

ILLINOIS POLLUTION CONTROL BOARD
November 5, 2015

ESTATE OF GERALD D. SLIGHTOM,)	
)	
Petitioner,)	
)	
v.)	PCB 11-25
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.A. Burke):

The Estate of Gerald D. Slightom (Estate) appealed an October 29, 2010 determination of the Illinois Environmental Protection Agency (Agency) denying the Estate's request for reimbursement from the Leaking Underground Storage Tank (UST) Fund. On June 19, 2014, the Board affirmed the Agency's determination. The Estate then appealed the Board's opinion and order.

On July 7, 2015, the Appellate Court reversed the Board's decision and remanded the case to the Board to consider the Estate's request for reimbursement of legal defense costs pursuant to Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2014)). Estate of Slightom v. PCB, 2015 IL App (4th) 140593, ¶29 (July 7, 2015). On August 12, 2015, the Appellate Court issued its mandate directing the Board to tax any costs in accordance with the law.

On September 3, 2015, the Board directed the Estate to submit its request for reimbursement of legal defense costs pursuant to Section 57.8(l) of the Act. The Estate filed a motion for authorization of payment of attorney's fees (Mot.) on September 28, 2015, accompanied by the affidavit of Patrick D. Shaw (Mot. Exh. A). The Estate moved to supplement its motion (Sup.) on October 2, 2015, and the Board grants the motion to supplement. The Agency did not file a response.

The Agency's October 29, 2010 determination is reversed and remanded to the Agency consistent with the Appellate Court's opinion. The Agency is further directed to reimburse the Estate \$79,455.26 in legal fees and costs from the UST Fund.

AGENCY DEDUCTIBLE DETERMINATION

The Board summarized the facts of this case in its June 19, 2014 opinion and order and does not repeat that summary here. See Estate of Slightom v. IEPA, PCB 11-25, slip op. at 3-5 (June 19, 2014).

Title XVI of the Act establishes the requirements for eligible owners to seek reimbursement from the UST Fund. 415 ILCS 5/57 (2014). In its July 7, 2015 opinion, the Appellate Court found that “the \$10,000 deductible determined by the State Fire Marshal should have been applied based on the facts in this case.” 2015 IL App (4th) 140593, *15. The Agency’s October 29, 2010 determination applying a \$100,000 deductible is reversed and the Agency is directed to apply the State Fire Marshal’s \$10,000 deductible to the Estate’s request for reimbursement from the UST Fund. Accordingly, the Board finds that the Estate has prevailed under Title XVI of the Act. The Board notes that the Agency previously issued a partial payment in this matter and that “[i]t is the [Agency’s] full intention to grant the Petitioner the full dollar amount that is the subject of this case.” *See Reply to Petitioner’s Opposition to Motion to Dismiss*, page 1 (Oct. 2, 2013).

ESTATE LEGAL FEES AND COSTS

The Estate requests \$79,455.26 in legal fees and costs. Mot. at 3. The affidavit sets forth legal services provided, the identity of the attorney providing the legal services, itemization of the time expended for the individual service, and the hourly rate charged. *Id.* at 3-4. The Estate further requests a Board order mandating that the Agency re-issue the appealed decision letter without application of the \$100,000 deductible. *Id.* at 4.

Costs associated with corrective action may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a) (2014). “Corrective action” means activities associated with compliance with the provisions of Sections 57.6 and 57.7 of the Act. 415 ILCS 5/57.2 (2014). Generally, corrective action does not include legal defense costs. 415 ILCS 5/57.8(l) (2014). However, the Act provides an exception where “the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees.” *Id.*; *see also* 35 Ill. Adm. Code 734.630(g).

The Board has awarded legal costs where a petitioner prevails and the petition for review “raised important issues regarding Agency determinations on reimbursement from the UST Fund.” PAK-AGS, Inc. v. IEPA, PCB 15-14, slip op. at 7 (March 5, 2015). The Board considers the reasonableness of the requested legal fees and costs when determining whether to exercise its discretion to authorize payment. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 4 (Nov. 5, 2009), citing Illinois Ayers Oil v. IEPA, PCB 03-214, slip op. at 8-9 (Aug. 5, 2004). The Estate has the burden of presenting sufficient evidence for the Board to determine the reasonableness of the fees. Prime Location, slip op. at 4, citing J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership, 325 Ill. App. 3d 276, 283 (5th Dist. 2001). The Estate 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.

The Board may “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 Memorial Medical Center, Inc., 371 Ill. App. 3d 841, 868 (5th Dist. 2007). 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. The Board may also apply its own expertise “to assess the time required to complete particular activities.” Cretton, 371 Ill. App. 3d at 868.

The Estate’s motion is accompanied by an affidavit and a 30-page summary of fees and costs (Mot. Exh. A-1, Mot. Exh A-2). The affidavit and summary set forth the hourly rates of the attorneys involved, the type of service provided, the identity of the attorney providing the service, an itemization of the time expended for the service, and the hourly rate charged. Mot. Exh. A; Mot. Exh. A-1.

The Board can determine from the summary that work on this proceeding began around November 30, 2010, and continued through January 21, 2015. The number of hours expended were 403.6 hours for total legal fees of \$74,290. Costs incurred during the period totaled \$5,456.26. The Estate does not seek legal fees for three entries, totaling \$291. Therefore, the total legal fees and costs amount to \$79,455.26. The summary of fees describes the work performed and the time allocated to that work in tenths of an hour. The Board finds that the listings, fees, and costs are reasonable. *See* Prime Location, slip op. at 5, citing Sampson v. Miglin, 279 Ill. App. 3d at 281-282. The summary is generally similar to information provided in previous UST cases where the Board has directed the Agency to reimburse fees and costs. *See, e.g.,* Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 2-3 (Aug. 19, 2004). As noted above, the Agency did not respond to the Estate’s request for fees and costs.

The Board finds that the Estate’s requested legal fees and costs are reasonable. This appeal raised significant issues regarding the Agency’s review and determinations under the UST program, as well as included multiple motions for summary judgment and dismissal. Accordingly, the Board exercises its discretion and directs the Agency to reimburse the Estate from the UST Fund in the amount of \$79,455.26.

CONCLUSION

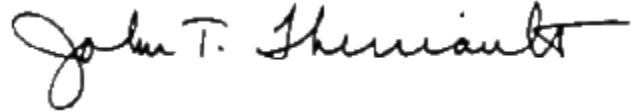
The Agency’s October 29, 2010 determination is reversed and remanded to the Agency consistent with the Appellate Court’s July 7, 2015 opinion. The Agency must apply the State Fire Marshal’s \$10,000 deductible to the Estate’s request for reimbursement from the UST Fund. The Board further exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse the Estate \$79,455.26 in legal fees and costs from the UST Fund.

ORDER

1. The Board reverses and remands the Agency’s October 29, 2010 determination consistent with the Appellate Court’s July 7, 2015 opinion.
2. The Board exercises its discretion under Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2014)) and directs the Agency to reimburse the Estate \$79,455.26 in legal fees and costs from the UST Fund.

IT IS SO ORDERED.

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

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Clerk
Illinois Pollution Control Board