

**Minutes of the AOPA Committee of the
Natural Resources Commission**
May 17, 2005

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Michael J. Kiley
Linda Runkle

NRC Staff Present

Stephen L. Lucas
Sandra L. Jensen
Jennifer M. Kane

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 10:45 a.m., EST, on May 17, 2005 at the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis (Lawrence), Indiana. With all three members of the Committee present, the Committee Chair observed a quorum.

Michael Kiley and Linda Runkle introduced themselves.

Approval of Minutes for Meeting Held on March 15, 2005.

The Committee discussed and approved by acclamation the minutes for the meeting held on March 15, 2005.

Consideration of Parties' Simultaneous Briefs with respect to Objections by Steven Gerber in *Gerber v. Department of Natural Resources*; Administrative Cause Number 01-159L.

Jane Ann Stautz called for consideration the objections by Steven Gerber to the nonfinal order of the panel of Administrative Law Judges affirming Gerber's termination as a Conservation Officer. She said the item was exclusively for deliberations by the members of the AOPA Committee following the filing of simultaneous briefs by the attorneys for Gerber and for the DNR. "There will be no oral argument by the parties and by the public at this time. I trust we've all had the opportunity to review the filings and the briefs submitted there and would entertain a motion."

Michael Kiley said, "Madam Chairman, this case has been one of some duration and has been pending and more than adequately briefed by both sides by the Department and by Mr. Gerber's counsels. We are here to consider what was initially entered as a Report

and Findings of Fact of the Nonfinal Order of the Administrative Law Judge, which was entered on April 2, 2004. It has been followed-up by briefing, by closing arguments, by objections, by proposed findings of fact,” by briefs in lieu of an oral argument and by Gerber’s closing argument. Giving due consideration to all these documents, “I would make a motion that the AOPA Committee adopt the ‘Report and Findings of Fact and Nonfinal Order of the Administrative Law Judge’ as entered in April 2004.”

Linda Runkle followed, “I will second that motion. After carefully reading and examining the materials, I am of the opinion that Gerber has failed to meet the burden of establishing there is no substantial facts for the order of the three-member panel, and it is not found to be arbitrary and capricious.”

Stephen Lucas, Director of the Commission’s Division of Hearings, said there were a few clerical and enumeration errors in the findings and nonfinal order of the panel of Administrative Law Judges. He said he would seek to correct them whether the AOPA Committee approves this disposition or some other disposition.

The Committee Chair said, “Okay, thank you very much.”

Michael Kiley added, “Very well.”

Jane Ann Stautz said, “I agree and I do appreciate the briefs and the background provided. It was very helpful taking a look at the various contentions and issues before us. If there’s no further comments or any questions, I’ll go ahead and call for the question from all those in favor of the motion to affirm the order.”

Upon a voice vote, the motion carried unanimously.

Consideration of Oral Argument with respect to Objections by Claimants to Findings of Fact and Conclusions of Law and Non-Final Order on Respondents’ Motions for Summary Judgment in *Don Mottley, Larry Back, Rhonda Back, Mark Barton, Kayla Barton v. Vigo Coal Company, Inc. and Department of Natural Resources; Administrative Cause Nos. 04-135R, 04-140R, and 04-134R.*

Jane Ann Stautz called for consideration oral argument with respect to objections by the Claimants to the “Findings of Fact and Conclusions of Law and Non-Final Order on Respondents’ Motions for Summary Judgment” in Don Mottley and others versus Vigo Coal Company, Inc. and the Department of Natural Resources. She recognized first Don Mottley.

Don Mottley addressed the AOPA Committee on his own behalf and for the other Claimants. “This is the first time I’ve ever done anything like this so I apologize if I do not address the Committee properly.”

Mottley urged, “Our objection is basically whether or not the applicant should have filed for its other permits, such as the NPDES, the air construction permit, and the State Fire

Marshal's permit for the storage of explosives. In 312 IAC-25-4-23, it provides each applicant shall contain a list of other licenses and permits needed by the applicant to conduct the proposed surface mining activities."

Mottley said, "As of yesterday afternoon, they still have not applied for the notice of intent for NPDES permit, the air construction permit. I was not able to confirm whether they had applied for the storage of explosives. And the reason we think this issue should be addressed now...in 1988 on the same property, the Warrick Coal Company was mining there. They mined from 1988 until 1990 without a permit from the State Fire Marshal's office. There was an inspection by a Christine Gerace at that time, and she sent a letter to the State Fire Marshal's Office asking them if they had yet applied. They had not applied, but yet they had mined for two years without having this permit. In their application, they basically did the same thing, pretending they applied, yet they had never applied. And, we don't know how long this had been going with the Division of Reclamation, that these coal companies are not applying and identifying with these identification numbers in their permit."

Mottley continued, "I believe with these identification numbers, there's a purpose that that was put in the statute. And, the purpose it is put in there so that individuals that are not on the mailing list, or do not get notice, would be able to see and contact the other agency and say, 'Hey, where is this permit? How can I get involved? What do we do if we're opposed to the air construction permit?' That gives them an identification number to fall back on. I believe it's sort of like a tracking. And the mine inspector, if he had an identification number, he could check and see if they'd applied, if they had a permit yet. So, we believe that this permit was not properly approved, or it should have been conditioned to have these identification numbers in the final approval of that permit application."

Michael Kiley said, "Thank you, sir."

The Chair asked the Committee members, "Any questions or clarifications?"

Kiley responded, "Not at this time."

Jane Stautz then recognized Ihor N. Boyko, attorney for the Department of Natural Resources.

Ihor Boyko thanked the Committee, introduced himself, and began his oral argument. "All along, the mine has maintained in this case that the reason they haven't applied for the other permits is the fact that they're not intending to mine at this point. It's a business decision on their part that they don't want to spend the additional money to apply for permits when they don't have coal contracts in place in terms of starting up mining."

Boyko continued, "I think the decision of the Administrative Law Judge in this case is very well reasoned. She basically found that there's nothing in the cited rule, which is 312 IAC 25-4-23, that would prohibit the Department from issuing a permit even though these other permits are not obtained. All that the rule requires is a listing of other permits

that may be needed, and, in fact, the Coal Company attached a copy of that particular part of the permit. The Coal Company does, in fact, list their explosive permit number that's required for their explosive permit from the ATF, a federal agency. On the remaining permits (the State Fire Marshal's permit, the air construction permit from IDEM, and the NPDES permit from IDEM), they indicate 'pending,' as well as for the mine safety permit."

Boyko concluded, "I think this is a well-reasoned opinion by the Administrative Law Judge. There is nothing in the rule that prohibits the agency (DNR) from issuing the permit. The permittee complied with the rule by indicating what other permits were needed of those that are pending at this point. And there's nothing in the rule that would prohibit the permit from going forward even though the mining company has made a business decision not to, in fact, spend the money and the time to apply for these permits at this point. So, we would request that the objections filed by Mr. Mottley be denied and the permit be upheld as the Administrative Law Judge did in the Nonfinal Order."

Kiley said, "Thank you."

The Chair inquired of the AOPA Committee, "Any questions?"

Michael Kiley stated, "As I sort through this, it seems that the Respondent DNR's Motion for Summary Judgment, as well as Motion for Summary Judgment filed by Vigo Coal Company, Inc., are fundamentally seeking the same thing. They are not opposed to one another."

Boyko responded, "That's correct."

Kiley continued, "And that the thrust of the matter seems to lie, Mr. Boyko, in the statement that you made in your brief down at the bottom of page three in the contention regarding the NPDES permit. 'There is nothing to prohibit the approval or issuance of a mining application, even though other licenses and permits are pending approval from the agency with regulatory authority.' Then you follow along with that with the same basic language on points four, five and six relative to the air construction permit, the notice, and the explosive storage permit, where you say: 'The same analysis in issue number three above applies here, also, since there's nothing in 312 IAC 25-4-23 to preclude issuance of a permit.'"

Kiley then added, "So, with that in mind, Madam Chairman, I would move that the AOPA Committee grant (I think we can do this) both Respondent Vigo Coal Company's Motion for Summary Judgment, as well as the DNR's Motion for Summary Judgment on the pleadings. Steve, wouldn't that have the impact of.... Let's see, are we in.... No, I think that's all we need to do. A second motion would be that we approve the Nonfinal Order."

Jane Ann Stautz inquired, "That the objections are denied and the permit would be upheld as stated in the Nonfinal Order?"

Michael Kiley responded, “That’s correct. That is the tenor of my motion.”

Linda Runkle stated, “I agree with that interpretation and I would second it.”

The Chair then clarified, “We have a motion on the table to deny the objections and to uphold the permit as stated in the nonfinal order granting the motions for summary judgment. Are there further discussions or comments on that?”

Runkle provided additional perspective. “I think that the [Claimants] put forward a good argument. I find sometimes that reading and interpreting administrative code provisions, and trying to make sense out of them, is a challenge. I think probably the most persuasive part of the argument to me is the fact that due deference must be paid, and great weight given, to an agency’s reasonable interpretation of an administrative rule it is responsible for administering. So, that is really what persuaded me that this is the right outcome.”

Jane Ann Stautz stated, “With that, I’ll call for a vote on the motion on the table.”

The motion carried unanimously.

Sandra Jensen, Administrative Law Judge, asked to state “for the record that the Claimants, Larry and Rhonda Back, are also present. They intended for Mr. Mottley to speak on their behalves.”

The Chair thanked the Administrative Law Judge for her clarification.

Vigo Coal Company, Inc. did not participate in the oral argument.

Adjournment

Jane Ann Stautz asked if there was “any other business to come before the AOPA Committee this morning?” There being none, she called for adjournment at approximately 11:25 a.m.