

ILLINOIS POLLUTION CONTROL BOARD
July 9, 1992

BURWELL OIL SERVICE, INC.,)
)
Petitioner,)
)
v.) PCB 92-42
) (Underground Storage Tank Fund
ILLINOIS ENVIRONMENTAL) Reimbursement Determination)
PROTECTION AGENCY,)
)
Respondent.)

ROBERT G. HECKENKAMP, HECKENKAMP, SIMHAUSER & LABARGE, APPEARED ON BEHALF OF PETITIONER.

DANIEL P. MERRIMAN, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the March 16, 1992 petition for review filed by Burwell Oil Service, Inc. (Burwell) Pursuant to Section 22.18b(g) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022.18b(g)), Burwell seeks review of the Illinois Environmental Protection Agency's (Agency) determination that a \$50,000 deductible applies to Burwell's claim for reimbursement from the Underground Storage Tank Fund (Fund) (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022.18b(d)(3)(C)(ii)). A hearing was held in Springfield, Illinois on May 29, 1992 at which no members of the public attended. On June 19, 1992, the Agency filed a motion for leave to file its brief instanter. The Agency's motion is granted.

BACKGROUND

In September of 1980, Burwell purchased a service station located at 1400 East Sangamon Avenue, Springfield, Illinois. (Tr. at 26; R. 1, 22.) Burwell operated the station from September 1980 through July 1988. (Tr. at 26-27.) Three underground storage tanks (USTs) located on the property were removed September 15, 1988. (Tr. at 28-29; R. 8, 22.) At the time of removal, no apparent soil contamination was found and the excavation site was filled. (Tr. at 29; R. 8.) Prior to selling the property in 1990, the purchaser performed soil tests. (Tr. 30; R. 10.) These tests revealed contamination near the site where the USTs had been located. (Tr. at 31; R. 13-17.)

On August 23, 1990, Burwell submitted an application for reimbursement from the Fund. (R. 21.) The application listed the release as a "tank system leak" and that only one tank had leaked. (R. 22-25.) In response to the question "Has there been a release from this UST system?" Burwell stated that with regard

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to two of the USTs "inventory records did not indicate a release". (R. 23, 25.) For one of the USTs, Burwell stated that there had been a release and referred to attached notes. (R. 24.) These attached notes included a report of Rapps Engineering referencing inventory records indicating the following product loss during 1988: April 986 gallons; May 354 gallons; June 362 gallons; and July 203 gallons. (R. 9.) The Rapps report stated that it was suspected that these losses may have occurred from one of the three tanks and that a Kent-Moore tightness test performed on one UST in May-June of 1988 was inconclusive. (R. 9.) Burwell stated in its application that it first became aware of the release on August 1, 1990. (R. 22.)

On August 30, 1990, the Agency notified Burwell that the information contained in the application indicated that the release occurred prior to July 28, 1989 and that Burwell had knowledge of the release prior to that date. (Pet. Motion to Supp. Rec. Ex. B.) Consequently, the Agency applied a \$50,000 deductible to Burwell's claim for reimbursement. (*Id.*) In December of 1991, Burwell submitted a "renewed application for reimbursement" documenting \$78,537.77 in corrective actions costs. (*Id.*; R. 31.) On February 10, 1992, the Agency notified Burwell that, after applying the \$50,000 deductible and subtracting \$170 for costs incurred prior to ESDA notification, it would be reimbursed \$28,365.77. Burwell seeks review only of the Agency's imposition of the \$50,000 deductible.

DISCUSSION

The issue is whether Burwell met its burden of establishing that it did not have knowledge of the release prior to July 28, 1989 such that the Agency incorrectly applied the \$50,000 deductible rather than the minimum \$10,000 deductible. The Agency asserted that Burwell failed to meet its burden. Alternatively, the Agency argues that evidence introduced by Burwell at hearing actually established that corrective action costs were not incurred as a result of a release from the subject USTs. At hearing, the Agency moved to "amend the pleadings" to add the additional finding that Burwell is not eligible to access the Fund. (Tr. 127-28.) The Agency also raises this argument in its brief.

In Clinton County Oil Co. v. IEPA (March 26, 1992), PCB 91-163, the Board ruled that the Agency cannot amend its denial letter after it has reached a final determination on eligibility. (See also, Clinton County Oil Co. v. IEPA (June 4, 1992), PCB 91-163.) Pursuant to Clinton, the Board denies the Agency's motion to amend the pleadings to add the additional finding that Burwell is ineligible to access the Fund.

Moreover, the Board disagrees with the Agency's contention that testimony at hearing presented by Burwell is inconsistent

with the application for reimbursement and that this testimony establishes that no release occurred from Burwell's USTs. C. Eugene Burwell, president of Burwell Oil, testified regarding the loss of product and its relation to the release. (Tr. at 63-65.) According to Mr. Burwell, at the time of the inventory-reported loss, he believed that there was some other explanation, such as human error, for the loss other than a tank leak. (Tr. at 59, 64.) While he could never prove a leak to himself, he stated that the subsequently revealed contamination and the Rapps report explanation for the leak led him to state in the application that there had been a release. (Tr. 64-65.) These statements merely seem to indicate some confusion on Burwell's part as to the exact explanation as to how the leak occurred from the USTs. Ronald Dye, of Rapps Engineering, testified that his study of the site indicated that a release occurred but that he could not pinpoint which of the three tanks had leaked. (Tr. at 104-05, 110-13.) In the context of explaining the import of the product losses, these statements merely indicate that Burwell cannot state with exact certainty where in the tank system the release occurred. When considered in light of the record as a whole, the testimony does not negate Burwell's statement in its application that there was a release from one of the three USTs.

The Board now addresses the issue of whether the imposition of the \$50,000 deductible is proper. Section 22.18b(d)(C)(ii) of the Act imposes a \$50,000 deductible where the owner/operator had actual or constructive knowledge of the release before July 28, 1989. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022.18b(d)(C)(ii).) The burden is on the owner/operator to prove to the satisfaction of the Agency that it did not have such knowledge. (*Id.*) Burwell contends that it did not have knowledge of the release until 1990 when the results of the soil borings indicated contamination near the location of the previously removed USTs. The Agency contends that Burwell had constructive knowledge of the release in 1988 by virtue of the inventory records indicating a product loss.

Burwell's application states that there was a release from one of three USTs. (R. 23-25.) Burwell supported its statement that one of the tanks had leaked with the report of Ronald Dye of Rapps Engineering. (R. 9-11.) This report provided that monthly inventory records indicated product losses during the months of April, May, June and July totalling 1,905 gallons. (R. 9.) While the nature of the loss was unclear, the report indicates that Burwell suspected that one of the tanks had leaked. (R. 9; Tr. 51.) As a result of these losses a Kent-Moore tank tightness test was performed on one of the USTs. (R. 9; Tr. at 43.) Although the results of this test were inconclusive, another test was not performed. (R. 9; Tr. at 68, 99.) The report stated that Burwell was unable to provide any physical evidence such as photographs or the results of the Kent-Moore test to document the leak, but that "evidence exists to support the theory that one of

the tanks has leaked." (R. 9.) According to the report, "[t]he most compelling piece of evidence of leakage from the tank system is a soil boring taken ten feet south of the excavation area (Boring # 2)." (R. 10.) Boring #2 was drilled outside the backfilled area into in-situ soils. (R. 10, 14.) Visual contamination was encountered at a depth of five feet. (R. 10.) The report concluded that the absence of contamination near the surface indicated a release from either the tank vessel or associated piping. (R. 10.) The report also indicates that Captain Greg Bestudick of the Springfield Fire Department was unable to witness the entire tank removal because two of the three tanks had been removed prior to his arrival and the excavation was completely backfilled with sand preventing a visual inspection of the site. (R. 10; see also Tr. 86-95.) Attached to the report are two documents signed by Gregory Bestudick stating that he was present at the removal, that two tanks had already been removed when he arrived and that he saw no leaking or contamination. (R. 5, 9.)

C. Eugene Burwell testified that he first became aware of the release in 1990 after Rapps had performed the borings. (Tr. at 31-32.) He also testified that the inventory records indicating a product loss did not bother him because of temperature adjustments "from where we purchased gasoline, the way it is when we get it in the ground and the way it's sold within the system." (Tr. at 33, 61-63.) According to Mr. Burwell, this type of loss is customary and not something which would cause him to think there had been a release. (Tr. at 33.) Burwell testified that the loss could be the result of human error in taking the stick reading creating a difference between purchase and sale amounts. (Tr. at 34-39, 64.) Burwell also testified that the product losses decreased from 986 gallons in April to 203 gallons in July indicated human error rather than a leak. (Tr. at 39.) However, Mr. Burwell admitted that the initial loss in April led Burwell to monitor the tanks and to perform a tank tightness test. (Tr. at 41-43, 60.)

Maurie Spooner, general manager of Burwell, testified that the three possible explanations for the product losses were human error in the stick reading, a wrong delivery or a leak. (Tr. at 67.) Spooner testified that the fact that the losses decreased after the April loss led him to believe that they did not have a leak. (Tr. at 69.)

John Deornellas, maintenance supervisor for Burwell, testified that he was present when the USTs were removed and that he did not notice any contamination. (Tr. at 87.) He also testified that Gregory Bestudick of the Springfield Fire Department arrived after two of the tanks had been removed and the third tank was in the process of being pulled. (Tr. at 88.) Deornellas testified that Bestudick examined the third tank and found nothing wrong with the tank. (Tr. at 88.) Because

Bestudick wanted to inspect the bottom of the hole where the two USTs had been, Deornellas testified that the dirt and sand were removed so that Bestudick could inspect the hole. (Tr. at 88-89.) Deornellas testified that Bestudick did not find any evidence of contamination. (Tr. 89.)

Ronald Dye of Rapps Engineering testified regarding the report he prepared in support of the application. (Tr. at 95.) He testified that Boring #2 was the only physical evidence that sported the theory that a release had occurred from one of the USTs. (Tr. at 104-05.) Dye also testified as to his conversation with Gregory Bestudick. (Tr. at 121.) According to Dye, Bestudick indicated that the tanks had been removed and the excavation was completely backfilled with sand such that he was unable to perform a visual subsurface inspection. (Tr. at 120-21.) Dye testified that he verified with Bestudick that he did not see any contamination. (Tr. at 122.)

Bur Filson, project manager for the Agency's Northern LUST section, testified that he reviewed the application for reimbursement and that the repeated product losses over a period of four months and the performance of the Kent-Moore test would indicate that there was a problem associated with the UST. (tr. at 139, 148.) Filson also testified that the decrease in loss of product from the initial loss in April did not necessarily negate the concern that a release occurred. (Tr. 150-52.) According to Filson:

[T]here is a tremendous surface area within the tank alone where a hole or a breach in the system could occur. Then you also have the lines associated with that. If the release or if the hole stays in the tank and it's in the upper third of the tank, you are going to see a loss of product only when the tank is full to that point.. If it's located lower in the tank ... you would see continual losses until the level was below that point and/or water backfills the tank and forces the product up. If it's associated with one of the lines, depending on where it would be associated with the line, if it's associated with a particular pump and it only occurs when that pump is turned on and that pump is not used with the same frequency as others, then you may see a variance.

(Tr. at 150-51.) Filson did state that if the tank was repeatedly filled with the same number of gallons of gasoline on a monthly basis, one could expect a continuous loss. (Tr. at 151.)

Burwell contends that it investigated the product losses by monitoring the tanks and performing the Kent-Moore test and that these actions ruled out the possibility of a tank leak.

Therefore, Burwell contends that it did not have constructive knowledge of the release prior to July 28, 1989. The Agency contends that Burwell did not exercise reasonable care in investigating the product losses or in performing the Kent-Moore test. Knowing that the Kent-Moore test was inconclusive, the Agency asserts that a second tank tightness test should have been performed.

Neither the Act or Board regulations define "constructive knowledge." However, the Illinois Supreme Court has construed "constructive notice" holding that one having notice of facts which would put a prudent person on inquiry is chargeable with knowledge of other facts which might have been discovered by diligent inquiry. (Miller v. Bullington (1942), 381 Ill. 238, 44 N.E. 2d 850, 852.) "Whatever is notice enough to excite attention and put a party on his guard is notice of everything to which inquiry might have led and every unusual circumstance is a ground of suspicion and demands investigation." (Id.)

The record establishes that Burwell had notice of a significant loss of product over a four month period. While there may have been several suspected explanations for these losses, Burwell had an obligation to diligently investigate these possibilities rather than accept the erroneous explanation of human error in the stick test or in delivery. Had Burwell performed a second Kent-Moore tank test or performed a soil boring upon notice of the product losses, it likely would have discovered the release. Burwell is chargeable with knowledge of the release by virtue of its knowledge of the product loss and cannot be excused from such knowledge where it failed to perform a diligent inquiry.

Based upon the facts presented, the Board finds that Burwell failed to meet its burden of establishing that it did not have constructive knowledge of the release prior to July 28, 1989. Therefore, the Agency's imposition of the \$50,000 deductible is affirmed.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

For the foregoing reasons, the Board finds that Burwell oil Service, Inc. had constructive knowledge of the release of petroleum prior to July 28, 1989 and upholds the Agency's imposition of a \$50,000 deductible on Burwell's claim for reimbursement from the UST Fund.

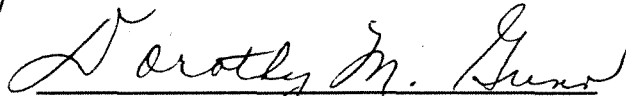
IT IS SO ORDERED.

B.Forcade and R. Flemal dissent.

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Section 41 of the Environmental protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above opinion and order was adopted on the 9th day of July, 1992 by a vote of 4-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board