RENDERED: December 10, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002477-MR

CURTISS SHEWMAKER and
SHEWMAKER ENVIRONMENTAL, INC. APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 98-CI-00362

OFFICE OF PETROLEUM STORAGE TANK
ENVIRONMENTAL ASSURANCE FUND,
PUBLIC PROTECTION & REGULATION CABINET APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, JOHNSON, and McANULTY, Judges.

COMBS, JUDGE: This court has reviewed the record presented to us, including the proceedings before the Public Protection and Regulation Cabinet and the Franklin Circuit Court. We find that the opinion of the circuit court fairly, completely, and correctly sets out the operative facts and the applicable law of this case. We therefore adopt that opinion as our own.

> This matter is before the Court on the Petitioner's, Curtiss Shewmaker/Shewmaker Environmental, Inc. ("Shewmaker" and "SEI"), Complaint, which seeks review of an administrative decision by the Office of Petroleum Storage Tank Environmental Assurance Fund ("the Fund"), an agency of the Public Protection and Regulation Cabinet ("the Cabinet"). The Court has

reviewed the record and, being duly advised, finds as follows:

FACTS

Shewmaker owns and operates SEI, a company which is a certified contractor for the closure of underground petroleum storage tank sites. This case involves services performed by SEI in the closure of an underground storage tank site known as DC Tires, in Campbellsburg, Kentucky. After another contractor had removed the tanks and then been dismissed by the landowner, SEI was retained to complete the closure of the site.

The activity with which this case is concerned is SEI's treatment of water which had accumulated in the open tank pits, prior to the pits having been backfilled. It appears that Shewmaker treated pit water on two occasions, approximately October 21, 1994, and March 25, 1995. Both times, the water was treated by pumping it through mobile airstripper/carbon treatment unit, with the resulting effluent being pumped into a drainage ditch on or near the site.

It is important to note at this point that the mobile treatment unit used in this operation was, apparently, leased to SEI by a company named Compliance Equipment, Inc. ("Compliance"). Like SEI, Compliance is wholly owned by Curtiss Shewmaker. Though Compliance holds this equipment out for lease to the public at-large, Shewmaker readily admits that the great majority of its transactions are leases to SEI.

As permitted by various regulations, Shewmaker ultimately sought reimbursement for the expenses associated with treating the water. On February 9, 1995, he submitted "Claim Payment Number 1" to the Fund, covering the costs for the October, 1994 services. The claim requested reimbursement of $4894.40, an amount which represented the cost of the "lease" with Compliance for treatment of 10,640 gallons, at a cost of $0.40 per gallon, plus a 15% mark-up. Consistent with Fund regulations, which permitted reimbursement at a rate of $0.10 per 1,000 gallons, SEI was reimbursed $10.64 on April 4, 1996.

"Claim Payment Number 2" was submitted to the Fund on April 24, 1995, requesting reimbursement for $22,517.95 for the treatment of 34,643 gallons of water on March 25, 1995. This request was based on SEI's charge of $0.65 per gallon but SEI was reimbursed nowhere near the amount requested. Rather, again consistent with Fund regulations, SEI was reimbursed $34.64 on May 6, 1996.

Having been reimbursed the maximum allowable amount for the treatment of the water, Shewmaker decided to seek reimbursement for the disposal of the water. By filing "Claim Payment Number 4," he sought $31,199.99. This amount was based upon an invoice from Compliance Equipment for disposal of 45,283 gallons of water at $0.65 per gallon, plus tax. The invoice was created by Shewmaker on September 22, 1996 -- nearly two years after the

first treatment -- any payment was due the same day. Shewmaker acknowledges that this invoice was for the alleged disposal of the very same water which had been treated and discharged into the drainage ditch on October 21, 1994, and March 25, 1995.

The Fund denied "Claim Payment Number 4" in a letter dated January 13, 1997, which stated, "The cost you are requesting. . .have [sic] previously been addressed by the Fund. By your request, on September 6, 1996, your facility received final payment. Therefore, this request is not eligible for review." Thus, the claim was not reviewed for two reasons: first, SEI had already been reimbursed for the activity covered by "Claim Payment Number 4," and, second, the Fund had apparently determined that the claim was not timely.

Shewmaker then sought an appeal before a hearing officer, and an administrative hearing was conducted May 20, 1997. Shewmaker testified, as did a claims reviewer with the Fund, and briefs were filed subsequent to the hearing. The hearing officer recommended that the claim for $31,199.99 be denied, based essentially upon the fact that SEI had only treated and discharged the water, and had not disposed of it as claimed by Claim Payment Number 4.

Shewmaker filed exceptions, but the Cabinet nonetheless adopted the hearing officer's Recommended Order and denied Shewmaker's appeal. Following that decision, Shewmaker appealed to this Court.

On appeal, Shewmaker argues exactly the same thing he argued below: that he is entitled to reimbursement for treating the water and for disposing of the water, both pursuant to 415 KAR 1:110 §1(1)(c).[1] He asserts that the Cabinet has misconstrued its own regulations by concluding that he is entitled to reimbursement for either but not both, and supports his argument by pointing to the fact that treatment and disposal are listed in the regulation as separate line items. The Fund counters that, regardless of whether the regulation allows recovery for both, Shewmaker is not entitled to reimbursement on his claim because the water was never disposed of.

JUDGMENT

In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside its scope of authority, if the decision itself is not supported by substantial evidence on the record, or if the agency applied an incorrect rule of law. Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298 (1972). When dealing with issues of law,

[1]All references to regulation 415 KAR 1:110 will be to the version which became effective on December 13, 1993, as the parties agree that is the version which applies to this claim.

this Court may review them de novo, without granting the agency any deference. Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263 (1990). In contrast, on questions of fact, this Court's review is limited to an inquiry of "whether the agency's decision was supported by substantial evidence or whether the decision was arbitrary or unreasonable." Cabinet for Human Resources v. Jewish Hospital Healthcare Services, Inc., Ky. App., 932 S.W.2d 388 (1996). However, on mixed questions of law and fact -- such question presented here -- this Court is given greater latitude to determine whether the findings of the agency were supported by substantial evidence of probative value. Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991).

As noted, this appeal presents mixed questions of law and fact. Simply stated, Shewmaker's eligibility for reimbursement is evaluated by first interpreting the regulations to determine the criteria, then examining the facts to judge whether those criteria have been satisfied. On these questions, this Court may examine the evidence anew, and is not required to grant any deference to the agency's interpretation of the regulations at issue. See Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263 (1990).

Shewmaker's "Claim Payment Number 4" was submitted under his belief that 415 KAR 1:110§1(1)(c) permitted reimbursement for both the treatment of contaminated pit water and for the disposal of that same water. His primary argument is that the regulation lists both activities as separate line items, and thus both should therefore be reimbursable.

This Court is persuaded that the regulation does, by its terms, permit recovery for both the treatment of contaminated water, and for the disposal of contaminated water in [a] wastewater treatment plant. While the Court is unable to determine precisely whether the Cabinet employed a contrary construction, if the Cabinet construed the regulation to, on its face, permit recovery for only one or the other, that construction was incorrect and cannot be sustained.

However, even assuming the Cabinet misconstrued the terms of the regulation, this Court concludes that the regulation was applied as its drafters intended. This conclusion is confirmed by reference to the purpose and function of that section of the regulation. 415 KAR 1:110§1, by it own terms, does nothing more than provide the range of amounts to be paid by the Fund for the cost of performing these services, if the Fund has first determined that reimbursement is warranted. Thus, while the terms of the regulation may allow reimbursement for both treatment and disposal, recovery for either activity is conditioned upon a determination that the activities are in fact reimbursable.

This conclusion confirms that there can be a difference between the terms of a regulation and its application --and that such a

difference is illustrated by this case. As Shewmaker asserts, a contractor could, under the regulation, recover both for treatment of contaminated water and for disposal of contaminated water. However, the Cabinet is correct when it concludes that, due to what is actually involved in these two activities, it is practically impossible for SEI to recover for both by simply handling the same water.

In this case, SEI pumped contaminated water from the open pits, processed that water through the mobile airstrippr/carbon treatment unit, and discharged the uncontaminated effluent into a drainage ditch on or near the site. Shewmaker claims that this process both treated and disposed of the water, but logic does not permit this conclusion. As this Court understands Shewmaker's position, the alleged disposal occurred when the water was pumped from the pits to the treatment machine, and the treatment occurred when the water was processed through the machine.

Even viewing this job as separate events for the sake of argument, two things would still have to be true in order for Shewmaker to recover. First, the mobile airstripper/carbon treatment unit would have to be a wastewater treatment plant in which contaminated [water] could be disposed. It is not, for the well-articulated reasons the Cabinet asserts in its brief. Second, the regulation would have to permit a contractor to recover for operating the wastewater treatment plant which treated the contaminated water. That is clearly not the case. Rather, the regulation seems designed to permit the contractor to recover as a contractor for treating the contaminated water -- as Shewmaker did in this case -- or for disposing of it in a separate wastewater treatment plant.

Finally, Shewmaker relies on a claim payment for a previous closure site to argue that the Fund has previously paid him for both treatment and disposal of the same water. The Cabinet found, and this Court agrees, that the proffered claim payment does not support this assertion. However, it does seem to suggest that, at least for the payment of that single claim, the Fund reimbursed Shewmaker something in excess of the $0.10 per 1,000 gallons which it reimbursed him for treating the DC Tires water. Because the parties did not address the issue of apparently inconsistent rates of payment, however, this Court need not evaluate the merits of that claim.

Though the Cabinet misconstrued the regulation at issue, it nonetheless reached the right result when the regulation was applied. There is substantial evidence of record to support the Cabinet's conclusion that this single series of activities constituted, under the regulation, nothing more than treatment of the contaminated water. Because the Fund had already paid Shewmaker for the treatment of this water, its decision not to review his request for reimbursement was not in error.

The Petition's Complaint is therefore DISMISSED, and the relief sought is DENIED.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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