

Objections to the Denial of Excess Liability Trust Fund Claim
ELTF #200004502-16 / FID #11136
Ohio Farmers Insurance Co.
2018 OEA 39 (17-F-J-4969)

OFFICIAL SHORT CITATION NAME: When referring to 2018 OEA 39, cite this case as
Ohio Farmers Ins., 2018 OEA 39.

TOPICS:

Summary judgment
Excess liability trust fund
Denial of reimbursement
328 IAC 1-3-1(c)
Timeliness
Statutory construction
Receipt of decision
Resubmittal
I.C. §13-23-8-7(a)

PRESIDING JUDGE: Catherine Gibbs

PARTY REPRESENTATIVES:

Counsel for IDEM:
Petitioner:

Clark Kirkman
Rebecca J. Maas

ORDER ISSUED:

June 13, 2018

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[None]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE DENIAL OF EXCESS)
LIABILITY TRUST FUND CLAIM) CAUSE NO. 17-F-J-4969
ELTF #200004502-16 / FID #11136)
OHIO FARMERS INSURANCE CO.)
FOWLER, BENTON COUNTY, INDIANA)

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER

The Office of Environmental Adjudication (the OEA), having read the record, the motions, responses and replies, enters the following findings of fact and conclusions of law and final order.

Findings of Fact

1. Ohio Farmers Insurance Company¹ (Ohio Farmers) sought reimbursement of corrective action costs incurred for the remediation of petroleum released from underground storage tanks at a facility referred to as “vacant gas station” located at 209 West US 52 Bypass, Fowler, Benton County, Indiana.
2. On April 6, 2016, Ohio Farmers submitted an application for reimbursement. The application designated Ohio Farmers as the applicant and William Delaney as the “contact person concerning claim issues.”
3. On August 2, 2016, the Indiana Department of Environmental Management (IDEM) issued a letter granting partial reimbursement of corrective action costs (Claim #14). IDEM denied a total of \$227,790.56. This letter was addressed to William Delaney and mailed to Ohio Farmers’ address. Mr. Delaney worked for ECC Horizon, Ohio Farmers’ consultant.
4. Ohio Farmers received the August 2, 2016 letter on August 8, 2016.
5. On August 7, 2017, ECC Horizon, on Ohio Farmers’ behalf, resubmitted an application for reimbursement of \$162,624.08 of the denied costs (Claim #16).

¹ The owners of the facility had arranged to have reimbursement sent to Ohio Farmers.

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6. On September 6, 2017, IDEM denied reimbursement of all of Claim #16 for the reason that Claim #16 had not been timely submitted pursuant to 328 IAC 1-3-5. Ohio Farmers timely petitioned for review of this denial on September 25, 2017. This matter was assigned Cause No. 17-F-J-4969.
7. On August 7, 2017, ECC Horizon, on Ohio Farmers' behalf, resubmitted an application for reimbursement of \$8,631.38 of the denied costs (Claim #17).
8. On September 6, 2017, IDEM denied reimbursement of all of Claim #17 for the reason that Claim #16 had not been timely submitted pursuant to 328 IAC 1-3-5. Ohio Farmers timely petitioned for review of this denial on September 25, 2017. This matter was assigned Cause No. 17-F-J-4970.
9. Cause No. 17-F-J-4969 and 17-F-J-4970 were consolidated under Cause No. 17-F-J-4969 on October 17, 2017.
10. Both IDEM and Ohio Farmers filed Motions for Summary Judgment on April 9, 2018. IDEM filed its Response to Ohio Farmers' Motion for Summary Judgment on May 7, 2018.

Conclusions of Law

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code (I.C.) § 13-13, *et seq.* 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 I.C. § 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.
3. 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 issues 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 shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine

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issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 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. Each party has requested summary judgment in this matter. “The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992) *see also*; *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).
6. IDEM denied the resubmittal on the basis that the resubmittals were untimely in accordance with 328 IAC 1-3-1(c).² This rule states:
 - (c) All claims for payment of reimbursable costs must be submitted within nine (9) months after the fund qualifying occurrence is granted a status of no further action (NFA) by the administrator. All resubmittals associated with any disallowed cost must be received by the department within twelve (12) months after the denial of the claim.
7. There are no facts in dispute here. The parties agree on when these events occurred. The sole question is the interpretation of 328 IAC 1-3-1(c). Ohio Farmers argues that the rule should be interpreted that the twelve months should start on the date that the denial is received by the claimant rather than the date IDEM issues the denial.
8. “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). The same rules that govern construction of statutes also govern construction of rules. *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996).
9. The rule is clear and unambiguous that resubmittals must be received by IDEM within twelve months of the denial. The only logical interpretation is that the denial is made on the date that IDEM issues its decision. This is consistent with the Administrative Orders and Procedures Act (AOPA, I.C. §4-21.5-3 *et seq.*), which calculates deadlines from the date on which an agency decision is served. Any other interpretation would also create a logistical problem for IDEM, requiring IDEM to issue decisions via certified mail and to track receipt.

² 328 IAC 1-3-1(c) was promulgated in 2011.

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10. Ohio Farmers argues that the denial was confusing because (1) the method of specifying the date of issuance was confusing and (2) the letter was addressed to William Delaney, who did not work for Ohio Farmers. The August 2, 2016 letter, *as issued by IDEM*, was clearly marked with the date “August 2, 2016”. However, Ohio Farmers, upon receipt, stamped the letter as received on August 8, 2016. The letter was addressed to the contact person identified by Ohio Farmers. Any confusion was created by Ohio Farmers.
11. Ohio Farmers’ argument might be more persuasive if it could show that this confusion about the date of the denial had any impact on the timely resubmission of Claims #16 and 17 and therefore, might constitute grounds for estoppel. However, the rule allows for 12 months. At the most, any confusion created by the alleged misdirection of the August 2, 2016 letter to Mr. Delaney would be 7 to 10 days, which could be significant if the deadline for resubmittals was significantly less. However, Ohio Farmers makes no argument that it did not have sufficient time to compile the information needed for resubmission. The rule does not allow for an extension of time and must be enforced as it is written. Given that I.C. §13-23-8-7(a) is clear that “a claimant does not have an enforceable right to the payment of a claim under this chapter”, Ohio Farmers’ plea for leniency must fail.
12. The rule is clear that resubmittals must be received by IDEM within 12 months of the denial of the claim. IDEM denied Claim #14 on August 2, 2016. The resubmittals (Claims #16 and 17) were received by IDEM August 7, 2017. The resubmittals were not timely. IDEM’s denials were correct.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED IDEM’s Motion for Summary Judgment is **GRANTED**.

You are further notified that pursuant to provisions of Ind. Code (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. 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 13th day of June, 2018 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge