

**IN THE MINING WARDEN'S COURT
AT SYDNEY
J A BAILEY, CHIEF MINING WARDEN
WEDNESDAY 28TH JUNE 2000**

CASE NO. 1999/131

JOSEF SCHNITZENBAUMER (Applicant)

v.

MINING REGISTRAR (Respondent)

**APPLICATION FOR REVIEW OF A DECISION OF A MINING REGISTRAR
SECTION 206 MINING ACT 1992**

HEARING DATES AT LIGHTNING RIDGE: 16 November 1999
17 November 1999
14 June 2000

DECISION

Mr Josef Schnitzenbaumer, the claimholder of Mineral Claim 17867 at Lightning Ridge, made application for a Review of a Decision of a Mining Registrar, pursuant to Section 206 of the Mining Act 1992, concerning the cancellation of Mineral Claim 17867.

This matter first came before the court at Lightning Ridge on 16 and 17 November 1999. Due to the unavailability of Mr Schnitzenbaumer in March 2000, the matter was adjourned for further evidence on 9 May 2000. The matter did not proceed in May due to a request by Mr Schnitzenbaumer to have the matter adjourned, as he had another hearing in the Supreme Court. The re-hearing of the application commenced on 14 June 2000 at Lightning Ridge Court House.

UNDISPUTED FACTS

Mineral Claim 17867 was first registered in 1987. It was transferred to Mr J Schnitzenbaumer on 21 June 1994.

Condition 1 of the claim states:

“The claim holder must ensure that the mineral claim area is effectively worked to the satisfaction of the Mining Registrar”.

Since the claim was first registered in 1987, there has been a total of seven (7) suspensions of working conditions. On 10 August 1996 the last suspension of working conditions on Mineral Claim 17867 expired. Mr Schnitzenbaumer wrote to the Minister for Mineral Resources on 15 October 1997, requesting suspension of labour conditions. That communication did not specify the mineral claim for which the suspension was required nor did it nominate any period of time for which the work was to be suspended.

On 25 November 1997 the Minister for Mineral Resources wrote to Mr Schnitzenbaumer, informing him that any application for suspension of working conditions must be made on the appropriate form and lodged with the Mining Registrar. On 24 April 1998 Mr

Schnitzenbaumer wrote to the Department of Mineral Resources requesting “exemption of labour conditions for life”.

On 17 March 1999 the Department of Mineral Resources received letters from Eileen Fallon and Graham Pickles; such letters stating that they had not seen any work being done on Mineral Claim 17867 for a period of about 4 years.

Following communications between Mr Schnitzenbaumer and officers of the Department of Mineral Resources, a letter was forwarded to Mr Schnitzenbaumer on 31 August 1999 indicating that a mining registrar had cancelled Mineral Claim 17867.

EVIDENCE OF WITNESSES

The first witness at the Review was Mr Graham Pickles, a local miner, who has lived on a camp site for the past five years, such site being near Mineral Claim 17867.

Mr Pickles indicated that he wrote to the Department on 17 March 1999 complaining that Mineral Claim 17867 had not been effectively worked.

He told the court that he had been working a claim, which adjoins 17867 for the past 12 months. Furthermore, he walks past Mineral Claim 17867 each day when he walks his dog. From his camp site Mr Pickles can see the compressor and hoist which is located on Mr Schnitzenbaumer’s claim. Mr Pickles told the court that he had never seen any fresh dirt or any activities on that site in the whole time that he had been involved in the area. Mr Pickles conceded under cross-examination that he was the person who had over-pegged this claim, not for himself but for another person, Eileen Fallon.

Mr Pickles told the court that he thought it was unfair that he and other people each year had to sign a document indicating that they would effectively work their claim, yet no work had been done on this particular claim for a number of years.

Eileen Marjorie Fallon gave evidence that she also had made a written complaint to the Department of Mineral Resources on 17 March 1999, her complaint being that, in her opinion, Mineral Claim 17867 had not been effectively worked. She indicated that she had been on a claim for about 4 years and such claim was in full view of Mineral Claim 17867. She says she walks her dog twice a day past Mr Schnitzenbaumer's claim and she has never seen any activity on it.

Under cross-examination she told the court she was away from the area about 30 days per year and is absent from the claim while performing her employment duties in a local hotel for about four days per month.

The Mining Registrar at Lightning Ridge, Mr Jeffrey Inman, gave evidence that on 17 March 1999 he inspected Mineral Claim 17867 subsequent to a complaint that had been lodged by Mr Pickles and Ms Fallon. Mr David Howell, Mine Safety Officer, was with him on the day of inspection. Mr Inman spent about half an hour on the claim site. Mr Inman made the following observations:

- There was a hoist, generator and compressor on the site.
- There was a mound of dirt under the hoist; weeds and other vegetation were growing on this heap of opal dirt.
- The hoist runners were rusted and the tarpaulin, which was over a generator, had perished.
- A box trailer, in which sat a generator covered in a perished tarpaulin, was on the site; one of the tyres on the trailer was flat.
- There were cobwebs all over the generator, compressor and hoist.

These same observations were made by the Court when all parties inspected the site prior to receiving evidence from witnesses.

Mr Inman expressed an opinion that from his observations from the surface of the mine, no recent work had been done at all. Mr Inman gave evidence that the phrase

“effectively worked” means that opal bearing dirt is being extracted on a regular basis and is being puddled or dumped.

The final witness for the Department of Mineral Resources was Mr Manny Hatch, Mining Registrar, Sydney. As Mr Schnitzenbaumer had challenged his jurisdiction to cancel the claim, a copy of a Government Gazette outlining the appointment of Mr Hatch as a Mining Registrar was tendered to the court and marked exhibit 7.

Mr Hatch gave evidence of receiving a memo from officers of the Department of Mineral Resources at Lightning Ridge, together with two letters of complaint from members of the public, concerning the lack of work on Mineral Claim 17867. Mr Hatch said that he wrote to Mr Schnitzenbaumer offering him an opportunity to put forward any reasons as to why the claim should not be cancelled.

In summary, Mr Hatch took into account representations made by Mr Schnitzenbaumer, the complaints from members of the public, and a report from Mr Inman. Mr Hatch formed an opinion that the claim ought to be cancelled due to the failure to comply with condition 1 of Mineral Claim 17867, that is, failing to effectively work the claim.

In giving evidence in support of his application for a review, Mr Josef Schnitzenbaumer first of all took issue as to the legal authority of a mining registrar from Sydney to cancel the claim which is within the Lightning Ridge Mining Registrar’s district.

Mr Schnitzenbaumer then moved on to the area of his health. He gave evidence that he was involved in a motor vehicle accident in August 1996 in which his mining associate, Ms Doris Fuller was hospitalised and he was seriously injured. Mr Schnitzenbaumer outlined the difficulties he was having with his back and leg after the accident. He indicated that he was operated on during the following year after the accident. Since the operation he says he has been unable to do any lifting or heavy work; he received a doctor’s report which, to his dismay, indicated he would never work again. He told the

court that he thought he was on his way to mending and expressed an opinion that he would be “good again” in 3 to 4 years.

He told the court that he would, in normal circumstances, have some other person perform the mining work for him but for the fact that the Department of Mineral Resources is continually bringing actions against him. It is his belief that other miners in the area don't wish to work for him because they fear they would be prejudiced themselves by the Department of Mineral Resources. He said to the court: *“When I get the burden of the Mineral Resources off me I will be able to get others to help me”*.

He said he has in fact been doing work on the claim insofar as he has been writing letters to the Department of Mineral Resources and this in itself is performing work in respect of the particular claim.

Under cross-examination Mr Schnitzenbaumer was shown a copy of a letter he wrote to Mr Alec Ramsland of the Department of Mineral Resources. That letter was subsequently marked exhibit 11 in the proceedings. He was asked to explain a portion of that letter which reads: *“I ask for exemption of Labour Condition, for Life in my particular Case, due to Motorcar-accident”*. Mr Schnitzenbaumer indicated that because of his injuries he would have lifelong disabilities. He said to the court: *“I can scratch about and do some work.”*

When it was put to him that he had not worked for 5 years Mr Schnitzenbaumer replied that he had been working “on matters of mining”. It was then put to him that he has not performed any physical work in respect of the claim. His reply was: *“Even if I get rust off a nut on machinery, that is work”*.

Mr Schnitzenbaumer agreed under cross-examination that he had not moved the generator for years, informing the court that he had long leads and there was no need to move the generator.

The next witness in support of the application was Doris Adele Fuller. Ms Fuller has a mining venture with Mr Schnitzenbaumer.

Ms Fuller gave evidence that due to the number of other matters, such as court cases involving her mining interests at Lightning Ridge, in addition to the injuries she received in the motor vehicle accident in 1996, she has been unable to devote her full time to mining. She told the court that she has requested other people to assist in the mining and she keeps being told that they will be available "in a fortnight's time". She indicated that this has gone on for the past six months.

Ms Fuller was asked under cross-examination when she last performed any work on Mineral Claim 17867. She indicated it was March and May 1999. Initially she indicated to the court that she was on the claim, on those occasions, maintaining the site. When subjected to cross-examination as to specifics, she gave evidence of actually being down the mine on a couple of days in 1999, one day in 1998, and could not recall what occurred in 1997. When asked what work she did down the mine, she said: "*I went down the hole and had a pick*". When asked what work she did with a pick in 1999, she replied that she was "*looking to see if anyone had gone over the boundary*".

CONCLUSIONS

Although no medical evidence was called on behalf of Mr Schnitzenbaumer to prove to the court his and Ms Fuller's injuries, the Department of Mineral Resources did not challenge his assertions as to his health during the hearing. I do accept what has been put to the court by both Mr Schnitzenbaumer and Ms Fuller that they received serious injuries in a motor vehicle accident in 1996 and this has drastically impaired their physical ability to climb down a mine shaft and process opal clay.

I accept what the applicant puts to the court insofar as no other miner in the area is willing to enter into agreement to mine this particular claim.

It is clear from the evidence that has been put before the hearing that there has been a breach of Clause 1 of Mineral Claim 17867, that is, the claim has not been effectively worked. Furthermore, the claim has not been effectively worked since August 1996 and it would appear some time before then.

I am satisfied that, on the evidence placed before the hearing, Mineral Claim 17867 will in fact not be effectively worked for many years to come if it remains in the hands of Mr Schnitzenbaumer or Ms Fuller. It would appear on the evidence that Mr Schnitzenbaumer and Ms Fuller will never be able to effectively work Mineral Claim 17867 due to their personal health and their inability to contract with other miners to work Mineral Claim 17867.

It is trite to say the purpose of Condition 1 is to ensure minerals are extracted from the ground as soon as practicable following the grant of a mineral claim. To grant a claim without any requirement to work would be contrary to the spirit and intent of the Mining Act, 1992. Claims are not granted to remain dormant for years.

JURISDICTION OF MINING REGISTRAR

Mr Schnitzenbaumer challenged the jurisdiction of Mr. Hatch, Mining Registrar, Sydney, to cancel a claim that is within the Lightning Ridge Mineral Claims District. He submitted to the court that the only registrar who has the jurisdiction to cancel this particular claim is the Mining Registrar at Lightning Ridge.

It was submitted by the respondent that Section 203 of the Mining Act 1992, establishes the authority for Mr. Hatch to cancel a claim and in this particular instance, sub-section (1) (c) is applicable. It states:

203 Grounds of cancellation

(1) A mining registrar may cancel a mineral claim, as to the whole or any part of the land to which it relates:

(c) if the holder of the claim contravenes any condition of the claim or any provision

The respondent relied upon the wording at the commencement of the section: *A mining registrar.*

Section 203 is within Division 6 of the Mining Act 1992, that division has a heading:

Renewal, transfer and cancellation of mineral claims

The Division provides that applications for renewal and transfer of mineral claims **must** be lodged with the mining registrar for the mining division within which the claim area is situated. It then provides that **the** mining registrar may do certain things with such applications.

However, when the Act refers to cancellations, it does not refer to **the** mining registrar, but it states **a** mining registrar.

It is quite clear that Parliament, when enacting Section 203, intended that any mining registrar within New South Wales could cancel a mineral claim within any mineral claims district within the state.

Consequently, I find that Mr. Hatch, the Mining Registrar, Sydney, has jurisdiction, under the provisions of Section 203 of the Mining Act 1992, to cancel Mineral Claim 17867, which is within the Lightning Ridge Mineral Claims District.

COSTS

An application has been made for the costs of the Department of Mineral Resources. A breakdown of these costs was handed to the court which involves expenses of the Department for the hearings in November 1999 and in June 2000.

It was submitted on behalf of the Department that the Application for a Review had no merit and could be considered vexatious.

Mr Schnitzenbaumer opposed any order for costs and submitted that the court should be awarding costs against the Department. He did not put to the court as to what his costs were.

Section 317 of the Mining Act 1992 provides for a discretion in the warden considering costs. In considering this matter and in the exercise of my discretion I do not propose to make any order for costs.

FINDING

I find against the applicant in respect of his claim that the Mining Registrar Sydney does not have jurisdiction to cancel mineral claim 17867.

I find that the applicant has not complied with Condition 1 of Mineral Claim 17867

I find that a Warden's Court has discretion, as does a mining registrar, when considering whether or not a mineral claim should be cancelled. [See S206(4) and S203(1), Mining Act 1992].

I find on the evidence before me that neither the applicant nor his mining associate, Ms. D. Fuller, due to their ill health, will never be able to personally mine this underground claim to an extent which would satisfy Condition 1 of Mineral Claim 17867.

I find, on the evidence before me, that all attempts by the applicant to have other persons perform mining duties on Mineral Claim 17867 have been fruitless. Furthermore, that the likelihood of either Mr. Schnitzenbaumer or Ms Fuller engaging any person or persons in future to mine Mineral Claim 17867 is so remote it could be considered negligible

Consequently, if Mr Schnitzenbaumer retains Mineral Claim 17867, there is a very high likelihood it will remain unworked during his lifetime.

ACCORDINGLY, THE APPLICATION FOR REVIEW OF THE DECISION OF A MINING REGISTRAR IS DISMISSED.

THE DECISION OF THE MINING REGISTRAR OF 31 AUGUST 1999 IS CONFIRMED.

I RECOMMEND THE MINING REGISTRAR LIGHTNING RIDGE NOT PROCESS ANY PENDING APPLICATION(S) OVER THE AREA COVERED BY MINERAL CLAIM 17867 FOR A PERIOD OF ONE MONTH, TO ALLOW MR SCHNITZENBAUMER TO REMOVE HIS EQUIPMENT FROM THE CLAIM AREA.

NO ORDER AS TO COSTS.