

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001061-MR

COMMONWEALTH OF KENTUCKY, ENERGY  
AND ENVIRONMENT CABINET, DIVISION OF  
ABANDONED MINE LANDS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE WILLIAM ENGLE, III, SPECIAL JUDGE  
ACTION NO. 99-CI-00461

ROSCOE HOLBROOK, RUBY STURGILL,  
AND KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: The Commonwealth of Kentucky, Energy and Environment Cabinet (hereinafter the “Cabinet”), Division of Abandoned Mine Lands (hereinafter the “Division”), appeals the opinion and order of the Letcher Circuit Court affirming a final order of the Board of Claims (hereinafter the “Board”).

Having determined that the Board exceeded its authority, we reverse the Letcher Circuit Court and instruct it to remand the case to the Board for dismissal.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 1989, an inspector from the Cabinet investigated a complaint filed by Roscoe Holbrook about a landslide above Crafts Colly Creek in Letcher County. At that time, the Division had the responsibility to reclaim land that had been mined prior to 1977. The landslide was the result of past coal-mining activities. The slide was moving into the edge of the creek and potentially threatening three houses with flooding. The inspection showed that material had moved into the creek from the slide and, as a consequence, flooding had occurred in Phillip Baker's and Ruby Sturgill's backyards. The inspector recommended reclamation of the slide.

In April 1990, a design branch engineer for the Cabinet visited the site and determined that significant work was necessary to stabilize the slide at a cost of \$104,000. This Abandoned Mine Lands' construction project was designated the Phillip Baker Slide Project. Holbrook and Sturgill signed consents for the work to be done.

The actual work on the project began in 1996. Not only was the project conducted according to plans prepared by the Division, but also the Division supervised the actual construction. The work consisted of the stabilization of a slide that threatened to obstruct the creek.

A key concern related to the project was crossing the creek in order to access the slide for purposes of the reclamation. The design branch engineer recommended a temporary culvert crossing over the creek to get to the “slide” site. The Division agreed and decided that a culvert crossing was appropriate since the project would take only three or four months and the cost to build a bridge for the project would be approximately \$50,000.

Metal tiles (pipe) covered with dense-grade crushed stone was used for the temporary crossing. To build the crossing, the project’s consulting engineer had recommended four 30-inch pipes. However, the contractor obtained permission to use three 42-inch pipes instead. The temporary crossing was installed in August 1996 and, initially, adequately handled the flow of the creek.

On October 2, 1996, a rainfall event occurred and the temporary crossing was unable to accommodate the run-off. Instead, it acted as a dam and flooding occurred, which caused water to back up into Holbrook’s mobile home and Sturgill’s basement. Sturgill contacted the Division about the flooding around her home. The culverts were removed and the flooding subsided. After the flooding incident, the project continued. Identical pipes were reinstalled with no further drainage problems occurring.

However, following the flooding, Holbrook claimed damage to his mobile home, and Sturgill alleged water damage to personal property in the basement of her residence. They separately filed claims for the property damages

with the Board. Subsequently, the claims were consolidated. The Board held a hearing on January 21, 1999. The hearing officer recommended a finding of negligence on the part of the Cabinet and the finding was adopted by the Board. Holbrook, who had sought \$1,875, was awarded \$6,000, and Sturgill, who had sought \$25,000, was awarded \$2,300.

Next, the Cabinet filed a petition for review in Letcher Circuit Court on December 17, 1999. After almost fourteen years, following the submission of written briefs, supplements, arguments, and the appointment of a special judge for the Letcher Circuit Court, the trial court entered an opinion and order on June 17, 2013. The order affirmed the decision of the Board. The Cabinet now appeals this order.

The Cabinet argues that the Board exceeded its authority. It points out that the trial court did not address this issue in its decision. In making this argument, the Cabinet maintains that it is necessary to analyze whether the Division's actions were ministerial or discretionary and, thus, entitled to sovereign immunity. If the actions were discretionary, the Board has no jurisdiction over the claims. In the alternative, the Cabinet argues that if the acts were ministerial, the Board wrongly determined that the acts were negligent. Further, the Cabinet raises issues about the amount of the damages and comparative negligence.

Accordingly, the Cabinet maintains that the trial court's decision should be reversed and remanded to the Board with instructions to dismiss appellees' claims.

In response, Holbrook and Sturgill cite Kentucky Revised Statutes

(KRS) 44.073(2) for the proposition that the Board has “jurisdiction over all negligence claims for the negligent performance of ministerial acts against the Commonwealth . . . thereof while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies.” They maintain that the actions by the Division were ministerial and, therefore, based on the limited statutory waiver of sovereign immunity for negligently performed ministerial acts, the Board had jurisdiction to make this determination. Additionally, they maintain that the Board specifically made findings regarding the elements of negligence; the findings were supported by substantial evidence; and, thus, the findings were not clearly erroneous. Moreover, Holbrook and Sturgill did not act negligently, and expert testimony is not necessary to value the property.

#### STANDARD OF REVIEW

The Board is an administrative body with powers and duties strictly governed by legislative enactment. *Commonwealth of Kentucky, Department of Parks v. Bergee Bros. Inc.*, 480 S.W.2d 158, 159 (Ky.1972). It “is created and vested with full power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth” or any of its agents. KRS 44.070(1).

The statutes governing the Board also establish court authority for appellate review of Board decisions and provide the standard of review. KRS 44.150 states that this Court is limited in the matters that it may review, stating:

The Court of Appeals shall review only the matters subject to review by the Circuit Court and also errors of law arising in the Circuit Court and made reviewable by the Rules of Civil Procedure, where not in conflict with KRS 44.070 to 44.160.

KRS 44.150.

An appellate court may only overturn the Board's findings of fact if they are not supported by substantial evidence or are clearly erroneous.

*Department for Human Resources v. Redmon*, 599 S.W.2d 474, 476 (Ky. App. 1980). Questions of law, however, are reviewed *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006).

#### ANALYSIS

Sovereign immunity is granted to the Commonwealth of Kentucky by Section 231 of the Constitution. The Board of Claims Act offers a limited statutory waiver of governmental immunity with regard to negligence claims filed with the Board. *Greene v. Commonwealth*, 349 S.W.3d 892, 903 (Ky. 2011). In reviewing a decision of the Board, the circuit court is limited to four grounds for review:

- (1) The Board acted without or in excess of its powers;
- (2) The award was procured by fraud;
- (3) The award is not in conformity to the provisions of KRS 44.070 to 44.160; and
- (4) Whether the findings of fact support the award.

KRS 44.140(5). As noted above, an appellate court is only permitted to review the same subject matter. KRS 44.150.

In the case at hand, the Cabinet argues that the Board acted in excess of its powers. The trial court did not address this issue and, in fact, stated in the opinion that the sole issue for review was whether the findings supported the award. A review of the record demonstrates, however, that the Cabinet, beginning with its exceptions to the Board's award, has consistently argued that the Board acted in excess of its authority. This question is a legal one and, hence, we review it *de novo*.

The jurisdiction of the Board is set out in KRS 44.070(1). It provides that the Board has the

power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment....

Still, the Board's jurisdiction is limited. As provided in KRS 44.073(2), the Board only has jurisdiction over claims involving "the negligent performance of ministerial acts" by the Commonwealth or its subdivisions.

Simply put, the Board's jurisdiction with regard to claims is limited to negligent performance of ministerial acts, and the jurisdiction does not extend to discretionary acts. KRS 44.073(2); *Greene v. Commonwealth*, 349 S.W.3d 892, 906 (Ky. 2011).

Consequently, we must evaluate the actions of Division personnel in designing the mechanism for reclamation of the land in the Phillip Baker Slide

Project and, in particular, the decision regarding the use of a culvert or a bridge to handle the flow of the creek during the project. This evaluation is necessary to ascertain whether the actions were discretionary or ministerial. In general, ministerial acts involve the performance of merely routine duties while discretionary acts involve the exercise of judgment in choosing which of several courses to follow. See *Collins v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d 122, 126 (Ky. 1999).

To elaborate, discretionary acts are “those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.” *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Further, as observed in *Collins*, discretionary duties are those that “require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed.” *Collins*, 10 S.W.3d at 125 (quoting *Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997)). In contrast, a ministerial act is “one that requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” *Yanero*, 65 S.W.3d at 522.



Holbrook's and Sturgill's claims of negligence arise from the flooding of creek after a rain event, which they maintain occurred because the Division chose to use a culvert-type bridge rather than build a bridge. Nonetheless, the decision as to handling access to the reclamation site was not easy, perfunctory, or certain.

The statutes governing reclamation projects (KRS 350.020 et seq.) illustrate that funds are limited and priorities of expenses must be considered. Here, the budget for the project was \$104,000 and to install a bridge would cost an additional \$50,000. Further, the project was only to take three months. The three months chosen had the lightest rainfall. Priorities were weighed, factors considered, and a decision made. In making this determination, it is obvious to us that the Division exercised discretion, judgment, and forethought. We believe that the process used by the Division falls squarely within the parameters of a discretionary action. The Division assessed the landslide, its reclamation, and the process for doing so, and its actions required discretion. These were not routine, preordained duties and, hence, not ministerial.

Consequently, the Board of Claims exceeded its jurisdiction, that is, its power to award damages for the negligent performance of ministerial acts. Since the Division performed discretionary acts when determining the proper mechanism for this reclamation project, it was immune from claims of negligence under the doctrine of sovereign immunity. Having so decided, it is unnecessary for

us to address the Cabinet’s remaining arguments about the efficacy of the negligence claim or its legality of the award of damages.

As an aside, we are not persuaded by the Cabinet’s contention that the statutes in Chapter 350, which concern surface coal mining, pursuant to KRS 44.073(13) are completely immune to any claim of negligence – discretionary or ministerial. Under our analysis, the actions of the division were clearly discretionary and, thus, the waiver of sovereign immunity under KRS 44.070 is not applicable. This analysis sufficiently addresses the dispute herein, and we decline to extend blanket immunity to actions under KRS Chapter 350. *See Collins*, 10 S.W.3d 122.

#### CONCLUSION

We reverse the decision of the Letcher Circuit Court and direct it to remand the case to the Board of Claims with instructions to dismiss the claims of Holbrook and Sturgill.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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