

BEFORE THE RECLAMATION COMMISSION

MYRON & NIKKI ARMSTRONG,	:	
	:	
Appellants,	:	Case No. RC-12-005
	:	
-vs-	:	
	:	
DIVISION OF MINERAL RESOURCES	:	Review of Chief's Informal Review;
MANAGEMENT,	:	Permit D-2206 (Oxford Mining Company)
	:	
Appellee,	:	
	:	
and	:	<u>ORDER OF THE COMMISSION</u>
	:	<u>GRANTING MOTION TO</u>
OXFORD MINING COMPANY,	:	<u>DISMISS APPEAL ON</u>
	:	<u>JURISDICTIONAL GROUNDS</u>
	:	
Intervenor.	:	

Appearances: Brad Hillyer, Counsel for Appellants Myron & Nikki Armstrong; Molly Corey, Megan DeLisi, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; Michael B. Gardner, Counsel for Intervenor Oxford Mining Company.

BACKGROUND

This matter came before the Reclamation Commission upon appeal by Myron & Nikki Armstrong [the "Armstrongs"] from a decision of the Chief of the Division of Mineral Resources Management [the "Division"]. This decision addressed a domestic water supply owned by the Armstrongs.

The Armstrongs' domestic water well was determined by the Division Chief to have been affected by a coal mining operation conducted by Oxford Mining Company ["Oxford"] pursuant to permit D-2206.¹ Oxford was required to replace the Armstrongs' water well, and did, in fact, drill a new well on the Armstrongs' property. Following replacement, the Armstrongs had concerns regarding their replacement water supply, including (1) concerns relative to water quality, specifically with regards to odor, and (2) concerns regarding certain costs associated with the operation and maintenance of the replacement well.

¹ No evidentiary hearing has been conducted in this matter. This factual background is taken from the filings of the parties, including the notice of appeal and the Chief's decision after informal review, and is intended only to provide an understanding of the issues raised through this appeal.

At some point in time after the replacement well was installed by Oxford, the Armstrongs filed a ground water complaint with the Division. As a result of this complaint, the Division conducted an investigation, and the Division Chief held an informal review of the complaint, which included a hearing on March 28, 2012. On May 31, 2012, the Division Chief issued to the Armstrongs a decision following the Division's informal review. The Chief found:

. . . [T]he reviewing hydrologist's conclusions and recommendations are valid and reasonable given the data and information that has been collected. Oxford Mining Company LLC has satisfied the Division's requirement for the permanent replacement of a water supply affected by coal mining operations.

(Chief's May 31, 2012 decision after informal review, page 3.)

The Chief's May 31, 2012 decision included instructions for appealing this Chief's decision to the Reclamation Commission. And, on June 14, 2012, the Armstrongs, through counsel, filed a notice of appeal with the Reclamation Commission.

Pursuant to motion, on July 12, 2012, Oxford Mining Company was granted intervenor status in this appeal. This matter has been set for hearing before the Reclamation Commission, which hearing is currently scheduled to commence on October 31, 2012.

On August 23, 2012, the Appellee Division filed a Motion to Dismiss this appeal, asserting that the Armstrongs failed to file with the Chief a copy of their notice of appeal, as is required by O.R.C. §1513.13. The Division argues that this failure constitutes a jurisdictional defect, requiring dismissal of the Armstrongs' appeal. On August 24, 2012, Oxford made a filing in support of the Division's motion. On September 4, 2012, the Armstrongs responded to the Division's motion, arguing that: (1) the deadline for filing a copy of their notice of appeal has been tolled, and/or that (2) the Division is, in fact, currently aware of the filing of their notice of appeal and has not been prejudiced by the Armstrongs' failure to file a copy of their notice of appeal with the Division Chief within three days of the appeal to the Reclamation Commission. The Division replied to the Armstrongs' arguments on September 11, 2012.

DISCUSSION

O.R.C. §1513 sets forth the method by which an appeal is perfected to the Reclamation Commission. This section of law provides in part:

(A)(1) Any 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 by filing a notice of appeal with the reclamation commission for review of the notice, order, or decision within thirty days after the notice, order, or decision is served upon the person . . . and by filing a copy of the notice of appeal with the chief within three days after filing the notice of appeal with the commission.

(Emphasis added; see also O.A.C. §1513-3-04.)

The Chief's May 31, 2012 decision after the informal review hearing specifically set forth the filing requirements for an appeal to the Commission. The Chief's May 31, 2012 decision contained the following instructions:

You may appeal the above Chief's decision, pursuant to Section 1513.13 of the Ohio Revised Code, by filing [a] notice of appeal with the Reclamation Commission. At a minimum, your notice of appeal must:

- Be filed within 30-days of your receipt of the Chief's decision
- Include a statement of the grounds upon which your appeal is based
- Have attached a copy of the Chief's decision

Your notice of appeal may include a request that the Commission review the site in question. Your appeal must be directed to the Reclamation Commission at the following address: [address given].

Also, a copy of your notice of appeal, including the attached copy of the Chief's decision, must be sent to the Division Chief within three (3) days after filing the notice of appeal with the Commission at: [Chief's address given].

Failure to comply with any of these requirements will result in a dismissal of your appeal without a hearing.

(Chief's May 31, 2012 decision after informal review, pages 3 & 4; emphasis added.)

Thus, the Appellants were clearly informed of the requirements for filing an appeal to the Reclamation Commission.

Where a statute confers the right of appeal, adherence to the conditions imposed thereby is essential to possessing that right. *American Restaurant and Lunch Co. v. Glander*, 147 Ohio St. 147, 70 N.E. 2d 93 (1946). Such conditions are mandatory and jurisdictional. *Kruger Coal Company v. Division*, RBR-6-83-089 (July 25, 1983).

The Reclamation Commission has a long history of dismissing appeals, when an appellant has failed to adhere to the conditions imposed upon the right of appeal. This history includes cases where appeals have been specifically dismissed as a result of an appellant's failure to file a complete copy of its notice of appeal with the Division Chief. The Division's Motion to Dismiss cites two such cases. See *Robert & Edna Fenty v. Division*, RBR-4-85-237 (February 6, 1986); *Mrs. Charles Hassler v. Division*, RBR-3-86-181 (November 17, 1986).²

The Armstrongs' response to the Division's Motion to Dismiss, did not directly contest the Division's argument that jurisdiction is lacking in the immediate appeal as a result of the identified filing error. Nor did the Appellants bring forth any argument as to why the Commission's prior decisions should not be controlling.

The doctrine of *stare decisis* suggests that a body adhere to, and follow, its decisions previously made in similar cases. In this case, the Appellants have provided the Commission with no reason to disturb its previous holdings that the failure to file a copy of a notice of appeal with the Division Chief, as required under O.R.C. §1513.13, constitutes a jurisdictional defect in the perfection of an appeal. Therefore, it is appropriate for the Commission to issue a decision in conformity with its prior holdings.

² The Reclamation Commission has been in existence since 1949. Initially, this body was named the "Reclamation Board of Review." However, in February 1997, the "Reclamation Board of Review" was renamed the "Reclamation Commission."

In their response to the Division's Motion to Dismiss, the Armstrongs also argue that the deadline for filing its appeal with the Division Chief has been tolled by operation of O.R.C. §1513.13(A)(3). This section of law provides:

(A)(3) Any person authorized under this section to appeal to the commission may request an informal review by the chief or the chief's designee by filling a written request with the chief within thirty days after a notice, order, decision, modification, vacation, or termination is served upon the person. **Filing of the written request shall toll the time for appeal before the commission**, but shall not operate as a stay of any order, notice of violation, or decision of the chief. **The chief's determination of an informal review is appealable to the commission under this section.**

(Emphasis added.)

O.R.C. §1513.13(A)(3) allows any person authorized to appeal a Chief's decision to the Reclamation Commission to first seek "informal review" directly with the Chief. However, O.R.C. §1513.13(A)(3) does not remove the filing deadlines for appeals to the Commission. Rather, O.R.C. §1513.13(A)(3) allows for this deadline to be tolled for the period of time necessary for the Division to complete its informal review. Once informal review is completed, the deadlines for appealing to the Commission are reinstated. *Murray Energy Corporation, et al. v. Division & Oxford Oil Company*, RC-11-006 (Order Denying Intervenor's Motion to Dismiss, September 21, 2011).

However, even if the tolling provisions of O.R.C. §1513.13(A)(3) were applied, a decision after informal review was rendered by the Division Chief on May 31, 2012. The Appellants properly appealed the Chief's decision on June 14, 2012. But, the Appellants' first attempt to file a copy of their notice of appeal with the Division Chief was initiated on August 30, 2012,³ three months after the Chief's issuance of his decision after informal review. August 30, 2012 is clearly beyond the three day period following June 14, 2012, in which the Appellants were statutorily required to file their notice of appeal with the Chief.

³ As part of their response to the Division's Motion to Dismiss, the Appellants mailed to the Commission and to the Division a "renewed" notice of appeal dated August 30, 2012. Pursuant to O.A.C. §1513-3-04(D)(8), notices of appeal may be amended. However, an amendment made outside the 30 day statutory appeal period may not serve to correct a jurisdictional flaw. *Deerhake v. Limbach*, 47 Ohio St. 3d 44 (1989); *Quality Coal v. Division*, RBR-6-84-090 (September 12, 1984).

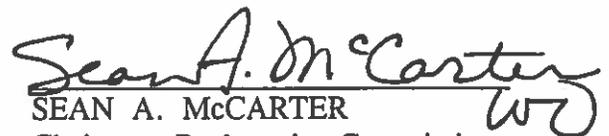
As set forth in prior decisions, in order to invoke the jurisdiction of the Commission, an appellant must file: (1) a complete notice of appeal with the Commission within 30 days after service of the Chief's decision complained of, and must file (2) a copy of the complete notice of appeal with the Division Chief within 3 days after filing with the Commission. As set forth in prior decisions, the failure of an appellant to comply with these jurisdictional provisions will result in the dismissal of an appeal.

Here, the Armstrongs did not formally file a copy of their notice of appeal with the Division Chief until approximately 3 months after the Chief issued his decision after informal review, and approximately 2½ months after the filing of their appeal with the Reclamation Commission. Therefore, the Armstrongs failed to satisfy one of the conditions precedent to the perfection of an appeal to the Reclamation Commission. For this reason, the Reclamation Commission lacks jurisdiction to hear and decide the immediate appeal.

ORDER

Based upon the foregoing, the Board hereby **GRANTS** the Appellee's Motion, and **DISMISSES** the instant appeal for lack of jurisdiction.

9/26/2012
DATE ISSUED


SEAN A. McCARTER
Chairman, Reclamation Commission

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Appeals, within thirty days of its issuance, in accordance with Ohio Revised Code Section §1513.14 and Ohio Administrative Code Section §1513-3-22.

DISTRIBUTION:

Brad Hillyer, via Fax [740-922-2229], E-Mail [chwlawoffice@sbcglobal.net] & Certified Mail #: 91 7199 9991 7030 3132 9965
Molly Corey, Megan DeLisi, via Fax [614-268-8871], E-Mail [molly.corey@ohioattorneygeneral.gov, megan.delisi@ohioattorneygeneral.gov] & Inter-Office Certified Mail#: 6685
Michael B. Gardner, via Fax [614-754-7100], E-Mail [mgardner@oxfordresources.com] & Certified Mail #: 91 7199 9991 7030 3132 9958