

ILLINOIS POLLUTION CONTROL BOARD
March 5, 2015

PAK-AGS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 15-14
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On July 25, 2014, PAK-AGS filed a petition (Pet.) asking the Board to review a June 23, 2014 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404. The Agency's determination concerns PAK-AGS' leaking underground storage tank (UST) site located at 2526 Nameoki Road, Granite City, Madison County (the Site). The Agency denied PAK-AGS' request for reimbursement from the UST Fund. PAK-AGS appealed on the grounds that it was not required to submit an eligibility and deductibility determination (E&D determination) for incident 20050545, which occurred sometime in 2005, to receive reimbursement for incident 20110945, which occurred on September 1, 2011. Pet. at 2-3.

On December 4, 2014 the Board issued an interim opinion and order reversing the Agency's determination, directing the Agency to reimburse PAK-AGS for incident 20110945 in the amount of \$16,595.90, and ordering the parties to file statements on legal costs. Following the Board's December 4, 2014 order, PAK-AGS filed a motion for modification of Board order, the Agency filed a motion for reconsideration, and PAK-AGS filed a response to the Agency's motion.

For the reasons stated below, the Board denies the Agency's motion for reconsideration and PAK-AGS' motion for modification, which the Board construes as a motion for reconsideration. Finally, the Board directs the Agency to reimburse PAK-AGS for incident 20110945 in the amount of \$16,595.90 plus \$10,355 in legal fees and costs from the UST Fund.

ABBREVIATED PROCEDURAL HISTORY

On August 7, 2014, the Board accepted PAK-AGS' petition for review. PAK-AGS, Inc. v. IEPA, PCB 15-14 (Aug. 7, 2014). The hearing in this case was held on September 17, 2014, at the Illinois Pollution Control Board office in Springfield, Illinois. The parties made arguments in post-hearing briefs and on December 4, 2014 the Board issued an interim opinion and order reversing the Agency's determination and directing the Agency to reimburse PAK-AGS for

incident 20110945 in the amount of \$16,595.90. The December 4, 2014 Board order directed the parties to file statements on legal costs.

On January 5, 2015, PAK-AGS filed a motion for modification of interim order (Mot.) and authorization of payment of attorney's fees as costs of corrective action. On January 15, 2015, the Agency filed a motion for reconsideration (Agency Mot.) that included a section addressing PAK-AGS's request for attorney's fees. Agency Mot. at 8. On February 2, 2015, PAK-AGS filed a response to the Agency's motion for reconsideration (Resp.).

STATUTORY AND REGULATORY PROVISIONS

Section 57.8 of the Act provides that, "[i]f an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57.9 [of the Act], the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release." 415 ILCS 5/57.8 (2012).

Section 57.8(l) of the Act provides in its entirety that "[c]orrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2012). Section 734.630(g) of the Board's UST regulations provides that costs ineligible for payment from the UST Fund include, but are not limited to, "[l]egal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part [734] unless the owner or operator prevails before the Board and the Board authorizes payment of such costs." 35 Ill. Adm. Code 734.630(g).

SUMMARY OF PAK-AGS' MOTION FOR MODIFICATION OF INTERIM ORDER AND AUTHORIZATION OF PAYMENT OF ATTORNEY'S FEES

In its December 4, 2014 order, the Board directed the Agency to reimburse PAK-AGS in the amount of \$16,595.90. Mot. at 1. In its motion, PAK-AGS first argues that "handling charges should be included in the final order," and then that legal defense costs should be reimbursed as a part of corrective action. *Id.* at 1, 3.

Handling Charges

At the opening of its motion, PAK-AGS "asks the Board to reconsider and review the amount approved [for reimbursement in the December 4, 2014 order], as Petitioner believes the amount should be \$17,562.48." Mot. at 1. PAK-AGS asserts that "[h]andling charges are treated differently than other reimbursable expenses, as they are reimbursable as a percentage of actual subcontract costs . . . This ministerial task is not evaluated at the budget stage" but instead is determined at the payment stage. *Id.* at 2, citing 35 Ill. Adm. Code 734.635. PAK-AGS argues that \$928.68 was properly requested for handling charges of a subcontract valued at \$8,286.75 at the application of payment stage. *Id.* PAK-AGS asserts that the Board's interim order "expressly reserved the issue of handling charges at the reimbursement stage." *Id.* at 3, citing PAK-AGS, INC. v. IEPA, PCB 15-14, slip op. at 19 (Dec. 4, 2014). Therefore, PAK-AGS

asks that the final order include the \$928.69 in handling charges that were omitted by the Board in the interim order.

Legal Costs

PAK-AGS continues that the award for legal costs is discretionary with the Board and that such fees are “reimbursable from the underground storage tank fund if the owner or operator prevails before the Board.” Mot. at 3, citing 415 ILCS 5/57.8(1) (2012). PAK-AGS also asserts that the Board has “authorized payment of reasonable legal defense costs in all cases where petitioners have prevailed.” *Id.* at 3-4. PAK-AGS argues that, “[h]istorically, the Board has initially and fully considered the reasonableness of the claimed legal defense costs before exercising its discretion to authorize their payment.” *Id.* at 4, citing Evergreen FS v. IEPA, PCB No. 11-51 (Sept. 6, 2012). Attached to PAK-AGS’ motion was the affidavit of Patrick D. Shaw, PAK-AGS’ legal counsel, documenting the legal costs in this matter totaling \$10,355. *Id.* PAK-AGS states that the Board has previously recognized Mr. Shaw’s experience and that the hourly rate used in calculating the fees is “comparable to, if not less than, the rate of environmental legal services in Springfield, Illinois.” *Id.* at 5 (internal citations omitted). PAK-AGS states that the “purpose of statutory fee awards is to encourage such claims for reimbursement, particularly where not insisting on proper reimbursement may be less costly than litigation.” *Id.* Therefore, PAK-AGS requests that the Board authorize payment from the leaking underground storage tank fund in the amount of \$10,355 in attorney’s fees and litigation costs pursuant to 415 ILCS 5/57.8(1). *Id.* at 6.

SUMMARY OF THE AGENCY’S MOTION FOR RECONSIDERATION

On January 15, 2015, the Agency filed a motion with the Board to seek reconsideration because, as stated by the Agency, “the Board erred in its application of existing law.” Agency Mot. at 2. Like PAK-AGS, the Agency splits its motion, first discussing the motion for reconsideration, then discussing the reimbursement of legal costs. *Id.* at 3, 8.

Reconsideration

The Agency prefaces its argument by stating that, “the Board fails to consider the argument presented by the Agency within the pleadings as well as the provisions of Section 57.8.” Agency Mot. at 3. The Agency argues that the Board’s reasoning and ruling that Section 57.8 “does not authorize the Agency to deny an application for payment of costs based upon a lack of supporting documentation for another incident on-site” is “contrary to the express language of the Act and regulations,” and therefore the Board misapplied the law. *Id.* at 4.

The Agency argues that according to Section 57.7, “it is difficult to imagine requiring an E&D [determination] from an owner and operator at [the budget and plan] stage.” Agency Mot. at 5. The Agency argues that according to Section 57.8 “[i]t is at the PAYMENT stage where the Illinois EPA can consider all incidents and deductibles and apply the higher of such.” *Id.* at 7. The Agency argues that the Act “places this review squarely within the language of Section 57.8 and accompanying regulations.” *Id.* The Agency contends that it is at the payment stage, rather than at the budget approval stage, that the Agency “may require additional information

based upon a finding of lack of supporting documentation.” *Id.* The Agency also states that it is at this stage “where the owner or operator actually seeks payment from the Fund and at which the most strident review should be held.” *Id.* The Agency asserts that the language of the Act indicates that the “budgets are primarily technical in nature” and that the “‘payment’ stage is designed for Agency review of costs as well as deductibles and insuring the higher deductible applies or that indeed the Agency review ‘any deductible’ against ‘any payment invoice.’” *Id.*, citing 475 ILCS 57.8(a)(4) (2012).

The Agency continues that according to Section 734.615 of the Board’s regulations, they are “charged with reviewing and assessing payments and invoices from the Fund . . . the Agency is deemed responsible for making sure that the higher deductible per site applies.” Agency Mot. at 6. The Agency believes that due to the Board’s “strained interpretation of a single subsection” within Section 57.8, “the Agency is now precluded from this review at this point.” *Id.* at 7.

Legal Costs

Finally, the Agency objects to the assessment of attorney fees. Agency Mot. at 8. The Agency argues that “[t]here was absolutely no need for a hearing in this case,” but that PAK-AGS’ attorney decided to hold a “[p]seudo” hearing “in order to get around prior rulings of the Board that held legal fees could not be assessed after motions for summary judgment.” *Id.* The Agency argues that “the Board must strictly construe fee-shifting statutes, and the amount of fees to be awarded lies within the broad discretionary powers of the Board.” *Id.* at 9, (internal citations omitted). Therefore, the Agency asks the Board to construe Section 57.8(1) of the Act narrowly and to not award attorney fees in this case. *Id.* at 10.

SUMMARY OF PAK-AGS’ RESPONSE TO THE AGENCY’S MOTION FOR RECONSIDERATION

On February 3, 2015, PAK-AGS filed a response to the Agency’s Motion for Reconsideration. In their response, PAK-AGS argues that the Board did not misapply applicable law. PAK-AGS argues that “[a] motion for reconsideration which offers nothing new but consists of reargue[ment] is properly denied.” Resp. at 1, citing Burgess v. Chicago Sun-Times, 132 Ill.App.3d 181, 189 (1st Dist. 1985). PAK-AGS continued that “[t]he bulk of the Agency’s reargument is a contention that since this is a deductible issue, and deductibles relate to payment, then the payment stage is appropriate.” *Id.* at 1-2. PAK-AGS asserts that “[t]he actual grounds for denial of payment is the lack of an eligibility and deductibility (E&D) determination,” and argues that, contrary to the Agency’s position, “[t]he existence of a confirmed release and eligibility to access the LUST Fund are clearly important issues at the planning and budget stage.” *Id.* PAK-AGS reminds the Board that the Agency reviewer highlighted Incident 20050545 in the planning and budget stage, but the Agency did not reject PAK-AGS budget. *Id.* at 3. Therefore, PAK-AGS asks the Board to reject the Agency’s request to review determinations made at the technical stage. *Id.*

Finally, PAK-AGS asks that the Board not reconsider whether Petitioner was a “prevailing party.” Resp. at 3. PAK-AGS states that they exercised its statutory right to a hearing, according to 415 ILCS 5/57.8(a)(4) (2012). *Id.* PAK-AGS asserts that “[t]here is no

requirement for petitioners to file waivers of their statutory right to a hearing,” and this case was not the first one in which a hearing was held without a witness. *Id.*, citing Prime Location Properties, LLC v. IEPA, PCB No. 09-67, slip op. at 3 (Aug. 20, 2009).

BOARD DISCUSSION

The Board finds it necessary to first address the Agency’s motion for reconsideration before reaching PAK-AGS’ motion for modification and request for legal costs. Therefore, the Board addresses each of the filings in that order, below.

Agency’s Motion for Reconsideration

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board’s decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), the Board observed that “the intended purpose of a motion for reconsideration is to bring to the court’s attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court’s previous application of the existing law.” Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

In this case, the Agency asserts that the Board misapplied existing law to reach its decision in the December 4, 2014 order. Agency Mot. at 2. In its motion, the Agency argues that the Board failed “to consider the argument presented by the Agency within the pleadings as well as the provisions of Section 57.8.” *Id.* at 3. Thereafter, in its motion for reconsideration, the Agency makes arguments similar to those made in post-hearing briefs filed with the Board. The Board finds that rather than explaining how the Board made a misapplication of the law to reach its December 4, 2014 decision, in its motion for reconsideration, the Agency instead relied on the same arguments considered by the Board in that decision. The Board therefore finds that the Agency provided no new evidence or a change in the law that would indicate the Board’s December 4, 2014 order was in error and denies the Agency’s motion for reconsideration.

PAK-AGS’ Motion for Modification

Because PAK-AGS opens its motion with a statement asking “that the Board reconsider and review the amount approved” for reimbursement, the Board construes PAK-AGS’ motion for modification as a motion for reconsideration. Mot. at 1. As stated above, the factors the Board may consider when ruling on a motion for reconsideration include new evidence or a change in the law, to lead to a conclusion that the Board’s December 4, 2014 decision was in error.

In the December 4, 2014 interim order, the Board reversed the Agency’s determination and directed the Agency to reimburse PAK-AGS for incident 20110945 in the amount of \$16,595.90. In their motion for modification, PAK-AGS stated they believe the amount should be \$17,562.48. Mot. at 1. In the motion, PAK-AGS argues that “[handling charges are treated differently than other reimbursable expenses,” and “the appropriate amount of handling charges

is determined at the payment stage upon ‘proof of payment of subcontract costs for which handling charges are requested.’ *Id.* at 2, citing 35 Ill. Adm. Code 734.605(b)(10).

PAK-AGS fails to include new evidence or a change in the law that would lead the Board to conclude that its December 4, 2014 decision was in error. The Board, instead, finds the language of the Act controlling. Section 57.7(c)(1) of the Act provides that the Agency’s approval of a budget, “shall be considered final approval for purposes of seeking and obtaining payment from the UST Fund if the costs associated with the completion of any such plan are *less than or equal to* the amounts approved in such budget.” 415 ILCS 5/57.7(c)(1) (2012) (emphasis added). Further, Section 57.8(a)(1) of the Act provides, “in no event shall the Agency reimburse the owner or operator an amount greater than the amount approved in the plan.” 415 ILCS 5/57.8(a)(1) (2012). Consistent with those sections of the Act, the Board’s December 4, 2014 order relied on the Agency’s January 29, 2014 Modified Approval of Stage 1 Site Investigation Actual Costs for the amount of reimbursement. Therefore, the Board denies PAK-AGS’ motion for reconsideration and upholds the reimbursement amount of \$16,595.90 from the December 4, 2014 Board order.

PAK-AGS’ Request For Attorney’s Fees

The Board has ordered reimbursement of legal fees where petitioner prevails in appealing the Agency’s rejection of a plan under Section 57.7 of the Act. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 3 (Nov. 5, 2009); Illinois Ayers Oil Co. v. IEPA, PCB 03-214 slip op. at 7-8 (Aug. 5, 2004). In this case, PAK-AGS’ appeal sought payment from the UST Fund after the Agency had denied such payment. There was a hearing held in this matter on July 29, 2014. Finally, the Agency’s determination was reversed and PAK-AGS was awarded reimbursement from the UST Fund in the Board’s December 4, 2014 order. Therefore, the Board finds that it may exercise its discretion to determine whether to award PAK-AGS’ legal fees and costs in this case pursuant to Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2012).

In determining whether to exercise its discretion to authorize payment, the Board considers the reasonableness of the requested legal fees and costs. Prime Location, slip op. at 4, citing Illinois Ayers, slip op. at 8-9; Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004). As the party seeking reimbursement of fees, PAK-AGS has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Prime Location, slip op. at 4, citing J.B. Esker & Sons, Inc. v. Cle-Pa’s P’ship., 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271, 1277 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281, 664 N.E. 2d 281, 288-89 (1st Dist. 1996). PAK-AGS “must set forth with specificity the legal services provided, the identity of the attorney providing the legal services, an itemization of the time expended for the individual service, and the hourly rate charged.” Prime Location, slip op. at 4, citing J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278.

While PAK-AGS “must present a sufficient basis for determining whether the requested charges are reasonable, the Board may also consider the entire record and its experience and knowledge of the case in assessing whether the charges are reasonable.” Prime Location, slip op. at 4, citing Cretton v. Protestant Mem’l. Med. Cent., Inc., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288, 315 (5th Dist. 2007); Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. In determining

whether PAK-AGS' request is reasonable, the Board may consider factors including "the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation." Prime Location, slip op. at 4, citing Cretton, 371 Ill. App. 3d at 867-68, 864 N.E.2d at 315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. The Board may apply its own expertise "to assess the time required to complete particular activities." Cretton, 371 Ill. App. 3d at 868, 864 N.E.2d at 315.

PAK-AGS' motion is accompanied by an affidavit of PAK-AGS' legal counsel, Mr. Shaw (Aff.), and a 5-page summary of fees and costs (Exh.). From the affidavit and summary, the Board can determine the rate and hours billed; the person providing legal services; the date on which the person provided them; a description of those services; and the amount charged. Aff.; Exh. 1; *see* J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278.

The Board's review of the summary of fees and costs shows that PAK-AGS' legal services began in or around July of 2014, and continued to December 5, 2014. Aff. At 1; Exh. at 1-5. The summary of fees describes work performed and time allocated to that work in tenths of an hour. Exh. 1. The Board finds that the listings are itemized specifically enough to assess the reasonableness of the charges. *See* Prime Location, slip op. at 5, citing Sampson, 279 Ill. App. 3d at 281-82, 664 N.E.2d at 289. The summary submitted by PAK-AGS is generally similar to information provided in UST cases in which the Board has directed the Agency to reimburse fees and costs. *See, e.g.*, Swif-T, slip op. at 2-3 (Aug. 19, 2004).

In the portion of its motion for reconsideration dedicated to replying to PAK-AGS' request for legal fees, the Agency argued that the hearing held in this case was unnecessary and did not advance the case. Agency Mot. at 8-9. In addition, the Agency argued that the Board must construe Section 57.8(l) of the Act, a fee-shifting statute, conservatively. *Id.* at 9.

The Board finds that PAK-AGS' requested legal fees and costs to be reasonable. The petition for review filed with the Board in this case raised important issues regarding Agency determinations on reimbursement from the UST Fund. These considerations make PAK-AGS' request consistent with other cases in which the Board has directed reimbursement for legal costs. *See, for example* Chatham BP, LLC, v. IEPA, PCB 14-1 (Feb. 5, 2015). Accordingly, the Board will exercise its discretion under Section 57.8(l) of the Act and direct the Agency to reimburse PAK-AGS from the UST Fund in the amount of \$10,355 in legal fees and costs.

CONCLUSION

For the reasons given above, the Board denies the Agency's motion for reconsideration and PAK-AGS' motion for modification, which the Board construes as a motion for reconsideration. The Board, however, exercises its discretion under Section 57.8(l) of the Act and directs the Agency to reimburse PAK-AGS \$10,355 in legal fees and costs from the UST Fund in addition to the reimbursement of \$16,595.90 for Stage 1 Site Investigation Actual Costs. *See* 415 ILCS 5/57.8(l) (2012).

ORDER

1. The Board denies the Agency's motion to reconsider.
2. The Board construes PAK-AGS' motion for modification as a motion for reconsideration and denies the motion.
3. The Board orders the Agency to pay \$16,595.90 in reimbursement for Stage 1 Site Investigation Actual Costs to PAK-AGS from the UST Fund.
4. The Board exercises its discretion under Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2012)) and directs the Agency to reimburse PAK-AGS \$10,355 in legal fees and costs from the UST Fund.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 5, 2015, by a vote of 4 - 0.



John T. Therriault, Clerk
Illinois Pollution Control Board