

TORAO NEISHI

IBLA 86-1623

Decided April 13, 1988

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting a petition for a class II reinstatement of terminated oil and gas lease AA-48976-P.

Affirmed as modified.

1. Oil and Gas Leases: Reinstatement--Words and Phrases

"Inadvertent." As used in 30 U.S.C. § 188(d) (1982), a failure to timely submit annual rental for an oil and gas lease will be deemed "inadvertent," where the failure was occasioned by forgetfulness or inattention to the requirements of the law. A failure to timely submit the rental will be deemed not to be "inadvertent" only where it is the result of an intentional and knowing choice of the lessee or where the lessee simply lacked the resources to pay the rental.

2. Oil and Gas Leases: Reinstatement

The back rental due when filing a petition for a class II reinstatement is determined at the increased rates accruing from the date of termination. The increased rates are the rates which will apply if class II reinstatement is granted: a minimum of \$5 per acre for nonproducing leases and \$10 per acre for producing leases.

APPEARANCES: Alexander Schmid, Esq., Oakland, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Torao Neishi has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 14, 1986, rejecting his petition for a class II reinstatement of terminated oil and gas lease AA-48976-P.

Base lease AA-48976, embracing a total of 7,630 acres, was issued to Alaska Federal Petroleum Corporation with an effective date of February 1, 1984. On February 7, 1984, the lessee filed a partial assignment of the lease, totalling 320 acres, to appellant. This assignment was approved on February 19, 1985, with an effective date of March 1, 1984, the annual rental having apparently been paid for the 1985-86 lease year. The next annual rental payment for the assigned acreage in the amount of \$320 was therefore due on or before February 1, 1986. This rental payment was not received until March 8, 1986. Accordingly, pursuant to the provisions of 30 U.S.C. § 188(b) (1982), the lease terminated by operation of law.

By notice dated April 17, 1986, the State Office informed appellant that the subject lease had terminated and advised him of his right to apply for either a class I or a class II reinstatement of the lease. On May 13, 1986, the State Office received a reply from appellant. Appellant stated that he had received notice of the lease termination while he was still in the hospital recovering from an arterial bypass operation. He noted that he had been suffering from cardiac problems since the beginning of the year and that he had seen three doctors before agreeing to a quadruple bypass, which was performed on April 23, 1986. He noted that he had suffered mental distress over the past few months, and asked that his lease be reinstated. He submitted the \$25 dollar filing fee with his letter.

In light of his submissions, particularly the \$25 dollar filing fee, the State Office treated this as a petition for a class I reinstatement. This petition was denied by decision dated May 30, 1986, because the annual rental had not been paid or tendered within 20 days of the anniversary date of the lease, which is an absolute precondition for a class I reinstatement. See Anna Beitman, 94 IBLA 148 (1986). This decision went on to note, however, that the State Office had further determined that appellant was not qualified for a class II reinstatement, holding that the record did not establish that the failure to pay was "inadvertent."

While the decision itself purported to reject reinstatement under class II, the caption of the decision was inconsistent with its wording. Thus, the decision was captioned "Petition for Class I Reinstatement of Lease Under Public Law 91-245 Denied; Conditions for Class II Reinstatement of Lease under Public Law 97-451 Required." This apparently led to some confusion on the part of appellant. Thus, on June 18, 1986, appellant filed a supplemental petition for a class II reinstatement together with one check for \$500 to cover the reinstatement fee and another check of \$130 for publication costs. ^{1/} Together with this petition, appellant submitted an affidavit recounting his medical problems in greater detail. He concluded by noting that "[d]ue to my preoccupation with my health, all of my business responsibilities suffered."

^{1/} We note that appellant did not receive the Apr. 14 notice of lease termination until May 1. Thus, this petition was received within 60 days after receipt by appellant of the initial notice of termination as required by the applicable statutory provision, 30 U.S.C. § 188(d)(2)(B)(i) (1982).

By decision dated August 14, 1986, the State Office again refused to grant a class II reinstatement of the lease. The decision noted:

Class II reinstatement is denied because there is nothing in your Petition for Reinstatement to indicate that you had forgotten or overlooked making a timely rental payment (inadvertence). You have simply indicated that health problems were more pressing and thus took priority over making the payment. This does not constitute inadvertence. Had the surgery been of a sudden, "emergency" nature rather than something which had been deliberated on for several months, it would have constituted a "justified or not due to a lack of reasonable diligence" reason for late payment as addressed in 30 U.S.C. 188(d), 43 CFR 3108.2-2(a)2 and 43 CFR 3108.2-3(a). It would have been sufficient to warrant a Class I reinstatement if the payment had been received with[in] 20 days of the anniversary date or a Class II if the payment was received after that date. Unfortunately, this does not apply to the case at hand regardless of the seriousness of the operation.

Appellant timely took an appeal from this decision.

[1] The initial question to be decided by the Board is whether the State Office was correct in its determination that appellant had failed to show that his failure to timely submit the annual rental was the result of "inadvertence," as that term is employed in 30 U.S.C. § 188(d) (1982).

Since the onset of its adjudications under the Act of May 12, 1970, 84 Stat. 206, this Board has distinguished between actions which constituted reasonable diligence or which supplied a "justifiable" excuse for the failure to exercise reasonable diligence as opposed to those which constituted simple "inadvertence." That Act had, for the first time, granted the Department permanent authority to reinstate terminated leases under specified conditions. In our seminal decision in Louis Samuel, 8 IBLA 268 (1972), we noted that the term "reasonable diligence" meant that the payment was posted at no later date than that on which letters mailed thereon would, despite normal delays in the collection, transmittal, and delivery of mail, be delivered to the appropriate office on or before the due date. Insofar as the "justifiable" standard was concerned, we noted:

It seems reasonably clear that Congress by the word "justifiable" was advertent to a limited number of cases where, owing to factors ordinarily outside of the individual's control, the reasonable diligence test could not be met. This is thus a subjective test, dependent upon the factual milieu of the individual. We believe that cases which are so covered are those where the death or illness of the lessee or member of his close family, occurring with immediate proximity to the anniversary date, have been a causative factor in his failure to exercise reasonable diligence. Coming under this rubric would be natural disasters such as floods, earthquakes and the like. Whether in the individual case these events had the sufficient proximity and causality to fall under the statute is a question in which the various must

be weighed. What is clearly not covered are cases of forgetfulness, simple inadvertence or ignorance of the regulations, or, as in the instant case, inability to pay. [Emphasis in original.]

Id. at 274.

Subsequent to that decision, the Board consistently held that reinstatement was not possible where the failure to exercise reasonable diligence had been caused by simple inadvertence or neglect. ^{2/} In 1983, however, Congress amended the law to permit reinstatement of terminated leases where, inter alia, the lessee was unable to show that the failure to timely pay was not the result of a lack of reasonable diligence or that the lack of diligence was justifiable, so long as the failure to timely pay the rental was "inadvertent."

This Board has had relatively few opportunities to examine the parameters of this latest provision. However, in Dena F. Collins, 86 IBLA 32 (1985), this Board rejected a class II reinstatement of a lease where the lessee had failed to timely pay the rental because of certain financial problems. Thus, appellant had argued that the payment was mailed five days after the due date because she "needed the extra 5 days to obtain the \$320." Id. at 34.

In reversing a decision granting appellant a class II reinstatement, the Board noted:

Appellant's business, financial and personal problems did not involve carelessness, oversight, or the failure to pay careful and prudent attention to the rental due date. In fact, appellant knew the rent was due. She needed the extra time after the anniversary date "to obtain the \$320" rental payment. Thus, appellant's problems were not due to inadvertence, rather she simply was unable to pay the rental on the anniversary date.

Id. at 36. We believe it likely that the State Office may have misapplied the ruling in Collins to the facts of the instant case. ^{3/}

^{2/} We note, in passing, that the decision of the State Office implied that, had an emergency situation been involved with respect to his heart operation, it would have constituted a "'justifiable or not due to a lack of reasonable diligence' reason for late payment." This is not correct. While appellant's medical problems might have been considered a "justifiable" reason for the failure to exercise reasonable diligence, his actions would never constitute the exercise of reasonable diligence. As the Board has repeatedly held, due diligence is an objective standard and only where the payment has been mailed in sufficient time that it should have reached the proper office on or before the due date can the standard be said to have been met. See Melvin P. Clarke, 90 IBLA 95, 99 n.3 (1985).

^{3/} Thus, the decision of the State Office quoted three definitions for inadvertence. All three of these citations had appeared in our Collins decision.

In Collins, the Board was, in essence, dealing with a situation in which an applicant had failed to submit the rental not out of any ignorance but rather because she was financially unable to. Inability to pay is not the same as inadvertence. In the instant case, however, appellant never once suggested that he failed to timely pay because he was short of funds. Rather, he clearly stated that he failed to timely pay because of the emotional trauma caused by on-going medical problems. In this regard, we have no difficulty finding that his failure to pay was inadvertent.

As used in 30 U.S.C. § 188(d) (1982), we believe the term "inadvertence" should be accorded the broadest possible scope consistent with its purpose of affording relief to those who might not qualify for a class I reinstatement. Thus, we believe that, except for those cases in which a lessee lacks the financial ability to submit a rental payment, the only situations which are properly deemed not to be "inadvertent" are those in which the failure to pay represented the knowing and free choice of the lessee. Under this standard, we must find that appellant had established that his failure to timely pay was inadvertent and, thus, appellant was eligible for a class II reinstatement.

[2] Despite this conclusion, we are not able to order that appellant's lease be reinstated. The reason for this is quite simple. Appellant submitted rental for the terminated lease at the rate of \$1 per acre. As we recently held in R. Gerald Jones, 101 IBLA 57 (1988), the back rental necessary as a precondition for reinstating a lease under class II must be paid at the increased rates accruing from the date of termination, i.e., a minimum of \$5 per acre for nonproducing leases and \$10 per acre for producing leases. While appellant submitted the class II reinstatement filing fee and a separate check for the costs of publication of the notice of reinstatement, as directed by BLM, appellant did not submit the rental at the increased rate. This is a mandatory requirement under the regulations. See 43 CFR 3108.2-3(b)(1)(i). Since appellant did not comply with this regulation, it is no longer possible to grant the petition for a class II reinstatement. 4/ Accordingly, while we have reversed the basis of the State

4/ In all candor, we must admit that the notice which appellant received concerning the requirements for a class II reinstatement was scarcely a paradigm of clarity. Thus, while it informed appellant that he was required to submit all "required rental, including any back rental, * * * which has accrued from the date of termination," it did not, by its terms, expressly advise him that the rental must be computed at the reinstated rate, i.e., \$5 per acre. The applicable regulation, however, was quite explicit in noting that reinstatement under class II could be granted only if the "required back rental * * * at the increased rates accruing from the date of termination" was paid within 60 days after receipt of the notice of termination. 43 CFR 3108.2-3(b)(1) (emphasis added). Inasmuch as appellant must be charged with constructive knowledge of this duly promulgated regulation, there could be no basis for the invocation of estoppel in the instant appeal. See Kerogen Crushers, 95 IBLA 63, 64 (1986); Ptarmigan Co., 91 IBLA 113 (1986); John Plutt, Jr., 53 IBLA 313, 318 (1981) (concurring opinion).

Office decision refusing reinstatement of appellant's lease, we must affirm the result.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified herein.

James L. Burski
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member