

**Objection to Denial of Excess Liability Trust Fund Claim No. 20043517 / FID 8478,
Century Oil Marathon, Clermont, Marion County
2009 OEA 24, (04-F-J-3430)**

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 24 cite this case as
Century Oil Marathon, 2009 OEA 24.

TOPICS:

Excess Liability Trust Fund Claim
Motion to Set Aside Final Order
modification of final order
dismissal
dismiss
default
jurisdiction
untimely
30 days
excusable neglect
I.C. § 4-21.5-3-31
I.C. § 4-21.5-3-31(a)(1)
315 IAC 1-3-1(b)(18)
Ind. Trial Rule 60(B)

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

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

ORDER ISSUED:

April 2, 2009

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	

IN THE MATTER OF:)	
)	
OBJECTION TO DENIAL OF)	
EXCESS LIABILITY TRUST FUND)	
CLAIM NO. 20043517 / FAC. ID NO. 8478)	Cause No. 04-F-J-3430
CENTURY OIL MARATHON)	
CLERMONT, MARION COUNTY, INDIANA)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL ORDER

This matter came before the Office of Environmental Adjudication (“OEA”) on July 20, 2007 when Century Oil Company (“Century”) filed a Motion to Set Aside Final Order Granting Dismissal of Petition for Review entered on June 13, 2007. The Environmental Law Judge (“ELJ”) having considered the parties’ response, reply, petitions, evidence, and pleadings, now finds that judgment may be made upon the record. The ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. On August 23, 2004, the Indiana Department of Environmental Management (“IDEM”) sent written notice to Century Oil Company, Attn: Jonathan Bottorf of Lee & Ryan Environmental Services, Inc., of IDEM’s decision to deny Excess Liability Trust Fund (“ELTF”) reimbursement until Century obtained “approval of a site characterization and/or a corrective action plan.”
2. Pursuant to I.C. § 4-21.5-3, *et seq.*, Century and Lee & Ryan Environmental Services, Inc. (“Lee & Ryan”) timely filed a Petition for Review with OEA on September 2, 2004. Century had assigned its right to ELTF reimbursement to Lee & Ryan pursuant to I.C. § 13-23-8-4(d).
3. On December 15, 2006, this Court issued an Order to Submit Status Report. The order required the parties to submit a Status Report on or before March 8, 2007. The Order was sent via U.S. Mail, First Class, postage prepaid. The Court received no indication that service failed and the mail was not returned. No party requested a schedule change.
4. A review of the Court’s file indicates that Petitioner filed no further documents with the Court and the Court issued no Orders after December 15, 2006.

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5. On May 15, 2007, IDEM filed a Motion for Default or Dismissal for Failure to Take Action, based on Century's failure to file a Status Report by March 8, 2007. Per its Motion, IDEM stated that it had attempted to contact Petitioner without response.
6. On May 16, 2007, this Court issued a Notice of Proposed Order of Default to Century for failure to comply with the December 15, 2006 Order to Submit Status Report. The Notice of Proposed Order of Default was sent to Lee & Ryan on May 16, 2007 via U.S. Mail, First Class, postage prepaid, and by certified mail, article number 7003 3110 0003 5633 1714. The notice sent via first class mail was not returned to the Court. A domestic return receipt for the notice sent via certified mail was returned having been signed on May 18, 2007. The Petitioner did not file any objection or response to the Court's May 16, 2007 notice.
7. On June 13, 2007, this Court issued a Final Order Granting Dismissal of Petition for Review ("Dismissal") pursuant to 315 IAC 1-3-7 and -8. The Petition for Review was dismissed with prejudice and all further proceedings before this Court were vacated. The Dismissal was sent to Lee & Ryan via certified mail, article number 7003 3110 0004 5107 1768. A domestic return receipt for the notice sent via certified mail was signed on June 15, 2007 and returned to OEA.
8. The Dismissal stated that it was a final order and, informed Century that, pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of the Dismissal must be filed with a civil court of competent jurisdiction within thirty (30) days of receiving service in order to be timely.
9. On July 20, 2007, Century filed a Motion to Set Aside Final Order Granting Dismissal of Petition for Review ("Century's Motion") with this Court. Century had been represented by Lee & Ryan; its Motion stated that it was now represented by legal counsel. Century requested that this Court set aside the Dismissal pursuant to Ind. Trial Rule 60(B) on the grounds of excusable neglect. Century argues that the circumstances support a finding of excusable neglect since the Lee & Ryan employee responsible for monitoring this case ended his employment with Lee & Ryan shortly before the Dismissal was issued. Century further asserts that it became aware of the litigation of this case after entry of the Final Order.
10. Per the Court's schedule, IDEM filed a response to Century's Motion with this Court on August 17, 2007. Century filed a reply with this Court on August 31, 2007.

CONCLUSIONS OF LAW

1. The OEA has jurisdiction over decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. I.C. § 4-21.5-3, *et seq.*, and I.C. § 4-21.5-7 allow the OEA to promulgate rules and standards in order to allow it to conduct its duties.

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2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27, and 315 IAC 1-2-1(9). 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. The issue in this matter is whether this ELJ has the authority to set aside the final order in this cause. Proceedings in the OEA are governed by the Administrative Orders and Procedures Act (“AOPA”), I.C. § 4-21.5, *et seq.*, and by the procedural rules promulgated by OEA at 315 IAC 1, *et seq.*
4. I.C. § 4-21.5-3-31 expressly provides that a final order may be modified as follows:
 - (a) An agency has jurisdiction to modify a final order under this section before the earlier of the following:
 - (1) Thirty (30) days after the agency has served the final order under section 27, 29, or 30 of this chapter.
 - (2) Another agency assumes jurisdiction over the final order under section 30 of this chapter.
 - (3) A court assumes jurisdiction over the final order under I.C. § 4-21.5-5.
 - (b) A party may petition the ultimate authority for an agency for a stay of effectiveness of a final order. The ultimate authority or its designee may, before or after the order becomes effective, stay the final order in whole or in part.
 - (c) A party may petition the ultimate authority for an agency for a rehearing of a final order. The ultimate authority or its designee may grant a petition for rehearing only if the petitioning party demonstrates that:
 - (1) the party is not in default under this chapter;
 - (2) newly discovered material evidence exists; and
 - (3) the evidence could not, by due diligence, have been discovered and produced at the hearing in the proceeding. The rehearing may be limited to the issues directly affected by the newly discovered evidence. If the rehearing is conducted by a person other than the ultimate authority, section 29 of this chapter applies to review of the order resulting from the rehearing.
 - (d) Clerical mistakes and other errors resulting from oversight or omission in a final order or other part of the record of a proceeding may be corrected by an ultimate authority or its designee on the motion of any party or on the motion of the ultimate authority or its designee.
 - (e) An action of a petitioning party or an agency under this section neither tolls the period in which a party may object to a second agency under section 30 of this chapter nor tolls the period in which a party may petition for judicial review under I.C. § 4-21.5-5. However, if a rehearing is granted under subsection (c), these periods are tolled and a new period begins on the date that a new final order is served.

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5. Under Indiana Rules of Trial Procedure 60(B), a default judgment may be overturned upon a showing of excusable neglect. However, pursuant to 315 IAC 1-3-1(b)(18), the ELJ may apply the Indiana Rules of Trial Procedure only where not inconsistent with AOPA or Title 315. T.R. 60(B) is clearly inconsistent with the time limitations found in I.C. § 4-21.5-3-31. The Court may not apply T.R. 60(B) in this case, but must apply the requirements stated in I.C. § 4-21.5-3-31.
6. The rules of statutory construction provide that statutory language must be given its plain and ordinary meaning. “When construing the language of a statute, the Court of Appeals is bound to apply the plain and ordinary meaning of words and phrases.” *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193, 205 (Ind. Ct. App. 1996).
7. I.C. § 4-21.5-3-31 expressly allows for the modification of a final order within thirty (30) days if no other agency or court subsequently assumed jurisdiction. Since OEA is the ultimate administrative authority, another court would assume jurisdiction if a party petitioned for judicial review. No petition for judicial review was filed. Therefore, no other agency or court has assumed jurisdiction. The OEA maintained authority to modify the final order within, but not after, thirty (30) days of the parties receiving notice.
8. Century’s Motion was filed with OEA more thirty (30) days after the final order was issued. The Dismissal was issued by this Court on June 13, 2007 and Century received notice on June 15, 2007 when a representative of Lee & Ryan signed the domestic return receipt. Century’s Motion was not filed with OEA until July 20, 2007, more than thirty (30) days after receiving notice. Under the plain and ordinary meaning of I.C. § 4-21.5-3-31, the OEA’s jurisdiction to modify a final order expires after the thirty (30) day deadline.
9. OEA lost jurisdiction to modify the final order in this matter once Century failed to file its Motion within thirty (30) days of receiving notice of the final order as is required by I.C. § 4-21.5-3-31. Therefore, Century’s Motion should be denied.

FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that:

1. Century failed to timely file its Motion to Set Aside Final Order and, therefore, this Court does not have jurisdiction to consider the matter.
2. This Court may not invoke T.R. 60(B) to set aside a final order since applying T.R. 60(B) in this case would be clearly inconsistent with the I.C. § 4-21.5-3-31(a)(1) time limitation.

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IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's Motion to Set Aside Final Order is **DENIED**. Judgment is entered in favor of IDEM and against Petitioners. Petitioners' Petition for Review is therefore **DISMISSED**. All further proceedings before the Office of Environmental Adjudication are hereby **VACATED**.

You are further notified that pursuant to provisions of I.C. § 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 a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 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 2nd day of April, 2009 in Indianapolis, Indiana.

Hon. Mary L. Davidsen
Chief Environmental Law Judge