

ILLINOIS POLLUTION CONTROL BOARD
February 15, 2024

J.D. STRETT & COMPANY, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 22-27
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by M. Gibson):

J.D. Streett & Company, Inc. (J.D. Streett) is the operator of a gasoline station and convenience store in Williamson County at which underground storage tanks (UST) leaked petroleum. The Illinois Environmental Protection Agency (IEPA) denied a request for reimbursement of \$11,791.28 for early action activities involving the clean-up of a leaking UST system. J.D. Streett requested that the Board reverse IEPA’s decision and approve the reimbursement. In an interim opinion and order on November 16, 2023, the Board granted J.D. Streett’s motion for summary judgment for \$3,340.34 in costs for backfill of the tank field, but denied its motion for summary judgment for \$8,450.94 for tank removal costs.

J.D. Streett now requests that the Board authorize payment of its legal fees of \$12,057. Below, the Board finds that J.D. Streett’s appeal sought payment from the UST Fund and that it partially prevailed before the Board under Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2022)); *see* 35 Ill. Adm. Code 734.630(g). The Board exercises its discretion to award legal fees and directs IEPA to reimburse J.D. Streett \$3,375.96 from the UST Fund.

The Board’s order begins below with an abbreviated procedural history. After providing the statutory and regulatory authorities, the Board discusses the issues, reaches its conclusion, and issues its order.

PROCEDURAL HISTORY

Petitioner filed this appeal on December 10, 2021, and the Board accepted it for hearing on December 16, 2021. IEPA filed the administrative record on October 11, 2022. On January 30, 2023, petitioner filed a motion to supplement the record, which the hearing officer granted on January 31, 2023. On February 7, 2023, petitioner filed a motion for summary judgement. IEPA responded with a cross-motion for summary judgement on February 28, 2023. Petitioner filed a response to IEPA’s motion on March 14, 2023.

On November 16, 2023, the Board granted J.D. Streett’s motion for summary judgment for \$3,340.34 in costs for backfill of the tank field, denied IEPA’s motion on that issue, and reversed IEPA’s decision on backfill costs. The Board also granted IEPA’s motion on and affirmed its denial of reimbursement of \$8,450.94 for tank removal costs and denied J.D. Streett’s motion on that issue. The Board set a deadline for J.D. Streett to file a statement of legal fees that may be reimbursable and also set a deadline for IEPA to respond.

On December 19, 2023, J.D. Streett filed its request (Req.), attached to which was the affidavit of Patrick D. Shaw (Aff.). IEPA has not filed a response to J.D. Streett’s request.

STATUTORY AND REGULATORY AUTHORITIES

Costs associated with “corrective action” may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a)(7) (2022). “‘Corrective action’ means activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and corrective action] of this Title [XVI Petroleum Underground Storage Tanks].” 415 ILCS 5/57.2 (2022).

Section 57.8 of the Act addresses reimbursement from the UST Fund. Subsection (l) 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) (2022); *see also* 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Below, the Board first addresses whether this appeal falls within the scope of Section 57.8(l) of the Act. If it does, the Board next addresses whether the requested fees are reasonable and then whether it will exercise its discretion to award J.D. Streett’s requested legal fees and costs.

Whether Section 57.8(l) Applies

“The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision.” Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 2 (Nov. 17, 2016), citing Ill. Ayers Oil Co. v IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (Ill. Ayers).

J.D. Streett argues that “[a]ll of the legal costs sought herein were incurred ‘seeking payment under Title XVI and the plain language of Section 57.8(l) of the Act allows the awarding of legal fees.’” Req. at 3, *citing* Ill. Ayers, slip op. at 8. J.D. Streett argues that “the Board has generally awarded litigation costs whenever the petitioner has prevailed on the issues either completely or substantially.” Req. at 3.

The Board finds that J.D. Streett prevailed on the issue of backfill costs. Previously, “the Board has awarded the reimbursement of legal fees to parties that prevail on some, but not all issues.” Abel Investments v. IEPA, PCB 16-108, slip op. at 4 (Mar. 2, 2017); *see* Illinois Ayers,

slip op at 9; Webb & Sons, Inc. v. IEPA, PCB 7-24 (May 3, 2007). Therefore, the Board finds that this appeal falls within the scope of Section 57.8(l) of the Act and it may award J.D. Streett legal fees.

Reasonableness of Requested Fees

J.D. Streett states that, in earlier cases, the Board considered the “reasonableness” of the claimed legal defense costs before exercising its discretion to authorize paying them. Req. at 3; see Evergreen FS v. IEPA, PCB 11-51, 12-61 (cons.), slip op. at 4 (Sept. 6, 2012). The Board agrees. See City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 3 (May 24, 2018) (Benton); Prime Location Properties v. IEPA, PCB 09-67, slip op. at 4 (Nov. 5, 2009) (Prime Location), citing Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004); Ill. Ayers, slip op. at 8-9.

As the party seeking reimbursement, J.D. Streett has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Abel Investments v. IEPA, PCB 16-108, slip op. at 2 (Mar. 2, 2017); Prime Location, slip op. at 4, citing J.B. Esker & Sons 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 (1st Dist. 1996). J.D. Streett “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 & Sons, 325 Ill. App. 3d at 283. While J.D. Streett 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., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288,315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289.

In determining whether J.D. Streett’s 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.

J.D. Streett’s motion is accompanied by an affidavit of Patrick D. Shaw, J.D. Streett’s counsel, and a five-page summary of fees (Aff. Exh. A). The affidavit and summary include the date of services, a description of services, the hours and hourly rate billed, and the fee charged. *Id.* Mr. Shaw’s services began on December 3, 2021 and continued to December 18, 2023. They comprise 61 billed hours for total fees of \$11,780. *Id.* The summary describes the work performed and the time allocated to that work in tenths of an hour. *Id.* The summary also includes \$277 of itemized costs for Lexis research and the Board filing fee. *Id.* at 4-5. 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 J.D. Street is generally similar to information provided in other UST cases in which the Board has directed IEPA to reimburse legal fees. *See, e.g., Dersch Energies, v. IEPA*, PCB 17-3, slip op. at 4 (Oct. 20, 2022); *Burgess v. IEPA*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016) (*Burgess*). As noted above, IEPA has not filed a response or disputed the reasonableness of the requested fees and costs. For these reasons, the Board finds that the legal fees were reasonable and turns to whether the Board should exercise its discretion to authorize reimbursement.

Board Discretion

J.D. Streett did not prevail on all of the claims before the Board. J.D. Streett's motion does not, however, account for work hours spent on individual issues of the case. When a petitioner partially prevails, the Board has used its discretion both to award the entire amount of requested legal fees and to award only a portion of the requested legal fees. *E.g., Illinois Ayers*, PCB 3-214, slip op. at 9 (awarding entire amount); *Abel Investments*, PCB 16-108, slip op. at 4 (awarding entire amount); *Webb & Sons*, PCB 7-24, slip op. at 5 (awarding partial amount). The statutory fee provision is silent on the issue of a party that prevails on some claims before the Board. Therefore, the Board looks to Illinois case law for precedent.

“The general rule is that a party is not entitled to fees for its unsuccessful claims.” *Abel Investments*, PCB 16-108, slip op. at 3, *citing Globalcom, Inc. v. Illinois Commerce Comm'n.*, 347 Ill. App. 3d 592, 619 (1st Dist. 2004); *Becovic v. City of Chicago*, 296 Ill. App. 3d 236, 242 (1st Dist. 1998). However, “the courts agree that ‘[w]here a plaintiff’s claims of relief involve a common core of facts or are based on related legal theories, such that much of [the] attorney’s time is devoted generally to the litigation as a whole, a fee award should not be reduced simply because all requested relief was not obtained.’” *Abel Investments*, PCB 16-108, slip op. at 3, *citing Becovic*, 296 Ill. App. 3d 236, 242; *Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986); *Hensley*, 461 U.S. 424, 434-35; *Berlak v. Villa Scalabrini Home for the Aged*, 284 Ill. App. 3d 231, 238-39 (1st Dist. 1996). In such a case, the focus should be “on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.” *Hensley v. Eckerhard*, 461 U.S. 424, 435 (1983).

J.D. Streett argues that the factual issues in its appeal “arose from the same administrative record involving removal of leaking tanks and backfilling the resulting excavation.” Req. at 5. J.D. Streett also contends that “the legal issues arose from the same Agency decision claiming the submittal was incomplete under the same regulation.” *Id.* Lastly, J.D. Streett claims that the Board’s ruling in its interim order “was significant in interpreting the concept of ‘supporting documentation.’” *Id.* at 5-6.

The Board is not persuaded that the facts of this case justify deviating from the general rule that parties are not entitled to fees for unsuccessful claims. *See Abel Investments*, PCB 16-108. While this case is based solely on IEPA's administrative record and a single site, the issues of tank removal and backfilling hinge on distinct evidence within that record. Since the record distinguishes between the requested reimbursement for tank removal and backfill, the Board can distinguish those claims from one another and determine the extent to which J.D. Streett succeeded. In its interim opinion and order, the Board upheld only 28% of J.D. Streett's total

request for reimbursement. Therefore, the Board directs that J.D. Streett be reimbursed \$3,375.96, an amount equal to 28 percent of the legal fees claimed by J.D. Streett.

ORDER

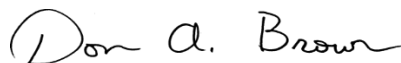
1. The Board partially grants J.D. Streett's request to authorize payment of attorney's fees. The Board directs IEPA to reimburse J.D. Streett \$3,375.96 in legal fees from the UST Fund under Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2022).

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) (2022); 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. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 15, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board