

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001610-MR

PAUL CLEVINGER; AND
DAVID STURGILL

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00497

COMMONWEALTH OF KENTUCKY, MINE
SAFETY REVIEW COMMISSION

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Paul Clevinger and David Sturgill have appealed from an opinion and order entered by the Franklin Circuit Court on May 23, 2003, which dismissed their administrative appeal for failure to list a party's name and address in the complaint and for failure to serve a copy of the complaint on a party as

required by KRS¹ 13B.140(1). Having concluded that the circuit court properly dismissed this action, we affirm.

On September 16, 1999, Clevinger and Sturgill were employed as mine foremen at South Akers Mining Company, LLC's Beefhide No. 2 Mine located in Pike County, Kentucky, when the collapse of the mine's roof caused the death of miner Ronnie Charles and injured miner David Ramey. The Kentucky Department of Mines and Minerals² investigated this fatal accident and cited Clevinger, Sturgill, and South Akers for various mine safety violations, and on November 16, 2001, took charges against them for those violations before the Kentucky Mine Safety Review Commission. In a final order dated March 28, 2003, the Commission revoked Clevinger's and Sturgill's underground mine foreman certificates for a period four years.

Pursuant to KRS 351.194(8), Clevinger and Sturgill filed a complaint and petition for declaration of rights on April 28, 2003, in the Franklin Circuit Court. The petitioners named as respondents: "Commonwealth of Kentucky, Mine Safety Review Commission; Charles M. Tackett, Commissioner and William R. Whitley, Commissioner," and asserted various constitutional

¹ Kentucky Revised Statutes.

² Effective July 9, 2004, the Department was reestablished as the Office of Mine Safety and Licensing (OMSL).

and statutory violations that they alleged resulted in their mine foreman certificates being improperly revoked.

On May 1, 2003, OMSL filed a motion to dismiss the complaint due to the petitioners' "failure to comply with the statutory provision regarding appeals of administrative orders." Specifically, OMSL relied upon KRS 13B.140(1), which provides as follows:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order [emphasis added].

In its order and opinion entered on May 23, 2003, the circuit court granted the respondents' motion to dismiss due to the petitioners' failure to list OMSL's name and address in the complaint and to serve a copy of the complaint on OMSL as required by KRS 13B.140(1). On June 3, 2003, the petitioners filed a motion to alter, amend, or vacate, which was denied by an order entered on July 10, 2003. This appeal followed.

Clevinger and Sturgill claim their complaint and petition filed in the circuit court complied with the statutory requirements of KRS 13B.140. Specifically, they argue as follows:

KRS 13B.140 first requires that copies of the [p]etition shall be served by the [p]etitioners upon the agency and all parties of record. The [a]ppellants' [a]ppeal was only filed against the Commonwealth of Kentucky, Mine Safety Review Commission, since it is the Commission that took action against the mine foreman certificates held by Clevinger and Sturgill. As a result, [OMSL] was not named as a party to the [a]ppeal filed with the Franklin Circuit Court. In fact, it was acknowledged during oral arguments in chambers that [OMSL] was not alleging that it should have been named as a party to the [a]ppeal. Since [OMSL] was not a party to the [a]ppeal, there is no requirement that a copy of the [p]etition be served on [OMSL] and there is no requirement that the [p]etition should include the name and address of [OMSL].

In addition, the Franklin Circuit Court seems to indicate in its [o]rder dismissing the [a]ppellants' [c]omplaint that the [p]etitioners should have named [OMSL] as a party to this proceeding. As indicated earlier, counsel for [OMSL] alleged during oral arguments that he was not alleging that [OMSL] should be a party to this [a]ppeal. Upon review of the Commission's enabling statutes, it is obvious that the Commission is the agency that took action against the [a]ppellants and not [OMSL], thus the Commission is the only party necessary for this [a]ppeal.

In OMSL's brief, it concedes that Clevinger and Sturgill are correct in arguing that it took the position before the circuit court that the statute did not require OMSL to be named as a party respondent in the administrative appeal in circuit court. OMSL states that its position on that issue remains the same and it argues that the circuit court's opinion and order dismissing "is somewhat ambiguous as to whether it means that Clevinger and Sturgill were required to make [OMSL] a party-[r]espondent, or merely list - in their [c]omplaint [and] [p]etition - [OMSL] as a party in the proceeding below." OMSL states that it "believes the more reasonable interpretation of the [c]ourt's [o]pinion and [o]rder is that the [c]ourt merely required Clevinger and Sturgill to list in their [c]omplaint [and] [p]etition the name and address of [OMSL] (as a party below), and to serve [OMSL] with a copy of their [p]etition."

In dismissing this action, the circuit court relied upon City of Richmond v. Flood,³ where the circuit court dismissed an administrative appeal of a decision of a city board of adjustments due to the petitioners' failure to make the city planning commission a party to the circuit court action within 30 days. The Court of Appeals reversed the circuit court, but the Supreme Court reversed the Court of Appeals and stated as follows:

³ 581 S.W.2d 1 (Ky. 1978).

There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy [citation omitted].

. . .

It is as plain as a billboard that the legislature has granted to persons aggrieved by the final action of the board of adjustments the grace of appeal to the circuit court provided they perfect that appeal by filing it in the circuit court, including the planning commission as a party, within thirty days. Here the appeal was filed within the thirty-day limitation, but no effort was made to include the Commission as a party until sixty-eight days after the final action of the Board. Consequently, one of the conditions precedent to the exercise of judicial power by the circuit court was not met and it was required to dismiss the appeal for want of jurisdiction [citations omitted].⁴

Clevinger and Sturgill attempt to distinguish Flood by pointing out that the enabling statute⁵ in Flood required that summons shall issue "to all parties, including the planning commission, in all cases." They argue in this case that "there is no requirement that [OMSL] be made a party since [OMSL] did not take any action in the [f]inal [o]rder which revoked the underground mine foreman certificates of Sturgill and

⁴ Flood, 581 S.W.2d at 2.

⁵ KRS 100.347(2).

Clevinger." They note in this case that "[t]he [a]ppeal was taken against the Commission, which was named as a party to the [a]ppeal in conformity with KRS 13B.140(1), since it is the agency who took action against the [a]ppellants." Clevinger and Sturgill also rely on Commonwealth of Kentucky, Dept. of Public Safety v. Bell,⁶ which was a case involving the suspension of Bell's driver's license. Bell filed a petition in Wayne Quarterly Court and obtained reinstatement of his license. The circuit court affirmed and the Department appealed to the former Court of Appeals. In affirming, the Court stated that "[w]hen an aggrieved party is in literal compliance with this statute [KRS 186.580(2)] and the administrative agency is afforded reasonable notice and opportunity to be heard, judicial review of the administrative order is proper" [citation omitted].⁷

However, as OMSL correctly notes, Bell was decided before Flood, and while Bell has not been followed in any other case, Flood has been relied upon several times. In Kentucky Unemployment Insurance Commission v. Providian Agency Group,⁸ the Court stated "[w]hen an appeal is brought in circuit court by grant of statute, the parties must strictly comply with the dictates of that statute." And in Compton v. American

⁶ 453 S.W.2d 749 (Ky. 1970).

⁷ Id. at 750.

⁸ 981 S.W.2d 138, 140 (Ky.App. 1998).

Commercial Barge Line Co.,⁹ the Court of Appeals noted that "the courts in this jurisdiction have consistently ruled in favor of strict compliance when the action brought in the circuit court is brought pursuant to a statute[,]" and "[g]iven such rulings, the circuit court acted correctly in dismissing appellants' action for failing to name the Workers' Compensation Board as a party to the appeal" [citations omitted].

Accordingly, the circuit court correctly applied KRS 13B.140(1), which contains the jurisdictional requirement that the petitioners list OMSL's name and address in the complaint and serve a copy of the complaint on OMSL, and thus, it properly dismissed Clevinger's and Sturgill's complaint. Based on the foregoing, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Billy R. Shelton
Lexington, Kentucky

James P. Pruitt, Jr.
Pikeville, Kentucky

BRIEF FOR APPELLEE, OFFICE OF
MINE SAFETY & LICENSING:

Tony Opegard
Frankfort, Kentucky

⁹ 664 S.W.2d 950, 952 (Ky.App. 1984).