Starcher, J., Dissenting Opinion, Case No.23876 West Virginia Department of Environmental Protection v. Kingwood Coal Company

No. 23876 - WV Dept. of Environmental Protection v. Kingwood Coal Co.

Starcher, Justice, dissenting:

I respectfully dissent. I would reverse the ruling below, and remand to the Surface Mine Board for consideration of important factual and legal issues regarding "control" that were not adequately addressed below. I also would require the Surface Mine Board to show the Department of Environmental Protection the deference the statute requires.

I.

Control

The pleadings and record indicate that the appellee Kingwood Coal is a subsidiary of a large national energy company, the Coastal Corporation. Kingwood Coal bought Kingwood Mining, a company which chose to acquire coal for the purpose of mining it, and selected a company (T&T) to carry out coal extraction. Kingwood Mining received, processed and sold almost all most of the coal as it was mined. Like the majority opinion, I would make the assumption that Kingwood Coal bought Kingwood Mining's liabilities and responsibilities, as well as its assets.

Now Kingwood Coal, a subsidiary of a large national corporation, disclaims any responsibility for the creation of what the pleadings indicate may be one of the worst long-term acid mine drainage sites created in this state since the passage of the Surface Mine Reclamation and Control Act twenty years ago.

Moreover, the pleadings indicate that because T&T Coal is bankrupt, the State of West Virginia is currently paying in the neighborhood of $60,000 per month to treat the acid mine drainage that is flowing from the mine void left by the mining of the coal.

I am concerned that our ruling may have the effect of shielding Kingwood Coal from long-term liability for the financial and environmental consequences of its chosen economic activity. This sort of immunity distorts the market, and unfairly penalizes coal operators and companies who do accept responsibility for the long-term effects of their economic activity.

I believe that the first issue in a control case should be the relevance of the control determination to the environmental law violation at issue. I think a that a fair and neutral test can and should be set out that would guide the control inquiry, and protect innocent coal owners but not immunize coal companies that are active partners in creating the problems that lead to the environmental law violations.

I believe that the Surface Mine Board should be required to address two key "control" issues: (1) what acts and decisions caused the creation of a long-term underground toxic spoil area that is polluting millions of gallons of groundwater discharge daily; and (2) who made those decisions?

The undisputed facts in the record strongly indicate that Kingwood actually made and thus "controlled" the only significant decision that resulted in the creation of this acid mine drainage site -- the decision to extract the coal in the first instance. If the Board agreed with this impression, then Kingwood's responsibility for that decision should leave Kingwood permit-blocked, unless they abate the pollution.

The principle of responsibility by a mineral owner coal company was established in our law in *O'Dell v. McKenzie*, 150 W.Va. 346, 145 S.E.2d 388 (1965), where this Court held that a coal owner/lessor was jointly liable for water pollution damages where the lessor was a commercial coal company leasing coal.

Accordingly, I would reverse and remand to the Surface Mine Board.

II.

Deference

I also feel that we should not announce a new standard removing all deference to the agency (DEP) decision by the Surface Mine Board -- particularly when, as the majority opinion clearly notes, our statutes contain clear language setting forth a deferential standard of review.

W.Va. Code, 22B-1-7 [1994] states that:

(2) The surface mine board *shall* . . . affirm[ ] . . . the decision appealed from if the board finds that the decision was lawful and reasonable . . . if the board finds that the decision *was not supported by substantial evidence in the record considered as a whole*, it shall make and enter a written order reversing or modifying the decision of the director. (emphasis added).

The classic "substantial evidence test," which is taught in every administrative law class, could not be set out more clearly. I am concerned that the majority opinion's failure to give due weight to this important principle of modern jurisprudence will undermine its significance in other contexts, beyond the area of appeals to the Surface Mine Board.(1)

How should we interpret the "hear de novo" language which the majority opinion accurately points to -- language which is also contained in the same statutory section as the above-quoted "substantial evidence" standard?

In my opinion, we are required to derive a standard that gives meaning to all of the legislative language. We should rule that, given the deferential "substantial evidence" standard of review language in our law, "hear *de novo*" means a procedural standard for the hearing, governing the receipt of evidence. That is, the record is developed in a hearing *de novo* (but the entire agency record below becomes part of the hearing record, along with all of the new evidence, testimony, etc.). This *de novo* procedural standard is wholly compatible with a deferential substantive standard for reviewing the decision below.

The majority opinion cites a number of cases from other jurisdictions for the proposition that to "hear *de novo"* means in all cases to give no deference in any regard to the decision below. But upon examination, none of those cases involved a situation where additional statutory language sets out a deferential standard of review.

When a statute provides for a deferential standard of review, a "*de novo*" hearing still means that deference is given to the decision below. A *"de novo"* hearing with deferential review is not incompatible. *See, Enservco, Inc. V. Indiana Securities Div.,* 623 N.E.2d 416, 420 (Ind. 1993).

Practically speaking, under the new "no deference" standard set forth in the majority opinion, the institutional expertise and policies of the state's crucial environmental enforcement agency (for all of its limitations) is to be entitled to no weight and to mean nothing -- upon review by a Board of part-time political appointees. It's not at all clear to me that this is what the Legislature intended. Accordingly, I dissent to this portion of the majority opinion as well.

III.

When Will We Ever Learn?

Finally, I am reminded of a case in many ways similar to the instant case, whose facts arose in my home county, although the case itself came before the Circuit Court of Kanawha County. In *Four-H Road Comm. Assoc. v. Chief, Div. of Water Resources*, 177 W.Va. 643, 355 S.E.2d 624 (1987), this Court upheld a favorable mining permit decision by the Surface Mine Board, when a group of citizens, with expert support, had warned that the Omega mine would become a toxic acid mine drainage site for hundreds of years after mining. About five years after this Court's decision, what the citizens predicted turned out to be correct. At the Omega mine, the State of West Virginia is now treating the toxic drainage from the mine, at a cost of hundreds of thousands of dollars a year. We are now adding the T & T mine to the burden of State taxpayers and of coal companies who pay into the reclamation fund.

As I stated earlier in this dissent, I read our law as designed to be about requiring accountability for coal mining enterprises. To permit escape from accountability unfairly penalizes responsible businesses -- here favoring large irresponsible out-of-state corporate interests over responsible State businesses. As a further result, the public fisc of our State is spent in toxic

abatement -- or alternatively, our communities, streams and mountains are fouled. I understand the majority opinion's approach to the issues in this case, but I disagree with it. Accordingly, I respectfully dissent.

1. The DEP is not represented by the Attorney General in this case, but by their own agency counsel, as is permitted by the statutes. This situation, in my opinion, can lead to problems. Important issues of what and how law applies to the State may be considered by this Court without the input and expertise of the State's chief legal officer, and without the consideration of the impact of decisions on these issues upon a wide variety of government agencies. *See, e.g., State ex rel. Smith v. Kermit Lumber*, (W. Va. S. Ct. App., June 24, 1997, No. 23831 (holding that "personal action" statutes of limitation apply to the State; the State was represented in appeal by in-house counsel from DEP.) I think that one of the principal reasons that our founders established an Attorney General's office was to assure that important legal issues that will affect all state agencies had an advocate who is able to bring the expertise and breadth of government-wide representation before this Court, when we consider matters of overall importance to state government.