IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M & M Stone Co.,	:	
Petitioner	:	
	:	No. 743 C.D. 2010
v.	:	
	:	Submitted: December 6, 2010
Department of Environmental Protection,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: June 14, 2011

M&M Stone Company (Petitioner) petitions for review of the March 26, 2010, order of the Environmental Hearing Board (Board) denying Petitioner's request to reopen the record and reconsider the Board's January 31, 2008, adjudication, which held Petitioner responsible for water loss at a public water supply well and directed Petitioner to cease pumping at its quarry.[1] We affirm.

The relevant facts are briefly summarized as follows.[2] Petitioner, a Pennsylvania corporation engaged in the mining of non-coal minerals, operates a

[1] By order dated December 9, 2010, this Court granted the petition to withdraw filed by Petitioner's counsel.

[2] The summary of the facts and procedural history is based on this court's opinion in M & M Stone Co. v. Department of Environmental Protection, (No. 383 C.D. 2008, filed October 17, 2008),
(Footnote continued on next page…)

quarry in West Rockhill Township, Bucks County. After investigating complaints filed by Telford Borough Authority (TBA), which operates municipal drinking water supply wells, and owners of other nearby wells, the Department of Environmental Protection (Department) determined that Petitioner's quarry pumping had dewatered private wells and was causing decreased production at a TBA supply well (TBA #4). On November 15, 2005, the Department issued two compliance orders requiring Petitioner to cease pumping and mining activities at the quarry and to restore or replace affected water supplies at TBA #4 and three private wells. Additionally, after finding that Petitioner violated special conditions of its mining permit, the Department suspended Petitioner's permit and ordered Petitioner to restore and replace water supplies at TBA #4 and three private wells. (R.R. at 319a.) Petitioner appealed, and by decision and order dated January 31, 2008, the Board dismissed Petitioner's appeals.

By order dated October 17, 2008, this Court affirmed the Board's adjudication, noting that the Board's opinion contained 165 findings of fact, spanning over 50 pages, and that the Board found the opinions of the Department's and TBA's expert witnesses to be the most credible. After this Court denied Petitioner's request for reconsideration or reargument, Petitioner filed a petition for allowance of appeal with our Supreme Court and thereafter filed an application to supplement that petition with newly discovered evidence. (R.R. at 274a-313a). By order dated December 8, 2009, the Supreme Court denied Petitioner the relief requested.

(continued…)

upholding the Department of Environmental Protection's suspension of Petitioner's non-coal surface mine operator's permit and ordering Petitioner to cease pumping water at its quarry and to restore or replace lost water at several wells. (R.R. at 315a-36a.)

In its entirety, the Supreme Court's order states as follows:

> AND NOW, this 8th day of December, 2009, Petitioner's Petition for Allowance of Appeal is DENIED, and Petitioner's Application to Supplement Petition for Allowance of Appeal With Newly Discovered Evidence is DENIED, both without prejudice to raise after discovered evidence claims before the Environmental Hearing Board.

(R.R. at 526a.)

Petitioner then filed a petition with the Board requesting the Board to reopen the record and reconsider its January 31, 2008, adjudication. (R.R. at 519a-23a.) In the petition, Petitioner asserted that the after discovered evidence it seeks to produce, as well as additional evidence that may be obtained via further discovery, undermines the Board's order. Petitioner further asserted that the Board "must comply with the Supreme Court's order, open the record in this appeal, allow discovery and reconsider its adjudication." (R.R. at 522a.)

By opinion and order dated March 26, 2010, the Board denied Petitioner's request to reopen the record and reconsider its final order. The Board first rejected Petitioner's assertion that the Supreme Court's December 8, 2009, order specifically directed the Board to consider after discovered evidence. Instead, the Board characterized the Supreme Court's order as merely an acknowledgement that claims related to after discovered evidence must be presented in the first instance to the trier of fact. The Board also observed that the petition for reconsideration was not timely filed and does not meet the substantive criteria for the grant of reconsideration or reopening of the record under the Board's rules. Further, the Board concluded that the petition did not set forth any facts or evidence that would justify a reversal of its prior adjudication or demonstrate any other compelling or persuasive reason for reconsideration.

On appeal to this Court,[3] Petitioner first contends that the Board ignored the Supreme Court's directive to consider after discovered evidence. Petitioner argues that the Board is duty-bound to comply completely with the Supreme Court's order and, at a minimum, hold a hearing. Relying on Commonwealth v. Williams, 877 A.2d 471 (Pa. Super. 2005), and Nigro v. Remington Arms Co. Inc, 637 A.2d 983 (Pa. Super. 1993), Petitioner asserts that, even if the order does not specifically instruct the Board to hold a hearing, the Board's obligation to comply with the court's directive "mediates in favor of holding such a hearing if there is any ground to interpret the order as requiring a hearing. In other words, any doubt should be resolved in favor of holding a hearing." Williams, 877 A.2d at 477.

In Williams, our Supreme Court remanded a case involving a constitutional challenge to the law commonly known as Megan's Law II[4] and directed the trial court to review additional issues, including whether certain statutory provisions were excessive in relation to their remedial purpose. On remand, the trial court rejected Williams' remaining constitutional challenges to Megan's Law II without holding a hearing. Williams appealed, arguing that the trial court erred and failed to follow the Supreme Court's directive because the trial court could not determine the excessiveness of statutory provisions without an evidentiary hearing. The Superior Court observed that, although the Supreme Court's order did not mention an evidentiary hearing, it was clear from the opinion that the Supreme Court

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Joseph J. Brunner, Inc. v. Department of Environmental Protection, 869 A.2d 1172, 1173 n.2 (Pa. Cmwlth. 2005).

[4] 42 Pa. C.S. §§9791-9799.9.

did, in fact, expect that a hearing would be held on remand.[5] Accordingly, the Superior Court vacated the trial court's order and remanded the matter for further proceedings.

We conclude that Williams and Nigro[6] are distinguishable and lend no support to Petitioner's assertions. Moreover, Petitioner's contention that the Supreme Court's use of the phrase "without prejudice to raise after discovered evidence claims" directs the Board to hold a hearing is also without merit. The Supreme Court's order neither states nor implies that the Board must reopen the record; instead, the phrase "without prejudice" merely leaves open the possibility that the Board may grant Petitioner's petition should the Board recognize any merit to Petitioner's assertions. Contrary to Petitioner's interpretation of this language, the phrase "without prejudice" does not create or confer rights upon a party, but instead means only "without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." Black's Law Dictionary 1740 (9th ed. 2009). Thus, we conclude that the Supreme Court's order did not require the Board to reopen the record.

Petitioner also argues that the Board erred in determining that the evidence Petitioner wishes to present is not after discovered evidence warranting re-opening of the record. We disagree.

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[5] For example, in its opinion the Supreme Court specifically stated that nothing in its opinion should be read to foreclose the proffer of competent evidence on remand. See Williams, 877 A.2d at 476.

[6] Petitioner quotes language from Nigro out of context, making no reference to the facts, issues or procedural history of that case. Suffice it to say that the same do not support Petitioner's argument here.

Under the Board's rules, a record may be reopened on the basis of recently discovered evidence when all of the following circumstances are present: (1) evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true; (2) the evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence; and (3) the evidence is not cumulative.[7] 25 Pa. Code §1021.133(b). In addition, a petition to reopen the record must identify the evidence sought to be added to the record, describe the petitioner's efforts to discover the evidence prior to the close of the record, and explain how the evidence was subsequently discovered. 25 Pa. Code §1021.133(d).

According to Petitioner, a June 20, 2005, internal Department e-mail, (R.R. at 71a), reflects that Michael Hill, the Department's expert, believed that TBA #4, and not Petitioner's quarry, was adversely affecting one of the private wells; such opinion directly contradicts Hill's testimony that TBA #4 was not affecting the private water supplies. (R.R. at 109a.) Petitioner describes this e-mail as the most significant evidence that TBA #4, and not the quarry, was impacting private wells. Petitioner also contends that testimony by TBA manager Mark Fournier in a subsequent proceeding conflicts with the testimony he gave in this case, specifically, with testimony that it was only a matter of time before TBA #4 went back into service.

[7] The Board's rules are consistent with the general principle that a petition to reopen a case to receive after discovered evidence is properly granted where that evidence: (1) is new; (2) could not have been obtained at trial in the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purposes of impeachment; and (5) is likely to compel a different result. Minersville Area School District v. Minersville Area School Service Personnel Association, 518 A.2d 874 (Pa. Cmwlth. 1986).

However, as the Board correctly observes, the statements contained in the June 20, 2005, e-mail are hearsay. In addition, the e-mail does not identify the private well to which Hill refers. Moreover, the e-mail statements are *not* inconsistent with Fournier's testimony and/or the Board's findings in this matter. In addition, Petitioner relies on subsequent testimony of TBA manager Fournier taken out of context; in its entirety, the subsequent testimony is consistent with Fournier's prior testimony and with the Board's findings in this case.[8] Accordingly, we reject

[8] In its brief, Petitioner adds emphasis to the following testimony given by Fournier during his October 27, 2008, deposition, (R.R. at 396a), and contends that it conflicts with Fournier's earlier testimony that TBA #4 will be placed back in service after this case is over:

> Q. So, if the appeals are exhausted, that's when you are going to put it [TBA #4] back in service?
>
> A. Possibly.
>
> Q. What are the other possibilities?
>
> A. The -- **we don't use four ever again**. We go to another location.

(Petitioner's brief at 11.) Petitioner omits the exchanges immediately following the quoted testimony, which cast a different light on Fournier's opinion:

> Q. How likely is that?
>
> A. I don't know.
>
> Q. But given – I know you can't predict the future, but what's more likely, it goes back into service or doesn't go back into service?
>
> A. I think it is probably more likely that it does go into service.

(R.R. at 396a.) We reject Petitioner's assertion that Fournier's 2008 deposition testimony is an "utter contradiction" of his prior testimony (Petitioner's brief at 21), and constitutes compelling evidence that TBA #4 has been abandoned by TBA.

Petitioner's contention that the Board erred in failing to reopen the record to receive after discovered evidence.

Finally, Petitioner argues that the Board improperly applied its rules in denying Petitioner's request to reopen the record and reconsider the prior adjudication. Specifically, Petitioner asserts that the Board erred in determining that the petition for reconsideration was not timely filed and does not meet the substantive criteria for the grant of reconsideration or reopening of the record under the Board's rules. Petitioner does not dispute that the Board's rules only allow for reopening of the record prior to an adjudication and after the conclusion of a hearing on the merits, 25 Pa. Code §1021.133(a). However, Petitioner complains that the Board ignored the principle that its rules are to be liberally applied and allow the Board to disregard errors or defects of procedure. 25 Pa. Code §1021.4.[9]

As the EHB observes, Petitioner waited nearly two years after the January 2008 adjudication to file a petition to reopen the record, despite having some of the purported after discovered evidence as early as October 2008. Under the circumstances, we reject Petitioner's contention that, in this case, the EHB's application of its rules elevates the notion of finality above the goal of a correct outcome.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

[9] Pursuant to 25 Pa. Code §1021.4, the Board's rules "shall be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. The Board … may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

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ORDER

AND NOW, this 14th day of June, 2011, the order of the Environmental Hearing Board, dated March 26, 2010, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge