

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PETROLEUM TANK
RELEASE COMPENSATION BOARD

In the Matter of the
Application of Fina Oil and
Chemical Company, Leak Site
No. 4847

**RECOMMENDED ORDER
ON MOTION FOR
SUMMARY JUDGMENT**

The above-entitled matter is before the undersigned Administrative Law Judge (ALJ) on Fina Oil and Chemical Company's ("Fina") motion for summary judgment. The parties filed initial briefs on August 20, 1996 and reply briefs on September 6, 1996. The ALJ allowed an additional comment period following a September 23, 1996 letter from counsel for Petroleum Maintenance Company ("PMC"). The record closed on October 3, 1996.

Philip H.M. Grove, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN, 55101, represented the Minnesota Petroleum Tank Release Compensation Board ("PetroBoard").

J. Patrick Wilcox, Esq. and Kenneth R. Hall, Esq., 1500 Metropolitan Centre, 333 South Seventh Street, Minneapolis, Minnesota, 55402, represented Fina Oil and Chemical Company.

Maclay R. Hyde, Esq. and Nancy Q. Burke, Esq., 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota 55402, represented Petroleum Maintenance Company.

Based upon the Memoranda filed by the parties, all the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

1. That Fina's motion for summary judgment as to whether Fina "actually incurred" costs under Minn. Stat. § 115C.09, subd. 3(b) is GRANTED.
2. That the PetroBoard reimburse Fina for its cleanup costs actually incurred and reasonable pursuant to Minn. Stat. Chap. 115C.

Dated this 4th day of November, 1996

ALLAN W. KLEIN
Administrative Law Judge

MEMORANDUM

The Petroleum Tank Release Cleanup Act ("PetroFund Act"), Minn. Stat. ch. 115C, was enacted in 1987 and establishes a fund for the reimbursement of cleanup costs for releases and spills of petroleum into the environment. The PetroFund Act provides for reimbursement of 90 percent of corrective action costs on the first \$250,000 and 75 percent on any remaining costs. Minn. Stat. § 115C.09, subd. 3(a). The PetroFund Act prohibits reimbursement from the fund until the PetroFund Board has determined that the costs for which reimbursement is requested were "actually incurred." Minn. Stat. § 115C.09, subd. 3(b).

Fina Oil and Chemical Company (Fina) is the owner of a service station located at 9445 Lyndale Avenue, Bloomington, Minnesota. On May 21, 1991, Fina hired Petroleum Maintenance Company ("PMC") to remove and replace some underground storage petroleum tanks. Under the contract between Fina and PMC ("First Contract"), PMC was to remove and dispose of three underground storage tanks and replace them with three fiberglass tanks supplied by Fina. PMC hired a subcontractor, Jacobsen Trucking and Excavating ("Jacobsen"), to perform backhoe operations to remove and replace soil surrounding the existing and new tanks. While backfilling soil around the new tanks, Jacobsen's backhoe operator allegedly scraped one of the tanks and damaged it. The damaged tank leaked 3,000 gallons of gasoline into the soil before the leak was discovered a few days later. On February 5, 1992, PMC entered into an Agreement with Fina ("Second Contract") allocating the costs of the cleanup. Under this agreement, PMC admitted its liability and agreed to pay Fina all cleanup costs not reimbursed by the PetroFund. Fina agreed to make a good faith effort to seek reimbursement from the PetroFund. Subsequently, PMC reversed its position and now denies any liability for the cleanup costs.

Fina undertook clean up procedures of the spill and submitted an application for reimbursement to the PetroBoard on or about January 3, 1994. Fina requested reimbursement of \$274,459.32 based on total clean-up costs of \$304,954.80. In a December 16, 1994 letter, the Board informed Fina that it would allow reimbursement of \$134,423.66 of Fina's claim. This amount reflected deductions for unreasonable costs and a 50 percent "lack of due care" penalty. (This penalty was later repealed by the Legislature in 1995.) Fina challenged the Board's determination and on January 18, 1996, the PetroBoard denied Fina's request for reimbursement in total. One of the bases for the denial was that Fina's costs were payable under an applicable insurance policy (Jacobsen's) and that reasonable efforts were not made to collect the insurance pursuant to Minn. Stat. § 115C.09, subd. 3(f). On July 16, 1996 the ALJ granted Fina's motion for partial summary judgment and determined that Jacobsen's insurance policy is not an "applicable insurance policy" within the meaning of the PetroFund Act.

The second reason for the Board's denial of Fina's claim was that Fina had not "actually incurred" the costs due to PMC's admission that it was ultimately financially responsible. Fina has brought another motion for summary judgment on the issue of whether it "actually incurred" remediation costs within the meaning of Minn. Stat. § 115C.09, subd. 3(b). Summary disposition is the administrative equivalent of summary judgment and the same standards apply. Minn. Rules, pt. 1400.5500(k). Summary

judgment is appropriate if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. Minn. R. Civ. Pro. 56.03.

The Board argues that Fina has not “actually incurred” costs within the meaning of the Act. The Board interprets the word “actually” as modifying the word “incurred” so as to allow for consideration of the availability of coverage from a third party source. The Board contends that because Fina had a written admission of liability for the cleanup costs from PMC but chose to enter into an agreement with PMC allocating all allowable cleanup costs to the Board, Fina’s costs were not “actually incurred”. According to the Board, where recovery from a liable third party with “minimal effort” on the part of the applicant is “certain”, the cleanup costs should not be reimbursed from the Fund. The Board argues that Fina only theoretically incurred costs and that Fina’s obligation exists only for the purpose of gaining recovery from the PetroFund.

Fina contends that it is legally liable to pay and has paid the over \$300,000 of reasonable remediation costs specified in its January 1994 PetroFund application. Fina argues that the words “actually” and “incurred” are not ambiguous. Fina maintains that it has actually incurred and has paid these costs. According to Fina, the ALJ should apply recognized principles of statutory construction and follow the plain and obvious meaning of the term “actually incurred”. Fina argues that the Board is improperly attempting to engraft further restrictions to the statutory language that simply are not there.

PMC also argues that the Board’s interpretation of the phrase “actually incurred” adds words to Minn. Stat. § 115C.09 that are not there. By claiming that “actually incurred” does not include costs where there is a “certainty of recovery from a third party with minimal effort”, PMC contends that the Board engrafts a diligent prosecution requirement onto the statute which would force parties to litigate against third parties before being eligible for reimbursement. According to PMC, the Board’s interpretation disregards the Act’s goal of promoting prompt cleanups and runs counter to principles of statutory construction.

Interpretation of statutes is a question of law. McClain v. Begley, 465 N.W.2d 680 (Minn. 1991). In considering questions of law, the Administrative Law Judge is not bound by the decision of the agency and need not defer to the agency’s expertise. Johnson v. County of Anoka, 536 N.W.2d 336,338 (Minn. App. 1995), *pet. for rev. denied* (Sept. 28, 1995); St. Otto’s Home v. Minnesota Dep’t of Human Serv., 437 N.W.2d 35, 39-40 (Minn. 1989). In particular, when reviewing matters of statutory interpretation, reviewing courts are not bound by the determination of the agency. Arvig Tel. Co. v. Northwestern Bell Tel. Co., 270 N.W.2d 111, 114 (Minn. 1978). However, an agency’s interpretation of a statute is entitled to consideration, and weight of that consideration increases when the agency is construing a statute which it administers and the construction is longstanding. Minn. Stat. § 645.16(8); McAfee v. Department of Revenue, 514 N.W.2d 301, 304 (Minn. App. 1994). If the statute is ambiguous, the agency interpretation will generally be upheld if it is reasonable. St. Otto’s Home, 437 N.W.2d at 40. If the statute is not ambiguous, no deference is given to the agency’s interpretation and the court may substitute its own judgment. Id.

The fundamental rule of statutory construction is that the court should look first to the specific statutory language and be guided by its natural and most obvious meaning. Heaslip v. Freeman, 511 N.W.2d 21, 22 (Minn. App. 1994), rev. den., February 24, 1994; *citing*, Nadeau v. Austin Mut. Ins., 350 N.W.2d 368, 373 (Minn. 1984). When the language of a statute is unambiguous, the court must apply its plain meaning. Current Technology Concepts, Inc. v. Irie Enterprises, Inc., 530 N.W.2d 539, 543 (Minn. 1995); *see also* Minn. Stat. § 645.16 (1994) (when words of a statute are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.) This principle of plain meaning has its corollary that ordinary rules of grammar apply. Mattson v. Flynn, 216 Minn. 354, 359, 13 N.W.2d 11, 14 (1944).

Black's Law Dictionary defines "incur", in relevant part, as:

To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. To become liable or subject to, to bring down upon oneself, as to incur debt, danger, displeasure and penalty, and become through one's own action liable or subject to.

Black's Law Dictionary 768 (6th ed. 1990). *The American Heritage Dictionary* defines "incur" as: "To become liable or subject to as a result of one's actions; bring upon oneself." *American Heritage Dictionary* 916 (3rd ed. 1992).

The phrase "actually incurred" is unambiguous. Fina has shown that it has incurred and paid out over \$300,000 in costs for cleanup of the site. It is contrary to the plain meaning of the statute to interpret the phrase "actually incurred" as somehow implicitly excluding costs potentially recoverable from third parties. A statute must be enforced literally if its language embodies a definite meaning which involves no absurdity or contradiction; the statute being its own best expositor. State v. Village of Spring Lake Park, 245 Minn. 302, 71 N.W.2d 812, 818 (Minn. 1955). Nothing in the plain meaning of the statutory phrase "actually incurred" includes consideration of third party liability. Furthermore, the Board's construction of the phrase "actually incurred" as excluding costs potentially recoverable from third parties appears to be one of first impression and not one of longstanding application. Therefore, the Board's interpretation need not be afforded deference.

In addition, the Board does not deny that it has awarded reimbursement in many prior cases in which possible third party liability existed. Rather, the Board claims that each case must be evaluated and decided based on its own unique facts relating to third party liability. (PetroBoard's Reply Brief p.6.) The Board maintains that the unique facts of this case, particularly the potential for recovery from PMC and the allocation of costs agreement in the Second Contract between Fina and PMC, justify the denial of Fina's reimbursement claim. The Board points out that the Court of Appeals has specifically stated that agencies have the authority to formulate policy on a case-by-case basis. Matter of Hibbing Taconite Co., 431 N.W.2d 885, 894 (Minn. App. 1988).

While agencies may formulate policy on a case-by-case basis "based on facts as applied to a specific party", agencies may not create policy of "general applicability and future effect" without following APA rulemaking requirements. Application of Crown

CoCo, Inc. 458 N.W.2d 132, 136 (Minn. App. 1990). In attempting to deny reimbursement to responsible persons in cases where cleanup costs may be easily recovered from a third party, the Board is creating policy of “general applicability and future effect”. Consequently, the Board’s policy determination comes within the definition of a “rule” under Minn. Stat. § 14.02, subd. 4. Furthermore, the Board’s determination fails to meet the rule-making exception granted to interpretations consistent with the “plain meaning” of the implemented statute or rule. Application of Crown Coco, 458 N.W.2d at 137. Here, the Board’s attempt to exclude from reimbursement costs potentially recoverable from third parties is not consistent with the plain meaning of the phrase “actually incurred” costs. Therefore, if the Board wants to exclude from reimbursement costs likely to be recovered from third parties, it must comply with the proper rulemaking procedures of Chapter 14.

In Application of Crown CoCo, Inc., 458 N.W.2d at 137, the Court of Appeals rejected the PetroBoard’s attempt to engraft additional terms onto the word “costs” within Chapter 115C. In that case the Board denied Crown’s claim for reimbursement of cleanup costs already covered by an insurance policy. On appeal, the Court found that nothing in the plain meaning of the statutory term “costs” excluded costs already covered by insurance. Consequently, the court reversed the PetroBoard’s denial of reimbursement to Crown. The Court advised the Board to go through the appropriate rulemaking procedures if it wanted to create such an exclusion. Id. at 138.

Like Crown Coco, there is nothing in the plain reading of Minn. Stat. § 115C.09, subd. 3 that makes a finding of “actually incurred” costs dependent upon potential third party liability. It appears that the PetroBoard wants the ALJ to amend the statute by reading things into it or engrafting requirements onto it that are not there. The ALJ cannot agree to such a proposal. In construing statutes, the ALJ is prohibited from supplying that which the Legislature purposely omits or inadvertently overlooks. Wallace v. Commissioner of Taxation, 184 N.W.2d 588 (Minn. 1971). The legislature has delegated to the Board the responsibility for promulgating rules specifying the costs that are eligible for reimbursement from the fund. Minn. Stat. § 115C.07, subd. 3(a). Thus, the Board may choose to adopt rules excluding from reimbursement costs potentially recoverable from third party sources. While the wisdom of such a policy is questionable and seems contrary to the Act’s intent of expediting cleanups, it is within the Board’s authority to determine eligible and ineligible costs. However, until such an exclusion *from reimbursement* is specified, the statute must be applied as written.

Therefore, the ALJ rejects the PetroBoard’s interpretation of “actually incurred” costs under Minn. Stat. § 115C.09, subd. 3(b) as excluding costs the Board deems to be easily recoverable from third parties. Instead, the ALJ finds that the statutory phrase “actually incurred” is unambiguous and does not include consideration of third party liability. Consequently, Fina has “actually incurred” remediation costs pursuant to Minn. Stat. § 115C.09, subd. 3(b). Fina’s motion for summary judgment is granted.

A.W.K.