

**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF MINES MINERALS AND ENERGY**

**PUBLIC FORMAL HEARING**

**RECOMMENDED DECISION OF HEARING OFFICER**

**IN RE: JOSEPH KISER, Complainant  
Complaint No. ECN 1100074**

Public Formal Hearing was held on January 7, 2015 beginning at 9:30 a.m. at the Division of Mined Land Reclamation's Big Stone Gap Office, Buchanan-Smith Building, Room 219, Big Stone Gap, VA.

Mr. Joseph Kiser filed a complaint received on May 16, 2011 by the Division of Mined Land Reclamation, Department of Mines, Minerals and Energy that cracks on his house were caused by subsidence due to mining. Subsequent to the Complaint Investigation Report being issued he requested an Informal Complaint Review. After the Informal Complaint Review was Issued Mr. Kiser made an Application for Administrative Review of DMME's Complaint Investigation findings.

Mr. Kiser was afforded opportunity to present information related to his complaint at a Public Formal Hearing. The following individuals participated in the Public Formal Hearing held on January 7, 2015:

Mr. Paul Kugelman, Jr., Esq.	Counsel for DMME
Mr. Harve A. Mooney	Agency Party Representative at hearing
Mr. Joseph Kiser	Complainant (who represented himself and was a witness)
Mr. Danny Bailey	Witness for DMME
Mr. Mike Washburn	Witness for DMME

**BURDEN OF PROOF:**

As provided for in § 2.2-4020 (C.), the burden of proof is upon the proponent or applicant. Thus, Complainant has the burden of proof in this cause.

**EXHIBITS AND TRANSCRIPT:**

Exhibits, by agreement of the parties, were admitted *en masse*. Complainant offered one exhibit and Agency offered three exhibits, all of which were admitted. Complainant's Exhibit is referred to herein as "C. Ex.1". Agency's Exhibits referred to herein as "A. Ex. \_\_\_" with the exhibit letter inserted at "\_\_\_". The transcript of the hearing consists of one bound volume and is herein referred to as "Tr. \_\_\_" with the page number inserted at the "\_\_\_".

## **FINDING OF FACTS:**

01. Mr. Joseph Kiser filed a complaint which was received on May 16, 2011 by the Division of Mined Land Reclamation, Department of Mines, Minerals and Energy raising concerns that the cracks he discovered on his house were caused by subsidence due to mining. Mr. Kiser indicated damage occurred to the foundation and outer wall of the foyer at the rear of his house as well as the porch at the end of the foyer.<sup>1</sup>

02. Mr. Kiser's complaint was assigned Complaint No. "ECN 1100074" and investigated by Mr. Danny Bailey who filed a Complaint Investigation Report dated June 2, 2011.<sup>2</sup> Based upon his investigation, Mr. Bailey found no evidence to show the problems experienced at Complainant's residence were caused by mining and he therefore closed out the complaint investigation.

Mr. Bailey's Complaint Investigation Report stated in pertinent part:

### **COMPLAINT'S COMMENTS**

Noticed cracks in the exterior brick wall and cinder block foundation/basement wall about 2 or 3 months ago. The crack on the left side of the back porch slab was noticed about a year ago and the crack on the right side was noticed 4 to 6 months ago. All the cracks seem to be getting worse with time. During rains water leaks into the basement in that corner. Complainant stated he thought the original home was built in the late 1970s and the addition was constructed in 1994.<sup>3</sup>

### **INVESTIGATOR'S DESCRIPTION, COMMENTS, AND RECOMMENDATIONS:**

I took GPS location of the structure as shown on the location map. I contacted Glenda Brady with Maxxim Shared Services who supplied the mine maps that are included. ....

Advanced mining was conducted in the lower banner seam approximately 580 feet east of the residence around 2-18-10. No pillaring was conducted in this area. Surface elevation is approximately 2820 feet. The coal seam elevation is approximately 1,997 feet which would result in an interval approximately 823 feet from coal seam to surface.

Mining was conducted beneath the structure in the upper banner seam in 1935. No pillaring was conducted. The seam elevation the area is approximately 2110 feet making the interval approximately 710 feet.

Advanced mining was conducted in the splashdam seam around 1-20-06 approximately 80 feet NE of the residence. The nearest pillaring was conducted approximately 430 feet SE of the residence in the Spring of 2001. The seam elevation is approximately 2175 feet making the interval approximately 645 feet. This calculates an area of influence/angle of draw approximately 34 degrees which is outside the area of influence as described below. Also, the timing of most subsidence usually occurs within 1 year of second mining/pulled pillars.

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<sup>1</sup> C. Ex. 1.

<sup>2</sup> Tr. pg. 7 and A. Ex. C.

<sup>3</sup> A. Ex. C.

The proximity of mining in relation to the area under investigation, the type of mining performed, and the timing of the mining relative to the occurrence of damage are important factors to consider in subsidence complaints. In order to determine if the complaint area is located within an area susceptible to subsidence caused by mining, it must be established how far out from the underground works subsidence would be expected to occur. This distance is determined by using the angle of draw .... It has been determined the average angle of draw for the Appalachian coalfields is 28° (Karmis et al, 1982, p. 122)

Based on my evaluation of the information gathered during this investigation, I found no evidence to show that the problems experienced at the complaint's residence was caused by mining. Therefore this complaint investigation is being closed out.<sup>4</sup>

03. On June 22, 2011 DMLR received a request from Mr. Kiser for Informal Review of DMME's decision as stated by Investigator Bailey in his Complaint Investigation.<sup>5</sup> Informal Review Officer requested the Technical Services Section have an engineer review the findings set forth in the Complaint Investigation.<sup>6</sup>

04. Environmental Engineer Michael Washburn, P.E. conducted a technical review of the Complaint Investigation findings. On September 7, 2011 Mr. Washburn found, and stated in his Memorandum of this date:

I have reviewed the complaint that Danny Bailey investigated on May 18, 2011. I found the location of Mr. Kiser's home on ArcGis and determined the Mine Index numbers for the mines located in the Splashdam, Upper Banner and Lower Banner seams. I then obtained copies of the mine maps from Brent Hughes.

The surface elevation of the Kiser home is 2775, based upon the contours that Steve Mullins generated from the digital ortho-photography.

For the Splashdam seam, the nearest area of pillar removal is about 430 feet away at an elevation of 2177, or a depth of 598'. This results in an Angle of Draw of 35.7 degrees.

The Upper Banner was not pillared. The area under the Kiser home was room and pillar mine in the 1930's. The seam elevation is 2110, which results in a depth of 665 feet.

The Lower Banner was second mined about 573 feet from the house at an elevation of 1997 or a depth of 778 feet. This results in an Angle of Draw of 36.3 degrees.

My numbers are a little different than Danny's, but I agree with his conclusions. The second mining in the Splashdam and Lower Banner are outside the expected draw angle. The first mining in the Upper Banner would not be expected to cause subsidence problems and if any did occur, they should have happened long ago. The overburden depths are much larger than what we typically see when there is sinkhole type subsidence over a single room (30 feet or less).<sup>7</sup>

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<sup>4</sup> A. Ex. C.

<sup>5</sup> A. Ex. B.

<sup>6</sup> A. Ex. B.

<sup>7</sup> A. Ex. A.

05. An Informal Complaint Review was conducted pursuant to 4 VAC 25-130-842.15 (B) of the Virginia Coal Surface Mining Reclamation Regulations at the Complainant's house on July 7, 2011. Informal Review Officer, Complainant, and Inspector Danny Bailey were present. Complainant provided additional information at the Informal Complaint Review which was accepted.<sup>8</sup> The Informal Complaint Review Report of 9/8/11 found structural damage apparent at Mr. Kiser's home. Additionally, the Informal Complaint Review found, "... it cannot be determined that the damage to the citizen's dwelling is related to mining" and found that the Division's Complaint Investigation findings were proper.<sup>9</sup>

06. Complainant requested an Administrative Review of DMME's findings that there was no evidence to show the problems at his residence were caused by mining.

### CONCLUSIONS OF LAW:

#### ***Complainant:***

Mr. Kiser provided a written statement which, as he requested, was read by him at the hearing and was admitted as his Exhibit. Mr. Kiser indicated he filed a damage complaint on May 16, 2011 with DMME.

Mr. Kiser stated, "The damage to my home occurred to the foundation and the outer wall of the foyer at the rear of the house as well as the porch at the end of the foyer. The damage can be seen in pictures one, two, and three, as provided."<sup>10</sup> These pictures had been attached to the Complaint Investigation Report.

It is not contested that there is damage to Mr. Kiser's home. At issue is whether the damage to Mr. Kiser's home is related to mining.

Mr. Kiser indicated concern that one of the investigator claimed the foyer was added to the house at a different time than the main house was built. Mr. Kiser indicated the foyer was, in fact, constructed at the same time as the house. He was also concerned it was suggested the foyer was built on a separate foundation than the basement since there were no cracks in the basement corner. Mr. Kiser noted naturally you wouldn't dig down eight feet to make a foundation for the foyer since the basement foundation is much deeper than the foyer foundation, it would not be likely to crack with the same shock.

Mr. Kiser contests any suggestion that the foyer was partially constructed on backfield dirt placed against the wall of the basement of the main house and this is where the settlement occurred. He notes that since the house was constructed in 1978 one would logically believe the backfield dirt would have settled long before 32 years had passed.

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<sup>8</sup> A. Ex. B.

<sup>9</sup> A. Ex. B.

<sup>10</sup> C. Ex. 1.

Mr. Kiser indicated that the damage occurred at the same time other houses were damaged to the east of his residence and these people were compensated. He noted a Church was damaged just to the NW of his residence and the claim was file but was rejected by the Department. Mr. Kiser also raised that in 2010 a note was left on his door advising that mining was going to take place near his residence and if he wanted them to take pictures they would. He asks if, as suggested, mining could not have damage his home, why would Paramount want to take pictures?

Mr. Kiser stated he believed he has refuted the reasons given pertaining to the damage and believes he has given a reasonable explanation for why he believes mining was responsible for the damage to his house.

***DMME:***

Mr. Kiser's complaint that his home was damaged due to mining was investigated by Mr. Bailey and his Complaint Investigation Report findings were the subject of an Informal Review conducted at Mr. Kiser's request. Additionally, Technical Services Section had an engineer review the findings expressed in Mr. Bailey's Complaint Investigation Report.

In determining whether damage was caused by subsidence Mr. Bailey met with Complainant on May 31, 2011, discussed matters, and secured photographs of damage to his home. Mr. Bailey took into consideration, among other matters, the type of damage to Complainant's home, mining in the area, timing of the mining as related to the occurrence of damage, the type of mining in the area, and the proximity of mining to the Complainant's home.<sup>11</sup>

Both Mr. Bailey and Mr. Washburn utilized Angle of Draw to assist in determining if the Complainant's home is located within an area susceptible to subsidence caused by mining. Angle of Draw was expressed as the angle between a vertical line from the edge of the mining that could cause subsidence and a line extending from the edge of the mining to the point on the surface where subsidence becomes negligible.

Both Mr. Bailey and Mr. Washburn reviewed mining maps, determined mining in the area of Complainant's home, and compared the relative locations (distance and elevation) of any mining to Mr. Kiser's house. Both investigations found mining in the Lower Banner, Upper Banner, and Splashdam seams.

The Complaint Investigation Report addressed and included copies of maps depicting mining and the relation of mining to Complainant's home. It additionally included photographs of the Complainant's home and damage to Complainant's home.

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<sup>11</sup> Tr. 19, Testimony.

Mr. Bailey, in his Complaint Investigation, noted and utilized an average Angle of Draw for the Appalachian coalfields of 28 degrees. Mr. Washburn indicated in Virginia it is assumed the maximum Angle of Draw is 30 degrees and referenced this figure. Testimony further indicated that this 30 degree Angle of Draw was submitted by DMLR to the Office of Surface Mining ("OSM") for review and OSM approved it.<sup>12</sup>

Mr. Bailey has worked for DMME for approximately 29 years as a reclamation inspector and has conducted approximately 100 subsidence inspections. He investigated the complaint filed by Mr. Kiser and observed some cracks in the cinderblocks and brick to Mr. Kiser's house. His Complaint Investigation found no evidence to show the problems at the Complainant's residence were caused by mining.

Both Mr. Bailey and Mr. Washburn testified to their conclusions that there was no evidence to show the problems experience at the Complainant's residence were caused by mining. Both indicated further that this conclusion would not be affected whether the house was built as a unit or with a later addition.<sup>13</sup>

Mr. Bailey also noted if there was going to be subsidence in an area, it would happen usually within a year. The damage to Mr. Kiser's house was estimated to have occurred or started to occur, based on Mr. Kiser's report, about 10 years after the pillars were removed.<sup>14</sup>

Mr. Washburn is an environmental engineer and licensed professional engineer who has worked for DMME since 1977.<sup>15</sup> He conducted a review of Mr. Bailey's Complaint Investigation findings. Mr. Washburn noted in his review that, "My numbers are a little different than Danny's, but I agree with his conclusions." Mr. Washburn determined:

*Splashdam seam:* Angle of Draw of 35.7 degrees

*Upper Banner seam:* Not Pillared. The area under the Kiser home was room and pillar mined in the 1930's. The seam elevation is 2110, which results in a depth of 665 feet. The first mining would not be expected to cause subsidence problems and if any did occur, it should have happened long ago.

*Lower Banner seam:* Angle of Draw of 36.3 degrees.<sup>16</sup>

While Mr. Washburn determined an Angle of Draw of 35.7 degrees and Mr. Bailey determined an Angle of Draw of approximately 34 degrees as to mining in the Splashdam seam, both determinations exceeded area of influence/30 degree maximum Angle of Draw. Both found the Upper Banner seam was not pillared.

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<sup>12</sup> Tr. 50-51.

<sup>13</sup> Tr. 33 and 51.

<sup>14</sup> Tr. 37-38.

<sup>15</sup> Tr. 47.

<sup>16</sup> Tr. 49.

Upon consideration of all evidence in this cause, Complainant has not met his burden of proof.

**RECOMMENDATION:**

Upon consideration of all the evidence in this cause and for the reasons stated above, the Hearing Officer finds that:

1. Complainant has not met his burden of proof. While structural damage is apparent at Mr. Kiser's home there is insufficient evidence to find the damage to Mr. Kiser's home is related to mining.
2. The Complaint Investigation and its finding, "I found no evidence to show that the problems experienced at the complainant's residence was caused by mining. Therefore this complaint investigation is being closed out." are proper.

For the reasons stated above, the undersigned Hearing Officer respectfully recommends *affirming* the Complaint Investigation findings made in reference to Complaint No. ECN 1100074.

Respectfully submitted this 5<sup>th</sup> day of March, 2015.



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Lorin A. Costanzo, Hearing Officer