

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002229-MR

KENTUCKY SOUTHERN COAL CORPORATION

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-00081

KENTUCKY ENERGY AND ENVIRONMENT
CABINET (FORMERLY THE ENVIRONMENTAL
AND PUBLIC PROTECTION CABINET)

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, DIXON AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Kentucky Southern Coal Corporation (“KSCC”), appeals from a decision of the Franklin Circuit Court upholding a final order of Appellee, the Kentucky Energy and Environment Cabinet¹ (“Cabinet”) denying Appellant’s mining license renewal application. Finding no error, we affirm.

¹ Formerly the Environmental and Public Protection Cabinet.

This action concerns an 18.1- acre tract of land located in Hopkins County that lies within the boundaries of a Surface Coal Mining and Reclamation Permit held by KSCC. In 1936, Walter Crick acquired the surface tract to the 18.1 acres from KSCC's predecessor in interest, Norton Coal Mining Company, by a deed that contained a mineral reservation in favor of Norton. Harold and Georgia Bandy subsequently acquired the surface tract from Crick.

Sometime thereafter a dispute arose between Norton and the Bandys regarding the Crick deed and Norton's right to mine the property. As a result, Norton brought suit in the Hopkins Circuit Court. *Norton Coal Company v. Bandy*, 84-CI-339. On March 13, 1985, the trial court entered a judgment declaring Norton to be the owner of certain coal seams and granting it a 15-year surface lease for the Bandy property, effective January 23, 1985. The judgment provided, in relevant part:

2. The Defendants, Harold Bandy and Georgia Bandy, do hereby let, lease and demise unto Norton Coal Corporation, its successors and assigns, the surface rights to 18.1 acres of land . . . for a period of fifteen (15) years, commencing January 23, 1985. . . . During the term of said Lease, the Plaintiff, Norton Coal Corporation, shall have the right to strip mine the property and perform any mining or associated operations thereon not prohibited by this Judgment or state or federal law,

. . . .

6(c). At the end of the fifteen (15) year term of this lease, the Bandy Leasehold will be returned to the Bandys reclaimed in accordance with state and federal regulations[.]

In 1995, the Bandys conveyed the disputed property to Jeff and Marion Reynolds.

In March 1990, KSCC acquired Norton's rights in the lease. In 2004, the Reynolds conveyed the 18.1-acre tract to the current owner, Cathy Gunn, individually and as trustee for her children.

Sometime in late 1999 or earlier 2000, KSCC filed an application to renew its mining permit for another five years. While the application was pending, the Cabinet received a protest letter from the Reynolds claiming that the 1985 surface lease between the Bandys and Norton Coal had expired, and that a renewal lease had not been negotiated. As such, on September 28, 2000, the Cabinet's Division of Permits denied KSCC's application, finding that it had no legal right of entry to the disputed property following the expiration of the 15-year surface lease.

KSCC thereafter submitted an amended petition, arguing for the first time that the 15-year lease applied only to strip mining, and that its right of entry was based upon the terms of its "broad form" mineral deed and did not require consent of the surface owners. Nevertheless, in July 2004, the Division issued a second determination, again concluding that the permit renewal should not be granted because there was a *bona fide* dispute as to KSCC's right of entry to the surface:

The Division disagrees that it is clear from the [Hopkins Circuit Court] Judgment that the 15-year lease and the requirement to return the leasehold to the Bandys reclaimed applied only to strip mining. The ambiguities concerning the lease formulated by the Judgment and the requirement that the Bandy leasehold be returned to the Bandys reclaimed at the end of 15 years substantiates the

Reynolds' claim that there exists a *bona fide* property dispute. In light of the Hopkins Circuit Court ruling, Kentucky Southern's argument that ownership of the dominant mineral now allows it entry onto the Reynolds' property without their consent is not valid. The Division believes that it correctly denied the renewal.

The matter was thereafter submitted to the Cabinet's hearing officer for a report and recommended order. On April 27, 2005, the hearing officer rendered his report, wherein he concluded:

[T]he Hearing Officer is of the opinion . . . that the Cabinet properly applied the provisions of KRS [Kentucky Revised Statutes] 350.060(2), 405 KAR [Kentucky Administrative Regulations] 8:010, and 405 KAR 8:030 in determining that permit renewal could not be authorized because the protest filed by Mr. Reynolds and his assertion that Kentucky Southern needed a surface lease in order to access his property created a *bona fide* dispute. As to this determination, the Cabinet did not resolve a property dispute when it concluded that the Final Judgment Lease had expired and notwithstanding Kentucky Southern's assertions that such lease was not needed, Mr. Reynolds objections were such that the matter needed to be resolved before Kentucky Southern could demonstrate that it had submitted a complete and accurate permit petition.

Following the issuance of the Secretary's final order adopting the hearing officer's recommendation and affirming the Division's denial of the permit renewal, KSCC sought review in the Franklin Circuit Court. By opinion and order dated November 3, 2008, the circuit court affirmed the Cabinet's decision. This appeal ensued.

The function of the court in administrative matters "is one of review, not reinterpretation." *Kentucky Unemployment Insurance Commission v. King*,

657 S.W.2d 250, 251 (Ky. App. 1983). A reviewing court may only overturn an agency decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence of probative value. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 300-301 (Ky. 1972). As long as there is substantial evidence in the record to support the agency's decision, we must defer to that decision even if there is conflicting evidence. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121 (Ky. App. 2006).

On appeal, KSCC sets forth the same arguments that it did before the Cabinet and the circuit court. Specifically, KSCC argues that the court and Cabinet erred by refusing to recognize its prima facie right of entry based upon the deeds and court judgments; that there can be no *bona fide* dispute because the Reynolds no longer own the property; and that granting the permit is not an adjudication of property rights. We disagree.

Because coal mining involves land disturbances of such magnitude to both surface and underground areas, Kentucky requires private corporations seeking to engage in such operations to establish a legal right to mine on the property in question. The granting of a surface mining permit is governed by Kentucky Revised Statutes (KRS) Chapter 350. KRS 350.060 provides, in pertinent part:

(2) No permit or revision application shall be approved unless the application affirmatively demonstrates, and the cabinet finds in writing on the basis of the information set forth in the application or from information otherwise available, that the permit application is accurate and complete and that all the requirements of this chapter have been complied with.

(3) A person desiring a permit to engage in surface coal mining operations shall file an application which shall state:

.....

(b) The owner or owners of the surface of the area of land to be affected by the permit and the owner or owners of all surface area adjacent to any part of the affected area;

.....

(d) The source of the applicant's legal right to mine the coal on the land affected by the permit[.]

As noted by the circuit court, KRS 350.060(3)(b) and (d) were enacted by the legislature “to prevent outlaw coal operators from seizing mineral rights that are owned by others and to require the state permitting authorities to respect the property rights of all its citizens.” In addition to statutory requirements, 405 Kentucky Administrative Regulations (KAR) 8:030, Section 4(2) further requires that for severed estates, the application must contain: (a) A copy of the written consent of the surface owner for the extraction of coal by surface mining methods; or (b) A copy of the conveyance that expressly grants or reserves the right to extract coal by surface mining methods; or (c) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, a copy of

the original instrument of severance upon which the applicant bases his right to extract coal by surface mining methods and documentation that under applicable state law, the applicant has the legal authority to extract the coal by those methods. *See Johnson v. Environmental and Public Protection Cabinet*, 289 S.W.3d 216, 219 (Ky. App. 2009). The burden is on the applicant to demonstrate the legal right to mine.

After reviewing the record and decisions below, we are of the opinion that the Franklin Circuit Court thoroughly addressed each and every issue raised by KSCC. As such, we incorporate and adopt the reasoning set forth in its opinion and order:

The expiration of the surface lease adjudicated by the Hopkins Circuit Court creates a *bona fide* dispute as to the rights of KSCC to mine the coal on the land in question. The [Cabinet] has provided an abundant record and opinions and briefs based upon reasonable interpretations of that record. There is substantial evidence in the record to support the decision of [the Cabinet] to deny Petitioner's renewal application.

KSCC makes much of the fact that the Reynolds no longer own the property in question, and that they have not actively participated in the agency decision for several years. However, this Court finds this to be irrelevant. The Reynolds are not required to be active parties to the agency action. They properly intervened to protect their legitimate interests in their own property. Once that property was sold, it is understandable that they would have a much diminished interest in the litigation. Thus, their lack of participation is not interpreted by the Court to be any manner of acquiescence or waiver of their rights, nor can it be interpreted to be a waiver of the rights of their successors in interest. The fact that they no longer own the property

in question is equally irrelevant. The current owner of the property has the same legal rights in the estate as the Reynolds had, and there has been no waiver, lease, or deed executed by them in favor of KSCC. Thus, there still appears to be a *bona fide* property dispute regarding the 18.1 acre tract which must be resolved before KSCC's renewal application can be granted. [The Cabinet] is acting within the scope of its statutory mandate to require that this dispute be settled and KSCC's right to the property in question be made clear before granting an application to mine.

.....

KSCC argues that it has established a *prima facie* right of entry, and that the mineral estate is dominant over the surface estate. KRS Chapter 350 represents Kentucky's implementation of Public Law 95-87, the federal Surface Mining Control and Reclamation Act, 30 U.S.C. Sec. 1255, *et seq.* ("SMCRA"). SMCRA provides that "nothing herein authorizes the regulatory authority to adjudicate property disputes." 30 U.S.C. Sec. 1260(6)(c). KSCC here seeks to have the Cabinet, and this Court, "adjudicate property disputes" under the guise of granting a permit application that would have the effect of rendering competing property rights meaningless.

KSCC may or may not have valid arguments to make regarding its property rights, but the Cabinet, and this Court, have no jurisdiction to adjudicate those disputes. Any such dispute must be adjudicated in the court of general jurisdiction in which the real estate is located. *See* KRS 452.400. The burden is on the permit applicant to resolve such issues prior to applying for, or obtaining, a permit. Absent a valid lease, deed, contract with the owners of the real estate, or judgment from a court of competent jurisdiction, the Cabinet has no basis for finding that KSCC has a legal right to mine this property. No such evidence exists in this record. KSCC's lease has expired. It has offered no other basis to support its right to mine that does not potentially implicate the property rights of third parties. KSCC essentially seeks to force the Cabinet to issue a permit

that will render the competing property rights of others null and void without ever giving them the opportunity to be heard.

The Court notes that the rights of surface owners are not necessarily subordinate to the rights of mineral owners. *See Florman v. Mebco Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006); *Ward v Harding*, 860 S.W.2d 280 (Ky. 1993). No surface mining permit can be issued until the permit applicant has demonstrated that it meets all of the requirements of law. [KRS] 350.085(1). In any event, the burden is on the permit applicant to establish its legal right to mine, and it would be wrong to adjudicate these property interests in an administrative proceeding. The administrative agency lacks jurisdiction to adjudicate such property rights, and KSCC has submitted no valid lease, deed, or other legal authority that supports its right to mine this property. Here, KSCC has simply failed to meet its burden. Moreover, KSCC has not provided, and the Court does not find, any credible evidence that [the Cabinet] has misapplied the applicable law in this case. Accordingly, the Court has no grounds upon which to reverse the decision of the administrative agency.

In addition to agreeing with the rationale of the circuit court, we make two additional observations. First, KSCC has insisted that the mineral reservation in the Crick deed grants it unfettered access to the disputed property regardless of the surface owner's consent. If such were the case, Norton had no need to agree to the 15-year surface lease in the 1985 judgment. An agreed surface lease would have been unnecessary if Norton had intended to proceed solely under its mineral reservation at that time. Thus, the very fact that the parties entered into the 15-year lease calls into question what surface rights Norton, and later KSCC, held after the

judgment was entered. Further, the expiration of the lease itself creates a genuine issue as to what, if any, surface rights KSCC currently possesses.

Second, KSCC has adamantly claimed that no *bona fide* dispute can exist because the Reynolds no longer own the property and the current owner, Cathy Gunn, does not dispute KSCC's right of entry. Yet, notably missing from the record is any evidence of a deed, lease, or even written consent by Gunn granting KSCC legal right of access to the property. As such, we conclude, as did the Cabinet and circuit court, that KSCC has failed to comply with the plain language of KRS Chapter 350 and, in fact, cannot comply with such, until the property dispute is settled by a circuit court of general jurisdiction. KRS 23A.010. Since such actions are civil in nature, they are not within the jurisdiction of an administrative agency or, in this case, the Franklin Circuit Court, since the property at issue is located in Hopkins County. *See Johnson*, 289 S.W.3d at 222; *Department for Natural Resources and Environmental Protection v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471 (Ky.1978).

Accordingly, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sam P. Burchett
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BRIEF FOR APPELLEE:

Tamara J. Patrick
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