

MULLINS COAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-910

Decided April 7, 1987

Appeal from a decision of Administrative Law Judge Joseph E. McGuire, denying applications for review. NX 5-29-R, NX 5-41-R.

Affirmed.

1. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Statement of Reasons

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

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

In a hearing on an application for review of a notice of violation or cessation order, OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is un rebutted, the violation will be sustained on appeal.

APPEARANCES: Dennis E. Jones, Esq., Lebanon, Virginia, for Mullins Coal Company, Inc.; Elizabeth S. Tonkin, 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 ADMINISTRATIVE JUDGE KELLY

Mullins Coal Company, Inc. (appellant), appeals from a decision dated August 23, 1985, by Administrative Law Judge Joseph E. McGuire, denying applications for review of Notice of Violation (NOV) No. 84-13-285-5 and Cessation Order (CO) No. 84-13-285-4, issued by the Office of Surface Mining Reclamation and Enforcement (OSM), after an oversight inspection pursuant to the provisions set forth in section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1982).

On July 26, 1984, OSM Reclamation Specialist David E. Beam conducted an inspection of the surface effects of applicant's underground coal mining operation known as Mullins #2 Mine, State permit No. 1200069, located in Buchanan County, Virginia. Beam observed two conditions which he determined were violations of the Virginia Coal Surface Mining Control and Reclamation Act of 1979 (VCSMCRA).

On August 6, 1984, Beam issued to the Virginia Division of Mined Land Reclamation (DMLR) a 10-day notice describing the alleged violations and recommending that remedial action be taken. On September 26, 1984, DMLR advised OSM it planned to take no enforcement action because "[d]isturbance for the area in question occurred at a period of time when DMLR was without jurisdiction." Beam reinspected the site on October 5, 1984, and issued the NOV on the same date, charging two violations. These violations and the abatements required were described in Judge McGuire's decision as follows:

Violation 1 of that NOV alleged that [appellant] had failed to permit all lands affected by its surface coal mining and reclamation operation, in violation of V 701.11(a) and V 770.4(a). In order to abate that alleged violation [appellant] was required to apply to DMLR for an amendment to its surface mining permit so that all areas that had been affected by its operations would have been incorporated in its permit. The additional area which [appellant] was required to permit by 8 a.m. on November 5, 1984, was the landslide which had developed in the hill slope of the haul road.

Violation 2 of the NOV consisted of appellant's having allegedly used a pre-existing structure, the haul road, to facilitate its surface coal mining operation after DMLR had approved its permanent program permit without having proven to DMLR that the performance standards of VCSMCRA were being met or by having reconstructed the haul road to insure its compliance with the performance standards, in violation of V 701.11(e)(1)(iii) and V 786.21(c)(1)(vi). Appellant was ordered to abate this violation within 30 days following DMLR's approval of its plan covering the reconstruction of the haul road and all lands affected by that road.

(Decision at 2-3).

On December 4, 1984, Inspector Beam conducted another inspection of appellant's minesite. He determined that appellant had not abated the violations and issued CO No. 84-13-285-4 on the same date. Appellant filed an application for review of the NOV on November 8, 1984, and applications for review of and temporary relief from the CO on December 17, 1984.

On January 4, 1985, a hearing was held on appellant's application for temporary relief before Judge McGuire at Abingdon, Virginia, and on January 9, 1985, Judge McGuire issued a decision denying temporary relief.

A hearing on appellant's applications for review of the NOV and CO was held before Judge McGuire on January 24, 1985. In his August 23, 1985, decision, Judge McGuire concluded that OSM had established a prima facie case as to both violations cited in the NOV and that appellant had "not furnished a sufficiency of credible evidence that the CO was not properly issued." Consequently, he found that the CO was properly issued and denied the applications for review. This appeal followed.

In its statement of reasons, appellant emphasizes that the slide was a pre-existing condition and argues that Judge relied on speculative testimony that its reworking of the haul road resulted in movement of the slide. Appellant asserts that its operations were in compliance with its permit package and applicable regulations. Appellant argues that the Judge ignored the testimony of its witnesses and failed to review the permit.

OSM moves to dismiss the appeal pursuant to 43 CFR 4.1273(e) on the grounds that appellant's statement of reasons contains no legal arguments and contains only "a single inaccurate reference to the record." OSM's answer contends that the appeal presents only a single issue: whether the record contains sufficient evidence to support the Judge's factual determination. OSM answers the issue in the affirmative, asserting that the Judge properly sustained the NOV and CO.

[1] Department regulation 43 CFR 4.1273(e) states that where any argument is based on evidence of record and there is a failure to include specific record citations, the Board need not consider the argument. However, dismissal of an appeal for deficiencies in the reasons for appeal is within the discretion of the Board, and each case will be considered on its own merits. Geneva Barry, 54 IBLA 48 (1981). In the case before us, appellant makes an affirmative assignment of error in contending that the Judge failed to assign proper probative weight to the testimony of its witnesses and to documentary evidence. While this may be a general allegation of error, it merits discussion and OSM's motion to dismiss is accordingly denied.

[2] The burden of going forward to establish a prima facie case as to the validity of the NOV and CO is on OSM. See 43 CFR 4.1171(a). If a prima facie case is established, the ultimate burden of persuasion is on appellant. See 43 CFR 4.1171(b). A prima facie case is made when OSM submits sufficient evidence to establish the essential facts of the violation. Turner Brothers, Inc. v. OSM, 93 IBLA 194 (1986). When this evidence is un rebutted, the violation will be sustained on appeal. Id.

As to violation 1, Judge McGuire summarized the testimony and evidence which he found satisfied OSM's evidentiary burden:

Through the testimony of the applicant firm's president, Tolbert P. Mullins, as well as the drawings and data contained in the permit package (Applicant's Exh. 1), it was conclusively established that the shoulder of the haul road served as the

boundary of State permit No. 1200069. Thus, the area of the slide located below the haul road was clearly located off the permit area. By way of the testimony of Messrs. Beam and Sefton, as well as by the use of drawings and onsite and aerial photographs, respondent has shown that an unstable slide area was created by applicant's mining activities and that the area extends some 214 feet below the haul road. Respondent further demonstrated that the haul road was not in existence on April 17, 1980 (Respondent's Exhs. I-1 and I-2), that it became visible in an aerial photograph taken on November 15, 1982 (Respondent's Exhs. J-1 and J-2), or some 23 months after applicant opened Mullins #2 Mine in December 1980, and that the size of the area of the slide increased from 0.27 of an acre on November 15, 1982, to 0.46 of an acre on May 16, 1984, during the period in which applicant conducted its surface coal mining operations in connection with its underground mine.

In addition, respondent furnished evidence to show that applicant did not utilize a pre-existing haul road in commencing this operation in December 1980, in the form of the expert testimony of John Russell Sefton, to the effect that applicant had simply cut the haul road in question through a preexisting, stable slide area, which caused instability in the slide because of the loss of lateral support. These evidentiary facts satisfy respondent's evidentiary burden, that of establishing a prima facie case that the pertinent NOV had been validly issued as it related to Violation 1 therein.

(Decision at 8).

Judge McGuire assessed appellant's evidence and concluded that appellant "simply did not assume its burden of persuasion" to show the NOV (as to Violation 1) was not properly issued.

As to Violation 2, Judge McGuire found as follows:

I further find that the evidence adduced in connection with the remaining violation supports a finding that applicant also violated V 701.11(e)(1)(iii) as alleged in Violation 2 of the pertinent NOV since the testimony of applicant firm's president contains the admission that a pre-existing haul road had been utilized after having been updated in the faceup phase of this operation and since it was further established that applicant, prior to using that pre-existing haul road, had failed to demonstrate to DMLR that pre-existing structure had met its performance standards.

(Decision at 9).

Based on our review of the record, we conclude Judge McGuire correctly found that OSM established a prima facie case for the issuance of the NOV as

to both violations and the CO. 1/ We further conclude the record supports the Judge's findings that appellant failed to rebut OSM's evidence as to both violations. Appellant asserts the Judge relied on the speculative testimony of John Sefton as to Violation 1. Even if this testimony were disregarded, the remaining evidence submitted by OSM is sufficient to establish a prima facie case and appellant has not rebutted such evidence.

Finally, we find no merit in appellant's argument that the Judge "chose to ignore all the testimony of Appellant and the Reclamation Specialist employed by DMLR" and did not review the permit package approved by DMLR. Our review of the testimony of Tolbert P. Mullins and DMLR Inspectors Blackwell and Comer does not indicate their testimony was sufficient to rebut that evidence offered by OSM. Nor does our view of the record indicate the Judge did not properly consider appellant's permit package and give it appropriate probative weight.

Therefore, we conclude Judge McGuire properly denied appellant's application for review of NOV No. 84-13-285-5 and CO No. 84-13-285-4.

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.

John H. Kelly
Administrative Judge

We concur

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

1/ The issuance of the CO is not at issue here. The Judge's decision found appellant made no attempt to abate the violations and appellant does not argue on appeal that such attempt was made.

