

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002105-MR

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 95-CI-000960

E & C COAL COMPANY and DENZIL COLEMAN

APPELLEES

consolidated with

NO. 1997-CA-002106-MR

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 95-CI-001021

R & H MINERAL ENTERPRISES OF
WESTERN KENTUCKY, INC. and
DENZIL COLEMAN

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, DYCHE, and GUIDUGLI, Judges.

COMBS, JUDGE: The Natural Resources and Environmental Protection Cabinet (the Cabinet) appeals from an order of the Franklin Circuit Court holding that the Secretary of the Cabinet erred in imposing individual liability upon the appellee, Denzil Coleman. After a careful review of the record and pertinent authorities, we affirm.

Between 1981-1986, the Cabinet issued nine surface mining permits to E&C Coal Company, Inc., (E&C); the sole officer and shareholder of E&C was Denzil Coleman. As required by KRS 350.060, E&C posted a performance bond with the Cabinet to secure its mining permits. Union Indemnity Insurance Company (Union) acted as surety for the performance bonds. In 1986, Union was deemed to be insolvent; that insolvency resulted in E&C's losing its bond coverage as the performance bonds were no longer valid.

Shortly thereafter, the Cabinet issued notices of noncompliance to E&C for nine violations of KRS 350.060 for failing to maintain bond coverage on the nine surface mining permits. The noncompliance notices ordered E&C to take remedial measures to abate the violations. In June 1987, the Cabinet issued cessation and immediate compliance orders to E&C for failure to abate the violations. The Cabinet also issued Coleman notices of individual liability pursuant to KRS 350.990(9) for violations by E&C. Subsequently, the Cabinet filed an administrative complaint in which it sought civil penalties against both Coleman and E&C for the unabated violations.

In addition to owning E&C, Coleman was the sole shareholder of R&H Mineral Enterprises of Western Kentucky, Inc.,

(R&H). R&H had been issued three mining permits, which were secured by performance bonds for which American Druggists Insurance Company (American) had acted as surety. However, in 1986, American – like Union – was deemed to be insolvent, rendering R&H's performance bonds invalid. R&H subsequently received notices of noncompliance from the Cabinet for failure to maintain bond coverage pursuant to KRS 350.060. By June 1987, R&H had not abated the violations, and the Cabinet issued orders of cessation and immediate compliance to R&H. Coleman also received notices of individual liability for the cited violations. Thereafter, the Cabinet filed an administrative complaint against Coleman and R&H, seeking civil penalties for the violations.

The hearing officer conducted a combined hearing on both of the administrative complaints. In his report, the hearing officer recommended that in both actions, civil penalties should not be imposed on Coleman. Nonetheless, on June 1995, the Secretary entered an order in the action against E&C and Coleman. He found both E&C and Coleman liable for the violations and remanded the action to the hearing officer for a calculation of civil penalties to be assessed against each of them. E&C and Coleman appealed to the Franklin Circuit Court. On August 11, 1997, the circuit court entered an order affirming in part and vacating in part the Secretary's order. The circuit court affirmed the imposition of liability on E&C but vacated that portion of the Secretary's order as to Coleman's liability, reasoning that "individual liability may only be assessed at the

'enforcement stage'..." The Cabinet filed an appeal, challenging the court's decision regarding Coleman. (Case No. 97-CA-002105).

On June 22, 1995, the Secretary entered an order with respect to the complaint against R&H and Coleman. The Secretary held both R&H and Coleman liable for the violations cited in the noncompliance notices and cessation orders and remanded the case to a hearing officer for an assessment of civil penalties. R&H and Coleman appealed the order to the Franklin Circuit Court. On August 11, 1997, the circuit court entered its order affirming in part and vacating in part the Secretary's order as to R&H and Coleman. As had occurred in the E&C and Coleman case, the court affirmed the Secretary's imposition of liability on R&H but vacated the portion of the order imposing liability on Coleman. The court adopted and reiterated the reasoning set forth in its order in the E&C and Coleman case regarding the imposition of the individual liability under KRS 350.990(9). The Cabinet appealed the circuit court's order denying the imposition of individual liability on Coleman. (Case No. 97-CA-002106). By order of this Court, Case Nos. 97-CA-002105 and 97-CA-002106 were consolidated on January 20, 1998.

The Cabinet argues that the circuit court erred in not finding that individual liability could be imposed on Coleman at the administrative level; i.e., the assessment stage as opposed to the enforcement stage. It contends that the Secretary found Coleman liable for E&C's and R&H's violation based upon his actions in authorizing, ordering, or carrying out the violations.

Therefore, pursuant to KRS 350.990(9), it contends that the Secretary is authorized to impose liability on Coleman.

KRS 350.990(9) provides:

When a corporate permittee violates any provision of this chapter or administrative regulation issued 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 imposed upon a person pursuant to this section. (Emphasis added).

The clear language of this statute sets out two situations in which individual liability may be imposed upon a director, officer, or agent of a corporate permittee. An agent can be held liable for his willful and knowing actions which result in a violation of KRS Chapter 350 or the administrative regulations issued pursuant to that chapter. The agent may also be held liable if he willfully and knowingly fails or refuses to comply with a final order of the Secretary. The critical issue before us is when does personal liability of the corporate director, officer, or agent arise.

It is essential to analyze the language and the grammatical structure of the statute in order to determine its meaning as to this issue of timing of liability. The introductory adverbial clause commencing with [w]hen sets forth two alternate grounds for liability as to the "corporate permittee" (the corporation): violation of any portion of the statute and/or regulations or failure or refusal to comply with a final order of the secretary. A comma follows, and the principal

clause commences to spell out the individual liability of "any director, officer or agent of the corporation." That individual liability arises subsequent to – and is not chronologically commensurate with – a finding of liability as to the corporation under the two criteria (violation of (1) statute/regulation or (2) final order) stated in the introductory ("when") clause.

The Cabinet argues erroneously that individual liability is to be construed according to the same two criteria that apply to the liability of the corporation. We disagree. Individual liability of a corporate officer, director, or agent can arise only after the liability of a corporation has been determined. A corporation thus may be liable either at the assessment stage (violation of portion of the statute or of a regulation) or at the enforcement stage (refusal or failure to obey a final order of the Secretary). An individual, however, can only face imposition of liability at the enforcement stage (i.e., violation of a final order of the Secretary). The heightened standard for individual liability also requires an element of scienter not required for corporate culpability – utilizing the adverbs "willfully and knowingly."

This technical, grammatical analysis comports with and is substantial by the holding in Natural Resources and Environmental Protection Cabinet v. Williams, Ky., 768 S.W.2d 47 (1989), where the Supreme Court of Kentucky addressed the imposition of individual liability based upon a corporation's failure or refusal to comply with a final order of the Secretary. The Court explained as follows:

The language of subsection nine (9) of KRS 350.990 which covers Williams' [sic] liability in the event the "corporate permittee . . . fails or refuses to comply with any final order issued by the secretary," necessarily implies that the enforcement procedure provided for therein against the corporate officer "who willfully and knowingly authorized, ordered, or carried out such . . . failure or refusal" shall be in Franklin Circuit Court because liability is predicated on failure by the corporate permitted to comply with the secretary's "final order." Chronologically, such failure can only occur after the administrative procedure against the corporation has culminated in an order that has been disobeyed.

Id. at 49.

The Williams case presented the specific issue of when individual liability may be imposed upon a corporate officer for failure or refusal to comply with a final order of the Secretary. The Supreme Court clearly enunciated the temporal sequence of events, holding that the procedure against the corporation must be completed and must "have culminated in an order that has been disobeyed" before individual liability comes into consideration.

Thus, Williams arrives by way of legal analysis at the same conclusion compelled by our grammatical analysis: that individual liability of a corporate officer can be found only at the enforcement stage – chronologically subsequent to a determination of corporate liability.

In the case before us, the Cabinet attempts to hold a corporate officer individually liable commensurate with and in the same order as its determination of liability as to the corporation. In so doing, it errs. The Cabinet must allow an individual – be it corporate officer, director, or agent – the

opportunity to comply with a final order. Failure to comply with that order must then be found to have occurred deliberately. Again, the Williams Court found that the statute envisioned and intended such heightened degree of culpability in order to impose individual liability:

The purpose of this subsection is to impose an additional liability upon the corporate officer upon proof of willful and knowing complicity in the failure by the corporate permittee to respond to the secretary's order.

Id. at 49.

The Franklin Circuit Court reasoned its way carefully and correctly to its conclusion in vacating the Secretary's order as to the imposition of individual liability. Accordingly, we affirm.

GUIDUGLI, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

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