

CHARLES PARKER
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 92-304

Decided December 18, 1997

Appeal from a Decision of the Director, Charleston, West Virginia Office, Office of Surface Mining Reclamation and Enforcement, denying informal review in response to a citizen's complaint of subsidence damage caused by underground coal mining. I&E-MOR-91-049-06.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints:
Generally—Surface Mining Control and Reclamation Act of 1977: Subsidence:
Generally

The OSM properly denied informal review of a citizen's complaint of damage to property from subsidence caused by coal extraction completed before the effective date of SMCRA.

APPEARANCES: Charles Parker, Fairview, West Virginia, pro se; Stephen D. Williams, Esq., and W. Henry Lawrence IV, Clarksburg, West Virginia, for Intervenor Eastern Associated Coal Corp.; Steven C. Barclay, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Charles Parker has appealed from a determination by the Director, Charleston, West Virginia Office, Office of Surface Mining Reclamation and Enforcement (OSM), that the West Virginia Division of Environmental Protection (WVDEP) properly refused to take enforcement action on Parker's complaint that subsidence caused by underground mining by Eastern Associated Coal Corporation (Eastern) damaged his house and well. Review of the refusal by WVDEP to take action under Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1251 through 1279 (1994), was delayed by agreement of the parties pending investigation and litigation in State court. Finally, however, on August 11, 1997, WVDEP stated it had "investigated the complaint and made the determination that

mining had taken place prior to the August 3, 1977 passage of [SMCRA]. Therefore, it is the [State's] position that the subsidence damage * * * is * * * not subject to Title V jurisdiction." It is also the position of OSM and Eastern that the subsidence damage complained of by Parker does not fall within the scope of section 516 of SMCRA, 30 U.S.C. § 1266 (1994), regulating surface effects of underground mining.

Parker filed a complaint on December 5, 1990, alleging that mining by Eastern caused subsidence damage to his house and water well. His complaint was investigated by WVDEP on January 16, 1991, and it was determined that the damage reported by Parker and observed by WVDEP was caused by subsidence. Whether WVDEP had jurisdiction to proceed further, however, was questioned, and it was determined by the State, after referring the question to the State Attorney General, that the State lacked jurisdiction to proceed further inasmuch as it appeared that mining below the Parker house had been completed in April 1977, before SMCRA took effect in August of that year. Agreeing with this conclusion, OSM denied informal review of Parker's complaint. In so doing, a finding based on an engineering investigation of the complaint was made that

Eastern Associated Coal Corporation (Federal Number 1 Mine) extracted coal (retreat mining) beneath your [Parker's] property in January and April of 1977 and had advanced 350 feet from your residence. A number of fairly large stumps and fenders of coal remained beneath your property after the retreat mining was completed (an estimated 35 percent). Therefore, subsidence did not immediately follow retreat mining. Mining of the entire complex was completed in 1985 and the mine was sealed in the early part of 1986. After mining was completed, water naturally began to accumulate in the voids where coal had been extracted. The Pittsburgh coal in your area is underlain by 3 to 3.5 feet of fire clay. Under flooded conditions, fire clay loses most of its bearing strength. Most likely, the remnant coal pillars "sunk" into the clay floor, causing shifting roof pressures and ultimately subsidence of your property. For this reason, you did not experience subsidence damage to your property until well after coal extraction had occurred.

It is our position that the subsidence damages you have experienced are the result of coal extraction and mining activities that occurred prior to the enactment of SMCRA for which we do not have regulatory jurisdiction. Therefore we are upholding the decision * * * that the State has shown good cause for not taking enforcement action in this case.

(Decision at 2.)

Parker disputes that mining beneath his property ended in April 1977; he argues that the report of investigation relied upon by OSM failed to locate his property correctly in relation to the underground workings of

Eastern, and that Eastern continued operations beneath his house until after August 3, 1977. He contends that coal mining cannot be equated with coal extraction, and that "pumping, firebossing, ventilation and mining continued until 1978 causing the entire panel to be subject to the regulatory jurisdiction of SMCRA." (Statement of Reasons at 3.) Parker concludes that OSM should have recognized that mining continued past 1977 under provision of West Virginia Code § 22A-2-5 (1997), which states that "[f]or the purpose of this section, working within a panel shall not be deemed to be abandoned until such panel is abandoned."

Assuming, without deciding, that Parker's house and well were damaged by subsidence, the issue presented by this appeal is whether OSM concluded correctly that WVDEP had shown good cause in that it lacked jurisdiction to take enforcement action against Eastern on Parker's behalf. See 30 C.F.R. § 842.11(b). We conclude that OSM's ruling on this issue was correct, and affirm the Director's Decision.

[1] Although Parker challenges OSM's finding that mining below his property ended in April of 1977, he has offered no evidence that mining was still being conducted there on August 3, 1977, when SMCRA took effect. The engineer whose report is questioned by Parker relied on maps supplied by Eastern and the Mine Safety and Health Administration (MSHA) in reaching his conclusion about the location and time of mining relevant to Parker's complaint. His report recites that he "talked with personnel from Eastern, MSHA District No. 3 Office, WVDOE [West Virginia Department of Energy, now WVDEP] personnel who originally investigated the complaint, and Mr. Parker." (Engineer's Report dated Dec. 4, 1991, at 3.) Nothing in the record before us supports conclusions contrary to those reached by the engineer's report; OSM properly accepted the engineer's findings that coal extraction under Parker's house and well was completed in April 1977.

As Parker contends however, coal mining is not limited to extraction. In making this point, he relies on section 22A-2-5 of the West Virginia Code, quoted above, for the proposition that abandonment, not cessation of extraction, establishes the ending date for mining below his building. Nonetheless, the applicability of section 22A-2-5 is, by its terms, limited to regulation of the health and safety of underground miners; it is not part of the State's surface mining program. Section 22A-2-5 is not relevant to the question whether OSM has jurisdiction over this complaint under authority conferred by SMCRA.

Pursuing his argument based on section 22A-2-5 nonetheless, Parker contends that continued use of the mined area under his house for ventilation after August 3, 1977, brings his complaint within the scope of SMCRA section 516. See Engineer's Report at 4 (stating that the area in question was used for ventilation until July 1978). Section 701(28)(A) of SMCRA, 30 U.S.C. § 1291(28)(A) (1994), defines "surface coal mining operations" to include "surface impacts incident to an underground coal mine." We find that maintenance of an underground section of a mine for ventilation purposes has not established a surface impact incident to an underground coal mine. It is not argued by Parker that the subsidence in 1990

of his property was caused by ventilation of the mine until July 1978. He argues, rather, that coal removal in 1977, followed by flooding sometime after the mine closed in 1978, eventually caused subsidence of his land and damage to his property. While it could be argued that ventilation is an "underground mining activity" under 30 C.F.R. § 701.5, this fact alone is insufficient to confer jurisdiction upon OSM and WVDEP to take action for subsidence caused by mining completed before the effective date of SMCRA.

Coal extraction, however, was not the single cause of subsidence, according to OSM's engineer; it is suggested by his report that flooding after the mine closed led to the subsidence of Parker's land. But flooding is not an activity included in the definition of surface coal mining operations. See 30 U.S.C. § 1291(28) (1994). Since the regulatory performance standards at 30 C.F.R. Part 817 apply only to underground mining activities, flooding is not a regulated activity. See 30 C.F.R. § 817.121(c) (1991) (subsidence control). This aspect of the subsidence, found by the engineer to be a possible factor in the damage ultimately observed at the Parker property, also fails to provide a basis for regulation in this case.

It is concluded, therefore, that no error has been shown in the decision by OSM to accept WVDEP's refusal to attempt to regulate coal extraction that was completed before the effective date of SMCRA and that OSM properly denied informal review of Parker's complaint as a consequence. 30 C.F.R. § 842.11(b).

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.

Franklin D. Amess
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

