

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 13th day of September, 2013. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

R&B TAKE EXCEPTION to the ALJ's recommendation to deny R&B's Indemnity Fund eligibility for costs associated with the accidental release of regulated substances that were incurred prior to notification to the Oklahoma Corporation Commission ("Commission").

Applicant filed this cause on December 11, 2012, seeking reimbursement of costs estimated to be expenditures by R&B of \$103,015.50 associated with corrective action due to an emergency response caused by a vehicle impact on a diesel dispenser located at the Okie's facility.

R&B TAKES THE POSITION:

- 1) The ALJ Report recommended that R&B be denied Indemnity Fund eligibility for the costs associated with the accidental release of regulated substances that were "incurred prior to notification to the Oklahoma Corporation Commission."
- 2) The evidence before the ALJ clearly showed that the release of diesel occurred from a pressurized underground storage tank on the evening of August 11, 2012, after 5:00 p.m. on a Friday. The testimony of the owner of Okie's was, to the effect, that the diesel product had flowed onto a neighbor's property and he began notifying both law enforcement and attempting to get the property cleaned up as quickly as he could due to the fact that it had traveled onto a neighbor's property.
- 3) Mr. Robert Williams testified that, in his opinion, there was an "emergency situation". The Commission was not called until the Monday following the Friday since the initial entity which was called was the Oklahoma Department of Environmental Quality (ODEQ). Apparently, a representative of the ODEQ was present at the scene immediately after notification.
- 4) By the time Mr. Neil Garrett, the Environmental Project Manager for the Petroleum Storage Tank Division ("PSTD"), arrived on August 15, 2013, at approximately 1:30 p.m., the job was nearly completed.

5) 17 O.S. Section 309 et seq., requires and commands an operator to take decisive action in an emergency situation to clean up toxic substances which endanger property and the environment. See 17 O.S. Section 309(B).

6) As found by the ALJ and by the staff of the PSTD office, R&B was in complete compliance with all rules of the Commission up until the time of the release.

7) While R&B cannot argue that they did not call the PSTD as quickly as they should have, there was no evidence before the ALJ that the remediation efforts were not successful or appropriate to cleanup and protect the environment.

8) The Commission's attention is directed to 17 O.S. Section 351(B) which states:

...voluntary corrective action should be encouraged, provided that such corrective action is conducted in a manner and to a level of completion which will protect the public health, safety and welfare and will minimize damage to the environment. To accomplish this purpose, any person entitled to reimbursement pursuant to the provisions of this act shall be reimbursed for certain allowable costs in connection with such corrective action, subject to the conditions specified in this act.

9) There is no evidence before the ALJ that the corrective emergency action taken by R&B was not in compliance with applicable state statutes. In the face of an emergency, and in the face of law enforcement who had already contacted the company named A Clean Environment ("ACE") (a remediation expert who had performed corrective work for the PSTD in the past) a finding that R&B was not eligible for participation in the Indemnity Fund is an abuse of discretion. The Commission should not adopt the findings of the ALJ but instead should direct the PSTD Indemnity Fund to determine what costs were associated with the emergency clean up of this release and these should be paid by the Indemnity Fund.

10) At the hearing on September 13, 2013, R&B presented to the Referee a copy of the public and official website of the PSTD which indicated that after-hours, on weekends and holidays, an owner/operator was to report a release from an underground petroleum storage tank to either the PSTD or the ODEQ.

11) This information is provided to owners, such as R&B herein, by the PSTD as the correct procedure to be followed.

12) The clear evidence before the ALJ was that on the evening of the release, the ODEQ was notified and during the clean up over the weekend, the ODEQ was on site.

13) Further, R&B would show that under the PSTD rules for fines, in the event of a failure to follow their rules, it is to cost \$300 under OCC-OAC 165;25-1-3 for using a non-licensed remediation cleanup company.

14) The ALJ's Decision to deny R&B the ability to participate in the Indemnity Fund ignored the provision of a fine for using a non-licensed cleanup remediation company and further ignored PSTD's own website which provided for notice to ODEQ, afterhours and on weekends and holidays.

15) R&B prays that the Corporation Commission overrule the ALJ's ruling; allow R&B to participate in the Indemnity Fund and submit those bills and statements for consideration for participation and payment by the Indemnity Fund.

THE ALJ FOUND:

1) After taking into consideration all the facts, circumstances, testimony, and evidence presented in this cause, the ALJ recommends R&B be denied Indemnity Fund eligibility for costs associated with the accidental release of regulated substances that were incurred prior to notification being made to the Commission.

2) There are statutes enacted in Oklahoma that affect underground storage tank systems. 17 O.S. Section 309 states:

"A. No owner or operator, employee or agent of such owner or operator, or transporter shall knowingly allow a release from a storage tank system to occur or continue to occur without reporting the release to the Corporation Commission ***within twenty four (24) hours upon discovering such a release***" (emphasis added).

Section 309 continues in Paragraph B stating:

"The Corporation Commission shall require that any corrective action taken by a storage tank system owner or operator or authorized by the Commission ***shall be in compliance with all*** applicable ***state statutes...***"(emphasis added).

3) Clearly R&B was not in compliance with applicable state statutes requiring notification to the Commission even though an emergency 24 hour a day contact phone number is provided to operators.

4) R&B admitted they were not familiar with the Commission rules regarding reporting a release. That unfamiliarity caused him to call in a contractor **who is not licensed** by the Commission to do remediation work. OCC-OAC 165:29-3-71(d) requires "Any corrective action work performed at a release site must have prior documented verbal or written approval by a member of the PSTD Technical Staff to be considered reimbursable by the Indemnity Fund."

5) It is commendable R&B took action to perform emergency spill mitigation, however, R&B took it upon itself (or was directed by law enforcement personnel) to have remediation measures performed by a contractor who is not licensed by the Commission to perform remediation work. R&B did not have prior approval to perform corrective work. Although this contractor has performed remediation in the past, that does not mean costs incurred using this contractor for this release are eligible expenses for reimbursement from the PSTD Indemnity Fund. Had R&B familiarized itself with the Commission rule, they would have known the Commission can be contacted 24 hours a day, 365 days a year, in emergencies.

6) R&B did not use a licensed environmental consultant, and the release was remediated before the Commission could inspect the site. There was no approval from the Commission to perform remedial work, thus no compensation from the PSTD Indemnity Fund should be made to R&B. The corrective action taken by R&B was not in compliance with "applicable state statutes."

POSITIONS OF THE PARTIES

R&B

1) **David Blankenship**, attorney, stated that R&B operates a number of convenience stores and gas stations in the southern Oklahoma area. R&B is a participant in the PST Indemnity Fund. On the evening of August 11th, 2012, Mr. James Henry backed his pickup into the diesel fuel dispenser operated by Okie's. This accident caused approximately 700 gallons of diesel fuel to escape and run out onto the ground. The fuel ran out onto Okie's parking lot, and then ran over onto a neighbor's parking lot.

2) R&B has never received any notices of violation and were in compliance with all the requirements of the PSTD. The first issue in the hearing was whether or not this was a release from the dispenser or a release from the lines and pipes connecting it to the diesel tank. R&B presented a photograph to the ALJ that shows Mr. Henry backed into the dispenser and broke the line under the cutoff valve, and that this was actually part of the storage tank itself. Another question that was asked and answered was why the tank ran out. The fuel ran out because the tank was pressurized and before it was cutoff the pressurization led to 700 gallons of diesel being released.

3) The owner of Okie's, Mr. Jatinder Sethi, arrived at the scene not long after the accident. There were already sheriff deputies from Carter County at the scene. The deputy notified a local environmental cleanup company called A Clean Environment (ACE). ACE has worked in environmental cleanup remediation for a number of years in the area, and they are probably the closest and largest company to Okie's. When ACE arrived they presented Mr. Sethi with a contract and told him that he must sign it for them to start working on the cleanup. Mr. Sethi signed the contract and ACE began their cleanup process.

4) The ALJ heard evidence that the ODEQ was called after hours. When the cleanup commenced, ODEQ was on the scene. The ALJ indicated in his order that that was not appropriate. However, on the website of the Oklahoma Corporation Commission PSTD, the requirement for reporting is listed as "[w]ithin 24-hours of discovering evidence of released fuel, all petroleum storage tank owners, operators, their agents and/or employees must report to the Petroleum Storage Tank Division (PSTD) by telephone...during normal working hours...After office hours, weekends or holidays, calls must be reported to the PSTD's pager... or to the Oklahoma Department of Environmental Quality (ODEQ)..." ODEQ was notified and they were on the scene when the work commenced.

5) In Title 17, O.S. Section 351(B), which was cited in the exceptions, the Legislature declared that in order to provide for the rehabilitation of pollution sites as soon as possible, voluntary corrective action should be encouraged, "provided that such corrective action is conducted in a manner and to a level of completion which will protect the public health, safety and welfare, and will minimize damage to the environment." This is what R&B did, and that is what the deputy did by calling ACE.

6) The first issue where the ALJ, in their opinion, was incorrect was when he determined that the notification of the ODEQ was inadequate. ODEQ was notified and they had someone onsite for the start of the cleanup. Also, the PSTD was notified the following Monday after the accident occurred Friday evening. When the PSTD inspector came to the site though, it had already been cleaned up.

7) R&B had an insurance policy, which provided them with \$10,000. R&B also had a lawsuit pending against Mr. Henry, since he was the cause of the accident. Mr. Henry had an insurance policy that was limited to \$25,000. Mr. Henry paid \$22,000 to R&B and \$3,000 to the next-door neighbor Color Probe. Besides the \$32,000 received, there is no other insurance to defray the costs of this release other than the PSTD Indemnity Fund.

8) The next issue addressed by the ALJ was that R&B did not use a licensed environmental consultant for the cleanup. ACE was clearly not licensed, but if you go back through the records of the PSTD Indemnity Fund, you will find that ACE had submitted claims and been paid by the Fund for work done in Carter County.

9) In the Underground Storage Tank Rules, OCC-OAC 165:25-3-1 and particularly Appendix S, it is indicated that if you fail to notify the Oklahoma Corporation Commission of a release, it's a \$250 fine. Under OCC-OAC 165:25-3-7, if you fail to report a spill over 25 gallons it's \$100. And under OCC-OAC 165:25-2-42 and 165:25-2-111, if you fail to use an OCC licensed repairer it's a \$500 fine. R&B believes the ALJ abused his discretion when he indicated that because they didn't use a licensed environmental consultant, and because it was remediated before it was approved, that there should be no compensation. Currently, R&B owes ACE \$88,000 and the PSTD Indemnity Fund has indicated they will not pay. R&B believes it is an abuse of discretion to not let them pay a fine and be eligible for recovery from the Fund.

10) R&B is simply asking to be made eligible to make a claim and that that bill by ACE be audited. R&B is willing to pay a fine if it is necessary. R&B are participants in the Indemnity Fund and for every gallon of gasoline or diesel they sell, a portion of that goes into the Indemnity Fund. If they are not allowed to recover from the Indemnity Fund it would be because of an abuse of discretion.

PSTD

1) **Jeffrey Southwick**, Deputy General Counsel, requested the Report of the ALJ be upheld.

2) The Commission rules make it an obligation of a tank operator or owner to report a release within 24 hours. That did not occur here. R&B was rushed into a contract because of the pressing need for what was before their very eyes, but it still does not relieve them of the obligation to report it to the Commission. The rules say you have to report the release to the Commission.

3) Mr. Blankenship spoke to the fines to the PSTD rules. Those fines he spoke of are a fine table for fuel citations. If a fuel inspector goes out and sees a problem at a storage tank system, he contacts the owner and his supervisor. If it is serious enough, the supervisor will issue a fuel citation for a fuel citation docket and appear in a formal administrative hearing. Those fines Mr. Blankenship discussed apply to those types of violations.

4) Mr. Blankenship also discussed seeing other people come in with much larger releases and they were able to recover. However, those other people reported their release properly. They made application to the indemnity Fund. They were not in substantial compliance, so they had to pay fines to become in substantial compliance and receive anything from the Indemnity Fund.

5) Two elements keep R&B from obtaining relief. The first is OCC-OAC 165:27-5-1(5) where it says: "Investigation and remediation costs expended prior to submission of a release report to the Commission, shall not be eligible for Indemnity Fund reimbursement." Second, in OCC-OAC 165:27-7-7(j), it says: "No reimbursement shall be made for costs incurred prior to confirmation of release or, SOR (suspicion of release) investigation unless costs of an emergency response are approved in advance by the PSTD."

6) This decision is difficult because the statute allows R&B to seek reimbursement for their voluntary actions, but on the other hand the rules say they must report the accident first before proceeding with the cleanup.

RESPONSE OF R&B

1) This is a case about the relation between the statute and the rules. The issue here is whether R&B followed those rules as best they could, given the situation that confronted them. R&B called the ODEQ; they had someone onsite when the cleanup commenced, and it was cleaned up quickly and properly. R&B is asking to be able to submit the bill to the Indemnity Fund and get reimbursed for it.

2) R&B believe that ACE followed the law, and cleaned up the site quickly. In the past, ACE has been paid by the Indemnity Fund despite not being a licensed environmental consultant, so why can't ACE be paid now.

CONCLUSIONS

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

1) The Referee finds that the ALJ's recommendation that R&B be denied Indemnity Fund eligibility for costs associated with the accidental release of regulated substances that were incurred prior to notification being made to the Oklahoma Corporation Commission is supported by the weight of the evidence, in accordance with law and free of reversible error. 17 O.S. Sections 303 through 324 known as the "Oklahoma Storage Tank Regulation Act" and 17 O.S. Sections 351 through 360 known as "Oklahoma Petroleum Storage Tank Release Indemnity Program" concern this case. Also, OCC-OAC 165:25-1-1 et seq., known as the Oklahoma Corporation Commission Underground Storage Tank Rules; OCC-OAC 165:27-1-1 et seq., known as the Indemnity Fund Rules; and OCC-OAC 165:29-1-1 et seq., known as the Remediation of Petroleum Storage Tank Release Rules are applicable to the present case.

2) 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. 1983); *Ashland Oil Inc. v. Corporation Commission*, 595 P.2d 423 (Okl. 1979). Rules and regulations enacted by the Commission pursuant to the powers delegated to it have the force and effect of law and are presumed to be reasonable and valid. *Toxic Waste Impact Group v. Leavitt*, 755 P.2d 626 (Okl. 1988).

3) Title 17 of the Oklahoma statutes is entitled "Corporation Commission". Under Title 17 Corporation Commission Chapter 14 is entitled "Oklahoma Storage Tank Regulation Act". 17 O.S. Section 309 provides:

A. No owner or operator, employee or agent of such owner or operator, or transporter shall knowingly allow a release from a storage tank system to occur or continue to occur without reporting the release to the Corporation Commission within twenty-four (24) hours upon discovering such a release.

4) Title 17 Oklahoma Corporation Commission Chapter 15 is entitled "Oklahoma Petroleum Storage Tank Release Indemnity Program." 17 O.S. Section 351 provides:

B. The Legislature declares that, in order to provide for rehabilitation of as many pollution sites resulting from releases of petroleum from storage tank systems, as soon as possible, voluntary corrective action should be encouraged, provided that such corrective action is conducted in a manner and to a level of completion which will protect the public health, safety and welfare and will minimize damage to the environment. To accomplish this purpose, any person entitled to reimbursement pursuant to the provisions of this act, shall be reimbursed for certain allowable costs in connection with such corrective action, subject to the conditions specified by this act.

5) 17 O.S. Section 352 provides:

8. "Eligible release" means a release for which allowable costs, as determined by the Administrator, are reimbursable to or on behalf of an eligible person;

6) The Corporation Commission Oklahoma Storage Tank Regulation Act and the Corporation Commission Oklahoma Petroleum Storage Tank Release Indemnity Program have been laws in effect since 1989. The Corporation Commission has promulgated rules concerning these statutes. OCC-OAC 165:25-1-1 "Purpose" provides:

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. It is recommended that all underground storage tanks, whether regulated by these rules or not, follow the National Fire Protection Association (NFPA) guidelines, including NFPA 30 and 30A.

OCC-OAC 165:25-3-7 "Release Reporting" provides:

(b) All underground storage tank system owners, operators, their employees or agents, or transporters must report any of the following events to PSTD by telephone at (405) 521-6575 or toll free at 1-888-621-5878 (if after hours or on weekends or holidays, a detailed message must be left on PSTD's answering machine) within 24 hours of knowing of any of the following situations. ...(1) the discovery of released regulated substances at the facility or in the surrounding area...

OCC-OAC 165:29-1-21 through 165:29-5-4, Chapter 29, "Remediation of Petroleum Storage Tank Release" provides in 165:29-1-21 "Overview of applicability and enforcement":

This Chapter applies to the containment, control, abatement and removal of releases of regulated substances from any petroleum storage tank system that causes pollution harmful to the public health, safety or welfare or the environment of the State of Oklahoma, regardless of whether release occurs within or outside of the State.

Also, OCC-OAC Rule 165:29-3-2 "Release reporting" provides:

(b) All petroleum storage tank system owners, operators, their agents and employees must report any of the following events to the PSTD by telephone at 405-521-4683 or 1-888-621-5878 (and if after hours or on weekends or holidays, they must leave a message on the answering machine) within 24 hours of discovering the substances, conditions or monitoring results. Release reports may also be made by telephone to PSTD personnel at the following numbers: 405-522-1437 or 405-522-5266....

Title 165, Corporation Commission, Chapter 27, Indemnity Fund states in OCC-OAC 165:27-1-1 "Purpose":

The Indemnity Fund Program will provide reimbursement for corrective action performed of PSTD regulated pollution sites that have resulted from releases of petroleum from storage tank systems. The Indemnity Fund Program as a good steward of monies entrusted to it, will also prioritize cases to most effectively protect the public health, safety and welfare and minimize-damage to the environment. In order to accomplish these purposes, the Indemnity Fund Program will reimburse allowable costs incurred for corrective action to eligible parties for eligible releases from eligible tank systems...

OCC-OAC 165:27-1-3 "Scope" states:

This Chapter provides a basis that will allow the Indemnity Fund Program to organize and maintain itself, define eligible parties, allowable costs, methods, limitation of reimbursement, corrective action, completed work, and standards that will protect the health, safety and welfare of the state in its environment, and offers specific procedures and policies for speedy and timely reimbursement of allowable costs to eligible parties.

Subchapter 5 "Qualifications for Reimbursement", OCC-OAC 165:27-5-1 states:

In order to receive reimbursement from the Indemnity Fund, a person must, among other requirements:

(5) Investigation and remediation costs expended prior to submission of a release report to the Commission, shall not be eligible for Indemnity Fund reimbursement.

Subchapter 7 "Reimbursement", OCC-OAC 165:27-7-2 states:

(c) Reimbursement shall not be made from the Indemnity Fund pursuant to this Section until the Indemnity Fund Program has determined that the costs for which reimbursement is requested were incurred on behalf of an eligible person, of an eligible release from an eligible tank system and were reasonable.

OCC-OAC 165:27-7-7 "Exclusions from reimbursement" provides:

(j) No reimbursement shall be made for costs incurred prior to confirmation of release or SOR investigation unless cost of an emergency response are approved in advance by the PSTD.

As stated above it is clear R&B was not in compliance with the applicable state statutes concerning the Oklahoma Corporation Commission, Oklahoma Storage Tank Regulations Act or the Oklahoma Corporation Commission Oklahoma Petroleum Storage Tank Release Indemnity Program.

7) R&B owns seven other gas facilities and has been in the business for ten years. It is thus incumbent upon an entity that is regulated by the Commission and has been in this business for many years to be conversant with the rules that regulate them. As stated above, it is the tank owner's or operator's responsibility and obligation to report a release within 24 hours .

8) R&B in its Amended Exceptions to the Report of the Administrative Law Judge asserts that the official website of the PSTD of the Oklahoma Corporation Commission states:

Within 24-hours of discovering evidence of released fuel, all petroleum storage tank owners, operators, their agents and/or employees must report to the Petroleum Storage Tank Division (PSTD), by telephone, at **405-521-4683** during normal working hours (8:00 a.m.-4:30p.m., Monday through Friday). After office hours, weekends or holidays, calls must be reported to the PSTD's pager at 405-575-5255 or to the Oklahoma Department of Environmental Quality (ODEQ) at 1-800-522-0206 (in state) or 405-271-4468 (out of state).

Regardless of whether or not the website states that the release may be reported to ODEQ, it is still the obligation of the operator/owner to report said release to the PSTD pursuant to the above stated rules. The website might allow the owner/operator to report to the ODEQ but the operator/owner must also pursuant to the above stated rules report said release to the Corporation Commission PSTD within the required timeframe.

9) R&B stated that it would be willing to pay a fine pursuant to Chapter 25, OCC-OAC 165:25-1-1 et seq. Appendix S. The Referee agrees with PSTD that said fine referred to in Appendix S in the underground storage tank rules is a fine citation table. If a fuel inspector goes out and sees a problem at a storage tank system site he then lets the owner know and he contacts the Oklahoma Corporation Commission supervisor and if the supervisor believes the problem warrants it, a fuel citation will be issued and placed on a fuel citation docket for a formal administrative hearing. The fines listed are the maximum fines for those particular violations. If an operator/owner is not in substantial compliance and has deficiencies then deficiencies are subject to a fine and a hearing is held before an administrative law judge who will either concur with the fine or reduce or increase it.

10) For the above stated reasons and law, the Referee finds the Report of the ALJ should be affirmed.

RESPECTFULLY SUBMITTED THIS 5th day of November, 2013.



Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Douglas
Commissioner Anthony
Commissioner Murphy
Jim Hamilton
ALJ Michael Porter
David Blankenship
Jatinder Sethi
Jeffrey Southwick
Kathy Lynn Nelson

Office of General Counsel
Michael L. Decker, OAP Director
Oil Law Records
Court Clerks – 1
Commission Files