COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 14, 1996

No. 95-3274

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

FURNISHINGS UNLIMITED, INC.,
a/k/a Tom Van Lieshout,

Petitioner-Appellant,

v.

DEPARTMENT OF INDUSTRY,
LABOR, AND HUMAN RELATIONS,

Respondent-Respondent.

APPEAL from an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Furnishings Unlimited, Inc., appeals an order affirming a Department of Industry, Labor and Human Relations (DILHR) decision denying reimbursement from the Petroleum Environmental Cleanup Fund (PECFA) for costs Furnishings incurred cleaning and removing an underground storage tank from its property. Section 101.143(4)(c)7, STATS., provides that such costs are not eligible for reimbursement "unless those costs were incurred before November 1, 1991, or unless the claimant had signed a

contract for services ... before November 1, 1991."[1] DILHR denied reimbursement on grounds that its administrative rules define "costs incurred" as actual payment to the creditor. Furnishings maintains that its costs were incurred when it entered into an oral agreement with a contractor in June 1991 to have the tanks removed. Because the legislative history shows that DILHR was intimately involved in developing the statutory scheme excluding reimbursement of costs of tank removal pursuant to a legislative desire to reduce costs of the PECFA program, and because that agency's definition of "costs incurred" is a reasonable interpretation, we affirm the order.

The facts are stipulated. Furnishings entered into an oral agreement with a contractor for removal of an underground storage tank on property it owned on or about June 1, 1991. The contractor began the process of closing and removing the underground storage tank by September 3, 1991. The tank was removed on November 13 and 14, 1991. The project of cleaning and disposing of the tank was completed on February 11, 1992. Furnishings paid the contractor by check issued January 27, 1993. Furnishings sought reimbursement from the PECFA program for the expenses.

Initially, a PECFA financial manager determined that certain costs totaling $8,079.35 were ineligible for reimbursement because Furnishings paid the costs after November 1, 1991. Then DILHR affirmed the initial determination of the financial manager. The parties filed a stipulation of facts with an ALJ, who also affirmed the initial determination. Furnishings appealed to DILHR's deputy secretary, who affirmed the ALJ's decision. Furnishings

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[1] Section 101.143(4)(c), STATS., provides in part:

(c) Exclusions from eligible costs. *Eligible costs* for an award under par. (a) *do not include* the following:

....

7. *Costs* of emptying, cleaning and disposing of the tank and other costs normally associated with closing or removing any petroleum product storage system or home oil tank system *unless those costs were incurred before November 1, 1991, or unless the claimant had signed a contract* for services for activities required under sub. (3) (c) or a loan agreement, note or commitment letter for a loan for the purpose of conducting activities required under sub. (3) (c) *before November 1, 1991.* (Emphasis added.)

petitioned for judicial review of DILHR's decision. The circuit court affirmed DILHR's decision.

Furnishings contends that because it entered into an oral contract in June 1991 agreeing to pay a contractor the costs of removal, it had "incurred" the costs to remove the tanks prior to November 1, 1991. Furnishings relies upon the definition of "incur" found in a standard dictionary.[2]

We review the agency's decision and not that of the circuit court. ***Carrion Corp. v. DOR***, 179 Wis.2d 254, 264, 507 N.W.2d 356, 359 (Ct. App. 1993). When an agency interprets a statute in a case of first impression and the agency lacks special expertise or experience, our review is de novo. ***Jicha v. DILHR***, 169 Wis.2d 284, 291, 485 N.W.2d 256, 258-59 (1992). But where the legislature has specifically charged the agency with the duty of administering and applying the particular statute, we may infer that the agency is competent to interpret the statute and is entitled to a degree of judicial deference is this regard. ***Wisconsin Central Ltd. v. PSC***, 170 Wis.2d 558, 567, 490 N.W.2d 27, 31 (Ct. App. 1992). Where the legislature has ambiguously expressed its intent, we uphold the agency's interpretation where it "is based on a permissible construction of the statute." *See* ***Wisconsin Hosp. Ass'n v. Natural Resources Bd.***, 156 Wis.2d 688, 706, 457 N.W.2d 879, 886 (Ct. App. 1990) (quoting ***Chevron U.S.A. v. Natural Resources Defense Council***, 467 U.S. 837, 843 (1984)). Whether a statute is ambiguous is a question of law, and a statute is ambiguous if reasonable persons could differ as to its meaning. *See* ***State v. Frey***, 178 Wis.2d 729, 737, 505 N.W.2d 786, 789 (Ct. App. 1993).

The legislature has specifically charged DILHR with the duty of administering the PECFA. Section 101.143(4)(a), STATS., provides in part:

> If the department finds that the claimant meets all of the requirements of this section *and any rules promulgated under this section*, the department shall issue an

[2] Furnishings refers to the definition of "incur" as "to become liable or subject to, esp. as a result of one's own actions; bring upon oneself." AMERICAN HERITAGE DICTIONARY 653 (2d ed. 1985). Furnishings' argument is undercut by the fact that if we interpret "incurred" to mean when the claimant is legally bound to pay a cost, the statute's signed contract exception becomes superfluous because, assumably, one is legally bound to pay a cost when one has signed a contract to do so.

> award to reimburse a claimant for eligible costs incurred .... (Emphasis added.)

Furnishings does not challenge the validity of the legislature's delegation of power to DILHR. Pursuant to this authority, DILHR adopted WIS. ADMIN. CODE § ILHR 47, Petroleum Environmental Cleanup Fund, regulating PECFA awards, and includes ILHR 47.015(8), defining "costs incurred" for purposes of an award: "Costs are considered incurred when funds are disbursed to the creditor, i.e.; invoices have been paid and verification is available."

Neither of the conflicting meanings of "costs incurred" found in § 101.143(4)(c), STATS., as proposed by Furnishings and by DILHR, is unreasonable. We therefore conclude that the statute is ambiguous. If a statute is ambiguous, we look to the legislative intent, which may be found in the language of the statute in relation to its scope, history, context, subject matter and object to be accomplished. ***Ellingson v. DILHR***, 95 Wis.2d 710, 713-14, 291 N.W.2d 649, 651 (Ct. App. 1980).

The legislative history of the exclusion from reimbursement for tank removal shows that DILHR submitted recommendations because the legislature sought assistance to reduce the escalating costs of the PECFA program. Correspondence memoranda from drafting records for § 101.143, STATS., to the legislature's joint committee on finance shows that DILHR submitted a list of proposed changes to control PECFA's costs to the joint committee in April 1991. Among the proposed exclusions included costs of tank removal altogether.[3] The drafting records also indicate that the drafters were fully aware that a disallowance of closure costs would affect claims in process and companies performing tank-related services.

The legislature adopted that proposal to disallow closure costs and excluded reimbursement for any costs associated with closing or removing petroleum product storage systems. 1991 Wis. Act 39, § 2328f, effective August 15, 1991.[4] Then, pursuant to 1991 Wis. Act 82, § 7, enacted November 25, 1991,

[3] Cleanup of petroleum products discharge in Wisconsin was projected to rise from $7,000,000 in 1989-90 to an annual average of $200,000,000 in the immediate future.

[4] The amendment was in effect prior to commencement of any tank closing work on Furnishings' site but after the date of its oral contract.

published December 10, 1991, and effective December 11, 1991, the legislature created a retroactive exception to the exclusion for tank removal, but only if the "costs were incurred before November 1, 1991 ... or unless the claimant had signed a contract for services ... before November 1, 1991." Following these developments, DILHR adopted ch. ILHR 47 defining "costs incurred."

In context of the preceding legislative history, we conclude that we should accord deference to DILHR's definition. The legislature authorized DILHR to administer the statute. Because the legislation under review was adopted only after DILHR's close and immediate involvement, we should defer to the agency because it placed a permissible construction upon an ambiguous term within that legislation. *See* ***Wisconsin Hosp. Ass'n***, 156 Wis.2d 688 at 706, 457 N.W.2d at 886.

We also reject Furnishings' alternative argument that its oral contract satisfies the signed contract exception. Furnishings reasons that the legislative intent behind the requirement of a signed contract in lieu of "costs incurred" is to provide adequate proof of the agreement, and its oral contract fulfills that intent because the parties stipulated to its existence and terms. We reject this argument. The exception for a signed contract unambiguously requires a written document. DILHR's order is therefore affirmed.

By the Court. – Order affirmed.

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