ILLINOIS POLLUTION CONTROL BOARD
September 21, 1995

BARBARA L. HEISER (HEISER'S GARAGE),	)	
Petitioner,	)	
v.	)	PCB 94-377 (UST - Fund)
OFFICE OF THE STATE FIRE MARSHAL,	)	
Respondent.	)	

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

This matter is before the Board on a December 9, 1994 petition for review filed by Barbara Heiser d/b/a Heiser's Garage (Heiser), seeking review of a December 5, 1994 final eligibility/deductibility determination issued by the Office of the State Fire Marshal (OSFM). Heiser seeks the reversal of OSFM's imposition of a $100,000 deductible, and seeks to have a $10,000 deductible applied to the site.

Additionally, there are several motions and responsive pleadings pending before the Board. Heiser filed a motion for summary judgment with supporting affidavit and supporting memorandum on June 12, 1995. On June 26, 1995 the OSFM filed a cross-motion for summary judgment and a response to petitioner's motion for summary judgment, with a supporting memorandum. Also on June 26, 1995, OSFM filed a motion to strike petitioner's affidavit in support of its motion for summary judgment. On July 10, 1995, Heiser filed a response in opposition to OSFM's motion to strike, accompanied by a motion for leave to file instanter. On July 12, 1995 Heiser filed a combined response to OSFM's cross-motion for summary judgment and reply to OSFM's response to Heiser's motion for summary judgment. Heiser filed a motion for leave to file the reply on July 18, 1995. Also on July 18, 1995 OSFM filed a reply to Heiser's response to the motion to strike, accompanied by a motion for leave to file.

Motions for Leave to File

As an initial matter, we will address the various motions for leave to file pleadings. We grant Heiser's motion for leave to file a response to OSFM's motion to strike petitioner's affidavit; we believe that no prejudice will result from allowing Heiser to respond to this motion. Because Heiser's response to the OSFM motion to strike raised new issues, we also grant OSFM's motion for leave to file a reply to Heiser's response. Finally, we also grant Heiser's motion for leave to file a reply to the OSFM's response to Heiser's motion for summary judgment.

Motion to Strike

We will next address the OSFM's motion to strike the affidavit of Barbara Heiser, Heiser's response to that motion, and the OSFM's reply. The affidavit of Barbara Heiser was submitted in support of Heiser's motion for summary judgment. The affidavit describes Barbara Heiser's relationship to the business conducted at the site, and the actions surrounding the discovery of the petroleum release at the site. It includes descriptions of the illness of Raymond Heiser, who suffered from cancer which ultimately caused his death on November 15, 1993, and the illness of Linda Moelle Heiser, the wife of Norman Heiser, who also suffered from cancer, and who died in 1993. Several documents were attached to the affidavit as exhibits and referenced therein, which were not included in the OSFM's record on appeal. These documents include correspondence sent between Norman Heiser and the Agency between October and November 1989.

The OSFM seeks to strike the affidavit of Barbara Heiser, on the grounds that the affidavit contains conclusory and irrelevant statements, and statements which are not within the affiant's personal knowledge. The OSFM asserts that, since the affiant admits that she did not manage the businesses operated at the site, and that she was unaware of any problems with the property until early 1994, it can be reasonably inferred that she lacks any personal knowledge regarding the release of petroleum and the facts surrounding that release. The OSFM therefore asserts that the Board should not consider Mrs. Heiser's affidavit, and should strike the affidavit in its entirety. Alternatively, the OSFM asserts that the Board should strike those portions of the affidavit that contain conclusory or irrelevant statements, and identifies paragraphs 11-14, and 18-19 as those portions of the affidavit which should be stricken.

The Board's procedural rules do not address what information can be properly submitted in an affidavit supporting a motion for summary judgment. The Board's procedural rule at 35 Ill. Adm. Code 101.100 provides that in the absence of a specific rule in the Board's procedural rules, the parties may argue that a particular provision of the Code of Civil Procedure or Supreme Court Rules should apply. In its motion to strike, the OSFM seeks to rely on Supreme Court Rule 191(a), which provides:

> Affidavits in support of and in opposition to a motion for summary judgment . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently

thereto. If all of the facts to be sworn are not within the personal knowledge of one person, two or more affidavits shall be used.

The OSFM further seeks to rely on Clausen v. Ed Fanning Chevrolet, Inc., 8 Ill App.3d 1053, 291 N.E.2d 202 (3d Dist. 1972), which holds that conclusions to which an affiant cannot competently testify should be disregarded in considering a motion for summary judgment.

Heiser argues that, pursuant to Chemrex v. Illinois Pollution Control Board, 257 Ill.App.3d 274, 628 N.E.2d 963 (1993), it is necessary and appropriate for petitioner to present facts and equitable considerations which support application of the rule of law established in Chemrex. Heiser cites State Farm Mutual Automobile Insurance Company v. Short, 125 Ill.App.2d 97, 260 N.E.2d 415 (5th Dist. 1970), for the proposition that "where a witness is qualified to express . . . an opinion by reason of his special knowledge or familiarity with the matter in question, he will be permitted to give his conclusion" (260 N.E.2d at 418).

Heiser asserts that the information in paragraph 11 of Barbara Heiser's affidavit is a conclusion which the affiant is clearly qualified to express based on her relationship to Raymond Heiser, and her observations of him during his illness. Heiser asserts that this information is relevant as an equitable consideration pursuant to Chemrex. Similarly, petitioner asserts that the information in paragraph 12 concerning the illness of Linda Heiser is within the scope of the affiant's personal knowledge, since the affiant was her sister-in-law, and that this information is similarly admissible as an equitable consideration pursuant to Chemrex.

Regarding paragraph 13, petitioner asserts that the conclusion therein is based on the affiant's relationship with her husband and brother-in-law, and her personal observations of their behavior. Petitioner asserts that this information is also relevant as an equitable consideration under Chemrex.

Regarding the documents referenced in paragraph 14, petitioner, citing Mitchell v. Simms, 79 Ill. App. 3d 215, 398 N.E.2d 211, 216 (1st Dist. 1979), asserts that the affiant, as executor of the estate of Norman Heiser, is in a position to testify regarding the referenced documents through personal knowledge. Petitioner also argues that those documents are relevant to show that, under the rule in Chemrex, petitioner embarked upon remediation, and was diligently pursuing such remediation until his illness prevented him from doing so.

Regarding the statement in paragraph 18, petitioner admits that the evidence is arguably hearsay, but asserts that the same

information is included in the record on appeal. Finally, concerning paragraph 19 of the affidavit, petitioner asserts that Barbara Heiser is competent to testify at hearing regarding petitioner's diligent efforts to resolve all remaining issues concerning underground storage tanks (USTs) at the site.

We find that it is inappropriate to strike the entire affidavit. Barbara Heiser is the executor of the estate of Raymond Heiser, and as such is now responsible in part for the site and related obligations. As such she was required to take charge of activities at the site, and to familiarize herself with earlier activities associated with the USTs. She is therefore competent to attest to facts concerning the site and related activities. We will therefore consider the OSFM's objections to particular portions of the affidavit.

Concerning paragraphs 11-13 of the affidavit, we find that Barbara Heiser is clearly competent to testify regarding the illnesses of her husband and sister-in-law, and the impact that those illnesses had on the lives of the Heiser family. We therefore deny OSFM's motion to strike these paragraphs. OSFM's remaining objections to paragraphs 11-13 are based upon OSFM's belief that the Board should reject petitioner's legal theory regarding the application of Chemrex to the present case. The appropriateness of petitioner's legal theory will be addressed separately below.

Concerning paragraph 14 and the referenced exhibits attached to the affidavit, we find that they should be stricken. This is not information which was within Barbara Heiser's personal knowledge. Furthermore, the Board must make its determination based upon the record that was before OSFM at the time of its decision. The documents which petitioner seeks to admit were not before OSFM at the time of its decision, and they therefore cannot be admitted to form the basis of our opinion in this matter.

We find that the portion of paragraph 18 referencing the conversation between Duane Haag, a friend of the Heiser family, and Jane Squires of the OSFM, is based on hearsay. We therefore grant the motion to strike this statement. However, we note that, as petitioner correctly points out, the fact that this phone conversation took place is recorded in the record on appeal. Petitioner can therefore rely on this record in asserting that such a conversation took place. We also grant the motion to strike paragraph 19, referencing the "diligent efforts" of Barbara Heiser to resolve any conflicts concerning the USTs at the site. This statement is self-serving and conclusory.

BACKGROUND

Heiser is the owner of a facility known as Heiser's Garage located at 1728 N. Sheridan Road, Peoria, Illinois (the site). The site previously contained four USTs. The four USTs were removed from the site on September 20, 1989, by Illinois Oil Marketing Equipment, Inc., pursuant to a removal permit issued by OSFM. A release was discovered during the removal of the tanks, and the Illinois Emergency Management Agency (IEMA) was notified. The matter was assigned IEMA Incident No. 89-1836. Heiser also attempted to register the USTs on September 20, 1989, by submitting a "Notification for Underground Storage Tanks" to the OSFM's Division of Petroleum/Chemical Safety. On November 13, 1991, OSFM sent a letter to Heiser acknowledging receipt of the notification, but denying registration, stating that the tanks did not meet the criteria for registration.

On July 5, 1994, pursuant to a June 29, 1994 inquiry from Barbara Heiser, the OSFM sent Heiser an administrative order informing Heiser that the four tanks at the site were not registered since they had not been in use at any time since January 1, 1974. Subsequently, by letter dated September 12, 1994, PDC Technical Services (PDC) provided documentation to OSFM that the tanks were in use in 1979. By letter dated October 7, 1994, OSFM rescinded the July 5, 1994 administrative order because the tanks at the site were in operation after January 1, 1974.

PDC submitted an eligibility/deductibility application on Heiser's behalf, which was received by OSFM on September 15, 1994. OSFM determined that the initial application was deficient, since Heiser owed $2,400 in annual and/or late tank registration fees. On November 4, 1994, Heiser resubmitted the application, accompanied by the appropriate fees. On November 10, 1994 the OSFM issued its final eligibility/deductibility determination, finding that petitioner was eligible to access the UST Fund with a $100,000 deductible.

Summary judgment is appropriate where there are no genuine issues of material fact to be considered by the trier of fact and the movant is entitled to judgment as a matter of law. (Waste Management of Illinois, Inc. v. IEPA (July 21, 1994) PCB 94-153; ESG Watts v. IEPA (August 13, 1992), PCB 92-54; Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112.) Because we find there are no genuine issues of material fact, we find that summary judgment is appropriate. We will therefore rule on both Heiser's motion for summary judgment and the OSFM's cross-motion for summary judgment.

APPLICABLE LAW

Statutory History

P.A. 86-125, effective on July 28, 1989, amended the Environmental Protection Act (Act) by establishing new criteria for UST owners and operators to access the Fund. Pursuant to these provisions, owners and operators of USTs were subject to a $10,000 annual deductible when accessing the Fund, or alternatively, if the owner or operator failed to register its USTs in accordance with the requirements of the Gasoline Storage Act (GSA) prior to July 28, 1989, the owner or operator would be subject to a $15,000 deductible. Specifically, Section 22.18b(d)(3) provided:

> (A) If an owner or operator submits a claim or claims to the Agency for approval under this Section 22.18b, the Agency shall deduct from the amount approved a total of $10,000 for each site for which a claim is submitted. This deductible amount shall apply annually for each site at which costs were incurred under a claim submitted pursuant to this Section.
>
> (B) If prior to the effective date of this amendatory Act of 1989 [July 28, 1989], the owner or operator has not registered the underground storage tanks in use on that date at the site and paid all required fees as provided in item (4) of subsection (a), the deductible amount under subparagraph (A) of paragraph (3) of this subsection (d) for the first year in which a claim is submitted shall be $15,000 rather than $10,000.

P.A. 86-958, effective December 5, 1989, amended those deductibility provisions of the Act. Pursuant to these amendments, a $10,000 deductible still applied for owners and operators who properly registered their tanks prior to July 28, 1989. However, additional deductible levels were established for tank owners who did not register their tanks prior to July 28, 1989. These levels included a $100,000 deductible for owners and operators who failed to register any of the tanks at the site prior to July 28, 1989, and a $15,000 deductible if one or more, but not all, of the tanks at the site were registered prior to July 28, 1989. Specifically, Section 22.18b(d)(3)(B) provided in relevant part:

> (i) If prior to July 28, 1989, the owner or operator had registered none of the underground storage tanks in use on that date at the site, the deductible amount under subparagraph (A) of paragraph (3) of this subsection (d) shall be $100,000 rather than $10,000.

Subsequently, the legislature adopted P.A. 87-323, effective September 6, 1991, wherein the legislature amended Section 22.18b(d)(3)(B)(i) by deleting the words "in use". The subsection then read as follows:

> (i) 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 under subparagraph (A) of paragraph (3) of this subsection (d) shall be $100,000 rather than $10,000.

P.A. 88-496, also known as H.B. 300, effective September 13, 1993, moved the UST provisions of the Act to a new Title XVI. The sections pertaining to deductible amounts were moved to Section 57.9. This amendatory act also gave the OSFM authority to determine whether an owner or operator of a UST site is eligible to seek reimbursement for corrective action costs from the UST Fund, and to determine the appropriate deductible to be applied to reimbursement applications. These determinations are appealable to the Board. Pursuant to Section 107.340 of the Board's procedural rules governing appeals from OSFM determinations, adopted on October 20, 1994 in docket R94-11, the standard of review the Board will apply in these cases is "whether the application, as submitted to OSFM, demonstrates compliance with the Act and Board regulations."

Pursuant to Section 57.9(b) of the Act, an eligible owner or operator is entitled to access the UST Fund with a $10,000 deductible, unless one of the enumerated exceptions apply, which include the following:

> 1) A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989 . . .;
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> * * * *
>
> 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.

The OSFM applied a $100,000 deductible to the Heiser site pursuant to Section 57.9(b)(1), finding that none of the tanks at the site were registered prior to July 28, 1989.

ARGUMENTS OF THE PARTIES

Arguments of Heiser

In the motion for summary judgment, Heiser argues that OSFM applied the incorrect law when determining the appropriate deductible for Heiser's site. OSFM applied the law in effect at the time the eligibility/deductibility application was submitted on October 19, 1994. Instead, Heiser argues that OSFM should have applied the law in effect at the time the release was reported on September 20, 1989. The law in effect on that date was Section 22.18b(d)(3), as enacted by P.A. 86-125, effective on July 28, 1989. Heiser asserts that, pursuant to that law, it was entitled to a $10,000 deductible.

In support of this position, Heiser asserts that the Illinois Appellate Court has already determined that the appropriate deductible should be determined based on the law in effect at the date of the release. Heiser relies on Chemrex and First of America Trust Co. v. Armstead, 206 Ill.Dec. 935, 646 N.E.2d 303 (Ill.App. 3 Dist. 1995).

Arguments of the OSFM

In its response and cross-motion for summary judgment, the OSFM asserts that it correctly applied the law in effect at the time of the eligibility/deductibility application. Heiser submitted its initial eligibility/deductibility application on September 15, 1994, and a corrected application on November 4, 1994. The law in effect during this time period was Section 57.9(b) of the Act, as amended by P.A. 88-496, effective September 13, 1993. OSFM asserts that, pursuant to this law, it correctly determined that Heiser was entitled to access the Fund with a $100,000 deductible.

OSFM argues that the long-standing rule is that the law in effect at the time of the application applies when making an eligibility/deductibility determination, and that Heiser is incorrectly seeking to expand the limited scope of the holding in Chemrex. OSFM asserts that the court in Chemrex was exercising its equitable powers to avoid an unjust result, and that the holding was therefore limited to its facts. OSFM further asserts that the facts of this case, where the most recent amendments to the UST law were in effect for over one year before the application was filed, and where the application was filed almost 5 years after the release occurred, do not warrant the same equitable consideration.

OSFM further asserts that the right to an eligibility/deductibility determination is not triggered solely by the occurrence or the report of a release. Rather, the right to a determination is triggered by the submittal of an

eligibility/deductibility application, and then only if the applicant meets the requirements set forth in the statute.

Heiser submitted its initial application on September 15, 1994, and a corrected application on November 4, 1994. The law in effect at that time was Section 57.9(b) of the Act, as amended by P.A. 88-496. OSFM asserts that, pursuant to this law, it correctly determined that Heiser was entitled to access the Fund with a $100,000 deductible.

DISCUSSION AND DECISION

The Board has consistently held that the law to be applied is that which is in effect upon the date the application is filed. (Pulitzer Community Newspaper, Inc. v. Illinois Environmental Protection Agency PCB 90-142 (December 5, 1989); Marjorie B. Campbell v. Illinois Environmental Protection Agency, PCB 91-5 (June 6, 1991); First Busey Trust & Investment Co. v. Illinois Environmental Protection Agency, PCB 91-213 (February 27, 1992). Heiser applied for an eligibility/deductibility determination in the September of 1994, at which time Section 57.9(b) of the Act specified a $100,000 deductible for owners or operators who failed to register any tanks prior to July 28, 1989. Heiser did not register any of the tanks at the site prior to the July 28, 1989 statutory cut-off. Therefore, unless we find cause not follow this precedent, the $100,000 deductible in effect at the time of eligibity/deductibility application is the deductible properly applied to Heiser.

Relying upon Chemrex, Heiser argues that the applicable law is that in effect at the time the release was reported on September 20, 1989. In Chemrex, the Agency denied eligibility for Chemrex to access the UST Fund based on a change in the eligibility criteria that occurred after a release from Chemrex's tanks had occurred, but before Chemrex applied for reimbursement. Having completed its remediation, Chemrex applied to the Fund, one month after the passage of P.A. 87-323. P.A. 87-323 had changed the eligibility criteria for accessing the Fund, such that five of Chemrex's tanks containing petroleum-based solvents were no longer eligible for reimbursement. The Board upheld the Agency's denial of eligibility, on the grounds that the law in effect at the time the application was submitted controlled the eligibility determination. The appellate court reversed, finding that the application of the law to Chemrex constituted an unlawful retroactive deprivation of rights.

We find that the present case is not controlled by Chemrex. The most important distinction is that Chemrex involved a change in the statutory eligibility requirements for accessing the UST Fund. This change occurred between the time Chemrex initiated corrective action and the time Chemrex submitted its eligibility application. The statutory amendment establishing the new

eligibility criteria was, on its face, a "prospective" law. A general rule of statutory construction in Illinois requires that an amendatory act be construed as prospective only. (Chemrex, 257 Ill.App.3d 274, at 502 citing Rivard v. Chicago Fire Fighters Union, No.2 (1988), 122 Ill. 2d 303, 309, 522 N.E.2d 1195, 1198.) This presumption of prospectivity is rebuttable by express statutory language to the contrary, or by necessary implication (Id. at 502 citing Rivard, 122 Ill. 2d at 309.) In Chemrex, the court found that express statutory language making the new eligibility criteria retroactive was "absent". (Id.) The court found that denying Chemrex eligibility to access the UST Fund based on the date it submitted its eligibility application had an unlawful retroactive effect on Chemrex. The unlawful effect was to deprive Chemrex of its "vested" right to seek reimbursement from the UST Fund, when Chemrex had performed all statutory requirements to be eligible, *i.e.*, properly registered the USTs, notified the proper state authority, embarked upon and completed remediation.

Unlike Chemrex, this case involves a statutory amendment to the deductibility provisions of the UST law. This change occurred between the date of Heiser's release and the date of Heiser's registration of the tanks. While the cut-off date of July 28, 1989 remained the same, the deductible was raised to $100,000 if none of the tanks were registered prior to the cut-off date. Again, there is no dispute that by July, 28, 1989, Heiser had not registered any of the tanks at the site. While Heiser applied to register the tanks on September 20, 1989, OSFM denied registration in November of 1991. Heiser neither appealed this decision nor reapplied for registration until three years later in September of 1994. Thereafter, OSFM registered the tanks on October 7, 1994 based upon new information submitted by Heiser.

Beginning with its first act creating the UST Fund, the legislature has specifically tied the amount of the deductible to be assessed against any reimbursement from the UST Fund to whether or not the owner or operator had registered the underground storage tanks by July 28, 1989. In P.A. 86-125, effective July 28, 1989, if the owner or operator had not properly registered the tank by that date, the deductible would be $15,000. Then, in P.A. 86-958, effective December 5, 1989, the legislature enacted legislation providing that if the owner or operator had not registered any of the tanks in use as of July 28, 1989, the deductible would be $100,000. In P.A. 87-323, effective September 6, 1991, the legislature deleted the "in-use" requirement and if no tanks, whether in-use or not, were registered by July 28, 1989, the deductible would be $100,000. While there were extensive amendments to the UST law in 1993, the legislature again retained the $100,000 deductible if no tanks were registered by July 28, 1989. (P.A. 88-496.)

Initially, and in all of the amendments to the deductible provisions, the legislature has consistently determined that the deductible will retroactively apply to the owners or operators who failed to properly register their USTs by July 28, 1989. Unlike the eligibility provisions at issue in Chemrex, since their original adoption and with every subsequent amendment, the deductibility provisions are expressly retroactive. Since Heiser submitted its deductibility application in 1994, fully three years after the $100,000 deductible became applicable to any tank not registered by July 28, 1989, the OSFM, and consequently this Board, has no alternative but to apply the $100,000 deductible. Heiser's arguments that the application of these provisions constitutes an unlawful retrospective application is in error.

Furthermore, the amendment Heiser seeks to avoid has been in effect since the enactment of P.A. 87-323, effective September 6, 1991. The Illinois Supreme Court has held that there is no vested right in the continuance of a law. The legislature has an ongoing right to amend a statute (Envirite Corporation v. The Illinois Environmental Protection Agency, 198 Ill. Dec. 424, 426, 632 N.E. 2d 1035 (Ill. 1994), *citing* People ex rel. Eitel v. Lindheimer (1930), 371 Ill. 367, 373, 21 N.E.2d 318.) We find that Heiser had no reasonable expectation of application to it of the law that was in effect almost five years prior to the submission of its eligibility/deductibility application.

Having examined and found the deductibility provisions now found at Section 57.9(b) of the Act to be expressly retroactive, we find that the law in effect at the time of Heiser's eligibility/deductibility application is the appropriate law to apply. As stated previously, the law in effect during this time period was Section 57.9(b) of the Act. Pursuant to this law, a deductible of $100,000 applies when none of the underground storage tanks were registered prior to July 28, 1989. Since Heiser registered its tanks after this date, the OSFM correctly applied a $100,000 deductible to the site. We therefore affirm the OSFM's decision imposing a $100,000 deductible and grant the OSFM's cross-motion for summary judgment, and deny Heiser's motion for summary judgment.

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

ORDER

The November 10, 1994 decision of the Office of the State Fire Marshal (OSFM), finding Barbara Heiser d/b/a Heiser's Garage (Heiser) eligible to access the Underground Storage Tank Fund with a $100,000 deductible, for remediation associated with the September 20, 1989 release of petroleum at Heiser's facility located at 1728 N. Sheridan Road, Peoria, Illinois is hereby

affirmed. Heiser's motion for summary judgment is denied, and OSFM's cross-motion for summary judgment is granted.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of September 1995, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board