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ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
MAY 11, 2005 (2004-SC-0592-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001413-MR

ROY CAMPBELL

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 00-CI-00320

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, KNOFF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order of the Perry Circuit Court affirming a decision of the Secretary of Natural Resources and Environmental Protection Cabinet adjudging that appellant violated KRS 350.060 by engaging in mining operations without a permit and assessing a fine of \$5,000. Appellant argues the fine was unlawful because his excavation of the coal was not for the purpose of obtaining coal as required by KRS

350.010(1). We agree with appellant that KRS 350.010(1) and (2) contain an "intent" requirement that the extraction of the coal must be for the purpose of obtaining coal or extracting minerals, ores or other solid matter. Since the evidence was undisputed that appellant did not act for the purpose of obtaining the coal, the citation was issued in error. Hence, we reverse the order and remand the matter for further proceedings consistent with this opinion.

The facts in this case are essentially undisputed. Appellant, Roy Campbell, is self-employed as a developer of commercial and residential properties. In late summer of 1998, Campbell hired employees to conduct landscape excavation on a piece of property on Highway 80 in Perry County with a view toward commercial development. At the same time, Campbell agreed to build a new road for several homes located above the initial excavation site. The existing road had failed, and Campbell had persuaded the Perry County Fiscal Court Judge to accept a deed from him so that a more stable road could be built to the homes. As construction of the road progressed and material was moved, Campbell was notified by the Highway Department not to push any resulting dirt and material onto the highway right-of-way property adjoining the site, which Campbell sought to repurchase, until the buy-back was consummated. At some point during the road construction, a Hazard City employee

asked Campbell to build an access road across the construction site to a city water pump that was adjacent to Campbell's property on the side opposite the access road to the homes. Campbell agreed and engaged the services of Mark Perry to build the road to the water pump. Thereafter, Campbell did not visit the site everyday because he was working at another job site. In early September, while Campbell was in Somerset, Perry uncovered and stacked up a pile of coal that totaled approximately 345 tons. The evidence established that the coal, which had previously been mined in the 1960's or 1970's, was of very poor quality and was lying under a shallow layer of leaves and other debris.

When Campbell next visited the site on September 3, 1998, and saw what Perry had done, he told Perry, "You've got us in trouble. You should have left it laying." Perry replied that he decided to pile it back against the highway until it could be thrown onto the highway property Campbell was in the process of buying back from the county.

It is undisputed that no coal was ever sold or moved from the site, and after Campbell's discovery of the coal, no coal was added to the pile. The pile of coal was easily visible from Highway 80.

Unbeknownst to Campbell, the Natural Resources and Environmental Protection Cabinet (the "Cabinet") began an

investigation of the coal in early September once it became aware of its existence. As part of the investigation, motion-sensitive surveillance cameras were installed on September 18, 1998, on Campbell's property and were pointed toward the pile of coal. One of Campbell's employees discovered the surveillance cameras on or about October 2, 1998, while working in the area. When Campbell confronted the individuals taking the cameras down, they told Campbell that the cameras had been installed to catch people from the trailer park dumping raw sewage in the area. It should be noted that no evidence relative to what the surveillance cameras captured was presented by the Cabinet at the hearing.

On October 5, 1998, the Cabinet issued a citation to Campbell for mining coal without a permit in violation of KRS 350.060 and fined him \$10,000 (Non-Compliance No. 610667 and Illegal Mining Cessation Order No. 061103). Subsequently, upon the direction of Cabinet employees present at the site, Campbell buried the coal two or three days later.

Campbell contested the citation, and thereafter a formal hearing was held on the matter on January 11, 2000, before the Chief Hearing Officer (the "CHO"). The CHO rendered his report and recommendation in which he found that Campbell was not engaged in surface coal mining or strip mining. Accordingly, he recommended that the Cabinet enter an order

adjudging that Campbell did not violate the provisions of KRS 350.060. The Cabinet then filed its exceptions. On March 16, 2000, the Cabinet Secretary entered an order adopting the Cabinet's exceptions and certain of the CHO's findings, but ultimately rejected the CHO's recommendation to vacate the citation and remanded the case to the CHO to assess a penalty between \$5,000 and \$25,000. On remand, the CHO recommended a civil penalty of \$5,000 which was adopted by the Cabinet Secretary in a final order entered on May 18, 2000. Campbell thereafter filed his petition for review in the Perry Circuit Court on June 16, 2000. On March 13, 2003, the Perry Circuit Court entered its opinion and order affirming the Cabinet Secretary's decision. From the order denying Campbell's motion to alter or amend, this appeal followed.

The first argument we must address is the Cabinet's assertion that the Perry Circuit Court did not have jurisdiction over Campbell's petition for review because a summons was never issued on the Cabinet as was required by KRS 350.0305 and CR 3.01. However, this argument was not raised in a protective cross-appeal, but rather in the Cabinet's appellee's brief. We adjudge that it was improperly raised in the appellee's brief in this case because the jurisdiction argument was not related to Campbell's arguments on appeal on the merits of the case and, thus, was not properly raised as a response to those arguments.

Thompson v. Piasta, Ky. App., 662 S.W.2d 223 (1983). Rather, it was a completely separate ground for cross-appeal. CR 74.01. Although the Cabinet concedes that the issue should have been raised in a separate cross-appeal, the Cabinet maintains that subject matter jurisdiction can be raised at any time. It has been held that failure of service of process is a matter of personal jurisdiction, Foremost Ins. Co. v. Whitaker, Ky. App., 892 S.W.2d 607 (1995), and, unlike subject matter jurisdiction, personal jurisdiction can be waived. Ramirez v. Com. ex rel. Brooks, Ky. App., 44 S.W.3d 800 (2000). Accordingly, since the argument was not raised in a protective cross-appeal, it is precluded from our review. See Smith v. Wal-Mart Stores, Inc., Ky., 6 S.W.3d 829 (1999); Lainhart v. Rural Doxol Gas Co., Ky., 376 S.W.2d 681 (1964); and Center v. Rose, 252 Ky. 463, 67 S.W.2d 698 (1934).

We now move on to Campbell's argument that under the definitions of surface mining and strip mining in KRS 350.010(1) and (2), it must be shown that Campbell's actions in unearthing the coal were with the intent to obtain the coal. It is Campbell's position that there was no evidence of said intent and that the Cabinet's interpretation effectively imposed vicarious strict liability on him for his employee's mere incidental extraction of the coal during excavation for the road in question. KRS 350.010(1) provides:

"Surface coal mining operations" means activities conducted on the surface of lands in connection with a surface coal mine and surface impacts incident to an underground coal mine. The activities shall include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, extended depth secondary recovery systems, mountaintop removal, box cut, open pit, and area mining, the use of explosives and blasting, and in situ distillation or retorting, leaching, or other chemical or physical processing, and cleaning, concentrating, or other processing or preparation, and the loading of coal at or near the mine site. Excavation for the purpose of obtaining coal includes extraction of coal from refuse piles. The activities shall not include the extraction of coal by a landowner of fifty (50) tons or less within twelve (12) successive calendar months for his own noncommercial use from land owned or leased by him; the extraction of twenty-five (25) to two hundred fifty (250) tons of coal as an incidental part of privately financed construction where the coal is donated to a charitable or educational organization for noncommercial use or noncommercial distribution; the extraction of coal as an incidental part of federal, state, or local government financed highway or other construction under administrative regulations established by the cabinet; the extraction of, or intent to extract, twenty-five (25) tons or less of coal by any person by surface coal mining operations within twelve (12) successive calendar months; the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent (16-2/3%) of the tonnage of minerals removed for purposes of commercial use or sale; or coal exploration subject to KRS 350.057. Surface coal mining operations shall also include the areas upon which the activities occur or where the activities disturb the natural land surface.

The areas shall also include any adjacent land, the use of which is incidental to the activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface resulting from or incident to the activities. This definition shall include the terms "strip mining" of coal and the "surface effects of underground mining" of coal as used in this chapter; (emphasis added.)

Section 2 of the above statute provides:

"Strip mining" means the breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter; any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, and other solid matter from its original location; and the preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use; but shall not include the extraction of coal by a landowner for his own noncommercial use of fifty (50) tons or less within twelve (12) successive calendar months from land owned or leased by him; the extraction of coal as an incidental part of federal, state, or local government financed highway or other construction under administrative regulations established by the cabinet; the extraction of, or intent to extract, twenty-five (25) tons or less of coal by any person by surface coal mining operations within

twelve (12) successive calendar months; the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent (16-2/3%) of the tonnage of minerals removed for purposes of commercial use or sale; coal exploration subject to KRS 350.057; nor shall it include the surface effects or surface impacts of underground coal mining; (emphasis added.)

The basic scope of judicial review of an administrative decision is limited to a determination of whether the agency's action was arbitrary. Bobinchuck v. Levitch, Ky., 380 S.W.2d 233 (1964). If an administrative agency's findings of fact are supported by substantial evidence of probative value, they must be accepted as binding and it must then be determined whether or not the agency has applied the correct rule of law to the facts so found. Kentucky Unemployment Ins. Comm'n v. Landmark Community Newspapers of Kentucky, Inc., Ky., 91 S.W.3d 575 (2002). The Court of Appeals is authorized to review issues of law involving an administrative agency decision on a de novo basis. Aubrey v. Office of Attorney General, Ky. App., 994 S.W.2d 516 (1998).

The Cabinet maintains that as Perry's employer, Campbell is responsible for Perry's actions in extracting and stockpiling the coal, as they were within the scope of his employment. Further, according to the Cabinet's interpretation of KRS 350.010(1) and (2), the Cabinet is not required to prove

that Campbell's employee's excavation of the property at issue was for the purpose of obtaining coal. In support of their position, the Cabinet cites to an unpublished decision that we will not address, see CR 76.28(4)(c), and Natural Resources and Environmental Protection Cabinet v. Adams, Ky. App., 812 S.W.2d 159 (1991).

In Adams, this Court held that there was substantial circumstantial evidence to support the Cabinet's determination that appellee was engaged in surface coal mining activities pursuant to KRS 350.010(1) without a permit. In that case, appellee was discovered on the subject property drilling holes for explosives with other mining equipment on the site. A road had been cut from an old permitted road to the subject site. Overburden had been removed from the site and the coal seam exposed. However, at that time, there was no evidence that coal had been removed from the property. Approximately two weeks later, an inspection of the site revealed a pit in the area where appellee's drill had been operating from which it was estimated that 1,000 - 1,500 tons of coal had been removed. In reversing the circuit court's order reversing the Cabinet's issuance of the citation for mining without a permit, this Court stated, "The circuit court seemed to think that [appellee] had to be caught 'redhanded' removing the coal, but we do not believe the cabinet had that strict a burden." Adams, 812

S.W.2d at 161. This Court also specifically upheld the Cabinet's finding that appellee's activities fell within the definition of "surface coal mining operations" in KRS 350.010(1).

From our reading of Adams, it stands solely for the proposition that circumstantial evidence is sufficient to prove an individual is engaged in surface or strip mining activities under KRS 350.010(1) and (2). Contrary to the Cabinet's and the circuit court's interpretation of Adams in the present case, Adams' holding had no bearing on the "intent" issue - whether it must be proven that the individual's actions were for the purpose of obtaining coal.

The second sentence in the definition of "surface coal mining operations" in KRS 350.010(1) clearly states, "The activities shall include excavation for the purpose of obtaining coal, including" Similarly, the definition of "strip mining" in KRS 350.010(2) requires that the individual act to "facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter" Where a statute is unambiguous, it should be given effect according to its literal language. Hillard v. U.S., 310 F.2d 631 (6th Cir. 1962). We do not see that either section could be interpreted other than to contain an "intent" element - that the individual acted with the intent to obtain the coal.

In Adams, there was an abundance of circumstantial evidence that appellee's activities were for the purpose of obtaining coal. The site appeared to have been prepared for mining in that a road had been built to the site, overburden had been removed and the coal seam exposed. The appellee was thereafter seen drilling the telltale holes for mining explosives at the same time mining equipment with defaced serial numbers was found on the site. Two weeks later, a pit was observed in the same place appellee had been drilling from which 1,000 - 1,500 tons of coal had been removed.

In the present case, the only evidence that Campbell was engaged in mining activities was the stockpile of coal itself, which the Cabinet maintains was all it needed to prove he was mining without a permit. The Cabinet apparently interprets KRS 350.010(1) and (2) such that if no coal has yet been removed, then it must prove that the individual's actions were for the purpose of obtaining coal. If, however, coal has been removed, such intent need not be shown. The circuit court noted in its opinion that such an interpretation of the statute by the administrative body was entitled to great deference. Hagan v. Farris, Ky., 807 S.W.2d 488 (1991). However, it has been held that a reviewing court is not bound by an erroneous interpretation of the law no matter how longstanding the

interpretation is. Camera Center, Inc. v. Revenue Cabinet, Ky., 34 S.W.3d 39 (2000).

The Cabinet's interpretation of KRS 350.010(1) and (2) essentially creates an irrebuttable presumption of intent to obtain the coal whenever coal is removed, regardless of whether the extraction was purposeful, inadvertent or incidental. We do not believe such a presumption can be read into the statute. As stated above, the statutory definitions of "surface coal mining" and "strip mining" unambiguously require the person to be acting for the purpose of obtaining coal or extracting minerals, ores, or other solid matter, respectively.

In the present case, all the evidence relative to the excavation of the coal tended to show that its extraction was not for the purpose of obtaining coal. Although we agree with the Cabinet that Campbell would be vicariously liable for the actions of Perry within the scope of his employment, see Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. MIC-BAR, Inc., Ky. App., 765 S.W.2d 585 (1988), there was no direction by Campbell to Perry relative to doing anything with coal prior to the excavation. The evidence established that neither Campbell nor Perry was in the coal business, and the sole purpose of the excavation at issue was to construct a road to a nearby water pump. Campbell testified that Perry told him that he piled the coal up so it could be

easily thrown over the hill onto property Campbell was in the process of repurchasing from the county. It is undisputed that after the coal was stockpiled, the pile was not moved in any way and nothing was added to or removed from the pile until it was wasted in accordance with the Cabinet's instructions. Neither Campbell nor Perry in any way attempted to benefit from obtaining the coal. To the contrary, the extraction of the coal appears to have been only a burden for Campbell. All of the evidence indicated that the extraction of the coal was incidental to the excavation for the road. We acknowledge there could exist a situation where the intent to obtain coal would not be present at the outset of the excavation, but could thereafter be formed after the coal has incidentally been accessed or extracted, e.g., where a contractor incidentally encounters and extracts the coal in the process of excavating on a construction site and thereafter sells the coal. However, that is not what happened in the instant case. There was simply no evidence that Campbell's (or Perry's) actions were ever for the purpose of obtaining the coal.

For the reasons stated above, we reverse the order of the Perry Circuit Court affirming the Cabinet's imposition of the penalty for mining without a permit and remand the matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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