IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lehr's Exxon Service Station, Inc.,	:	
	:	No. 781 C.D. 2012
Petitioner	:	Argued: December 10, 2012
	:	
v.	:	
	:	
Pennsylvania Underground Storage Tank Indemnification Fund,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: January 14, 2013

Lehr's Exxon Service Station, Inc., (Lehr) petitions for review of the March 22, 2012, order of the Underground Storage Tank Indemnification Board (Board), which denied the exceptions filed by Lehr to the presiding officer's proposed report and recommendation (Report) and adopted the Report. In adopting the Report, the Board affirmed the decision of the Underground Storage Tank Indemnification Fund (Fund), denying payment for corrective action in response to the release of a regulated substance because Lehr failed to timely report the release. We affirm.

Lehr operated as a gas station and vehicle repair facility from 1959 to May 17, 2008. On June 23, 2008, Lehr notified the Fund of a fuel release it

discovered after removing distribution islands. ICF International (ICF) investigated the claim on behalf of the Fund. In a letter dated May 21, 2009, ICF determined that the claim was not eligible for funding from the Storage Tank and Spill Prevention Act[1] because Lehr failed to notify the Fund within sixty days after confirmation of the release as is required by 25 Pa. Code §977.34. ICF concluded that there were multiple documented releases dating back to 2005.

Lehr appealed to the executive director of the Fund, who affirmed denial of the claim, concluding that Lehr failed to: (1) notify the Fund within sixty days of the release; (2) establish that the release occurred after February 1, 1994; and (3) establish that the tanks were registered and that all applicable fees were paid.[2] Lehr appealed the decision and requested an administrative hearing.

A presiding officer, appointed by the Board, conducted a hearing and issued a Report on August 16, 2011. In the Report, the presiding officer made the following findings.

Charles Lehr, Jr., the son of the original owners, worked and assisted in the operation of the service station from 1982 through its closing in 2008. Beginning in 2000, James Baldwin assisted in some of Lehr's business affairs.

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[1] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§6021.101-6021.2104. Section 704(a)(1) of the Act, 35 P.S. §6021.704(a)(1), provides that the purpose of the Fund is for "making payments to owners, operators and certified tank installers of underground storage tanks who incur liability for taking corrective action or for bodily injury or property damage caused by a sudden or nonsudden release from underground storage tanks."

[2] The third reason for denial was subsequently dropped and is not at issue.

When Lehr made the claim to the Fund, Lehr's active registered underground storage tank systems included a 6,000 gallon diesel tank, a 4,000 gallon gasoline tank, and a 10,000 gallon gasoline tank. The active tanks were installed in 1978. The active diesel tank was originally a gasoline tank, but was converted in 2004. In addition to the active tanks, Charles Lehr, Jr., and Baldwin knew that seven old abandoned or closed tanks were on the property.

In 2003, Matthew Bupp, a realtor and developer, obtained an equitable interest in a 8.2-acre parcel, which included the Lehr site. Bupp had a potential purchaser for the property, Shaner Hotel Group (Shaner). Shaner hired a consultant, Groundwater and Environmental Services (GES), to conduct an environmental investigation of the property.

Charles Lehr, Jr. was on site in October 2004, when GES performed soil borings as part of its investigation. Charles Lehr, Jr. discussed with GES employees what appeared to be old contamination in the soil at the southern side of the property. Handwritten GES field notes indicated a hydrocarbon odor from the soil at a depth exceeding 18 feet from a boring in the southeastern corner of the property (B2), as well as from a boring in the southern side of the property (B8). The notes also indicated high field instrument readings from the same borings, which suggested contamination. GES used a certified laboratory to analyze the soil samples, which confirmed gasoline constituent contamination in excess of statewide health standards in both samples.

Bupp received a copy of the GES field notes and the laboratory analysis and retained Paul Nachlas, an environmental consultant. On May 13, 2005, Bupp and Nachlas met with Charles Lehr Jr., Baldwin, and their attorney and provided them with the GES field notes and the laboratory results. Nachlas explained the significance of the information showing petroleum contamination on the property and advised Lehr that it had sixty days to notify the Fund of the release or it risked losing eligibility for Fund reimbursement.

Lehr did not notify the Fund of a potential claim, nor did it engage an environmental consultant. Instead, Charles Lehr, Jr., at the suggestion of Baldwin, pressure tested the active system and checked the inventory control records, which would reveal leaks from the active system.[3] From all available records, there was no indication of significant missing product from the active system or lines.

In December 2006, Lehr was advised that the property was being sold and that it had to vacate the property. Lehr retained Alternative Environmental Solutions (AES). Lehr provided AES with the GES information. On December 18, 2006, AES provided Lehr a written project strategy for: removal of 65 tons of suspected petroleum-contaminated soil, closure of the existing tank system, full site characterization and remedial activities associated with various potential and actual recognized environmental conditions at the site. The project strategy also noted an isolated volume of soil, south of the active tanks, which was impacted by a gasoline constituent at concentrations above the applicable statewide health standards.

[3] Baldwin and Charles Lehr, Jr., were suspicious of Bupp and the information he presented because the parties were in negotiations to sell/purchase the property.

When Lehr had the active tanks removed in June 2008, there was no indication of a product release from the tanks themselves. However, when the product lines and dispensers were subsequently removed, product release below the diesel fuel dispenser was observable by sight and odor. AES performed soil borings around the site which revealed hydrocarbon constituents in the soil, primarily around the dispenser area and between the dispensers and the southern property line. Analysis of the AES 2008 soil borings generally confirmed the results of the 2004 GES soil borings as far as the locations of impacted and clean soil on the site, with the contaminated soil being near the 2004 B2 and B8 borings. Further, soil analysis revealed that the contamination on the site was not from diesel fuel, but from gasoline, and that the older, closed tanks were the source of the contamination.

In his Report, the presiding officer determined that Lehr failed to notify the Fund of the release within sixty days of its confirmation as is required by 25 Pa. Code §977.34. The presiding officer disagreed with Lehr that the release was confirmed for the first time in June 2008, and concluded that Lehr knew of a confirmed release in May 2005, when the GES field notes and laboratory results were supplied to him. The presiding officer also determined that Lehr failed to meet its burden of proving that any release occurred after February 1, 1994, as is required by section 706 of the Act, 35 P.S. §6021.706, and recommended that the Fund's decision to deny coverage be affirmed. Lehr filed exceptions to the Report with the Board. The Board issued a decision on March 22, 2012, which denied Lehr's exceptions,

adopted the Report in full, and affirmed the denial of coverage. This petition for review followed.[4]

Initially, we observe that "the Act imposes a heavy burden of proof on the claimant" seeking coverage to establish eligibility for coverage. *Southeast Delco School District v. Underground Storage Tank Indemnification Board*, 708 A.2d 881, 883 (Pa. Cmwlth. 1998). The issue presented in this case is whether Lehr met its burden of proving compliance with the notice provision of 25 Pa. Code §977.34.

In accordance with 25 Pa. Code §977.34, a "participant shall notify the Fund within 60 days after the confirmation of a release under §§ 245.304 and 245.305 (relating to investigation of suspected releases; and reporting releases)." Lehr maintains that before June 2008, when the distribution island was removed and fuel discovered under the structure, the only indication of a release was the unsigned GES field notes. Lehr argues that the liberal construction of the Act, mandated by the legislature, requires the Board to treat the unsigned GES field notes as only an indication of a release and not a confirmation. We disagree.

Section 109 of the Act, 35 P.S. §6021.109, states that "[t]his act and the regulations promulgated under this act shall be liberally construed in order to fully protect the public health, welfare and safety of the residents of this Commonwealth." "Shall," by definition, is mandatory, and generally is applied as such. *Chanceford*

[4] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Aviation Properties, LLP v. Chanceford Township Board of Supervisors, 592 Pa. 100, 108, 923 A.2d 1099, 1104 (2007).

In *MKP Enterprises, Inc. v. Underground Storage Tank Indemnification Board*, 39 A.3d 570 (Pa. Cmwlth. 2012), this court addressed 25 Pa. Code §977.34, the claims reporting regulation. In that case, an underground storage tank owner, Erie Petroleum, Inc., (EPI), began to have three underground storage tanks removed on November 6, 2007. During the excavation process, soil contamination was found and was believed to be the result of leaking around the spill buckets. The three tanks were removed and replaced on November 7, 2007. EPI, however, did not report the contamination to the Fund until April 14, 2008, after additional testing confirmed the release. The Fund denied EPI's request for remediation costs because EPI failed to notify the Fund within sixty days of the confirmed release.

On appeal to this court, we observed that EPI knew of a confirmed release in November 2007, but failed to report the claim within sixty days to the Fund. *Id.* at 585. Although EPI received a second confirmation of the release following additional testing in April 2008, this did not absolve EPI from the obligation of reporting the initial confirmed release. *Id.*

EPI argued that the claims reporting regulation in 25 Pa. Code §977.34 should be liberally construed. This court stated:

> While advocating a liberal construction of the notification regulation, EPI offers no suggestion as to how the Board should stretch the interpretation of the notification requirements of Section 977.34 in a consistent manner. *EPI's argument, however, essentially asks the Court to*

> *invoke a construction of Section 977.34 that would not simply be a liberal one, but rather one that would render the regulation virtually meaningless.*

MKP, 39 A.3d at 583-84 (Emphasis added).

Moreover, regulatory time limits have the same force and effect as mandatory statutory limits, and strict compliance with the applicable standard is required when public funds are at issue. *Mayer v. Unemployment Compensation Board of Review*, 366 A.2d 605, 607 (Pa. Cmwlth. 1976).

We agree with the Fund that the Board's conclusion that Lehr had a confirmed release in May 2005, yet failed to timely report the release, is supported by substantial evidence. Specifically, Lehr was present when GES did the core sampling and advised that there was old contamination on the property. Additionally, on May 13, 2005, Lehr received the unsigned GES field notes which indicated high field instrument readings suggesting contamination and a hydrocarbon odor from borings on the property. Also, on May 13, 2005, Lehr received laboratory results of the soil samples from the two borings, which confirmed gasoline constituent contamination. On that same day, Nachlas, an environmental consultant, informed Lehr that based on the field notes and laboratory results, contamination existed on the site and he advised Lehr to report it to the Fund. As in *MKP*, the June 2008, report was merely confirmation of the already confirmed May 13, 2005, release.[5]

[5] We also note that Lehr had additional confirmation of a release on December 18, 2007, when AES submitted its project strategy to Lehr, which noted an isolated volume of soil that was impacted by a gasoline constituent at concentrations above the applicable statewide standard.

Based on the above, Lehr had a confirmed release on May 13, 2005. Thus, the June 23, 2008, claim to the Fund was untimely because it was not made within sixty days of the May 13, 2005, confirmation.

Lehr, nonetheless, maintains that once it learned of a suspected release in May 2005, it complied with the regulations and conducted an investigation which revealed no contamination. Regarding investigation of a suspected release, 25 Pa. Code §245.304 provides:

> *§ 245.304. Investigation of suspected releases.*
>
> (a) The owner or operator of storage tanks . . . shall initiate and complete an investigation of an indication of a release of a regulated substance as soon as practicable, but no later than 7 days after the indication of a release.
>
> * * *
>
> (b) The investigation required by subsection (a) shall include a sufficient number of the procedures outlined in this subsection and be sufficiently detailed to confirm whether a release of a regulated substance has occurred. The owner . . . shall investigate the indication of a release by one or more of the following procedures:
>
> (1) A check of product dispensing or other similar equipment.
>
> (2) A check of release detection monitoring devices.
>
> (3) A check of inventory records to detect discrepancies.

(4) A visual inspection of the storage tank or the area immediately surrounding the storage tank.

(5) Testing of the storage tank for tightness or structural soundness.

(6) Sampling and analysis of soil or groundwater.

(7) Other investigation procedures which may be necessary to determine whether a release of a regulated substance has occurred.

(c) If the investigation confirms that a reportable release has occurred, the owner . . . shall report the release in accordance with §245.305 (relating to reporting releases) and initiate corrective action.

(d) If the investigation confirms that a nonreportable release has occurred, the owner . . . shall take necessary corrective actions to completely recover or remove the regulated substance which was released.

(e) If the investigation confirms that a release has not occurred, further investigation by the owner . . . is not required.

Lehr argues that it followed the regulations by performing additional testing of the active system, including verification of inventory and pressure testing, and because Lehr's additional testing found no releases, Lehr had no duty to report a confirmed release. We disagree.

Although Lehr performed additional testing, it did not confirm that a release had not occurred. At most, it confirmed that the active system was not the source of the release on the property. As previously stated, Lehr knew a confirmed

release occurred as of May 13, 2005, when it received the GES field notes and laboratory data verifying the release.

Finally, we observe that in addition to reporting the release within sixty days, Lehr, in accordance with section 706 of the Act, 35 P.S. §6021.706, had the burden of proving that the contamination in question occurred after February 1, 1994, the date of initial eligibility for benefits under the Act. The Board concluded that Lehr did not meet its burden. (Board's Op. at 26.)

Despite the Board's determination, Lehr did not include this issue in its "Statement of Questions Involved" or in the "Argument" section of its brief and, as such, it is waived. *See* Pa. R.A.P. 2116(a); *see also Rapid Pallet v. Unemployment Compensation Board of Review*, 707 A.2d 636, 638 (Pa. Cmwlth. 1998) (stating that arguments not properly developed are waived); *Coraluzzi v. Commonwealth*, 524 A.2d 540, 540 (Pa. Cmwlth. 1987) (noting that no point will be considered if it is not set forth in the statement of questions involved).

Accordingly, we affirm the Board's decision.

ROCHELLE S. FRIEDMAN, Senior Judge

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	:	
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O R D E R

AND NOW, this 14th day of January, 2013, we affirm the March 22, 2012, order of the Underground Storage Tank Indemnification Board, in the above-captioned matter.

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ROCHELLE S. FRIEDMAN, Senior Judge