

*Smith*

FILED - DIVISION OF APPEALS

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*Richard D. ...*  
CIVIL DIVISION

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
GALLIA COUNTY

RECEIVED  
FEDERAL SECTION  
RECLAMATION

The Personal Service  
Insurance Co.

Appellant,

No. 85 CA 1

vs.

Larry W. Mamone, Chief,  
Division of Reclamation,  
Department of Natural  
Resources,

DECISION & JUDGMENT ENTRY

Appellee

COUNSEL FOR APPELLANT: William C. Ailes, 100 East Gay Street,  
Columbus, Ohio 43216

COUNSEL FOR APPELLEE: Mary K. Smith, Assistant Attorney  
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Columbus, Ohio 43224

GREY, J.:

This is a direct appeal from a decision of the Reclamation Board of Review, forfeiting a portion of appellant PSI's reclamation surety contract on a Gallia County strip mining permit.

Permit No. C-605 was issued to CKL, Inc. on June 14, 1977. The original permit covered 20 acres which were subject to a reclamation bond requirement of \$1600.00 per acre. CKL posted a collateral bond for 9.1 acres to be affected the first year, in the amount of \$14,560.00. Mining progressed faster than expected, however, and CKL's mining plan and permit was modified five times. The changes are summarized in the chart below.

<u>DATE</u>	<u>AREA</u>	<u>BOND POSTED</u>	<u>BY WHOM</u>
6/14/77	9.1 acres (Original year 1 area plan)	\$14,560.	CKL (Certificates of Deposit)
8/8/77	4.0 acres (transferred from year 2 area)	6,400.	PSI (Bond No. 72-81-27)
9/24/77	6.9 acres (transferred from year 2 area)	11,040.	PSI (Bond No. 73-15-57)
10/12/77	3.4 acres (added by amendment)	5,440.	PSI (Bond No. 73-26-87)
11/18/77	3.9 acres (added by amendment)	6,240.	PSI (Bond No. 73-69-07)
11/30/78	.4 acres (to cover area affect- ed outside permit)	640.	CKL (Certificate of Deposit)
Total		<u>44,320.</u>	

In 1978, CKL applied for approval of reclamation other than planting, under R.C. 1513.16(D).<sup>1</sup> The Chief of the Division of Reclamation approved the request, and under the code released 50% of CKL's bond obligations. Instead of releasing 50% of each bond, area by area, however, he released the entire amount of \$22,160.00 from the surety bonds posted by PSI. Three of the bonds were released in full, and returned to PSI. These were No. 72-81-27, covering 4.0 acres, of \$6400., No. 73-26-87, covering 3.4 acres, of \$5440., No. 73-69-07, covering 3.9 acres, of \$6240. The remaining \$4,080. was released from No. 73-15-57, covering 6.9 acres, leaving \$6960. in the bond. The chief was following an unpublished Division policy of releasing surety bonds before the operator's collateral bonds, and "floating" the remaining security over the entire permit area.

In March, 1981, the Chief issued an Order declaring CKL's

failure to reclaim the entire 27.7 acre permit area, and notifying PSI of its election to perform the reclamation or pay the amount due under its surety obligation, under R.C. 1513.16 (F). When PSI did not elect to perform, the Chief issued the Order appealed from, demanding payment of the remaining \$6960., which would have covered completion of reclamation for 8.7 acres of land.

This order was affirmed by the Reclamation Board of Review and the Franklin County Court of Common Pleas, and was appealed to the Franklin County Court of Appeals. The Court of Appeals held that the Chief had failed to give credit for the number of acres which had been reclaimed at the time forfeiture was declared, as required by R.C. 1513.16(F), and that PSI's surety bonds could not be "floated" to cover the entire permit area. Personal Ins. Co. vs. Call (1983), 9 Ohio App.3d 286. It held that:

"Where, as here, the reclamation bond pertains to specific portions of the permit land, the Chief must release the bond covering those fully reclaimed areas under R.C. 1513.16(F)." 9 Ohio App.3d at 289."

The court ruled that the Chief must release the second half of the reclamation bond, or \$800. per acre, for each acre bonded by PSI which had been fully reclaimed. It found specifically that at least 6 acres (of the 6.9 acre addition) were fully reclaimed, ordered release of at least \$4800. of PSI's remaining surety bond, and remanded for determination of what additional acres of land bonded by PSI had been fully reclaimed.

On remand, the Reclamation Board of Review heard testimony

on this issue and found the following acres of land originally bonded by PSI had been fully reclaimed at the time of the Chief's original order of forfeiture: The entire 6.9 acre addition, 2.2 acres of the 3.4 acre addition, 1.8 acres of the 3.9 acre addition, and none of the 4 acre addition.

Thus 10.9 acres had been reclaimed, the equivalent of \$8720. at \$800. per acre, while 7.3 acres remained unreclaimed, the equivalent of \$5840. Instead of releasing PSI's entire remaining surety of \$6960. for the 10.9 acres reclaimed, the Board ordered a forfeiture of \$5840. for the unreclaimed acreage, and released only \$1120., the difference between that amount and the remaining surety. PSI appeals, raising a single assignment of error.<sup>2</sup>

"The Reclamation Board of Review erred in ordering termination of the appellant's right to perform reclamation of seven and three-tenths (7.3) acres of land affected under strip mine permit 605 and demanding payment of appellant of the sum of five thousand eight hundred and forty dollars (\$5,840.00) to complete reclamation of said seven and three-tenths (7.3) acres of land within said permit."

We start with the proposition that the ruling of the Franklin County Court of Appeals is binding on all further proceedings as the law of the case. That ruling establishes that 1) the Chief may not "float" the surety's obligation over areas of the permit bonded by the operator and, 2) PSI is entitled to release of \$800. per acre for each acre which it bonded which was fully reclaimed at the time of the Chief's original order.

If the Chief had initially released 50% of each bond when he approved reclamation other than planting, and then released the remaining 10.9 acres before forfeiting PSI's surety on the 7.3

unreclaimed acres, the net result would be a forfeiture of \$5840. for the 7.3 acres remaining unreclaimed. The Board's order is apparently an attempt to correct the Chief's prior error in releasing the surety in preference to the operator, to achieve the same result.

But we cannot simply rescind the action of the Chief and apply a rigid reconstruction of what should have happened. However erroneously, PSI was disproportionately released from its obligation to reclaim when the Chief chose to make the 50% release solely from the surety's bonds. PSI was entitled to rely on this release, in choosing whether to expend its funds for further reclamation. It may not now be penalized for the Chief's choice. Someone, either PSI or CKL, is entitled to release of bond under R.C. 1513.16(F) for 10.9 acres of land found to be fully reclaimed. The land was bonded by PSI, and it is reasonable that PSI should get the benefit of the release. The Franklin County Court of Appeals has ordered it so, and the Board must comply.

Both the Franklin County Court of Appeals order and R.C. 1513.16(F) provide for release of bond for reclaimed areas prior to forfeiture of bond for unreclaimed areas. Because the Board ignored this mandate, we must reverse its ruling. To do so does not impose an unjust burden on the state. The strip mining permit holder has underlying responsibility for all areas of the permit, whether bonded by collateral or a surety such as PSI. To "float" the operator's collateral bond over the entire permit area when the surety is released does not impose any additional

liability or extend the operator's risk, as does "floating" the surety's bond to cover areas it never agreed to be responsible for. The Chief had available at the time of forfeiture the operator's entire bond. This is more than sufficient to cover the 9.5 acres originally bonded, plus the 7.3 acres of unreclaimed land for which the surety must be fully released under our ruling. In fact, the state will have an excess of 2.2 acres worth of collateral bond, since PSI's bond release accounts for only 8.7 of the 10.9 acres found to have been fully reclaimed.

PSI's assignment of error is sustained. The order of the Reclamation Board of Review is reversed, and the cause remanded for entry of an order releasing PSI's surety for 10.9 acres of reclaimed land at \$800. per acre, up to the amount of its remaining bond. Since this amount exceeds its remaining surety, the entire bond must be released.

REVERSED & REMANDED WITH  
INSTRUCTIONS

<sup>1</sup>References are to the code before its amendment in 1981.

<sup>2</sup>Under the 1981 amendments, R.C. 1513.14 now provides for direct appeal from the Board to the court of appeals for the county in which the permit land is located.

It is ordered that (appellant~~appellee~~) recover of ~~appellant~~-appellee) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Reclamation Board of Review ~~Court~~ to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

STEPHENSON, P.J. & ABELE, J. CONCUR  
IN JUDGMENT & OPINION

*Earl E. Stephenson*

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Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.