

RICHARD GEHRES

IBLA 94-897

Decided November 7, 1997

Appeal from a decision by the Deputy Director, Operations and Technical Services, Office of Surface Mining and Reclamation Enforcement, upholding a finding that investigation into a citizen's complaint of damage to buildings revealed no causal connection to blasting at a coal mine. TDN 93-060-442-017 TV1.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Blasting and Use of Explosives: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally

An OSM decision upholding a finding by a state regulatory authority that blasting operations did not cause damage to buildings is affirmed in the absence of any showing that a causal connection exists between blasting and the damage complained of.

APPEARANCES: Richard Gehres, Springfield, Illinois, pro se and on behalf of his father, Robert Gehres; Steven C. Barclay, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Richard Gehres (Gehres) has appealed from a June 7, 1994, Decision by the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), finding insufficient proof exists to establish that damage to his father's house and machine shop was caused by Amax Coal Company blasting operations at a nearby surface mining operation.

The case arose on September 22, 1993, when Gehres filed a complaint with OSM's Indianapolis Field Office (IFO), alleging that the Indiana Department of Natural Resources, Division of Reclamation (DOR), had erroneously failed to find that damage to Robert Gehres' house and machine shop

was caused by blasting at Amax's Ayrshire mine, as alleged in Gehres' complaint. The OSM notified Gehres on October 6, 1993, that a 10-day notice would be sent to DOR for investigation. On October 25, 1993, IFO received a response to the 10-day notice request from DOR, which stated: "DOR has \* \* \* conducted an investigation of the Robert Gehres home and has determined [that] factors other than blasting caused the damage." The response included a copy of a structural engineering report completed by DOR investigator Alan Johnson. The DOR stated that the engineering report was believed to be accurate; therefore, it was concluded that "no enforcement action is required."

In order to determine the adequacy of the State response, on November 29, 1993, IFO requested technical assistance from OSM's Eastern Support Center (ESC). On February 15, 1994, ESC engineer Ken Eltschlager visited the Gehres property and inspected the house and machine shop. The ESC filed a report with IFO on March 21, 1994, which concluded:

DOR had no choice but to take no action because of the unavailability of blasting records during the damage claim period (pre-1986). However, based on the type and location of the building materials cracked in the Gehres structures, the existence of cracks in the pre-blast survey, and a probabilistic approach to determining ground vibration levels at the structure, we concur that the State cannot prove blasting damage.

This report resulted in a March 30, 1994, finding by the Director, IFO, addressed to Gehres, that the State response was appropriate. Therein, the Director stated:

In addition to the ESC written findings, I also contacted the primary OSM investigator, Mr. Ken Eltschlager, and specifically discussed your concerns that significant blasting violations had occurred at the site during the past. Mr. Eltschlager indicated that he was aware of the violations but still could not make a determination that the level of energy reaching your parents' home caused the type of damage observed. My decision is based largely on the difficulties in gathering meaningful information on damage that occurred years ago.

On April 14, 1994, Gehres filed a request for informal review of the field office findings pursuant to 30 C.F.R. § 842.12. That request was addressed by the Decision of June 7, 1994. The Decision found "that IFO followed all required procedures as well as obtaining the additional technical" evidence. The report drew the following conclusions relating to the evidence:

Both the ESC report and the earlier report prepared by the Indiana DOR were based upon the available blasting records (for the last 3 years). Both reports conclude that the blasts which occurred during that time period were at such distances and levels that the blasting standards would have not been exceeded

at your parents' house or machine shed and, therefore, the blasting could not be associated with any observed building problems. The findings in the March 16, 1994, report prepared by ESC were well-documented and are comprehensive. There is nothing in the record upon which to reverse the findings in the report.

Further, \* \* \* even though the pre-blast survey was conducted in 1980, your first complaint to OSM did not occur until 1993. It also appears that blasting took place closer to the buildings in question several years prior to the complaint. As was noted in the ESC report for this earlier period, the blasting records are no longer available.

(Decision at 2.) Gehres filed a timely appeal from this Decision.

To prove blasting damaged his property, Gehres relies on selected testimony from a lawsuit (or lawsuits) filed by persons in the McCutchanville and Daylight areas alleging damages from Amax blasting (Gehres Exs. 10, 15, 20/1, 25/1, 75, 220, 220/1, 230, 230/1, 230A, 250A, 250B, 270/14A, 440, 460/1, 465, 470/1A, and others), and complaints filed by other citizens with DOR (Exs. 270/1 through 270/10, and 480/1 among others). His argument seems to be that since other homes near the Ayrshire mine have been damaged by Amax blasting, it stands to reason that the Gehres home has also been damaged thereby; he advances mathematic and statistical analyses to establish his thesis. In addition, he argues that the findings of DOR and OSM investigators were biased against him.

The OSM found as a fact that evidence of blasting damage to the Gehres buildings does not exist and that DOR's decision to take no action against Amax was therefore appropriate. This determination was supported by analysis provided by the technical staff at ESC. On February 15, 1994, Ken Eltschlager, blasting specialist for the ESC, reviewed records at DOR offices pertaining to the complaint, and made a site visit at the Gehres residence. Eltschlager learned during his visit at the Gehres home that "both the residential structure and the machine shop were cracked before 1986." (Memorandum to Director, IFO, from Acting Assistant Director, ESC, dated Mar. 16, 1994 (ESC Report), at 2.) According to the ESC Report, DOR's report analyzed blasting records from May 17, 1990, through May 17, 1993, and concluded that available data could not support a conclusion that the damage sustained was caused by blasting. The ESC determined that, since damage to the property occurred before 1986, blasting records from 1990 through 1993 were irrelevant. The ESC determined, however, that the DOR report accurately identified "the existing structure cracks and note[d] that many cracks are shown on a 1980 pre-blast survey." (ESC Report at 2.)

The ESC Report found that recent OSM studies pertaining to blasting at the Amax mine (such as an Indiana blasting study and blast complaint oversight studies) were not germane, because their analysis did not extend in the direction of the Gehres property. It was observed that "[b]lasting complaint investigations, particularly blast damage claims,

need to be individually evaluated based on site specific information, structure information, and the availability of blasting information." (ESC Report at 2.) The report concluded that "[c]ritical information absent in this investigation is the ground vibration data during the damage claim period. The mine is required to keep 3 years of blasting data. Without the blast logs prior to 1986, prediction of ground vibrations is not possible." (ESC Report at 3-4.)

The only issue to be decided herein is whether OSM erred in finding that there was insufficient evidence available to conclude that damage to the Gehres buildings was caused by Amax's blasting operations; issues raised in Gehres' statement of reasons on appeal (SOR) not relevant to that question are, therefore, summarily considered and rejected. We find no evidence in the record to support Gehres' allegations that OSM personnel were biased in their investigation and handling of his citizen complaint. Because OSM did not rely on it, we reject arguments directed by Gehres against use of the Report of Investigation 8507 (a 1980 research document prepared by the Bureau of Mines, said by Gehres to "regulate blasting at the Ayrshire mine and mines nationwide." (SOR at 10.)) Likewise, allegations of erroneous use by OSM of other research documents are rejected as without substance.

[1] When OSM issues a 10-day notice to a state regulatory authority pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1994), in response to a citizen's complaint alleging damage to a dwelling caused by blasting operations, this Board will set aside OSM's decision affirming the finding of a state regulatory authority that blasting operations did not cause the damage and refer the case for hearing pursuant to 43 C.F.R. § 4.1286 where there are material issues of fact whether blasting operations were a cause of the damage. Mr. and Mrs. William J. Hamilton, 105 IBLA 160 (1988); Clifford Mackey, 99 IBLA 285 (1987). In the case before us, however, Gehres has not provided us with any "material issues of fact" concerning whether Amax's blasting operations were a causative factor in the damage to his father's buildings. Gehres has shown that there are cracks in his father's residence and machine shop and that blasting occurred at the Ayrshire mine; no relationship between the two has been shown, however. The Investigation by OSM found that a preblast survey showed damage to the buildings prior to 1980, and that the present damage alleged by Gehres occurred before 1986.

Gehres has not provided evidence disputing these findings. He argues, based upon damage to other dwellings near the Ayrshire mine and using his own statistical analysis, that the damage was more likely than not to have been caused by the Amax blasting; there is, however, no factual data tending to establish a connection between blasting by Amax and the cracks in Gehres' buildings, either in the form of blasting records from Amax from before 1986 when the damage occurred, or an independent analysis of probative evidence by a qualified expert. On the record developed, which lacks data tending to establish causation, OSM would have acted in an arbitrary manner had DOR been required to issue a notice of violation against Amax.

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.

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Franklin D. Arness  
Administrative Judge

I concur.

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James L. Bymes  
Chief Administrative Judge

