COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2002 **Cir. Ct. No. 2003CV302**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MIDWEST ENERGY RESOURCES CO.,

PETITIONER-RESPONDENT,

V.

WISCONSIN DEPARTMENT OF ADMINISTRATION AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENTS,

GORDON A. OFTEDAHL,

INTERVENOR-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County: GEORGE GLONEK, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Gordon Oftedahl appeals a judgment of the circuit court reversing a decision by a hearing examiner from the Department of Administration's Division of Hearings and Appeals.[1] The examiner concluded the Department of Natural Resources erred by granting a permit to Midwest Energy Resources Company without subjecting it to "prevention of significant deterioration" rules.[2] The DNR had determined those rules did not apply to Midwest because its facility is not a "coal preparation plant." Oftedahl essentially argues the circuit court failed to give proper deference to the hearing examiner. We disagree and affirm the judgment.

Background

¶2 Since 1976, Midwest has operated a "coal transshipment facility" in Superior. Coal arrives via railcar from coal mines in western states. Midwest unloads the coal from the railcars and loads it onto ships and trucks for transportation to Midwest's customers.

¶3 Midwest received a permit from the DNR in 1999 to process a maximum of eighteen million tons of coal per year. The permits are necessary, in part, to ensure compliance with environmental standards relating to clean air requirements and coal-related emissions. Certain "coal preparation plants" are subject to environmental standards found in WIS. ADMIN. CODE § NR 440.42.[3]

[1] The procedural statute applicable here, WIS. STAT. § 227.43(1)(b), refers to a hearing examiner rather than an administrative law judge. We will use the statute's terminology. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] While Midwest Energy Resources Company is the name of the company that owns the coal facility, we will refer interchangeably to both the company and the facility itself as Midwest.

[3] All references to the Wisconsin Administrative Code are to the 1999 version.

This code section is identical to subpart Y of chapter 40 in the Code of Federal Regulations. The subpart was promulgated by the Environmental Protection Agency in response to a congressional directive to develop "new source performance standards." Facilities subject to § NR 440.42 have their permits reviewed under "prevention of significant deterioration" rules—more costly and time consuming than the review of applications from facilities not subject to the performance standards.

¶4 Midwest's 1999 permit included a footnote stating:

> Under NR 440.12(3)(c), Wis. Admin. Code, NSPS [new source performance standards] for Coal preparation facilities the affective [sic] dates is modified or constructed after October 24, 1974. According to the affective [sic] date Superior Midwest Energy Terminal is subject to NSPS because the facility was modified or constructed after October 24, 1974.

The DNR's permit writer later testified at the contested case hearing that this note was based on her erroneous reading of WIS. ADMIN. CODE § NR 440.42(1).

¶5 Midwest applied for a new permit in 2001, seeking to increase its maximum permitted volume to twenty-five and one-half million tons annually. The DNR issued a temporary permit, including the same footnote from the 1999 permit stating Midwest was subject to WIS. ADMIN. CODE § NR 440.42. However, the DNR eventually determined that § NR 440.42 did not apply to Midwest because it was not a coal preparation plant, and the DNR issued a final permit in May 2002.

¶6 Oftedahl, who owns property near Midwest, sought a contested case hearing, raising several objections. One of his arguments was that the DNR erred by concluding Midwest was not a coal processing plant. Rather, Oftedahl thought

that the new source performance standards should apply and Midwest's permit application should be scrutinized under the stricter "prevention of significant deterioration" rules.

¶7 Contested case hearings involving the DNR are heard by a hearing examiner from the Division of Hearings and Appeals. *See* WIS. STAT. § 227.43(1)(b). At the hearing, the DNR appeared with Midwest, urging the examiner to defer to the DNR's determination that Midwest was not a coal preparation plant as it neither "breaks" nor "screens" coal. Moreover, the DNR stressed that WIS. STAT. § 990.01 required both it and the examiner to define those terms according to technical industry definitions, not common meanings.

¶8 Part of the contested hearing focused on Midwest's use of a grate over the hoppers that receive coal from the railcars. Midwest stated the grate is used to prevent stray material, like tree branches and scrap metal, from being transferred from the railcars into the facility. The grate is also designed to protect workers from falling into the hoppers. Midwest also conceded that some employees refer to the grate as a "grizzly."

¶9 The hearing examiner concluded Midwest breaks coal because "significant 'breaking' of coal does occur when shipments are dumped over the grizzly grate" and "personnel break up frozen and or ice coal trapped on top of the grizzly with a sledgehammer." The examiner also determined Midwest screens coal, because the grate "serves as a device for separating material according to size …." Accordingly, the examiner concluded Midwest was a coal preparation plant subject to WIS. ADMIN. CODE § NR 440.41, remanding the case to the DNR to review Midwest's permit application under the prevention of significant deterioration rules.

¶10 Midwest petitioned the circuit court for review.[4] The circuit court reversed the hearing examiner's decision based on its conclusion the examiner failed to follow WIS. STAT. § 990.01 and give the terms breaking and screening their industry meanings. The court reinstated Midwest's permit. Oftedahl appeals.

Discussion

¶11 Generally, in an appeal from an administrative agency's determination, we review the agency's decision, not the circuit court's. ***Sea View Estates Beach Club, Inc. v. DNR***, 223 Wis. 2d 138, 145, 588 N.W.2d 667 (Ct. App. 1998). We normally give one of three levels of deference—no weight, due weight, or great weight—to that decision. "[T]he greater the experience and expertise of the agency in the area at issue, the greater the deference the agency would be afforded." ***Id.*** at 146.

¶12 Here, however, we are not reviewing a DNR decision. We are reviewing the decision of a hearing examiner from the Division of Hearings and Appeals, part of "a department created to provide management services and assistance to state agencies and departments." ***Roehl Transp., Inc. v. Wisconsin Div. of Hearings & Apps.***, 213 Wis. 2d 452, 460, 570 N.W.2d 864 (Ct. App. 1997). It is neither argued nor shown that the Division "possess[es] any experience, expertise or specialized knowledge in the area of" environmental

[4] Midwest evidently petitioned both the Douglas County and the Dane County circuit courts because it was uncertain whether the DNR would file its own petition. When it was clear Midwest would be allowed to proceed itself, it petitioned the Douglas County court, where it had filed first, for a change of venue or consolidation, bringing the Dane County case into Douglas County. The court granted the order and the Dane County record was transferred to Douglas County.

protection or enforcement. *See* ***id.*** at 461. Accordingly, the hearing examiner is entitled to no deference.[5] *See* ***id.***

¶13 The real question to be decided is whether Midwest is a coal preparation plant under WIS. ADMIN. CODE § NR 440.42. If so, it is subject to the new source performance standards and must go through prevention of significant deterioration review. This would make the 2002 permit invalid, as the hearing examiner determined. If Midwest is not a coal preparation plant, the permit should be reinstated, as the circuit court determined. Interpretation of the administrative code presents us with a question of law we review de novo. ***State ex rel. L'Minggio v. Gamble***, 2003 WI 82, ¶11, 263 Wis. 2d 55, 667 N.W.2d 1.

¶14 WISCONSIN ADMIN. CODE § NR 440.42 states, in relevant part:

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[5] Oftedahl contends, however, that the DNR failed to appeal the hearing examiner's ruling, meaning it became a final DNR decision entitled to deference. *See* WIS. ADMIN. CODE § NR 2.155(1); ***Sea View Estates Beach Club, Inc. v. DNR***, 223 Wis. 2d 138, 145-49, 588 N.W.2d 667 (Ct. App. 1998). Midwest responds that the DNR informed the circuit court and this court that the agency joined Midwest for review purposes. The DNR's letter to the circuit court stated, in part:

> While the State of Wisconsin Department of Natural Resources is not a party in these cases, we appreciate being informed of the Court's actions and orders in these matters.
>
> The administrative record in this matter reflects that the position taken by DNR in the contested case hearing … is that the New Source Performance Standards … does not apply to [Midwest] facility in Superior. This position is consistent with the position taken by [Midwest] on this issue ….

We have not been asked to determine whether this constitutes a formal appearance or appeal by the DNR. However, the matter is ultimately irrelevant. As will be discussed, the hearing examiner made an error of law when he failed to apply WIS. STAT. § 990.01. Whether the decision is properly considered the examiner's or the DNR's, we owe no deference to an error of law. *See* ***Bosco v. LIRC***, 2003 WI App 219, ¶29, 267 Wis. 2d 293, 671 N.W.2d 331.

> (1) APPLICABILITY AND DESIGNATION OF AFFECTED FACILITY. (a) *The provisions of this section are applicable* to any of the following affected facilities *in coal preparation plants* which process more than 200 tons per day: thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying[6] equipment (including breakers and crushers), coal storage systems and coal transfer and loading systems.
>
> (b) Any facility under par. (a) that commences construction or modification after October 24, 1974, is subject to the requirements of this section.
>
> (2) DEFINITIONS. As used in this section, terms not defined in this subsection have the meanings given in s. NR 440.02.
>
> ….
>
> (c) *"Coal preparation plant" means any facility*, excluding underground mining operations, *which prepares coal by* one or more of the following processes: *breaking*, crushing, *screening*, wet or dry cleaning and thermal drying. (Emphasis added.)

¶15 Of all the processes in WIS. ADMIN. CODE § NR 440.42(2)(c), the only two in contention are breaking and screening. Neither term is defined in § 440.42(2), nor are they defined in the cross-referenced WIS. ADMIN. CODE § NR 440.02. When we interpret statutes or the administrative code, words are given meaning based on "common and approved usage; but *technical words* and phrases and others *that have a peculiar meaning … shall be construed according to such meaning*." WIS. STAT. § 990.01(1) (emphasis added).

[6] This is the language upon which the DNR's permit writer relied when adding the footnote to the 1999 permit. She determined that Midwest used conveying equipment and that Midwest was built after the effective date in WIS. ADMIN. CODE § NR 440.42(1)(b). She did not, however, determine whether Midwest was a coal preparation plant as defined in § NR 440.42(2)(c).

Breaking

¶16 Midwest presented evidence that breaking is a technical word with a peculiar meaning to the coal industry. The evidence regarding its meaning was substantially the same from all sources, including documentary sources. Breaking coal requires a machine called a breaker, which reduces chunks of coal into smaller pieces for cleaning or further reduction or for the marketplace.[7] Indeed, the hearing examiner acknowledged breakers are designed to reduce coal's size, that Midwest does not use a breaker, and that coal arriving at Midwest is presized to two-inch pieces. The examiner nonetheless concluded that breaking occurs when coal shipments are dumped over the grate into the hopper. This is clearly erroneous as contrary to the industry definition of breaking.

¶17 There is no evidence the grate is a breaker. Indeed, the grate is not so much a machine as a passive filter. Moreover, there is no evidence the grate is used to reduce coal for further cleaning—it is undisputed that Midwest does not clean coal—nor does Midwest further reduce the coal for market. In fact, if the coal is broken smaller than the two-inch pieces, it is undesirable to Midwest's clients.

¶18 For the hearing examiner, and Oftedahl—who spends a considerable amount of space giving us a dictionary definition—to contend coal is broken when it strikes the grate is to give breaking its common meaning, not its technical

[7] Oftedahl contends "[t]he video tape made by Oftedahl's expert clearly demonstrates that 115 tons of coal falling on the 'grizzly' [grate] breaks the coal, causing release of a large amount of coal dust and noise resulting from the coal hitting the screen." We have reviewed the tape and we disagree that it shows any breakage under either the hearing examiner's or the industry's definition.

meaning. This is contrary to WIS. STAT. § 990.01(1). Midwest does not break coal as the industry defines it.

Screening

¶19 The hearing examiner determined that Midwest

> "screens" coal by means of the grizzly grate. The grizzly serves as a device for separating material according to size by passing undersize material through the grid surface of the grate and retaining oversized material on the grate surface. The grizzly grate is a "grizzly" within the meaning of NR 400.02(141).

¶20 WISCONSIN ADMIN. CODE § NR 400.02(141) defines not screening but "screening operation":

> "Screening operation" means *a device for separating material according to size* by passing undersize material through one or more mesh surfaces, screens or similar surfaces in series, and retaining oversize material on the mesh surfaces, screens or similar surfaces. *Screening operation includes any grizzly*, rotating screen or deck type screen. Screening operation does not include washers that are designed to remove unwanted or unnecessary material from the product. (Emphasis added.)

¶21 Oftedahl argues that under this regulation and in accordance with the hearing examiner's determination, "a screening operation includes 'any' grizzly. The term 'any' means all. … Midwest employs a grizzly in its operations …." In other words, he contends that because Midwest has a grizzly, Midwest has a screening operation. If it has a screening operation, it must screen coal. Midwest responds that it does not, as the industry defines the terms, either screen coal or have a grizzly.

¶22 First, we agree that Midwest does not have a grizzly. Grizzly is not defined in the statutes or administrative code, so we must use the industry's

definition. The only evidence about a technical meaning is presented to us in an industrial treatise. *See* COAL PREPARATION (Joseph W. Leonard & David R. Mitchell, eds., 3d ed. 1968). This source reveals that a grizzly consists of "equally spaced parallel bars … supported in a longitudinally include position so that material fed at the upper end will slide down over the bars." ***Id.*** at 8-24 to -25. They are "of various profile (shapes) generally tapered with a relief angle of five to 15 degrees …." ***Id.*** at 8-25. There is no evidence that Midwest's grate is anything like this description of a grizzly, despite what Midwest's employees or other witnesses might call the grate. Because Midwest has no grizzly, we accordingly reject any suggestion that Midwest necessarily has a screening operation and therefore must be screening coal. The grate is nothing more than a safety device and its existence is not dispositive.

¶23 The hearing examiner, however, also determined that Midwest was screening coal because it was separating all materials—coal and refuse—by size. This definition of screening is contrary to the industry's meaning.

¶24 Screening is not defined in statutes or the administrative code. According to Midwest, the industry defines screening as separating coal by size. *See* COAL PREPARATION, ch.8. But the hearing examiner, relying on two witnesses' testimony, concluded that screening means separating any material based on size, like removing tree branches and scrap metal from the coal. But ascribing a definition to a word not specifically defined is a question of law, not of fact. *See* ***Green Bay Metro. Sewer. Dist. v. VT&AE***, 58 Wis. 2d 628, 635, 207 N.W.2d 623 (1973). In any event, these witnesses' testimony was ambiguous at best.

¶25 One witness was the DNR's expert. He first stated that with regard to WIS. ADMIN. CODE § NR 440.42, screening means classifying coal by size. This exchange then occurred with Oftedahl's attorney:

> Q: Under 440.42 separating material by size can involve separating two different types of material by size such as rock and … coal?
>
> A: It could, yes.
>
> Q: So they don't have to be the same thing, you could have two different types of material being separated by size with regard to screening under 440.42 ….
>
> A: You changed it a little bit there. Screening by size?
>
> ….
>
> A: My understanding was classifying by size was screening for coal, that was my–what I gleaned as being the NR 440.42.
>
> ….
>
> Q: Well, it is your opinion that removing rock from coal by size constitutes screening under 440.42?
>
> A: Removing rock by size from coal? Too many parts in that. I would state it would have to be yes.

This exchange reveals an attempt by Oftedahl's attorney to obfuscate the matter. The witness noted the questions kept changing the focus and finally indicated the attorney's question was too complex for an unqualified answer.

¶26 The second witness gave equally ambiguous testimony. For example:

> Q: And so is it the fact that–so you're saying that anything that's a noncoal item that can get caught by the grizzly is–constitutes screening under NSPS for coal preparation plants?
>
> A: I believe it could, yes.

> Q: So your testimony is that any facility that has a stationery grate or screen is subject to NSPS for coal preparation plants?
>
> A: I think it's–the potential is there that it could, yes.
>
> ….
>
> Q: Is there some reason you can't make–does it or doesn't it in your mind, your opinion?
>
> A: I'm not EPA making this–making determinations.
>
> ….
>
> Q: In all of your work in reviewing in connection with this case or otherwise, *have you ever seen a grizzly such as Midwest's characterized as a coal sizing or screening operation*?
>
> A: *No* ….
>
> Q: The answer to my question is no?
>
> A: I believe so. (Emphasis added.)

¶27 In short, neither witness clearly establishes that screening applies to separating *all* material by size. Even if they had, the witnesses' testimony does not relate to the industry's definition of screening. We are compelled by WIS. STAT. § 990.01 to give screening its specialized meaning and only evidence of the *industrial* definition of screening is that screening coal means separating the coal by size, regardless whether refuse is also separated from the coal.[8] Midwest does not separate coal by size because the coal arrives mostly presized to two inches.

[8] Contrary to Oftedahl's assertion, WIS. ADMIN. CODE § NR 400.02(141) does not inform directly on the meaning of screening. Rather, it defines devices used in screening. While Oftedahl would have us infer screening is "separating material according to size" with no distinction to the type of material, such inference would be inappropriate. Section NR 400.02(141) specifically excludes from the definition of screening any washers that remove unwanted materials from the coal. This exclusion better supports the industry's definition than Oftedahl's, because it implies screening coal excludes removing waste.

Because Midwest neither screens nor breaks coal, it is not a coal preparation plant under WIS. ADMIN. CODE § NR 440.42.

Additional Arguments

¶28 The hearing examiner had difficulty accepting the coal preparation handbook when comparing it to a letter written by the United States Environmental Protection Agency regarding a coal facility in Seward, Alaska. The Seward facility operates similarly to Midwest and the Agency implied in this letter that the Seward facility is a coal preparation plant. The hearing examiner considered the letter more persuasive than the handbook because it was written later in time,[9] and Oftedahl suggests we owe ***Chevron*** deference to the Agency's letter. *See* ***Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.***, 467 U.S. 837 (1984).

¶29 In ***Chevron***, the Supreme Court stated, "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." ***Id.*** at 844. However, interpretations contained in an opinion letter—rather than interpretations that result from the adversarial process or notice-and-comment rulemaking—do not warrant ***Chevron*** deference. ***Christensen v. Harris County***, 529 U.S. 576, 587 (2000). As such, we do not consider the Agency's letter necessary or even helpful to determining whether Midwest screens or breaks coal as mandated by WIS. STAT. § 990.01(1). There is no indication the letter is

[9] While Oftedahl and the examiner were inclined to discount the book because of its age, we know of no rule that requires us to use a source's age as the sole factor to determining its reliability.

anything but an opinion letter and it does not inform on industrial definitions to aid our WIS. STAT. § 990.01(1) analysis.

¶30 Oftedahl also argues that regulation of two other plants—one in Wisconsin and one in Iowa—shows the Agency meant to expand its definition of coal preparation plants to plants like Midwest. But the Wisconsin plant actually screens coal and the Iowa plant evidently crushes it—making the plants coal preparation plants under the WIS. ADMIN. CODE § NR440.42(2)(c) definition. Comparison to these plants' regulation is therefore unavailing.

¶31 In sum, the hearing examiner failed to follow WIS. STAT. § 990.01(1) and apply the technical, peculiar definition of breaking and screening in determining whether Midwest is a coal preparation plant under WIS. ADMIN. CODE § NR 440.42(2)(c). The only evidence of the industry definitions for those two words reveal that Midwest engages in neither process. Midwest is therefore not a coal preparation plant. It is not subject to the new source performance standards. The DNR properly issued Midwest's permit.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.