

**STATE OF WISCONSIN**  
**TAX APPEALS COMMISSION**

---

**THE NEWARK GROUP, INC.;**

**DOCKET NOS. 99-R-70,  
99-R-72 THROUGH 99-R-83**

**THE NEWARK GROUP, INC.,  
f/k/a PAPERBOARD CORP.;**

**DOCKET NOS. 00-M-44  
THROUGH 00-M-46**

**and**

**THE NEWARK GROUP, INC.,  
f/k/a RECYCLED FIBERS OF WI., INC.,  
1516 E. Thomas Avenue  
Milwaukee, WI 53211,**

**DOCKET NOS. 00-M-47  
AND 00-M-48**

Petitioner,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE  
P.O. Box 8907  
Madison, WI 53708,**

Respondent.

---

**DON M. MILLIS, COMMISSION CHAIRPERSON:**

These matters come before the Commission on petitioner's motion for costs pursuant to section 814.025 of the Statutes. Each party has submitted briefs with respect to the motion. Petitioner is represented by Foley & Lardner LLP, by Attorney Maureen A. McGinnity. Respondent is represented by Attorney Veronica Folstad.

Having considered the submissions of the parties and entire record in these matters, the Commission hereby finds, rules, and orders as follows:

## **RULING**

These matters came before the Commission for trial on March 4-5, 2003. At issue were whether certain real and personal property owned by petitioner were exempt from the property tax under section 70.11(21) of the Statutes as property used in treating waste or abating pollution. In addition, petitioner sought an assessment of costs, including attorney fees, against respondent, arguing that respondent's positions in these matter were frivolous.

On March 22, 2004, the Commission issued its Decision and Order in these matters, holding that (1) petitioner's real and personal property used by its Recycled Fibers division was not exempt from the property tax, (2) petitioner's real and personal property used by its Paperboard division, from receipt of waste paper and corrugated containers to its manufacture of paperboard, was exempt from the property tax, and (3) respondent knew or should have known that two of its defenses lacked a reasonable basis in law and could not be supported by a good faith argument for the extension, modification or reversal of existing law.

Specifically, the two arguments determined by the Commission to be frivolous were: (1) respondent's argument in its briefs on summary judgment and in its post-hearing brief that the Paperboard division's raw material was not "waste" as that term is used in section 70.11(21), and (2) respondent's argument in its post-hearing brief that the Paperboard division's activities do not abate or eliminate water or air pollution.

The March 22, 2004, Decision and Order directed petitioner to submit in affidavit form its costs to rebut the two defenses specified above. Respondent was

provided an opportunity to respond to petitioner's submission. Petitioner then filed its reply brief.<sup>1</sup>

Petitioner's counsel billed petitioner \$111,512.50 for attorney fees related to (1) preparing petitioner's summary judgment materials ("Phase 1"), (2) responding to respondent's cross-motion for summary judgment ("Phase 2"), (3) preparation and conduct of the hearing ("Phase 3"), and (4) post-hearing briefing ("Phase 4"). Petitioner's counsel deducted a 2% discount from this amount.

Petitioner's time ledgers contain descriptions of attorney fee charges that explicitly pertain to the two defenses that the Commission determined were frivolous. Petitioner's counsel determined these **specific amounts** with respect to each of the four Phases described above:

Phase 1	\$800
Phase 2	\$1,219
Phase 3	\$1,052
Phase 4	\$2,800
TOTAL	\$5,871

In order to ascertain the amount of remaining fees charged with respect to the four Phases that are attributable to the frivolous arguments, petitioner's counsel calculated a percentage of effort in each Phase that was attributed to the frivolous arguments. These percentages are:

Phase 1	25%
Phase 2	15%

---

<sup>1</sup> In its response, respondent spent considerable space challenging the Commission's conclusion that it possessed the authority to assess costs under section 814.025. In response to a motion by petitioner to strike this material in respondent's brief, the Commission, on May 19, 2004, granted the motion to strike and reiterated that the Commission would not revisit the issue of the Commission's authority to entertain motions under section 814.025.

Phase 3	20%
Phase 4	40%

Petitioner's counsel calculated that 25% of its effort with respect to Phase 1 related to the definition of waste issue, based on the following measures of effort with respect to the waste issue: (1) 9 of the 47 paragraphs in its statement of facts in its opening summary judgment brief, (2) 2 of the 8 pages in its legal argument in its opening summary judgment brief, and (3) 9 of the 28 pages in its supporting affidavit.

Petitioner's counsel calculated that 15% of its effort with respect to Phase 2 related to the definition of waste issue, because 2 of the 10 pages addressing the merits in its 24-page combined brief in opposition to respondent's motion and in support of its own motion related to the waste issue.

Petitioner's counsel estimated that 20% of its Phase 3 hearing preparation and hearing time was devoted to the waste issue.

Petitioner's counsel calculated that 40% of its effort with respect to Phase 4 related to the definition of waste or pollution abatement issues, based on the following measures of effort related to these issues: (1) 18 of the 59 paragraphs in its proposed findings of fact in its opening brief, (2) 11 of the 18 pages in its legal argument in its opening brief, and (3) 6 of the 15 pages dedicated to legal argument in its 18-page reply brief.

Based on these calculations, petitioner's counsel allocated its **non-specific charges** falling within each of the 4 Phases as follows:

Phase 1	\$7,065
---------	---------

Phase 2	\$1,747
Phase 3	\$4,897
Phase 4	\$9,065
TOTAL	\$22,774

Petitioner's counsel added the total of the specific charges, i.e., \$5,871, and non-specific charges, i.e., \$22,774, and calculated total attorney fee charges attributed to the two frivolous defenses as \$28,645, and then deducted the 2% discount, for a total award for attorney fees of \$28,072.10.

With respect to costs, petitioner incurred and paid costs of \$1,892 in photocopying charges, plus \$4,588.30 in electronic research charges, for a total of \$6,480.30 related to the 4 Phases. Petitioner's counsel estimates that 20% of these charges, i.e., \$1,296, can be allocated to the frivolous issues.

In all, petitioner's counsel seeks a total award of costs and attorney fees of \$29,368.

The Decision and Order provided only for costs associated with the summary judgment motion and in petitioner's post-hearing briefs. The Commission did not award costs and attorney fees with respect to preparation and conduct of the hearing. Therefore, we will not award attorney fees with respect to Phase 3. Deducting specific and non-specific charges related to Phase 3 leaves total chargeable attorney fees (pre-discount) of \$22,696, or 20.3% of total pre-discount fees of \$111,512.50.

Petitioner's counsel's methodology with respect to costs was subjective at best. Petitioner's counsel simply gave its "best estimate" of 20%. A more reasonable method would be to apply the percentage of eligible attorney fees to total costs. As it happens, the percentage of eligible attorney fees is 20.3%, virtually the same as

counsel's best estimate. Therefore, the Commission will not alter the request for costs by petitioner.

Respondent objects to the allocation of any non-specific charges for attorney fees. Respondent argues that unless a charge specifically described one of the two frivolous defenses, it should not be assessable. It is ridiculous to suggest that an attorney would list each and every issue upon which he or she was working when describing activity on a time ledger. Where the charge does not specifically address one of the frivolous defenses, it is more than reasonable to allocate totally time charges based on the measures offered by petitioner's counsel. The allocation we approve here is based on a much more sophisticated analysis than the award that was approved in *Lane v. Sharp Packaging Systems, Inc.*, 251 Wis. 2d 68, 119-20 (2002) (circuit court, ruling from the bench, simply awarded 50% of costs without requiring the prevailing party to allocate time charges between various activities).

Respondent also objects to those Phase 1 time charges where the descriptions might not specifically relate to the preparation of a brief, but rather a conference or preparation of affidavits. Respondent also objects to the inclusion of statements of the facts in briefs with respect to the frivolous arguments. Marshaling the undisputed material facts for presentation to the tribunal is part and parcel of pursuing a summary judgment motion. *L.L.N. v. Clauder*, 209 Wis. 2d 674, 683-84 (1997) (moving party must show there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law). Moreover, the Decision and Order referred to petitioner's summary judgment briefs, and these briefs included discussion of the

undisputed material facts and were not limited only to legal argument. Therefore, we

reject respondent's assertion.<sup>2</sup>

Respondent also argues that the amount of the fees and costs awarded should be multiplied by 18%, i.e., or 3/17, due to its assertion that frivolous arguments were found in only 3 of 17 dockets. We fail to see the logic of this argument. The Commission sought to compensate petitioner for its cost to address respondent's frivolous defenses. It matters not whether the frivolous defenses applied to 1 or 17 dockets. If petitioner reasonably spent \$23,000 to rebut these defenses, it is irrelevant how many dockets were involved. As in most multiple-docket cases presented to the Commission, the amount at issue can vary significantly. Dockets are a function of the assessments issued by respondent. It only makes sense that a party may spend more resources asserting its position in a docket at which more is at stake than a docket where relatively little is at stake. Thus, to adopt a rule that any award of fees and costs must be reduced by the percentage of dockets involved would only distort the most well-reasoned basis for awarding fees and costs.

As indicated above, all specific and non-specific charges for attorney fees, less those associated with Phase 3, amounts to \$22,696. After deducting the 2%

---

<sup>2</sup> It may appear that the Commission is inconsistent in allowing activities related to developing the factual record on summary judgment to be included in eligible costs, yet disallowing petitioner's costs related to preparation and conduct of the hearing. We believe there is no inconsistency. The bulk of the testimony at trial that was related to one of respondent's frivolous defenses was the testimony of petitioner's expert who explained how petitioner's activities abated pollution. In the Decision and Order, the Commission concluded that respondent's position on this issue was not frivolous with respect to summary judgment because petitioner had not made the necessary factual record and determined it was an issue for trial. However, once the uncontradicted testimony was received, the Commission determined that the maintenance of respondent's position was frivolous. Thus, it was necessary for petitioner to make a sufficient factual record on the abatement issue, and it would be imprudent to award fees and costs of petitioner to present this testimony.



discount, the total amount of eligible attorney fees is \$22,242. After adding this number to the total eligible costs, i.e., \$1,296, the total award to petitioner is \$23,538.

**ORDER<sup>3</sup>**

1. Petitioner's motion for costs is granted in part and denied in part.
2. Respondent shall remit \$23,538 in total fees and costs under section 814.025.

Dated at Madison, Wisconsin, this 2nd day of June, 2004.

**WISCONSIN TAX APPEALS COMMISSION**

---

Don M. Millis, Commission Chairperson

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

---

<sup>3</sup> This Ruling and Order is issued by a single Commissioner under the authority provided by section 73.01(4)(em)2 of the Statutes as created by 2003 Wisconsin Act 33, § 1614d.