

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Application of  
Donald Miller, Leak Site No. 9132

**RECOMMENDED ORDER  
GRANTING MOTION FOR  
SUMMARY DISPOSITION**

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson on the motion of the PetroBoard for summary disposition. The Minnesota Petroleum Tank Release Compensation Board ("the PetroBoard" or "the Board") filed its motion on March 9, 2001, and the Applicant filed his response in opposition to the motion on March 28, 2001. Oral argument was heard on April 6, 2001, at which time the record with respect to the motion closed.

Michael R. Vadnie, Attorney at Law, Schmidt & Lund, 11 North Seventh Avenue, St. Cloud, Minnesota 56303, appeared on behalf of the Applicant, Donald Miller. Patrick M. Driscoll, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the PetroBoard.

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after review of the record and may adopt, reject, or modify the Recommendation contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded each party adversely affected to file exceptions and to present argument to the Commissioner. The parties should contact the Office of the Commissioner of Commerce, Suite 500, 85 Seventh Place East, St. Paul, Minnesota 55101 (tel.: 651-296-6025) to ascertain the procedure for filing exceptions and presenting argument.

NOW, THEREFORE, based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY RECOMMENDED:

- (1) That the PetroBoard's motion for summary disposition be GRANTED; and
- (2) That the Department of Commerce dismiss the application of Donald Miller for claimed eligible costs.

Dated: May 7, 2001.

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BARBARA L. NEILSON  
Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department of Commerce is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

### MEMORANDUM

#### Background

This matter is a contested case proceeding initiated by the Executive Director of the Petroleum Tank Release Compensation Board in response to the Applicant's request for hearing under Minn. Stat. § 115C.12.<sup>[1]</sup> The Commissioner of Commerce has delegated to the Executive Director of the Minnesota Petroleum Tank Release Compensation Fund authority under Minn. Stat. § 45.024 to order contested case hearings requested by applicants under Minn. Stat. § 115C.112.<sup>[2]</sup> The primary issue involved in the Department's motion for summary disposition is whether the Applicant gave timely notice of appeal from a staff determination denying reimbursement from the Petroleum Tank Release Compensation Fund ("PetroFund") administered under Chapter 115C of the Minnesota Statutes.<sup>[3]</sup>

The PetroBoard reimburses persons for certain costs incurred in the cleanup of petroleum tank releases.<sup>[4]</sup> The Board may only reimburse costs that it determines "were actually incurred and were reasonable."<sup>[5]</sup> The staff of the PetroBoard is provided by the Commissioner of Commerce, and the Board has delegated to its staff authority to approve applications for reimbursement.<sup>[6]</sup> An applicant for reimbursement has the burden of proving his or her eligibility for reimbursement by a preponderance of the

evidence.<sup>[7]</sup> If an applicant for reimbursement does not agree with the reimbursement determination made by the PetroBoard staff, the applicant has sixty days from the date that the staff reimbursement determination letter was sent to file a written notice of appeal seeking a Board determination of the proper amount of reimbursement. If the applicant fails to give notice of appeal within sixty days after a determination by the PetroBoard's staff, the staff determination is final.<sup>[8]</sup> If timely notice is given by an applicant and an appeal is heard by the PetroBoard, its determination can then be appealed to the Commissioner of Commerce by the applicant within 30 days through a contested case proceeding.<sup>[9]</sup> The Commissioner of Commerce has authority to make a final decision as provided by Minn. Stat. § 115C.12, subd. 3.<sup>[10]</sup>

Based upon the motion papers, supporting documents, and factual stipulation filed by the parties, it appears that the following specific facts relating to this case are undisputed:

1. The Applicant, Donald Miller, purchased the St. Cloud commercial property at issue in this proceeding in approximately 1993.<sup>[11]</sup> He thereafter leased the property to another individual.<sup>[12]</sup> After a possible petroleum leak was noted on the site, the Applicant hired a consultant, EarthTech of Minnesota, Inc., in approximately March of 1996 to assist in the handling of the situation.<sup>[13]</sup> The Minnesota Pollution Control Agency notified the Applicant on November 20, 1996, that it had determined that his "investigation and/or cleanup has adequately addressed the petroleum tank release at the site" and that the release site file had been closed.<sup>[14]</sup>

2. On November 14, 1996, the Applicant filed an application with the PetroBoard for reimbursement totaling \$7,992.09, based on \$8,880.10 of claimed eligible costs for completion of an initial site assessment based on the Applicant's suspicion that a sheen existed on the water in a toilet tank at the site and the sheen was the result of a leak from a petroleum tank.<sup>[15]</sup>

3. The PetroBoard staff eventually concluded that all \$8,880.10 of the costs claimed by the Applicant were ineligible for Petrofund reimbursement.<sup>[16]</sup> In particular, the PetroBoard staff concluded that:

- a. The Minnesota Pollution Control Agency ("MPCA") concluded that the sheen the Applicant witnessed in the toilet bowl was most likely due to sewer gas (methane). The Applicant's excavation report indicated that the investigation detected only "toluene at 6.7 ppb in water, which is well below the HRLs of 1,000 ppb for toluene."
- b. The Applicant claimed that the site was used for transitory storage from 1977 to 1992, for sale of salvage items including concrete, overhead doors and other items, and the use of the site since 1992 has been as a remodeling and construction business.

- c. The MPCA suggested that a low hit of toluene could be from paint solvents, glues, or refining products from the salvage or construction use of the site.
- d. The Applicant indicated that four salvage tanks were auctioned at the site several years ago but did not establish that they contained any petroleum product or that a release from the salvage tanks caused any contamination at the site.
- e. Because the Applicant had not established that he incurred corrective action costs in response to a release of petroleum from a tank, reimbursement was denied.<sup>[17]</sup>

4. On June 3, 1998, Sandy MacKenthun of the Petrofund Division of the Department of Commerce sent a letter to the Applicant denying reimbursement of any amount based upon his application dated November 14, 1996. The second page of the letter included the following statement in bold type: **“Your written notice of appeal to the Petrofund Board must be received within 60 days of the date of this letter.”** A copy of this letter was not sent to the Applicant’s consultant, EarthTech of Minnesota, Inc.<sup>[18]</sup>

5. The Applicant’s notice of appeal from the PetroBoard staff determination was due on or before August 2, 1998, no more than sixty days after the issuance of the determination letter dated June 3, 1998.<sup>[19]</sup>

6. The Applicant did not file a notice of appeal by August 2, 1998. His notice of appeal dated July 20, 1999, was received by the Board on July 23, 1999, nearly one year after the August 2, 1998, deadline for giving notice of appeal.<sup>[20]</sup>

7. At its meeting on August 11, 1999, the PetroBoard considered the Applicant’s late notice of appeal from the staff determination to deny his application.<sup>[21]</sup> The Board concluded that the Commissioner’s determination of June 3, 1998, was final on August 2, 1998.<sup>[22]</sup> The Board denied the Applicant’s claim for reimbursement because a timely notice of appeal was not received from the Applicant within the statutory deadline contained in Minn. Stat. § 115C.12, subd. 1.<sup>[23]</sup>

8. On September 10, 1999, the Applicant filed a notice of appeal from the PetroBoard’s determination of August 11, 1999,<sup>[24]</sup> resulting in the initiation of this contested case proceeding.

### **Motion for Summary Disposition**

Summary disposition is the administrative equivalent of summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same standards apply. See Minn. R. 1400.5500 K (1991); Minn. R. Civ. P. 56.03. Summary disposition

of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minn. R. Civ. P. 56.03. A material fact is one which is substantial and will affect the result or outcome of the proceeding depending on the determination of that fact. Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984), rev. denied, (Minn. 1985). In considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the non-moving party. Grondahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981).

With a motion for summary disposition, the initial burden is on the moving party to show facts establishing a prima facie case for the absence of material facts at issue. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Co. v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The non-moving party may not rely on general assertions; significant probative evidence must be offered. Minn. R. Civ. P. 56.05; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The evidence introduced to defeat a summary disposition motion, however, need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex, 477 U.S. at 324).

## **Legal Analysis**

Minn. Stat. § 115C.12, subd. 1, specifies that an applicant for reimbursement “must file written notice with the board of an appeal of a reimbursement determination made by the commissioner of commerce within 60 days of the date that the commissioner of commerce sends written notice to the applicant of the reimbursement determination.” The Applicant in the present case admits that (1) he in fact received the staff determination letter; (2) the sixty-day period for the filing of his notice of appeal from that letter ended on August 2, 1998; and (3) he did not send his notice of appeal until July of 1999, nearly one year after the staff determination letter was sent.

The PetroBoard asserts that it lacks jurisdiction to take up a case after the sixty-day deadline has passed. It contends that the Applicant's failure to file a timely appeal allowed the staff determination to rest and became final, in accordance with the implied provisions of the governing statute. The Board further argues that it would have been contrary to PetroBoard precedent, the concept of finality, and the equal treatment of applicants to consider the Applicant's late-filed appeal.

The Applicant emphasizes that his consultant was not sent a copy of the staff determination letter. In addition, it is not disputed that the Applicant did not consult with his current attorney until well after the appeal deadline had passed. Although the

Applicant did not file an affidavit in this matter, counsel for the Applicant asserts that the Applicant is an unsophisticated person who did not realize the significance of the appeal notice language set forth on the second page of the letter and assumed that his consultant would “take care of” the appeal. The Applicant points out that the staff now places the appeal notice on the first page of its letters (a point which the Department contends should not be considered here as a subsequent remedial measure). He argues that his failure to file an appeal within sixty days of the staff determination letter was “excusable neglect” that should not preclude consideration of his appeal at the present time. The Applicant further explained that he has spent a significant length of time engaged in an unsuccessful effort to persuade the Board to provide him with compensation or have the Legislature enact a special bill that would provide compensation to him.

Under applicable case law, it is well established that:

[s]tatutes of limitation are within the legislative domain and the courts and administrative agencies have no power to extend or modify the periods of limitation prescribed by statute. The courts have no dispensing power in favor of parties who do not discover their rights until their remedy is gone. . . . There are no exceptions to statutes of limitation except as expressly provided. A court of equity cannot read an exception into a statute. Exceptions must be clear, but express exceptions are to be liberally construed.<sup>[25]</sup>

Chapter 541 of the Minnesota Statutes, which contains general provisions addressing limitations periods, sets forth specific conduct or circumstances that will suspend the running of the period of limitations, such as age under 18, insanity, citizenship in a country at war with the United States, or staying of the beginning of the action by injunction or statutory prohibition.<sup>[26]</sup> No such period of disability is asserted in the present case. Moreover, “[i]n the absence of fraudulent concealment, a party’s ignorance of the existence of his cause of action does not prevent the running of the statute of limitations.”<sup>[27]</sup>

Minn. Stat. § 115C.112, subd. 1, clearly establishes a sixty-day limitations period for the filing of a notice of appeal to the PetroBoard from a staff determination. The language of the statute is unequivocal and does not set forth any exceptions for excusable neglect or other good cause. By logical implication of the governing statute, a staff determination becomes final once sixty days has passed and no notice of appeal has been filed. The letter sent to the Applicant contained a notification in bold type of the time limit for filing the notice of appeal. Although this notice was set forth on the second page of the letter rather than the first, the Applicant has not claimed that he didn’t see the notice language nor has he explained by affidavit any claim that the location of the notice caused his delay or any confusion. It appears to the Administrative Law Judge that this language was sufficiently clear and prominent to draw attention to the appeal deadline. In addition, the Applicant has not claimed that his consultant led him to believe that he would file the notice of appeal on the Applicant’s

behalf or otherwise misled him about the nature of the appeal requirement. Finally, there is no requirement in statute that consultants be notified of the staff determination, and there is no evidence that the PetroBoard typically notifies consultants.

The cases relied upon by the Applicant involve situations that are not analogous to the case at bar, such as the right of administrative agencies to act within a reasonable time to vacate prior orders that they believe are erroneous; the ability of appellate courts to entertain appeals that are filed within the applicable timeframe from entry of a trial court's amended order; and the ability of tribunals to consider reasons for late filing where the applicable rule or statute of limitations expressly permits the consideration of excusable neglect or other good cause. These cases are not persuasive. Rather, the Administrative Law Judge must be guided by precedent holding that time limitations are jurisdictional and that alleged mitigating circumstances may be not considered in the absence of legislative authorization.<sup>[28]</sup>

While, as recognized at oral argument, there may be some situations in which it might be appropriate for the Board to exercise its discretion to entertain a late-filed appeal (such as where an applicant never received the letter containing the staff determination), the Administrative Law Judge is not convinced that the facts presented in this case warrant any modification of the limitations period set forth in Minn. Stat. § 115C.112. It is very unfortunate that the Applicant did not act to protect his claim for reimbursement by filing an appeal within the sixty-day period, but the Administrative Law Judge is unable to conclude that the PetroBoard is required to entertain his late-filed appeal. The Administrative Law Judge does not have the authority to extend a statute of limitations established by the Legislature.<sup>[29]</sup>

B.L.N.

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<sup>[1]</sup> Stip. of Fact, ¶2.

<sup>[2]</sup> Stip. of Fact, ¶14.

<sup>[3]</sup> Stip. of Fact, ¶3.

<sup>[4]</sup> Minn. Stat. § 115C.09; Stip. of Fact, ¶5..

<sup>[5]</sup> Minn. Stat. § 115C.09, subd. 3(b); Stip. of Fact, ¶6.

<sup>[6]</sup> Minn. Stat. §§ 115C.07, subd. 2, and 115C.09, subd. 10; Stip. of Fact, ¶¶ 7-8.

<sup>[7]</sup> Minn. R. 1400.7300, subp. 5; Stip. of Fact, ¶9.

<sup>[8]</sup> Minn. Stat. § 115C.12(1); Stip. of Facts, ¶¶10-11, 24.

<sup>[9]</sup> Minn. Stat. § 115C.12(2) and Minn. R. 2890.0110; Stip. of Facts, ¶12.

<sup>[10]</sup> Stip. of Facts, ¶13.

<sup>[11]</sup> See January 14, 1998, letter to Applicant from EarthTech, appended to Applicant's Memorandum in Opposition at Tab 5.

<sup>[12]</sup> See July 20, 1999, letter to James Pearson from Michael Vadnie, appended to Applicant's Memorandum in Opposition at Tab 9 and chronology at Tab 10.

<sup>[13]</sup> See Applicant's Memorandum in Opposition, Tabs 3, 5, and 10.

<sup>[14]</sup> See Letter appended to the Applicant's Memorandum in Opposition, Tab 3.

<sup>[15]</sup> Stip. of Facts, ¶15.

<sup>[16]</sup> Stip. of Facts, ¶16.

<sup>[17]</sup> Stip. of Facts, ¶¶17.

<sup>[18]</sup> Stip. of Facts, ¶¶18-19; letter of June 3, 1998, appended to the Applicant's Memorandum in Opposition, Tab 7.

<sup>[19]</sup> Stip. of Facts, ¶¶20, 25.

<sup>[20]</sup> Stip. of Facts, ¶26.

<sup>[21]</sup> Stip. of Facts, ¶21; see also Applicant's Memorandum in Opposition, Tabs 11 and 12.

<sup>[22]</sup> Stip. of Facts, ¶ 23.

<sup>[23]</sup> Stip. of Facts, ¶22.

<sup>[24]</sup> Stip. of Facts, ¶2; see also letter appended to Applicant's Memorandum in Opposition, Tab 13.

<sup>[25]</sup> *Dunnell Minnesota Digest*, Vol. 30, Limitation of Actions §1.02 (footnotes and citations omitted); accord *Hermeling v. Minnesota Fire and Casualty Co.*, 548 N.W.2d 270, 274 (Minn. 1996); *Johnson v. Winthrop Laboratories Division*, 291 Minn. 145, 190 N.W.2d 77 (1971); *Dumont v. Commissioner of Taxation*, 278 Minn. 312, 154 N.W.2d 196 (1967).

<sup>[26]</sup> Minn. Stat. § 541.15(a).

<sup>[27]</sup> *Normania Township v. Yellow Medicine County*, 205 Minn. 451, 456; 286 N.W. 881, 884 (1939).

<sup>[28]</sup> See, e.g., *Johnson v. Metropolitan Medical Center*, 395 N.W.2d 380 (Minn. App. 1986); *Baldinger Baking Co. v. Stepan*, 354 N.W.2d 569 (Minn. App. 1984); *Cole v. Holiday Inns, Inc.*, 347 N.W.2d 72 (Minn. App. 1984); *Johnson v. Winthrop Laboratories Division*, 190 N.W.2d 77 (Minn. 1971); *Dumont v. Commissioner of Taxation*, 154 N.W.2d 196 (Minn. 1967).

<sup>[29]</sup> Accord *Hermeling v. Minnesota Fire & Casualty Co.*, 548 N.W.2d 270, 275 (Minn. 1996).