



OCT 15 2001



# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod  
Chief Administrative Law Judge

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STATE OF INDIANA        )  
                                  ) SS:  
COUNTY OF MARION     )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:                     )  
  )  
COMMISSIONER, INDIANA                )  
DEPARTMENT OF ENVIRONMENTAL        )  
MANAGEMENT,                            )  
    Complainant,                         )  
                  v.                         )  
DOMINIC PITZEL,                         )  
    Respondent.                         )

CAUSE NO. 99-S-E-2362

## FINAL ORDER OF DISMISSAL

### FINDINGS OF FACT

1. Though insufficient evidence was provided to establish the point as a matter of law, Respondent claimed to be in a motorcycle accident on June 25, 1999 followed by three days in a coma and two and a half weeks in the hospital. Applying the axiomatic dispositional motion standard of giving the benefit of any disputed facts to the non-moving party, the Court chooses not to address the defects in evidence inasmuch as the outcome of any such analysis would be irrelevant to the ultimate disposition of this case. It may be assumed for the limited purpose of considering the pending motion to dismiss that Respondent's claims regarding a motorcycle accident and his medical care are true.

2. Respondent received an appealable Commissioner's Order on July 12, 1999 as demonstrated by Complainant's postal return receipt numbered Z- 495-497-330.

3. Indiana Code 13-30-3-5(a)(2) requires that a petition for review of a Commissioner's Order must be filed before the twentieth day after receiving the Commissioner's Order, and that such a petition, if any, must be filed with the Indiana Office of Environmental Adjudication(OEA). The Commissioner's Order here in question indicated clearly the proper address and time period required for filing a petition for review with the OEA.

4. By calculation governed by Indiana Code 4-21.5-3-2, Respondent must have properly filed a petition for review, if at all, before August 3, 1999.

5. A letter that Respondent might have intended to be both a petition for review and a motion for continuance was received by the Commissioner's Office of the Indiana Department of Environmental Management (IDEM) on July 29, 1999. The IDEM forwarded Respondent's letter to the OEA and it was received at OEA on August 5, 1999.

#### CONCLUSIONS OF LAW

1. Based upon its own research, this Court concludes that there is no legal duty imposed on the IDEM requiring the agency to forward misfiled petitions, such as Respondent's, to the OEA.

2. The Court has compassion for Respondent's injuries; however, Respondent was able to contact the IDEM by letter after his accident but before August 3, 1999 and therefore demonstrated he was capable of filing a petition for review with OEA before August 3, 1999 had he followed the instructions given to him at the conclusion of the IDEM Commissioner's Order here in question. In order to support a tolling of an administrative statute of limitations, one must show that he is "entirely incapable" of filing a timely petition. *Barnhart v. United States*, 884 F.2d 295, 300 (7<sup>th</sup> Cir. 1989)(holding that patient's timely civil suit against drug manufacturer precluded the argument that he was entirely incapable of meeting the concurrent deadline for administrative appeal against the Veterans Administration Hospital). Administrative filing deadlines are to be strictly construed. *Wayne Metal Products Co. v. IDEM*, 721 N.E.2d 316, 319.

3. Therefore, Complainant's motion to dismiss is **GRANTED** and Respondent Dominic Pitzel's petition for administrative review is hereby **DISMISSED** on the above stated grounds.

4. You are further notified that, pursuant to Indiana Code 4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code 4-21.5-5, 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** in Indianapolis, Indiana, this 15<sup>th</sup> day of October, 2001.

Wayne E. Penrod, Chief  
Administrative Law Judge