

[Cite as *Helton v. Div. of Mineral Resources Mgt.*, 2004-Ohio-6838.]

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

Richard Helton, et al.,	:	
	:	
Plaintiffs-Appellants,	:	
	:	Case No. 03CA14
v.	:	
	:	<u>DECISION AND</u>
Division of Mineral Resources	:	<u>JUDGMENT ENTRY</u>
Management,	:	
	:	
Defendant-Appellee,	:	
	:	
Southern Ohio Coal Co., Consul	:	FILE-STAMPED DATE: 11-23-04
Energy, Inc.,	:	
	:	
Intervenor-Appellee.	:	

APPEARANCES:

Robert J. Shostak, Athens, Ohio, for appellants.

Robert A. Eubanks, Assistant Attorney General, Columbus, Ohio, for defendant-appellee.

Mark S. Stemm and Robert Schmidt, Columbus, Ohio, for intervenor-appellee.

Kline, P.J.:

{¶1} Richard and Pamela Helton appeal the Ohio Department of Natural Resources, Division of Mineral Resources, Reclamation Commission's decision to affirm the Division Chief's finding that subsidence did not cause damage to their

home. The Heltons assert that the Reclamation Commission (“the Commission”) abused its discretion when it failed to find that the Division Chief applied an incorrect burden of proof to their complaint. Because we find that the Heltons failed to raise the issue of whether the Division Chief applied an incorrect burden of proof to their claim at the Commission hearing, we decline to address it now. The Heltons also argue that the Commission applied an impermissibly high burden of proof to affirm the Division Chief’s decision. Because we find that the Commission applied the correct burden of proof, we disagree. Finally, the Heltons contend that the Commission erred by refusing to introduce new evidence of subsidence on jurisdictional grounds despite an administrative rule to the contrary. Because we find that the Commission’s interpretation of the administrative rule contradicts its own precedent, we agree. Accordingly, we affirm in part, reverse in part, and remand this cause for further proceedings consistent with this opinion.

I.

{¶2} In March 2002, the Heltons filed a subsidence damage complaint with the Ohio Department of Natural Resources, Division of Mineral Resources Management (“the Division”). The complaint alleged that mining operations conducted by Southern Ohio Coal Company (hereinafter “SOCCO”) caused damage to their home.

{¶3} In its investigation, the Division requested that SOCCO: (1) investigate whether it violated its mining plan and permit; (2) calculate the overburden, angle of draw, and pillar stability; (3) conduct horizontal strain and horizontal displacement analyses; and (4) evaluate the foundation of the mine floor for stability. SOCCO responded with: (1) evidence showing compliance with its mining permit; (2) calculations for the overburden, angle of draw, and pillar stability, which the Division determined to be accurate models and which tended to disprove any allegation of subsidence; and (3) analyses of the horizontal strain, horizontal displacement, and foundation of the mine floor for wet and dry conditions, which also tended to disprove any allegation of subsidence.

{¶4} On January 10, 2003, the Division informed the Heltons that it determined subsidence was not the cause of the damage to their home. The Division stated that it “concluded an exhaustive review of the facts surrounding [the Helton] complaint and [was] unable to find *conclusive evidence* that the mining operations of the Southern Ohio Coal Company are responsible for the damages as alleged in [the Helton] complaint. Many facts including: the amount of coal remaining in-place, the demonstrations of percent extraction, the geometry of the mine related to the house, and the pillar stability were considered by the Division’s engineering section prior to reaching this decision. The type of foundation and the general

condition of the property gave further indication that factors other than mine subsidence are the likely causes of the damages you report.” (Emphasis added).

{¶5} The Heltons appealed to the Division Chief. On March 6, 2003, the Division Chief affirmed the Division’s decision. The Division Chief stated that it found no evidence that: “[1] Division staff had made any incorrect evaluations and/or determinations or [2] [SOCCO] [in]appropriately responded to requests by Division staff for information to verify compliance with the approved mining plan.”

{¶6} The Heltons then appealed to the Commission. On July 10, 2003, the Commission held a hearing. The Commission heard evidence from the Division and SOCCO regarding the likelihood that poor water drainage caused damage to the Helton home. It also heard evidence negating almost all possibilities that the damage occurred from subsidence. In presenting their case, the Heltons argued that subsidence caused the damage. The Heltons relied on pictures of the damage to their home and property as evidence. However, they failed to provide any expert testimony linking the damage to their subsidence claim.

{¶7} On July 29, 2003, the Division visited the Helton home to inspect alleged new evidence of subsidence. The evidence consisted of a small round depression and two large rectangular depressions in the yard. The Division emailed

photographs to the Commission's hearing officer, who did not open the attached photographs. Instead, the hearing officer stated that the evidence could be used either as a new complaint or added to the existing appeal. Adding the evidence to the existing appeal would require the Commission to reopen the evidentiary hearing. The hearing officer also stated that the Commission's "deliberations on the evidence presented at the July 10, 2003 hearing [had] not yet begun.

Therefore, re-opening * * * the hearing could be arranged without great difficulty."

{¶8} The Heltons filed a motion to reopen the case for presentation of the new evidence. Both the Division and SOCCO filed motions against reopening the hearing. The Commission denied the Heltons' motion despite O.A.C. 1513-3-11(D) which allows it to hear new evidence. The Commission stated that in order for it to exercise its authority to reopen a hearing and examine new evidence, the evidence must be relevant and within the Commission's jurisdiction. Determining that it enjoyed only the limited jurisdiction of reviewing the actions of the Division Chief, the Commission held that it could not entertain new evidence not considered by the Division Chief in his determination.

{¶9} The Commission affirmed the Division Chief's decision. In its conclusions of law, the Commission stated that "[t]he ultimate burden of persuasion in this matter is upon the Appellants Richard & Pamela Helton to prove by a

preponderance of the evidence that the Chief's determination that SOCCO's mining operation is not responsible for any damage to the Heltons' home, was arbitrary, capricious or inconsistent with law." The Commission also stated that the Heltons "established no conclusive proof that SOCCO's mining caused damage to their home. In light of the evidence presented in this matter, the Commission cannot find that the Division Chief's determination that mining did not cause damage to the Helton home was arbitrary, capricious or otherwise inconsistent with law."

{¶10} The Heltons appeal raising the following assignments of error: "[I] The Commission imposed an impermissibly high burden of persuasion upon appellants. [II] The Commission's failure to reopen the hearing after the Heltons discovered additional evidence of subsidence was arbitrary and capricious."

II.

{¶11} In their first assignment of error, the Heltons claim that both the Division and the Commission applied the incorrect burden of proof to their claim and that the Commission erred when it failed to overturn the Division Chief's decision for applying an impermissibly high burden of proof. Specifically, the Heltons argue that the Division and the Commission applied a "conclusive proof" standard instead of a "preponderance of the evidence" standard.

{¶12} R.C. 1513.14(A) states: “Any party aggrieved or adversely affected by a decision of the reclamation commission may appeal to the court of appeals for the county in which the activity addressed by the decision of the commission occurred, is occurring, or will occur, which court has exclusive jurisdiction over the appeal. The court shall confine its review to the record certified by the commission * * *. The court shall affirm the decision of the commission unless the court determines that it is arbitrary, capricious, or otherwise inconsistent with law, in which case the court shall vacate the decision and remand to the commission for such further proceedings as it may direct.”

{¶13} R.C. 1513.13(A)(1) states that “[a]ny person having an interest that is or may be adversely affected by a notice of violation, order, or decision of the chief of the division of mineral resources management * * * may appeal [to the] reclamation commission * * *.” Subsection (B) states: “The commission shall affirm the notice of violation, order, or decision of the chief unless the commission determines that it is arbitrary, capricious, or otherwise inconsistent with law; in that case the commission may modify the notice of violation, order, or vacate it and remand it to the chief for further proceedings that the commission may direct.”

{¶14} Both R.C. 1513.13(A)(1) and R.C. 1513.14(A) require the Commission and the appellate court, respectively, to apply an abuse of discretion standard of review.

In general, an abuse of discretion “connotes more than an error of law or judgment; it implies that the court’s attitude is *unreasonable, arbitrary, or unconscionable*.”

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. (Emphasis added.).

However, when reviewing decisions of the Commission, R.C. 1513.14(A) requires this court to apply a variation of the abuse of discretion standard of review by determining whether the Commission’s decision was *arbitrary, capricious, or otherwise inconsistent with law*. In applying this standard, this court is not free to substitute its judgment for that of the Commission. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 138.

{¶15} Here, the Heltons claim that both the Division and the Commission applied an impermissibly high burden of proof to their subsidence claim. They urge this court to find that the Commission abused its discretion when it failed to reverse the Division’s final determination for applying a “conclusive evidence” burden of proof rather than the statutorily required “preponderance of evidence” burden. However, the Heltons failed to raise this issue in their appeal to the Commission. Instead, their arguments at the Commission hearing focused only on attempting to prove that the Division erred in weighing the evidence. Because the Heltons failed to raise this issue before the Commission, we decline to address it here. *Mark v.*

Mellott Mfg. Co., Inc. (1995), 106 Ohio App.3d 571, 589, citing *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220.

{¶16} The Heltons also claim that the Commission itself applied an impermissibly high burden of proof to their subsidence claim when it reviewed the evidence relied on by the Division. However, the Commission merely reviewed the evidence to determine whether the Division abused its discretion in deciding that the Heltons' subsidence claim was without merit. To that end, it held an evidentiary hearing to review the evidence relied on by the Division. In its conclusions of law, the Commission stated that the proper burden of proof was the preponderance of the evidence standard. In its findings of fact, the Commission found that the Heltons introduced no conclusive evidence in support of their subsidence claim. We cannot find an abuse of discretion in the Commission's judgment merely because it used the term "conclusive proof" in its findings of fact. The Commission properly applied the statutory burden of proof, as illustrated by its statements in its conclusions of law. The fact that the Commission noted the absence of conclusive proof supporting the Heltons' subsidence claim does not negate the actual application of the statutorily required burden of proof in the conclusions of law. Therefore, the Commission's decision was neither arbitrary,

capricious, nor inconsistent with the law. Accordingly, we overrule this assignment of error.

III.

{¶17} In their second assignment of error, the Heltons contend that the Commission erred in refusing to admit additional evidence of subsidence discovered by the Heltons after the hearing date, but before the Commission deliberated on the case. The Heltons argue that O.A.C. 1513-3-11 permits the Commission to hear new evidence regardless of whether the Division Chief reviewed the evidence in question.

{¶18} According to the Ohio Supreme Court, “it is well-settled that courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command.” *State ex rel. McLean v. Ind. Comm. of Ohio* (1986), 25 Ohio St.3d 90, 92. O.A.C. 1513-3-11(D) states: “The commission may grant a motion for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the proceeding before the commission.”

{¶19} Here, the Commission interpreted O.A.C. 1513-3-11(D) to bar the introduction of newly discovered evidence without ruling on whether the evidence may have been discovered with reasonable diligence, asserting that jurisdictional grounds prohibited it from hearing any evidence that was not presented to the Division. The Commission reasoned that because it enjoys only a limited review of the Division Chief's final determination, any evidence not considered by the Chief was irrelevant. The Heltons argue that this interpretation is unreasonable because it renders O.A.C. 1513-3-11 a superfluous administrative rule. According to the Heltons, a rule permitting the admission of newly discovered evidence necessarily anticipates that such evidence was not available to the Division and the Division Chief. The Division and SOCCO argue that the Commission's interpretation is reasonable and that it still permits application of the administrative rule. They argue that the interpretation merely restricts use of O.A.C. 1513-3-11 to situations where the evidence was available to the Division and Division Chief, but not disclosed to the claimant.

{¶20} In *Gex Hardy, Inc. v. Div. of Reclamation*, RBR-2-87-109 through RBR-2-87-114, the Commission held it may grant the introduction of new evidence despite the fact that the relevant evidence was not presented to the Division Chief. The Commission found that R.C. 1513.13(A)(1) provided it with exclusive original

jurisdiction with respect to appeals. Reasoning that such jurisdiction allowed the Commission to hear appeals de novo, the Commission found that it may consider additional evidence not part of the record considered by the Division Chief.¹

{¶21} Because the Commission’s interpretation of O.A.C. 1513-3-11(D) in this case contradicts its own precedent in *Gex Hardy*, we find it unreasonable. In its decision denying the Heltons’ motion to introduce new evidence, the Commission fails to even acknowledge, let alone reconcile, its contradictory precedent with its decision in this case. As a result, it appears that the Commission is applying vastly different interpretations of O.A.C. 1513-3-11(D) in different cases. Such inconsistencies in interpreting its administrative rules are unreasonable.

{¶22} Moreover, even without the contradictory interpretation contained within the Commission’s decision in *Gex Hardy*, the interpretation of O.A.C. 1513-3-11(D) in this case is still unreasonable. R.C. 1513.14(A) limits an appellate court’s review of the Commission’s decisions to a “review to the record certified by the commission * * *.” However, R.C. 1513.13(A)(1), which controls the Commission’s review of the Division Chief’s decisions, contains no such limitation. A rational reading of these two statutes necessarily implies that while

¹ In *Gex Hardy*, the Commission held that it enjoyed de novo review of an appeal from the Division Chief. However, R.C. 1513.13(A)(1) clearly sets out the standard for review as “arbitrary, capricious, or otherwise unlawful.” Nonetheless, some merit exists in the ultimate holding of *Gex Hardy* and the inconsistency of that holding with this case is troubling and unreasonable.

an appellate court is limited to a review of the record as it existed below, the Commission is not. O.A.C. 1513-3-11(D) reinforces this interpretation by expressly providing the Commission with the discretion to hear new evidence. Here, the Commission's interpretation of O.A.C. 1513-3-11(D) is unreasonable in light of the different scopes of review assigned to the Commission and the appellate courts by R.C. 1513.14(A) and R.C. 1513.13(A)(1). Accordingly, we sustain the Heltons' second assignment of error.

IV.

{¶23} In conclusion, because we find that the Heltons failed to raise the argument that the Division and Division Chief applied an impermissibly high burden of proof at the evidentiary hearing before the Commission, we decline to address that argument here. However, because we find that the Commission applied the correct burden of proof in affirming the Division Chief's decision, we find no merit in the Heltons' first assignment of error. Finally, because the Commission's interpretation of O.A.C. 1513-3-11(D) contradicts its own precedent and disregards the language contained in R.C. 1513.14(A) and R.C. 1513.13(A)(1), we find the Commission's decision to exclude the Heltons' newly discovered evidence was unreasonable. Accordingly, we sustain the Heltons' second assignment of error,

reverse the Commission's judgment, and remand this cause for further proceedings consistent with this opinion.

**JUDGMENT REVERSED AND
CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and the cause remanded to the Commission for proceedings consistent with this opinion, costs herein taxed to appellees.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ohio Department of Natural Resources, Division of Mineral Resources Reclamation Commission, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

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

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.