

**Objection to Denial of Excess Liability Trust Fund Claim No. 200504216/ FID No. 12316,
Thornton's, Inc. No. 81, Evansville, Vanderburgh County, Indiana.
2008 OEA 62 (08-F-J-4090)**

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 62 cite this case as
Thornton's No. 81, 2008 OEA 62.

TOPICS:

dismiss
petition
untimely
Excess Liability Trust Fund Claim
18 days
undated
affidavit
certified mail
IC 4-21.5-3, *et seq.*
IC 4-21.5-5, *et seq.*
IC 13-23-9-4
315 IAC 1-3-3
Ind. Trial Rule 4.6(A)

PRESIDING JUDGE:

Daidsen

PARTY REPRESENTATIVES:

Claimant, *pro se*: Mark Sweet, PG
IDEM: Denise A. Walker, Esq.

ORDER ISSUED:

June 18, 2008

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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4. A telephonic Prehearing Conference was held as scheduled on April 28, 2008. Claimant participated telephonically Mark Sweet, PG, Senior Project Manager, Shield Environmental Associates, Inc. At the Prehearing Conference, Mr. Sweet was given the opportunity to respond to whether the Petition for Review was timely filed so as to maintain OEA's jurisdiction over this matter. As summarized in the Court's May 7, 2008 Report of Prehearing Conference and Order for Response to Dismissal: Mr. Sweet stated that he met monthly with Thornton's Eric Zoth. In this case, Mr. Sweet and Mr. Zoth met in mid-December, 2007, around the Christmas holidays, and IDEM's denial letter was reviewed. Mr. Sweet noted that IDEM's denial letter was neither dated nor signed, and that the certified mail receipt had been separated from the letter. At Thornton, Mr. Zoth does not typically sign for receipt of certified mail directed to Mr. Zoth. Therefore, the ability to identify a receipt date for the specific denial letter would be difficult.
5. The Court's May 7, 2008 Order required IDEM to review its file, and the US Postal Service database, to determine a basis for IDEM's position as to delivery date, and to provide a verified document to the Court and parties within ten (10) days. Mr. Sweet agreed to file a response to IDEM's delivery date position, and to the Court's indication that this matter may be subject to dismissal as not timely filed by thirty (30) days thereafter.
6. IDEM's May 2, 2008 Affidavit of Kim Hostetter provided under oath, subject to penalties for perjury, that Kim Hostetter had firsthand knowledge of IDEM's mailing of the denial letter. The denial letter was mailed on October 31, 2007 via certified mail, "attn: Eric Zoph", and signed by Paula Dunn as received by Thornton on November 2, 2007.
7. Thornton has provided no further communication after the April 28, 2008 telephonic prehearing conference.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management and the parties to this controversy pursuant to IC 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to IC 4-21.4-3-27. 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 OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"). *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).

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4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also*, IC 4-21.5-3-27(d). OEA is authorized "to make a determination from the affidavits . . . pleadings 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 Winamac Service.*, (04-F-J-3338), 2005 OEA 26, 41.
5. In this case, IDEM seeks dismissal, based upon the documents in the file, and facts stated in an affidavit concerning the date its denial was mailed and received. Procedurally, IDEM seeks summary judgment dismissal for lack of genuine issue of material fact entitling IDEM to dismissal of this cause as a matter of law. 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.
6. IDEM, as the moving party, bears the burden of establishing that summary judgment is appropriate. When the 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. "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 (Ind. Ct. App. 1992) at 864. "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 (Ind. Ct. App. 1992), 703-704. 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).
7. IC 13-23-9-4 provides, "If the administrator denies a request made under section 2 or 3 of this chapter, the owner or operator who made the request may appeal the denial under IC 4-21.5 to the office of environmental adjudication under IC 4-21.5-7." IC 4-21.5-3-7(a)(3)(A) states that a Petition for Review must be filed within fifteen (15) days after the person is given notice of the order. IC 4-21.5-3-2(e) provides that three (3) days shall be added to this deadline if service is by mail.
8. Pursuant to IC 4-21.5-3-1(f)(2) and 315 IAC 1-3-3(c), the date of filing is the date of the postmark on the envelope containing the document.

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9. Substantial evidence, construed in favor of non-movant Thornton, supports a finding that IDEM's denial letter was dated October 31, 2007, and received by Claimant on November 2, 2007. In addition, the denial letter was discussed with Thornton in mid-December, 2007. As indicated by its postmark, Thornton's Petition for Administrative Review was filed on March 27, 2008 and was not timely filed in this matter.
10. OEA has jurisdiction over Petitions for Administrative Review of determinations such as issued to Thornton which are timely filed within eighteen (18) days of the date of the notice of decision as required in IC 4-21.5-3-2 and IC 4-21.5-3-7. Conversely, OEA is not authorized to assume jurisdiction over Petitions for Administrative Review which are filed after the deadline set by statute. In this case, substantial evidence is undisputed that the Petitioners' March 27, 2008 Petition for Administrative Review was filed more than eighteen (18) days after the October 31, 2007 Denial was issued to Thornton. OEA has no authority over the Petition for Administrative Review or further proceedings in this cause, due to lack of jurisdiction.

Final Order

IT IS THEREFORE ORDERED that the Petition for Administrative Review filed by Claimant, Thornton's, Inc., No. 81 is hereby **DISMISSED**. All pending matters are hereby **VACATED**.

You are hereby further notified that pursuant to provisions of IC 4-21.5-7.5, *et seq.*, 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, *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 18th day of June, 2008 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge