ILLINOIS POLLUTION CONTROL BOARD
February 4, 1993

IDEAL HEATING COMPANY, an Illinois corporation,	)	
Petitioner,	)	
v.	)	PCB 92-118
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Tank Reimbursement)
Respondent.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on several motions. On December 4, 1992, petitioner Ideal Heating Company (Ideal) filed a motion for summary judgment. On January 7, 1993, respondent Illinois Environmental Protection Agency (Agency) filed a response to Ideal's motion for summary judgment, a cross motion for summary judgment, and a motion for leave to file instanter. Ideal filed a response in opposition to the Agency's motion to file instanter on January 13, 1993. On January 19, 1993, the Agency filed a reply to Ideal's response in opposition to the motion for leave to file instanter. The Board points out that our procedural rules state that a moving party shall not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. (35 Ill.Adm.Code 101.241(c).) The Agency did not include a motion for leave to file a reply, and the Board will not consider the reply.

The Board will first address the Agency's motion for leave to file its response and cross motion for summary judgment instanter. The Agency contends that its filings were due on December 27, 1992; that due to the press of Agency business and the holidays, as well as being short-staffed due to the holidays, the Agency attorney was unable to complete preparation of the filings; that Ideal will not suffer irreparable harm due to the delayed filings; and that it is important that the Board have an opportunity to consider the positions of both parties. Ideal filed a response in opposition to the motion to file instanter, maintaining that the hearing officer's scheduling order provided that the Agency was to file any response to Ideal's motion for summary judgment within 15 days of the date that motion was filed, or by December 19, 1992; that the Agency never asked for an extension of time to respond; that Ideal has met all deadlines throughout this proceeding; and that if Ideal must meet filing deadlines, so must the Agency. Ideal asks that the Board impose sanctions against the Agency for its failure to follow the hearing officer's scheduling order.

The Board first notes that allowing four days for service of Ideal's motion for summary judgment (35 Ill.Adm.Code 101.144), the Agency's filings were due on December 23, 1992. (35 Ill.Adm.Code 101.109.) Thus, neither party correctly calculated the due date for the Agency's filings. The Agency has not given any reason for the delay which would have precluded the filing of a motion for extension of time when it became apparent that the Agency was going to miss the filing deadline. Both the press of business and the holidays can be predicted ahead of time. However, the Board will reluctantly grant the Agency's motion for leave to file instanter. Ideal's request for sanctions is denied.

BACKGROUND

This case arises out of the Agency's findings that Ideal is eligible for reimbursement from the Underground Storage Tank (UST) Fund, subject to a $100,000 deductible, and that $2,275 in supplemental soil sampling and analysis is not a reimbursable cost. (Rec. A at 43-44; 133-135.)[1] The parties filed a stipulation of facts on November 16, 1992. Ideal purchased real estate at 7335 South Madison, Willowbrook, Illinois, on June 15, 1990. Ideal was informed of the existence of one UST on the property at the time of purchase (June 15, 1990), and had no knowledge of that tank prior to June 15, 1990. Ideal and the Agency agree that Ideal did not operate or own the site prior to June 15, 1990. (Stip. at 1; Pet. at 2.)

On September 19, 1990, Ideal had the UST removed, and caused corrective action to be taken in response to a release of a petroleum product from that UST. Ideal filed an application for reimbursement from the UST Fund, pursuant to Section 22.18b of the Environmental Protection Act (Act) (Ill.Rev.Stat.1991, ch. 111½, par. 1022.18b), on July 16, 1991. (Stip. at 1; Pet. at 2-3.) On August 8, 1991, the Agency sent a letter to Ideal, notifying Ideal of specific deficiencies in the application. (Rec. A at 14-15.) That August 8 letter stated that the Agency was returning the application due to incompleteness, and specifically mentioned the following three items necessary to complete the application: 1) proof that the tank has been properly registered, with the facility identification number entered by the Office of State Fire Marshal (OFSM); 2) proof that registration fees had been paid to OSFM; and 3) full responses to

---

[1] The Agency record was filed in two binders. Part one, the fiscal file, will be cited as "Rec. A at ___", while part two, the technical file, will be cited as "Rec. B at _____". The stipulation of facts, filed by the parties on November 16, 1992, will be cited as "Stip. at ____". The petition for review, filed on August 19, 1992, will be cited as "Pet. at _____".

questions 8(a), (b), (c), and (f) of the application, dealing with the history of the tank and insurance coverage. (Rec. A at 14.) On October 28, 1991, Ideal revised its application. (Stip. at 1; Pet. at 3.)

On November 19, 1991, the Agency determined that Ideal was eligible for reimbursement of corrective action costs, after payment of a $100,000 deductible. (Rec. A at 43-44.) On July 17, 1992, the Agency reiterated its conclusion that the $100,000 deductible was applicable to Ideal, and stated that the allowable corrective action costs to be reimbursed are $5,593.15. (Rec. A at 133-135.) That July 17, 1992 decision does not include payment of $2,275 in supplemental soil sampling and analysis, but does not specifically deny payment.

ISSUES

On December 4, 1992, Ideal filed the instant motion for summary judgment. Ideal contends that there is no genuine issue of material fact in this case, and that it is entitled to judgment as a matter of law. On January 7, 1993, the Agency field a counter motion for summary judgment. The Agency contends that it is entitled to summary judgment, affirming its decision. However, the Agency also argues, in the alternative, that a genuine issue of material fact exists as to when Ideal's complete application for reimbursement was filed with the Agency.

There are two issues in this case:

1. Whether the Agency properly applied P.A. 87-323, effective September 6, 1991, as it amended Section 22.18b of the Act, to apply a $100,000 deductible to Ideal's application for reimbursement; and

2. Whether $2,275 in supplemental soil sampling and analysis costs, not included by the Agency in the amount reimbursed to Ideal, but not specifically denied, is reimbursable as a cost of corrective action.

$100,000 Deductible

The dispute over whether a $100,000 deductible applies to Ideal's application for reimbursement is rooted in whether a September 6, 1991 amendment to Section 22.18b(d)(3)(B)(i) should be applied in this case. Before September 6, 1991, that section stated:

> If prior to July 28, 1989, the owner or operator has registered none of the underground storage tanks *in use on that date on the site*, the deductible amount ... shall be $100,000 rather than $10,000. (Emphasis added.)

After the amendment in P.A. 87-323 became effective on September 6, 1991, the section states:

> If prior to July 28, 1989, the owner or operator had registered none of the underground storage tanks *at the site on that date*, the deductible amount ... shall be $100,000 rather than $10,000. (Emphasis added.)

It is undisputed that the UST at the site was not registered prior to July 28, 1989. It is also undisputed that the amendment in P.A. 87-323, deleting the "in use" language, would mandate the imposition of a $100,000 deductible in this case. Ideal contends that the September 6, 1991 amendment is not applicable to its application for reimbursement, so that the proper deductible is $10,000. On the other hand, the Agency argues that the phrase "in use" should be given a passive, rather than active, construction, leading to an interpretation that any registrable tanks which were not registered before July 28, 1989 are subject to a $100,000 deductible. Thus, the Agency argues that the September 6, 1991 amendment has no effect on this case. In the alternative, the Agency contends that the September 6, 1991 amendment was properly applied to Ideal's application, resulting in a $100,000 deductible.

Initially, the Board will address the Agency's contention that we should construe the phrase "in use", as it existed in Section 22.18b(d)(3)(i) prior to the September 1991 amendment, in a passive, rather than active, manner. The Agency maintains that a passive construction of "in use" (i.e., being underground and storing a regulated substance, as opposed to the more active pumping product in and out of the tank) would mean that the September 1991 amendment is meaningless to the outcome of this case. However, as the Agency notes, the Board has previously applied an active construction to the phrase "in use". (First Busey Trust & Investment Co. v. Illinois Environmental Protection Agency (February 27, 1992), PCB 91-213, 130 PCB 287; A.K.A. Land Inc. v. Illinois Environmental Protection Agency (March 14, 1991), PCB 90-188.) The Board is not persuaded by the Agency's suggestion that we should now use a passive construction of "in use". Thus, whether the September 1991 amendment is applicable to this case is the dispositive question on the deductible issue.

The Act provides that the applicable deductible is to be determined based upon the date that the Agency receives a complete application. (415 ILCS 5/22.18b(d)(3)(G) (1992).) Thus, in determining whether the September 6, 1991 amendment applies to Ideal's application, the Board must determine if Ideal had submitted a complete application to the Agency before September 6, 1991. If Ideal's July 1991 application was complete, a $100,000 deductible is not applicable in this case. If, however, as the Agency contends, Ideal did not file a complete application until October 1991, the amendment added by

P.A. 87-323 is applicable to this case, so that a $100,000 deductible is properly applied.

Ideal contends that under the rationale expressed by the Board in First Busey, Ideal's application must be considered complete in July 1991. Ideal notes that in First Busey, the Board held that an application for reimbursement cannot be considered complete unless the information necessary for the Agency to make its decision is included, and that the issue of whether an application is complete is a factual determination. (130 PCB 291.) Ideal notes that the Agency articulated three reasons for returning the July 1991 application (returned on August 8, 1991), but argues that the Agency erred in its findings that those three requirements had not been met.[2] Ideal contends that its July 1991 application was complete when filed, arguing that the July application contained all elements necessary for the Agency to make a decision under the Act. Ideal maintains that to find its July application to be incomplete would penalize Ideal for the Agency's arbitrary and unilateral mishandling of the July application, and would subject Ideal, or any applicant, to an uncertain filing date and uncertain applicable law, completely within the control of the Agency.

The Agency agrees that First Busey is controlling precedent, but argues that there are fundamental distinctions between the facts in First Busey and those in this case, which require a different outcome in this case. The Agency also rebuts Ideal's contention that the application was complete when filed in July 1991.

After reviewing the arguments and the record in this case,

---

[2] Ideal notes that the Agency record filed with the Board does not include the July 16, 1991 application itself, although the record does contain documents which accompanied that application. (Rec. A at 1-11; Rec. B at 9-191.) Ideal presumes that this omission was an oversight, and provides a copy of the July 1991 application (and an affidavit attesting to its authenticity) as Exhibit A to Ideal's memorandum in support of its motion for summary judgment. (Exhibit B is a private insurance coverage affidavit, also excluded from the Agency record.) The Agency, in response, contends that the omission of the July 1991 application was not an oversight, since that application was "rejected" by the Agency on August 8, 1991. The Board reminds the Agency that the question of the completeness of an application may become an issue in a case, as it has in this proceeding. Clearly, the "rejected" application must be in the record so that the Board can review it, if necessary. Thus, the Board will accept Exhibits A and B as part of the record in this case.

the Board finds that Ideal's application was complete when filed on July 16, 1991. The Board recognizes, as the Agency maintains, that the facts of this case do differ from the facts in First Busey. However, the important holding in First Busey is that "[t]he determination of when an application can be considered complete and therefore filed is a factual determination." (130 PCB 291.) Just as we did in First Busey, the Board must analyze the facts of this case in order to determine whether the July 1991 application was complete.

In its August 8, 1991 letter to Ideal, the Agency listed three items which were deemed incomplete. (Rec. A at 14.) First, the Agency stated that Ideal must submit proof that the tank had been properly registered, including the facility identification number as entered by OSFM. Ideal points out that it furnished, in the July 1991 application, copies of two forms filed with OSFM on August 3, 1990 (registration form 7530-1 and Ideal's application for a permit to remove the tank), along with copies of the front of two checks payable to OSFM. (Rec. A at 3-5.) Additionally, Ideal verified, under oath, that those forms had been filed with OSFM, and stated that a registration number had not been issued by OSFM. (Exh. A.) The Board takes official notice of the fact that there have frequently been lengthy delays in obtaining registration numbers from OSFM. (See First Busey, where tanks were registered on March 5 and April 5, 1990, but no confirmation of that registration was issued by OSFM until July 26, 1991.) Although the Agency contends that it must have verification from OSFM that the tank was actually registered, the Board finds that the information submitted by Ideal in July 1991 on the question of tank registration was sufficiently complete to deem the application filed.[3] Ideal furnished all information in its possession, and verified that information under oath, when filing the July 1991 application.

Second, the Agency stated that the July 1991 application was incomplete because it lacked proof that all proper registration fees had been paid. The Agency stated that such proof should include front and back copies of checks, or written confirmation from OSFM. The Agency argues that those documents are the only evidence sufficient to document that those fees were actually paid, rather than merely tendered for payment. In response, Ideal points out that it provided a copy of the front of the checks, and swore under oath that all fees had been paid. (Exh. A; Rec. A at 4.) Ideal also furnished copies of its August 3, 1990 correspondence to OSFM. (Rec. B at 15-16.) The Board finds that the information submitted by Ideal in July 1991 on the issue

---

[3] The Board notes that Ideal was able to subsequently provide the OSFM site registration number, in October 1991. (Rec. A at 35.)

of fee payment was sufficiently complete to deem the application.

Third, the Agency found the July 1991 application was incomplete because Ideal answered "unknown" to questions 8(a), (b), (c), and (f) of the application. Those questions ask about the owner or operator of the tank at the time of installation, the date the tank was installed, the date the tank was taken out of service, and the site registration number. The Agency also returned the insurance affidavit, stating that all blanks must be completed. (Rec. A at 14.) The Agency argues that this information is relevant to its reimbursement determination because tanks must be registerable by OSFM, and OSFM cannot register tanks which were taken out of service before January 1, 1974. (430 ILCS 15/4(b)(1)(A) (1992).) The Agency also maintains that the exact date that a tank is removed from service is relevant in determining the appropriate deductible. In response, Ideal notes that it could not certify, under oath, information to which it was not privy, and that it did specifically state that the tank was not in use as of July 28, 1989, or at any time thereafter. Ideal contends that it provided the information necessary for the Agency to determine whether Ideal was eligible for reimbursement, and to apply the appropriate deductible. As to the insurance affidavit, Ideal points out that it provided two separate affidavits, one from Ideal and the other from Ideal's insurance representative, and that those two affidavits, taken together, are complete. (Rec. A at 2, 8-9; Exh. B.)

The Board finds that the information furnished by Ideal in July 1991 on the history of the tank, and insurance coverage, was sufficiently complete to deem the application filed. Because only OSFM, and not the Agency, has authority to register tanks, the Agency has no need to know whether the tanks were taken out of service before January 1, 1974. That fact, as it relates to tank registration, is relevant only to OSFM. Ideal specifically stated, under oath, that the tank was not in use on July 28, 1989, or at anytime thereafter. This is the information necessary for the Agency to determine the applicable deductible in this case. As to the insurance coverage affidavits, the Board finds that the two separate affidavits, taken together, clearly answer all questions on those affidavits.

In sum, the Board finds that the application and supporting information submitted by Ideal in July 1991 was sufficiently complete for the Agency to make its decision. Thus, the July 1991 application should have been deemed filed, so that the amendment added by P.A. 87-323 does not apply to Ideal. The Board grants summary judgment on the issue of the deductible, in favor of Ideal. The Agency's determination that a $100,000 deductible is applicable to Ideal is reversed, and a $10,000 deductible should be applied.

Supplemental Soil Sampling Costs

As noted above, Ideal submitted $2,275 in supplemental soil sampling and analysis costs to the Agency for reimbursement. The Agency's July 17, 1992 decision did not include payment of those costs, but also did not specifically deny those costs. (Rec. A at 131-135.) In the stipulation filed in this case, the parties agreed that the Agency would investigate this matter to determine whether the amount remains in dispute. If a dispute was found, the parties agreed to submit the issue to the Board. (Stip. at 1-2.)

In its motion for summary judgment and supporting memorandum, Ideal contends that the issue has not been resolved as of the date of filing (December 4, 1992), and is therefore properly considered a matter in dispute. Thus, Ideal asks that the Board find for Ideal on this issue based upon the facts in this case. However, in the Agency's motion and memorandum, it states that the "denial" of the soil sampling costs was based upon a belief that the expense was not sufficiently documented. The Agency states "the parties agreed that upon presentation to the Agency by Ideal of a copy of its canceled check for the subject cost documenting proof of payment, the item would be properly reimbursable from the Fund. Accordingly, this [r]esponse and [c]ounter-[m]otion will address only the deductible issue." (Agency motion at 2, fn. 1.)

The Agency has stated that the soil sampling costs are reimbursable from the Fund. Therefore, the Board finds that these costs are no longer in dispute, and are reimbursable. The Agency is directed to reimburse Ideal for $2,275 in supplemental soil sampling and analysis costs, upon Ideal's presentation of cancelled checks reflecting payment of those costs.

CONCLUSION

In sum, the Board finds that Ideal's July 1991 application for reimbursement was complete, and should have been considered filed. Therefore, the September 6, 1991 amendment to the deductible provisions, added by P.A. 87-323, is not applicable to this case. Summary judgment on the issue of the deductible is granted in favor of Ideal, and the Agency is directed to impose a $10,000 deductible. Additionally, the Agency is directed to reimburse Ideal for $2,275 in supplemental soil sampling and analysis costs, upon presentation of cancelled checks reflecting payment of those costs.

This case is remanded to the Agency for payment of reimbursable costs to Ideal, consistent with this order. This docket is closed.

This order constitutes the Board's findings of fact and

conclusions of law.

IT IS SO ORDERED.

B. Forcade dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration" and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 4th day of February, 1993, by a vote of 5-1.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board