

STATE OF MICHIGAN
COURT OF APPEALS

FORD MOTOR COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL
QUALITY and AMY S. CARTER, Fund
Administrator,

Defendants-Appellees.

UNPUBLISHED
May 9, 2000

No. 211307
Ingham Circuit Court
LC Nos. 97-087593-AA
97-087594-AA
97-087595-AA
97-087596-AA
97-087597-AA

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the order affirming defendant's¹ decision to deny five of plaintiff's claims for reimbursement costs incurred in cleaning up underground storage tank sites pursuant to the Michigan Underground Storage Tank Financial Assurance (MUSTFA) section of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.21501 *et seq.*; MSA 13A.21501 *et seq.*, on the ground that plaintiff's administrative appeals from the denial of these claims were untimely. We reverse and remand for further proceedings.

In enacting MUSTFA, the Legislature established a fund for reimbursing property owners for certain expenditures incurred in the cleanup of underground petroleum storage tanks. In order to obtain reimbursement, a property owner or its agent must submit a claim to the fund administrator, defendant Carter, to establish eligibility and document expenses. MCL 324.21515; MSA 13.21515. Once a claim with regard to a particular site has been approved, additional work invoices may be submitted for reimbursement in connection with the claim. *Id.* The statute imposes no time limit on the submission of these additional work invoices. The parties agree that once Carter approved a particular site as eligible for reimbursement, additional invoices were reviewed by a private third-party administrator [TPA] retained to act on behalf of the fund. After reviewing the invoices, the TPA would send a form entitled "Review of Claim for Payment" [RCP] to Carter, who would then notify the claimant regarding payment. If a claimant disputed the denial of a claim for reimbursement, the statute provided for an

appeal to the MUSTFA Advisory Board that was to be filed within fourteen days following the denial. MCL 324.21521(1); MSA 13.21521(1).

Plaintiff claims that, at least since 1993, claimants whose requests for reimbursement were denied by the TPA for inadequate documentation could at any time submit a “request for reconsideration” to the TPA, along with the appropriate documentation, and the claim would then be reevaluated. Plaintiff claims that it submitted twenty-two such reconsideration requests, that other owners followed the same procedure, and that Carter wrote letters to the TPA directing that the requests for reimbursement be reviewed and a “reconsideration Review of Payment” be prepared. Although these requests and letters relating to other claims are not part of the administrative record in this case, plaintiff filed an affidavit and supporting documentation in the circuit court to establish the existence of this procedure.

Defendant, on the other hand, contended that its Procedure No. MUSTFA-5 clearly informed claimants that “[t]he TPA provides an informal opportunity of 1 review period, 30-45 days, for claimant to resolve any documentation issues.” Defendant claimed that the fourteen-day period for filing an appeal begins when the RCP is filed with the department, that there was never a reconsideration procedure, and that even if there was such a procedure, it was not without time limits. The parties do not dispute that five of plaintiff’s requests for reconsideration in 1997 were rejected by Carter as untimely appeals to the advisory board.

Plaintiff appealed these decisions to the Ingham Circuit Court pursuant to § 21521 of the NREPA, MCL 324.21521(3); MSA 13A.21521(3). The court decided the matter without a hearing and issued a brief opinion affirming the denials. Plaintiff argues that the circuit court failed to provide meaningful analysis and applied the incorrect standard of review. The standard of review appropriate to a particular decision is a question of law that is reviewed de novo. *Oakland County Bd of Rd Comm’rs v Michigan Property & Casualty Guaranty Ass’n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Contrary to both parties’ arguments, the questions (1) whether a long-standing practice of accepting requests for reconsideration existed apart from the appeals procedure, and, if so, (2) whether adequate notice was provided to plaintiff that this established practice was going to be eliminated, present factual issues. Rather than making specific factual findings with regard to these issues, the court simply stated that it would not substitute its opinion for that of the agency. In contrast to a situation in which the agency’s decision is the result of a contested case hearing between two adverse parties, in this case the dispute is between a party and the agency over procedural issues, in which no hearing was conducted. Therefore, there were no factual findings at the administrative level that would have been entitled to deference from the trial court. Therefore, remand is necessary in order to enable the court to conduct a hearing, consider the evidence, and make the factual findings that are a prerequisite to this Court’s review.

If the reconsideration procedure was in fact an established practice, the department could not eliminate it without providing adequate notice. *Marshall v D J Jacobetti Veterans Facility (After Remand)*, 447 Mich 544, 548-549; 526 NW2d 585 (1994); see also *Lambroff v Ram’s Horn*

Restaurant, 149 Mich App 303; 385 NW2d 775 (1986); *Beger v Industrial Painting Co*, 7 Mich App 628; 152 NW2d 706 (1967). The reconsideration procedure described by plaintiff would not have been inconsistent with the statute, which specifically provides for the submission of additional work invoices and imposes no time limits on their submission. MCL 324.21515(6); MSA 13.21515(6). Furthermore, as indicated by *Marshall*, *supra* at 550, even if the agency's past practice was inconsistent with the statute or with its own administrative rules, adequate notice must still be provided before changes are instituted. Defendant's argument that plaintiff had notice of the fact that it intended to enforce the fourteen-day time limit on appeals is somewhat disingenuous; the issue here is not the enforcement of the time limits on a formal appeal to the advisory board, but the discontinuance of the alleged informal reconsideration procedure upon which plaintiff claims it relied.

Accordingly, we reverse the circuit court's decision and remand for resolution of the factual issues identified in this opinion. We decline to address plaintiff's equitable estoppel claim in view of our finding that issues of fact remain unresolved. *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 552; 487 NW2d 499 (1992).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ For purposes of this opinion, the defendants will be referred to in the singular, since the department's involvement in this case stems only from Ms. Carter's role as fund administrator.