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CLERK OF COURT OF APPEALS
LICKING COUNTY, OHIO

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ARTHUR MARTIN,
Appellant-Appellant

vs.

LARRY W. MAMONE, CHIEF
DIVISION OF RECLAMATION
OHIO DEPARTMENT OF NATURAL
RESOURCES,

Appellee-Appellee

and

GUARD CASUALTY & SURETY,
Intervenor-Appellee

JUDGES:

Hon. Norman J. Putman, P.J.
Hon. John R. Milligan, J.
Hon. John R. Hoffman, J.

CASE NO. CA-3126

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the
Reclamation Board of Review
Case No. RBR-4-84-134

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Appellant-Appellant

For Appellee-Appellee

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PUTMAN, P.J.

There are three assignments of error in this appeal from an administrative order of the Reclamation Board of Review which approved a decision of the Chief of the Division of Reclamation to release a certain permit. In effect, it approved the planting and reclamation work which had been done by the Guard Casualty and Surety Co. in the place of a strip-mining operator that had gone bankrupt and failed to perform its statutory duties.

The assignments of error read as follows:

ASSIGNMENT OF ERROR NO. I

THE APPEALED-FROM ORDER IS ARBITRARY, CAPRICIOUS, OR OTHERWISE INCONSISTENT WITH LAW.

ASSIGNMENT OF ERROR NO. II

THE BOARD'S ORDER, IN NOT ACCEPTING FINDING OF FACTS 20 & 21 OF THE HEARING OFFICER, IS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

ASSIGNMENT OF ERROR NO. III

THE BOARD'S DENIAL OF APPELLANT'S MOTION TO STRIKE THE OBJECTIONS FILED APRIL 8, 1985, BY INTERVENOR WAS ARBITRARY, UNREASONABLE, AND UNLAWFUL.

We overrule all three assignments of error and affirm the order appealed from.

Our reasons follow.

I

The administrative Board of Review is the primary fact-finder. It has the authority under the law to consider the evidence before the hearing officer and decide all questions including credibility of the evidence. See R.C. 1513.13 (A)(1) as amended Sept. 1, 1981, and Powell v. Young (1947), 148 Ohio St. 342.

Upon a careful consideration of the record before the Board, we cannot say its order is either arbitrary, or capricious, or otherwise inconsistent with law.

II

It is the prerogative of the Board of Review to determine all questions of fact including credibility of witnesses and, accordingly, its decision to not accept fact-findings number 20 and 21 of the hearing officer cannot be said to be either arbitrary, capricious, or unreasonable.


III

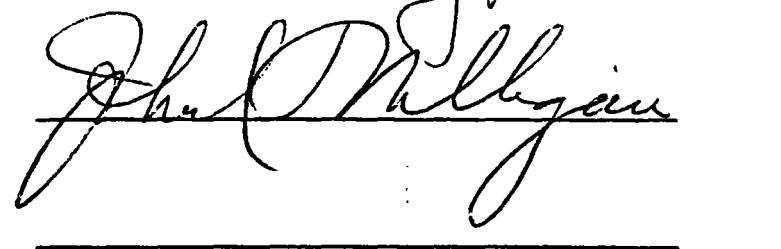
We find no arbitrariness, unreasonableness, or illegality to appear affirmatively from the record respecting the decision of the Board not to strike the objections filed by the intervenor on April 8, 1985.

For the foregoing reasons, all three assigned errors are overruled and the order of the Reclamation Board of Review is affirmed.

Milligan, J. concurs and

Hoffman, J. dissents.





NJP/emc

JUDGES

HOFFMAN, J. (Dissent)

I respectfully dissent from the majority's opinion and would reverse the judgment of the Reclamation Board of Review as being arbitrary, capricious, or otherwise inconsistent with law and would adopt the report recommendation of the Hearing Officer of the Board of Reclamation dated March 19, 1985, and filed with the Reclamation Board of Review on March 20, 1985.

That report recommended that the Reclamation Board of Review vacate the Chief's decision approving the SM-8 request for permit area C-1387 and that the Board order the Chief to take all necessary actions to bring the permit area into compliance with O.R.C. 1513.16.

For the Board of Reclamation to come to the decision it did, without hearing further testimony or additional evidence and with the comprehensive and detailed report of its Hearing Officer dated March 19, 1985, which was made upon actual view of the premises by the Hearing Officer and included testimony and reports submitted to him, is patently erroneous.

The reclamation Board of Review had to deliberately ignore and reject the undisputed findings of fact of its own Hearing Officer that:

FINDINGS OF FACT

. . .

20. Prior to mining on permit area C-1387, one hill existed which sloped downward toward the north, except for slight rise where a knoll or Indian mound was located. After

mining there were two distinct hills or banks with a substantially lower area between them.

21 Appellant now has substantial difficulty in mowing the slopes in the pasture area and in gaining access to fields behind the slopes with other farm equipment because of the increased steepness of the slopes.

Report and Recommendation of the Hearing Officer, dated March 19, 1985

Further, the Hearing Officer also found that:

22. Five holes 2-3 feet in diameter and three or more feet deep were left on the hill above the highwall after the mining and reclamation were complete.

Report and Recommendation of the Hearing Officer, dated March 19, 1985

The conclusions of law made by the Hearing Officer based upon the findings of fact contained in this report dated March 19, 1985, included:

CONCLUSIONS OF LAW

. . .

8. The five holes left on the hill above the highwall were caused by the mining and were not properly reclaimed.

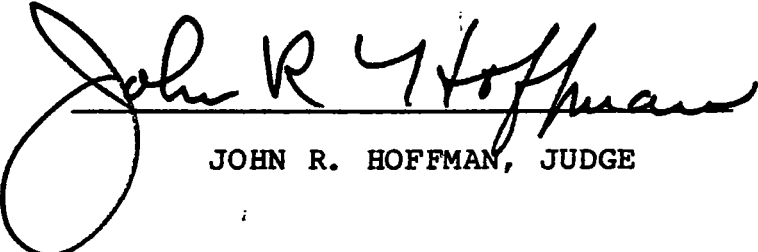
9. The existence of two hills, where only one had existed before mining, represents a material difference in the contour and surface configuration of permit area C-1387.

10. Permit area C-1387 was not backfilled, graded or otherwise contoured so that the reclaimed area closely resembled the general surface configuration of land prior to the mining, and so that the approximate original contour was restored. O.R.C. 1513.01(B) and 1513.16(C)(1); and O.A.C. 1501:13-2-01(B).

11. Although access is distinct from contour, the issue of access cannot be ignored when it indicates that the slope of the area has been materially changed.

Report and Recommendation of the Hearing Officer dated March 19, 1985

For the above reasons, the order of the Reclamation Board of Review should be reversed and all necessary actions to bring the permit area into compliance with O.R.C. 1513.16 be ordered.



JOHN R. HOFFMAN, JUDGE