

BELL COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
(ON RECONSIDERATION)

IBLA 83-630
IBSMA 82-38

Decided June 28, 1984

Reconsideration of a petition for review of the August 4, 1982, decision of Administrative Law Judge Sheldon Shepard, Docket Nos. CH 0-335-P and CH 0-336-P, following review of enforcement action by the Office of Surface Mining Reclamation and Enforcement pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1982).

Affirmed in part as modified; reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

The application of the general rule that in hearing proceedings initiated by a petition for review OSM has the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and as to the amount of the penalty must take into account the issues actually raised in a petition for review. Where a petitioner did not specify any error in OSM's calculation of a proposed civil penalty, OSM's evidentiary burden in the review proceeding was limited to prevailing in its case in support of the merits of the alleged violations.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

As a general performance obligation under the initial Federal regulatory program, a person who conducts surface coal mining and reclamation operations on and after May 3, 1978, must obtain a state permit for the operations if required to do so under state law. When state law defines surface coal mining to include exploration activity, the Federal performance obligation extends to such activity.

3. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The general performance obligation under the initial Federal regulatory program that a person who conducts surface coal mining and reclamation operations on and after May 3, 1978, must obtain a state permit for the operations if required to do so under state law is applicable to persons who allow mining operations on lands under their legal control even when the persons are not actually engaged in the mining operations.

4. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The obligation under the Federal initial regulatory program of a person who conducts surface coal mining and reclamation operations to obtain a state permit for the operations if required to do so under state law is applicable only in the context of mining operations conducted on and after May 3, 1978; therefore, action by OSM to enforce the obligation was not properly upheld in the absence of evidence that the subject mining activity occurred after that date.

5. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

OSM satisfied the burden of persuasion in support of an alleged violation of the permit requirement in 30 CFR 710.11(a)(2) when, in an evidentiary hearing, OSM demonstrated that the subject mining activity was conducted after May 3, 1978, and that OSM had been unable to discover evidence of a state permit covering the activity, and the person charged with the violation did not offer any documentary evidence in support of the assertion that the subject mining activity was covered by an existing state permit.

6. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

OSM lacked regulatory authority to enforce the special performance standards in 30 CFR 716.5(b) (applicable

to anthracite surface coal mining and reclamation operations in the Commonwealth of Pennsylvania) with respect to surface coal mining and reclamation operations conducted only before May 3, 1978.

7. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Where OSM demonstrated in an evidentiary hearing that particular surface coal mining and reclamation operations were not covered by a state approved mining plan at the time of OSM's inspection of the operations, OSM was precluded, as a matter of law, from establishing its allegation that the person conducting the mining operations had failed to accomplish backfilling in accordance with an approved mining plan.

APPEARANCES: Gregg M. Rosen, Esq., Pittsburgh, Pennsylvania, for Bell Coal Company (on its Petition for Review and Amended Petition for Review); Anthony Kovalchick, president, Bell Coal Company (on the Answer to Order to Show Cause and the Brief of the petitioner); Mimi Methvin, Esq., Office of the Field Solicitor, Charleston, West Virginia, and Walton D. Morris, Jr., Esq., Assistant Solicitor, Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement (on its Response to Petition for Review); C. Cleveland Gambill, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement (on its Motion for Summary Dismissal); C. Cleveland Gambill, Esq., and Susan K. Hoven, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement (on its Brief).

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This reconsideration of the petition of Bell Coal Company for review of the August 4, 1982, decision of Administrative Law Judge Sheldon Shepard, under Docket Nos. CH 0-335-P and CH 0-336-P, follows the Board's order of November 28, 1983, by which it vacated an earlier order dismissing the petition. The dismissal order was based on petitioner's failure to file a brief in support of its petition. Following the dismissal, the Board was shown adequate cause to excuse this failure.

Background

In March 1980, Bell Coal Company (Bell) was engaged in surface mining operations for anthracite coal on leased land in Schuylkill County, Pennsylvania. Office of Surface Mining Reclamation and Enforcement (OSM) Inspector Eric Brummer and Pennsylvania Department of Environmental Resources (DER) Inspector James Leber inspected Bell's operations on

March 11, 1980. Noting possible violations of Federal and State regulations applicable to surface mining of anthracite coal, the two inspectors planned to return to the site for a more thorough inspection. They returned to the minesite on March 20, accompanied by OSM Reclamation Specialist Larry Beyer. Michael Kovalchick, the son of Bell's owner and an employee of the company, joined the inspectors during this visit.

At the conclusion of the March 20 inspection, OSM issued two notices of violation to Bell. In Notice of Violation (NOV) No. 80-I-27-5 OSM charged Bell with having mined "several small areas" without a permit, in violation of "30 CFR 716.5; Pa Act 418 Section 4." OSM described the location of this violation as "[a]ll areas to the east, south, and west of existing permits." In NOV No. 80-I-27-6 OSM charged Bell with two violations: (1) mining "off the area designated in the mine permit * * * in two places," in violation of "30 CFR 716.5; Pa Act 418 Section 4"; and (2) failing "to accomplish backfilling as mining progressed in accordance with the approved mining plan," in violation of "30 CFR 716.5; Pa Title 25 Chapter 77.92 (f)(1)."

After a review conference held pursuant to 30 CFR 723.18, OSM assessed civil penalties of \$1,100 for NOV No. 80-I-27-5 and \$1,100 for violation 2 of NOV No. 80-I-27-6. OSM did not assess a civil penalty for violation 1 of the latter NOV.

Bell petitioned the Hearings Division for review of OSM's enforcement action and, after unsuccessful settlement negotiations, a hearing was conducted on October 19, 1981, before Administrative Law Judge Shepherd. Following is a summary of the evidence presented at the hearing.

NOV No. 80-I-27-5 (Exh. 2)

OSM's Inspector Brummer described the general locations of Bell's mining without a permit as being to the south, east, and west of Bell's permit areas shown on the map introduced as Exhibit 1 (Tr. 18-19). ^{1/} The inspector marked the approximate location of three of the areas of violation on OSM's Exhibit 1 and indicated that the other areas of violation were beyond the scope of the map (Tr. 19).

The inspector identified OSM's Exhibits 3 and 4 as photographs depicting one of the disturbed areas located south of the permit area shown in the central portion of Exhibit 1 (Tr. 24-25). Both Inspector Brummer and Inspector Beyer testified that Michael Kovalchick, the son of Bell's owner and an equipment operator for the company, informed them during the course of the March 20 inspection that Bell was responsible for the disturbances identified in NOV No. 80-I-27-5. Inspector Beyer testified on the basis of his educational and professional experience, and his examination of the areas identified in the NOV, that the disturbances occurred after May 3, 1978 (Tr. 80); however, neither OSM inspector observed active mining in the areas identified in the NOV (see Tr. 51).

^{1/} OSM introduced into evidence all of the numbered exhibits referenced in this decision. OSM's Exhibit 1 is a map dated Apr. 4, 1980, submitted by Bell to DER showing the areas of its coal mining operations (Tr. 12-17).

In further support of NOV No. 80-I-27-5, OSM introduced Exhibit 12, purportedly a copy of a DER mining permit (No. AN 121-3(A4)) issued to Bell on April 30, 1976; Exhibit 13, a copy of a DER inspection report, dated September 25, 1979, pertaining to Bell's operations; Exhibit 15, a letter from James E. Leber, DER District Mine Inspector, to Anthony Kovalchick, dated March 21, 1980, informing Kovalchick that Bell was found to "have illegally mined more than 25 acres of land outside * * * [permit] boundaries none of which had been restored"; and Exhibit 16, a letter from Anthony Kovalchick to James Leber, dated April 21, 1980, describing corrective action undertaken by the Bell in response to Federal and State enforcement actions.

Michael Kovalchick testified that, as an equipment operator for Bell, he is familiar with the areas of Bell's mining operations and that Bell did not disturb any of the areas identified in NOV No. 80-I-27-5 (Tr. 143, 145-48). He further testified that he informed the OSM inspectors during their inspection that Bell had not disturbed those areas (Tr. 148) and that the disturbances were the result of unauthorized activities by various operators other than Bell (Tr. 149). Concerning such mining activity the witness also testified:

Q Have you ever seen . . . well, let me ask you this Mr. Kovalchick on this entire 450 acres that are leased are there many abandoned little pits that are left over from other claims or mining operations? 2/

A Yes.

Q Would you estimate how many there might be?

A It's very hard to put a number on it because it is very, very numerous. In fact there are some operators up there now that are working illegally and opening up basins and I told Mr. Beyer and Mr. Brummer about it. In fact they saw me and went up there themselves and they didn't see the man that owns the equipment but they saw the equipment there and I don't know to date whether they have done anything about it.

(Tr. 149).

Q Mr. Kovalchick, when you say Bell never owned or leased a backhoe, did they ever backhoe on any of these areas?

A Not to my knowledge. Not loaned to Bell Coal Company but I have seen small backhoes on the property and in fact there is one up there now and I don't know who owns it. But they are illegally affecting and in fact they are affecting one of our areas we had planted and we have notified the DER and OSM about this mining that is going on so we don't get in trouble for what they are doing.

2/ The question refers to 450 acres of land leased by Bell between 1970 and 1980 (Tr. 139).

Q Who did you notify in OSM?

A These two men right here.

Q When you see these people with the backhoes on your property, do you ever encounter them or do you let them go ahead and do what they are doing?

A Excuse me?

Q When you see these people with backhoes on your property and they are illegally there, have you gone over and spoken to them or encountered them in any way?

A No, I have not.

Q Have you let them go ahead and do what they are doing on your permit areas, is that correct?

A Would you go up with a man with a piece of machinery and tell him to get off that property?

Q How frequently has this occurred?

A It has been going on for many years.

Q And you never once found out exactly who was operating a backhoe on your permit area?

A No, I have not.

(Tr. 151-52).

Anthony Kovalchick, the owner of Bell, testified that he was familiar with the areas of violation identified in NOV No. 80-I-27-5 and that Bell had not removed coal from those areas (Tr. 91). He explained that the open pits are the work of other operators (Tr. 92). More particularly he testified that some of the disturbed area identified by OSM was the result of the Phillip Corral mining operations shown on Exhibit 1 (Tr. 93), but that he had backfilled the area under pressure from OSM (Tr. 94). His testimony was similar in reference to the areas of disturbance west of the permitted areas (Tr. 96-97). The witness did, however, testify that he had drilled throughout the area shown on Exhibit 1 (Tr. 138), including "one" of the pits identified by OSM (Tr. 141-42).

NOV No. 80-I-27-6 (Exh. 5)

The first violation charged in NOV No. 80-I-27-6 was that Bell had mined off its permit areas. OSM's Inspector Brummer explained that this violation concerned mining activity identifiable with particular permit areas, in contrast to the mining activity that was the basis of the charge of mining

without a permit in NOV No. 80-I-27-5 (Tr. 74). The inspector described the locations of the alleged violation as being "south of the upper area and west of the northwest area" (Tr. 27). By the "upper area" the inspector apparently meant a rectangular shaped permit area outlined in yellow on Exhibit 1 (see Tr. 117); by the "northwest area" the inspector meant a W-shaped permit area shown on Exhibit 1 (Tr. 29). The inspector identified OSM Exhibits 6, 7, and 8 as photographs depicting mining disturbances adjacent to the western boundaries of the W-shaped permit area (Tr. 29-31) and testified that Michael Kovalchick admitted that Bell had mined in the areas depicted (Tr. 32-33).

Anthony Kovalchick testified that Bell had not mined coal in the W-shaped area after May 3, 1978 (Tr. 96). He acknowledged that Bell was mining in the area outlined in red on Exhibit 1 on the date of OSM's inspection (Tr. 105), but claimed that the first 100 feet of this area was covered by a permit issued in 1973 (Tr. 106, 108) and that he had applied for a permit to mine the remainder of the red area and that the area was bonded (Tr. 106).

The second violation charged in NOV No. 80-I-27-6 was that Bell did not backfill certain mined areas in a timely manner. OSM's Inspector Brummer testified that the violation pertained to approximately 12 acres in the W-shaped permit area (Tr. 34, 39-40, 65-66) and to current operations in the area outlined in red on Exhibit 1 (Tr. 66-72). Inspector Beyer also testified regarding the area outlined in red, indicating that Bell's mining activity had proceeded ahead of the backfilling to a greater extent than is allowed under Pennsylvania law (Tr. 83-84).

Anthony Kovalchick testified that he had not mined in the W-shaped permit area since 1976 and that at that time he was instructed by "two Federal people" not to backfill the area (Tr. 97-98). He further testified that, in accordance with the instructions of a State inspector based on an inspection conducted in September 1979, he was to begin backfilling the area in the spring of 1980 (Tr. 98-104). As to the area outlined in red on Exhibit 1, where Bell was conducting operations at the time of OSM's inspection, he testified that backfilling was being accomplished in a manner consistent with the block cut system of mining used by Bell (Tr. 104-05).

Decision Below

NOV No. 80-I-27-5

The Administrative Law Judge upheld NOV No. 80-I-27-5, finding that "while all of the areas mentioned by Inspector Brummer were not established as the basis of the notice of violation, the areas did support the general allegations" (Decision at 3). In reaching this conclusion the Administrative Law Judge placed particular emphasis on Exhibit 16, a letter from Anthony Kovalchick dated April 21, 1980, in which Kovalchick reported: "3. Strip mining on areas not covered by bond or mining permit-situation corrected, engineer has submitted maps of amended area to the Bureau." Concerning OSM's proposed civil penalty assessment for the violation charged in NOV No. 80-I-27-5, the Administrative Law Judge concluded: "In view of the fact that the penalty assessment was based upon 'numerous' areas off the permit which, however, were not established in this proceeding, I feel compelled to reduce the penalty assessment * * * to \$500" (Decision at 4).

NOV No. 80-I-27-6

The Administrative Law Judge also upheld both violations charged in NOV No. 80-I-27-6. Again he placed particular emphasis on the information contained in Exhibit 16, which included, in addition to that quoted above, the statement: "4. Backfilling not concurrent -- backfilling is progressively in progress and we are delighted to advise is almost complete and is being supervised by the federal government." The Administrative Law Judge did not change the civil penalty assessment proposed by OSM for violation 2 of the NOV (concerning backfilling) (Decision at 4).

Discussion

The record evidence is replete with contradictions, vague generalities, and simple gaps. Moreover, our review task is not aided by the fact that the transcript may be characterized as, in the kind words of the Administrative Law Judge, "of limited assistance," and, in the more pointed words of one of the attorneys, "gobbledygook." Nonetheless, we must attempt to resolve fairly the issues presented. We begin by defining their scope.

In its petition to the Board, Bell has challenged the Administrative Law Judge's decision with respect to violations upheld and the civil penalties assessed. Bell claims that OSM failed to meet its burden of proof in the hearing proceeding.

[1] As a general rule in hearing proceedings initiated by a petition for review, OSM has "the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and as to the amount of the penalty." 43 CFR 4.1155. The application of this general rule, however, must take into account the issues actually raised in a particular petition. Bell's petitions did not specify any error in OSM's calculation of the proposed civil penalty amounts associated with the two notices of violation issued to the company; thus, the petitions were fairly understood as being addressed against the merits of the notices of violation. Under these circumstances OSM's evidentiary burden in the proceeding below was limited to prevailing in its case in support of the notices of violation. 3/ To the extent that it failed in carrying that burden, of course, OSM lacks authority to impose the civil penalty assessments.

3/ Under 43 CFR 4.1152(a)(2), if the amount of a civil penalty assessment is to be contested on the basis of an asserted misapplication by OSM of the civil penalty formula, the petition for review must include "a statement indicating how the civil penalty formula contained in 30 CFR Part 723 was misapplied, along with a proposed civil penalty utilizing the civil penalty formula." Neither petition filed by Bell with the Hearings Division included such a statement. Accordingly, OSM did not have the burden in the hearing proceeding of putting on evidence to support its calculation of the proposed civil penalty assessments, and the Administrative Law Judge did not err, as Bell charged in its petition to the Board, in not vacating the proposed civil penalty assessments in the absence of such evidence.

We address the portion of the Administrative Law Judge's decision reducing the proposed civil penalty assessment for NOV No. 80-I-27-5, infra.

Turning to the merits of the notices of violation, we first consider NOV No. 80-I-27-5, in which OSM charged Bell with mining without a permit. We are persuaded that the Administrative Law Judge correctly upheld this NOV, although his explanation of his ruling in this regard is not totally satisfactory.

[2] A general performance obligation under the Federal initial regulatory program was to obtain a permit for coal mining activities conducted on and after May 3, 1978, if required to do so under State law. 30 CFR 710.11(a)(2) and (a)(3)(ii). Under Pennsylvania law applicable at the time of OSM's enforcement action, a mining permit was required for the surface mining of anthracite coal. 52 Pa. Cons. Stat. Ann. § 1396.4 (Purdon 1982). This permit requirement extended to exploration activities. 52 Pa. Cons. Stat. Ann. § 1396.2 (Purdon 1982) (definition of "surface mining"). Bell has not disputed these legal premises for the violation charged in NOV No. 80-I-27-5.

As for the factual premises of the alleged violation, there is dispute. We conclude, however, that the evidence on the whole supported OSM's enforcement action.

OSM adequately established through the testimony of its inspectors that the mining disturbances described in the NOV occurred after May 3, 1978, the effective date of OSM's authority to enforce the permit requirement. And the OSM inspectors' testimony that Michael Kovalchick admitted that Bell caused the off-permit disturbances was sufficient to complete a prima facie case by OSM in support of the alleged violation. See, e.g., Rhonda Coal Co., 4 IBSMA 124, 84 I.D. 460 (1982).

In his testimony Michael Kovalchick denied having informed the OSM inspectors that Bell had done the off-permit mining described in the NOV, but Anthony Kovalchick acknowledged that Bell had conducted extensive off-permit exploratory drilling and that such activity had affected at least one of the areas identified by OSM. This latter testimony, considered together with OSM's testimony, established the validity of the NOV at least with respect to one of the sites of off-permit mining identified by OSM.

[3] As to the other locations of the off-permit mining identified by OSM, 4/ we conclude that Bell could be considered to bear responsibility as a result of its acquiescence in the mining activities of others on areas Bell controlled as a lessee. Both Kovalchick testified that they were aware of such mining activity being conducted in the vicinity of their permit areas.

4/ It should be noted that we find the inability of the inspector to identify the location of 8 of the 12 alleged points of violation to be very disturbing. While three of the points identified on Exhibit 1 were within the property leased by Bell, one was not. Further, the testimony identified the balance to be off the map to the east and to the west. Any points of disturbance to the east would not be in the leased property and, while this property does extend to the west of the map limits, we cannot rest assured that the points of disturbance said to be located west of the area depicted on the map are within the leased property. Our determination is based solely on the four points clearly identified to be within the control of Bell.

Although these witnesses indicated that they had not formally approved such mining activity, it is apparent from their testimony that the only action they took to prevent the activity was their mentioning it to the OSM and DER inspectors at the time enforcement action against Bell was initiated.

The Board previously has ruled that one legally capable of exercising control over particular coal mining operations can be held responsible for compliance with any Federal performance standards applicable to the operations. S & M Coal Co. v. OSM, 79 IBLA 350, 358, 91 I.D. 159, 163-64 (1984). Had Bell presented evidence that it had actively attempted to halt the mining activities of others on its leased areas, e.g., by timely reporting them to appropriate State or Federal authorities, the Board would not consider it appropriate to attribute responsibility to Bell for any noncompliance with Federal performance standards associated with the "unauthorized" mining activities. It appears from the record, however, that Bell tolerated the activities and, thus, in effect licensed them. See generally 62 Am. Jur. 2d Premises Liability § 51 (1972); 53 C.J.S. Licenses § 81 (1983). We conclude, therefore, that the record evidence of unpermitted mining on the area leased by Bell is properly considered in support of NOV No. 80-I-27-5 and that, taking into account this evidence, OSM satisfied its burden of proof with respect to at least four of the areas referenced in the NOV.

[4, 5] We next consider the violations charged in NOV No. 80-I-27-6. The first of these alleged violations was that Bell had mined off its permit areas. As was noted in the summary of the evidence, supra, OSM explained the distinction between this alleged violation and the violation alleged in NOV No. 80-I-27-5 as being that, in the case of the alleged mining off the permit areas, the mining disturbances could be associated with the mining operations on particular permit areas, whereas the alleged mining without a permit was removed from the vicinity of any particular permit area. Still, we consider the legal basis for the alleged violation to be the general performance obligation in 30 CFR 710.11(a)(2) discussed, supra.

OSM associated the alleged violation with two areas of mining: The W-shaped permit area shown on the west side of Exhibit 1; and the area outlined in red in the central portion of Exhibit 1. The only evidence introduced by OSM in support of the first-described area of the alleged violation consisted of three photographs, Exhibit 6, 7, and 8, depicting mining disturbances described by OSM Inspector Brummer as being located several hundred feet to the west of the W-shaped permit area. Neither OSM inspector offered an opinion as to when the disturbances shown in these photographs occurred; in contrast, Anthony Kovalchick testified that Bell had not conducted any mining in the W-shaped permit area after May 3, 1978. We conclude, therefore, that OSM did not satisfy its burden of proof in support of the alleged violation with respect to the W-shaped permit area.

Concerning the area outlined in red on Exhibit 1, there is no question that Bell was actively engaged in mining there on the date of OSM's inspection. Anthony Kovalchick testified, however, that the area affected by those operations was covered by a permit and bond.

The only permit document introduced into the record, Exhibit 12, appears not to pertain to the area of the alleged violation. In any event, Bell challenged the authenticity of the document and the probative value of the small-scale map appended to it. We make no finding as to the authenticity of the document, but conclude that, in the absence of documentary evidence that Bell had obtained a permit for its operations in the area outlined in red on Exhibit 1 as of the date of OSM's inspection, the record supports the alleged violation pertinent to that area. 5/

We reject petitioner's claim that the DER inspector's action (reported in Exhibit 15) allowing Bell to continue to mine in the disputed area pending the timely submission of an amended permit application and bond was tantamount to a State permit for that mining. This State action was remedial in nature and did not constitute approval of any practice constituting a violation of the permit requirement.

[6, 7] The second violation charged in NOV No. 80-I-27-6 was that Bell had "failed to accomplish backfilling as mining progressed in accordance with the approved mining plan." The legal requirement on which OSM based this alleged violation is 25 Pa. Admin. Code § 77.92(f)(1) (Shepard's 1980), which provided: "Backfilling shall be accomplished as mining progresses in accordance with the approved mining plan." OSM has authority to enforce this requirement under the provisions of 30 CFR 716.5. 6/

The only mining plan introduced into the record was that associated with Exhibit 12. According to OSM's testimony, that permit package appears to pertain only to the W-shaped permit area and a portion of the area outlined in yellow on Exhibit 1. Concerning the W-shaped permit area, we have already concluded that Bell did not engage in mining activity in that area between May 3, 1978, and March 20, 1980, the date of OSM's enforcement action; therefore, it follows that OSM lacked regulatory authority to enforce the terms of the approved mining plan as to that area. We also have found that on the date of OSM's inspection Bell was engaged in mining in the area outlined in red on Exhibit 1, and that this was not an area shown to be covered by a permit. As a matter of law, OSM could not prove both that Bell was mining in an area not covered by a State permit and that, in the same area, Bell was mining in a manner inconsistent with a requirement set forth in a State permit. While there is some indication in the testimony that Bell's

5/ We consider the burden of producing such documentary evidence to have rested with petitioner because such evidence was more readily available to petitioner. See Campbell v. United States, 365 U.S. 85, 96 (1961). Anthony Kovalchick's mere unsupported assertion that Bell had a State permit to mine in the area outlined in red was not an adequate substitute for documentary evidence.

6/ This regulation provides, in part: "(b) The environmental protection provisions of Title 25, Rules and Regulations, Part I, Department of Environmental Resources, Commonwealth of Pennsylvania, shall apply to reclamation of anthracite surface coal mining and reclamation operations in the Commonwealth of Pennsylvania instead of Part 715 and Part 717 of this chapter."

mining activity on March 20, 1980, might have been affecting some portion of the area outlined in yellow on Exhibit 1 -- an area that, according to OSM's testimony, was covered by the permit package introduced as Exhibit 12 -- the evidence in this regard is unclear. We conclude, therefore, that OSM did not prove that Bell failed to accomplish backfilling in accordance with any approved mining plan.

Civil Penalty Assessments

OSM did not propose a civil penalty assessment for violation 1 of NOV No. 80-I-27-6 and, because we have concluded that OSM did not satisfy its burden of proof with respect to violation 2 of that NOV, there is no basis for the civil penalty assessment proposed for that alleged violation. It follows from our discussion concerning NOV No. 80-I-27-5, that the Administrative Law Judge's reduction of OSM's proposed civil penalty assessment was improper because, contrary to his findings, the evidence supports the alleged violation with respect to at least four of the various areas identified with the violation. Moreover, we note that the Administrative Law Judge failed to incorporate in his decision the findings of fact on the criteria in 30 CFR 723.12 required under 43 CFR 4.1157(a). Accordingly, we conclude that OSM's proposed civil penalty assessment should be reinstated for NOV No. 80-I-27-5. 7/

Order

On the basis of the foregoing, and pursuant to the power delegated to the Board of Land Appeals by the Secretary of the Interior under 43 CFR 4.1, as amended at 49 FR 7564 (Mar. 1, 1984), it is hereby ordered:

1. That the decision below is affirmed as modified with respect to the merits of the violation alleged in NOV No. 80-I-27-5;
2. that the decision below is reversed with respect to the reduction of the civil penalty assessment proposed by OSM on the basis of NOV No. 80-I-27-5 and OSM's proposed assessment is affirmed;
3. that the decision below is affirmed as modified with respect to the merits of violation 1 of NOV No. 80-I-27-6;
4. that the decision below is reversed with respect to the merits of violation 2 of NOV No. 80-I-27-6; and
5. that OSM shall return to Bell Coal Company, with interest calculated in accordance with the provisions of 30 CFR 723.20, the sum of \$1,100,

7/ We reach this conclusion in the absence of any assertion by Bell that OSM erred in its calculation of the proposed civil penalty assessment. See discussion, supra at note 3, and accompanying text.

representing the amount of the proposed civil penalty assessment associated with violation 2 of NOV No. 80-I-27-6 and paid into escrow by Bell.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

James L. Burski
Administrative Judge

