

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEBB & SONS, INC.,)
Petitioner,)
)
v.) PCB 07-24
) (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
Respondent.)
)

NOTICE

Dorothy Gunn
Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Jeffrey W. Tock
Harrington & Tock
P.O. Box 1550
Champaign, Illinois 61824-1550

PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF REIMBURSEMENT OF PETITIONER'S LEGAL FEES with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Special Assistant Attorney General

Dated: March 29, 2007
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
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**THIS FILING IS SUBMITTED ON RECYCLED PAPER
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

WEBB & SONS, INC.,)	
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Petitioner,)	
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v.)	PCB 07-24
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT
OF REIMBURSEMENT OF PETITIONER'S LEGAL FEES**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Assistant Counsel and Special Assistant Attorney General, and hereby submits to the Illinois Pollution Control Board ("Board") its Response to Petitioner's Supplemental Brief in Support of Reimbursement of Petitioner's Legal Fees. It is the Illinois EPA's position that Webb & Sons, Inc. ("Webb") should be awarded no more than 45% of the legal fees it seeks and none of the requested engineer fees.

I. BACKGROUND

On February 15, 2007, an Interim Opinion and Order of the Board was entered in this matter. The Board affirmed the Illinois EPA's rejection of the personnel hours sought for the job titles of Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs, and Scientist III for CACR Report/HAA's/Reimbursements. The Illinois EPA's rejection of personnel hours sought for 16 other job titles was reversed. Noting that Webb's Petition for Review requested the award of its fees and expenses in this action and the fact that Webb partially prevailed in this proceeding, Webb and the Illinois EPA were provided the opportunity to file information and arguments as to whether any legal fees and costs should be reimbursed from the

UST Fund. In its March 8, 2007 filing, Webb seeks reimbursement of \$7,932.50 in legal fees and \$4,044.50 in engineer fees.

II. ARGUMENT

A. Legal Fees

Section 57.8(l) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/57.8(1), states that the Board “may authorize payment of legal fees” to an owner or operator that prevails before the Board in seeking payment under Title XVI of the Act. As noted in Illinois Ayers Oil Company v. Illinois EPA, PCB 03-214 (August 5, 2004), this provision is a “fee-shifting” statute. Such statutes must be strictly construed since they are in derogation of common law. Miller v. Pollution Control Board, 267 Ill. App. 3d 160, 171; 642 N.E.2d 475, 485 (4th Dist. 1994); Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill. App. 3d 592, 618; 806 N.E.2d 1194, 1214 (1st Dist. 2004) The Board has broad discretionary powers concerning the amount of fees to be awarded. Swif-T-Food Mart v. Illinois EPA, PCB 03-185, slip op. at 3 (August 19, 2004)

Illinois courts have recognized the general principle that a party is not entitled to fees on unsuccessful claims. Globalcom, 347 Ill. App. 3d 592, 618; 806 N.E.2d 1194, 1214. They have also acknowledged the difficulty in making such a determination in situations where discrete claims cannot be perceived, with one suggesting that a “court must evaluate whether the claims (1) involved a common core of facts or related legal theories and (2) whether the plaintiff achieved a level of success making it appropriate to award attorney fees for hours reasonably expended on the unsuccessful claims as well.” Cannon v. William Chevrolet/GEO, Inc., 341 Ill. App. 3d 674, 687; 794 N.E.2d 843, 854 (1st Dist. 2004) But when courts can identify and separate claims, fees are awarded on only the successful claims for which fees are allowed. Franz v. Calaco Development

Corp., 352 Ill. App. 3d 1129, 1151-1152; 818 N.E.2d 357, 377-378 (2nd Dist.2004)

The Board has awarded legal fees to a petitioner in an UST appeal on three previous occasions, namely Illinois Ayers, Swift-T, and Ted Harrison Oil Company v. Illinois EPA, PCB 99-127 (October 16, 2003). In Harrison and Swif-T, the petitioner prevailed on the all of the dollar amounts at issue in the appeals. In Illinois Ayers, the Board restored soil borings and their associated costs of \$29,603.19 that the Illinois EPA had removed from a high priority corrective action plan and budget. Although the Board also affirmed Illinois EPA budget reductions totaling \$690.00, the Board concluded that the petitioner had prevailed in “significant part.” Illinois Ayers, slip op. at 8 (August 5, 2004) In each of these cases, all of the legal fees requested were awarded.

The level of success achieved by Webb in the instant appeal is not difficult to measure. The job titles of Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs, along with Scientist III for CACR Report/HAA/Reimbursements, account for 55% of the total personnel costs sought by Webb in its August 18, 2006 proposed Corrective Action Plan and Budget. Webb prevailed on the remaining job titles that represent 45% of the total personnel costs sought.

It is appropriate and consistent with the legal precedent cited herein to award Webb no more than 45% of the legal fees it claims. Fee shifting statutes are not creatures of common law and they should neither be construed nor applied liberally. This is demonstrated by the fact that the general rule in Illinois law is that a party is not entitled to fees on unsuccessful claims. Although Webb references the common core of facts and legal theory concept in its Supplemental Brief, this argument is not convincing. Readily identifiable, discrete and separate costs in a proposed budget are at issue here, and therefore it is not necessary to employ the test set forth by the Cannon court.

Even if use of this test was deemed appropriate, consideration of the level of success achieved in determining whether fees should be awarded for time expended on unsuccessful claims is still required.

This case is unlike the three previous legal fees cases considered by the Board as Webb only “partially prevailed” in this proceeding. Webb & Sons, Inc. v. Illinois EPA, PCB 07-24, slip op. at 14 (February 15, 2007) The amount of legal fees awarded to Webb should likewise be distinguishable from the full awards made in Illinois Ayers, Swif-T, and Harrison.

B. Engineer Fees

In Harrison, Illinois Ayers, and Swif-T, the fees awarded pursuant to Section 57.8(1) of the Act, 415 ILCS 5/57.8(1), were referenced as attorney fees or legal fees. As previously noted, Section 57.8(1) of the Act is a fee-shifting statute and, as such, must be strictly construed. Webb provides no legal authority for interpreting Section 57.8(1) or past Board precedent as allowing the award of engineer fees. Therefore these fees should not be awarded to Webb.

III. CONCLUSION

For all of the foregoing reasons and arguments presented herein, Webb should be awarded no more than 45% of the legal fees claimed and none of the requested engineer fees.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Special Assistant Attorney General

Dated: March 29, 2007

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 29, 2007 I served true and correct copies of a RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF REIMBURSEMENT OF PETITIONER'S LEGAL FEES upon the persons and by the methods as follows:

[Electronic Filing]

Dorothy Gunn
Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
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[1st Class U.S. Mail]

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/s/ James G. Richardson

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