

ILLINOIS POLLUTION CONTROL BOARD
December 5, 2002

VOGUE TYRE & RUBBER COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 95-78
)	(UST Fund)
OFFICE OF STATE FIRE MARSHAL,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Vogue Tyre & Rubber Company (Vogue Tyre) is seeking review of a determination by the Office of State Fire Marshal (OSFM) that two tanks removed by Vogue Tyre from 1401 Golf Road, Skokie, Cook County are ineligible for reimbursement from the leaking underground storage tank fund (UST fund). On September 13, 2002, the OSFM filed a motion for summary judgment (Mot.). On November 6, 2002, Vogue Tyre filed a response to the motion (Resp.). On November 22, 2002, OSFM filed a motion for leave to file a reply and a reply (Reply), which the Board hereby grants. For the reasons discussed below the Board finds that there are no issues of material fact and the motion for summary judgment is granted. The Board affirms the OSFM's February 1, 1995 denial of eligibility.

FACTS

On March 6, 1995, Vogue Tyre filed a petition for review (Pet.) of an OSFM determination that Vogue Tyre was ineligible to seek payment for corrective action for the clean up of a leaking underground storage tank. The Board accepted this matter for hearing on March 9, 1995. See Vogue Tyre & Rubber Company v. OSFM, PCB 95-78 (Mar. 9, 1995). This proceeding was previously stayed pending the resolution of the insurance claims related to this proceeding. See Vogue Tyre & Rubber Company v. OSFM, PCB 95-78 (Jan. 18, 1996). Vogue Tyre is no longer asking that the proceeding be stayed. On March 16 1995, OSFM filed the record on appeal (R.).

The Vogue Tyre site contained four underground storage tanks that were registered with OSFM on May 6, 1986. R. at 1. Tanks 3 and 4 were removed in 1993 and a release was reported to Illinois Emergency Management Agency (IEMA). R. at 13-25, 38. Those two tanks are not at issue in this appeal.

Tanks 1 and 2 were deregistered by an administrative order issued by OSFM on February 17, 1993. R. at 6. The administrative order indicates that the tanks could no longer be registered because the tanks were removed prior to September 27, 1987. *Id.* The administrative order also contained direction on what steps should be taken to appeal the order. *Id.* Vogue Tyre did not appeal that order.

Tanks 1 and 2 were removed¹ prior to the release reported on December 7, 1994. R. at 56. On December 27, 1994, Vogue Tyre filed an application for reimbursement with the OSFM. R. at 88-90. On February 1, 1995, OSFM denied access to the UST fund because Tanks 1 and 2 were not registered and were therefore ineligible for access to the UST Fund. R. at 82-84.

REGULATORY FRAMEWORK

Illinois reimburses owners and operators of leaking underground storage tanks for cleanup costs through the Underground Storage Tank Program and the UST Fund. *See* 415 ILCS 5/57 (2000). Those seeking reimbursement from the UST fund must establish that they are eligible to access the UST fund under the criteria set forth in Section 57.9 of the Act (415 ILCS 5/57.9 (2000)). One of those criteria is that the owner of the tank registered the tank and paid the fees in accordance with the Gasoline Storage Act 430 ILCS 15/1 *et seq.* (2000). *See* 415 ILCS 5/57.9 (2000).

The Gasoline Storage Act (430 ILCS 15/1 *et seq.* (2000)) provides for registration of underground storage tanks meeting various criteria. Section 4(b)(1)(A) of the Gasoline Storage Act 430 ILCS 15/4(b)(1)(A) (2000). Section 4(b) of the Gasoline Storage Act 430 ILCS 15/4(b) (2000) requires that the owner “shall register the tank with the” OSFM. Section 7(b) of the Gasoline Storage Act 430 ILCS 15/7(b) (2000) provides that:

The State Fire Marshal may suspend or revoke the registration of any person who has violated the rules of the State Fire Marshal after notice and opportunity for an Administrative hearing which shall be governed by the Administrative Procedure Act [5 ILCS 100/1-1 *et seq.* (2000)]. Any appeal from such suspension or revocation shall be to the circuit court of the county in which the hearing was held and be governed by the Administrative Review Law [735 ILCS 5/3-101 *et seq.* (2000)]. 430 ILCS 15/7(b) (2000).

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

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). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to the relief “is clear and free from doubt.” *Id.*, citing *Purtill v. Hess*, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present

¹ The record contains conflicting dates regarding the actual removal of the Tanks 1 and 2. The record indicates that removal occurred either in the spring of 1985 (*see* R. at 4.) or May of 1986 (*see* Pet. Exh. C.). The actual date of removal is not a material fact for the resolution of this matter.

a factual basis which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

DISCUSSION

The following discussion will briefly summarize the arguments of the parties and then state the Board’s findings on this case.

OSFM Arguments

OSFM asserts that Tanks 1 and 2 are not eligible for reimbursement because the tanks are no longer registered. Mot. at 5. OSFM points out that the Illinois Environmental Protection Agency and the OSFM jointly administer the Underground Storage Tank Program but the responsibilities are not identical. Mot. at 4, citing 430 ILCS 15/4(a) (2000) and Farrales v. OSFM, PCB 97-186 (May 7, 1998). OSFM argues that eligibility determinations are appealable to the Board but not the registration decision. Mot. at 4. OSFM maintains that the Board has consistently refused to review OSFM registration decisions. Mot. at 4. OSFM also argues that the Board has recognized the OSFM’s authority to deregister tanks on a number of occasions and cites to several Board cases and OK Trucking Com. v. Armstead, 274 Ill. App. 3d 376, 653 N.E.2d 863 (1st Dist. 1995). Mot. at 6.

In this case OSFM asserts that the record is clear that Vogue Tyre received an administrative order in 1993 stating that Tanks 1 and 2 were no longer registerable. Mot. at 5. Vogue Tyre did not appeal that order. *Id.* OSFM argues that because registration is a prerequisite to eligibility to access the UST Fund, petitioner is not eligible to access the UST Fund as a matter of law. Mot. at 6.

Vogue Tyre Arguments

Vogue Tyre asserts that the sole basis for the OSFM’s denial of eligibility “lies in its deregistration” of Tanks 1 and 2. Resp. at 6. Vogue Tyre asserts that OSFM cannot deregister tanks “without impinging upon a vested right” because OSFM cannot deregister tanks without retroactively applying a statute. *Id.*

Vogue Tyre further argues that OK Trucking Com. v. Armstead is distinguishable because in that case the tanks did not meet the definition of underground storage tank when registration was sought. Resp. at 4. Vogue Tyre asserts that in this case the tanks were in the ground at the time of registrations. *Id.* Vogue Tyre maintains that the facts of this case are more analogous to ChemRex, Inc. v. IPCB, 257 Ill.App.3d 274, 628 N.E.2d 963 (1st Dist 1993) wherein the tank owner was denied eligibility because of subsequent amendments to the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000) *amended by* P.A. 92-0574, eff. June 26, 2002). Resp. at 5-6. The court found that ChemRex had a vested right to access the UST Fund and the amendment to the Act could not be applied retroactively. Vogue Tyre argues that the tanks were registered and fees paid in accordance with the statute at the time and thus pursuant to ChemRex the tanks cannot be deregistered. Resp. at 5.

Finding

The Board finds that there are no issues of material fact and judgment may be granted as a matter of law. Therefore, the Board finds that summary judgment is appropriate. The sole issue is whether the OSFM appropriately denied eligibility to access the UST Fund by Vogue Tyre because Tanks 1 and 2 were deregistered.

Section 4 of the Gasoline Storage Act provides that underground storage tanks may be registered with the OSFM. 430 ILCS 15/4 (2000). The OSFM is also charged with the responsibility of determining eligibility for access to the UST fund. *See* 415 ILCS 5/57.9(c) (2000). Pursuant to the Act, decisions by the OSFM regarding eligibility are appealed to the Board. *Id.* However, decisions regarding registration are appealable to the circuit court under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (2000)). *See* 430 ILCS 15/7 (2000). Thus, as the Board has consistently held, the Board is not authorized to review OSFM's decision regarding registration of underground storage tanks. *See Farrales v. OSFM*, PCB 97-186 (May 7, 1998); *Divane Brothers Electric Co. v. IEPA*, PCB 93-105 (November 4, 1993); *Village of Lincolnwood v. IEPA*, PCB 91-83 (June 2, 1992).

OSFM has denied Vogue Tyre eligibility to access the UST fund because the tanks at issue were deregistered. In the response to the motion for summary judgment, Vogue Tyre argues at length that the tanks could not be deregistered. The Board does not review registration decisions by the OSFM.

Thus, the facts clearly establish that the tanks were not registered at the time that Vogue Tyre sought access to the UST Fund. Registration of tanks is a prerequisite to accessing the UST Fund. *See* 415 ILCS 5/57.9(a)(4) (2000). Authority to register tanks is vested in the OSFM by the legislature. Section 4 of the Gasoline Storage Act (430 ILCS 15/4 (2000)). Therefore, the denial of eligibility was appropriate and the Board affirms the decision by the OSFM.

CONCLUSION

The Board finds that there are no issues of material fact and summary judgment is appropriate. Based on the record, the Board finds that OSFM is entitled to judgment as a matter of law and the Board grants OSFM's motion for summary judgment. The Board affirms OSFM's February 1, 1995, decision denying access to the UST fund by Vogue Tyre.

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

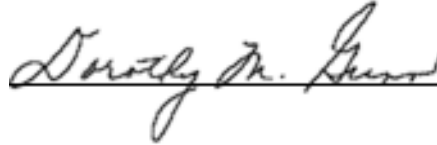
ORDER

The Board affirms the Office of State Fire Marshal's denial of eligibility to access the Underground Storage Tank Fund by Vogue Trye & Rubber Company for the facility located at 1401 Golf Road, Skokie.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 5, 2002, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board