

ILLINOIS POLLUTION CONTROL BOARD
December 2, 2021

RELIABLE STORES, INC.,)
)
 Petitioner,)
)
 v.) PCB 19-2
) (UST Appeal)
 OFFICE OF THE STATE FIRE MARSHAL,)
)
 Respondent.)

ORDER OF THE BOARD (by B.F. Currie):

Reliable Stores, Inc. (Reliable) filed an appeal asking the Board to review a determination of the Office of the State Fire Marshal (OSFM). OSFM had determined that leaks at Reliable’s gas station, located in Maywood, Cook County, were ineligible for reimbursement from the State’s Underground Storage Tank (UST) Fund. On cross-motions for summary judgment, the Board entered summary judgment for Reliable in a final order, reversing OSFM’s determination and remanding the matter for OSFM to determine Reliable’s applicable UST Fund deductible.

OSFM appealed the Board’s final order to the First District Appellate Court. Reliable then filed a motion with the Board seeking legal fees. OSFM now asks the Board to stay any ruling on Reliable’s legal fees motion pending the outcome of OSFM’s appeal. Alternatively, OSFM asks for permission to file a response to the legal fees motion.

The Board finds that it retains jurisdiction over the issue of legal fees as they are collateral or incidental to the final order now before the Appellate Court. The Board also finds that OSFM has not shown that a stay is otherwise warranted. The Board therefore denies OSFM’s motion for stay. But the Board grants OSFM’s alternative request for the opportunity to file a response to Reliable’s legal fees motion.

In this order, the Board provides procedural background before turning to OSFM’s stay motion.

PROCEDURAL BACKGROUND

On April 1, 2021, the Board issued its final order. For the procedural background of the case up to that point, please refer to the final order. On May 4, 2021, OSFM petitioned the First District Appellate Court (No. 1-21-0507) for direct administrative review of the final order.

On May 5, 2021, Reliable filed its legal fees motion with the Board. On June 24, 2021, OSFM filed its stay motion (Mot.), which includes the request that—if no stay issues—OSFM be

allowed to file a response to the legal fees motion. On July 8, 2021, Reliable filed a response (Resp.) opposing OSFM's stay motion.

On July 22, 2021, OSFM filed a motion for permission to file a reply in support of its stay motion (Reply Mot.), which Reliable opposed on August 5, 2021. OSFM asserts two grounds on which it would be materially prejudiced if not allowed to reply to Reliable's response. First, Reliable's response attacks the stay motion as untimely for not being a "response" to the legal fees motion. Reply Mot. at 2. Second, Reliable's response asserts that no OSFM response to the legal fees motion should be allowed. *Id.*

The Board denies OSFM's motion for permission to file a reply because this order eliminates both claimed grounds of material prejudice. First, the Board accepts OSFM's stay motion as timely. OSFM explicitly requested (June 10, 2021 motion) having until June 24, 2021, to make a "responsive filing" to the legal fees motion; the hearing officer granted OSFM's request (June 21, 2021 order). OSFM's stay motion, which was timely filed, is a "responsive filing." Second, although the Board denies OSFM's motion for stay, it grants OSFM's alternative request for an opportunity to file a response to Reliable's legal fees motion.

DISCUSSION

OSFM asks the Board to stay any ruling on Reliable's motion for legal fees pending OSFM's appeal in the First District Appellate Court. OSFM gives two reasons for requesting a stay: first, a stay would be appropriate under the Illinois Supreme Court's decision in Stacke v. Bates, 138 Ill. 2d 295 (1990); and second, the Board has been divested of jurisdiction to rule on the legal fees motion. The Board disagrees with OSFM on both counts. Below, the Board addresses jurisdiction before turning to Stacke.

The Board Has Jurisdiction to Rule on Reliable's Motion for Legal Fees

OSFM is correct (Mot. at 7) that, generally, once a petition for review of a final Board order is filed in the Appellate Court, jurisdiction attaches with the Appellate Court and the Board is deprived of jurisdiction (*see, e.g., GMC v. Pappas*, 242 Ill. 2d 163, 173 (2011); *see also Prime Location Properties, LLC v. IEPA*, PCB 09-67, slip op. at 4 (Nov. 15, 2012)). However, the Board retains jurisdiction to rule on matters "collateral or incidental" to its final order. *See, e.g., GMC*, 242 Ill. 2d at 173-74; *see also People v. Community Landfill, Inc.*, PCB 03-191, slip op. at 4 (Nov. 5, 2009).

In the final order here, the Board found that gasoline leaks from Reliable's under-dispenser containment systems to the soil were releases from UST systems and that OSFM erred in determining the leaks were not from UST systems—the basis on which OSFM denied Reliable's UST Fund eligibility application. Reliable Stores, Inc. v. OSFM, PCB 19-2, slip op. at 6-8 (Apr. 1, 2021). As legal fees had not been requested, they were not addressed in the

Board's final order. The issue of Reliable's legal fees is therefore not before the First District Appellate Court.¹

"The filing of a motion for attorney fees after a judgment in the principal action is an incidental or collateral matter; it is not a motion attacking the judgment and therefore does not affect the judgment appealed from or nullify an earlier notice of appeal." Brotherhood Mut. Ins. Co. v. Roseth, 177 Ill. App. 3d 443, 448 (1st Dist. 1988); *see also* Town of Libertyville v. Bank of Waukegan, 152 Ill. App. 3d 1066, 1072-73 (2d Dist. 1987) (filing appeal from final judgment in condemnation suit did not divest trial court of jurisdiction to hear petition for attorney fees and costs). Likewise, a Board ruling on Reliable's motion for legal fees would not "affect or alter the issues on appeal." GMC, 242 Ill. 2d at 174; *see also* Town of Libertyville, 152 Ill. App. 3d at 1073 (collateral matters include those "lying outside the issues in the appeal"). The Board agrees with Reliable (Resp. at 9) that its motion is collateral or incidental to the Board's final order. Accordingly, the Board has jurisdiction to rule on the legal fees motion.

OSFM Has Not Shown That a Stay Is Warranted under Stacke

The Board's decision to grant a motion for stay pending appeal is discretionary. *See, e.g., People v. State Oil Co.*, PCB 97-103, slip op. at 2 (May 15, 2003). The Board looks to the Illinois Supreme Court's Stacke opinion when ruling on these motions. *See, e.g., People v. Toyal, Inc.*, PCB 00-211, slip op. at 5-6 (Sept. 16, 2010). To decide a motion for stay pending appeal, the Illinois Supreme Court in Stacke declined to establish a "ritualistic formula" that would specify the elements that may be considered and limit consideration to those elements. Stacke, 138 Ill. 2d at 308. Instead, a court should have "a wide degree of latitude when exercising its discretion" to grant a stay. *Id.* at 305. The court is necessarily "engaged in a balancing process as to the rights of the parties, in which all elements bearing on the equitable nature of the relief sought should be considered." *Id.* at 308-09. Ultimately, a "stay pending appeal is preventive or protective and seeks to maintain the status quo pending appeal." *Id.* at 309.

With these principles stated, Stacke explained what the party requesting the stay (*i.e.*, the movant) must show:

We believe that in all cases, the movant, although not required to show a probability of success on the merits, must, nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing of a likelihood of success on the merits. Thus a strong showing of the likelihood of success on the merits

¹ The Environmental Protection Act (415 ILCS 5 (2020) addresses the payment of legal fees from the UST Fund: "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) (2020); *see also* 35 Ill. Adm. Code 734.630(g).

may offset other equitable factors favoring the other party. *Id.*

OSFM claims that the Board’s final order “effectively overturned thirty years of OSFM policy” and that OSFM has appealed “in good faith.” Mot at 6. But neither of these claims addresses “the merits” of OSFM’s case, let alone shows that OSFM has a “substantial case.”

The parties quibble over whether delaying a ruling on legal fees would pose a hardship to Reliable or indirectly risk harming human health or the environment (Mot. at 6; Resp. at 7-9). The Board finds that these factors, as supported by the parties, do not significantly militate either for or against the requested stay. OSFM also suggests that Reliable might not be entitled to *all* its requested legal fees (Mot. at 6). But even if true, that does not justify delaying the Board’s ruling on legal fees—just that OSFM should have a chance to respond to the merits of Reliable’s motion, which this order provides.

Other than jurisdiction, OSFM’s main argument for a stay boils down to concern over recoupment:

If the Board directs payment of legal fees as costs of corrective action and the OSFM is successful on its appeal, it may cause irreparable harm to the public because the Act and Board regulations provide no clear and obvious mechanism for the OSFM, a state entity, to recover those legal fees. Mot. at 6.

Reliable is correct (Resp. at 5, 6) that under the Environmental Protection Act, legal fees qualifying for payment as “corrective action” costs are paid not by OSFM but rather from the Underground Storage Tank Fund, a process assigned to the Illinois Environmental Protection Agency (IEPA) (415 ILCS 5/57.8 (2020)). And, contrary to OSFM’s understanding, the Board’s regulations—at 35 Ill. Adm. Code 734.660—do provide mechanisms for IEPA to collect excess payments made from the Fund. OSFM offers no convincing reason for why the requested stay is necessary to “preserve the fruits of a meritorious appeal where they might otherwise be lost.” Stacke, 138 Ill. 2d at 302.

Based on its Stacke analysis above, the Board finds that OSFM’s motion for stay neither presents a substantial case on the merits nor shows that the balance of equitable factors weighs in favor of granting a stay. The Board therefore declines to exercise its discretion to stay any ruling on Reliable’s legal fees motion pending appeal.

CONCLUSION

Despite OSFM’s appeal of the Board’s final order pending before the Appellate Court, the Board retains jurisdiction to rule on Reliable’s legal fees motion. OSFM has failed to show that a stay of that ruling pending appeal is warranted under Stacke. Accordingly, the Board denies OSFM’s motion for stay. But the Board gives OSFM until January 3, 2022, to file a response to the legal fees motion.

ORDER

1. The Board denies OSFM's motion to stay any ruling on Reliable's legal fees motion.
2. The Board permits OSFM to file a response to Reliable's legal fees motion by January 3, 2022.

IT IS SO ORDERED.

Board Member Gibson abstained.

I, Timothy J. Fox, Acting Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 2, 2021 by a vote of 4-0.



Timothy J. Fox, Acting Clerk
Illinois Pollution Control Board