RENDERED: April 16, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002629-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET;
DEPARTMENT OF HIGHWAYS — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE EDDY COLEMAN, SPECIAL JUDGE
ACTION NO. 92-CI-000139

SWAN FORK COAL COMPANY, A
PARTNERSHIP CONSISTING OF THE
FOLLOWING: IRA DAVID SANDERS,
JOHN RASNICK, JACK SYKES,
DAVID RASNICK, FRANK JUSTICE,
GARY ROYALTY, JAMES McGHEE,
M. LYNN PARRISH, and THURMAN
BARKER; NEALY COAL COMPANY;
AUBREY HALL; HERSHEL GIBSON
AND ARLENE GIBSON, HIS WIFE;
MARCUS COLLIER AND AMANDA
COLLIER, HIS WIFE; HENRY COLLIER
AND RUBY COLLIER, HIS WIFE;
DELORES ADAMS, SINGLE — APPELLEES

AND: NO. 1997-CA-002632-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS APPELLANT

V. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE EDDY COLEMAN, SPECIAL JUDGE
ACTION NO. 93-CI-00326

SWAN FORK COAL COMPANY, A
PARTNERSHIP CONSISTING OF THE
FOLLOWING PERSONS: IRA DAVID
SANDERS; JOHN RASNICK; JACK
SYKES; DAVID RASNICK; FRANK
JUSTICE; GARY ROYALTY; JAMES
MCGHEE; M. LYNN PARRISH; AND
THURMAN BARKER APPELLEES

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, MCANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (the Cabinet) brings these appeals from orders and judgments entered by the Letcher Circuit Court on July 9, 1997. We reverse and remand in both appeals.

APPEAL NO. 1997-CA-002629-MR

This is a condemnation case wherein the Cabinet sought to condemn property owned by the appellees in Letcher County incident to the improvement of Highway 23 between Jenkins, Kentucky, and Pike County. The tract condemned was a 25.79 parcel from a larger boundary of 85.76 acres of mostly steep, hillside woodland. The property contained two sediment basins, which had been used incident to strip mining. Proceedings were prosecuted pursuant to the "Eminent Domain Act of Kentucky." Ky. Rev. Stat. (KRS) 416.540 - .670. The appellees owned only the surface estate of the property to be condemned. The mineral estate had theretofore been severed. The Cabinet dealt separately with the minerals owners. The commissioners, appointed pursuant to KRS 416.580, appraised the taking at $15,500.00. There is but a single issue in this appeal: whether the surface owners could offer into evidence as a measure of the value of their land per ton royalties that might be paid incident to mining the mineral estate.[1] The trial court was of the opinion that such evidence was competent and, perforce, allowed the witnesses for the appellees to affix a value of the condemned property based upon proposed tonnage royalty. The Cabinet contends that the circuit court erred inasmuch as this has amounted to an impermissible "price tag" evaluation of property condemned. The Cabinet and appellees/landowners each produced an

[1]Notwithstanding the surface owner does not own the mineral estate, he often receives payment for surface use and/or damage incident to mining. Payment is usually relative to the tonnage of coal removed.

appraisal witness. Dixon Nunnery, witness for the Cabinet, fixed the before value of the condemned surface at $68,500.00 and the after value at $30,000.00, for a difference of $38,500.00. The appellees/landowners' appraisal witness, Arthur Jackson, used two approaches, each of which was predicated upon the value of the anticipated royalties. He described one of his evaluation approaches as "the income approach." Using that approach, he testified the before value was $325,000.00, the after value $30,000.00, for a difference of $295,000.00. Using what he termed "a market approach," Jackson fixed the before value at $260,000.00, the after value at $30,000.00, for a difference of $230,000.00. Considering the evaluations of the Cabinet and the landowners, the jury determined the before value at $280,000.00 and the after value at $30,000.00, for a difference of $250,000.00, which constituted its award.

We are of the opinion that the jury's award is excessive and that the jury was misled by evidence of per-tonnage royalties. We deem such evidence inappropriate. Indeed, evidence of per-tonnage royalty is no more than a "price-tag" evaluation, which is condemned in this Commonwealth. See Commonwealth, Department of Highways v. Morgan, Ky., 426 S.W.2d 452 (1968), and Gulf Interstate Gas Company v. Garvin, Ky., 303 S.W.2d 260 (1957). In disputed condemnation cases, the jury shall make a determination as to the property's highest and best use. See Commonwealth, Department of Highways v. Riley, Ky., 402 S.W.2d 840 (1966). Once done, the only triable issue is the difference between the fair market value immediately before and immediately after the taking. See Witbeck v. Big Rivers Rural

Electric Cooperative Corporation, Ky., 412 S.W.2d 265 (1967). Fair market value is, of course, the price property would bring in an arm's length transaction between a willing buyer and a willing seller. See Commonwealth, Department of Highways v. Darch, Ky., 374 S.W.2d 490 (1964). It is not the value of the property based upon the sum of "price tag" evaluations. Of course, all relevant factors should be considered tending to establish the value of the land, but no price should be placed upon an individual factor. See Commonwealth, Department of Highways v. Sherrod, Ky., 367 S.W.2d 844 (1963).

We reverse and remand on this appeal.

APPEAL NO. 1997-CA-002632-MR

This appeal involves the taking of 33.96 acres of the surface estate from a larger boundary of land located in the same area as the property condemned in Appeal No. 1997-CA-002629-MR. Valuations were based upon the same premises as in Appeal No. 1997-CA-002629-MR. Again, per-tonnage royalties were introduced as evidence concerning surface estate value, and the same jury--as in Appeal No. 1997-CA-002629-MR--fixed the before value at $798,000.00 and the after value at $115,400.00, for a difference of $682,600.00. For the same reasons as stated in the foregoing appeal, we likewise reverse and remand this matter.

We further note that it was error to admit evidence that, prior to condemnation, appellees had incurred expenses to prepare the land for development. See Commonwealth, Department of Highways v. Holloman, Ky., 390 S.W.2d 666 (1965).

For the foregoing reasons, the judgments in both appeals are reversed, and these causes are remanded for proceedings consistent with this opinion.

ALL CONCUR.

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