

ILLINOIS POLLUTION CONTROL BOARD
November 17, 2011

ESTATE OF GERALD D. SLIGHTOM,)	
)	
Petitioner,)	
)	
v.)	PCB 11-25
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.A. Burke):

The Estate of Gerald D. Slightom (Estate) appeals an October 29, 2010 determination of the Illinois Environmental Protection Agency (Agency) denying the Estate's request for reimbursement from the Underground Storage Tank (UST) Fund. The Estate's application concerns a location at 103 North Third Street, Girard, Macoupin County (Site).

The Estate appeals on the grounds that the Office of the State Fire Marshal's (OSFM) \$10,000 deductibility determination of 2008, rather than the Agency's \$100,000 deductibility determination, applies to this site. Alternatively, the Estate contends that the Agency is estopped and barred by laches from changing legal positions upon which the Estate relied to its prejudice.

There are three contested motions pending before the Board. For the reasons described below, the Board denies the Agency's motion for summary judgment, denies the Estate's motion for interlocutory appeal, and denies the Estate's motion for leave to file a surreply. Additionally, the Board orders the Agency to file a complete record by December 19, 2011.

PROCEDURAL HISTORY

On December 6, 2010, the Estate filed a petition asking the Board to review the Agency's October 29, 2010 determination applying a \$100,000 deductible to its UST reimbursement claim. On December 16, 2010, the Board accepted the petition as timely but directed the Estate to file an amended petition by January 17, 2011. The amended petition was filed on January 12, 2011 and included two exhibits: (A) letter from the Agency to the Estate dated October 29, 2010; and (B) a printout of the Agency's LUST database purportedly printed on November 3, 2010. The Board accepted the petition for hearing on January 20, 2011.

On June 16, 2011, the Agency filed the Agency Record (AR) accompanied by a motion for summary judgment (Motion). On June 29, 2011, the Estate filed a request for an extension of time to respond to the motion for summary judgment along with a motion to compel deposition. The Agency filed its objection to the motion for an extension of time and motion to compel deposition on July 8, 2011.

On July 18, 2011, the Estate filed a notice of deposition. The Agency filed a motion to quash the subpoena on July 19, 2011. The Estate filed a reply in support of its motion to compel deposition on July 29, 2011. The Agency filed a sur-objection to the Estate's motion to compel on August 8, 2011. On August 10, 2011, the hearing officer issued an order denying the Estate's motion to compel deposition and granting the Agency's motion to quash the subpoena.

On September 6, 2011, the Estate filed a motion for interlocutory appeal from the August 10, 2011 hearing officer order denying the motion to compel deposition. Also on September 6, 2011, the Estate filed a response to the motion for summary judgment (Response). On September 13, 2011, the Agency filed a reply to the Estate's motion for summary judgment (Reply) and a response to the Estate's motion for interlocutory appeal.

On September 27, 2011, the Estate filed a motion for leave to file a surreply in opposition to the motion for summary judgment (Mot. Surreply), along with the surreply. The Agency filed its objection to the Estate's motion for leave to file a surreply (Objection) on October 3, 2011.

FACTUAL SUMMARY

The Agency filed the Agency Record (215 pages) along with its motion for summary judgment which included a statement of facts. Motion at 3-5. In its response to the Agency's motion for summary judgment, the Estate included a statement of facts (Response at 2-6) and 5 exhibits. The following summarizes the parties' respective factual assertions.

Agency Record and Agency's Statement of Facts

On December 6, 1991, the Agency received an Application for Reimbursement from the Underground Storage Tank Fund for Corrective Action Costs from Gerald Slightom identifying five USTs located at 109 N. Third Street, Girard, Illinois at a site known as Robinson's Service Station.¹ AR at 1-12; Motion at 4. Four of the five tanks were installed in 1956 and one tank was installed in 1977. AR at 3-12. All five tanks were registered with OSFM on April 18, 1990 (Registration No. 5-025513). AR at 24-27. The tanks were taken out of service as follows: three tanks on June 1, 1990 because the "service station ceased operation" (AR at 3, 5, 7); one tank in April 1980 (AR at 9); and one tank in June 1981 (AR at 11). All five tanks were removed on August 30, 1991. AR at 3-12.

Gerald Slightom had owned the property since 1976. AR at 2. Gerald Slightom leased the property to Michael Robinson from "prior to 1977 to Aug. 1990, as a service station with underground tanks to store gasoline, heating fuel oil and waste oil." AR at 18. Gerald Slightom

¹ The initial application for reimbursement references the address as 109 N. 3rd Street. However, other documents indicate an address, as referenced earlier in this order, of 103 N. 3rd Street. Other documents also reference an address of 3rd and Center Street. The Board construes any references to "109 N. 3rd Street" or "3rd and Center Street" as referring to the subject property located at 103 N. 3rd Street.

became aware of a release on August 30, 1991 and reported the release to the Illinois Emergency Services & Disaster Agency (ESDA) on the same day (Incident No. 912456). AR at 2; Motion at 4. Gerald Slightom reported that one of the five tanks was leaking. AR at 3.

On December 20, 1991, the Agency issued a letter to Gerald Slightom stating that it reviewed the December 6, 1991 application for reimbursement (AR at 1-12) and “determined that you are eligible to seek reimbursement for corrective action costs, accrued on or after July 28, 1989, in excess of \$100,000.00.” AR at 13; Motion at 4. The Agency further stated that “[a] \$100,000.00 deductible applies to sites where the owner or operator had registered none of the underground storage tanks located at the site prior to July 28, 1989.” AR at 13; Motion at 4. The Agency cited to Section 22.18b(d)(3)(B)(i) of the Act (AR at 13), which later was repealed by Public Act 88-496, effective January 1, 1996. The provisions of former Section 22.18b(d)(3)(B)(i) were recodified at Section 57.9(b)(i) of the Act. The Agency’s letter stated that the determination on eligibility and the deductible amount was a final appealable decision. AR at 13. The record does not show that Gerald Slightom appealed the 1991 determination.

On January 24, 2008, OSFM received a Leaking Underground Storage Tank Fund Eligibility and Deductible Application from the Estate of Gerald D. Slightom. AR at 29. The application identified the facility as “103 N. 3rd St., Girard, Macoupin County” with OSFM Facility ID# 5025513. AR at 31-34. The application covered five tanks, stated that five tanks had a release and the release was discovered on August 29, 1991. AR at 32. Gerald Slightom reported the release on August 30, 1991 and the incident number was 912456. AR at 32. The application stated that the facility was purchased in “1976 by Mr. Slightom (Estate took over on 9/20/07).” AR at 31.

On February 6, 2008, OSFM sent a letter to the Estate referencing Facility No. 5-025513, Incident No. 91-2456, 103 N. 3rd St., Girard, Macoupin County. AR at 29; Motion at 4. OSFM “determined that you are eligible to seek payment of costs in excess of \$10,000. The costs must be in response to the occurrence referenced above and associated with the following tanks: [five tanks listed].” AR at 29; Motion at 4. OSFM noted that its determination was a final decision as it relates to eligibility and deductibility. AR at 30. OSFM reserved the right to change the deductible determination should additional information become available. AR at 30. The OSFM decision was appealable but there is no information in the record that the Estate appealed.

Stage 1 UST activities

On October 1, 2008, the Agency approved the actual costs for Stage 1 (the record as filed does not include any Stage 1 plans). AR at 102, 105. On October 20, 2008, the Agency received the Estate’s application (AR at 55-108) for payment from the UST Fund for \$29,239.08, covering the period from February 11, 2008, through October 2, 2008. AR at 206. On January 29, 2009, the Agency approved payment of \$19,239.08. AR at 206; Motion at 4-5. The Agency withheld a deductible amount of \$10,000 from payment stating, “Pursuant to Section 57.8(a)(4) of the Act, any deductible, as determined pursuant to the Office of the State Fire Marshal’s eligibility and deductibility final determination in accordance with Section 57.9 of the Act, shall be subtracted from any payment invoice paid to an eligible owner or operator.” AR at 206.

Stage 3 UST activities

On August 27, 2008, the Agency received a Stage 3 Site Investigation Plan (not in the filed record). AR at 102. On October 1, 2008, the Agency required the Estate to modify the plan and budget and gave conditional approval with the Agency's modifications. AR at 102-106. On March 4, 2009, the Agency received an amended Stage 3 Site Investigation Plan and proposed budget (also not in the record). AR at 41. On March 25, 2009, the Agency approved the amended plan and budget for Stage 3. AR at 41.

On June 11, 2010, the Agency received the Site Investigation Completion Report (not in the record). AR at 38. On July 8, 2010, the Agency required the Estate to modify the report and gave conditional approval with the Agency's modifications. AR at 38. The Agency also approved the Stage 3 budget. AR at 38-40.

On July 19, 2010, the Agency received the Estate's application (AR at 120-215) for payment from the UST Fund for \$83,912.58 for the period from May 19, 2008 to June 30, 2010. AR at 109. On October 29, 2010, the Agency sent the Estate a letter stating "a voucher cannot be prepared for submission to the Comptroller's office for payment." AR at 109; Motion at 5. The Agency further stated:

Pursuant to 35 Ill. Adm. Code Part 734.615(b)(4) where more than one deductible determination has been made, the higher deductible shall apply. On December 20, 1991, the Illinois Environmental Protection Agency issued an Eligibility and Deductibility Determination of \$100,000.00 for this site. A second Eligibility and Deductibility Determination of \$10,000.00 was issued on February 6, 2008 by the Office of the State Fire Marshal. *The Illinois Environmental Protection Agency has determined that the \$100,000.00 deductible applies to this site.*

AR at 109 (italicized language is not found in the Agency Record as filed but was attached to the Amended Petition at Exhibit A and quoted in the Motion at 5).

Estate's Statement of Facts

The Estate provided a statement of facts in its response to the Agency's motion for summary judgment which included citations to the Agency Record and provided information outside the record. The following summary will focus on the new information asserted by the Estate. The Estate stated that Gerald Slightom died on September 5, 2007. Resp. at 2. Richard Slightom was appointed as executor of the Estate and the Estate attaches a filing in a probate matter as support. Resp. at 2, Ex. A. This information is supported by the Affidavit of Shane Thorpe, attached to the Estate's response. Resp. Ex. 1, ¶7.

The Estate states that, on February 22, 2008, it filed its election to proceed as owner of the Site after having acquired an ownership interest. Resp. at 2. The Estate attached a copy of the election form as Exhibit B to the Response. The form references the "former Robinson Service Station (closed facility)" at 103 N. 3rd St., Girard, Macoupin County, Incident No. 912456. The election form states:

Pursuant to Section 57.2 of the Environmental Protection Act [415 ILCS 5/57.2], I hereby elect to proceed as an “owner” under Title XVI of the Environmental Protection Act. I certify that I have acquired an ownership interest in the above-named site, that one or more underground storage tanks registered with the Office of the State Fire Marshal have been removed from the site, and that corrective action on the site has not yet resulted in the issuance of a “no further remediation letter” by the Illinois EPA pursuant to Title XVI of the Environmental Protection Act.

I understand that by making this election I become subject to all the responsibilities and liabilities of an “owner” under Title XVI of the Environmental Protection Act and the Illinois Pollution Control Board’s rules at 35 Ill. Adm. Code 734. I further understand that, once made, this election cannot be withdrawn.

Resp. Ex. B. The form appears to be signed by Richard Slightom on February 16, 2008. *Id.*

On March 3, 2008, the Agency sent a response to the Estate acknowledging that it received the election to proceed form on February 22, 2008. Resp. at 2. The Estate attached a purported copy of the letter as Exhibit C to its Response. The Agency letter stated in part “your Election to Proceed as ‘Owner’ is accepted.” Resp. Ex. C.

The Estate asserts that it performed corrective action at the Site. Resp. at 2. The Estate states that “the specific work that is the subject of the appeal was performed in accordance with Stage 3 Site Investigation Plans and Budgets that were approved in full or with modifications by the Agency.” Resp. at 2-3. The Estate provides a list of four documents with submittal dates and approval dates. Resp. at 3. The Estate cites to pages 116-117 of the record which appear to be a printout of a database tracking submittals for the Site. The Estate also attached an undated affidavit of Shane Thorp. Resp. Ex. C.

The Estate asserts that on June 11, 2010 it submitted its Site Investigation Completion Report. Resp. at 3. This document does not appear to be contained in the record as filed. The Estate purports to attach excerpts of the report as Exhibit D to the Response.

MOTION FOR LEAVE TO FILE SURREPLY

The Estate filed its motion for leave to file surreply on September 27, 2011. The Estate contends that the Agency’s reply “contains new evidence and new legal arguments” which the Estate “did not have an opportunity to respond to.” Mot. Surreply at 1-2. The Estate contends that it will be materially prejudiced if not allowed to respond to the Agency’s reply prior to the Board ruling on the motion for summary judgment or related discovery issues. *Id.* at 2.

The Agency filed its objection on October 3, 2011, stating that the Estate “offers nothing new in its current motion.” Obj. at 2.

The Board's procedural rules state that "[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code Part 101.500(e). The Board finds that the Estate is not materially prejudiced by denying the motion for leave to file a surreply. Therefore, the motion for leave to file a surreply is denied.

MOTION FOR SUMMARY JUDGMENT

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); see also 35 Ill. Adm. Code 101.516(b). In ruling, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* A party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Board Discussion

While the parties address a number of arguments in their pleadings, a number of these arguments appear unrelated to the matter of summary judgment. Therefore, the Board only discusses the three disputes in the sections below.

Dispute Regarding the Issue

The UST Fund was created under the Illinois Environmental Protection Act (Act) and may be accessed by eligible UST owners and operators to pay for the environmental cleanup of leaking USTs. 415 ILCS 5/57. Under the Act, the OSFM decides whether persons are eligible to have their cleanup costs reimbursed from the UST Fund and, if so, which deductible applies. 415 ILCS 5/57.9(c). Based on the Agency Record as filed, both the Agency and OSFM decided that the Site owners are eligible to access the Fund. AR at 3, 29. The Estate's eligibility to access the UST Fund has not been disputed in the pleadings or the record as filed.

However, the parties vigorously dispute which deductible applies. Section 57.9(b) of the Act sets forth the applicable deductibles:

- (b) For releases reported prior to the effective date of this amendatory Act of the 96th General Assembly, an owner or operator may access the Underground Storage Tank Fund for costs associated with an Agency approved plan and the Agency shall approve the payment of costs associated with corrective action after the application of a \$ 10,000 deductible, except in the following situations:

- (1) A deductible of \$ 100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989
- (2) A deductible of \$ 50,000 shall apply if any of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to July [*5] 28, 1989.
- (3) A deductible of \$ 15,000 shall apply when one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release on or after July 28, 1989.

415 ILCS 5/57.9(b). The Illinois Appellate Court has found that this deductible scheme is constitutional, stating “[t]he State has a legitimate interest in determining the population of USTs within its borders through the registration process, and establishment of a deductible scheme which encourages registration is certainly a rational approach toward attaining this end.” Stroh Oil Company v. OSFM, 281 Ill. App. 3d 121, 130; 665 N.E.2d 540, 547 (4th Dist. 1996). After the OSFM determines eligibility and the proper deductible, the Agency determines whether to approve proposed cleanup plans and budgets for leaking UST sites, as well as requests for cleanup cost reimbursement from the UST Fund. 415 ILCS 5/57.7, 57.8.

The Agency asserts that a \$100,000 deductible applies to the Estate’s reimbursement claim and the stated issue in its motion is “whether, pursuant to 35 Ill. Adm. Code Section 732.603(b)(4), the higher deductible shall apply when more than one deductible determination is made?” Motion at 3. Section 732.603(b)(4) provides “Where more than one deductible determination is made, the higher deductible shall apply.” 35 Ill. Adm. Code 732.603(b)(4).

However, it is not clear that the Board’s Part 732 regulations apply to the Estate’s claim. Part 732 applies:

To owners or operators of any underground storage tank system used to contain petroleum and for which a release was reported to the Illinois Emergency Management Agency (IEMA) on or after September 23, 1994, but prior to June 24, 2002 . . . It also applies to owners or operators that, prior to June 24, 2002, elected to proceed in accordance with this Part pursuant to Section 732.101 of this Part.

35 Ill. Adm. Code 732.100. The Agency has not explained, and the record as filed does not provide, information needed to determine whether Section 732.603(b)(4) applies to the Estate. Documents in the record appearing to have been prepared by Gerald Slightom provide that he reported a release on August 30, 1991. AR at 2. This date is consistent with information provided by the Estate to OSFM. AR at 32, 24, 50, 120. This reporting date precedes September 23, 1994 and there is no information in the record as filed that Gerald Slightom or the Estate made an election to proceed under Part 732.

A corollary to Part 732 is Part 734, which is referenced in the Agency Record. The Agency's October 29, 2010 letter cites 35 Ill. Adm. Code 734.615(b)(4). AR at 109. Section 734.615(b)(4) includes the same provision as 732.603(b)(4): "Where more than one deductible determination is made, the higher deductible shall apply." 35 Ill. Adm. Code 734.615(b)(4). Part 734 applies "to owners or operators of any underground storage tank system used to contain petroleum and for which a release is reported to Illinois Emergency Management Agency (IEMA) on or after March 1, 2006." 35 Ill. Adm. Code 734.100(a). Similar to Part 732, UST owners or operators may elect to proceed under Part 734. 35 Ill. Adm. Code 734.100(b). Again, documents in the record appear to show that Gerald Slightom reported a release from a tank on August 30, 1991 and this date is before the March 1, 2006 applicability deadline for Part 734. There is no information in the record filed by the Agency that Gerald Slightom or the Estate made a timely election to proceed under Part 734.

A document provided by the Estate, but not included in the record, appears to show that the Estate elected to proceed under Part 734 at least for the 2008 determination. The document titled "Election to Proceed as Owner," attached to the Estate's response as Exhibit B, contains the statement "I understand that by making this election I become subject to all of the responsibilities and liabilities of an 'owner' under Title XVI of the Environmental Protection Act and the Illinois Pollution Control Board's rules at 35 Ill. Adm. Code 734."

These discrepancies as to whether either Part 732 or Part 734 applies, as well as insufficient facts in the record to make either determination, preclude judgment at this time. Accordingly, the Board denies the Agency's motion for summary judgment.

Insufficient Record

Even if 35 Ill. Adm. Code 732.603(b)(4) or 734.615(b)(4) applies to the Estate's claim, discrepancies in the Agency Record require the Board to deny summary judgment. As an initial matter, the Agency Record appears to be missing individual pages and perhaps entire documents. The Agency argues that the Agency Record is sufficient to render summary judgment and presents no disputed issues of fact. Motion at 2. The Estate, in its response, identifies documents which may be missing from the record and attaches additional documents. In its reply, the Agency maintains that the record is complete because it contains what is required by Board regulations and it contains the documents relied on by the Agency in making its decision. Reply at 8. Also in the Reply, the Agency submitted an affidavit of an Agency employee stating that "the documents contained within the Agency Record are the only documents that were relied upon by the Illinois EPA in reviewing the submittal at issue." Reply Ex. 1.

Section 105.410 of the Board's rules sets forth the items to be included in the Agency Record:

- (b) The record must include:

- (1) The plan or budget submittal or other request that requires and Agency decision;
- (2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submitted or other request;
- (3) The final determination letter; and
- (4) Any other information the Agency relied upon in making its determination.

35 Ill. Adm. Code 105.410.

Most notably, the October 29, 2010 letter, which is the Agency's final determination at issue in this appeal, is incomplete in the Agency Record as required by Section 105.410(b)(3). *See* AR at 109. Several individual pages of multi-page documents also appear to be missing from the Agency Record: page 2 of the letter from the Agency to the Estate dated March 25, 2009 (AR at 41-42); page 2 of the letter from the Agency to the Estate dated October 1, 2008 (AR at 44-45; a complete copy of the document appears to be found at AR 102-106); page 2 of the letter from the Agency to the Estate dated January 29, 2009 (AR at 47-48; a complete copy of the document appears to be found at AR 206-208); and page 2 of the letter from the Agency to the Estate dated October 29, 2010 (AR at 109-110). Additionally, there are several items listed on page 116-117 of the Agency Record which were not included as part of the filed record, as well as documents identified in the factual summary above which were not included in the record. These documents appear to pre-date the Agency's October 29, 2010 decision and may be required under Section 105.410(b)(1) or (b)(2).

The parties specifically dispute the validity and effect of the December 20, 1991 letter as it poses a genuine issue of material fact. As discussed above, the Agency moved for summary judgment on the issue of "whether, pursuant to 35 Ill. Adm. Code Section 732.603(b)(4), the higher deductible shall apply when more than one deductible determination is made?" Motion at 3. The Agency's argument places the 1991 letter at the center of its motion. The Estate challenges that "the [Agency] record lacks any evidence that the 1991 document was ever sent or issued by the Agency, or received by the prior owner." Response at 5.

The parties' dispute over the 1991 letter means summary judgment is not proper at this time. It is the hearing before the Board that affords the petitioner the opportunity "to challenge the reasons given by the Agency for [the denial] by means of cross-examination and the receipt of testimony 'to test the validity of the information [relied on by the Agency].'" Alton Packaging Corp. v. Pollution Control Board, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (1987), quoting IEPA v. Pollution Control Board, 115 Ill. 2d 65, 70, 503 N.E.2d 243, 345. Accordingly, petitioners before the Board "cannot introduce new matters outside the Agency administrative record, but they may cross-examine and present testimony to challenge the information relied on by the Agency for the denial." Freedom Oil Co. v. IEPA, PCB No. 03-54 (consol.), slip op. at 11

(February 2, 2006). Because the record appears incomplete at this time, the Board cannot grant the motion for summary judgment.

Estoppel

Even if the Board construes the Agency's motion more broadly to argue that Section 57.9(b) of the Act requires that the \$100,000 deductible applies, as argued in the Agency's reply (Reply at 1-2), factual discrepancies preclude summary judgment at this time.

The Board agrees that the Act is clear that a \$100,000 deductible applies when no USTs are registered before July 28, 1989. 415 ILCS 5/57.9(b)(1). Based on the record as filed, Gerald Slightom reported that the five tanks at the site were registered with OSFM on April 18, 1990. AR at 3, 5, 7, 9, 11. OSFM appears to have acknowledged the registration on May 8, 1990 and assigned Registration No. 5-025513. AR at 27. The Estate's filing with OSFM also stated that the tanks were registered on April 18, 1990. AR at 34. The Board previously has affirmed decisions applying the \$100,000 deductible when owner or operators failed to register tanks by the statutory July 28, 1989 deadline. *See e.g., R.P. Lumber Company, Inc. v. OSFM* (October 17, 1996), PCB 94-184, *aff'd* 293 Ill. App. 3d 402, 688 N.E.2d 379 (5th Dist. 1997).

Although it appears undisputed at this time that none of the USTs at the Site were registered before July 28, 1989, the Estate argues that it is entitled to the \$10,000 deductible. The Estate maintains that "even if we assume for the sake of argument that the Agency correctly states the law in its motion for summary judgment, the Board may still decide that the Agency is barred by estoppel and waiver from succeeding on this point due to prior Agency actions." Response at 20. Cases imposing equitable estoppel against the State generally indicate that the State had affirmatively misled the aggrieved party. *See, e.g., Hickey v. Illinois Central Railroad Co.* 35 Ill. 2d 427, 447-48, 220 N.E.2d 415, 425-26 (1966). Furthermore, the aggrieved party must have detrimentally relied on the misrepresentation. *See, e.g., Cities Service Oil Co. v. City of Des Plaines*, 21 Ill. 2d 157, 171 N.E.2d 605 (1961). Estoppel may apply when a party reasonably and detrimentally relies on the words or conduct of another. *Cancer Treatment Centers of America v. IEPA*, PCB No. 10-33, slip op. at 9 (Sept. 2, 2010).

At this point, the Board cannot determine whether equitable estoppel applies to the Agency's actions as the parties dispute the facts surrounding the Agency's application of the \$100,000 deductible. Further, the Agency presents its own estoppel argument in its Reply. Reply at 4-5. In determining a motion for summary judgment, the Board must take the pleadings in favor of the nonmovant. The facts are unclear at this time regarding the circumstances surrounding the application of OSFM's deductible determination, the Agency's later application of the \$100,000 deductible, and whether the Agency affirmatively misled the Estate. Without a more clear set of facts, the Board cannot grant summary judgment.

MOTION FOR INTERLOCUTORY APPEAL DENIED

The Board denies the motion for interlocutory appeal from the Hearing Officer's August 10, 2010 order as moot. "An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief."

Western Transp. Co., 151 Ill. 2d 108, 116, 601 N.E.2d 704 (1992). The motion for interlocutory appeal and underlying briefs dealt with the Estate's request to depose an Agency witness to respond to the Agency's motion for summary judgment. The Estate filed a response and other subsequent briefs relating to the summary judgment motion. The Board agrees with the Hearing Officer's assessment that the Estate made various legal arguments in its motion to compel which more appropriately were addressed in its response to the motion for summary judgment and have been addressed by the Board in denying the motion for summary judgment.

CONCLUSION

For the reasons described above, the Board denies the Agency's motion for summary judgment. The Board also denies the Estate's motion for interlocutory appeal because the motion is now moot and denies the Estate's motion for leave to file a surreply because no material prejudice will result. Finally, the Agency must file a complete record by December 19, 2011, which is the first business day after the 30th day following the date of this order. If the Agency wishes to seek additional time to file the record, it must file a request for extension with the Board or Hearing Officer before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 17, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board