

ILLINOIS POLLUTION CONTROL BOARD
March 2, 2017

ABEL INVESTMENTS, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 16-108
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

Abel Investments (Abel) appealed a determination by the Illinois Environmental Protection Agency (IEPA) reducing Abel’s budget for remediating a leaking underground storage tank (UST) site in Carbondale, Jackson County. The Board affirmed IEPA’s reduction where Abel failed to support its budget for consultants. The Board, however, reversed IEPA’s reduction where consulting costs did not violate the Environmental Protection Act (Act) and reversed IEPA on Abel’s budget for travel and using a measuring wheel.

Abel requests that the Board authorize payment of legal fees. IEPA did not respond to Abel’s request. The Board finds that Abel’s appeal sought payment from the UST Fund and that it prevailed under Section 57.8(1) of the Act. 415 ILCS 5/57.8(1) (2014). The Board awards \$13,519.37 in legal fees to Abel, as requested. In this opinion, the Board outlines the statutory and regulatory background for awarding legal fees in UST appeals, discusses the issues, and reaches its conclusions before issuing its order.

STATUTORY AND REGULATORY PROVISIONS

Costs associated with “corrective action” may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a)(7) (2014). “Corrective action” means early action activities under Sections 57.6 and site investigation and corrective action under Section 57.7. 415 ILCS 5/57.2 (2014). Section 57.8(1) of the Act addresses reimbursement from the UST Fund and 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(1) (2014); *see also* 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Abel Prevailed on a Significant Issue and Section 57.8(1) Applies

When deciding whether to award legal fees, the first question the Board must address is whether the proceeding falls within Section 57.8(l), which authorizes legal fees. *See Illinois Ayers Oil Co. v IEPA*, PCB 03-214, slip op. at 7 (Aug. 5, 2004). The Board has found that approval of a plan and budget is a prerequisite to reimbursement from the UST Fund. The Board has ordered reimbursement of legal fees where the petitioner prevails when appealing IEPA's rejection of a plan and budget. *Prime Location Properties v. IEPA*, PCB 09-67, slip op. at 3 (Nov. 5, 2009); *Illinois Ayers*, PCB 03-214, slip op. at 7-8.

In its interim opinion and order, the Board affirmed, in part, IEPA's determination on costs for consultants totaling \$3,192.62. However, the Board found that IEPA's determination did not properly modify Abel's budget for other consultant costs, travel costs, and the use of a measuring wheel totaling \$2,974.49. On these items, the Board reversed the determinations and deemed the budget for those items to be approved.

Abel argues that it does not need to prevail on all issues before the Board to be reimbursed for legal fees. Rather, "[a] prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit." Motion at 4, *citing J.B. Esker & Sons v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 280 (5th Dist. 2001). As stated above, IEPA did not respond to Abel's motion and therefore is deemed to have waived objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d).

The Board finds that Abel prevailed on the issue of travel costs and the measuring wheel. In addition, Abel prevailed on one group of the consultant costs—those for which IEPA determined Abel budgeted unreasonably, excessively, or for the title of the consultant rather than the work performed. The Board has awarded the reimbursement of legal fees to parties that prevail on some, but not all issues. *See Illinois Ayers*, PCB 03-214, slip op. at 9; *Webb & Sons, Inc. v IEPA*, PCB 07-24 (May 3, 2007). Therefore, Section 57.8(l) applies and the Board may award Abel legal fees.

The Board Orders Reimbursement of Legal Fees

In determining whether to exercise its discretion to authorize payment, the Board considers the reasonableness of the requested legal fees. *Prime Location*, PCB 09-67 slip op. at 4, *citing Illinois Ayers*, PCB 03-214, slip op. at 8-9; *Swif-T Food Mart v. IEPA*, PCB 03-185, slip op. at 3 (Aug. 19, 2004). When deciding whether requested legal fees are reasonable, the Board considers "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*, PCB 09-67, slip op. at 4, *citing Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 867-68. The Board may apply its own expertise "to assess the time required to complete particular activities." *Cretton*, 371 Ill. App. 3d at 868.

As the party seeking reimbursement, Abel has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. *Prime Location*, PCB 09-67, slip op. at 4, *citing J.B. Esker & Sons*, 325 Ill. App. 3d at 283. Therefore, Abel

“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.” *Id.*

Abel’s motion is accompanied by an affidavit of Patrick D. Shaw, Abel’s legal counsel, and a three-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.*; see J.B. Esker & Sons, 325 Ill. App. 3d at 283. Mr. Shaw’s services began on May 26, 2016 and continued to January 17, 2017. They comprise 67.2 billed hours for total fees of \$13,440. Aff. Exh. A. The summary describes work performed and the time allocated to that work in tenths of an hour. *Id.* The summary also includes \$79.37 of itemized costs for copying and the Board filing fee. *Id.* at 3. The Board finds that the listings are itemized specifically enough to assess the reasonableness of the charges. See Prime Location, PCB 09-67, slip op. at 5, *citing* Sampson, 279 Ill. App. 3d at 281-82. The summary submitted by Abel is generally similar to information provided in other UST cases in which the Board has directed IEPA to reimburse fees. See, e.g., Burgess v. IEPA, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016), *citing* PAK-AGS v. IEPA, PCB 15-14, slip op. at 7 (Mar. 5, 2015); Swif-T, PCB 03-185, slip op. at 2-3. IEPA did not respond to Abel’s motion and therefore has not disputed the reasonableness of the requested reimbursement rates.

Abel did not prevail on all of the claims before the Board. Abel’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 03-214, slip op. at 9 (awarding entire amount); Webb & Sons, PCB 07-24, 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.” Globalcom, Inc. v. Illinois Commerce Comm’n., 347 Ill. App. 3d 592, 618, (1st Dist. 2004), *citing* Becovic v. City of Chicago, 296 Ill. App. 3d 236, 242 (1st 1998). Further, “when the plaintiff fails to prevail on claims that are distinct in all respects from the prevailing claims, the hours spent on unsuccessful claims may be excluded in considering the amount of reasonable attorney fees.” Cannon v. William Chevrolet/Geo, Inc., 341 Ill. App. 3d 674, 686 (1st Dist. 2003), *citing* Hensley v. Eckerhart, 461 U.S. 424 (1983). 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.” Becovic, 296 Ill. App. 3d 236, 242, *citing* 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). Cannon referred to Congress¹ stating ““an attorney’s fee is to be

¹ The Cannon court was deciding a case under the Magnuson-Moss Act. Regarding legal fees, Magnuson-Moss is also silent on how they must be awarded in the case of a split decision and gives the court discretion in awarding fees much like Section 57.8(l) of the Act. 15 U.S.C. § 2310(d)(2) (2014); 415 ILCS 5/57.8(l) (2014).

based upon actual time expended rather than being tied to any percentage of the recovery . . . Thus, the award of attorney fees does not depend upon plaintiff's recovery of substantial monetary damages nor does it need to be proportionate to an award of money damages." Cannon, 341 Ill. App. 3d at 686 (citations omitted).

In this case, the Board concludes that Abel's appeal presented significant issues regarding IEPA's review and determination under the UST program. Burgess, PCB 15-186, slip op. at 6, *citing* PAK-AGS, PCB 15-14, slip op. at 7; Knapp Oil v. IEPA, PCB 16-103, slip op. at 4 (Nov. 17, 2016). Based on its review of the record and authorities including prior Board decisions, the Board finds Abel's requested legal fees reasonable. The Board finds that the facts in this case are from a "common core" and Abel's claims were based on related legal theories. *See Cannon*, 341 Ill. App. 3d at 687. Many of Abel's arguments relating to consultant costs overlapped. Therefore, the Board, under Section 57.8(1), awards reimbursement of legal fees in the amount requested by Abel, \$13,519.37.

The Board incorporates by reference its findings of fact and conclusions of law from its December 15, 2016 interim opinion and order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board affirms the Illinois Environmental Protection Agency's (IEPA) determination with regard to the following deductions from Abel Investment's (Abel) Stage 1 Actual Costs and Stage 2 Proposed Budget:
 - a. \$1,457.88 for a Senior Project Manager to conduct Stage 1 Technical Oversight, Compliance and Reimbursement review;
 - b. \$991.28 for a Senior Project Manager to conduct Stage 2 Budget Technical Compliance and Oversight; and
 - c. \$743.46 for a Senior Project Manager to conduct Site Investigation Completion Report Technical Compliance and Oversight.

2. The Board reverses IEPA's determination with regard to the following reductions from Abel's Stage 1 actual costs and Stage 2 proposed budget:
 - a. \$984.24 for an Engineer III to conduct Stage 1 Budget Calculations and Preparation;
 - b. \$660.52 for a Professional Geologist to conduct Stage 2 Budget Preparation and Calculations; and
 - c. \$456.80 for an Engineer III to conduct Stage 2 Budget Development.

3. The Board reverses IEPA's determination to deduct travel costs from Abel's Stage 2 proposed budget.

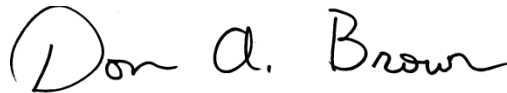
4. The Board reverses IEPA's determination to deduct the costs of using a measuring wheel from Abel's Stage 1 actual costs and Stage 2 proposed budget.

5. The Board grants Abel's unopposed motion to authorize payment and directs IEPA to reimburse Abel \$13,519.37 in legal fees from the UST Fund under Section 57.8(1) of the Act. 415 ILCS 5/57.8(1) (2014).

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) (2014); *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, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 2, 2017, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, looped initial "D".

Don A. Brown, Assistant Clerk
Illinois Pollution Control Board