

ILLINOIS POLLUTION CONTROL BOARD
November 17, 2016

KNAPP OIL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 16-103
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by J.D. O’Leary):

Knapp Oil Company (Knapp) appealed a determination by the Illinois Environmental Protection Agency (IEPA or Agency) concerning Knapp’s leaking underground storage tank (UST) site in Metropolis, Massac County. The Board reversed IEPA’s modification of Knapp’s site investigation budget for camera costs and found that IEPA had not properly modified the budget for a bailer, survey equipment, and sampling kit.

Knapp now requests that the Board authorize payment of its legal fees. The Board finds that Knapp’s appeal sought payment from the UST Fund and that it prevailed before the Board under Section 57.8(1) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(1) (2014)). The Board exercises its discretion to award legal fees and directs IEPA to reimburse Knapp \$9,990.38 from the UST Fund.

The Board’s order begins below with an abbreviated procedural history. After providing the statutory and regulatory background, the Board discusses the issues, reaches its conclusion, and issues its order.

ABBREVIATED PROCEDURAL HISTORY

The hearing took place on June 28, 2016. On September 22, 2016, the Board issued an interim opinion and order reversing IEPA’s determination to modify Knapp’s site investigation budget for costs associated with a camera. The Board also found that IEPA’s determination did not properly modify Knapp’s budget for costs associated with a bailer, survey equipment, and sampling kit. The Board reversed the determinations as to those items and deemed the budget for them to be approved.

The Board directed Knapp to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to reimburse those fees. Knapp timely filed its motion for authorization of payment of fees (Mot.) on October 24, 2016. Attached to the motion was the affidavit of Patrick D. Shaw (Aff.), Knapp’s attorney.

Although the Board's interim opinion and order allowed IEPA to respond within 14 days after being served with Knapp's statement, IEPA did not file a response.

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 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 Petroleum Underground Storage Tanks]." 415 ILCS 5/57.2 (2014).

Section 57.8(l) 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(l) (2014); *see also* 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Below, the Board addresses whether this appeal falls within the scope of Section 57.8(l) of the Act and, if it does, whether the Board will exercise its discretion to award Knapp's requested legal fees and costs. Because IEPA did not respond to Knapp's motion for payment, the Agency is deemed to have waived objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d).

Whether Section 57.8(l) Applies

"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) (Illinois Ayers). Knapp argues that it prevailed because the Board reversed IEPA's underlying decision. Mot. at 1. In its interim opinion and order, the Board reversed IEPA's determination to modify Knapp's site investigation budget for costs associated with a camera. The Board also found that IEPA's determination did not properly modify Knapp's budget for costs associated with a bailer, survey equipment, and sampling kit. The Board reversed the determinations and deemed the budget for those items to be approved. Plainly, Knapp prevailed before the Board.

Knapp states that it incurred all of its requested legal fees and costs while seeking payment from the UST Fund under the Act. Mot. at 1. Knapp further states that, because an approved budget is necessary to obtain payment from the UST Fund, "Section 57.8(l) provides reimbursement for appeals from plans and budgets." *Id.* at 2, citing Illinois Ayers, slip op. at 8. 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) (Prime Location); Illinois Ayers, slip op. at 7-8. The Board concludes that Knapp's appeal sought payment from the UST Fund.

Because Knapp prevailed in seeking payment from the UST Fund, the Board finds that this appeal falls within the scope of Section 57.8(l) of the Act. Accordingly, the Board may exercise its discretion to determine whether to award Knapp legal fees and costs requested in its motion.

Whether to Exercise the Board's Discretion to Award Fees

Knapp states that, in earlier cases, the Board considered the “reasonableness” of the claimed legal defense costs before exercising its discretion to authorize their payment. Mot. at 2, citing Evergreen FS v. IEPA, PCB 11-51, 12-61 (cons.), slip op. at 4 (Sept. 6, 2012). The Board agrees. See Prime Location, slip op. at 4, citing Illinois Ayers, slip op. at 8-9; Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004) (Swif-T).

As the party seeking reimbursement, Knapp has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Prime Location, slip op. at 4, citing J.B. Esker & Sons v. Cle-Pa's P'ship., 325 Ill. App. 3d 276, 283 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996). Knapp “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 & Sons, 325 Ill. App. 3d at 283. While Knapp 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.” Prime Location, slip op. at 4, citing Cretton v. Protestant Mem'l. Med. Cent., 371 Ill. App. 3d at 868; Sampson, 279 Ill. App. 3d at 281.

Knapp states that the Board also considers whether the case raised “important issues” regarding Agency determinations on reimbursement from the UST Fund. Mot. at 3, citing PAK-AGS v. IEPA, PCB 15-14, slip op. at 7 (Mar. 5, 2015) (PAK-AGS). Knapp argues that this case resulted in the Board's first decision on the difference between the undefined terms “direct costs” and “indirect costs.” Mot. at 3. According to Knapp, the Board's comparison of IEPA's roles at the budget and reimbursement stages is also significant. *Id.* Knapp further argues that the Board has recognized Mr. Shaw's experience in UST appeals. *Id.* at 2, citing Prime Location, slip op. at 6. Knapp adds that his hourly billing rate has been considered reasonable in prior awards of legal fees. Mot. at 2, citing Burgess v. IEPA, PCB 15-186, slip op. at 6 (Feb. 4, 2016) (Burgess).

In determining whether Knapp's request is reasonable, 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; Sampson, 279 Ill. App. 3d at 281. The Board may apply its own expertise to “assess the time required to complete particular activities.” Cretton, 371 Ill. App. 3d at 868.

Knapp points out that Mr. Shaw's affidavit is modeled on previous affidavits submitted to the Board and found to be sufficient. Mot. at 1. His affidavit is accompanied by a three-page summary of fees and costs. Aff.; Exh. A. From the affidavit and summary, the Board can determine 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 April 4, 2016, and continued to October 21, 2016. They comprise 49.5 billed hours for total fees of \$9,900.¹ Exh. A; see Aff. at 1-2. The summary describes work performed and the time allocated to that work in tenths of an hour. Exh. A. The summary also includes \$90.38 of itemized costs for copying and the Board filing fee. Exh. A at 3. The Board finds that the listings are itemized specifically enough to assess the reasonableness of the charges. See Prime Location, slip op. at 5, citing Sampson, 279 Ill. App. 3d at 281-82. The summary submitted by Knapp is generally similar to information provided in other UST cases in which the Board has directed IEPA to reimburse legal fees. See, e.g., Burgess, slip op. at 5-6, citing PAK-AGS, slip op. at 7; Swif-T, slip op. at 2-3. As noted, IEPA has not disputed the reasonableness of the requested fees and costs.

The Board concludes that this appeal presented significant issues regarding IEPA's review and determinations under the UST program. Burgess, slip op. at 6, citing PAK-AGS, slip op. at 7; Chatham BP v. IEPA, PCB 14-1 (Feb. 5, 2015). Based on its review of the record and authorities including prior Board decisions, as well as the absence of an IEPA response to the motion, the Board finds Knapp's requested legal fees and costs to be reasonable. Accordingly, the Board will exercise its discretion under Section 57.8(1) of the Act to grant Knapp's unopposed motion and direct IEPA to reimburse Knapp \$9,990.38 in legal fees and costs.

The Board incorporates by reference its findings of fact and conclusions of law from its September 22, 2016 interim opinion and order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board reverses IEPA's March 8, 2016 determination to modify Knapp Oil Company's Stage 1 site investigation budget for costs associated with a camera and deems the camera costs approved.
2. The Board finds that IEPA's March 8, 2016 determination did not properly modify Knapp Oil Company's Stage 1 site investigation budget for costs associated with a bailer, survey equipment, and a sampling kit and reverses the determination as to that equipment. The Board deems the budget for those items to be approved.
3. The Board grants Knapp Oil Company's motion to authorize payment and directs IEPA to reimburse Knapp \$9,990.38 in legal fees and costs from the UST Fund.

¹ Mr. Shaw states that his summary includes one entry of \$900 for 4.5 hours "not related to this appeal." Aff. at 1-2. His request deducts this amount. *Id.* at 2; see Exh. A. at 2.

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, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 17, 2016, 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