

**IN THE COURT OF APPEALS 8/6/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00740 COA**

**MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY**

**APPELLANT**

**v.**

**SAMSON, INC.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM J. LUTZ

COURT FROM WHICH APPEALED: MADISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ROY FURRH

ATTORNEY FOR APPELLEE:

JAMES M. CREWS, III

NATURE OF THE CASE: ADMINISTRATIVE

TRIAL COURT DISPOSITION: CHANCERY COURT REVERSED AND REMANDED  
COMMISSION FINDING THAT SAMSON, INC, WAS NOT IN SUBSTANTIAL  
COMPLIANCE WITHIN STATUTE TO BE ELIGIBLE FOR TRUST FUND

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

The Mississippi Commission on Environmental Quality determined that Samson, Inc. was ineligible for reimbursement from the Mississippi Groundwater Protection Fund, for clean-up costs to be incurred at the gas station owned by Samson. The Commission's order was appealed to the Madison County Chancery Court, by Samson. After a hearing, the chancery court reversed the Commission's order, finding the order "arbitrary, capricious, and not based upon substantial evidence." From this ruling the Commission appeals to this Court. Finding that the trial court was correct in reversing the order of the Commission, we affirm.

## FACTS

The Mississippi Groundwater Protection Trust Fund was a fund established for the purpose of cleaning up motor fuel spills at contaminated sites which may pose a threat to the environment or the public health, safety, or welfare. Miss. Code Ann. § 49-17-405 (1972). The trust fund is funded through an environmental protection fee of four-tenths of one cent (.4%) per gallon which is levied on bonded distributors who sell or deliver motor fuels to a retailer or user in this State. *Id.* § 49-17-407.

The Commission is authorized to collect a tank regulatory fee for each underground storage tank "UST" in the State. *Id.* § 49-17-421. At the time this case went before the Commission, the UST regulatory fee was \$40 per tank per year.

If the Commission determines that the owner of a contaminated site was not in substantial compliance with the Mississippi Underground Storage Tank Act of 1988, then the Commission may decide that the owner of the contaminated site is not eligible for the trust fund to help with the cost of clean-up. *Id.* § 49-17-405(2). The Commission may determine that the owner of an UST is not in substantial compliance, if such owner has been delinquent in the payment of the UST regulatory fees for more than three months after such fee is due and payable. *Id.* § 49-17-409(d).

Samson, Inc. owns two UST's located at Mac's Shell on Highway 51 in Canton, Mississippi. Samson was sent a bill for \$80 (\$40 per UST) on July 1, 1991, payable by August 31, 1991. On January 13, 1992, Samson was sent a letter by a local law firm stating that he was delinquent in paying the UST regulatory fee, and that such fee should be paid immediately.

In June of 1992, the Commission learned that there was a contamination leak in the area around Mac's Shell. In July of 1992, the Commission received the results of tests prepared by American Scientific Technology, which showed that the two UST's owned by Samson were leaking gasoline into the soil. The Commission hired Hughes Environmental Consulting Corporation to assess the area and to confirm the contamination at the Samson site. Hughes performed an assessment on July 29, 1992, indicating that the soil boring at the subject site was contaminated. On July 31, 1992, Samson, Inc. paid the delinquent UST regulatory fee.

In August of 1992, the Commission informed Samson that he was not in substantial compliance due to the delinquent UST regulatory fees, and, therefore, was not eligible to utilize the trust fund for assessment and clean-up costs. In September, Samson requested a hearing related to his trust fund eligibility. At the conclusion of the hearing, the Commission found that Samson was ineligible for reimbursement from the Trust fund for clean-up costs, and ordered Samson to reimburse the

Commission \$5,325.12 for the investigation work related to the fuel release. The cost of cleaning up the contaminated site was over \$80,000.

## DISCUSSION

The decision of an administrative agency may not be reversed by a reviewing court unless the decision was: (1) not based upon substantial evidence; (2) arbitrary or capricious; (3) beyond the power of the agency to make; or (4) a violation of due process rights or other statutory constitutional rights. *See Mississippi Comm'n on Env'tl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So. 2d 1211, 1215 (Miss. 1993); *Southeast Miss. Legal Serv. Corp. v. Mississippi Power Co.*, 605 So. 2d 796, 798 (Miss. 1992); *Mississippi State Dep't of Health v. Southwest Miss. Regional Medical Ctr.*, 580 So. 2d 1238, 1239 (Miss. 1991); *Eidt v. City of Natchez*, 421 So. 2d 1225, 1231-32 (Miss. 1982).

In the case *sub judice* the Commission determined that Samson was ineligible for reimbursement by the trust fund for clean-up costs associated with the spill at Mac's Shell in Canton, Mississippi. On appeal, the Commission argues that such decision is within its discretion and that the chancery court erred in ruling that it had acted arbitrarily and capriciously, and its order should be reinstated.

In support of its argument that the Commission's ruling was within its discretion the Commission cites to us Mississippi Code, section 49-17-409, which provides the following:

The commission may determine, in its discretion, that the owner of an underground storage tank is not in substantial compliance for the purposes of this section and section 49-17-405, if such owner of an underground storage tank has been delinquent in the payment of regulatory fees for more than three (3) months after such fee is due and payable.

Miss. Code Ann. § 49-17-405 (1972).

The term "substantial compliance" means that "an owner or operator of an underground storage tank has registered that tank with the department and has made a good-faith effort to comply with the law; and the rules and regulations adopted pursuant thereto." Miss. Code Ann. § 49-17-403(k). Furthermore, Mississippi Code, section 49-17-405 provides that if the owner of a UST is in substantial compliance then it shall not be liable to the Commission for any clean-up costs. *Id.* § 49-17-405.

It is clear that because Samson was eleven months delinquent in paying the UST regulatory fee, the Commission does have the discretion to find that Samson was not in substantial compliance, and therefore, ineligible for the trust fund. Having to pay over \$80,000 in clean-up costs because of failure to pay an \$80 fee may appear harsh at first glance; however, allowing persons to ignore the UST regulatory fee until such time as there is a contamination at their site is unacceptable.

In this case, even though it is clear that the Commission did have the discretion to find Samson ineligible for the Trust fund, the chancery court ruled that the Commission's decision was arbitrary and capricious. The chancellor stated:

The Commission has discretionary authority under Miss. Code Ann. § 49-17-409(f) to determine whether or not an owner is not in substantial compliance for purposes of the Act, and in this action, no record shows that the commission considered the facts involved therewith or otherwise exercised any discretion whatsoever. Instead, the Commission made a determination that the Appellant was not in substantial compliance based solely upon the fact that the tank regulatory fee for one year was delinquent.

We agree with the chancellor. While the Commission does have the discretion in determining whether the late payment of the UST regulatory fee should act to disqualify an owner from the Trust fund, no discretion was used by the Commission in making its decision. Apparently at least one commissioner believed that the Commission was constrained to find that Samson was not in substantial compliance because of the late payment of the UST regulatory fee. The Commission stated the following to Samson:

However we are here to follow the state laws, and for whatever reasons, the required payments were not made, even though I would like to help you myself. We *have* to follow the dictates of the law. Therefore, I move that we accept the staff recommendation.

The Commission's failure to even consider the facts of the case in reaching its decision, renders such decision arbitrary and capricious. The Commission thought that it had to find that Samson was not in substantial compliance because of the late payments. That is not the law in this state. The Commission may, within its discretion, find that Samson was not in substantial compliance, or it may find that Samson was in substantial compliance.

We therefore affirm the ruling of the chancery court and remand this cause back to the Commission for a hearing consistent with this opinion. If after such hearing the Commission finds that Samson was not in substantial compliance, then it should disqualify Samson from the trust fund. On the other hand, if it determines that Samson was in substantial compliance, then it should find him eligible for the trust fund.

**THE JUDGMENT OF THE CHANCERY COURT OF MADISON COUNTY IS AFFIRMED. COSTS ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**