

ILLINOIS POLLUTION CONTROL BOARD

December 16, 1999

TED HARRISON OIL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 99-127
)	(UST - Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by G.T. Girard):

On October 15, 1999, Ted Harrison Oil Company (Harrison Oil or petitioner) filed a motion for summary judgment (Mot.) on Harrison Oil's petition for review of an Illinois Environmental Protection Agency (Agency) denial of reimbursement for costs associated with the removal of an underground storage tank. On November 15, 1999, the Agency filed a response (Res.). After reviewing the arguments presented, the Board denies the motion for summary judgment for the reasons enunciated below.

DISCUSSION

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Harrison Oil argues that it is entitled to summary judgment for five reasons. First, Harrison Oil maintains that the decision by the Agency is contrary to the Board's prior decision in Owens Oil Company v. IEPA (December 18, 1997), PCB 98-32 (Owens Oil). Second, Harrison Oil asserts that the costs submitted for the work done by Harrison Environmental Solutions are reasonable. Third, Harrison Oil argues that the Agency's decision violates the Administrative Procedure Act (5 ILCS 1001-1 *et. seq.* (1998)) and fourth, Harrison Oil maintains that the Agency decision violates Section 57.8 of the Environmental Protection Act (Act) (415 ILCS 5/57.8 (1998)) and 35 Ill. Adm. Code 732.602(e). Finally, Harrison Oil asserts that the costs submitted for a 24-hour turnaround time for

laboratory analysis is reasonable. We will address each of these arguments in turn along with the Agency's response.

Owens Oil

Harrison Oil argues that the Agency's decision denying reimbursement of \$33,250.07 in handling charges to be paid to Harrison Environmental Solutions is contrary to the Board's prior decision in Owens Oil¹. Harrison Oil asserts that on three prior occasions Harrison Oil had filed for reimbursement of handling charges and the Agency had reimbursed the petitioner, with slight adjustments. Mot. at 4. Harrison Oil maintains that the Agency's prior practice of reimbursing petitioner is like the situation in Owens Oil and the Board should reverse the Agency's decision.

The Board finds that the facts surrounding Harrison Oil's requests for reimbursement are distinguishable from the facts of Owens Oil. Therefore, the Board finds that Owens Oil does not apply to this case.

Reasonableness of Costs

The second and fifth arguments made by Harrison Oil are similar and we will address them together. Harrison Oil argues that the costs submitted for services performed by Harrison Environmental Solutions were reasonable and the Agency's denial of reimbursement should be reversed. Mot. at 5-6. Harrison Oil also argues that the cost for the 24 hour laboratory analysis turnaround is reasonable. In response to these assertions, the Agency articulates several points in the record that the Agency asserts demonstrate that Harrison Oil has not demonstrated the reasonableness of the costs. Res. at 7-8. Specifically, the Agency maintains that the handling charges are excessive and the labor costs are not justified. The Agency also maintains there is no justification in the record for a 24-hour turnaround.

The Board finds that the petitioner is not entitled to summary judgment on the issue of reasonableness of costs. The reasonableness of the costs involves a factual determination and issues still exist regarding the reasonableness of the costs. Therefore, summary judgment is denied on these issues.

Administrative Procedure Act and Section 57.8 of the Act

¹ In Owens Oil, the petitioner had contracted with a consulting firm to remediate a contaminated site and the firm constructed a groundwater treatment plant. The groundwater treatment plant was leased to the petitioner at a rate of \$3,500 per month. In 1996, the petitioner filed three requests for reimbursement, all of which included the \$3,500 per month cost for treatment, and the Agency fully reimbursed the petitioner. In May 1997, the petitioner filed a request for reimbursement and the Agency failed to reimburse the full amount of the lease because the petitioner failed to demonstrate the \$3,500 per month was reasonable. The Board reversed the Agency's decision finding that the Agency had acted arbitrarily by refusing to reimburse the full lease amount.

Harrison Oil also argues that the Agency's decision violates the Administrative Procedure Act. Harrison Oil argues that, under the Administrative Procedure Act, "any statement of general applicability implement [sic], applying, interpreting or prescribing law or policy by the Agency, be promulgated as a rule." Mot. at 8. Harrison Oil asserts that the Agency's denial of reimbursement because the charges were "billing owner for owner's work" is such a statement of general applicability so as to require Agency promulgation of a rule. The Agency denies that this is such a statement of general applicability. Owners will be reimbursed for work performed so long as the statutory requirements for reimbursement are met, according to the Agency. The Board is not persuaded by this argument and summary judgment is denied.

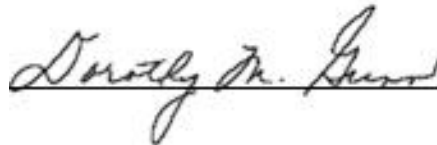
Finally, Harrison Oil argues that the Agency's denial letter fails to meet the requirements of Section 57.8 of the Act and 35 Ill. Adm. Code 732.602(e). The Agency points out that this matter involves a release that occurred prior to September 13, 1993, the effective date of Title XVI of the Act and the petitioner did not "opt into" Title XVI of the Act as allowed by Section 57.13(b). Therefore, the Agency argues that Section 57.8 of the Act and 35 Ill. Adm. Code 732.602(e) do not apply to petitioner. The Board agrees with the Agency. The tanks were removed on June 25 and 26, 1992, (R0681) and the release was reported prior to the adoption of Title XVI. Petitioner did not choose to proceed under Title XVI of the Act. Therefore, Section 57.8 of the Act and 35 Ill. Adm. Code 732.602(e) are not applicable to this appeal.

CONCLUSION

The Board finds that Owens Oil is not controlling based on the facts of this case and, therefore, summary judgment is not appropriate on that ground. The Board also finds that the Agency's decision does not violate the Administrative Procedure Act or Section 57.8 of the Act. Finally, the Board finds that there are genuine issues of material fact concerning the reasonableness of costs associated with services provided by Harrison Environmental Solutions and the 24-hour laboratory analysis turnaround. Therefore, summary judgment is denied and this matter is directed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 16th day of December 1999, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board