

FILED

JUN 5 1985

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

HOCKING COUNTY
COURT OF APPEALS
MAXINE DALTON
CLERK

The Personal Service Insurance Co.,

Plaintiff-Appellant,

No. 419

vs.

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

OPINION & JUDGMENT ENTRY

Defendant-Appellee

COUNSEL FOR APPELLANT: William C. Ailes, 100 East Gay Street,
P.O. Box 1226, Columbus, Ohio 43216

COUNSEL FOR APPELLEE: Anthony J. Celebrezze, Jr., Attorney
General of Ohio,

By: Mark G. Bonaventura, Assistant
Attorney General, Fountain Square,
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GREY, J.:

This is an appeal from a decision of the Reclamation Board of Review, affirming an order of the Chief, Division of Reclamation, Ohio Department of Natural Resources. The order terminates the right of appellant, Personal Services Insurance Company, the reclamation surety for a strip mining permit, to perform reclamation of 5.3033 acres of land and demands payment of the amount of the surety bond, \$9546.00.

The termination order appealed from was issued on January 4, 1982, and re-issued as a "modified" order on January 28, 1982. PSI filed a timely appeal with the Reclamation Board of Review on February 2, 1982. Sometime in the spring of 1982, Division of Reclamation arranged to have the reclamation performed by an in-

dependent contractor who had been reclaiming an adjacent area of the same mining permit for a different surety, Erie Ins. Co. (transcript of hearing, pgs. 54-56). By the time of PSI's hearing on August 3, 1982, the reclamation had been substantially completed.

Although PSI raised several other issues at the administrative level, it designates only one assignment of error on appeal.

"Demand by the defendant-appellee, Chief of the Division of Reclamation for payment of the penalty of the surety bond covering the permit holder is unlawful when evidence establishes that the area affected by the permit holder has been reclaimed."

When a strip mining operator fails to reclaim affected land, R.C. 1513.16(H)(4) requires the Division of Reclamation to notify the operator's surety and request it to perform the reclamation. The surety has ten days from receipt of this notice to notify Division of Reclamation of its intent to perform. If the surety elects to perform, notifies the Division of Reclamation of its election within 10 days, and begins work within 30 days of that notification, it is entitled to a release of its bond on completion of reclamation. If it fails to respond or to begin reclamation within the time limits, elects not to perform, or performs inadequately, the Division of Reclamation is entitled to terminate the surety's right to perform, and order it to immediately deposit the amount of the bond, in cash.

The Division of Reclamation did not terminate PSI's right to perform until 8 months after service of the "ten day" notice. It appears from the record that PSI did begin negotiations with a contractor to perform the reclamation in tandem with Erie's work in the same permit area, but it never finalized the contract.

Although PSI did occasionally advise the Division of Reclamation of the reason for the delays, it was either unable or unwilling to present a plan for reclamation within any reasonable time.

We cannot find that Division of Reclamation's decision to terminate PSI's right to reclaim was hasty or unreasonable. In fact, the record demonstrates that affected landowners considered the Division of Reclamation to have been much too slow to act.

PSI argues that because reclamation was ultimately performed on the property, its duty as surety was satisfied. If reclamation had been completed, or even in progress, at the time of Division of Reclamation's order, we might have considered the termination to have been "arbitrary" or "capricious", and reversed the board's decision under R.C. 1513.14(A). But all the reclamation activity in this case took place after the termination order. Far from being inequitable, the Division of Reclamation was merely performing its statutory function to reclaim land affected by strip mining. Under R.C. 1513.13(A)(1), PSI's appeal did not stay the termination order. Although PSI stood to gain from Division of Reclamation's decision to reclaim the land if the termination order were reversed on appeal, it stood to lose nothing in the event of affirmance. The obligation on a reclamation surety bond is fixed at the time of the operator's default, and does not depend on the actual cost of reclamation. If the actual cost exceeds the amount of the bond, Division of Reclamation may recover the excess from the operator but not the surety, R.C. 1513.18. If the actual cost is less than the amount forfeited, the surplus becomes state property - R.C. 1513.18. It is

the surety's option to elect performance instead of payment if it wishes to save money. But if performance is not timely completed, the surety will not be heard to complain.

Thus we hold that reclamation performed by the Division of Reclamation, after an order terminating a surety's right to reclaim, does not affect the validity of the order. PSI's assignment of error is overruled, and the Findings and Order of the Reclamation Board of Review is affirmed.

JUDGMENT AFFIRMED

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

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.

Earl E. Stephenson

Presiding Judge, COURT OF APPEALS

NOTICE TO COUNSEL

Pursuant to Local Rule 20.2, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.