

HEATHERLY MINING INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-411

Decided October 21, 1994

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., granting temporary relief from Cessation Order No. 93-030-246-001.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

A coal mine owner was entitled to temporary relief from a cessation order prohibiting continued disposal of mined material on unpermitted land pending issuance of an agency decision on substantial legal and factual questions concerning such disposal methods which had not been shown to be potentially harmful.

APPEARANCES: John S. Retrum, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Stephen W. Smith, Esq., Henryetta, Oklahoma, for Heatherly Mining, Inc.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a December 10, 1993, decision of Administrative Law Judge John R. Rampton, Jr., that granted temporary relief from Cessation Order (CO) No. 93-030-246-001 to Heatherly Mining Inc. (Heatherly). The CO had ordered Heatherly to cease allowing coal mine waste to be removed from its permit area and deposited on unpermitted areas. The temporary relief decision was issued during a hearing held on December 10, 1993, in Tulsa, Oklahoma, pursuant to Heatherly's application for review and request for temporary relief, Hearings Division Docket No. DV 94-15-R. Heatherly is the owner and permittee of an underground coal mine, Pollyanna #4, in Okmulgee County, Oklahoma, that is permitted by the Oklahoma Department of Mines (ODM), under Permit No. 88/93-4170.

Following a telephone complaint received at the Tulsa, Oklahoma, Field Office, OSM inspectors went to Heatherly's minesite on August 3, 1993, where they saw what they believed to be mine waste material being removed by a State of Oklahoma truck to be later spread on a county road (Dec. 10, 1993, Transcript, DV-15-R, at 47). They informed employees of ODM of their observations, stating that Heatherly's activity was a violation of the Oklahoma program and constituted a significant, imminent environmental harm. ODM declined to take enforcement action on the matter, responding that similar disposal methods are a common practice in the State (Tr. 53-55). On August 4, 1993, OSM cited Heatherly for violating DOM/PRR sections 773.11, 817.81(a), and 817.87(b) (Tr. 60; Exh. R-12). The CO describes the violation as a "[f]ailure to obtain a valid permit from the Oklahoma Department of Mines (ODM) before engaging in or carrying out coal mining and reclamation operations. Permittee is allowing coal mine waste to be disposed of outside of the permitted area." A deadline for abatement was set by the CO, which required Heatherly to "[s]ubmit permitting and bonding data to ODM by 8/20/93 for the purpose of permitting a coal mine waste disposal site. Acquire the approval of a coal mines waste disposal site from ODM by 9/20/93." Heatherly's application for review was filed on August 11, 1993.

Heatherly submitted several proposed permit revisions to ODM, one which would allow it to continue to allow material to be removed for disposal on unpermitted lands and others providing for a new disposal site within the permit area (Tr. 164-67). As a result of the revised applications, OSM extended the abatement deadline several times (Tr. 61-70; Exhs. R-15, R-18, R-20, R-22). Meanwhile, OSM concluded, based upon laboratory analysis of the material removed, that the material was acid-bearing (Tr. 81-139). The CO was therefore modified on November 3, 1993, to require Heatherly to "submit permitting and bonding data to [ODM] for the purpose of permitting a Coal Processing Waste disposal site within a permitted area for the disposal of acid-bearing material \* \* \* or[] cease mining and begin reclamation operations" (Exh. R-22 (emphasis in original)). The CO required Heatherly to acquire approval of a disposal site by December 17, 1993. Heatherly filed an application for temporary relief on December 3, 1993.

At the hearing held on December 10, 1993, the parties agreed that they would offer evidence on the merits of the CO as well as the issue of temporary relief (Tr. 20-21). At the conclusion of the hearing, Judge Rampton issued a decision granting temporary relief from the CO, pending his decision on the application for review (Tr. 233-37). OSM appealed.

OSM argues on appeal that the issue to be decided by the Board of Land Appeals concerns whether the record shows that Heatherly's waste disposal practices violated the Oklahoma program in a manner involving significant, imminent harm to the environment, and whether Heatherly met legal standards governing allowance of temporary relief. OSM argues that Heatherly's failure to dispose of all coal mine waste at an approved site within a permit area violates statutes and regulations and that Heatherly's permit did not allow the disposal practices observed at the Pollyanna Mine. OSM contends

that the practices described constitute surface coal mining operations for which Heatherly did not have a valid permit. Conducting surface mining activities without a permit is, by law, a significant, imminent harm to the environment, OSM asserts. It is concluded by OSM that Heatherly has no substantial likelihood of success on the merits, and that the finding that there is no imminent harm to the environment from Heatherly's disposal methods is not supported by the record.

Under section 525 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275 (1988), an applicant for review of a notice of violation or CO issued by OSM pursuant to section 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1988), may request temporary relief therefrom, pending completion of administrative review. As the statute applies to this appeal, the grant of temporary relief depends upon a showing that there is substantial likelihood that the ultimate findings of the Secretary will be favorable to Heatherly, provided that granting such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. 30 U.S.C. § 1275(c) (1988). Unless the record shows these standards have been met in this case, temporary relief cannot be granted. See 43 CFR 4.1263(b) and (c); Powderhorn Coal Co. v. OSM, 129 IBLA 22, 27 (1994).

OSM contends that Heatherly was required to obtain a permit from the State to dispose of the waste material at issue at places away from the permit site. Arguing that such a permit was issued in 1990, Heatherly relies on language in a State permit revision issued in 1990 reciting that "Heatherly plans to sell or give some of the waste rock to the county for county roads during the life of the mine." See Exh. R-2. OSM replies that this language does not constitute a valid permit for the practice in question, which OSM contends violates SMCRA whether or not it was permitted by ODM. This conclusion is grounded in the interpretation given by OSM to ODM/PRR § 817.81(a), which provides that "[a]ll coal mine waste shall be placed in new or existing disposal areas within a permit area, which are approved by the Department for this purpose." See also 30 CFR 817.81(a). Coal mine waste may, however, be disposed of in other ways with other spoil material if it is nontoxic or not acid-forming. See 30 CFR 817.71(i).

The regulation does not establish that on-site disposal areas are necessarily the area of final placement for such materials. When he granted temporary relief (thereby continuing the status quo pending issuance of a decision), Judge Rampton found that the method of disposal in use at the Pollyanna Mine had long continued without interference by ODM or OSM and that there was no evidence the material was acid-forming so that there might not be any imminent environmental harm (Tr. 233-34). The issue to be decided then became whether the material was properly disposed of under applicable law. That evaluation was delayed by Judge Rampton until he could reach a decision on the merits. His decision on the question has yet to issue.

[1] To decide whether Heatherly Mining has shown substantial likelihood of success on the merits, we follow the approach taken at Powderhorn

Coal Co. v. OSM, 129 IBLA at 28, a case where, as here, it was determined that "the balance of hardship to the parties from not granting temporary relief tips decidedly in favor of the applicant." While Heatherly's case may not "be free from doubt," the effect of the Judge's ruling was that the company had "raised questions going to the merits so serious, substantial, difficult and doubtful, as make them fair ground for litigation and thus for more deliberative investigation." Id.

Weighing the hardships to the parties, Judge Rampton observed that to deny relief would force Heatherly to shut down its operations at the Pollyanna Mine because there was not enough room to store the material taken from the mine within the permitted area. He further found there was a lack of evidence that the material removed was harmful to the environment (Tr. 234-35). He was not ready to accept OSM's argument that the disposal practice in question was harmful as a matter of law without further deliberation, and he did not rule on the question. Nor did he make a final ruling on the contention by OSM that the disposal practice was harmful as a matter of fact. Until there has been a ruling on those questions, however, we are in no position to review either question. We do not make initial decisions in cases arising before the Department, our authority being limited to an exercise of the review authority of the Secretary. See 43 CFR 4.1. Consequently, we do not reach the ultimate question whether the challenged disposal activity was harmful, as OSM urges us to do, while the case on the merits of that issue is not yet ripe for review.

Based on the record established at the hearing, we affirm the finding of the Administrative Law Judge that Heatherly had raised substantial questions concerning the matter in controversy so as to warrant temporary relief from the CO pending a decision on questions raised before, but not yet decided, by the Administrative Law Judge. He correctly evaluated the application under the standards for awarding such relief provided by 30 U.S.C. § 1275(c) (1988) and 43 CFR 4.1266 and determined that, given the evidence of equitable considerations favoring Heatherly, and the fact that substantial questions of fact and law were at issue, it was appropriate to grant temporary relief from the CO in the absence of a showing of imminent environmental harm. See Powderhorn Coal Co., 129 IBLA at 28. It has not been shown that this ruling was in error.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Arness  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge