

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of

Joseph R. Ritchie
Ritchie Lakeland Oil
P.O. Box 133
Minocqua WI 54548

PECFA Claim #54548-9319-83
Hearing #05-47

PROPOSED DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Decision in the above-entitled matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and decision within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection you wish to make and send them to:

Madison Hearing Office, Department of Commerce, PO Box 7838, Madison, WI 53707-7838. After the objection period, the hearing record will be provided to the Administrator for the Division of Environmental & Regulatory Services of the Department of Commerce, as the individual designated to make the final decision of the Department in this matter.

Administrative Law Judge:

Steven Wickland

Dated and Mailed:

August 15, 2006

PARTIES IN INTEREST:

Joseph R. Ritchie
Ritchie Lakeland Oil
P.O. Box 133
Minocqua WI 54548

By: Jennifer L. Bolger
Friebert, Finerty & St. John
330 East Kilbourn Ave
Suite 1250
Milwaukee WI 53202

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Joseph R. Thomas, Chief Legal Counsel
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison WI 53707-7838

Date Mailed: _____
Mailed By: _____

The Department of Commerce (Department) July 6, 2005 decision denied the petitioner's claim for reimbursement of certain remediation costs at the Ritchie Lakeland Oil Co., Inc. ("Ritchie Oil") Minocqua, Wisconsin. Petitioner Ritchie Oil, by its July 29, 2005 petition to the Department for hearing on the decision, filed a timely appeal from the Department's Petroleum Environmental Cleanup Fund Act (PECFA) decision.

A prehearing conference on the appeal was held on September 29, 2005. Pursuant to proper notice, a class 3 administrative hearing was held on December 13, 2005 in Madison, Wisconsin, Steven Wickland, administrative law judge presiding. Following the hearing, the parties filed written briefs, with the last brief received April 10, 2006.

The issue for determination raised by the petition was: Whether the Department's decision dated July 6, 2005 was incorrect with regard to the disputed costs identified in petitioners' appeal received July 29, 2005.

The issue for determination was narrowed at the December 13, 2005 hearing by the parties' Stipulation to Facts, Exhibits and Proceedings (The Stipulation, Exhibit 13, admitted at hearing). The parties agree therein, as a finding of fact, that the October, 2004 inspection of the Ritchie Oil site by Joe Schrieber formed the basis for the Department's denial of claim, and that the "specific item noted in the [October 2004 Schrieber] investigation that gives rise to the Department's denial is the observation that a leak detector had been damaged and thereby rendered inoperative." (Stipulation at ¶ 13.) The Stipulation further provides that: "The sole issue in this case is whether facts observed by

Mr. Schrieber constituted sufficient grounds to deny Ritchie's PECFA claim under §§ 101.143(g)(3)(4) and (6), Wis. Stats." Stipulation at ¶ B. 1.

The authority to issue a final decision in this matter remains with the Department of Commerce in the manner provided by the August 1, 2005 order of Secretary Mary P. Burke.

Petitioner Joseph Ritchie appeared at the hearing and testified. State of Wisconsin Department of Commerce staff Dennis Legler and Steve Mertens testified for the respondent. The Department also presented testimony from Joe Schrieber, of Acutank, an underground tank testing service.

Findings of Fact

1. Ritchie Oil sells propane gas and has a bulk petroleum storage facility and a retail gas station, and is the "owner" and "operator" of a "petroleum products storage system" as such terms are defined in § 101.143, Wis. Stats., located in Minocqua, Wisconsin.

Stipulated Facts ¶ 1.

2. As part of an earlier investigation related to potential petroleum discharges for which Ritchie Oil received PECFA reimbursement, it was concluded that a petroleum discharge had likely occurred from one of Ritchie Oil's eligible tank systems (the "Discharge"). Stipulation Facts ¶ 2.

3. On August 20, 2004, Ritchie Oil, through its environmental consultant, Northern Environmental, submitted a written request to Commerce for a preliminary determination that costs related to the investigation and cleanup of the Discharge would be eligible for reimbursement under PECFA. Stipulation ¶ 3.

4. On August 27, 2004, the Department responded with its initial determination that the project costs for the Discharge were PECFA eligible. Stipulation ¶ 4. The Department's response noted that a final determination of site eligibility will be made at the time of claim review.

5. The PECFA reimbursement referred to in paragraph 2 above, made following an extended period of remediation, was in the amount of \$297,137.00 in reimbursements on behalf of petitioner.

6. In order to better understand whether the Ritchie Oil tank systems were an ongoing source of the contamination, the Department arranged for an independent tester to conduct a second line tightness test of the entire system. Transcript at 11-12, 146-47.

7. In October 2004, the Department contacted Joe Schreiber of Walt's Petroleum a/k/a AcuTank Underground Tank Testing Service, Inc., as well as Joe Ritchie to coordinate the testing. Transcript 59-60; 114.

8. During the course of an independent inspection of the petitioner's site, the Department discovered that there was a large leak from the petitioner's regular unleaded line due to the line's failure.

9. As a result of the Schreiber independent inspection of the petitioner's site, the Department was advised that there was damage, apparently intentionally done to the petitioner's petroleum product storage system.

10. At all times relevant to this matter, Ritchie Oil has conducted line tightness testing of all its tank systems as required by Comm 10, Wis. Admin. Code. (Stipulation ¶ 16.)

11. The Department decision of July 6, 2005 denied the entire Ritchie Oil claim of \$84,925.27 on the basis that claimant violated Wis. Stat. § 101.143(4)(g)(3),(4) and (6).

12. The petition for hearing herein challenges the Department's decision. The Department received the petition by fax July 29, 2005 and by mail August 2, 2005.

Applicable Statutes and Codes

§ 101.143(4)(g)(3), (4) and (6), Wis. Stats. **Awards for Petroleum Product Investigations, Remedial Action planning and Remedial Action Activities.**

...

(g) Denial of Claims, limits on awards. The department shall deny a claim under par. (a) if any of the following applies:

...

3. The claimant has been grossly negligent in the maintenance of the petroleum product storage system or home oil tank system.
4. The claimant intentionally damaged the petroleum product storage system of home oil tank system.

...

6. The claimant willfully failed to comply with laws or rules of this state concerning the storage of petroleum products.

Part 4 – Release Detection - § Comm. 10.59 and § Comm. 10.60, Wis. Admin. Code.

Discussion

As initially set for hearing, the issue was broadly stated: “Whether the department’s decision dated July 6, 2005 was incorrect with regard to the disputed costs identified in petitioner’s appeal received July 29, 2005.” (September 29, 2005 notice of hearing.)

The statute providing the Department a range of reasons for claim denial is also broad, as referenced by the Department in its denial herein:

Note To Claimant: Per 101.143(4)(g) Denial of Claims, limits on awards. The department shall deny a claim under par. (a) if any of the following applies: 3. The claimant has been grossly negligent in the maintenance of the petroleum product storage system or home oil tank system. 4. The claimant intentionally damaged the petroleum product storage system of home oil tank system. 6. The claimant willfully failed to comply with laws or rules of this state concerning the storage of petroleum products.

Thus, the Department in its decision cited its broad authority pursuant to statute pursuant to Wis. Stat. § 101.143(4)(g)(3), (4) and (6).

In contrast, the parties at hearing – by stipulation and by testimony – specifically narrowed the factual basis for the Department’s decision and narrowed the factual issue upon which to case is to be decided. The broad reach of the statute is maintained, but the factual basis upon which the denial of eligibility is based is constricted to an October 2004 inspection of the site by Joe Schrieber, as agreed by the parties and set out below.

The Department's denial of the Ritchie claim was based upon the investigation conducted by Joe Schrieber of Walt's Petroleum (a.k.a. AcuTank Underground Tank Testing Service, Inc. ("AcuTank" or "Walt's Petroleum")). The specific item noted in the investigation that gives rise to the Department's denial is the observation that a leak detector had been damaged and thereby rendered inoperative. Stipulation at ¶ 13.

The parties further agreed that "The sole issue in this case is whether facts observed by Mr. Schrieber constituted sufficient grounds to deny Ritchie's PECFA claim under § 101.143(4)(g)(3), (4) and (6), Wis. Stats. Stipulation ¶ B.1.

PECFA Claims Section Chief Dennis Legler. The Department presented the testimony of Dennis Legler, who has been part of the Department's PECFA program since 1992, starting as a claim reviewer. He is currently chief, PECFA claims review section, a position he has held since 2000. As such, he supervises all phases of the section's activities and oversees the fourteen members of the PECFA claims review staff, who evaluate claims for reimbursement consideration. Mr. Legler reviewed the Ritchie Oil claim. He arranged for an independent test at the site to determine if the operating system was a source of a petroleum contamination leak on site. Transcript 11-12.

Mr. Legler noted that Steve Mertens, a Department petroleum inspector, regularly inspects tank systems like petitioner's. In this regard, Mr. Legler stated he had reviewed Merten's reports but did not use them as a basis for the Department's denial decision:

Q: Did you have Steve Mertens' materials in front of you when you – did you review those when reviewing this claim, his inspection reports from the – from the Ritchie site?

A: Most of them. I – I don't know if I had all of them but I had most of them.

Q: And was that – did you include that as a reason for the basis of the denial?

A: No.

Q: It was solely based on the fact that the leak detector had been damaged –

A: Correct.

Q: – correct?

Transcript at 19.

Mr. Legler testified further:

A: ... The basis for our denial was based on the fact that another bureau in our – in the Environmental Regulatory Services Division, which would be the Bureau of Tanks, had indicated to us that there was a problem with the inspections that were done by Joe Schreiber and that there was in fact a failed leak detection and that there was a problem with the – the flow restrictor having been cut off. The – the sole – the sole denial was based on the fact that – that that had happened...

Transcript at 143. Mr. Legler noted that the Department had no reason to believe that anybody had damaged the system other than the owner. (Transcript at 21.)

Department petroleum inspector Steve Mertens. Since 1990, Mr. Mertens has been a Department petroleum inspector, typically inspecting retail commercial sites. Transcript at 25. About every year and a half he performs a “checklist inspection” at petroleum sites, including petitioner's site. Transcript at 26. He notes any violations, and returns in thirty days to do a follow up inspection. Transcript at 27.

Mr. Mertens testified that if the tank system was a submersible or a pressurized system, where the pump sends product through the pipe line at a rate of 30 lbs. per square inch, then it should be fitted with a mechanical flow restrictor or catastrophic leak detector, so that in the event of a catastrophic leak (one in which the flow or leak is more than 3 gallons per hour or greater) from the system, a plunger drops into the pump to restrict or slow the flow of product from the pipe line. (Transcript at 31, 52.)

Mertens described a number of inspection violations on site, typically a failure to install or maintain equipment (with his reports included in Exhibit 11). The Department's thorough brief discusses the various apparent rule violations in the context of Wis. Adm. Code § 10.62, requiring provision by owners and operators of leak detection equipment. (Department brief at 3-6.) The testimony and the Department discussion of it include reference to inspections by Mertens (and sometimes by Felker Oil Petroleum) and reports from various time periods. The testimony refers to inspections in 1997 (transcript at 29-30, 39-41; exhibit 11 at 38) as well as a checklist inspection on site by Mertens in April 2002 (transcript 33, 36-41). In regard to these violations over time, the witness noted that "...it's a serious violation, but it's common that I find overdue detection testing requirements are not being met." (Transcript at 48-49.)

Joe Schreiber testimony. Mr. Schreiber is certified as a underground tank system inspector and has been with Welsh Petroleum since 1978, currently as vice-president and the inspector in charge of all tightness testing of lines and tanks. Transcript at 58-59. He performed tank tests at Ritchie Oil in October 2004; he described his testing methods at some length. Transcript 59-69. He found the leak detector on one tank system had been

rendered inoperable, concluding it had been sawed off. Transcript at 69. Schreiber stated that when he told Joe Ritchie of this observation on the day of the inspection, that Ritchie appeared shocked, and that Ritchie commented that “perhaps, you know, that one of his service guys may have inadvertently been working on it and had done that not knowing.” Transcript at 85.

Joe Ritchie, owner since 1984, testified that he learned on the leak detector damage when told by Mr. Schreiber. He said he had no idea who would have caused the damage. Transcript at 115. Normally, his five or six employees or a service person would have access to the tank system. Transcript at 116, 123.

Effect of the Legler and Mertens testimony considered together. Mr. Legler, an experienced PECFA staff member and a credible witness, provided background testimony on the PECFA program and this case, as well as specific testimony that the Schreiber inspection observations formed the “sole” basis for the Department denial. This testimony comports with the Stipulation as to the 2004 incident constituting the “sole issue” for hearing. Based on the Legler testimony and the Stipulation, it follows that the Mertens testimony showing a pattern of site tank violations from 1997 through 2002 and beyond was not regarded (or acted upon) by the Department as a separate or an additional reason for claim denial.

It can be argued (absent the Stipulation and Legler testimony) that Mertens demonstrated a pattern of failure to install or maintain equipment on site that would rise to the level of negligence or, possibly to the level of gross negligence. Because the issue was so narrowed as discussed above, the Mertens testimony as to the pattern of violations

over time cannot be utilized to in support of a reason for claim denied that was not invoked by the Department.

Circumstantial evidence concerning the leak detector. As the respondent notes concerning the hearing, “The Department offered no direct evidence that Mr. Ritchie damaged the leak detector.” (Brief at 9.) The Department contends it has shown -- by circumstantial evidence -- that Mr. Ritchie intentionally damaged the leak detector. Based on the authority cited, circumstantial evidence, if sufficient, can sustain a party’s burden of proof.

Through the Joe Schreiber inspection, the Department demonstrated that the leak detector had been damaged, likely with intent. On this point, petitioner submits that beyond the description of the detector’s condition when inspected, there is insufficient supporting evidence on which to find petitioner – in the October 2004 inspection and results – acted with intent, willfulness, or gross negligence. (Reply at 9-10.) A possible conclusion is that the owner or an employee must have damaged the detector, assuming no one else would have a reason to do so. However, there is no testimony as to the actions of owner or employees in the time frame supporting a finding that Joe Ritchie or his staff – intentionally, willfully, or through gross negligence – damaged the detector. There is no direct evidence as to what person or persons damaged the detector. A likelihood based on circumstances or circumstantial evidence may lead to the assumption that the owner or his employees may have acted in violation of the statute. But the circumstantial evidence here is simply not enough to carry the agreed Department burden

of so demonstrating by “clear and convincing evidence” that the petitioner (himself or by staff) intentionally, willfully, or through gross negligence disconnected the detector.

CONCLUSIONS OF LAW

1. Pursuant to Wis. Stat. § 101.143, the Department has primary authority for the promulgation and administration of the program for petroleum storage remedial action and financial assistance. Under Wis Stat. §101.143, the Department administers that program and evaluates and makes decision of claims for PECFA reimbursement of eligible costs of remediation of contaminated sites.
2. The Department of Commerce has authority under Wis. Stat. §§ 101.02(6)(e), and § 227.47, and Wis. Admin. Code COMM § 47.53, and in accordance with the findings of fact herein, to issue a final decision as to the correctness of its decision.
3. Pursuant to agreement by the parties, the sole issue herein is whether the facts observed by Mr. Schreiber constituted sufficient grounds to deny Ritchie Oil’s PECFA claim under Wis Stat. §101.143(g)(3)(4) and (6). Stipulation, specifically, Stipulated Procedures ¶ 1.
4. The correct burden of proof as to “gross negligence,” “intentional misconduct” and “willful neglect” is the middle burden of proof requiring “clear, satisfactory and convincing” evidence. Stipulation, specifically Stipulated Procedures ¶ 4.
5. Wis. Stat. § 101.143(4)(g)(3), (4) and (6), provides, in pertinent part:
...
(g) Denial of Claims, limits on awards. The department shall deny a claim under par. (a) if any of the following applies:

...

3. The claimant has been grossly negligent in the maintenance of the petroleum product storage system or home oil tank system.
4. The claimant intentionally damaged the petroleum product storage system of home oil tank system.

...

5. The claimant willfully failed to comply with laws or rules of this state concerning the storage of petroleum products.

6. The evidence presented by the Department on the sole issue herein -- whether the facts observed by Mr. Schreiber constituted sufficient grounds to deny Ritchie Oil's PECFA claim under Wis Stat. §101.143(g)(3)(4) and (6) – did not constitute clear and convincing evidence of a violation of the statute by petitioner.

Decision

The Department's decision herein is reversed.