BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

FILED
DEC 23 2011
COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

APPLICANT:	**CLIFF WIDENER**	)	
		)	
RESPONDENT:	**GARY S. WALKER, DIRECTOR, PETROLEUM STORAGE TANK DIVISION, OKLAHOMA CORPORATION COMMISSION**	)	**CAUSE PSD NO. 201100025**
		)	
RELIEF SOUGHT:	**DETERMINATION OF RESPONSIBILITY FOR MAKING REIMBURSEMENT FROM THE PETROLEUM STORAGE TANK RELEASE INDEMNITY FUND FOR SUITABILITY STUDY COSTS**	)	

REPORT OF THE OIL AND GAS APPELLATE REFEREE

This Cause came on for hearing before **Michael Porter**, Administrative Law Judge ("ALJ") for the Corporation Commission of the State of Oklahoma, on the 7th day of September, 2011, at 8:30 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Jeffrey Southwick**, Deputy General Counsel, appeared on behalf of Respondent, Gary S. Walker, Director, Petroleum Storage Tank Division, Oklahoma Corporation Commission ("the Commission"); **Cliff Widener** appeared Pro Se; and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The ALJ filed his Report of the Administrative Law Judge on the 13th day of October, 2011, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 29th

day of November, 2011. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

CLIFF WIDENER ("WIDENER") APPEALS the ALJ's recommendation that the facts in this cause do not address a release of petroleum from storage tank systems, and therefore, Widener's request for reimbursement from the Indemnity Fund is not an eligible reimbursement expense and Widener's request should be denied.

Cause PSD 201100025, filed on July 14, 2011, is the application of Widener seeking an Order for a determination of reimbursement from the Indemnity Fund for suitability study costs expended for a suitability study performed on Widener's underground storage tank system at the facility known as Tri City Quik Stop, 3721 N.W. 32nd, Newcastle, Oklahoma, PSTD assigned Facility No. 4407961.

WIDENER TAKES THE POSITION:

(1) The ALJ's Report is contrary to the law and contrary to the evidence and facts presented in this case.

(2) The recommendations of the ALJ set forth in the Report, if adopted, will result in a miscarriage of the law and imposes a financial burden to the owner, Widener.

(3) The ALJ's Report is arbitrary, capricious, unreasonable, discriminatory, and fails to effect the clear intent of the statutory scheme determining the need for the suitability study.

THE ALJ FOUND:

(1) The purpose of the Indemnity Fund program is to provide for the rehabilitation of pollution sites resulting from the release of petroleum from storage tank systems. See OCC-OAC 165:27-1-1. In order to accomplish this purpose, the Indemnity Fund will reimburse allowable costs incurred for corrective action to eligible parties. To qualify for reimbursement from the Indemnity Fund, a person must meet certain requirements. OCC-OAC 165:27-3-1 lists those requirements which can be summed up as being an owner/operator/person affected by a release. OCC-OAC 165:27-3-2 defines an eligible person as one who has incurred eligible expenses for an eligible confirmed release from a petroleum storage tank system. To qualify for reimbursement from the Indemnity Fund, a person must meet certain

requirements for PSTD eligibility and been issued a Fund Eligibility letter by the PSTD Director. There was no evidence given to indicate there was or has been a release of petroleum products at this site or a suspicion of a release at this site.

(2) OCC-OAC 165:25-1-53 requires owners and operators of underground storage tank systems to maintain certain records for inspection by the Commission. As concerns leak detection records, these records must be kept for the preceding 12 months. OCC-OAC 165:25-1-56 requires owners and operators of regulated tank systems to keep certain records. Specifically, owners/operators who use cathodic protection must maintain records that include the original cathodic protection design with drawings or plans depicting the cathodic protection system components along with the installer's credentials. Additional records to be kept are the rectifier readings (to be done every 60 days) and the results of the last three inspections of the cathodic protection system completed by a corrosion tester. These documents were not at the facility when Widener's facility was inspected in 2008. Widener received a Notice of Violation on August 14, 2008. This is approximately 3 months after he took control of the facility. The face of the Notice of Violation shows the area of non-compliance to be Corrosion Protection. In the remarks section of the Notice of Violation the notation appears that says "(19) Need suitability study and design on corrosion protection system. If original is not available this will need to be done. Begin documenting rectifier readings." Widener testified the suitability study was not available from the party who did the original study. Widener also said it was not available from the previous owner/operator. The company that performed the original suitability study is alleged to have acknowledged they did the study, but had no records of it. Commission staff testified that it was willing to accept a statement from the company (ILFC Inc) that the study was done. Unfortunately, Widener did not contact Commission staff after receiving the Notice of Violation. It appears Widener determined he needed to have a study done without any consultation with Commission staff.

(3) The evidence implies that once a suitability study has been done, then another study is not required unless the tanks have been out of service for 12 months without cathodic protection or if cathodic protection is not maintained. The last rectifier readings were recorded in 2006, however, there was no evidence the tanks were out of service over 12 months or the cathodic protection system wasn't maintained in that time frame. There was no evidence to show the cathodic protection was on or off from 2006 to 2008. Widener did not have the records to prove a study was done, so a new suitability study was needed to bring him into compliance and keep him there on this issue of required record keeping.

(4) After reviewing and carefully considering the evidence and testimony presented, it was the recommendation of the ALJ to deny reimbursement for

the suitability study commissioned by Widener. Commission staff had recommended denial on the basis that Widener was not in substantial compliance due to the lack of release detection records, statistical inventory reconciliation records and rectifier readings.

(5) Widener sought reimbursement from the Indemnity Fund. As noted above, the stated purpose of the Indemnity Fund is to provide rehabilitation for as many pollution sites as possible. While the suitability study could arguably prevent future pollution, the study will not assist in the clean up of pollution caused by a release from an underground storage tank. The facts in this cause do not address a "release" and thus, it is not an eligible reimbursable expense from the Indemnity Fund and Widener's application should be denied on that basis.

POSITIONS OF THE PARTIES

WIDENER

1) **Cliff Widener**, appeared Pro Se and stated that he was trying to find out why the suitability study was ordered. Widener purchased this facility May of 2008 and 4.5 months later he was ordered to do a suitability test because there was no paperwork pertaining to the tanks. The Oklahoma Corporation Commission field inspector gave Widener 30 days to do a suitability test which cost $1,775. Widener did have the suitability test performed but his complaint is that the suitability test was done in 1989. The company, the Fuel Consultants, that did the suitability test was located in Rio Rancho, New Mexico. Widener contacted them to tell them that all of the Tri City Quik Stop records were gone and paperwork was missing. They didn't keep any records of the suitability test being done but they did acknowledge that they had done it and they did have their stickers and various things indicating that they had been there and had done the suitability test. Widener contacted them by finding various tags with their name on the equipment. If the suitability test was done; the tanks were operating correctly; readings were kept; everything was working fine; there were no problems concerning leakage; Widener does not understand why Widener's facility was ordered to do a suitability test. Even though there was no indication of a leak or any problem of any kind and everybody knew the suitability study had already been done, but not having that piece of paper forced Widener to do another suitability test. The system facility passed and everything was okay. Widener then asked to have what he spent on having the suitability test done reimbursed, $1775.00. Nobody had asked for the suitability test prior to that time.

2) Widener does not know when the Commission requested the suitability study paperwork to be provided because he has only had the facilities 4.5

months. He does not know how the Commission picks the stations or facilities to ask for the paperwork concerning the suitability study. That is why Widener is asking for a reimbursement of the expenses for the suitability test. The Commission didn't ask everybody to do a suitability test. It shouldn't be just various facility owners be required to have a suitability test. The Commission also has a ruling that if the facility sits empty for 12 months they are ordered to do a suitability test. This wasn't the case here, this facility was never shut down. It was always operating, the red fires were operating correctly and the readings were kept. Everything was in place, but Widener did not have the suitability test piece of paper saying it had been done.

3) Widener concludes that he should have a reimbursement of the cost of the suitability study because of these various things that weren't required of everybody and there was no law passed that Widener had to do it. Widener believes that he was singled out by the Commission for the suitability study just because he did not have that piece of paper. Therefore he is requesting reimbursement for his expense concerning the suitability study.

THE COMMISSION

1) **Jeffrey Southwick**, Deputy General Counsel for the Corporation Commission, appearing on behalf of Gary S. Walker, Director, Petroleum Storage Underground Tank department, stated that the Commission would rely on the Report of the ALJ issued in this matter on October 13, 2011.

CONCLUSIONS

The Referee finds the Report of the Administrative Law Judge should be affirmed.

1) The Referee finds the recommendation of the ALJ to deny Widener reimbursement for his suitability study because it is not an eligible reimbursable expense from the Indemnity Fund is supported by the weight of the evidence, by law and free of reversible error and should be affirmed. . The purpose of the Indemnity Fund program is to provide for the rehabilitation of pollution sites resulting from the release of petroleum from storage tank systems.

2) OCC-OAC 165:25-1-1 sets forth the purpose of the Commission's Underground Storage Tank rules as follows:

> The purpose of this Chapter is to provide a comprehensive regulatory program for the safe operation of underground storage tank systems in Oklahoma and to prevent and contain pollution caused by leaking underground storage tank systems and to reduce the hazards of fire and explosion.

3) OCC-OAC 165:27-1-1 states the "purpose" of the Indemnity Fund program:

> The Indemnity Fund program will provide for rehabilitation of as many pollution sites as possible that have resulted from releases of petroleum from storage tank systems.

4) OCC-OAC 165:27-1-2 defines an eligible person and an eligible release as:

> "Eligible Person" means the party who has made application to the Indemnity Fund and met applicable criteria to become eligible to receive reimbursement on an OCC confirmed release, and who has been issued an Eligibility Letter from the Indemnity Fund. An eligible person may be an impacted party or adjacent owner.
>
> "Eligible Release" means a release of a petroleum product that qualifies for Indemnity Fund eligibility and/or reimbursement, and generally includes only those products and/or a release from a storage tank system regulated by the OCC.

5) OCC-OAC Rule 165:27-3-2 defines an eligible person as one who has incurred eligible expense for an eligible confirmed release from a petroleum storage tank system.

6) The general rules of the Commission have the force and effect of law and must be followed. *Brumark Corporation v. Corporation Commission*, 864 P.2d 1287 (Okl.App. 1993); *Ashland Oil, Inc. v. Corporation Commission*, 595 P.2d 423 (Okl. 1979).

7) The record reflects that there was no evidence presented to indicate there was or has been a release of petroleum products at this site, the Tri City Quik Stop. Widener has owned the Tri City Quik Stop since 2008. After Widener became the owner the property was inspected in 2008 and he received a Notice of Violation on August 14, 2008 approximately three months after he took control of the Tri City Quik Stop facility. Widener was not in substantial compliance due to the lack of release detection records, statistical inventory reconciliation records and rectifier readings. The Notice of Violation issued to Widener on August 14, 2008 found that the Description of Non-Compliance concerning petroleum storage tanks concerned corrosion protection. The Notice of Violation stated:

> (19) Need suitability study and design on corrosion protection system. If original is not available this will need to be done. Begin documenting rectifier readings.

The evidence reflected that a suitability study was not available from the party who did the original study and was not available from the previous owner/operator. Apparently the company that performed the original suitability study acknowledged they did the study but had no records concerning said study. Thus, Widener commissioned a suitability study to be performed which was performed by SCS Inc. at Widener's request to satisfy the Notice of Violation requirement. The evidence also reflected that the storage tank system passed the suitability study.

8) The rules provide that Widener carried the burden of proof under his application. The Referee therefore must find that Widener has failed to satisfy its burden of persuasion and its burden of production by the weight of the evidence. In administrative hearings, the applicant seeking relief has two burdens: (1) the burden of persuasion (that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose); and (2) the burden of production (a party's obligation to come forth with evidence to support its claim). *Director, Office of Workers Compensation Program, Department of Labor v. Maher Terminals, Inc.*, 512 U.S. 267, 272, 275 (U.S. 1994). Widener failed to be in substantial compliance due to the lack of release detection records, statistical inventory reconciliation records and rectifier readings. Thus, a new suitability study needed to be performed. The Indemnity Fund is to provide rehabilitation for as many pollution sites as possible. As stated above, there has been no evidence that there has been any release or pollution from the petroleum storage tank system maintained at Tri City Quik Stop. Therefore, Widener is not an eligible person to receive reimbursement for the suitability study from the Indemnity Fund as such study did not assist in the cleanup of pollution caused by a release from an underground storage tank. Thus, the

suitability study requested by Widener is not an eligible reimbursable expense from the Indemnity Fund and the application of Widener should be denied.

RESPECTFULLY SUBMITTED THIS 23rd day of December, 2011.

Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Anthony
Commissioner Douglas
Jim Hamilton
ALJ Michael Porter
Jeffrey Southwick
Cliff Widener
Office of General Counsel
Michael L. Decker, OAP Director
Oil Law Records
Court Clerks – 1
Commission Files