

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION**

**PUBLIC FORMAL HEARING
HEARING OFFICER'S DECISION and RECOMMENDATION**

**IN RE: ROGER BEVERLY
COMPLAINT NUMBERS 1100135 and 1200111**

PRELIMINARY MATTERS:

Complainant, Roger Beverly, filed a complaint (Complaint No. 1100135) with the Division concerning cracks discovered in his garage which he presented as being due to past underground mining and resultant subsidence. Inspector Dewey Hope conducted the initial complaint investigation and a request was made for technical assistance.¹ The January 2012- Roger Beverly Complaint Report - TRN 2722 - Complaint Number 1100135 noted finding insufficient evidence to show that the concerns at the complainant's residence were related to underground coal mining.² Subsequently, Complaint Number 1100135 was closed out but on July 9, 2012 Mr. Beverly filed a second complaint (Complaint Number 1200111, requesting DMLR re-evaluate the finding of Complaint Number 1100135 and TRN 2722.

Mr. Beverly provided additional evidence which he presented as indicating poor drainage did not cause the damage. Engineer Gary Bailey investigated and concluded in his re-evaluation that the additional evidence was insufficient to show the damage concerns of Complainant are related to subsidence from the underground coal mining.³

Complainant later presented a third complaint indicating new cracks appeared in the residence garage. On 5/14/14 a site visit was conducted with Inspector Dewey Hope, Inspector Supervisor Ken Coomer, and Engineer Tom Mitchell to observe the new damage. Conclusion was reached that subsidence from underground mining was not the cause of the reported damage.⁴

PUBLIC FORMAL HEARING:

Public Formal Hearing was held to review the Decision of the DMME's action on COMPLAINT NUMBERS 1100135 and 1200111. Public Formal Hearing was held on June 24,

¹ Ex C.

² Ex. C.

³ Ex. A. and Ex. B. pg. 3.

⁴ Ex. B. pg. 3 & 5.

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.

Complainant, Mr. Roger Beverly, was present at the Public Formal Hearing, and presented information related to his complaint. The following individuals participated in the June 24, 2015 Public Formal Hearing:

- Mr. Paul Kugelman, Jr., Esq. Counsel for DMME
- Mr. Harve Mooney..... Agency party representative at hearing
- Mr. Roger Beverly Complainant (who also testified)
- Mrs. Sharon Beverly Present at hearing
- Mr. Thomas Mitchell, Engineer with DMLR Witness

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:

Complainant offered six exhibits numbered 1 through 6 with Complainant's Exhibit No. 2 and No. 3 containing multiple photographs. Agency offered four exhibits (letter designated A through D). All exhibits offered by the parties were admitted. Complainant's Exhibits are referred to herein as " Ex. ___" with the exhibit number inserted at " ___". Agency's Exhibits are referred to herein as "Ex. ___" with the exhibit letter inserted at " ___".

The transcript of the hearing consists of one bound volume and is herein referred to as "Tr. pg. ___" with the page number inserted at the " ___".

FINDING OF FACTS:

01. In October of 2011 Mr. Roger Beverly filed a complaint (Complaint No. 1100135) with the Division of Mined Land Reclamation (DMLR), Department of Mines, Minerals and Energy (DMME) expressing concern about subsidence and cracks occurring in the concrete foundation/slab and the concrete block walls of his garage from underground mining. The initial complaint investigation was performed by Area Inspector Dewey Hope who requested assistance from the Technical Services Section. Subsequently, Engineer Gary Bailey investigated the complaint.⁵

In the DMLR's January 2012 - Roger Beverly Complaint Report - Technical Report Number 2722 - Complaint Number 1100135 *Summation of Findings* it was indicated:

⁵ Ex. C pg. 3.

Based on the evaluation performed by the Division of Mined Land Reclamation (DMLR) Technical Services Section and the information gathered during the investigation, we found no evidence to show that the concerns at the complainant's residence are related to underground coal mining.⁶

The initial complaint investigation was performed by Area Inspector Dewy Hope on October 5, 2011. A request for technical assistance was made and approved. Technical Services Section Environmental Engineer Gary Bailey made further investigation. DMME mapping files were used to locate known mine works in the complaint area. The mining shown consists of underground mining in the Dorchester and Norton coal seams.⁷

Timing of the mining in relation to the area under investigation was an important consideration in the subsidence complaint. Mining was determined to have occurred pre May 1, 1999, the final map date, in the Norton seam. The Dorchester seam mining was conducted before December 6, 1976. As the Complainant stated that the cracks were first noticed around July of 2011 this would be at least 12 years after mining in the area.⁸

This report also addressed standing water, flowing water, and drainage. The report stated:

Also, as seen in the pictures, this area of concern has a lot of standing water around and flowing under the garage foundation. There is rain water that is diverted from the gutter downspouts and directed to underneath the garage foundation. Also there is evidence of water seeping out of the hill side next to the garage and flowing under the garage concrete slab floor. Poor drainage around a structure and its foundation might cause the structure to settle and crack.⁹

02. Complaint Number 1100135 was closed finding no evidence to show that the concerns at the Complainant's residence are related to underground coal mining. However, on July 9, 2012 Mr. Beverly filed Complaint Number 1200111 requesting DMLR re-evaluate the finding of Complaint Number 1100135 and TRN 2722. He presented additional evidence concerning drainage under his garage and indicated he was gone for about 3 months on family hardship and was unable to file a request for informal review of the Agency's decision.¹⁰

Engineer Gary Bailey conducted a re-evaluation. After review and re-evaluations it was concluded that Complainant's additional evidence was insufficient to show that the concerns at his residence are related to subsidence from underground coal mining. It was further determined that the additional evidence supplied by the Complainant was concerning the drainage under his garage and not additional evidence of underground mining.¹¹

⁶ Ex. C. pg. 3.

⁷ Ex. C. pg. 3.

⁸ Ex. C. pg. 4.

⁹ Ex. C. pg. 4.

¹⁰ Ex. A.

¹¹ Ex. A. pg. 3.

03. In April of 2014 Mr. Beverly registered a third complaint (Complaint Number 1400030) indicating that new cracks had appeared in his garage. As Mr. Bailey had left employment with DMLR, the complaint was assigned to Engineer Tom Mitchell. A site visit was conducted by Inspector Dewey Hope, Inspector Supervisor Ken Coomer, and Engineer Tom Mitchell on May 14, 2014 to observe the new damage and discussed matters with Mr. Beverly.¹²

04. The Beverly Subsidence Complaint Investigation - TRN 2779 - Complaint No. 1400030 (April of 2015) addressed Mr. Beverly's October 2011 complaint, his reiterated complaint of July 2012, and third complaint in April of 2014.¹³ It was found therein that:

Two underground mines were in the vicinity of the Beverly residence. One in the Norton seam and one in the Dorchester seam. Also, there is some pre-SMCRA (Surface Mine Control and Reclamation Act of 1977) surface mining found far enough away as to not have any direct effect on the Beverly residence.¹⁴

The mining in the Norton seam is a post-SMCRA underground room and pillar mine with retreat mining. Mining was concluded by May 1, 1999 and the bond released in October 2005. Mining in the Norton seam was, considering angle of draw (28°), determined to be too far away to have caused subsidence at the Beverly residence.¹⁵

The underground mine in the Dorchester seam is a pre-SMCRA room and pillar mine. The mine map was dated 1976, no specific dates of mining were noted, thus mining was expected to have occurred before this date. While subsidence was indicated to have been expected to occur (under the circumstances discussed therein) it was determined subsidence would have been expected to have occurred shortly after completion of mining, not multiple decades later.

The conclusion was, as mining in the Norton seam is too far away to have cause subsidence at the Beverly residence, it can be eliminated as a potential cause of the damage and any subsidence from the Dorchester seam would be expected to have occurred decades ago – shortly after mining was completed, not recently. It was further concluded that, as these are the only two underground mining works in the vicinity of the Beverly residence, subsidence from underground mining would not be the cause of the reported damage.¹⁶

¹² Ex. B. pg. 3

¹³ Ex. B. pg. 3.

¹⁴ Ex. B. pg. 4.

¹⁵ Ex. B. pg. 4 and 5.

¹⁶ Ex. B. pg. 5.

05. Complainant's garage was built in 1975 and there was no damage noted until 2011.¹⁷ Mr. Beverly contends mining and subsidence relating to mining caused his problem with the cracks in his garage.

06. It is not contested there is damage to Mr. Beverly's garage and a number of photographs of cracks in concrete and concrete block cracks were admitted to evidence.¹⁸ Mr. Beverly presented copies of two payments to a contractor totaling \$9,000.00 for repair work.¹⁹

CONCLUSIONS OF LAW:

Complainant:

Mr. Beverly's garage was built in 1975, he didn't notice any problems until 2011, and he contends that if there was going to be any settling or anything like that it should have done it a whole lot before 2011.²⁰ He further contends something happened and stated, concerning the mine(s), "You all can say what you want to but I think it's fell in and it's still falling, so that's my theory. The maps show I'm pretty close to a lot of it, where the mines was, you know."²¹

Mr. Beverly also indicated he talked to two contractors concerning the damage to his garage. Mr. Beverly testified, "They say the only thing they [think] could cause it would be the ground falling or moving." and "They said, they predicted this would crack back."²² While consideration is given to Mr. Beverly's statement of what the contractors told him the Hearing Officer is charged with determining the probative weight to give these statements. Concerned is expressed that additional clarifying information was not provided as to the statements or the basis of such statements. The individuals did not testify and were not available for questions.

It is not contested that Mr. Beverly's garage has sustained damage. At issue is whether underground mining was the cause of the damage. Complainant testified as to his beliefs about the damage and its cause. He also presented Mr. Meador's letter of June 24, 2015 (Ex. 1) which indicated the conclusion there is ongoing subsidence related to continuing failure of the pillars in the Dorchester seam mining and this has caused the damage to Complainant's garage.

DMME presented testimony and evidence as to its conclusion that mining activities or subsidence from underground mining would not be the cause of the reported damage.

Evidence:

¹⁷ Tr. pg. 27 and 31.

¹⁸ Ex. 2 & 3.

¹⁹ Tr. 32 lines 16-17, Ex. 4, 5 & 6.

²⁰ Tr. 28 lines 13-16.

²¹ Tr. 28 and Tr. 29.

²² Tr. 28 lines 1-6.

A hearing officer is charged with evaluating the evidence and making findings of fact and conclusions of law based upon the record evidence. Where the evidence conflicts or is subject to varying interpretations, the hearing officer must determine the probative weight and persuasiveness of evidence.

As to Complainant's one page letter from Mr. Meador, it is noted that Mr. Meador was not present in person or available via telephone/other electronic means and did not testify at hearing. Thus, there was no opportunity to question him or cross-examine him as to his statements, conclusions, authority relied upon, or the basis for making such statements and conclusions. While the letterhead indicated *Mining & Property Specialists, LLC, and Engineering and Environmental Services*, and the signature block indicated Mr. Meador was a *P.E.*, no further information was presented. There was no opportunity to address and examine the qualifications, expertise, educational background, or experience of Mr. Meador.

The letter stated, "I also reviewed information and pictures from our previous visits to evaluate the subsidence damage to your garage". There is no evidence clarifying what information or pictures were reviewed, when or where the previous visits occurred, or what the referred to "subsidence damage" was. The letter also refers to a review of DMLR report 2779 dated April 2015. The letter is silent as to whether any consideration or review was made as to other reports, documents, or information involved in DMME's decision.

As to DMME's evidence, DMME admitted into evidence a number of detailed documents addressing its investigations into the matter, its findings, and basis for those findings. These documents (Ex. A through Ex. D) provide timelines of activities, facts taken into consideration, authorities, references, and a basis for the making of conclusions.

DMME presented Mr. Thomas Mitchell as a witness at hearing. Evidence was elicited as to Mr. Mitchell's educational background, expertise, experience, and qualifications. He testified, and was subject to cross-examination, as to his qualifications, the actions he took, his conclusions, methodology, and the basis for making his conclusion.

Mr. Mitchell has been employed since 2008 with DMLR as an engineer. He has a degree in Mine and Mineral Engineering and after investigation generated TRN 2779.²³ His testimony addressed there being two mines in the vicinity of the Beverly residence, both pillar mines, one mine being pre- SMCRA in the Dorchester Seam and one mine being post-SMCRA in the Norton seam.

Mr. Mitchell testified as to the angle of draw. He referenced research done, common industry accepted standards, and how the angle of draw was determined.²⁴ He indicated the

²³ Tr. pg. 38-40.

²⁴ Tr. pg. 45 and Tr. pg. 46.

Norton mine was determined outside the 28^o angle of draw for the Beverly home and thus too far for subsidence to have occurred.²⁵

As to the Dorchester seam mine he discussed matters taken into consideration in reaching his conclusion that it would be extremely unlikely, given the age of the mining, that subsidence caused the damage to Complainant's residence.²⁶

Mr. Beverly addressed, in his opening statement, his complaint about some shooting, blasting he felt affected him.²⁷ A document dated Red River 1601576 Blasting Complaints Investigation – Technical Report Number: 2733 – Complaint Numbers 1200032, 1200041, 12000169, 1300018, 1300096, 1300112 was admitted (Ex. D) which, on its face, indicates Mr. Beverly contacted DMLR on March 22, 2013 with regards to surface mining blasting damage at his home. He was one of a number who made complaints. The document indicated he expressed concern that blasting is causing structural damage to his home due to it causing underground mine works near his home to subside. It was further indicated that DMLR Inspector Dewey Hope visited the site on March 25, 2013 and reviewed blasting logs and seismograph readings. DMLR Inspector Adam Cumpston also assisted in reviewing the blast logs. Mr. Beverly's home was determined to lie approximately 4.6 miles from the extents of the Black Creek permit area. The *Summation of Findings* noted, based on the location of the Complainant homes and the type of physical damage, low amplitude blast vibrations from the blasts conducted by Red River Coal Company Inc., CSMO 1601576 did not cause the damages to Complainant's homes.²⁸

Objection:

Mr. Beverly noted his objection to a report of DMME being based on an analysis done "on paper".²⁹ Testimony was elicited as to concerns the Norton mine and the Dorchester mine were both sealed and it would not be safe to re-enter them.³⁰ Additionally, testimony indicated drilling is basically cost prohibitive and uncertain.³¹

Burden:

Mr. Beverly expressed concern that he has the burden of proof in this matter and being required to prove his damages resulted from mining activities.³² Upon consideration of the evidence presented, laws, and regulations it is found that Complainant has the burden of proof in this cause. Furthermore, for the reasons stated hereinabove, it is further found that Complainant, Roger Beverly, has not met his burden of proof in this cause.

²⁵ Tr. pg. 51 and Tr. pg. 52.

²⁶ Tr. pg. 47 - 49

²⁷ Tr. pg. 10.

²⁸ Ex. D. pg. 9.

²⁹ Tr. pg. 77.

³⁰ Tr. pg. 55.

³¹ Tr. pg. 44- 45.

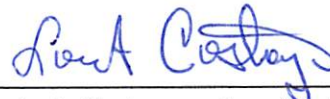
³² Tr. pg. 28 lines 8-11.

DECISION and RECOMMENDATION:

Upon consideration of the evidence in this cause and for the reasons stated above, the Hearing Officer determines and it is furthermore recommended to the Director that:

1. Complainant, Roger Beverly, has not met his burden of proof.
2. There is insufficient evidence to find the damage to Mr. Beverly's garage and/or residence is caused by coal mining activities or subsidence related to coal mining activities. Furthermore, any such finding of insufficient evidence by the DMME was proper. *and*
3. The actions of the DMME in closing out Complaint Number 1100135 and Complaint Number 1200111 are proper and affirmed.

Respectfully submitted this 31st day of August, 2015.



Lorin A. Costanzo, Hearing Officer