- from personal liability.

To address that concern, Section 110(c) imposes liability for Mine Act violations directly on the individuals responsible for the Mine Act violations. Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 26 (1981), aff'd, 680 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). As the Sixth Circuit Court of Appeals has explained:

> In a practical sense, any non-corporate mining operation is going to be relatively small, and the probability is that the decision-maker is going to fit the statutory definition of "operator." In a larger, corporate structure, the decision-maker may have authority over only a part of the mining operation. [Section 110(c)] assures that this makes him no less liable for his actions. In a noncorporate structure, the

> sole proprietor or partners are personally liable as "operators" for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do not violate mandatory health or safety standards than does the corporate operator. [Section 110(c)] attempts to correct his imbalance by giving the corporate employee a direct incentive to comply with the Act.

Richards v. Secretary of Labor, 689 F.2d 632, 633-34 (6th Cir. 1982), cert. denied, 46 U.S. 928 (1983). Accord United States v. Jones, 735 F.2d 785, 793 (4th Cir.), ("Congress may have believed that in a noncorporate coal mining operation the threat of criminal sanctions against the operator personally would provide a sufficient incentive to comply with the mandatory safety standards. By contrast, in a corporate mining operation, those who are in control might be insulated from criminal responsibility, the corporation being an impersonal legal entity"), cert. denied, 469 U.S. 918 (1984).

LLCs generally create the same sort of shield against personal liability that led Congress to impose personal liability on the directors, officers, and agents of corporations. See Abraham & Sons Enterprises v. Equilon 292 F.3d at 962. Indeed, "given the similar liability shields that are provided by corporations and LLCs to their

respective owners, [e]merging caselaw illustrates that situations that result in a piercing of the limited liability veil are similar to those that warrant piercing the corporate veil." NetJets Aviation, Inc. v. LHC Communications, LLC, 537 F.3d 168, 175 (2d Cir. 2008) (internal quotations omitted) (citing J. Leet, J. Clarke, P. Nolkamper & P. Whynott, The Limited Liablity Company, § 11.130, at 11-7, 11-9 (rev. ed. 2007) ("Every state that has enacted LLC piercing legislation has chosen to follow corporate law standards and not develop a separate LLC standard"). Because the same situations that warrant going behind the corporate shield warrant going behind the LLC shield, Congress' purpose in enacting Section 110(c) can only be achieved if the provision is interpreted to apply both to agents of corporations and to agents of LLCs.

Significantly, a number of LLCs in the mining industry are the sort of relatively large and corporately structured entities which Congress had in mind when it enacted Section 110(c). MSHA's records show that there are 35 operators doing business as LLCs with an average workforce over the last four years of more than 250, 15 operators doing business as LLCs with an average workforce of more than 500, and four operators doing business as LLCs with an average workforce of more than 1,000. United Taconite has

an average workforce of 489. See Sec. Opp. To Motion For Summary Decision at 2 n.1.

Before the judge, Mr. Simola asserted that because Congress explicitly expressed an intent to include corporations, Congress implicitly indicated an intent to exclude LLCs. Mot. Sum. Dec. at 7. Mr. Simola's assertion is, in effect, an argument in reliance on the maxim expressio unius est exclusio alterius -- the expression of one thing is the exclusion of another. That maxim is unreliable, however, when it is unreasonable "to suppose that Congress considered the unnamed possibility and meant to say no to it." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Accord Sidney Coal Co. v. SSA, 427 F.3d 336, 348-9 (4th Cir. 2005), cert. denied, 547 U.S. 1020 (2006). It is unreasonable to suppose that Congress considered whether to include LLCs because, at the time Congress enacted the Mine Act, LLcs were effectively not in existence. "[T]he better inference is that what we face here is nothing more than a case unprovided for." Barnhart, 547 U.S. at 169 (footnote omitted).

Before the judge, Mr. Simola also attempted to support his position by relying on cases distinguishing corporations from LLCs for diversity jurisdiction purposes. See Mot. for Summary Decision at 5-6 (citing General Tech

v. Exro, 388 F.3d 114, 121 (4th Cir. 2004), GMAC Dillard, 357, 828 (8th Cir. 2004), and Cosgrove v. Bartolotta, 150 F.3d 729 (7th Cir. 1988)). Because those cases involve principles of diversity jurisdiction -- and have nothing to do with Chevron deference – Mr. Simola's reliance on them is misplaced. See People of Puerto Rico v. Shell, 302 U.S. at 258 (recognizing that words in different acts have different meanings depending on the "character and aim of the act").

In any event, the cited cases rely on a line of Supreme Court cases in which the Court, after interpreting the word "citizen" in the federal diversity statute to include corporations, declined to expand its interpretation to include other business organizations. See Carden v. Arkoma, 494 U.S. 185, 189 (1990) (explaining history). Significantly, the Court determined that the "doctrinal wall" against expanding its interpretation to include business organizations other than corporations "would not be breached" because to do so would be at odds with Congress' intent to limit diversity jurisdiction -- an intent expressed in legislation enacted after the Court broadly construed the statute to include corporations. See United Steel Workers of America, AFL-CIO v. Bouligny, Inc., 382 U.S. 145, 148 (1965) (explaining history). The present

case presents precisely the opposite situation. As explained above, and as the judge found, interpreting Section 110(c) to include LLCs is plainly consistent with Congress' intent. See Dec. at 2.

Mr. Simola also appears to argue that because Congress amended Section 110(c) in 1990 and in 2006 without specifically adding agents of LLCs to the Section 110(c) personal liability provisions, the Secretary's interpretation must be rejected. See Pet. For Discretionary Review at 6. Contrary to Simola's suggestion, however, neither the 1990 amendment nor the 2006 amendment had anything to do with the scope of Section 110(c)'s personal liability provisions. Nor is there any indication that at the time of either amendment, Congress was aware of any controversy in applying Section 110(c) to agents of LLCs. Because there is "no . . . evidence to suggest that Congress was even aware of [the issue of the applicability of Section 110(c) to agents of LLCs] . . . [any] re-enactment [of Section 110(c)] [would have been] without significance." Brown v. Gardner, 513 U.S. 115, 121 (1994). Accord Public Citizen, 332 F.3d at 669 (citing and quoting Brown).

Mr. Simola's reliance on Donald Guess, employed by Pyro Mining Company, 15 FMSHRC 2440 (1993), aff'd, 52 F.3d

1123 (D.C. Cir. 1995) is similarly misplaced. See Mot. for Summary Decision at 3-4. In Guess, the Commission held that Section 110(c) does not apply to agents of partnerships because, by its terms, Section 110(c) applies only to agents of corporations. That holding has no bearing in this case because partnerships, unlike LLCs, existed and were a well known form of business organization when Congress enacted the Mine Act.[1]

CONCLUSION

The Secretary believes that the underlying objective Congress identified when it enacted the Coal Act in 1969 and reiterated when it enacted the Mine Act in 1977 —- to place responsibility for compliance and liability for violations "on those who control or supervise the operation of . . . mines as well as on those who operate them" -- will best be advanced if Section 110(c) is interpreted as being applicable to agents of LLCs. Because Section 110(c) is silent on the issue of whether it applies to LLCs, the Court must accept the Secretary's interpretation because it is reasonable. Accordingly, the Commission should hold that Section 110(c) applies to LLCs and affirm the judge's decision.

[1] Moreover the term "corporation" cannot reasonably be read to include partnerships, but can reasonably be read to include LLCs. See supra, pp. 8-10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served by U.S. mail postage prepaid this 13th day of July, 2010 on:

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