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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001527-MR
AND
NO. 1999-CA-001729-MR

COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND ENVIRONMENT
PROTECTION CABINET — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JAMES KNIGHT, JUDGE
ACTION NO. 96-CI-00062

PAUL PELPHREY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING IN PART
** ** ** ** **

BEFORE: GUDGEL, Chief Judge; COMBS and MILLER, Judges.

COMBS, JUDGE: This is an appeal and cross-appeal from the judgment of the Johnson Circuit Court affirming the final order of the Secretary of the Natural Resources and Environmental Protection Cabinet (the Secretary) but holding that the collection of civil penalties assessed against Paul Pelphrey (Pelphrey) was barred by KRS 413.120(3). On appeal, the Natural Resources and Environmental Protection Cabinet (the Cabinet) contends that the circuit court erred in holding that the collection of civil penalties against Pelphrey was time-barred

pursuant to KRS 413.120(3). Pelphrey argues on cross-appeal that the court should have set aside the Secretary's findings that he was personally liable for the mining violations as they were not supported by substantial evidence. We affirm in part and vacate and remand in part.

In February 1982, the Cabinet issued Blazer Coal Corporation (Blazer) a permit to engage in surface coal mining activities on a fifty-two-acre site in Martin County. Blazer contracted out the actual the mining of the coal to Diamond P Coal Company. Subsequently, an application for an amendment to Blazer's permit was submitted to the Cabinet seeking authorization for additional surface disturbance of approximately fifteen acres. The application bore the notarized signature of Paul Pelphrey, indicating that he was the "Office Manager" for Blazer and that he was acting on its behalf. The Cabinet issued an amendment to Blazer's permit in July 1982.

The mining of coal under the amendment pertaining to the extra fifteen acres was contracted out to Twin Star Contracting Company. Pelphrey owned interests in both Diamond P Coal Corporation and Twin Star Contracting Company. However, he maintains that he sold his interest in Diamond P Coal in the early 1980's and that he then started Twin Star before eventually getting out of the mining business.

On October 16, 1986, an inspector for the Cabinet issued a notice of non-compliance to Blazer, Pelphrey, Diamond P Coal Corporation, and Twin Star Coal Company for failing to eliminate a highwall on the property covered by the amendment to

Blazer's original permit. A follow-up inspection revealed that remedial measures had not been taken. On November 18, 1986, a Cabinet inspector issued a cessation order. On May 18, 1988, the Cabinet filed a formal administrative complaint against Pelphrey, Blazer, Diamond P Coal Corporation, and Twin Star Coal Company, alleging that the named defendants had violated KRS Chapter 350. The Cabinet requested that civil penalties be assessed against the defendants, that their performance bond be forfeited, and that they be found ineligible to receive another permit under KRS Chapter 350.

The administrative proceedings initiated by the Cabinet moved forward. On December 12, 1990, Blazer's performance bond securing its permit was ordered forfeited by the hearing officer. Subsequently, on January 18, 1994, Blazer was dismissed from the administrative proceedings in an interim order by the hearing officer. On February 8 and 9, 1995, the hearing officer conducted a formal evidentiary hearing on the Cabinet's complaint. The hearing officer rendered his report and recommendations on December 1, 1995, concluding as follows: (1) that Blazer should be formally dismissed from the action; (2) that the notice of noncompliance and the cessation order issued to the defendants were valid; (3) that Pelphrey had sought and obtained the amendment without Blazer's authority; and (4) that Pelphrey, Diamond P Coal, and Twin Star were liable for any resulting penalties. He recommended that a civil penalty of $25,200 be assessed against Pelphrey, Diamond P Coal, and Twin Star and that they be ineligible to receive another permit under

KRS Chapter 350. Significantly, Diamond P Coal and Twin Star failed to make an appearance in the administrative proceedings. On January 24, 1996, the Secretary entered a final order that incorporated by reference and adopted the findings and recommendations of the hearing officer.

On February 21, 1996, Pelphrey filed an appeal from the Secretary's order with the Johnson Circuit Court. In June 1997, the court ordered that the case be placed in abeyance. The action was subsequently taken out of abeyance and placed on the court's active docket in March 1999. On May 20, 1999, the court entered an order affirming the Secretary's final order but holding that the collection of civil penalties was barred by KRS 413.120(3). The Cabinet filed a motion to alter and amend the court's order; that motion was denied. This appeal and cross-appeal followed.

The Cabinet first argues that the issue of whether a cause of action for the enforcement of civil penalties had accrued was not properly before the circuit court as the proper time to address this issue would not ripen until commencement of an action to collect the penalty imposed by the Secretary's order. However, Pelphrey had raised the statute of limitations argument before the hearing officer as a defense to the administrative action, claiming that the administrative proceeding was moot and unenforceable. We disagree and find that review of the administrative hearing was properly before the court and that it had jurisdiction to review this matter.

The Cabinet next argues on appeal that the court erred in holding that the collection of civil penalties was barred by KRS 413.120(3), which provides that an action for a penalty or forfeiture must be commenced within five years of the date that the cause of action accrued. The Cabinet maintains that its cause of action to enforce penalties did not accrue until Pelphrey was actually assessed the penalties; that is, when the Secretary entered his final order on January 24, 1996. Pelphrey disagrees and argues that the Cabinet's cause of action accrued on the date of the alleged violation; *i.e.*, the earlier date on which the notice of noncompliance was issued.

We find that the cases of Couch v. Natural Resources and Environmental Protection Cabinet, Ky., 986 S.W.2d 158 (1999), and Vanhoose v. Commonwealth, Ky. App., 995 S.W.2d 389 (1999) are dispositive of this issue. In Vanhoose, this court specifically addressed this issue and held that a cause of action for the enforcement of civil penalties accrues upon entry of the Secretary's final order imposing penalties. We stated that:

> [T]here has been established an extensive administrative process for the fair and just imposition of liability upon coal mining permittees. As such, to comport with due process requirements, we hold that a cause of action for the enforcement of civil penalties begins to run when the liability for, and amount of, the penalties have been conclusively and finally established, i.e. upon the Secretary's final order imposing the penalties.

Vanhoose, Ky., 995 S.W.2d at 392. Subsequently, the Supreme Court reviewed the issue of accrual. The Supreme Court adopted this court's opinion in Vanhoose that any applicable limitation

statute does not begin to run until after entry of the Secretary's final order.

In the case before, the Secretary entered his final order on January 24, 1996, assessing and imposing civil penalties against Pelphrey. The Cabinet's cause of action for the enforcement of those penalties accrued upon entry of that order and was not time-barred. Therefore, the court erred in holding that collection of the civil penalties against Pelphrey was barred by the five-year limitation in KRS 413.120(3).

Pelphrey argues on cross-appeal that the hearing officer's finding (which was ultimately adopted by the Secretary) that he signed the application for the amendment to Blazer's permit was not supported by substantial evidence. Thus, he contends that the court erred in affirming the Secretary's order. Throughout the administrative and court proceedings, Pelphrey maintained that he did not sign the application for the amendment and that someone forged his signature.

"When the findings fact of an administrative commission are supported by substantial evidence of probative value, the findings are binding upon a reviewing court." Department of Education v. Kentucky Unemployment Insurance Commission, Ky. App., 798 S.W.2d 464, 467 (1990). Evidence is substantial if, when taken alone or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable persons. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972).

In this case, the hearing officer found that Pelphrey had applied for the amendment to Blazer's permit without any authorization from Blazer. In reaching this conclusion, the hearing officer relied on testimony from Beth Van Hoose, a former notary public; Robert Hiller, the president and part owner of Blazer; and Dewey Bocook, the engineer who had prepared the application for the amendment. Ms. Van Hoose testified that it was her signature that had notarized Pelphrey's signature and that while she could not specifically remember notarizing the signature in dispute, it was her consistent practice only to notarize signatures made in her presence. Hiller testified that the amendment was obtained without his consent or knowledge.

The hearing officer found that Hiller's assertion that he had not participated in applying for the amendment was supported by Bocook's testimony. Bocook testified that when he had discussed the amendment with Hiller after it had been issued, Hiller appeared surprised and called the amendment "illegal." The hearing officer also noted that the agreed order between Blazer and Pelphrey entered on March 8, 1985, stated that "an application for amendment to Permit No. 080-00095 was applied for by Paul Pelphrey in the name of [Blazer] and issued to [Blazer]." This order was signed by Pelphrey's attorney at that time. The hearing officer noted in his report that he generally found the testimonies of Van Hoose and Hiller more credible than that of Pelphrey. We cannot conclude that the hearing officer's determination is not supported by substantial evidence.

In summary, we find that the circuit court erred in holding that collection of civil penalties against Pelphrey was barred by the statute of limitations. The court otherwise properly reviewed and correctly affirmed the findings of the Secretary's order. Accordingly, we affirm in part and vacate and remand in part the order of the circuit court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

S. Bradford Smock
Frankfort, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT:

J. Bradford Derifield
Frankfort, KY