

**BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO**

COSHOCTON COUNTY CITIZENS FOR A
SAFE COMMUNITY, ET AL.

Case No. ERAC 165768-
995773

Appellants,

v.

JOSEPH KONCELIK, DIRECTOR
OF ENVIRONMENTAL PROTECTION, ET AL.

Appellees.

Issued: March 16, 2006

**RULING ON APPELLEE COSHOCTON ETHANOL, LLC'S REQUEST THAT
THE COMMISSISON SET APPELLANTS' EXPERT FEES AT A
REASONABLE RATE**

This appeal originated with the Environmental Review Appeals Commission ("ERAC," "Commission") upon Appellant Coshocton County Citizens for a Safe Community's ("Citizens") appeal of the Director of the Environmental Protection Agency's ("Director," "OEPA," "Agency") issuance of a Permit to Install ("PTI") to Coshocton Ethanol, L.L.C. ("Coshocton Ethanol") authorizing Coshocton Ethanol to construct an ethanol production facility in Coshocton County, Ohio.

Phyllis Fox, Ph.D., prepared expert comments on the Draft PTI and submitted them to the Agency for their consideration. As part of discovery in the instant proceeding, Appellants indicated that they would call Dr. Fox to testify as an expert at the *de novo* hearing before the Commission currently scheduled to commence on May 22, 2006. Accordingly, Appellee Coshocton Ethanol determined to depose Dr. Fox. On December 15, 2005, counsel for Appellants sent a letter to counsel for Coshocton Ethanol

to confirm the arrangements for Dr. Fox's deposition. The letter included a list of fees requested by Dr. Fox for her deposition in Ohio.

Dr. Fox requested¹ that she be paid \$15,375.00 for the deposition. This amount was broken down as follows:

Travel:

Air Fare: Roundtrip from Oakland: $\$900 \times \frac{1}{2} = \450^2

Taxi in California: 2 roundtrips: $\$100 \times \frac{1}{2} = \50

Taxi in Ohio: \$440

Travel time to Ohio: 23 hours (16 flying; 4 layover; 3 packing) @ \$300 = \$3750

Hotel: 3 nights Concourse: \$600

Food: \$200

Travel Arrangements: 5 hours @ \$75 = \$375

Travel total: \$5,465

Expenses Attending Deposition

Review & Preparation: 12 hours @ \$300 = \$3600

Deposition: 8 hours @ \$650 = \$5200

Technical Support during Preparation: 10 hours @ \$75 = \$750

Administrative overhead (2%): \$360

(ERAC Case File Item DD).

Appellee Coshocton Ethanol contends that the fees are excessive and has requested that the Commission "set Appellants' expert fees at a reasonable rate." Appellants claim that Dr. Fox's \$500 per hour request is reasonable based on her credentials and experience. They also assert it is reasonable because it is her "customary and normal rate" and because it has "never before" been challenged. (ERAC Case File DD).

Ohio Rule of Civil Procedure 26(B) (4) (c) addresses the issue of expert witness fees and provides that an expert "may" be paid "a reasonable fee for time spent in

¹ During the course of this dispute, Dr. Fox has agreed to her "in-state" fee of \$500 per hour for deposition testimony and \$200 per hour for preparation time. (ERAC Case File Items FF and KK).

² Dr. Fox was planning to be in the Ohio area as part of services she is providing to the United States Department of Justice ("DOJ"), and, accordingly was willing to only charge Coshocton Ethanol half of her airfare, with the remainder being paid by DOJ.

responding to discovery” by the party seeking to depose the expert. (Civ. R. 26(B) (4) (c).)

The party seeking reimbursement of deposition fees bears the burden of proving reasonableness. If the parties provide little evidence to support their interpretation of a reasonable rate, the decisionmaker may use its discretion to determine a reasonable fee. *Royal MacCabees Life Insurance Co. v. Malachinski, D.O.*, 2001 U.S. Dist. LEXIS 3362, 2001 WL 290308, (N.D. Ill 2001).

A REASONABLE FEE

Little judicial guidance exists relative to what constitutes a reasonable fee for testimony provided by environmental experts. *New York v. Solvent Chem. Co.*, 210 F.R.D. 462 (W.D.N.Y 2002); 2002 U.S. Dist. LEXIS 18601. As a result, courts have considered the following factors to determine whether an expert’s fee is reasonable within the meaning of the rules of civil procedure:

(1) the witness’s area of expertise; (2) the education and training that is required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area; and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26. *Goldwater v. Postmaster General*, 136 F.R.D. 337, 339 (D.Ct. 1991).

These factors represent a judicial “effort to calibrate [a] balance so that a defendant will not be unduly hampered in [its] efforts to attract competent experts, while at the same time, an inquiring [plaintiff] will not be unfairly burdened by excessive ransoms which produce windfalls for the [defendant’s] experts.” *Magee v. Paul Revere Life Ins. Co.* 172 F.R.D. 627 (E.D.N.Y. 1997), 1997 U.S. Dist. LEXIS 5474, quoting

Anthony v. Abbott Labs., 106 F.R.D. 461, 465 (D.R.I. 1985).

Relative to factors one and two, *i.e.*, Dr. Fox's area of expertise and the education and training required which would justify her fee request, Appellants contend that Dr. Fox's "expertise and experience are at the very highest levels of the practice and, thus, justify the highest limit of fees." In support of this claim, Appellants filed Dr. Fox's extensive and impressive resume. Appellants have not, however, indicated that this education and training is required to provide the "expert insight" relative to the instant permit and whether hers is an area of expertise justifying her \$500 per hour fee. Further, the fact that Dr. Fox is a highly credentialed and experienced expert does not necessarily make her request reasonable. (See *e.g.*, *Cabana v. Forcier* 200 F.R.D. 9 (D. Mass. 2001), 2001 U.S. Dist. LEXIS 8495 ["This court does not question Dr. Ziem's qualifications which appear to be prodigious but her requested fees are simply unconscionable"]; *Kirby v. Ahmad* (1994), 63 Ohio Misc. 2d 533 ["This court has no doubt that Dr. Artz is indeed a well-qualified physician and that he has the qualifications and expertise to testify in this particular case However, the mandate of Rule 26(b)(4)(c) is not that an adverse expert will be paid his heart's desire, but that he will be paid a 'reasonable fee.'"]; *Anthony v. Abbott Labs.*, *supra* ["Perhaps he [Dr. Goldstein] is, as the plaintiffs contend, 'one of only a handful of physicians . . . who has the qualifications and expertise to testify' Yet, he cannot be left free, in this sort of proceeding, arbitrarily to saddle his adversary with whatever price tag strikes his fancy."] (ERAC Case File Items FF and KK).

Further, Appellee Coshocton Ethanol's expert Mr. Howard Gebhart stated by

affidavit that he has “performed the air permitting and compliance work at 30 operating ethanol plants” and that the “issues on appeal as well as the comments submitted by Appellant are rather detailed, but in essence common and virtually identical to issues and comments” he has seen in other similar appeals. Mr. Gebhart is charging \$150 per hour as an expert in this appeal. (ERAC Case File Item LL, Exhibit I).

Relative to the third factor, *i.e.*, a consideration of prevailing rates of comparably respected available experts, Appellants provided the Commission with the educational and professional information for Ms. Camille Sears, “another frequently used expert” for environmental organizations in California who charges \$360 per hour for depositions.³ Appellants also provided a study conducted by the Public Utilities Commission (“PUC”) for the state of California which documented that experts providing consulting and research services to the PUC were paid between \$90 and \$475 per hour. Appellant asserts that the study is germane because the “role and level of expertise of such utility experts and environmental experts are comparable.” Further, he submits that fees for testifying would be even higher than those for research and consulting due to the “greater rigor and challenge involved [in litigation] compared to work performed in the benign setting of their own office.” (ERAC Case File Item KK).

Appellee Cochocton Ethanol provided the Commission with information relative to a number of national environmental consulting firms, the credentials and experience of experts within those firms, and the fees generally charged for environmental testimony. Four of the named experts, Dr. Stephen Webb, Dr. Vasiliki Keramida, Dr. Konrad Banaszak and Mr. John Kominsky, appear to be equivalent in stature to Dr. Fox and

³ The Commission notes that, unlike Dr. Fox, Ms. Sears does not possess a Ph.D.

charge an average of \$278.00 per hour for testimony, regardless of the location where their services are offered. (ERAC Case File Item LL),

In considering the prevailing rates of comparably respected available experts to determine a reasonable fee, Ohio's Third District Court of Appeals stated:

Dr. Lubbers filed a motion to set reasonable fees for his testimony, seeking \$8000.00 The trial court awarded Dr. Lubbers a sum of \$1500.00, well below the amount requested by Dr. Lubbers in his motion for fees . . . the trial court made its determination on fees after examining the evidence presented by Vance regarding similar witness fees imposed by other doctors in his specialization. After examining the record, we find that the fee imposed by the trial court was entirely reasonable. *Vance v. Marion Gen. Hosp.* (Jan. 17, 2006), 3rd Dist. No. 9-05-23, 2006 WL 93106; 2006 Ohio App. LEXIS 116.

Relative to the fourth factor, *i.e.*, a consideration of the nature, quality and complexity of the deposition responses that will be requested from Dr. Fox, it appears that she will be deposed about her comments on the Draft PTI, which, according to Mr. Gebhart are no different than those commonly seen in other similar cases. A review of Dr. Fox's comments leads the Commission to conclude that while they may be typical of comments in similar cases, they are nevertheless detailed, extensive and technically complex. (Certified Record 3-204 through 3-233).

Finally, relative to the cost of doing business in an expert's geographic area, Dr. Fox lives and works in California, where the cost of living and doing business is surely among the most expensive in the country. Dr. Webb is located in Greenville, South Carolina, Drs. Keramida and Banaszak appear to be based in Indianapolis, Indiana and Mr. Kominsky in Cincinnati, Ohio. The costs of living in these locales are likely to be lower than those in California.

After a consideration of all of the foregoing, the Commission finds that a fee of

\$375 per hour of deposition testimony is reasonable.

REIMBURSEMENT FOR PREPARATION

Appellee Coshocton Ethanol objects to paying Dr. Fox for time spent preparing for the deposition. Courts that have dealt with the issue of payment for preparation time are divided. Courts allowing payment for preparation time reason that experts should be paid for preparation time involving review of pertinent documents because good preparation results in a more efficient deposition. Further, in establishing a reasonable fee for preparation, they consider such factors as the volume and complexity of documents the expert must review and how long it has been since he/she has last examined them. These courts do not compensate an expert for time spent with counsel preparing for the deposition. *Cabana v. Forcier* 200 F.R.D. 9 (D.Mass. 2001), 2001 U.S. Dist. LEXIS 8495; *New York v. Solvent Chem. Co.*, 210 R.F.D. 462, 471 (W.D.N.Y. 2002), 2002 U.S. Dist. LEXIS 18601; *Magee v. Paul Revere Life Ins. Co.*, *supra*; *Patterson Farm, Inc. v. City of Britton* 22 F. Supp. 2d 1085 (D.S.D. 1998), 1998 U.S. Dist. LEXIS 16017.

Other courts have refused to award compensation for preparation time reasoning that "an expert's deposition is in part a dress rehearsal for his testimony at trial and thus his preparation is part of trial preparation" rather than time spent "responding to discovery." *Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45 (N.D. Ill. 1989). The courts adhering to this general rule that preparation time should not generally be compensated,

have created an exception to the rule and explained that compensation for preparation time would be “appropriate in cases where the litigation is complex, where the expert must review voluminous materials” or when significant time has passed between when the expert prepared his comments and when the deposition occurred. *Hose v. Chicago and North Western Transp. Co.*, 154 F.R.D. 222, 228 (S.D. Ia. 1994); *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 154 F.R.D. 212, 214 (E.D. Wis. 1994); *Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47-48 (N.D. Ill. 1989).

Dr. Fox requests that she be reimbursed for 12 hours of preparation time. Appellants provide no specifics regarding what Dr. Fox will have to review in order to be prepared for her deposition beyond a general statement that she will need to “reacquaint herself with the extensive documents in this case.” Further, they appear to argue that because Dr. Fox was compensated for preparation time in two previous cases, she is entitled to payment as requested in the instant matter.

It has been at least nine months since Dr. Fox prepared her comments on Coshocton Ethanol’s application. As such, reimbursing her to review her comments will likely result in a more efficient deposition. Accordingly, the Commission finds that 6 hours of preparation time at an hourly rate of \$200 is reasonable.

REIMBURSEMENT FOR TRAVEL

Appellee Coshocton Ethanol objects to paying Dr. Fox for time spent traveling to and from the deposition. Relative to compensation for travel time, courts generally attempt to ascertain which party selected the location of the deposition and acknowledge

the fact that a party seeking deposition either pays for the expert to travel to a location of its choosing, or pays its counsel to travel to the deponent's offices. So long as they are reasonable, time spent traveling to and from a deposition, and the direct expenses incurred during travel have been held to be compensable. *Magee v. Paul Revere Life Insurance Co.*, *supra*; *State of New York v. Solvent Chem. Co.*, *supra*; *Scoutto v. Secretary of the Dept. of Health and Human Services*, 1997 U.S. Claims LEXIS 195; *Patterson Farm, Inc. v. City of Britton*, *supra*.

It is unclear from the filings what, if any, agreement has been reached relative to where Dr. Fox will be deposed. If the deposition occurs in Ohio, Dr. Fox requests that she be reimbursed for 23 hours of travel time (including time spent in layovers and packing) and for direct travel expenses (plane fare, room accommodations and taxis). In the instant appeal, she has requested that she be paid \$300 per hour for travel; however, recent invoices of Dr. Fox's reflect a rate of \$200 per hour. (ERAC Case File Item KK).

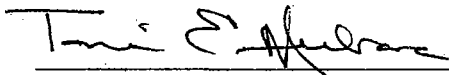
If the deposition occurs at Dr. Fox's office in California, she will incur no travel expenses. If she travels to Ohio she may reasonably be reimbursed for 16 hours of travel time at a rate of \$200.00 per hour, the cost of one round trip economy class plane ticket and direct expenses incurred, such as taxi, food and hotel accommodations. She will not be reimbursed for the five hours she claims for making travel arrangements or the three hours for packing.

Finally, Dr. Fox requests that she be reimbursed for "technical support during preparation" and "administrative overhead." Ohio Rule of Civil Procedure 26(B) (4) (c)

allows the expert to be reimbursed for "time spent in responding to discovery." The rule does not extend payment to paying technical support or administrative overhead, both of which are clearly expenses inherent in the operation of any business. Accordingly, Appellee need not compensate Dr. Fox for these expenses.

THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION

Entered in the Case File
of the Commission 1/6/06
day of March, 2006.


Toni E. Mulrane, Chairman


Julianna F. Bull, Vice Chairman


Melissa M. Shilling, Member

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