

of legal and factual errors that permeate the IEPA's arguments." Mot. Lv. at 1-2. The Agency has not responded to Prime's motion for leave, which the Board grants. The Board therefore accepts Prime's reply (Reply).

DISCUSSION

Prime seeks reimbursement of legal fees and costs totaling \$10,803.18 from the UST Fund. Mot. at 5.¹ The Agency "objects to the award of attorney's fees as requested." Resp. at 10. Below, the Board provides the applicable legal framework before addressing (1) whether this appeal falls within the scope of Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2008)), which authorizes the Board to award legal fees and costs; and (2) if so, whether the Board will exercise its discretion to award Prime's requested legal fees and costs. The Board describes the parties' arguments as they bear on the relevant issues.

Legal Framework

Costs associated with "corrective action" may be reimbursed from the UST Fund. 415 ILCS 5/57.9 (2008). "Corrective action" is defined as "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, the Leaking UST Program]." 415 ILCS 5/57.2 (2008) (referring to 415 ILCS 5/57.6, 57.7 (2008)).

Section 57.8(1) of the Act states:

Corrective 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(1) (2008).

Part 734 of the Board's UST regulations likewise provides:

Costs ineligible for payment from the Fund include but are not limited to:

- g) Legal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part unless the owner or operator prevails before the Board and the Board authorizes payment of such costs[.] 35 Ill. Adm. Code 734.630.

¹ Prime's request does not include its "legal expenses in seeking reimbursement of legal costs." Affid. at 1.

Whether this Appeal Falls Within Section 57.8(l) of the Act

“The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision.” Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004)). For the reasons below, the Board finds that this appeal comes within the parameters of Section 57.8(l) of the Act, allowing the Board to authorize the payment to Prime of legal fees and costs from the UST Fund.

The Board has required the reimbursement of legal fees and costs where the petitioner prevailed in appealing the Agency’s rejection of a plan and budget under Section 57.7 of the Act. See Illinois Ayers, PCB 03-214, slip op. at 7-8. The Board found in Illinois Ayers that obtaining plan and budget approval is a prerequisite to UST Fund reimbursement. *Id.* The Board therefore held that the petitioner was “seeking payment” within the meaning of Section 57.8(l) of the Act. *Id.* at 8.

Here, the Board reversed the Agency determination rejecting Prime’s plan and budget and remanded the matter to the Agency to consider their merits. It is undisputed that approval of the plan and budget is a prerequisite to UST Fund reimbursement. Consistent with Illinois Ayers, the Board finds that Prime was “seeking payment” under Title XVI. The Agency concedes that Prime “has prevailed in its action before the Board.” Resp. at 1. The Agency further concedes that Prime “qualifies for a potential award of legal costs.” *Id.* at 9. The Board finds that under Section 57.8(l) of the Act, the Board may exercise its discretion to award legal fees and costs in this case.

Whether the Board Will Authorize Payment

“Second, the Board must also determine whether or not to exercise our discretion.” Illinois Ayers, PCB 03-214, slip op. at 7. For the reasons below, the Board will exercise its discretion to authorize the payment of legal fees and costs from the UST Fund. Prime’s requested \$10,803.18 consists of \$9,680 in fees and \$1,123.18 in costs. Mot. at 5; Exh. at 1-4. Prime was represented in this appeal by two attorneys, Patrick D. Shaw and Fred C. Prillaman, both with the law firm of Mohan, Alewelt, Prillaman & Adami. Reply at 1. The total amount of legal fees requested, \$9,680, reflects a \$577.50 deduction (*i.e.*, \$10,257.50 less \$577.50) offered by Prime based on the fact that Prime’s witness did not appear at hearing. The \$577.50 amount represents one afternoon of attorney time spent on hearing preparation regarding the intended testimony. Mot. at 5; Affid. at 1; Exh. at 2, 3.

In his affidavit, attorney Shaw states that the information in the exhibit to the affidavit is “an accurate summary of the legal work done and the legal fees incurred with respect to this matter” and was “taken from the actual invoices and thus reflects actual work performed and fees incurred.” Affid. at 1-2. The Agency “accepts as true the verified statements as to the nature and amounts of work performed” (Resp. at 8) and concedes that “a reasonable award . . . may be made in this case” (Resp. at 10).

The Agency does raise questions about differing hourly billing rates (Resp. at 7-8, 10) and whether Prime has paid the legal bills (Resp. at 3-6, 8-9). The difference in billing rates,

however, stems from the fact that two attorneys with different hourly rates worked on the case for Prime. Reply at 1; *see also* Exh. at 1-3. Further, it is plain in the record that Prime is “the entity incurring and paying legal bills.” Reply at 1 n.1; *see also* Affid. at 2, Exh. at 1.

Primarily, the Agency takes issue with an alleged lack of specific reasoning in prior Board decisions awarding the payment of legal fees and costs from the UST Fund:

[T]he Board’s reasonableness approach is only as good as its attention to the details such as the hourly rates being charged for legal services and the relation of that work to the outcome achieved. A finding that a particular award is based upon the facts of a given case has no meaning as precedent unless the assessment of that particular award is articulated. Resp. at 9-10; *see also id.* at 2, 7-10.

The Agency asks the Board to specify an “appropriate rationale” if an award is to be made here. *Id.* at 10. Prime counters that the Agency “cannot simply chide the Board’s attention to details from the sidelines[], without offering evidence or point[ing] to issues in the evidence.” Reply at 7.

The Board considers the reasonableness of requested legal fees and costs before authorizing payment. *See, e.g., Illinois Ayers*, PCB 03-214, slip op. at 8-9; *Swif-T-Food Mart*, PCB 03-185, slip op. at 3. The party requesting legal fees and costs bears the burden of presenting sufficient evidence from which the Board can render a decision as to their reasonableness. *See J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership*, 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271, 1277 (5th Dist. 2001) (“The party seeking fees has the burden of presenting the court with sufficient evidence from which it can determine the reasonableness of the fees.”); *Sampson v. Miglin*, 279 Ill. App. 3d 270, 281, 664 N.E.2d 281, 288-89 (1st Dist. 1996) (same). The petitioner “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.” *J.B. Esker*, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278 (affirming award where attorney “submitted a detailed bill itemizing the time spent in fractions of an hour.”).

Although the petitioner 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. *See Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 868, 864 N.E.2d 288, 315 (5th Dist. 2007) (“trial court is permitted to use its own knowledge and experience to assess the time required to complete particular activities”); *Sampson*, 279 Ill. App. 3d at 281, 664 N.E.2d at 289 (“the trial judge may also consider the entire record and his knowledge of the case in determining the reasonableness of fees.”). In determining the reasonableness of Prime’s request, the Board may take into account a number of 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.” *Cretton*, 371 Ill. App. 3d at 867-68, 868, 864 N.E.2d at 315 (setting

forth factors trial court should consider in assessing reasonableness of fees); *see also* Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289 (same).

Prime's motion for legal fees and costs is supported by an affidavit and an exhibit to the affidavit specifying the legal services rendered and costs incurred. The Board has reviewed the entries of attorney work and time spent for Prime's legal counsel, Mr. Shaw and Mr. Prillaman, along with the documentation of costs. Exh. at 1-4. Attorney work was performed for Prime from April 2009 through July 2009. Affid. at 1; Exh. at 1-3. Mr. Shaw's billing rate is \$165 per hour while Mr. Prillaman's is \$220 per hour. Reply at 1; Exh. at 1-3. There are a total of 60.8 attorney hours (33 entries), 56.7 hours for Mr. Shaw (24 entries) and 4.1 hours for Mr. Prillaman (9 entries). Exh. at 1-3. Each entry describes the attorney work performed and lists the corresponding amount of time spent in fractions of an hour. *Id.* Some of the entries aggregate the time for an attorney's tasks on a given day into a single hourly total for that day, but none so as to render the Board unable to assess the reasonableness of the charges. *See* Sampson, 279 Ill. App. 3d at 281-82, 664 N.E.2d at 289 (aggregation alone does not require reversal of fee award where trial court "found itself capable of determining the reasonableness and necessity of all the charges, based on the breakdown of specific tasks and the court's intimate knowledge of the case.").

Attorney work for Prime included preparing and filing an amended petition for review (filed 4/20/09) pursuant to Board order, a 10-page response (filed 6/4/09) to the Agency's motion to dismiss (filed 5/26/09), a 14-page opening post-hearing brief (filed 6/29/09), and a 9-page reply brief (filed 7/13/09). Prime's counsel also prepared eight hearing exhibits (6/17/09 hearing) without the Agency's sizeable record, which the Agency did not file until after the hearing. Costs consist of \$946.70 in computerized legal research (Lexis) charges (May-July 2009), \$171.20 in photocopying charges (April-July 2009), and \$5.28 in postage (April, June, July 2009). *See, e.g.,* Illinois Ayers, PCB 03-214, slip op. at 8-9 (awarding costs of, among other things, computerized legal research, photocopying, and postage (*see* 5/3/04 filing)).

Prime asserts that in challenging the Agency's determination, Prime has contributed to the body of UST reimbursement case law, a contribution that will mostly benefit "future Fund claimants that can look to Board precedent." Mot. at 4. Prime adds that it was the "lucky" petitioner that had to respond to the Agency's "difficult, potentially dispositive" challenge based on the alleged unauthorized practice of law, "an important issue of general applicability." *Id.* at 4-5 ("Future petitioners (and future Boards) will presumably be the beneficiaries of Prime providing one side of the adversarial dialogue herein, and it would be unfair for Prime to solely bear those costs."). Prime further argues that it brought this appeal "with the hope that cleaning up the property within the context of the existing remediation project would be quicker and ultimately more economical than starting over from the beginning," maintaining that the former approach will "not only save money from the Fund, but promote public goals of a prompt clean-up." *Id.* at 5. The Agency contests none of these assertions made by Prime.

The documentation presented by Prime is similar to that provided by the successful petitioners in Illinois Ayers and Swif-T-Food Mart v. IEPA, PCB 03-185 (Aug. 19, 2004), for example, where the Board awarded, respectively, \$44,456.49 and \$11,291.37 in legal fees and costs. *See* Illinois Ayers, PCB 03-214, slip op. at 9-10 (*see* 5/3/04 filing); Swif-T-Food Mart,

PCB 03-185, slip op. at 3 (*see* 6/7/04 filing). Attorneys Shaw and Prillaman also represented the petitioner in the Illinois Ayers case and are long-time practitioners before the Board. *See* 35 Ill. Adm. Code 101.630 (official notice). It is stated under oath, and the Agency does not dispute, that the “hourly rates charged are commensurate with the prevailing rates for environmental legal services in Springfield, Illinois for 2009 and represent the rates charged to all clients of the respective attorneys.” Affid. at 2. Over five years ago in Illinois Ayers, the Board approved hourly rates of \$140 and \$195 for Mr. Shaw and Mr. Prillaman, respectively. *See* Illinois Ayers, PCB 03-214, slip op. at 9-10 (*see* 5/3/04 filing).

The Board notes that while the Agency did not address its merits, the proposed budget rejected here by the Agency was for \$42,466.44. AR36, Proposed Budget Summary and Budget Total. In addition, both parties maintained that the Board’s decision would resolve whether another deductible applies with respect to UST Fund reimbursement, but the Board did not reach that question because it was beyond the scope of the Agency’s denial letter, which frames the issue on appeal. *See* Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005). At bottom, the Board finds that this appeal did present important and difficult issues, resulting in a 35-page opinion and order containing Board rulings on when persons may obtain Board review of Agency UST determinations and how leaking UST cleanups may be conducted under the Act.

Other than questioning how there could be two billing rates for attorney time, which is answered above, the Agency does not argue that the requested legal fees or costs are unreasonable. *Cf.* Illinois Ayers, PCB 03-214, slip op. at 9 (“The Agency did not challenge the reasonableness of the costs.”); Swif-T-Food Mart, PCB 03-185, slip op. at 2 (Agency did not respond to motion for legal fees and costs). Taking into account the record and the Board’s experience and knowledge of the case, as well as the other factors discussed above, the Board finds the requested legal fees and costs to be reasonable, with several exceptions. Two of the attorney work entries are too vague as to the subject of the work for the Board to assess their reasonableness. The 7/20/09 entry simply states “Memo to PDS” (0.40 hours at \$220 per hour or \$88) and the 7/21/09 entry provides only “Revise memo to PDS (x2)” (0.30 hours at \$220 per hour or \$66). Exh. at 3. These descriptions, for work performed a week after Prime filed its reply brief, are inadequately detailed. The Board declines to authorize payment of these legal fees, totaling \$154. The Board also declines to authorize legal fee payment for the 5/12/09 entry (3.4 hours at \$165 per hour or \$561) (Exh. at 2) because the issue of the applicable deductible, the subject of the entry, was not in front of the Board in this appeal, as discussed above. Accordingly, the Board will direct the Agency to reimburse Prime from the UST Fund for legal fees in the amount of \$8,965, which reflects the requested \$9,680, less deductions totaling \$715 (*i.e.*, \$154 plus \$561).

In sum, the Board will exercise its discretion under Section 57.8(l) of the Act and direct that Prime be reimbursed from the UST Fund for legal fees and costs totaling \$10,088.18 (*i.e.*, \$8,965 in fees plus \$1,123.18 in costs).

CONCLUSION

For the reasons discussed above, the Board finds that awarding legal fees and costs is warranted in this case. Therefore, the Board grants Prime’s motion but deducts \$715 from the

requested legal fees. The Board directs that \$10,088.18 in legal fees and costs be reimbursed to Prime from the UST Fund as corrective action costs. Below, the Board will set forth its order as modified by this award.

The Board incorporates by reference its findings of fact and conclusions of law from the August 20, 2009 interim opinion and order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board denies Prime's request to sanction the Agency.
2. The Board denies the Agency's motion to dismiss.
3. The Board reverses the Agency's January 27, 2009 determination and remands the matter to the Agency to undertake actions consistent with this opinion.
4. The Board directs the Agency to provide Prime with reimbursement from the UST Fund for legal fees and costs in the amount of \$10,088.18.

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) (2008); *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 Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 5, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board