
OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 47, cite this case as ***Custom Contractors of Evansville*, 2007 OEA 47.**

TOPICS:
Excess Liability Trust Fund ("ELTF")
deductible amount
occurrence
incident, release
estoppel
material difference
waive

PRESIDING JUDGE:
Gibbs

PARTY REPRESENTATIVES:
Petitioner: Monica E. Edwards, Esq., Michael E. DeRienzo, Esq.
Kahn Dees Donovan & Kahn
IDEM: Julie Lang, Esq.

ORDER ISSUED:
April 3, 2007

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 EXCESS	)	
LIABILITY TRUST FUND CLAIM	)	
NO. 9808501-5/FID NO. 5324	)	CAUSE No. 06-F-J-3737
CUSTOM CONTRACTORS OF EVANSVILLE	)	
HAUBSTADT, GIBSON COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court for the final hearing, held on January 31, 2007, of the Petition for Review from the Petitioner, Custom Contractors of Evansville and the Environmental Law Judge having considered the evidence presented at the hearing, now finds that judgment may be made upon the record; and the ELJ, being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

Findings of Fact

1. This matter involves the property known as the Lakeview Truck Stop, located at U.S. Highway 41 and State Road 28 in Haubstadt, Gibson County, Indiana (hereinafter referred to as the "Facility").

2. In November of 1990, the owners of the Facility, Lakeview Truck Stop, Inc., reported a release of petroleum to the Indiana Department of Environmental Management (the "IDEM") from underground storage tanks. This release was assigned an incident number of 199011560. A report regarding this release was submitted to the IDEM in January of 1991. This report was modified in May of 1991.

3. The 1990 release was discovered in the UST pit area.

4. In 1992 and 1993, an investigation of the nature and extent of possible petroleum contamination was conducted. These investigations revealed significant petroleum contamination at the site. No report of a release was made to the IDEM.

5. A new release was reported to IDEM in July of 1998. This release was the result of a leak in one of the gasoline product dispensers. This release was assigned an incident number of 199808501.

6. Each release was discovered in separate areas of the Facility.

7. Lakeview Truck Stop, Inc. (Lakeview) submitted a claim for zero dollars[1] to the Excess Liability Trust Fund (the "ELTF") in December of 2000 under the 1998 incident number. The IDEM notified Lakeview that the Facility was eligible for reimbursement from the ELTF for 84%[2] of the eligible corrective action costs after the payment of a deductible amount of thirty-five thousand dollars ($35,000).

8. Custom Contractors of Evansville (the Petitioner) purchased the property in 2004. The Petitioner submitted a claim for reimbursement (Claim #1[3]) to the ELTF in November of 2004 under the 1998 incident number. Again, the Petitioner was notified that the Facility was eligible to receive 84% of the eligible corrective actions costs after payment of one deductible. The Petitioner requested reimbursement of $127,587.54. The Petitioner received none of this amount as the Petitioner did not have an approved initial site characterization or corrective action plan for this Facility.[4]

9. On April 11, 2005, the IDEM approved the site characterization. All available information, regarding both the 1990 and 1998 releases, was reviewed. The IDEM informed the Petitioner that only costs associated with the 1998 release were eligible for reimbursement. This determination was based on a finding that the 1992 and 1993 releases were not reported.

10. In February of 2005, the Petitioner submitted a claim for zero dollars under the 1990 incident number (Claim #2). The IDEM notified the Petitioner that the Facility was eligible for 92% of the eligible corrective action costs after the payment of a deductible of $35,000. This determination was not appealed to the Office of Environmental Adjudication.

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[1] The claimant did not request any reimbursement of corrective action costs. This action is typically taken in order to get a determination from the IDEM as to the eligibility of the facility.

[2] An owner/operator of an underground storage tank facility must pay an annual tank fee in order to be eligible for reimbursement from the ELTF. If an owner/operator has paid less than 100% of the tank fees (but more than 50%), the owner/operator will be reimbursed for that portion of the tank fees paid. So, in this instance, the owner/operator had paid only 84% of the tank fees and was eligible to receive only 84% of the eligible costs. 328 IAC 1-3-3(b).

[3] Claim numbers were assigned by the ELJ for identification purposes only and, in some instances, do not correspond to the "ELTF submittal number" assigned by the IDEM.

[4] This is a prerequisite to reimbursement pursuant to Ind. Code § 13-23-8-4(a)(4). This determination is not an issue in this cause.

11. Later in 2005, the Petitioner resubmitted the denied claim of $127,587.54 under the 1998 incident number (Claim #3). On November 2, 2005, the IDEM notified the Petitioner that the Facility was eligible for 84% of the eligible corrective action costs after payment of a deductible of $35,000. The IDEM approved $59,334.09[5] for reimbursement, applied the 84% eligibility rate ($49,840.64), subtracted the deductible ($35,000) and sent a check for $14,840.64. The Petitioner did not appeal this determination.

12. In November of 2005, the Petitioner sent its fourth claim to the IDEM for reimbursement (Claim #4). This claim was submitted under the 1998 incident number. This time the Petitioner requested reimbursement of $50,927.21. The IDEM notified the Petitioner that the Facility was eligible to receive 88% of the corrective action costs after the payment of 2 deductibles ($35,000 for each incident for a total of $70,000). The IDEM approved payment of $10,259.45 and this amount was applied to the second deductible. The Petitioner did not appeal this determination.

13. In March of 2006, the Petitioner filed another claim for $40,942.26 (Claim #5) under the 1998 incident number. This claim was approved at 88% eligibility after the payment of two (2) deductibles. The approved amount ($25,758.57) was applied to the remaining deductible amount ($23,598.57). The Petitioner was reimbursed in the amount of $2,160.25.

14. The Petitioner filed a petition for review of IDEM's determination on Claim #5, objecting to IDEM's determination that two deductibles needed to be paid. The petition for review was based upon new evidence discovered by the Petitioner relating to tank tightness tests run on the USTs in 1990.

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. This office 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).

[5] Some costs were disallowed in each claim because the Claimant did not provide adequate back-up documentation or were for work that was not allowed by the ELTF rules or exceeded the cost ranges found in 328 IAC 1-3-5. The IDEM allows claimants to re-submit for reimbursement of these costs. These costs were not an issue in this appeal.

3. The IDEM argues that because the Petitioner did not appeal the determination made in Claim #4, it is estopped from appealing the same decision made in Claim #5. The Office of Environmental Adjudication has addressed in this issue in a prior case[6]; *In the Matter of: Objection to the Denial of ELF Claim 9611125, Circle K Mini Mart, Greenfield, Indiana*, Cause No. 00-F-J-2475, *2000 In Env Lexis 18*. This Office has decided that a previous denial for reimbursement will not prevent a claimant from applying again for reimbursement of the same corrective action costs and appealing a subsequent denial, if it presents new material evidence that the denial was incorrect.[7]

4. In *Circle K Mini Mart, id.,* the claimant had applied for reimbursement of specific costs and been denied. The claimant did not appeal that initial determination. The claimant then re-applied to the ELTF for reimbursement of the same costs, but did not supply any justification or new information in support of the re-application. The second time the claimant was denied reimbursement for the costs, the claimant appealed. The ELJ determined that the claimant was estopped from appealing the second denial because there was no material difference between the first and second application.

5. In this case, the Petitioner did present new evidence in Claim #5 for IDEM's consideration. Therefore, there was a material difference between the claims and Petitioner is not estopped from appealing the denial of Claim #5.[8]

6. Ind. Code § 13-23-8-3 establishes deductible amounts for the underground petroleum storage tank that is involved in the "occurrence for which claims are made".

7. "Occurrence", as defined in 328 IAC 1-1-7, means "an incident that results in a release of petroleum, including a continuous or repeated release of petroleum, from an underground storage tank system."

8. "Deductible amount", under 328 IAC 1-1-4, means "the amount specified in Ind. Code § 3-23-8-3 applicable to each incident number assigned by the department."

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[6] Ind. Code § 4-21.5-3-27(c) provides that conclusions of law "must consider prior final orders of the ultimate authority under the same or similar circumstances if those prior final orders are raised on the record in writing by a party and must state the reasons for deviations from those prior orders." The IDEM cites to the *Benzol Cleaning Company, Inc.* case in its Prehearing Brief. *Circle K Mini Mart* is cited by the ELJ in the *Benzol* order.

[7] However, the doctrine of res judicata could bar a subsequent petition for review once the issues are decided on the merits by the OEA. This was the issue in *In the Matter of: Objection to the Denial of Excess Liability Fund Claim Frank Suverkrup Benzol Cleaning Company, Inc., Columbus, Bartholomew County,* Cause No. 04-F-J-3473 (April 6, 2006).

[8] This conclusion seems appropriate given that the IDEM has made 4 different determinations regarding this Facility's eligibility, obviously relying on different information each time.

9. It is clear from the applicable statutes and regulations that the IDEM has the authority to charge a deductible for each "occurrence". There were two (2) reported occurrences or "incidents" at this Facility, one in 1990 (Incident #199011560) and one in 1998 (Incident #199808501). Each "incident" or release was discovered in separate areas of the Facility.

10. The IDEM asserts that a compromise was reached where the average (88%) of the two percentages (84% and 92%) would be applied and the Facility would be responsible for two deductibles. However, no evidence was presented of this compromise other than the allegations made in IDEM's Pre-hearing Brief. This is insufficient to prove that an agreement binding upon the parties was entered into. However, the IDEM is bound to its determination of 88%.
11. In addition, the Petitioner did not object to the IDEM's determination that the percentage of reimbursement should be 88%[9]; therefore, the Petitioner has waived review of this determination.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Petitioner, Custom Contractors of Evansville, Inc., is eligible for reimbursement from the Excess Liability Trust Fund after the payment of two (2) deductibles at a reduced rate of 88%.

You are hereby further notified that pursuant to provisions of IND. 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 3rd day of April, 2007.

Catherine Gibbs
Environmental Law Judge

[9] The Petition for Review states "The portion of the determination Custom Contractors is appealing is the amount of the deductible." June 22, 2006, page 2.