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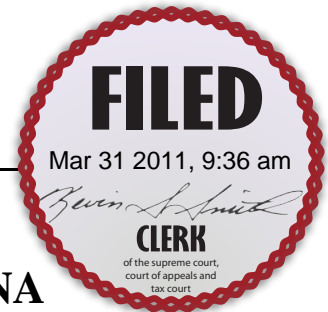
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**IN THE
COURT OF APPEALS OF INDIANA**

INDIANA DEPARTMENT OF NATURAL)
RESOURCES,)

Appellant-Respondent,)

vs.)

UNITED MINERALS CO., LLC,)

Appellee-Petitioner.)

No. 26A05-1007-PL-453

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Jeffrey F. Meade, Judge
Cause No. 26C01-0909-PL-13

March 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The Indiana Department of Natural Resources (DNR) issued a Notice of Violation after a seismograph indicated United Minerals (United) exceeded the blast vibration limit at a mine it operated. United sought administrative review. After cross-motions for summary judgment, an administrative law judge (ALJ) affirmed the Notice of Violation. United sought judicial review, and the trial court set aside the ALJ's decision and vacated the Notice of Violation. As the issues the parties present could not have appropriately been resolved on summary judgment, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

United conducts blasting operations at the Somerville Mine. DNR regulations establish a blast vibration limit at any dwelling, and on February 23, 2007, a seismograph DNR maintained at an area residence recorded a reading that exceeded the limit. DNR accordingly issued a Notice of Violation. United sought administrative review, and both parties moved for summary judgment with evidence regarding the accuracy of the seismograph reading.

United characterized the reading on which the Notice of Violation was based as an “aberration,” (App. at 26), because seismographs closer to the blast had recorded lower readings. United also presented evidence the seismograph was improperly installed because one of its geophones¹ was not sufficiently embedded in the ground and was located in or near

¹ A geophone is an electronic receiver designed to pick up seismic vibrations on or below the Earth's surface and to convert them into electric impulses that are proportional to the displacement, velocity, and acceleration of ground movement. <http://dictionary.reference.com/browse/geophone> (last visited March 9, 2011).

the root base of a juniper.²

DNR presented evidence that in the Somerville Mine area, ground vibrations do not always dissipate at greater distances as would normally be expected. DNR asserted the seismograph was properly calibrated, but removed it shortly after the blast. One side of the geophone was “slightly pulled away from the soil due to wetness,” (*id.* at 39-A), but DNR determined no “obstructions or voids were present that could affect the measurements.” (*Id.*)

The ALJ entered summary judgment for DNR after determining United did not prove the reading was inaccurate. United sought judicial review, and the trial court found the ALJ “improperly disregarded,” (*id.* at 11), or “failed to give proper evidentiary weight to” certain evidence, (*id.* at 12), causing the ALJ’s decision to be contrary to law and unsupported by substantial evidence. It vacated the Notice of Violation and set aside the ALJ’s decision.

DISCUSSION AND DECISION

Normally, in an appeal involving a decision of an administrative agency, our standard of review is governed by the Administrative Orders and Procedures Act (AOPA), and we are bound by the same standard of review as the trial court. *Dev. Servs. Alts., Inc. v. Ind. Family*

² As part of his argument the Commission’s final order was not supported by substantial evidence, United’s counsel makes the following statement: “the ALJ simply concluded that there was no evidence that the green mound juniper had a root system . . . [t]his conclusion defies logic.” (Br. of Appellee at 12.)

We agree such a statement would defy logic. Junipers have roots. But the ALJ made no such statement, and we admonish United’s counsel to refrain from so misrepresenting the record. The parts of the record to which United directs us indicate the ALJ found there was “no evidence that roots infiltrated the holes dug for installation” of nearby seismographs, (App. at 26), and “the juniper’s root system is not the cause of the discrepancy.” (*Id.*) In other words, the ALJ undoubtedly acknowledged the juniper *did* have a root system.

& Soc. Servs. Admin., 915 N.E.2d 169, 176 (Ind. Ct. App. 2009), *trans. denied*. A court reviewing a decision from an administrative agency may neither try the case *de novo* nor substitute its judgment for that of the agency. Ind. Code § 4-21.5-5-11. The reviewing court will not reweigh the evidence, *Dev. Servs. Alts.*, 915 N.E.2d at 176, and will give deference to the expertise of the administrative body. It will reverse the agency's decision only if it is

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to a constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d).³ The burden of demonstrating an agency's action was invalid is on the party asserting its invalidity, here United. *See* Ind. Code § 4-21.5-5-14(a).

In *Developmental Services*, we applied that standard to review an action where, as here, the agency decided the issues on summary judgment. 915 N.E.2d at 175. There we determined that, on judicial review, the trial court had not engaged in improper reweighing of the evidence because the facts presented to the ALJ had been undisputed. The ALJ, and thus the trial court, decided only issues of law. *Id.* at 177.

The ALJ decided the case before us on summary judgment. But here, unlike in *Developmental Services*, there was a factual dispute that should have precluded summary judgment.

³ The trial court made no finding DNR's action was an abuse of discretion or was arbitrary or capricious.

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C).⁴ There may be such a genuine issue if the trial court is required to resolve disputed facts, but summary judgment is likewise inappropriate if conflicting inferences arise from the facts. *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1175 (Ind. Ct. App. 1983). To preclude summary judgment, the conflicting inferences must be decisive to the action or a relevant secondary issue. *Id.* Here, they are.

United and DNR disputed below, and continue to dispute on appeal, the validity of the seismographic reading on which the ALJ's order is based – in other words, they disagreed on the factual inferences the ALJ should have drawn from the evidence. At the proceedings before the ALJ, both parties agreed “the underlying facts were not disputed and that the proceeding might be appropriately disposed of through summary judgment.” (App. at 21.) But even if the facts were undisputed, there was disagreement over the determinative inferences to be drawn from the facts – *i.e.*, whether the reading that showed a violation was accurate or was an aberration because of the placement of the seismograph and the condition of the geophone. As these are determinations of ultimate facts, not legal decisions, summary judgment for either party was improper.

⁴ The AOPA standard is the same:

The judgment sought shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law.

Ind. Code § 4-21.5-3-23(b).

We accordingly reverse the order of the trial court and remand to the ALJ for a hearing on the merits.

Reversed and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.