

Objection to the Denial of Excess Liability Trust Fund Claim
ELTF No. 1995055530/ FID No. 19475
Leeson Investments, LLC
Shelburn, Sullivan County, Indiana
2008 OEA 157, (06-F-J-3806)

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 157, cite this case as
Leeson Investments, LLC, 2008 OEA 157.

TOPICS:

Summary Judgment
Petition
Excess Liability Trust Fund Claim
soil contamination
ground water contamination
clean
regulatory limits
tank fees
arrears
Initial Site Characterization (ISC)
suspect
discover
confirm a release
I.C. § 4-21.5-3, *et seq.*
I.C. § 4-21.5-3-23
328 IAC 1-3-3(a)(4)

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

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

ORDER ISSUED:

November 21, 2008

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

Judicial Review: [*IDEM v. Leeson Investments, LLC*](#), 49F12-0901-CC-000661
(Marion Sup. Ct. 2009)

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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)	
ELTF NO. 1995055530. FID NO. 19475)	CAUSE NO. 06-F-J-3806
LEESON INVESTMENTS, LLC)	
SHELburn, SULLIVAN COUNTY, INDIANA)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter is before the Court pursuant to Motions for Summary Judgment filed by Claimant Leeson Investments, LLC and by Respondent Indiana Department of Environmental Management as to whether any genuine issues of material fact exist as to Respondent, Indiana Department of Environmental Management’s (“IDEM”) determination that Leeson Investments, LLC was not eligible for reimbursement from the Excess Liability Trust Fund for failure to pay tank fees prior to a 1995 release, and is therefore ineligible for reimbursement for a 2004 claim. The parties fully briefed their positions on summary judgment, did not request oral argument, and did not submit proposed findings of fact, conclusions of law and orders. 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 Order:

FINDINGS OF FACT

1. Leeson Investments, LLC (“Leeson”) owns a property located at 6959 Highway 41, Shelburn, Indiana, commonly known as The Junction (the “Site”). The Site is a gasoline and service station with underground storage tanks (“USTs”). The Site is identified by the Indiana Department of Environmental Management (“IDEM”) as FID No. 19475.
2. IDEM assigned Incident No. 9505530 to a 1995 release at the Site. The 1995 release concerned contamination of soil, but made no reference to groundwater contamination.

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3. IDEM's public file contains an April 21, 1998 report from Ron Bedwell, The Junction, ("1998 Report"), containing sampling data indicating that the Site had no soil contamination above regulatory limits as of April, 1998, and was cleaned to below-regulatory levels, and did not note any contamination to ground water. *Leeson's Motion for Summary Judgment ("Leeson's Motion"), Ex. A, Affidavit of Daniel Pratter; Ex. A-2, April 21, 1998 report from Ron Bedwell.* No evidence was presented that IDEM required further investigation or cleanup, or responded to any party, concerning the 1998 Report. The 1998 Report provides substantial evidence that the 1995 Incident was substantially cleaned up.
4. Leeson's tank fees were in arrears, but were reconciled and paid in September, 2003.
5. Leeson engaged Daniel Pratter, consultant, Pratter Environmental Services, Inc. ("Pratter") to perform work at the Site. In November, 2003, Pratter performed an Initial Site Characterization ("ISC") at the Site, to ascertain the Site's then-current environmental conditions. *Leeson's Motion, Exs. A, A-1.* At the time Pratter performed the ISC, Pratter reviewed IDEM's public file on the Site, understood that a 1995 release had been reported to IDEM, and had reviewed the 1998 Report. *Id.* Sampling for the ISC was performed in the same area as the sampling described in the 1998 Report. *Id.* The ISC was submitted to IDEM. *Id.*
6. The Pratter ISC indicated that both soil and groundwater at the Site were contaminated with petroleum hydrocarbons. *Id.* 2003 ISC Site soil petroleum contamination levels were at least an order of magnitude, or ten times greater, than those stated in the 1998 Report. A release at the Site occurred after the release reported in 1995. The only Incident number IDEM assigned to this Site is the 1995 Incident number.
7. On or about July 11, 2006, Leeson submitted a request for a determination of eligibility to the IDEM's Excess Liability Trust Fund ("ELTF"). On September 27, 2006, the IDEM notified Leeson that its ELTF claim was denied on the basis that tank fees were not paid prior to the 1995 release. *Leeson's Motion, Ex. A-3.*
8. Leeson timely filed its Petition for Review on October 13, 2006. Both parties filed Motions for Summary Judgment, Responses and Replies, and did not request Oral Argument.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction for administrative review of the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, *et seq.*

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2. This is a Final Order issued pursuant to I.C. § 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. This Court 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), I.C. § 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.*; “*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, 253 (Ind. Ct. App. 1981).

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.” I.C. § 4-21.5-3-23. 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). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). “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 - 704 (Ind. Ct. App. 1992). 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.
5. “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.” *Id.* In this case, each party has the burden of showing whether the IDEM’s determination on Leeson’s ELTF claim either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 OEA 41 (“*Aquasource*”). Each movant has the burden of proof, persuasion and of

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going forward on its motion for summary judgment. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23. In this case, Claimant Leeson has the burden of showing whether IDEM's ELTF claim determination either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law; Respondent IDEM bears a similar burden on the issue of whether there is no genuine issue of material fact that its determination of Leeson's ELTF claim met applicable legal standards as a matter of law.

6. 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. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM's determination of Leeson's ELTF claim was proper, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 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. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
7. Leeson's timely Petition for Review objecting to the September 27, 2006 Denial is based on the assertion that IDEM erroneously concluded that the release was reported in 1995 and not cleaned up, and that tank fees were reconciled after the (1995) release, in September, 2003.
8. 328 IAC 1-3-3 (a)(4) requires a party seeking ELTF claim reimbursement to "make timely payment of all past due tank fees, interest, and penalties in accordance with subsection (f) to make a claim for reimbursable costs for any site characterization or corrective action related to a release that is first suspected, discovered, or confirmed after the payment of all past and currently due fees, interest and penalties." In sum, an owner or operator must demonstrate that a new release was not reported or discovered until after the fee payments were reconciled.
9. In this case, Leeson's tank fees were rectified in September, 2003. Leeson first "suspected, discovered, or confirmed" a release in November, 2003, based on Pratter's sampling and ISC. 328 IAC 1-3-3(a)(4) contains no further requirement as to when a release actually occurred, so long as no release was suspected, discovered or confirmed prior to required payment. Leeson has presented substantial evidence that its Motion for Summary Judgment on the issue of claim reimbursement should be granted.

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ELTF No. 1995055530/ FID No. 19475
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10. Leeson further requests that this Court preclude IDEM from stating new reasons for denial of Leeson's claim. While IDEM should have asserted all reasons known or those which could reasonably be known when it issued its September 27, 2006 determination on Leeson's claim, the particular claims, nor their supporting and contradicting facts are not yet sufficiently before this Court so as to confer a claim capable of adjudication upon the Court.

FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Claimant, Leeson Investments, LLC, provided substantial evidence required to meet its burden of showing that its July 11, 2006 claim was eligible for reimbursement from the Excess Liability Trust Fund, as a matter of law, and that no genuine issue of material facts exist 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 its denial of Leeson Investment, LLC's claim complied with applicable law, as a matter of law. Claimant, Leeson Investments, LLC is entitled to judgment as a matter of law that its claim was eligible for reimbursement from the Excess Liability Trust Fund.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Claimant, Leeson Investments, LLC's, Motion for Summary Judgment is **GRANTED**; Respondent, Indiana Department of Environmental Management's Motion for Summary Judgment is **DENIED**. Judgment is entered in favor of Claimant, Leeson Investments, LLC.

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 21st day of November, 2008 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge