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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000691-MR

DENZIL COLEMAN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 95-CI-00960

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET — APPELLEE

TO BE HEARD WITH: NO. 2002-CA-000692-MR

DENZIL COLEMAN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 95-CI-01021

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET — APPELLEE

TO BE HEARD WITH: NO. 2002-CA-000747-MR

LYNN EVANS AND
DENZIL COLEMAN APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 95-CI-00959

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET APPELLEE

OPINION

AFFIRMING IN PART AND
REVERSING IN PART

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON, JUDGES.

BAKER, JUDGE. Denzil Coleman brings Appeal Nos. 2002-CA-000691-MR and 2002-CA-000692-MR from March 4, 2002, opinions and orders of the Franklin Circuit Court. Denzil Coleman and Lynn Evans bring Appeal No. 2002-CA-000747-MR from a March 12, 2002, opinion and order of the Franklin Circuit Court. We affirm Appeal Nos. 2002-CA-000691-MR and 2002-CA-000692-MR. We reverse Appeal No. 2002-CA-000747-MR.

These appeals center upon the imposition of civil penalties upon Coleman and Evans, as shareholders, directors, or agents, of various coal companies. Kentucky Revised Statutes

(KRS) 350.990(9). We observe that these cases have tortuous procedural histories, and we will not attempt to recite the whole of these histories in this opinion. Rather, the procedural facts recited herein shall be confined only to those necessary for disposition of these appeals.

Appeal Nos. 2002-CA-000691-MR and 2002-CA-000692-MR shall be initially and simultaneously addressed; Appeal No. 2002-CA-000747-MR shall be subsequently addressed.

Appeal Nos. 2002-CA-000691-MR and 2002-CA-000692-MR

Appellant, Coleman, was the principle owner of E&C, Inc., (E&C); he was also the sole shareholder, director, and "officer in charge" of R&H Mineral Enterprises of Western Kentucky, Inc., (R&H). E&C and R&H were Kentucky corporations engaged in coal mining activities within the Commonwealth. The corporations held some twelve mining permits and had obtained performance bonds to assure reclamation of the sites. KRS 350.060 and .064. Some time thereafter, the sureties on the performance bonds became insolvent. Appellee, the Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet (the Cabinet), discovered the insolvency and issued Notices of Non-Compliance And Orders For Remedial Measures (non-compliance orders). KRS 350.130; 405 Ky. Admin. Regs. (KAR)

7:001 Section 1(51); 405 KAR 12:020 Section 2. The non-compliance orders directed E&C and R&H to take the following remedial measures:

> (1) submit new bond,
> (2) if a new bond cannot be obtained, provide written documentation showing inability to acquire new bond coverages,
> (3) **maintain area at release standards until a complete release is obtained.** (emphasis added).

Hearing Officer's Report at 13.[1] Eventually, the Cabinet issued Orders for Cessation and Immediate Compliance (cessation orders).

The Cabinet filed Administrative Complaints against E&C, R&H, and Coleman, individually. 405 KAR 12:020 Section 2; 405 KAR 7:092E, Section 5. Therein, the Cabinet sought to impose individual liability upon Coleman by imposition of civil penalties under KRS 350.990(9). A hearing officer conducted hearings upon the complaints and entered his reports and recommendations. KRS 350.0301. The hearing officer concluded that imposition of civil penalties upon Coleman was not warranted. The Cabinet filed exceptions with the secretary. KRS 350.0301. The secretary agreed with the Cabinet and entered final orders adjudicating Coleman individually liable for civil penalties under KRS 350.990(9). Appeals were taken to the

[1] We note that the hearing officer's reports and recommendations in Appeal Nos. 2002-CA-000691-MR & 2002-CA-000692-MR are substantively identical; therefore, all citations to the hearing officer's reports in this opinion shall be taken from Appeal No. 2002-CA-000691-MR.

Franklin Circuit Court. KRS 350.032. The circuit court ultimately entered opinions and orders affirming the secretary's orders.[2]

In his briefs, Coleman raises several issues for our review.[3] We shall address the issues in an order that aids our disposition of the appeals, rather than in the order presented in Coleman's briefs.

Judicial review of an administrative decision is concerned with arbitrariness. See American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). As an appellate court, we step into the shoes of the circuit court and review the secretary's orders for arbitrariness. Arbitrariness has many facets; relevant to these appeals are whether the secretary's orders are contrary to law and whether the secretary's orders are supported by substantial evidence of a probative value. Id.

Coleman contends that the secretary's "order is erroneous as a matter of law." Specifically, Coleman argues:

> The Secretary adopted the Cabinet's position, expressed in its Exceptions, that Coleman was individually liable because they did "willfully and knowingly authorize, order or carry out the ... failure or refusal of the corporate permittee to comply

[2] The circuit court's opinion and order was entered on remand from an opinion of the Supreme Court of Kentucky in Commonwealth v. Evans, Ky., 45 S.W.3d 442 (1999).

[3] We observe that Coleman raises identical arguments in Appeal Nos. 2002-CA-000691-MR & 2002-CA-000692-MR.

> with an order issued by the Secretary ...” Noncompliances and Cessation Orders are not “final orders of the Secretary” as required by KRS 350.990(9). At the time the violations were written and the Administrative Complaint filed, there was no final order of the Secretary in existence. The Secretary misconstrued and misapplied the law to the facts and his order is thereby erroneous. (citations omitted).

Coleman’s Brief at 16.[4]

Coleman essentially argues that the non-compliance orders are not “final orders” within the meaning of KRS 350.990(9), and, thus, the secretary erroneously relied upon said orders as the bases for Coleman’s individual liability under KRS 350.990(9). We believe Coleman has misconstrued the secretary’s order and KRS 350.990(9).

KRS 350.990(9) reads:

> When a corporate permittee **violates any provision of this chapter or administrative regulation promulgated pursuant thereto** or fails or refuses to comply with any final order issued by the secretary, any director, officer, or agent of the corporation who willfully and knowingly authorized, ordered, or carried out the violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment as may be subject to the same civil penalties, fines, and imprisonment as may be imposed upon a person pursuant to this section. (emphasis added).

[4] Coleman’s briefs in Appeal Nos. 2002-CA-000691-MR & 2002-CA-000692-MR are substantively identical; therefore, all citations to Coleman’s brief in this opinion shall be from Appeal No. 2002-CA-000691-MR.

Under subsection (9), we observe individual liability may be imposed for violation of KRS Chapter 350 or administrative regulations promulgated thereunder.

The secretary concluded:

> The Cabinet is not asserting that Defendant Coleman caused the surety's insolvency which in turn caused the violation of KRS 350.060; the Cabinet is asserting that Defendant Coleman committed an omission which rose to level of plain indifference to the law's requirements when he failed to properly maintain the Permit as ordered in the Non-Compliance. . . .
>
> The Cabinet's position is clearly the more logical. The Secretary adopts the Cabinet's position that Defendant Coleman did "willfully and knowingly authorize[], order[] or carry[] out the . . .failure or refusal" of the corporate Permittee to comply with an order issued by the Secretary under KRS 350.990(9). . . . Defendant Coleman, with plain indifference to legal requirements, omitted to act within the 90 days to comply with the remedial measures set forth in the Non-Compliances, and this failure to act resulted in violation of 350.060[sic], which entitled the Cabinet to issue the Cessation Orders.(alteration in original)

Secretary's Order at 5. We think the secretary based Coleman's individual liability upon failure to maintain the permit sites "as ordered in the Non-Compliances." The failure to properly maintain or reclaim the permit sites as required by the non-compliance orders violated KRS Chapter 350 and administrative

regulations.[5] KRS 350.060, .405, and .028(3); 405 KAR 10:030; 405 KAR 12:020. Thus, Coleman's individual liability under KRS 350.990(9) was not based upon violation of the final order but rather upon violation of KRS Chapter 350 and administrative regulations.

Coleman further contends that the non-compliance orders did not formally "charge" him with failure to maintain the permit sites. Instead, he maintains that the non-compliance orders only charge failure to maintain performance bonds and that the proper remedy for such violation is to obtain new bonds. As the secretary relied upon violations not charged in the non-compliances orders, Coleman argues that the secretary's final orders are erroneous as a matter of law. More particularly, he argues:

> [T]he Cabinet argues in favor of penalization of Coleman on grounds that he failed to *reclaim and rehabilitate the sites* and contends that Coleman draws an artificial distinction between surface mining violations and the failure to abate or correct them. The Cabinet's argument totally ignores what the charges were in this case and the nature of remedial measures attached to such violation.
>
> The Noncompliances and Cessation Orders were issued for violation of *administrative requirements* whose remedial measure is to obtain replacement bonds. (footnote omitted).

[5] Payne v. Natural Resources & Environmental Protection Cabinet, Ky. App., 746 S.W.2d 90 (1988) elucidates the Natural Resources and Environmental Protection Cabinet's authority to order reclamation.

Coleman's Reply Brief at 2. We must disagree.

The non-compliance orders specifically directed Coleman to maintain the permit sites to release standards. Indeed, we observe that reclamation of a permit site in the event of permanent performance bond loss is required by 405 KAR 10:030 Section 2(3)[6]. In the event of permanent bond loss, we believe that an appropriate remedial measure is to reclaim the permit site. This is consistent with the underlying purpose of obtaining and maintaining a performance bond. A performance bond is obtained to insure proper reclamation of the permit site. See Natural Resources v. Whitley Development, Ky. App., 940 S.W.2d 904 (1997). If Coleman had reclaimed the permit sites, the failure to maintain performance bonds would have been of little import.

Upon the whole, we are of the opinion that the non-compliance orders properly directed Coleman to undertake the remedial measures of reclaiming the permit sites. We view such remedial measures as appropriate in the event of permanent bond loss. Additionally, we think Coleman's failure to follow the remedial measures of reclamation may constitute the basis of individual liability under KRS 350.990(9). As hereinbefore

[6] 405 Ky. Admin. Regs. 10:030 Section 2(3) states, in relevant part, "If an adequate bond is not posted by the end of the period allowed, the permittee shall cease coal extraction and coal procession operations and shall comply with the provisions of 405 KAR 16:010, Section 6, or 405 KAR 18:010, Section 4, and shall immediately begin to conduct reclamation operations in accordance with the reclamation plan."

concluded, we believe the failure to reclaim or maintain the permit sites as directed by the non-compliance orders violated KRS Chapter 350 and administrative regulations.

Coleman also asserts that the secretary's orders are not supported by substantial evidence. Coleman expressly argues[7]:

> The evidence in this case does not establish that Coleman, as an officer or agent of the corporate permittee, authorized, ordered or carried out the loss of reclamation bonds for the permit. As found by the Hearing Officer, "the only evidence in the record is that the Cabinet cited E&C for failing to maintain a bond on the permits in question here." As the permittee, E&C could be liable for failing to have bonds irrespective of the reason for such failure. However, Coleman's individual liability would accrue only if he caused the violation; for example, if he had directed that the premiums not be paid. However, the Cabinet's own witnesses, in response to questions by the Hearing Officer, testified they knew absolutely nothing to indicate that Coleman caused or contributed to the loss of bonds or that he had taken any action to cause such loss of bonding. On the contrary, the record indicates that Coleman made efforts to secure replacement bonding. (citations omitted).

Coleman's Brief at 11-12. Coleman's argument is not well-taken.

The secretary premised Coleman's individual liability upon failure to maintain the permit sites as directed in the

[7] Although Coleman makes general allegations concerning the lack of substantial evidence to support the secretary's final orders, we are compelled to point out that Coleman never directly argues that the secretary's finding concerning the failure to maintain the permit sites was not supported by substantial evidence.

non-compliance orders; individual liability was not premised upon Coleman's failure to maintain performance bonds. Accordingly, we attach no merit to this argument.

Coleman next contends that the secretary arbitrarily "overruled" the hearing officer's reports and recommendations. We are directed to Union Underwear Company, Inc. v. Scearce, Ky. 896 S.W.2d 7 (1995)[8] for the proposition that the secretary's review of the hearing officer's findings of fact is under the "clearly erroneous" rule. We reject same.

We view Scearce as inapposite. It dealt with the proper standard of review the workers compensation board gives to findings of fact of an administrative law judge (ALJ). The ALJ is statutorily vested with adjudicatory power; however, the hearing officer is not so vested. KRS 342.275 and .285.

KRS 350.030(2)[9] states, in relevant part:

> [T]he hearing officer shall . . . make to the secretary a report and recommended order which shall contain a finding of fact and a conclusion of law. . . . The secretary shall consider the report, exceptions, and recommended order and decide the case.

Under the above statutory scheme, the hearing officer renders a recommended order to the secretary; the secretary then "decide[s] the case." The hearing officer is not vested with

[8] Coleman also directs this court to Citizens State Bank of Marshfield v. FDIC, 718 F.2d 144 (8th Cir. 1983). We, however, are not bound by a federal district court decision and further believe the case inapplicable.
[9] See also 405 KAR 7:091, Section 3.

adjudicatory power; adjudicatory power lies squarely with the secretary. See Swatzell v. Natural Resources & Environment Protection Cabinet, Ky., 962 S.W.2d 866 (1998)(recognizing that the secretary is the ultimate fact finder). The secretary may adopt in whole or part, or may reject in whole or part, the hearing officer's report. In short, the secretary possesses the "broadest possible discretion" as to her use of the hearing officer's report. Cf. Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997). We, thus, do not believe that the secretary acted arbitrarily in rejecting the hearing officer's reports.

In sum, we hold that the secretary's final orders were not arbitrary. See American Beauty Homes Corporation, 379 S.W.2d 450.

Appeal No. 2002-CA-000747-MR

Stanley Pendley was the sole officer and shareholder of Poplar Grove Mining Company, Inc. (Poplar Grove). Poplar Grove was engaged in coal mining activities within the Commonwealth. It held a permit to mine some two hundred twenty-one acres and had obtained a performance bond to assure reclamation of the site. KRS 350.060 and .064. Some time thereafter, the Cabinet issued a Notice of Non-Compliance and Order for Remedial Measures (non-compliance order). The non-compliance order cited Poplar Grove with failure to conduct

water monitoring and with failure to contemporaneously reclaim. 405 KAR 16:110; 405 KAR 16:020; 405 KAR 16:190. Poplar Grove subsequently started water monitoring. It, however, failed to perform the required reclamation of the site. As a result, the Cabinet issued an Order for Cessation and Immediate Compliance (cessation order).

The Cabinet filed an Administrative Complaint against Poplar Grove and against Pendley, Coleman and Evans, individually. The Cabinet reached a settlement with Pendley and the matter was dismissed with prejudice against him. The Cabinet sought to impose individual liability by imposition of civil penalties upon Coleman and Evans as "agents" of Poplar Grove under KRS 350.990(9). A hearing officer conducted a hearing upon the complaint and entered his report and recommendation. KRS 350.0301. The hearing officer concluded that imposition of civil penalties upon Coleman and Evans was not warranted. The Cabinet filed exceptions with the secretary. KRS 350.0301. The secretary agreed with the Cabinet and entered a final order adjudicating Coleman and Evans individually liable for civil penalties under KRS 350.990(9). An appeal was taken to the Franklin Circuit Court. KRS 350.032. The circuit court

ultimately entered an opinion and order affirming the secretary's order.[10]

Coleman and Evans raise several issues on appeal. As we find particular merit with one of those issues, we need not address the remaining issues.

Coleman and Evans maintain that the secretary erroneously concluded that they were agents of Poplar Grove within the meaning of KRS 350.990(9). We must agree.

KRS 350.990(9) particularly provides that an "**agent** of the corporation who willfully and knowingly authorized, ordered, or carried out the violation, failure, or refusal shall be subject to . . . civil penalties." (emphasis added). In Couch v. Natural Resources and Environmental Protection Cabinet, Ky., 986 S.W.2d 158 (1999), the Court recognized that the term "agent" was not defined in KRS 350.990 or in KRS Chapter 350. Thereupon, the Court adopted the definition of agent as enunciated in United States v. Dix Fork Coal Company, 692 F.2d 436 (6th Cir. 1982). Our Supreme Court specifically held that an agent under KRS 350.990(9) is "a person charged with responsibility for the operation of all or a part of a coal mine or the supervision of the miners in coal mine." Id. at 162 (quoting 30 U.S.C. § 802(e)). The Court further observed that

[10] The circuit court's opinion and order was entered on remand from an opinion of the Supreme Court of Kentucky in Commonwealth v. Evans, Ky., 45 S.W.3d 442 (1999).

an agent "includes that person charged with the responsibility for protecting society and the environment from the adverse effects of the surface coal mining operation and particularly charged with effectuating compliance with environmental performance standards during the course of a permittee's mining operation." Id. (quoting Dix Fork Coal Company, 692 F.2d at 440).

In the case *sub judice*, the secretary concluded:

> The record in this case reflects that Denzil Coleman was the personal guarantor on a bank promissory note securing the bond for Poplar Grove. The Dix Fork court used the definition of "agent" found in the Coal Mines Health and Safety Act:
>
> > (e) "Agent" means any person charged with responsibility for the operation of all or part of a coal mine or the supervision of the miners in the coal mine.
>
> The record at issue contains substantial evidence to indicate that both individual Defendants here were instrumental in putting together this particular mining venture. Evans is the brother-in-law of Mr. Pendley, who signed the Permit application at the request of Evans. Coleman personally signed the note guaranteeing the bond. Each of these Defendants discussed the conditions on the Permit site at various times with the permit inspectors. Further factual support can be found in the Hearing Officer's Report and Recommendations and the Cabinet's Exceptions. Thus, as in Dix Fork, the Defendants here are agents in that they are people "charged with effectuating compliance with environmental performance standards

> during the course of a Permittee's mining operation." (citation omitted).

Secretary's Order at 2.

The secretary found that Coleman signed a promissory note for Poplar Grove's performance bond and that Evans and Coleman were involved with the formation of Poplar Grove. Evans performed some work at Poplar Grove and occasionally spoke to Cabinet inspectors; Coleman also occasionally spoke to Cabinet inspectors and made some efforts to reclaim or obtain a permit revision after issuance of the cessation order.

It is well established that determination of an agency relationship "is a legal conclusion to be reached only after analyzing relevant facts." Wright v. Sullivan Payne Company, Ky., 839 S.W.2d 250, 253 (1982). Here, we accept the secretary's findings of fact concerning Evans and Coleman's involvement and activities with Poplar Grove. We, however, must draw a different legal conclusion from those facts; specifically, we do not believe the facts support the legal conclusion that Evans and Coleman were agents of Poplar Grove.

Unlike the facts in Dix Fork Coal Company, 692 F.2d 436, there was no evidence that Evans and Coleman were charged with the responsibility of acting as Poplar Grove's spokesmen or with advising Poplar Grove upon matters concerning compliance with various mining statutes and regulations, and unlike the

facts in Couch, 986 S.W.2d 158, the evidence failed to demonstrate that Evans and Coleman's "overall involvement" with Poplar Grove required them to assume responsibility for protecting society and the environment from Poplar Grove's coal mining operation. There was no evidence that Evans or Coleman provided the "start-up money" for Poplar Grove, paid bills for Poplar Grove, received proceeds from the sale of coal at Poplar Grove, or assumed responsibility for the day to day operations of Poplar Grove. See Couch, 986 S.W.2d 158; Dix Fork Coal Company, 692 F.2d 436. Upon the whole, we do not think the record demonstrates that Evans and Coleman were responsible for the operation of Poplar Grove or responsible for protecting society or environment from the adverse effects of coal mining at Poplar Grove.

In sum, we are of the opinion that the secretary erred as a matter of law in concluding that Evans and Coleman were agents of Poplar Grove under KRS 350.990(9). As such, we hold that the secretary arbitrarily imposed individual liability by imposition of civil penalties upon Evans and Coleman under KRS 350.990(9). See American Beauty Homes Corporation, 379 S.W.2d 450.

For the foregoing reasons, the opinions and orders of the Franklin Circuit Court are affirmed in part and reversed in part for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT, DENZIL COLEMAN:

Donald Duff
Frankfort, Kentucky

BRIEFS FOR APPELLANTS, LYNN EVANS AND DENZIL COLEMAN:

Donald Duff
Frankfort, Kentucky

BRIEF FOR APPELLEE, COMMONWEALTH OF KENTUCKY NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET:

Tamara J. Patrick
Frankfort, Kentucky