Objection to the Denial of Third Party Excess Liability Fund Claim of Hukill Oil, Inc. Marion County; Claim No. ELF 9412509/FAC ID 15985 2005 OEA 19 (03-F-J-3104)

TOPICS:
third party claims
ELTF
excess liability
first party claimants
Kiel Brothers
FAB
Resolution
de novo

PRESIDING JUDGE:
Gibbs

PARTY REPRESENTATIVES:

Petitioner:	Donn Wray
IDEM:	Anne Patterson
Attorney General:	Tim Junk
Intervenor:	John Van Buskirk

ORDER ISSUED:
March 17, 2005

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE DENIAL OF	)	
THIRD PARTY EXCESS LIABILITY FUND	)	
CLAIM OF HUKILL OIL, INC.	)	CAUSE NO. 03-F-J-3104
MARION COUNTY	)	
CLAIM NO. ELF 9412509/FAC ID 15985	)	
_____	)	
Hukill Oil Company, Inc.	)	
Petitioner,	)	
	)	
Indiana Department of Environmental Management	)	
and the Office of the Attorney General	)	
Respondents,	)	
	)	
GasAmerica Services, Inc.	)	
Intervenor.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court on the Motions for Summary Judgment filed by the Office of the Attorney General (the "AG"), the Indiana Department of Environmental Management (the "IDEM"), Hukill Oil Company, Inc. ("Hukill") and GasAmerica Services, Inc. ("GasAmerica") which pleadings are a part of the Court's record; and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, record of proceedings, evidence, and the briefs, responses and replies of the parties, now finds that judgment may be made upon the record; and the ELJ, by a preponderance of the evidence and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

Findings of Fact

1. The Court adopts and incorporates the Stipulation of Facts filed with the Court on October 6, 2003.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3. Pursuant to IC 4-21.5-3-27(d), "the administrative law judge's experience, technical competence, and specialized knowledge may be used in evaluating evidence."[1]

2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.,* 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.;* I.C. 4-21.5-3-27(d). "*De novo* review" means that:

   > all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

   Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. The OEA may enter judgment for a party if it finds that "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 judgment as a matter of law." IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.,* 725 N.E.2d 949 (Ind.Ct.App. 2000).

5. "The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management,* 806 N.E.2d 14, 20 (Ind.Ct.App. 2004). Courts may consult English language dictionaries to ascertain the plain and ordinary meaning of a statutory term. *Walling v. Appel. Serv. Co.,* 641 N. E.2d 647, 649 (Ind. Ct. App. 1994).

[1] ELJ Gibbs has over 7 years experience with the Excess Liability Trust Fund as an IDEM staff attorney and as corporate counsel for a consulting firm, which dealt primarily with the remediation of underground storage tanks and the Excess Liability Trust Fund.

6. The Court's analysis of this matter must begin with an examination of *Kiel Brothers Oil Company v. IDEM et. al.*, 819 N.E.2d 892 (Ind. Ct. App. 2004).[2] In this case, Kiel Brothers Oil Company ("Kiel") operated a gasoline station on property owned by Hukill Oil Company, Inc. ("Hukill"), the Lessor in this matter. After Kiel Brothers ceased its operations, Hukill continued to operate the station. When contamination was found on the property, Hukill expended funds to clean up the contamination and subsequently applied for and received reimbursement from the Excess Liability Trust Fund (the ELTF). Thereafter, Hukill sued Kiel for contribution. Hukill and Kiel entered into a settlement and Kiel submitted this settlement to the ELTF for reimbursement as a third party claim (with Hukill being the third party). The settlement agreement included the deductible paid by Hukill and costs expended by Hukill in the clean up that had been denied reimbursement by the IDEM. The third party claim was denied because the Attorney General found that Hukill, being the owner of the tanks and property, was not a third party under the ELTF statutes. The OEA, the Marion Superior Court and the Appellate Court all determined that Hukill could not be considered a third party under IC 13-23-8. The Appellate Court adopted the definition of "third party" found in Black's Law Dictionary and states "According to its plain and ordinary meaning, a "third party" is "[a] person other than the principals." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2378 (2002). In fact, Black's Law Dictionary defines the phrase "third party" as "one who is not a party to a lawsuit, agreement, or other transaction but who is somehow involved in the transaction; someone other than the principal parties," i.e., an outside party. BLACK'S LAW DICTIONARY 1489 (7th ed 1999)." at 902. The Court further states, "Lessor cannot simultaneously be a first-party claimant and an "outside party" to the underlying circumstances of the present dispute. Because Lessor was a first-party claimant, it is not a third party . . ." *Kiel Brothers*, 819 N.E.2d at 903.

7. IC 13-23-8-4(e) states, "A transferee of property upon which a tank was located is eligible to receive money from the fund under this section if the transferor of the property was eligible to receive money under this section with respect to the property."[3] In addition, 328 IAC 1-3-1 states, "(a) The following persons may apply to the fund for payment of reimbursable costs or for third party liability claims:

   (1) Tank owners and operators, including a person as described in section 3(d) of this rule.
   (2) Persons assigned the right of reimbursement by any person described in subdivision (1).
   (3) Subsequent owners of the property upon which tanks were located, if the tanks were closed by a previous property owner, tank owner, or operator who is eligible, as specified in IC 13-23-8-4(e).[4]

[2] The Court notes that Appellant has petitioned for transfer. However, as of March 17, 2005, the Supreme Court has not ruled on the petition. Therefore, this case is binding precedent on this issue.
[3] As amended by P.L. 14-2001, §9.
[4] Amendments effective November 17, 2001.

8. Both GasAmerica and TKC are eligible to receive reimbursement for corrective action costs under this law and regulation as *first party claimants.* As such, they are not "third parties".[5]

9. This interpretation is consistent with decisions made under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 et. seq., regarding the definition of a "third party". The Court in *Pantry, Inc. v. Stop-N-Go Foods, Inc.,* 777 F. Supp. 713, 721, (S.D. Ind. 1991) held that the underground storage tanks laws in Indiana were "drafted in the same language and spirit of CERCLA." The cases decided under CERCLA that were cited in the AG's briefs.

10. The ELTF was established to (1) provide financial assurance for tank owners and operators as required by the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et. seq. and (2) to reimburse owners and operators for the costs of corrective action, including legitimate third party claims.

11. Hukill argues that this Court should apply case law that applies to insurance agreements in this matter. Hukill argues that the first purpose of this fund provides support for its argument that the ELTF is insurance and that insurance law should govern. The analogy to insurance law is not persuasive. This is an issue of statutory construction not contract interpretation.

12. Hukill also argues that the AG's decision is contrary to a decision made by IDEM in another case called "Overway Petroleum". However, neither GasAmerica nor Hukill provide any evidence of the decision made in this case other than the unsupported allegations made in their briefs. In addition, neither party provided sufficient detail about the circumstances in this case to persuade this Court that it should adopt Hukill's interpretation in this matter.

[5] As first party claimants, both GasAmerica and TKC can apply to the ELTF for reimbursement of *eligible* corrective action costs. This means that the corrective action must comply with all of the requirements of IC 13-23-8 and IC 13-23-9 and that the costs must be within the ranges of acceptable costs found in 328 IAC 1-3-5.

13. The ELTF also exists to serve a second purpose, that is, to reimburse tank owners and operators for the costs of cleaning up petroleum contamination to the benefit of the general public and the environment.[6] To adopt Hukill's interpretation would divert money from cleaning up the environment to compensating businesses for losses that were foreseeable and undertaken with knowledge of the risk. Proof that the legislature and the Financial Assurance Board intended this fund to be used primarily to reimburse reasonable corrective action costs can be found in the limits placed on reimbursement in IC 13-23-8 and the long list of eligible and ineligible costs adopted under 328 IAC 1-3-3. The amendments to 328 IAC 1-3[7] include limitations on third party claims, such as excluding reimbursement for punitive damages and costs that were previously deemed ineligible for reimbursement.

14. The resolution adopted by the Financial Assurance Board (the FAB) is not dispositive of this matter for 2 reasons. First, the resolution was not properly adopted as a rule and therefore does not have the effect of law. The FAB recently had the opportunity to amend the rules under 328 IAC 1 to reflect this interpretation and choose not to.[8] Second, this Court is required to review this matter *de novo*. In *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management,* 820 N.E.2d 771, 781 (Ind.App. 2005), the Court held that OEA's finding that "Courts, and by extension, administrative adjudicatory agencies, must give considerable deference to an agency's interpretation of the statute it is charged with enforcing" was incorrect and that the decision must be reversed because the presiding ELJ used the wrong standard of review. The Court held that the ELJ must apply a *de novo* standard of review. at 781. Further, the Court, in *Kiel,* held "Moreover, we note that this resolution does not alter our analysis in this case, where the owner was both a first-party claimant and an alleged third party, because we are free to determine any legal question that arises out of the administrative agency's decision and are not bound by its interpretation of the law." The resolution does not have the effect of law and this Court is not bound to the FAB's interpretation.

15. The Court concludes that there is no genuine issue of material fact in this matter and that summary judgment is appropriate.

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[6] At the time of this decision, there are not sufficient funds to reimburse all claims for corrective action costs. While this is not a factor in this decision, it does point out the importance of ensuring that only those costs, which the legislature intended to be reimbursed, are actually reimbursed.

[7] Effective September 30, 2004.

[8] The FAB recently adopted amendments to 315 IAC that became effective on September 30, 2004. This was after the resolution was adopted. However, the FAB did not amend the rules to be consistent with this resolution. 328 IAC 1-3-1(d) was amended to include the following provision, "a person who owns property with a tank is considered a tank owner." The inconsistency between the resolution and the amendments to the rule give support to this Court's interpretation of the statute and rule.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the Motion for Summary Judgment filed by the Indiana Department of Environmental Management and the Office of the Attorney General is **GRANTED** and Hukill Oil Company, Inc.'s Motion for Summary Judgment and GasAmerica Services, Inc.'s Cross Motion for Summary Judgment are **DENIED**.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable rules and statutes. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED THIS 17th day of March, 2005.

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Catherine Gibbs
Environmental Law Judge