

**IN THE COURT OF APPEALS 03/26/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-CA-00500 COA**

**W. C. FORE TRUCKING, INC.**

**APPELLANT**

**v.**

**MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JASON H. FLOYD, JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

J. HENRY ROS

ATTORNEY FOR APPELLEE:

ROY FURRH

NATURE OF THE CASE: APPEAL FROM ADMINISTRATIVE AGENCY'S ORDER

TRIAL COURT DISPOSITION: AFFIRMED ADMINISTRATIVE AGENCY'S ORDER

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

The Mississippi Commission on Environmental Quality (the Commission) ordered W. C. Fore Trucking, Inc. (Fore Trucking), (1) to pay "a penalty of \$1,000.00 . . . for each offense charged, for a total of \$6,000.00 penalty;" (2) to "cease and desist all further surface mining operations in the described area;" and (3) immediately to "commence reclamation of the described site in question which is acceptable to all interested Federal and State agencies." Fore Trucking appealed the Commission's order to the Chancery Court of Harrison County, and that court affirmed the Commission's order. Fore Trucking then appealed to the Mississippi Supreme Court, which directed its appeal to this Court. Fore Trucking argues on appeal that the Commission's order was arbitrary and capricious and that it was not supported by substantial evidence and, therefore, the chancery court erred when it affirmed the Commission's order. We affirm in part and reverse and render in part the chancery court's decree which affirmed the Commission's order.

## **I. Facts**

In addition to its trucking services, Fore Trucking engaged in surface mining operations in and around Harrison County. Fore Trucking had engaged in surface mining operations on tracts and parcels of land other than the one which is the subject of this litigation before April 15, 1978, the date that the Mississippi Surface Mining and Reclamation Law (the Mining Law), sections 53-7-1 *et seq.* of the Mississippi Code of 1972, became effective. On August 24, 1976, Richard W. Stewart and Mildred D. Stewart, husband and wife, conveyed by warranty deed to Wallace C. Fore and Pat Fore, Sr., the following described parcel of land:

The Northeast Quarter (NE 1/4) of the Southwest Quarter (SW 1/4) of Section 1, Township 7 South, Range 11 West, in Harrison County, Mississippi.

The Stewarts' warranty deed included this provision about the minerals:

This sale includes all oil, gas, and minerals owned by the undersigned, but oil, gas, and minerals are not warranted, the undersigned owning a portion thereof only.

Fore Trucking maintains in its brief that this land was bought solely with the intent to conduct surface mining activities on it. The timber on this tract of land was later sold, and ditches were dug on portions of the tract.

On July 12, 1988, the Mississippi Department of Natural Resources issued Surface Mining Permit No. P88-027 to W. C. Fore Trucking, Inc., for "38 acres of sand and clay" located in the NW 1/4 of the SW 1/4 of Sec. 1, Township 7 South, Range 11 West. This "permitted" parcel of land is located west of the twelve acres of land which is the subject of the case *sub judice*. A portion of these twelve acres is located in the Stewart tract.

After April 15, 1978, Fore Trucking began an open pit mining operation on a portion of this tract. Fore Trucking had a permit to conduct an open pit mine on an adjoining parcel of land, which open

pit mine was adjacent to the mining operation it began on the NE 1/4 of the SW 1/4. Fore Trucking never applied for and thus never received from the Mississippi Commission on Natural Resources a permit to mine anywhere on the NE 1/4 of the SW 1/4.

In April, 1988, an adjoining land-owner complained to the Commission that Fore Trucking had mined in excess of four acres in the NE 1/4 of the SW 1/4 without a permit. The Commission's investigation of that complaint was the genesis of the litigation between Fore Trucking and the Commission which has culminated in this appeal.

## **II. Course of the Litigation**

Pursuant to section 53-7-65 of the Mississippi Code of 1972, James L. Palmer, Jr., Executive Director of the Department of Environmental Quality, wrote Wallace C. Fore, principal of Fore Trucking, to notify him that Fore Trucking had failed to file with the Office of Geology, Department of Environmental Quality, certain documents which the Mining Law required before beginning a mining operation and that Fore Trucking was mining without a permit on the land which the Fores had bought from the Stewarts. Palmer advised Fore that "[i]f the alleged violations have not been corrected within ten (10) days after receipt of this notice, then this is your notice to appear before [the Commission] on the 22nd day of October, 1992 at 9:00 a.m." for a hearing on these charges. The Commission conducted the hearing on Fore Trucking's failure to obtain a permit to conduct a mining operation on this land on October 22 as scheduled. Burt Taylor, the general manager of W. C. Fore Construction Division, represented Fore Trucking at this hearing. Early in the hearing, Taylor stated Fore Trucking's position as follows:

It's our contention that -- we deny the charges because we didn't think a permit was necessary since the land was purchased before the law went into effect and therefore it

was established as a mining operation at that time. And we didn't feel that a permit was necessary.

Later in this opinion we will explain in more detail the nature and basis of Fore Trucking's position that the subject land was "grandfathered" land and thus exempt from the permit requirement.

On November 12, 1992, the Commission entered its order, in which it specifically found the following facts and stated the following conclusions of law:

19. [t]hat neither clearing the timber on land nor purchasing land with the intent to mine constitute surface mining operations as contemplated by Miss. Code Ann. § 53-7-7(2) . . .

20. W. C. Fore Trucking, Inc., has not demonstrated that surface mining operations were being conducted on the unpermitted lands in question prior to April 15, 1978, and, thus, has not proved that lands are "grandfathered."

21. [t]he unpermitted area exceeds the acreage covered by Permit P88-027 issued by the Office of Geology to W. C. Fore Trucking, Inc., and the lands in question are "newly mined land" located east of the said permit.

22. [a]s a result of the noncompliance with Mississippi Surface Mining and Reclamation Law, . . . finds W. C. Fore Trucking, Inc., guilty of the six (6) charges . . . .

We quoted the mandate of this order at the beginning of this opinion. Fore Trucking appealed this order to the Harrison County Chancery Court which, as we previously noted, affirmed the order.

### **III. Issues and the law**

Fore Trucking seeks this Court's resolution of the following three issues, which we state as it expressed them in its brief:

**First Issue:** The Chancellor erred in affirming the Mississippi Department of Environmental Quality's finding that certain property mined by W. C. Fore Trucking, Inc., did not fall within the permit exemption of the Mississippi Surface Mining and Reclamation Act as that prior decision was arbitrary and capricious.

**Second Issue:** The Chancellor erred in affirming the Mississippi Department of Environmental Quality's finding that certain property mined by W. C. Fore Trucking, Inc., did not fall within the permit exemption of the Mississippi Surface Mining and Reclamation Act as that prior decision was unsupported by substantial evidence.

**Third Issue:** The Chancellor erred in affirming the Mississippi Department of Environmental Quality's fine of \$6,000 against W. C. Fore Trucking, Inc., for alleged violations of the Mississippi Surface Mining and Reclamation Act where such fine is unreasonable, unsupported by substantial evidence, and arbitrary and capricious.

#### **A. Standard of Review**

Section 53-7-65 of the Mississippi Code provides the following procedure for appealing any order of the Commission to the chancery court which has jurisdiction in the county in which the violation allegedly occurred:

Any party may appeal any order of the commission to the chancery court having jurisdiction in the county in which the violation allegedly occurred, provided that such appeal is filed in said court within twenty (20) days following the date of such order. The commission shall be made a party to the court proceeding, and service shall be made upon the director, whose domicile for the purpose of service shall be deemed to be the office of the director in Hinds County, Jackson, Mississippi. The cause shall be tried in said court on the record made before the commission and shall be a preference case on the docket thereof. The court shall have jurisdiction to determine the reasonableness and lawfulness of the order of the commission. *Upon a finding by the court that the order is not reasonable or lawful, or not supported by substantial evidence, the cause shall be remanded to the commission for further proceedings in accordance with the provisions of this chapter and the order of such court.* The parties shall have all rights of appeal as in other equity cases.

Miss. Code Ann. § 53-7-65 (1972) (emphasis added). We find that this section essentially codifies the standard of review which the Mississippi Supreme Court has repeatedly adopted in other appeals

from orders of Mississippi's administrative agencies.

For example, in *Sprouse v. Mississippi Employment Sec. Commission*, 639 So. 2d 901, 902 (Miss. 1994), the Mississippi Supreme Court explained the breadth of the appellate court's standard of review of decisions made by administrative agencies as follows:

This Court's standard of review of an administrative agency's findings and decisions is well established. An agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights. A rebuttable presumption exists in favor of the administrative agency, and the challenging party has the burden of proving otherwise. Lastly, this Court must not reweigh the facts of the case or insert its judgment for that of the agency.

Fore Trucking has in fact relied on only two of the four grounds on which the Mississippi Supreme Court will reverse or otherwise alter an administrative agency's order or conclusion. Fore Trucking's two grounds are: (1) the Commission's decision was not supported by substantial evidence and (2) the Commission's decision was arbitrary and capricious. There is no question that the Commission had the authority to conduct the hearing and to assess the penalty. *See* Miss. Code Ann. § 53-7-19, - 59, - 65 (1972). We further note that Fore Trucking raises no alleged violations of due process or other constitutional rights. Because these two grounds are interwoven, we shall simultaneously consider Fore Trucking's first two issues.

**B. Fore Trucking's First Two Issues, which are that the Commission's findings that certain property mined by W. C. Fore Trucking, Inc. did not fall within the permit exemption of the Mississippi Surface Mining and Reclamation Act were arbitrary and capricious and were unsupported by substantial evidence.**

### **1. Substantial evidence**

Perhaps the obvious facts in this case render it unnecessary, but we begin our analysis of these issues with our comprehension of the meaning of the term "substantial evidence." In *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991), the supreme court wrote:

Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." It may be said that it "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

We interpret this quotation to mean that "substantial evidence" must be more than a scintilla of evidence, but it need not be equivalent to a preponderance of the evidence. Substantial evidence may be found somewhere in between these concepts of evidence. The obvious facts to which we referred

are: (1) the timber on the land was sold, (2) ditches had been dug on the land's surface, and (3) no mining operation had begun on the land before April 15, 1978. The evidence of these three facts is more than substantial simply because there is no evidence to the contrary. These three facts are given.

To persuade us nonetheless that the Commission's order was not supported by substantial evidence, Fore Trucking argues in its brief that:

Unquestionably, clearing timber in preparation for future mining would be activities which would alter the surface estate, and therefore, be considered mining activities as defined by the Mining [Law]. Accordingly, such activities would be subject to the exemption from the permit requirements if said activities were conducted prior to the enactment of the [Law]."

Fore Trucking next emphasizes that on March 5, 1990, John E. Johnson, a geologist with the Mining and Reclamation Section of the Department of Environmental Quality, wrote a letter to Edsel Stewart in response to Stewart's complaint to the Department about Fore Trucking's mining operation on the unpermitted site. In that letter, Johnson wrote:

Regarding the ditches dug by W. C. Fore (NE 1/4, SW 1/4, Section 1, Township 7 South, Range 11 West), this area appears to have been affected prior to 1978 and is, therefore, "grandfathered" and beyond our jurisdiction."

Fore Trucking seeks to bind the Commission with its employee's opinion even though his opinion was neither ratified nor officially recognized by the Commission as its official policy or its own finding of fact on this issue, as indeed the Commission argues in its brief.

The third point which Fore Trucking makes on the issue of whether the evidence was substantial to support the Commission's order is that the Commission must have relied on the opinion of Kevin Cayhill, the Director of Mining and Reclamation Division of the Office of Geology, that the land in question had not been "grandfathered" by the Mining Law. Cayhill expressed this opinion at the hearing which the Commission conducted on October 22, 1992. It then argues that Cayhill's opinion contradicted that of Johnson's.

Before we proceed to resolve these arguments that the Commission's order was not supported by substantial evidence, we must consider relevant sections of the Mining Law. Section 53-7-7 of the Mississippi Code of 1972 contains the "grandfather" provision which spawned this litigation. It reads:

The provisions of this chapter shall not apply to operations for any materials on any lands whereupon the operations are being conducted prior to the effective date of this chapter; provided, however, that if the operation extends to or encompasses additional land after the effective date of this chapter, then the newly mined land shall be subject to the provisions of this chapter.

Miss. Code Ann. § 53-7-7 (1972). Section 53-7-5 of the Mississippi Code of 1972 contains the following definitions which are relevant to these two issues:

For the purposes of this chapter, the following terms shall have the meanings respectively ascribed to them, except where the context or subject matter otherwise requires:

(b)(I) "Class I materials" means bentonite, metallic ore, mineral clay, dolomite and phosphate;

(ii) "Class II materials" means sand, gravel, soil, clay, sand clay, clay gravel, limestone and chalk;

(iii) "Materials" means all Class I materials and all Class II materials and such other materials as shall be designated by the commission either as a Class I or Class II material;

....

(o) "Surface mining" and "mining" means the extraction of materials from the ground or water or from waste or stock piles or from pits or banks or natural occurrences by methods including, but not limited to, strip drift, open pit, contour or auger mining, dredging, placering, quarrying and leaching, and activities related thereto, which will, in effect, consume, delete or alter the surface estate, and also those aspects of underground mining having significant effects on the surface;

(p) "Surface mining operation" and "operation" means the activities conducted at a mining site, including extraction, storage, processing and shipping of materials and reclamation of the affected area.

Miss. Code Ann. § 53-7-5 (1972). When section 53-7-7 excepts, or "grandfathers," "operations for any materials on any lands whereupon the operations are being conducted prior to the effective date of this chapter," the term "operations" can only be defined for purposes of the Mining Law by referring to section 53-7-5, in which the legislature defined "operation" as "the activities conducted at a mining site, including extraction, storage, processing and shipping of materials and reclamation of the affected area." Section 53-7-5 further defines "mining" as "the extraction of materials from the ground or water or from waste or stock piles or from pits or banks or natural occurrences by methods including, but not limited to, strip drift, open pit, contour or auger mining, dredging, placering, quarrying and leaching, and activities related thereto, which will, in effect, consume, delete or alter the surface estate."

In *Hernandez v. Vickery Chevrolet-Oldsmobile Co., Inc.*, 652 So. 2d 179, 182 (Miss. 1995), the issue was whether the appellee had misrepresented that the truck which it sold the appellant was new. The appellant, Hernandez, contended that the truck was used. Nevertheless, the trial court granted the dealer's motion for summary judgment, which the Mississippi Supreme Court affirmed. The issue involved the interpretation and application of various state statutes which related to the titling of new and used vehicles. The supreme court stated:

Interpretation of statutes is a matter of law rather than an issue for the jury, else there would be differing results on the same facts. Resolution of the "new v. used" question is a matter of law. The trial court did not err in summarily determining that the truck was new.

*Id.* We cite this case to support our conclusion that whether the land in the case *sub judice* was "grandfathered" was a question of law for the Commission to decide and for the chancery court to review on appeal. Of course, applying sections 53-7-5 and 53-7-7 to the issues in this case involves our ascertainment of the facts to which the law is to be applied. In this case, there is no dispute about the facts to which sections 53-7-5 and 53-7-7 are to be applied. The undisputed facts are that the timber was sold and ditches were dug. Fore may have bought the land with the intent to begin mining it; and his sale of the timber on the land and his ditching the land may have been consistent with that intent, but the simple fact remains that Fore Trucking began no mining operation as defined by section 53-7-5 on this land before April 15, 1978. The definitions of "mining" and "mining operations" do not include the sale of trees and the ditching of land. For there to have been an operation on this land before April 15, 1978, which would "grandfather" it pursuant to section 53-7-7, there would have had to have been "the extraction of materials from the ground . . . by methods including, but not limited to, strip drift, open pit, contour or auger mining, dredging, placering, quarrying and leaching, and activities related thereto, which [would], in effect, consume, delete or alter the surface estate."

Fore Trucking argues that harvesting timber and digging ditches would "consume, delete or alter the surface estate," and thus must be construed as "operations for any materials" which section 53-7-7 requires for land to be exempt from the requirement of obtaining a permit. As a matter of law, we reject that argument because the operation contemplated by section 53-7-7 must be a mining operation as defined by section 53-7-5. This Court rejects Fore Trucking's contention that the Commission's order, which we find to be amply supported by its findings of fact and conclusions of law, was not supported by substantial evidence.

## **2. Arbitrary and capricious**

To support its contention that the Commission's decision was arbitrary and capricious, Fore Trucking argues that the Commission's order was "contrary to the express provisions of the Mining [Law] and in direct conflict with the prior findings made by the Division of Geology regarding the properties owned by [it] which were 'grandfathered' and exempt from the permit requirements." To assert further that the Commission's order was arbitrary and capricious, Fore Trucking further argues that Cayhill's interpretation of section 53-7-7 restricts the Commission's regulatory power to "situations where active mining was being conducted." This restriction is contradictory to the express definitions contained in the Mining Law, and, Fore Trucking argues, "[t]he probability of inconsistent

application of these definitions leads to the inescapable conclusion that the decision of the Commission was ad hoc in nature, and therefore, arbitrary and capricious."

In *Mississippi State Dept. of Health v. Southwest Mississippi Regional Medical Center*, 580 So. 2d 1238, 1249 (Miss. 1991), the Mississippi Supreme Court adopted another court's definition of arbitrary and capricious:

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,--absolute in power, tyrannical, despotic, non-rational, - - implying either a lack of understanding of or a disregard for the fundamental nature of things.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles . . . .

None of the three arguments which Fore Trucking makes to support its position that the Commission's order was arbitrary and capricious persuades us that it was. We have already dispensed with Johnson's letter dated March 5, 1990, to Stewart in which he expressed his view that the land in question was properly "grandfathered." As for Cayhill's interpretation of section 53-7-7, our determination that the interpretation of the statute is a question of law renders his opinion as an issue of evidence moot. We have found that the Commission correctly interpreted and applied these sections of the Mining Law to the undisputed facts in this case regardless of Cayhill's interpretation. Our interpretation in no way restricts the Commission's regulatory power to "situations where active mining was being conducted," but it does restrict the application of the exemption from the requirement of a permit found in section 53-7-7 to "situations where active mining was being conducted." Finally, our determination that the Commission's order was consistent with the definitions found in section 53-7-5 dispels Fore Trucking's third argument that the Commission's order was "ad hoc in nature, and therefore, arbitrary and capricious."

We conclude that the Commission's decision that the land in question did not qualify for exemption from the requirement for a permit as allowed by section 53-7-7 was consistent with the definitions found in section 53-7-5 and was consistent with the undisputed facts in this case. Its decision was therefore not arbitrary and capricious as those terms have been defined by the Mississippi Supreme Court.

### **C. Fore Trucking's third issue**

We deal separately with this issue, which is:

The Chancellor erred in affirming the Mississippi Department of Environmental Quality's fine of \$6,000 against W. C. Fore Trucking, Inc., for alleged violations of the Mississippi Surface Mining and Reclamation Act where such fine is unreasonable, unsupported by

substantial evidence, and arbitrary and capricious.

The Commission argues that it found six violations of the Mining Law and that these "violations are separate and except in one instance are found in different code sections." The six separate violations which the Commission found are the following:

1. Failure to file a surface mining permit application with the Office of Geology -- Section 53-7-23 of the Mississippi Code of 1972.
  
2. Failure to submit an application fee with the Office of Geology -- Section 53-7-25 of the Mississippi Code of 1972.
  
3. Failure to file a performance bond or other collateral with the Office of Geology -- Section 53-7-37 of the Mississippi Code of 1972.
  
4. Failure to file complete documentation supporting the operator's legal right to mine with the Office of Geology -- Section 53-7-27 of the Mississippi Code of 1972.
  
5. Failure to file a topographical survey map with the Office of Geology -- Section 53-7-23 of the Mississippi Code of 1972.
  
6. Mining without a surface mining permit -- Section 53-7-21 of the Mississippi Code of 1972.

In support of its position on this issue, the Commission asserts that it has traditionally assessed multiple penalties similar to these six violations in other of its cases. The Commission included no other examples of multiple assessments in other cases in the record of this case, but it attached three copies of such orders, one of which was entitled "an agreed order," in an "Addendum of Selected Authorities Pursuant to Mississippi Supreme Court Rule 28(f)." Fore Trucking objects to the Commission's maneuver to present these orders for the first time in this litigation to this Court in this fashion.

In response to the Commission's claim of six separate violations, Fore Trucking submits "that nothing in the Mining [Law] supports this conclusion." It contends that:

[a] complete permit requires the filing of the application, the application fee, a notice of intent to mine, a performance bond, a notice of right to mine, and topographic maps of the area to be mined. Although these are separate statutory requirements, they are merely subparts of the single requirement that a complete permit application be filed by the applicant seeking to conduct surface mining activities pursuant to [the] Mining [Law]. Nothing contained in these individual statutes setting forth the sub-requirements contain the language notifying an applicant that a failure to provide one or more of these documents constitutes a single violation of the [Mining Law]. Rather, a reasonable interpretation of the Act would be that a failure to file the complete application where such an application was necessary would constitute a single violation subject to a penalty of \$1,000.00.

We previously included in footnote 1 the text of section 53-7-65, but we quote that part of this section which empowers the Commission to impose civil penalties:

The commission shall enter such order as it deems appropriate on the evidence presented, which order may include a civil penalty in an amount not to exceed one thousand dollars (\$1,000.00) for each violation.

Miss. Code Ann. § 53-7-65 (1972). There appear to be no Mississippi Supreme Court cases which have interpreted this quoted portion of Section 53-7-65. This Court finds that the key phrase is "for each violation."

However, before we analyze these arguments on this issue, we review cases in which the Mississippi Supreme Court has considered the imposition of civil penalties. In *T. C. Fuller Plywood Co. v. Moffett*, 231 Miss. 382, 95 So. 2d 475, 476 (1957), the issue was whether a claimant who had been accorded an award of workers' compensation benefits was entitled to recover a penalty of twenty percent on the amount of the award for an alleged delay in the payment of the award. The Mississippi Supreme Court held that the employer, T. C. Fuller Plywood Company, had had thirty days from the date of the Commission's order in which to appeal or else to comply with the award. *T. C. Fuller Plywood Co.*, 95 So. 2d at 478. Because the employer had complied with the award within the period of thirty days, it incurred no liability for the twenty percent penalty provided by statute. *Id.* The supreme court opined:

In determining the question here presented, it is to be borne in mind that it is a well-recognized rule that presumptions are against one seeking the enforcement of a statutory penalty and that all questions of doubt are to be resolved in favor of one against whom the penalty is sought. In 70 C.J.S. Penalties § 1, page 391, appears the following: 'Every presumption is against one seeking to enforce a statutory penalty, and all questions of doubt must be resolved in favor of those from whom the penalty is sought.'

*Id. Winter v. Hardester*, 232 Miss. 200, 98 So. 2d 629 (1957) involved a bill of complaint filed by the state tax collector against Hardester and his two partners in which the state tax collector sought to collect two separate penalties of \$500 each for both Lauderdale County and the City of Meridian -- a total of \$2,000 -- for Hardester's two sales of whiskey to two different deputy state tax collectors on Hardester's premises which were located within Meridian's corporate limits. *Winter*, 98 So. 2d at 630. The chancellor only allowed the state tax collector to collect one penalty of \$500 each for Lauderdale County and for the City of Meridian. *Id.* The state tax collector appealed to argue that he was entitled to collect two penalties of \$500 each for both the state and the city; but the supreme court affirmed the chancellor's decree. In its opinion, the supreme court opined:

The general rule relating to the assessment of cumulative penalties in cases of this kind is stated in 23 Am.Jur., p. 638, Forfeitures and Penalties, par. 47, as follows:

The theory of prosecutions to recover penalties has been considered to be for the purpose of administering warnings not to continue the acts complained of. Generally, the purpose of the legislature will be sufficiently subserved when one violation or one default is recovered for, which shall act as a deterrent on continuing to disregard the statute. . . . In view of this principle and the rule that penalty statutes are to be subjected to strict construction, the courts have laid down the rule that cumulative recoveries will not be permitted in the absence of such a definite statement by the legislature as to leave its intention in that respect unmistakable.

*Winter*, 98 So. 2d at 631.

We now consider the Commission's and Fore Trucking's arguments in the illumination afforded by the previously cited cases. First, we note that among the many useful definitions found in section 53-7-5 of the Mississippi Code of 1972, there is not one of the term "offense." Next, we note that section 53-7-3 of the Mississippi Code of 1972, which is entitled "Legislative findings and declarations," provides that the purpose of the Mining Law is to: "[e]stablish a regulatory system of permits and reclamation standards . . . which is designed to achieve an acceptable, workable balance between the economic necessities of developing our natural resources and the public interest in protecting our birthright of natural beauty and a pristine environment . . ." Miss. Code Ann. § 53-7-5 (1972). Section 53-7-19 provides that the Commission shall have the power "[t]o approve or deny permits and bonds and to issue, amend, renew and revoke permits in the manner prescribed by [the Mining Law]."

While the Mining Law does not define the term "offense" as it is used throughout that chapter, we note that Fore Trucking does not contest the first violation, "failure to file a surface mining permit application with the Office of Geology," and the sixth, or last, violation, "mining without a surface mining permit." It does not argue that mining without a permit might include the violation of failure to file a surface mining permit application, and we conclude from our consideration of the previously quoted sections of the Mining Law that as a matter of law the chancellor correctly affirmed the

Commission's assessment of civil penalties of \$1,000 each for the first and sixth violations as charged by the Commission.

We next consider the third violation, the failure to file a performance bond. As we noted, section 53-7-19 gives the Commission the power "[t]o approve or deny permits and bonds." That section distinguishes between permits and bonds. Performance bonds are the sole subject of section 53-7-37. Section 53-7-37 provides different times for filing a performance bond depending on whether the permit application is for Class I materials or Class II materials, but it is plain that the legislature required an applicant to file a performance bond separate and apart from its application for a permit. Indeed, the performance bond is treated differently from the permit in several sections of the Mining Act, as indeed it should be since one of the purposes of the performance bond is to protect others after the permit has expired or perhaps been canceled by act of the Commission. Therefore, we conclude that the failure to file a performance bond is also a separate offense unrelated to the failure to file for a permit. Thus, we affirm the Commission's assessment of a civil penalty of \$1,000 for this third violation.

The Commission's second offense, failure to file an application fee; fourth offense, failure to file complete documentation supporting the operator's legal right to mine, and fifth offense, failure to file a topographical survey map, all relate to, are a part of, or a condition precedent to the application for the permit. Indeed, the fourth and fifth offenses are included in section 53-7-27 of the Mississippi Code of 1972. Unlike filing the performance bond, the first violation, which was Fore Trucking's failure to file the application for the permit, also includes not only the second, fourth, and fifth violations, but also so many more requirements which are included in section 53-1-27 that an unrestrained Commission could assess a total penalty for failing to file an application for a permit that would exceed many times over the civil penalty of \$1,000 for each.

The fact that the first violation per force includes the second, fourth, and fifth violations compels this Court to the conclusion that pursuant to the previously cited and discussed opinions of the Mississippi Supreme Court, which held that the purpose of the legislature will be sufficiently subserved when one violation or one default is recovered for, the Commission's assessment of civil penalties each in the amount of \$1,000 for the second, fourth, and fifth violations was arbitrary and capricious. It was arbitrary because it was done without adequately determining the principles of the Mining Law as the legislation intended them, especially in view of what the supreme court has opined about the assessment of multiple penalties and because the Commission did it just because it thought that it could do it. These three penalties were capricious because the Commission imposed them without reason and in an almost whimsical manner.

We remember the Mining Law's standard of review which the legislature has prescribed for us to follow, *i.e.*, was the Commission's order "reasonable or lawful"? Whether the order in the case *sub judice* was reasonable and lawful depends on whether it was arbitrary and capricious in light of established legal principles, especially principles of the interpretation of statutes such as section 53-7-65 which authorizes the Commission to impose "a civil penalty in an amount not to exceed [\$1,000] for each violation." Since the legislature did not define the term "violation," we find but three violations of the Mining Law for which Fore Trucking should be assessed, and we, therefore, reduce its assessment of civil penalties in the amount of \$6,000 to \$3,000.

#### IV. Conclusion

The issue in the case *sub judice* was whether the Commission correctly found that Fore Trucking's mining operation on certain land was not exempt from the Mining Law because Fore Trucking had not begun mining operations on the land before April 15, 1978, the date this law became effective. Even though Fore Trucking argues both that the Commission's order to cease and desist its mining operation was not supported by substantial evidence and that it was arbitrary and capricious, we find that there was no dispute that the timber had been sold and harvested from the land and that certain ditches had been dug on the land's surface before that date. We further find that neither was there any dispute that a mining operation as defined by the Mining Act was not begun until after April 15, 1978. Thus, while we have found that substantial evidence supported the Commission's order to cease and desist because the land was not exempt, or "grandfathered," from the application of the Mining Law, the reality is that there was no dispute about the facts that were truly relevant to this issue.

We also find that the Commission's order to cease and desist was not arbitrary and capricious as the Mississippi Supreme Court had defined those terms. Thus, we affirm the Commission on its cease and desist order which it entered on the basis of its finding that the land in question was not exempt from the Mining Law because Fore Trucking had not begun "operations for any materials" on the land, as those terms are defined in the Mining Law had, before April 15, 1978, the effective date of the Mining Law.

We reverse the Commission's assessment of civil penalties of \$1,000 each on three of the violations of the Mining Law because we find that those three violations, failure to file an application fee, failure to file complete documentation supporting the operator's legal right to mine, and failure to file a topographical survey map were inherent in the one violation of failing to file an application for the mining permit. The practical consequence of the Commission's assessments of these three civil penalties was to "fine" Fore Trucking \$4,000 for one violation, its failure to file an application for the mining permit, the maximum civil penalty for which was only \$1,000. Thus, in view of the Mississippi Supreme Court's opinions regarding the limited circumstances of imposing civil penalties and multiple statutory civil penalties, which we have cited, we conclude that the Commission's imposition of these three civil penalties of \$1,000 each for a total of \$3,000 was not reasonable and unlawful because it was arbitrary and capricious.

**THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY AFFIRMING THE MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY'S ORDER TO W. C. FORE TRUCKING, INC. TO "CEASE AND DESIST ALL FURTHER SURFACE MINING OPERATIONS IN THE DESCRIBED AREA;" AND IMMEDIATELY TO "COMMENCE RECLAMATION OF THE DESCRIBED SITE IN QUESTION WHICH IS ACCEPTABLE TO ALL INTERESTED FEDERAL AND STATE AGENCIES" IS AFFIRMED; THE ORDER TO PAY "A PENALTY OF \$1,000.00 . . . FOR EACH OFFENSE CHARGED, FOR A TOTAL OF \$6,000.00 PENALTY" IS REVERSED AND MODIFIED TO ORDER APPELLANT TO PAY "A PENALTY OF \$1,000.00 . . . FOR THE FIRST, THIRD, AND SIXTH OFFENSE CHARGED, FOR A TOTAL OF \$3,000.00 PENALTY." COSTS ARE ASSESSED TO APPELLANT.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**