.RENDERED: JULY 8, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000394-MR

CHARLES RAY TUSSEY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00772

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET,
DEPARTMENT OF NATURAL RESOURCES,
DIVISION OF OIL AND GAS; and KENTUCKY
BOARD OF CLAIMS — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON, AND STUMBO, JUDGES.

COMBS, JUDGE: Appellant, Charles Tussey (Tussey), appeals from an Opinion and Order of the Franklin Circuit Court vacating an award of damages and reversing the Final Order of the Board of Claims. Appellees are the

Commonwealth of Kentucky, Energy and Environment Cabinet, Department of Natural Resources, Division of Oil and Gas (the Division),[1] and the Kentucky Board of Claims. For the reasons set forth below, we vacate and remand.

Tussey operates a group of oil wells covered by a blanket bond in the amount of $10,000.00 consisting of $5,000.00 in cash and $5,000.00 in a certificate of deposit at First National Bank-Grayson, the principal of which is pledged to the Division. Tussey filed a claim in the Board of Claims seeking damages for lost weeks of production after the Division forfeited his bond and shut down his wells. Central to this appeal is KRS[2] 353.590(22),[3] which governs notification requirements for bond forfeiture:

> If the requirements of this section with respect to proper plugging upon abandonment and submission of all required records on all well or wells have not been complied with within the time limits set by the department, by administrative regulation, or by this chapter, **the department shall cause a notice of noncompliance to be served upon the operator by certified mail**, addressed to the permanent address shown on the application for a permit.
>
> (a) **The notice shall specify in what respects the operator has failed to comply with this chapter or the administrative regulations of the department.**

[1] Appellee is referred to as "DOG" in the parties' stipulations and as "the Respondent" and/or "the Cabinet" in the Hearing Officer's Recommendations. We have retained the original references in citing those materials.

[2] Kentucky Revised Statutes.

[3] Now KRS 353.590(26).

> (b) If the operator has not reached an agreement with the department or has not complied with the requirements set forth by it within forty-five (45) days after mailing of the notice, the bond shall be forfeited to the department.

(Emphases added.)

The parties filed agreed stipulations in the Board of Claims. As stipulated, on about May 21, 2008, the Division sent Tussey five separate letters/notices of violation by certified mail. They are exhibits to the stipulations. Each well is identified in the subject line by permit number and location; otherwise, the notices are identical and provide as follows:

> You are listed as the operator of the above-referenced well and are in violation of the Statutes and Administrative Regulations of the Commonwealth as follows:
>
> | ***Statute and/or Administrative Regulation*** | ***Violation*** |
> |---|---|
> | KRS 363.550(P) | Failure to identify producing lease |
>
> You are required to file a gas and/or oil production report with this office for this permitted well.
>
> If compliance is not accomplished on the subject well within 45 days, by you or the bondholder acting on your behalf, we shall forfeit your bond. If your bond is forfeited you shall no longer be authorized to operate wells subject to that bond. No permits will be issued to you until this violation is cleared.

(Bold-face italics original).

Tussey timely responded to notices of May 21, 2008.

The stipulations further reflect as follows:

> On or about June 2, 2008 Tussey submitted to DOG a hand-written response to the letter/notices of violation … and a 2007 Annual Report of Monthly Production form for each of the permits/wells cited for a violation of KRS 353.550 on May 21, 2008. ….
>
> DOG acknowledged receipt of the 2007 Annual Report of Monthly Production forms from Tussey in a letter sent to Tussey dated June 11, 2008. … Tussey was advised by that letter that additional reports were necessary to clear the violations that were issued. **The June 11, 2008 letter from DOG did not advise Tussey that DOG expected receipt of the additional reports required within the forty-five (45) day period set out in [in the May 21, 2008 notices].**
>
> Tussey submitted no additional documentation to DOG regarding the May 21, 2008 Notices of Violation or the June 11, 2008 letter prior to July 7, 2008.
>
> DOG forfeited the blanket bond posted by Tussey as a result of the violations cited on May 21, 2008 on or about July 24, 2008.

(Emphasis added.)

The July 24, 2008, forfeiture letter sent to Tussey references only the "Certified letter … dated May 21, 2008" and states: "You failed to satisfy the requirements of the above-referenced letter, which was a legal notice of a non-compliance matter." The July 24, 2008, forfeiture letter sent to the bank is also based upon Tussey's having "failed to obtain compliance after having been given notice by certified mail of the non-compliance…." Neither forfeiture letter refers to the June 11, 2008, sent by **non-certified mail**.

The parties stipulated that "[a]s a result of the forfeiture of Tussey's blanket bond, all wells operated by Tussey were "'red-tagged' or ordered shut in

and all production to cease." Tussey sought relief in Elliot Circuit Court. The parties further stipulated that on or about March 27, 2009, the Elliot Circuit Court issued a temporary injunction, enjoining and restraining the Division from taking any action to forfeit Tussey's blanket bond, which was ordered to be reinstated. In addition, the Division was enjoined and restrained from prohibiting Tussey from producing or selling any oil from the wells at issue based upon the attempted forfeiture.

On July 23, 2009, Tussey filed a claim with the Board of Claims in which he alleged that the Division arbitrarily, capriciously and negligently closed down his oil and gas wells by wrongfully forfeiting his bonds and by ordering that he could no longer produce oil and gas. A hearing was held on December 7, 2011. Tussey and Marvin Combs, assistant director with the Division, testified. Mr. Combs agreed that the (five) May 21, 2008, notices sent by certified mail only advised Tussey that he needed to file a (single) report for each well. Mr. Combs acknowledged that the June 11, 2008, letter was the first communication advising Tussey that the Division also wanted "a whole bunch of reports" for previous years. (TH, Combs 139-40). Mr. Combs also admitted that the June 11, 2008, letter did not set forth a written timeframe in which Tussey was required to comply and that it had not been sent by certified mail as required in mandatory language by KRS 353.590(22). *Id.* 131. Mr. Combs did not dispute that there was a period of time during which the state was not enforcing the reporting requirements. He testified: "Well, we didn't have the staff, but as we found issues with an operator

we would address them at that point. Obviously, there were operators that fell through the cracks, so to speak." *Id.* 141.

On April 19, 2012, the Hearing Officer at the Board of Claims issued the following Recommended Findings of Fact, Conclusions of Law, and Order:

> The Respondent [Cabinet] presents several varying alternative arguments that it believes should allow the Cabinet to retain sovereign or governmental immunity in this case, and thus deny the claim entirely. In essence, Respondent believes that its regulatory functions allow it "quasi-judicial" immunity in its decision-making, or else that its revocation of [Tussey's] license was a "discretionary" function that takes it out of the subject matter jurisdiction of the Board of Claims. The Hearing Officer rejects these arguments. The basis of the claim is that there was negligent performance of a ministerial act by the Respondent that resulted in damages, and an examination of the evidence validates this.
>
> The evidence indicates that two crucial communications took place between Respondent and [Tussey]: the certified mail notices sent on May 21, 2008, and the June 11, 2008 letter. The May 21 letters were the stated basis of the revocation of the bond. Yet these letters are completely inadequate in describing what [Tussey] must do in order to become compliant. Simply stating that they expect "a report," singular, [Tussey] was entirely reasonable in thinking that they were finally going to start enforcing the ***annual*** reporting requirement, and that the most recent report for each well, from 2007, was all that was necessary.
>
> The follow-up letter of June 11 is similarly flawed. If it was meant to supplement the May 21 notices, and to be considered a basis for bond revocation, **the statute indicates that this letter should have been sent by certified mail.** [Emphasis added.] And while it was a clear

> improvement in the area of *what* [Tussey] had to do for compliance, it was completely inadequate as to *when.* The [follow-up] letter contained no indication that the 45 day time frame of the May 21 letters was still in effect while [Tussey] was waiting for the last decade of past annual reports, nor did it indicate that these additional reports were under any other deadline. If one takes the very best qualities of the May 21 and June 11 letters, and put them together the right way (the "what to do" of the June 11 letter, the "when" of the May 21 letters, the requisite "certified mail" status of the May 21 letters), then there would have been adequate notice under KRS 363.590. As it was, the notice in the Claimant's case was fatally defective.
>
> Having established that the notice provided to [Tussey] was defective, this Hearing Officer must next consider whether this is negligent performance of a ministerial duty, sufficient for jurisdiction in the Board of Claims. This Hearing Officer believes that it is. Per the [*Commonwealth v.*] *Sexton*[, 256 S.W.3d 29 (Ky. 2008)] and *Stratton* [*v. Commonwealth,* 182 S.W.3d 516 (Ky. 2006)] cases, it is known that ministerial duties are routine ones, spelled out in statutes and regulations – and indeed, the notice requirements for bond forfeiture are defined in KRS 353.590(22). The requirements are not extensive. The notice only has to "specify in what respects the operator failed to comply" and it has to be sent via certified mail. But as previously noted, the notice in this case was simply not up to that minimal standard. **This defective notice was the act of ministerial negligence required to give the Board of Claims subject matter jurisdiction. [Emphasis added.]**

The Hearing Officer further concluded that the negligent ministerial act caused Tussey's damages. Based upon what Tussey would have been able to generate from pumping oil during the period of shut-down, the Hearing Officer

recommended judgment for Tussey in the amount of $8,797.42. On May 10, 2012, the Division filed exceptions. By Final Order issued May 17, 2012, the Board of Claims accepted and adopted as its own the well-reasoned recommendation of the Hearing Officer.

The Division appealed to the Franklin Circuit Court. By Opinion and Order entered February 9, 2015, that court concluded as follows:

> The Divisions' [sic] actions were discretionary, and the Board of Claims did not have jurisdiction to entertain Mr. Tussey's claim against the Division. Mr. Tussey bases his claim on his assertion that the Division acted negligently in determining that his initial submission to the Division in response to the [May 21] Notice of Violation was insufficient to clear the cited violations and avoid forfeiture. This Court cannot agree. The Department of Natural Resources has the authority to require oil and gas well operators to submit reports with the Division [sic]. KRS § 353.550. Pursuant to the General Assembly's grant of authority, the Division promulgated administrative regulations regarding the reporting requirements for operators. *See* 805 KAR 1:180. Operators are required to submit annual production reports for the preceding year with the Division by April 15. 805 KAR 1:180 § 2(1)(a, b). In the event than an operator fails to submit a report, the Division must then notify the operator in writing of his noncompliance. 805 KAR 1:180 § 3. The operator has forty-five days from the time he receives the Division's notice within which to provide his report before becoming subject to the penalties established in KRS 353.570. The Division followed this process in notifying Mr. Tussey of his violations in the initial May 21, 2008 letter. The subsequent June 11, 2008 letter acknowledge [sic] receipt of Mr. Tussey's report and requested further documentation to address

> Mr. Tussey's violations. The second letter [sic] was not a notice of further violations. For this reason, the Board of Claim's [sic] damage award to Mr. Tussey must be vacated and the Final Order reversed.

Tussey filed a Motion to Alter, Amend, or Vacate, which was denied by Order entered on March 3, 2015. Tussey appeals.

We begin our analysis by noting the reasoning of *Collins v. Commonwealth of Ky. Nat. Res. & Envtl. Prot. Cabinet*, 10 S.W.3d 122, 124-25 (Ky. 1999):

> The Board of Claims Act offers a limited waiver of sovereign immunity with regard to negligence claims filed with the Board. KRS 44.072.
> …
>
> This provision clearly establishes that any negligence claims against the Commonwealth or its subdivisions must be for the negligent performance of "ministerial acts." By implication, the negligent performance of non-ministerial, i.e., discretionary, acts cannot be a basis for recovery under the Act.

(Citations omitted.)

The scope of our review is set forth in the Board of Claims Act. "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. "[T]he Board's findings must be upheld if they are supported by substantial evidence …. The question of immunity is a matter of law which both

the circuit court and this Court review *de novo." Energy & Env't Cabinet, Div. of Forestry, Com. v. Robinson*, 363 S.W.3d 24, 26 (Ky. App. 2012).

In concluding that the Division's acts were discretionary and that the Board of Claims lacked jurisdiction, the circuit court stated: "Tussey bases his claim on his assertion that the Division acted negligently in determining that his initial submission … in response to the Notice of Violation was insufficient…." Tussey submits that the circuit court misconstrued the issue. We agree. As the Hearing Officer explained, "the defective notice was the act of ministerial negligence required to give the Board of Claims subject matter jurisdiction." That has been Tussey's argument throughout these proceedings.

The circuit court referred to administrative regulations governing reporting requirements and then concluded that the Division followed "this process" in notifying Tussey of his violations in the initial May 21, 2008 letter, and that the June 11, 2008, letter requesting further documentation was not a notice of further violations. The circuit court made its own findings and substituted its judgment for the Board's. In so doing, we hold that it erred.

The former Court of Appeals, the predecessor of our current Supreme Court, analyzed this very issue of the highly limited role of an appellate court in its review of issues arising from the Board of Claims. In *Com., Dep't of Parks v. Bergee Bros.,* 480 S.W.2d 158, 159 it held as follows:

> The judiciary enforces the decisions of the board and has limited appellate review. The jurisdiction of the circuit court in appeals arising from the board is

> extrinsic; it has no other powers or duties than those enumerated in the statutes.

The *Bergee Bros.* Court continued its discussion by noting that the statute imposes the following constraints governing judicial review of a Board decision:

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

Id. at 160.

The June 11, 2008, letter requesting *additional* documentation only underscores the fact that the Division **did not** follow the proper process in its initial May 21, 2008, letters. Substantial evidence supports the Board's determination that the May 21, 2008, notices were completely inadequate in advising what Tussey had to do in order to become compliant and that the June 11, 2008, communication was similarly flawed because it was not sent by certified mail.

The Legislature prescribed the notification requirements for bond forfeiture in KRS 353.590(22) (now (26)): "[T]he department shall cause a notice of noncompliance to be served upon the operator by certified mail …. [and] [t]he notice shall specify in what respects the operator has failed to comply with this chapter or the administrative regulations of the department." We agree with

Tussey that "it is hard to imagine" how an act or function could be more ministerial.

> An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. In some respects public officials must interpret the statutes imposing duties on them to form a judgment from the language of the statute as to what responsibilities are imposed. Such an intellectual activity does not make the duty of the officer anything other than a ministerial one. Accordingly, if the statute directs the officer to perform a particular act which does not involve discretion, the officer is required to do so and the act remains ministerial despite any doubt by the official.

Cty. of Harlan v. Appalachian Reg'l Healthcare, Inc., 85 S.W.3d 607, 613 (Ky. 2002); *Upchurch v. Clinton Cty.,* 330 S.W.2d 428, 430 (Ky. 1959) ("The duty required to be performed under [the statute] was not of a discretionary nature; it was ministerial in character. … The word 'shall' in each instance imports the absolute necessity of carrying out these legal conditions according to their tenor.").

We are compelled to vacate the Opinion and Order of the Franklin Circuit Court, and we remand this matter for entry of a judgment reinstating the Final Order of the Board of Claims.

ALL CONCUR.

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