

Objection to the Denial of Excess Liability Trust Fund Claim for Bigfoot #101
ELF No. 9201041 / FID No. 99, Seymour, Jackson County, Indiana
2007 OEA 139 (06-F-J-3811)

OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 139, cite this case as
Bigfoot #101 ELTF, 2007 OEA 139.

TOPICS:

attorney's fees
USTs, underground storage tanks
ELTF, Excess Liability Trust Fund
summary judgment
off site access
access agreements
328 IAC 1-3-5
third party claim

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner: David L. Hatchett, Esq.; Thomas W. Baker, Esq.
Hatchett & Hauck, LLP.
IDEM: Julie E. Lang, Esq.

ORDER ISSUED:

July 30, 2007

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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Monitoring well OW-23 is completed in the right-of-way of U.S. 50 (Tipton Street) and was installed in accordance with an INDOT right-of-way permit. Further delineation to the southwest of OW-23 requires access to the Wal-Mart Distribution Center property. AEC contacted representatives from Wal-Mart and at this time, access to the property is still being negotiated between Wal-Mart and Mac's Convenience Stores.

4. The Project Manager for this Site attempted to obtain access to Wal-Mart's property, but was unsuccessful.
5. Thereafter, Mac's retained the law firm of Hatchett and Hauck to negotiate an access agreement with Wal-Mart. The access agreement includes various clauses dealing with damages, indemnification, proof of insurance and required adherence to a multitude of legal provisions, most notably federal laws concerning the employment of persons not legally allowed to work in the United States.
6. On or about July 24, 2006, American submitted on Mac's behalf a request for Excess Liability Trust Fund reimbursement ("ELTF Submittal"). The ELTF Submittal included a request for \$4,298.58 in attorneys fees incurred during the course of negotiating an access agreement to the Wal-Mart property.
7. On or about October 4, 2006, Mac's received the IDEM ELTF Determination letter denying reimbursement of the attorney's fees. The Determination Letter stated the following reason for denial of the attorney's fees:

Legal fees are not eligible for reimbursement, unless the fees are for work performed in defense of a third party claim. Costs incurred by an attorney may be reimbursed at the appropriate level if the attorney is acting as a technical advisor such as a Project Manager. The evidence submitted failed to show that the costs were for either of these exceptions.

8. On October 19, 2006, Mac's filed an appeal of this determination with this Court.

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.
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.

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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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; "*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). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996)."

5. Ind. Code § 13-23-8-1 provides that:

The department, under rules adopted by the underground storage tank financial assurance board under IC 4-22-2, shall use money in the excess liability trust fund, to the extent that money is available in the excess liability trust fund, to pay claims submitted to the department for the following:

- (1) The payment of the costs allowed under IC 13-23-9-2, excluding:
 - (A) liabilities to third parties; and
 - (B) the costs of repairing or replacing an underground storage tank; arising out of releases of petroleum.
- (2) Providing payment of part of the liability of owners and operators of underground petroleum storage tanks:
 - (A) to third parties under IC 13-23-9-3; or
 - (B) for reasonable attorney's fees incurred in defense of a third party liability claim.

6. 328 IAC 1-3-5(b)(1) provides that site characterization costs are reimbursable.
7. Other provisions in 328 IAC 1-3-5 provide that the following corrective action costs are also reimbursable:

Objection to the Denial of Excess Liability Trust Fund Claim for Bigfoot #101
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2007 OEA 139 (06-F-J-3811)

- (b)(8) Any other reimbursable costs the administrator finds to be necessary.
 - (b)(11) The fair market value of the cost to obtain access to off-site property if necessary for site characterization or corrective action.
8. 328 IAC 1-3-5(f) specifies the acceptable hourly rate for various personnel, including, but not limited to the following:
- (1) Principal will do the following:
 - (A) Supervise professional staff.
 - (B) Serve as technical expert on sites.
 - (C) Provide final review of project documents.
 - (D) Limit site visits on projects.
 - (E) Handle legal matters.
 - (F) Coordinate with attorneys.
 - (2) Senior project manager (includes professional geologist, engineer, and hydrogeologist) will provide the following:
 - (A) Project management/oversight.
 - (B) Technical document preparation/review.
 - (C) Coordination with the department, client, and contractors.
 - (D) Hydrogeologic and contaminant modeling.
 - (E) Supervision of investigation/remediation activities.
 - (F) Site access/permitting.
9. 328 IAC 1-6-2 states:
- (d) Third party liability claims subject to approval by the attorney general shall include the reasonable fees or compensation paid for any of the following:
 - (1) Access to properties not controlled by the applicant, if not submitted as a reimbursable cost under 328 IAC 1-3-5.
 - (2) Institutional and engineered controls for off-site properties, including, but not limited to, restrictive covenants as defined under IC 13-11-2-193.5.
 - (3) Attorney's fees, not to exceed twenty-five percent (25%) of the total claim or thirty thousand dollars (\$30,000), whichever is less, shall only be payable if incurred by the owner or operator in defense of a third party liability claim.
10. It is clear that the rules contemplate that it will be necessary to obtain access to properties other than that property which is the source of the contamination. As a necessary activity, the costs associated with obtaining access are reimbursable. The costs associated with obtaining off-site access are reimbursable as either (A) part of a direct claim for site characterization or corrective action costs pursuant to 328 IAC 1-3-5(b)(1) and (11) or (B) under 328 IAC 1-6-2 as part of a third party liability claim.

Objection to the Denial of Excess Liability Trust Fund Claim for Bigfoot #101
ELF No. 9201041 / FID No. 99, Seymour, Jackson County, Indiana
2007 OEA 139 (06-F-J-3811)

11. In this case, the IDEM determined that further delineation of the contamination was necessary in order to complete the site characterization. This determination required that Mac's obtain access to the Wal-Mart property.
12. Attempts to obtain access by non-attorneys were not successful until Hatchett & Hauck were retained to negotiate an access agreement with Wal-Mart.¹ In this case, the agreement with Wal-Mart is a legal document which required representation by an attorney.²
13. The IDEM reimbursed Mac's for the costs that American Environmental personnel incurred in support of Hatchett & Hauck's negotiation of the off-site access agreement. It is unreasonable for IDEM to deny reimbursement for work performed by an attorney when it allows reimbursement for that same work performed by a Project Manager. (See 328 IAC 1-3-5(f)(2) which allows the Project Manager to work on obtaining site access).
14. Given that neither of the parties presented arguments about whether the hourly rate and/or the amount of time spent on this activity were reasonable, the ELJ concludes that the hourly rate of \$195 to \$230 is reasonable. The amount of time spent on this activity also appears to be reasonable.
15. The ELJ concludes that the necessary and reasonable attorney's fees associated with negotiating the off-site access agreement in this case were necessary corrective action costs and are reimbursable from the ELTF at a reasonable hourly rate for the following reasons³:
 - a. That portion of 328 IAC 1-6-2 that allows attorney's fees only in defense of a third party claim is limited to third party liability claims.
 - b. The IDEM ordered Mac's to further delineate the contamination at this Site which necessitated obtaining access to the Wal-Mart property. These costs were necessary site characterization costs and are reimbursable under 328 IAC 1-5-3(b)(1).
 - c. These costs are also reimbursable as necessary costs under 328 IAC 1-5-3(b)(11) and (8).
 - d. The highly legalistic nature of the access agreement necessitated the involvement of an attorney.

¹ It should be obvious that negotiating with Wal-Mart is different than negotiating the same type of agreement with private individuals or even many other businesses because of the size, complexity and probable lack of local control over Wal-Mart's operations.

² The ELJ refuses to decide that negotiation of access agreements is the practice of law and must be conducted by attorneys. There will certainly be many occasions where Project Managers will be able to successfully obtain access without resorting to the use of attorneys.

³ The IDEM has the authority to promulgate rules which specifically define when attorney's fees will be paid by the ELTF. It also has the authority to promulgate rules, and, in the interim, publish non-rule policies, which allow for the reasonable recovery of such fees and to set the rates at which it will reimburse such activity.

Objection to the Denial of Excess Liability Trust Fund Claim for Bigfoot #101
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2007 OEA 139 (06-F-J-3811)

16. An attorney will NOT be necessary every time a claimant seeks access to an off-site property. In addition, the use of an attorney to perform those activities identified as Project Manager, Senior Project Manager or Principal duties will not justify the payment of an hourly rate above the hourly rates specified in 328 IAC 1-3-5.
17. There is no genuine issue as to any material fact in this case and summary judgment is appropriate.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that Mac Convenience Stores LLC's Motion for Summary Judgment is **GRANTED** and the Indiana Department of Environmental Management's Motion for Summary Judgment is **DENIED**. The IDEM is **ORDERED** to reimburse Mac Convenience Stores LLC the sum of \$4,298.58 from the Excess Liability Trust Fund.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. 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 30th day of July, 2007 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge