STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of:

John Harlfinger
Harlfinger's, Inc.
1505 East Racine Street
Waukesha, Wisconsin 53186

PECFA Claims: #53186-6826-05 A & B
Hearing: #97-187 & 98-60

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed November 24, 1997, under § 101.02 (6) (e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code, to review a decision of the Wisconsin Department of Commerce (Department), a hearing was commenced on September 16, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on January 19, 2000, and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination in the consolidated cases is:

Whether the Department's decisions were incorrect in applying a fifty- percent cost allocation methodology to the Appellant's Claims.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

John Harlfinger
Harlfinger's, Inc.
1505 East Racine Street
Waukesha, Wisconsin 53186

By: George J. Marek, Esq.
Rachel A. Schneider, Esq.
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4497

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kelly Cochrane, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 8/16/00

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: Tuesday, August 22, 2000

Mailed By: Linda K. Esser

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

John Harlfinger
Harlfinger's Inc
1505 E Racine Street
Waukesha, WI 53186

Hearing Number: 97-187 and 98-60
Re: PECFA Claim # 53186-6826-05A & B

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975 Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Terry W. Grosenheider, Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
Karen L. Godshall

DATED AND MAILED:
January 19, 2000

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MAILED TO:

Appellant Aqent or Attorney

George J Marek
Quarles & Brady
411 E Wisconsin Avenue
Milwaukee, WI 53202-4497

Department of Commerce

Kelly Cochrane
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

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STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the matter of the

Claim for Reimbursement under
The Provisions of the PECFA Program by

John Harlfinger
Harlfinger's Inc.
1505 E Racine Street
Waukesha WI 53186

PECFA Claims #53186-6826-05A & B
Hearing Nos. 97-187 and 98-60

A decision of the department regarding the Petroleum Environmental Cleanup Act (PECFA) was issued on October 24, 1997, denying reimbursement for certain portions of the appellant's claim. The appellant filed a timely appeal on November 24, 1997. A second determination was issued on April 22, 1998, and the appellant filed a timely appeal to that determination on May 22, 1998. The two matters were consolidated for hearing. A hearing on the appellant's appeals was held on July 15, 1999, before Administrative Law Judge Karen L. Godshall. Following the hearing, written briefs were received from the appellant and the respondent department. The matter is now ready for a proposed decision.

The issue presented for decision is whether the department's decisions were incorrect in applying a fifty percent cost allocation methodology to the appellant's claims.

PROPOSED FINDINGS OF FACT

The appellant is the owner of a site which was previously a vehicle service facility. There were four underground storage tanks at the site. The two larger tanks include a 10,000-gallon and a 6,000-gallon gasoline tank. The two smaller tanks, each holding 550 gallons, include one fuel oil tank and one waste oil tank. In 1993, the two smaller tanks were removed and the site assessed for contamination. There were some small holes in the tanks and soil contamination was found at the site. The consultant notified the Wisconsin Department of Natural Resources of the contamination, and a site investigation was begun. Remediation continued through late 1995, at which point it was considered successfully concluded.

The appellant submitted a claim to the PECFA program, seeking reimbursement of the costs of investigation and remediation. The claim submission related to work done in connection with the removal of the two smaller tanks and there was no mention of the two larger gasoline tanks as being a source of contamination. The first decision by the PECFA program was issued on October 24, 1997. That decision permitted reimbursement of fifty percent of the amount sought, on the basis that the costs were the result of contamination from one eligible tank (the waste oil tank) and one ineligible tank (the fuel oil tank) in equal proportion. After the first decision was issued, the appellant, through its consultant communicated with the department and proposed a different cost allocation. The consultant proposed that

the costs be allocated among all four of the tanks on the site, using the assumption that the contamination had originated with all four of the tanks. Since only one small tank contained ineligible fuels, the consultant sought to have the vast majority of costs reimbursed, and only 3.2 percent considered ineligible.

The second decision and appeal in this matter relates to the same site, and differs from the first primarily in that the second concerns costs incurred in a later stage of remediation, while the first related primarily to investigation-stage costs. In both cases, the department has indicated its unwillingness to accept the new formula advanced by the appellant for the cost allocation, and has limited reimbursement to fifty percent of the amount sought.

APPLICABLE ADMINISTRATIVE RULES

Since the issue presented is the appropriateness of the allocation of costs as determined by the department, two administrative rules are particularly on point.

Section ILHR 47.30(4) provides in part as follows

> When a contamination is identified which contains both eligible and ineligible products under the fund, only the costs associated with the eligible products may be claimed. Eligible costs of remediation, which are only associated with the eligible product, may be claimed in their entirety, as specified in this section.

Section ILHR 47.33(2)(c) provides

> If a contamination is identified which contains both eligible and ineligible products, the owner or operator and the department shall be notified immediately. The consultant, in conjunction with the owner or operator, shall establish a methodology for dividing the costs of remediation between the eligible and ineligible products. The approach used to divide the costs of remediation shall be approved by the department prior to the submittal of the claim.

PROPOSED DISCUSSION and CONCLUSIONS OF LAW

The burden of proving that the denial of reimbursement was incorrect is upon the appellant, as both parties agree. The appellant must prove that the denial was unreasonable, which is a substantial burden.

In the testing and monitoring of the site in question, a number of monitoring wells were established. At one of those wells, contaminants were found which suggested contamination from gasoline products. There was conflicting evidence offered as to whether that contamination originated from the two gasoline tanks on the site. No release from those tanks was ever reported, and the focus of the investigation and remediation was on the fuel oil and waste oil tanks. Even the witnesses testifying on behalf of the appellant were uncertain why any monitoring wells had been installed in the area of the gasoline tanks. There are a variety of explanations for the GRO (gasoline range organics) which were detected in the one well, including surface spills or even testing errors. The evidence presented by the appellant does not establish with any reasonable degree of certainty or even of probability that the gasoline tanks were the source of the contamination.

In addition to its failure to establish that the gasoline tanks on site were a source of the contamination, the appellant also has failed to establish that the appellant or its consultant complied with the administrative rule requirement that a proposed allocation methodology be provided to the department in advance of the claim submission. In fact, it does not appear that the appellant is even contending that it met that requirement, although it argues that some information concerning the possibility of gasoline contamination was offered prior to the issuance of the second departmental decision. Given the information which was available to the department at the time of the claim submission and review, and at the time of its decisions, it was entirely reasonable for the department to focus its review on the contamination from the two smaller tanks which were removed and to conclude that one-half of the submitted costs should be allocated to the ineligible fuel oil tank and its contents.

PROPOSED DECISION

The department's decisions of October 24, 1997 and April 22, 1998, utilizing a fifty per cent cost allocation methodology for reimbursement of the appellants claims are affirmed.

By

Karen L. Godshall
Administrative Law Judge

Issued this 19th day of January, 2000

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