Objection to Denial of Excess Liability Trust Fund Claim No. 200107501,
Milk Barn, Anderson, Madison County, Indiana.
2008 OEA 92 (03-F-J-3174)

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 92 cite this case as *Milk Barn,* **2008 OEA 92.**

TOPICS:
Excess Liability Trust Fund Claim
cost
reimburse
work performed prior
date of release
reported
petroleum release
Leaking Underground Storage Tank
Phase II Site Inspection
Corrective action plan
summary judgment
cross motion
Ind. Trial Rule 36
IC 4-21.5-3-23
IC 13-23-8-4(b)
IC 13-23-9-2
315 IAC 1-3-3
328 IAC 1

PRESIDING JUDGE:
Davidsen

PARTY REPRESENTATIVES:
Claimant: David L. Hatchett, Esq.; Thomas W. Baker, Esq.
IDEM: Julie E. Lang, Esq.

ORDER ISSUED:
July 24, 2008

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

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2008 OEA 92 (03-F-J-3174)

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. 200107501/FID NO. 2499	)	CAUSE NO. 03-F-J-3174
MILK BARN, ANDERSON,	)	
MADISON COUNTY, INDIANA.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter is before the Court pursuant to a Motion for Summary Judgment ("Motion") filed by Petitioner/Claimant Lee & Ryan Environmental Consulting, Inc. ("Lee & Ryan" or "Petitioner"), and a cross motion filed by Respondent, Indiana Department of Environmental Management ("IDEM") as to whether any genuine issues of material fact exist as to IDEM's denial of Excess Liability Trust Fund Claim No. 200107501, on the basis that costs for work performed prior to the date the release was reported to IDEM are not reimbursable. The Chief Environmental Law Judge ("ELJ") having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief 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. The site at issue in this cause is a convenience store and gas station at 1002 Nichol, Anderson, Indiana ("Site"). Everybody's Oil Company ("Everybody's Oil") owns and operates the Site facilities, currently and at all times relevant to the issues in controversy in this case. On or about June 20, 2001, a petroleum release at the Site was reported. On or about January 16, 2003, per an assignment of rights from Everybody's Oil, Lee & Ryan applied for reimbursement ("ELTF Submittal") from the Excess Liability Trust Fund ("ELTF") for work performed at the Site between May 24, 2001 and June 22, 2001. *Motion, p. 1.*

2. As part of its ELTF Submittal, Lee & Ryan provided the following Executive Summary to the LUST site investigation: [Lee & Ryan] was retained by [Everybody's Oil] to perform a Leaking Underground Storage Tank (LUST) Site Investigation at Everybody's Oil facility . . . The LUST Site Investigation was performed to determine the nature and extent of petroleum Impacted soil and groundwater discovered during a Phase II subsurface investigation. The release was reported to the IDEM LUST Section on June 20, 2001. IDEM assigned the site incident number 200107501 and a medium priority ranking. On May 31, 2001 Lee & Ryan conducted a Phase II Subsurface Investigation as part of Everybody's Oil's

corporate policy to assess the potential of soil and/or groundwater contamination resulting from the operation of current UST systems located at the aforementioned facility. During the Phase II Subsurface Investigation, Lee & Ryan installed eight soil borings, collected soil samples from each of the borings and groundwater samples from two of the borings for laboratory analysis. As part of the LUST Site Investigation, Lee & Ryan installed 11 additional soil borings, three of which were subsequently converted to monitoring wells, between July 12, 2001 and August 1, 2001. *Motion, Ex. B.*

3. After its review, IDEM issued an August 27, 2003 determination ("Determination") denying the amount of $8,894.81, a portion of Lee & Ryan's ELTF submittal. The denied costs were for work performed during a Phase II subsurface investigation conducted prior to the reporting of a release to IDEM. *Motion, Ex. C, Milk Barn Initial Incident Report; Exs. E and F, Lee & Ryan Invoices 4148, 4349; Ex. B, Lust Site Investigation Report.* IDEM's Determination stated that the reason for denial was "costs for work performed prior to the date the release was reported to IDEM are not reimbursable." *Determination, p. 4.*

4. On September 9, 2003, Lee & Ryan timely filed a Petition for Administrative Review of IDEM's August 27, 2003 Determination of ineligibility.

5. On April 13, 2005, Lee & Ryan filed its Motion for Summary Judgment. Respondent, IDEM, filed its May 19, 2005 Response in Opposition to Lee & Ryan's Motion for Summary Judgment and Cross Motion for Summary Judgment. In its June 17, 2005 supporting Reply, Lee & Ryan moved to strike IDEM's Cross Motion for Summary Judgment. On May 29, 2008, IDEM filed a supplemental opposing brief; Lee & Ryan's supplemental response was filed on June 20, 2008. The parties fully briefed their positions on summary judgment, and did not request oral argument. Lee & Ryan filed its Proposed Findings of Fact, Conclusions of Law and Order on June 24, 2005.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3. IC 4-21.5-3, *et seq.,* and 4-21.5-7 allow the OEA to promulgate rules and standards in order to allow it to conduct its duties.

2. This is a Final Order issued pursuant to IC 4-21.5-3-23, IC 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. In this case, Lee & Ryan moved for summary judgment, and IDEM cross-moved, as to whether any genuine issues of material fact exist as to IDEM's denial of Excess Liability Trust Fund Claim No. 200107501, on the basis that costs for work performed between May 24, 2001 and June 22, 2001, were prior to the June 20, 2001 date the release was reported to IDEM and are thus not reimbursable.

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; *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App 1998); Ind. T.R. 56(C).

5. The moving party bears the burden of establishing that summary judgment is appropriate. "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. of Voters Registration,* 585 N.E.2d 700, 703-04 (Ind. Ct. App. 1992). "A factual issue is said to be "genuine" if a trier of fact is required to resolve the opposing parties differing versions of the underlying facts." *York v. Union Carbide Corp.,* 586 N.E.2d 861, 864 (Ind. Ct. App. 1992). A fact is "material" if it helps to prove or disprove an essential element of plaintiff's cause of action. *Weida v. Dowden,* 664 N.E.2d 742, 747 (Ind. Ct. App. 1996). 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); *State v. Livengood,* 688 N.E.2d 189, 192 (Ind. Ct. App. 1997). The moving party must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospital of Indianapolis,* 567 N.E.2d 842, 843 (Ind. Ct. App. 1991), *citing Elkhart Community School Corp. v. Mills,* 546 N.E.2d 854 (Ind. Ct. App. 1989). A moving party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara,* 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan v. Snap-On Tool Corp.,* 478 N.E.2d 116, 122 (Ind. Ct. App. 1985). Factual disputes that are irrelevant or unnecessary will not be considered. *Owen v. Vaughn,* 479 N.E.2d 83, 87 (Ind. Ct. App. 1985). Once each moving party sets out a *prima facie* case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue.

6. "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, (Ind. Ct. App. 1992), 703-704. In this case, each party has the burden of showing whether IDEM's determination to deny a portion of Lee & Ryan's ELTF Claim No. 200107501, on the basis that costs for work performed between May 24, 2001 and June 22, 2001, were prior to the June 20, 2001 date the release was reported to IDEM and are thus not reimbursable, either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *AquaSource Services and Technology*, 2002 OEA 41, 44. Each movant has the burden of proof, persuasion and of going forward on its motion for summary judgment. IC 4-21.5-3-14(c); IC 4-21.5-3-23. In this case, Lee & Ryan has the burden of showing that no genuine issue of material facts exists that IDEM's ELFT claim Determination was contrary to law or is somehow deficient so as to require revocation, as a matter of law; IDEM bears a similar burden that no genuine issue of material fact exists on the validity of its determination, as a matter of law.

7. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. IC 4-21.5-3-27(d); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "*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).

8. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also,* IC 4-21.5-3-27(d). While the parties disputed whether IDEM properly denied of ELTF claim Claim No. 200107501, on the basis that costs for work performed between May 24, 2001 and June 22, 2001, were prior to the June 20, 2001 date the release was reported to IDEM and are thus not reimbursable, OEA is authorized "to make a determination from the affidavits . . . leadings or evidence." IC § 4-21.5-3- 23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47,* 2004 OEA 123, 129. *See also, Blue River Valley*, 2005 OEA 1, 11-12. *Marathon Point Service and Winimac Service,* 2005 OEA 26, 41.

9. ELTF was established to provide "a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under IC 13-23-13-8 for corrective action." IC 13-23-7-1(2). In cases not involving third-party liability suits, the ELTF may only reimburse "costs allowed under IC 13-23-9-2 . . . arising out of releases of petroleum." IC 13-23-8-1(1). The ELFT reimbursements compensate work that "concerns the elimination or mitigation of a release of petroleum from an underground storage tank . . . including release investigation." IC 12-23-9-2(b)(3)(A). IDEM based its ELFT Determination on the fact that Lee & Ryan discovered the release in the course of conducting a Phase II Site Investigation. IDEM asserted that a compensable release can occur only after a release has been found and reported, usually as part of a site investigation/characterization performed after contamination is discovered and reported to IDEM. IDEM contends that a Phase II site investigation is not a release investigation, but is an assessment to determine if there is petroleum contamination at a site; Indiana law does not provide ELTF compensation for costs incurred arising from contamination discovered in the course of a Phase II site investigation.

10. For an ELTF claim to be reimbursed, IC 13-23-8-4(b) requires "An owner, operator, or transferee of property under subsection (e) is eligible to receive money from the fund before the owner, operator, or transferee has a corrective action plan approved or deemed approved if:

    (1) the work for which payment is sought under IC 13-23-9-2 was an initial response to a petroleum release that created the need for emergency action to abate an immediate threat of harm to human health, property, or the environment;
    (2) the work is for a site characterization completed in accordance with 329 IAC 5; or
    (3) [IDEM] has not acted upon a corrective action plan submitted under IC 13-23-9-2 within ninety (90) days after the date [IDEM] receives the:
        (A) plan; or
        (B) application to the fund; whichever is later.

11. 329 IAC 5 provides numerous technical requirements applicable to actions to be taken on-site, or to be included in a site characterization.

12. IC 13-23-9-2-(b)(3) provides that to receive money for an ELTF claim, the ELTF administrator must determine that the work performed concerns the elimination or mitigation of a release, including a release investigation. IC 13-23-9-2(d) requires that the ELTF "administrator shall notify the claimant of an approval or a denial of a request made under subsection (b) . . . Except as provided in subsection (f), the administrator shall notify the claimant of all reasons for a denial or partial denial."

13. A statute's meaning is controlled by its express language. *Chavis v. Patton*, 683 N.E.2d 253, 257 (Ind. Ct. App. 1997). A court may not read into a statute that which is not the expressed intent of the legislature. *State v. Derossett*, 714 N.E.2d 205 (Ind. App. 1999). Instead, a court is to ascertain and give effect to the legislature's intent, *Hendrix v. State,* 759 N.E.2d 1045 (Ind. 2001), and to do so in a way so as to prevent absurdity and hardship, and to favor public convenience. *Livingston v. Fast Cash USA, Inc.,* 753 N.E.2d 572, 575 (Ind. 2001). When a statute or regulation is clear and unambiguous on its fact, the court does not need to "apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense." *St. Vincent Hosp & Health Care Ctr., Inc., v. Steele,* 766 N.E.2d 699, 703-04 (Ind. 2002.)

14. IDEM's Determination was silent as to the terms or cites to the above statutes. Both statutes are silent as to the timing of work performed relative to the discovery of the release, but through reference to specific work noted in 329 IAC 5, focus instead on the type of work performed.

15. IC 13-23-8-4(b) does not address what costs may be reimbursed, but limits reimbursement to when costs may be submitted to IDEM: before a corrective action plan is approved. The terms of this statute protect the ELTF for costs for actual remediation, instead of investigative costs or costs for emergency measures incurred before IDEM approves a corrective action plan. Lee & Ryan's ELTF submittal did not include actual remediation costs and is therefore not eligible for denial under this statute.

16. IC 13-23-9-2(b)(3) does not contain language limiting reimbursement to costs incurred prior to release reporting or discovery. IC 12-23-9-2(b)(3) further applies "only after receiving a corrective action plan"; no evidence was presented to the Court to show that Lee & Ryan's costs were submitted after the submission of the corrective action plan and were therefore subject to denial under this statute.

17. Undisputed substantial evidence exists to show that IDEM's Determination was for the reason that "costs for work performed prior to the date the release was reported to IDEM are not reimbursable." No regulations applicable prior to September 29, 2004 provide IDEM with the legal authority to deny costs on the basis that they were incurred "prior to the date the release was reported to IDEM." To the extent that IDEM's subsequent legal argument serves as a new basis for denial, IC 13-23-9-2(d) does not prohibit IDEM from asserting a new basis for denial, as the term "shall" has been determined by this forum as directory, and not mandatory. *Objections to denial of ELTF Claim No. 9611125, Circle K Mini Mart,* 2000 OEA 75, 78-79. *See also, May v. Department of Natural Resources,* 565 N.E.2d 367, 371 (Ind. Ct. App. 1991).

18. On Lee & Ryan's Motion for Summary Judgment, Lee & Ryan has provided substantial evidence required to meet its burden of showing that IDEM's Determination to deny a portion of the ELTF claim did not comply with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. On IDEM's Cross Motion for Summary Judgment, IDEM has not provided substantial evidence required to meet its burden of showing that IDEM's Determination to deny a portion of the ELTF claim complied with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Lee & Ryan is entitled to judgment as a matter of law that IDEM erred in its August 27, 2003 Determination to deny $8,894.81 of Lee & Ryan's January 16, 2003 application for reimbursement from the Excess Liability Trust Fund. Lee & Ryan is therefore eligible for reimbursement of $8,894.81 from the Indiana Underground Storage Tank Excess Liability Trust Fund, effective as of the August 27, 2003 date when IDEM issued its Determination denying reimbursement.

**Objection to Denial of Excess Liability Trust Fund Claim No. 200107501,
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FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Claimant/Petitioner, Lee & Ryan Environmental Consulting, Inc., has provided substantial evidence required to meet its burden of showing that the Indiana Department of Environmental Management's August 27, 2003 Determination to deny an $8,894.81 portion of Lee & Ryan's January 16, 2003 application for reimbursement from the Excess Liability Trust Fund, did not comply with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Respondent, Indiana Department of Environmental Management, did not provide substantial evidence required to meet its burden of showing the lack of genuine issue of material fact that Lee & Ryan's January 16, 2003 application for reimbursement from the Excess Liability Trust Fund did not comply with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Claimant/Petitioner Lee & Ryan Environmental Consulting, Inc., is entitled to judgment as a matter of law that its claim for $8,894.81 complied with applicable law and should be reimbursed from the Indiana Underground Storage Tank Excess Liability Trust Fund, effective as of the August 27, 2003 date when IDEM issued its Determination denying reimbursement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Claimant/Petitioner Lee & Ryan Environmental Consulting, Inc.'s Motion for Summary Judgment is **GRANTED**; Respondent Indiana Department of Environmental Management's Cross Motion for Summary Judgment is **DENIED.** A Final Order is entered in favor of Claimant/Petitioner Lee & Ryan Environmental Consulting, Inc. and against Respondent, Indiana Department of Environmental Management. All further proceedings before the Office of Environmental Adjudication are hereby **VACATED.**

You are further notified that pursuant to provisions of IC 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 IC 4-21.5, *et seq.* 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 24th day of July, 2008 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge