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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000521-MR

OFFICE OF PETROLEUM STORAGE TANK
ENVIRONMENTAL ASSURANCE FUND,
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 98-CI-01005

SHOPPES OF AUDUBON PARK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

BARBER, JUDGE: This is an appeal originating from a claim made by Appellee, Shoppes of Audubon Park (SAP), to the Office of Petroleum Storage Tank Environmental Fund (Fund), Appellant, for reimbursement of expenses related to the removal of two underground storage tanks. In 1988, federal legislation obligated owners of underground storage tanks to meet environmental standards when the tanks were removed. The costs of meeting the standard were to be paid by the owner. In 1990,

Kentucky's General Assembly responded by declaring that an emergency existed and created the Petroleum Storage Tank Environmental Assurance Fund. The effective date of KRS 224.815-825 was April 9, 1990. Shortly thereafter, the Public Protection and Regulation Cabinet (Cabinet) implemented administrative regulations related to the statutes.

SAP purchased property from Kentucky Metal Products Company in October 1989. In March 1990, SAP discovered and removed two underground storage tanks from the property in accordance with the federal law. The work to remove and remediate the two underground tanks continued until 1992. The cost of the removal totaled $66,111.10. SAP requested reimbursement from the Fund for monies expended in the removal process under KRS 224.821. The fund initially approved only $800.00.[1] SAP requested reconsideration by the Fund for the remaining amount.[2] The Fund reconsidered and advised SAP it was prepared to obligate a total of $10,800.00.[3] The Fund denied reimbursement of the remaining $55,311.10 solely on the basis that the corrective action costs were incurred before April 9, 1990.

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[1] This was by letter dated March 28, 1996.

[2] SAP asserted that the $10,000.00 entry fee it had previously paid to participate in the Fund had been assessed by the Fund in error and that the Fund had erroneously determined SAP was not entitled to recover the remaining $55,311.10.

[3] This was by letters dated August 2, 1996 and October 14, 1996.

SAP petitioned for an administrative hearing by the Public Protection and Regulation Cabinet (Cabinet) regarding the denial of the $55,311.10. SAP and the Fund stipulated to facts in the matter and the Hearing Officer[4] made a determination based upon said stipulations and the parties' memoranda. The Hearing Officer issued her Conclusions of Law and Recommended Order on Facts Stipulated by Parties February 27, 1998 which recommended the Fund's denial of monies to SAP was proper in accordance with 415 KAR 1:070, Section 2(1)(b). Said regulation allowed for recovery of corrective action costs incurred after April 9, 1990. As such, the Hearing Officer concluded SAP should be denied recovery on all corrective action costs incurred prior to April 9, 1990. SAP filed exceptions to the Hearing Officer's Recommended Order, but the Cabinet's Final Order adopted the Hearing Officer's Recommended Order in its entirety July 7, 1998.

SAP appealed to the Franklin Circuit Court. Each party filed motions for summary judgment in 2004.[5] The trial court rendered its Order and Opinion February 8, 2005 granting summary judgment to SAP and reversing the Cabinet's Final Order.

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[4] Nancy Yelton served as Hearing Officer.

[5] After the Complaint and Answer were filed in August 1998, no action occurred in the matter until the court issued a Notice to Dismiss for Lack of Prosecution March 17, 2004. SAP then filed its summary judgment motion July 30, 2004 with the Fund filing a cross-motion for summary judgment November 1, 2004.

The trial court concluded that the legislation creating the Fund was remedial in nature and thus should be applied retroactively to cover SAP's corrective action costs. The Fund now appeals to our court.

The facts in this matter are undisputed. The issue is whether under KRS 224.821 and 415 KAR 1:070, Section 2(1)(b), SAP was entitled to reimbursement from the Fund for its costs to perform corrective action on its two tanks. The Court of Appeals is authorized to review issues of law involving an administrative agency on a *de novo* basis. Liquor Outlet, LLC v. Alcoholic Beverage Control Board, 141 S.W. 3d 378, 381 (Ky.App. 2004), (citing Aubrey v. Office of the Attorney General, 994 S.W.2d 516 (Ky.App. 1998)). In particular, an interpretation of a statute is a question of law and a reviewing court is not bound by the agency's interpretation of that statute. Id., (citing Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000)). However, an administrative agency's interpretation of its own regulation is entitled to substantial deference. Cabinet for Health Services v. Family Home Health Care, Inc., 98 S.W.3d 524, 527 (Ky.App. 2003), (citing Camera Center, Inc. v. Revenue Cabinet, 34 S.W.3d 39 (Ky. 2000)). A regulation is valid unless it exceeds statutory authority or, in some way, is repugnant to the statutory scheme. Revenue Cabinet

v. Joy Technologies, Inc., 838 S.W.2d 406, 409 (Ky.App. 1992).

We turn now to 415 KAR 1:070.[6]

The relevant portions of 415 KAR 1:070 are as follows:

> Section 1. (1)(b) The cost of corrective action for a release of motor fuel from a petroleum storage tank removed from the ground after January 1, 1974 or a tank closed in place after January 1, 1974 shall be eligible for payment by the petroleum storage tank account if the eligibility requirements of Section 2 of this administrative regulation are met:
>
> . . . .
>
> Section 2. An owner or operator of a facility of the class described in Section 1(1)(b) of this administrative regulation shall be eligible for participation in the petroleum storage tank account if the following eligibility requirements are met:
>
> (1)(a) A release of motor fuel is detected at the facility after April 9, 1990; or
>
> (b) Corrective action costs associated with a release are incurred after April 9, 1990;
>
> . . . .
>
> Section 9. (1) The costs of corrective action incurred prior to April 9, 1990 shall not be payable from the petroleum storage tank account.

Based on the plain language of the regulation, it appears that all corrective action costs incurred prior to April 9, 1990, such as SAP's, are not reimbursable. However, we believe it is

[6] 415 KAR 1:070 is now 401 KAR 42:270. All relevant portions remain unchanged.

necessary to review the statute from which the Cabinet promulgated this regulation in furtherance thereof.

The statute to which 415 KAR 1:070 applies is KRS 224.821,[7] which states in pertinent part:

> (5) The fund shall be used to guarantee payment of reasonable costs and expenses to a contractor performing corrective action under contract with a petroleum storage tank owner or operator subject to deductible amounts payable by the petroleum storage tank owner or operator. Money in the fund shall be obligated to secure the guarantee.
>
> (6) A petroleum storage tank owner or operator may apply to the commission for reimbursement from the fund of costs to perform corrective action . . .

The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect. Cabinet for Human Resources, Interim Office of Health Planning and Certification v. Jewish Hospital Healthcare Services, Inc., 932 S.W.2d 388, 390 (Ky.App. 1996). Further, all statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . . KRS 446.080(1). The legislative findings and intent of KRS 224.816-825 are found in KRS 224.815.[8] Kentucky Revised Statute 224.815 states in relevant part:

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[7] Transferred to KRS 224.60-140 by the Reviser of Statutes in 1991. No changes were made as to cited portions.

[8] Transferred to KRS 224.60-110 by the Reviser of Statutes in 1991. No changes were made as to cited portions, but (10) is now (11).

The General Assembly of the Commonwealth of Kentucky finds and declares that:

> . . . .
>
> (3) Adequate financial resources must be readily available to provide a means for investigation and cleanup of contamination without delay;
>
> . . . .
>
> (5) It is in the best interests of the state to protect public health and safety and the environment by creating a fund for corrective action measures for releases into the environment from petroleum storage tanks;
>
> . . . .
>
> (7) An efficient program of financial responsibility should include corrective action requirements that encourage petroleum storage tank owners or operators to take corrective action measures in the first instance;
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> . . . .
>
> (10) It is the intent of the General Assembly that a state fund be created to assist petroleum storage tank owners or operators in complying with the federal financial responsibility requirements promulgated under federal regulations and to assist petroleum storage tank owners or operators in cleaning up contamination caused by a release.

As stated earlier, the effective date of KRS 224.815 and KRS 224.821 was April 9, 1990. As a general rule, no statute shall be construed to be retroactive, unless expressly so declared. KRS 446.080(3). The courts have consistently upheld this and have declared there is a strong presumption that

statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result. Commonwealth of Kentucky Department of Agriculture v. Vinson, 30 S.W.3d 162, 168 (Ky. 2000). The original bill creating KRS 224.815-825, House Bill 194,[9] did contain an emergency clause.[10] 1990 Ky. Acts 370. However, in the absence of an express statement that a particular piece of legislation is remedial and is to apply to antecedent causes of action, the presence of an emergency clause does not necessarily indicate a legislative intent that it be so applied. Spurlin v. Adkins, 940 S.W.2d 900, 903 (Ky. 1997). Since there was no express statement that the statutes were to be applied retroactively, we must determine whether KRS 224.815 is remedial.

The general rule is that a statute, even though it does not expressly state, has retroactive application provided the statute is remedial. Kentucky Insurance Guaranty Association v. Jeffers, 13 S.W.3d 606, 610 (Ky. 2000). Remedial legislation implies an intention to reform or extend existing rights, and has for its purpose the promotion of justice and the

[9] House Bill 194 was introduced January 5, 1990; passed through the House February 13, 1990; passed through the Senate March 19, 1990; the House concurred with the Senate's amendments March 27, 1990; and the Governor signed April 9, 1990.

[10] The significance of an emergency clause is that legislation containing such a clause becomes effective upon approval of the Governor rather than ninety days after adjournment of the session in which it is passed. Spurlin v. Adkins, 940 S.W.2d 900, 903 (Ky. 1997).

advancement of public welfare and of important and beneficial public objects. Id. The term applies to a statute giving a party a remedy where he had none, or a different one, before. Id.

Following a review of KRS 224.815 and KRS 224.821, we believe KRS 224.815 to be remedial in nature in that it is a statute giving a party a remedy where he had none and its purpose is to advance the public welfare through environmental protections. As a result, KRS 224.815 should be applied retroactively.

We further believe 415 KAR 1:070, Section 9(1), which disallows claims on correction action costs incurred prior to April 9, 1990, to be repugnant to the statutory scheme behind KRS 224.815-825 and invalid. See Revenue Cabinet, supra 838 S.W.2d at 409. The clear intent of the legislature was to encourage underground storage tank owners to take corrective actions promptly in accordance with the federal requirements and to make funds readily available to those individuals which did so.[11] See KRS 224.815. The limitation of 415 KAR 1:070, Section 9(1) in no way furthers this legislative intent.

Based on the foregoing, we believe the granting of the summary judgment to SAP by the circuit court which reversed the

[11] SAP incurred its corrective action costs in March 1990, a few weeks before the effective date of the legislation.

Cabinet's Final Order was appropriate. Therefore, we affirm the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin Welch
Frankfort, Kentucky

BRIEF FOR APPELLEE:

David A. Owen
Kelly A. Dant
Lexington, Kentucky