

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration of
A Cross-Section of Spring Creek
By Elden and Dorothy Brant Without
A Permit from the Commissioner
Of Natural Resources.

**ORDER GRANTING EXPERT
WITNESS EXPENSES**

This matter came before Administrative Law Judge Steve M. Mihalchick on June 27, 2000, at 3:00 p.m. at the Office of Administrative Hearings on the Brants' Motion requesting an order requiring the Department to pay the reasonable expenses of expert witnesses incurred when the Department of Natural Resources subpoenaed these witnesses for depositions conducted in November 1999. Louis A. Haik, Krebsbach & Haik, LTD., 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415-1631 appeared on behalf of Elden and Dorothy Brant. Peter L. Tester, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127 appeared on behalf of the Department of Natural Resources.

Based upon all the documents in the file and the arguments of counsel, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner of Natural Resources order that:

The Department of Natural Resources shall pay the reasonable fees and costs of the non-party witnesses who were subpoenaed for depositions in November 1999 as follows:

1. Witness fees for preparation and deposition time by Ray Wuolo in the amount of \$471.50.
2. Witness fees for preparation and deposition time by Jeff Ubl in the amount of \$513.00.
3. Witness fees for preparation and deposition time by Bruce Monson in the amount of \$1,818.00.
4. Witness fees for preparation and deposition time by Mark Wilson in the amount of \$832.50.
5. Mileage and parking fees in the amount of \$83.20.

Dated July 21, 2000

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Brandts' have moved for payment of expert witness fees incurred when the Department subpoenaed those witnesses for depositions in November 1999. No specific rule of the Office of Administrative Hearings expressly covers the determination of expert witness fees in contested cases. However, administrative law judges are empowered to hear and rule on motions and to make orders as deemed appropriate.¹ In ruling on motions where the Rules of the Office of Administrative Hearings are silent, the judge is to apply to Rules of Civil Procedure for the District Courts "to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding."² For this motion, it is appropriate to apply Minn. R. Civ. Proc. 45.06, which provides that expert witnesses are "entitled to compensation for the time and expense involved in preparing for and giving such testimony"

There is a question as to whether the Administrative Law Judge's determination in this matter is the final agency decision or a recommendation to the Commissioner of Natural Resources. The Department is willing to stipulate that the Administrative Law Judge has jurisdiction to make a recommendation. Various statutes and rules give administrative law judges authority to make final agency decisions on various type of cases and certain issues. But there is no such authority in regard to determining expert witness fees. Since the underlying contested case in this matter is one in which the Administrative Law Judge makes a recommendation, that same process will be followed here.

The Department asserts that "only the time each expert was deposed by the DNR and parking and mileage fees associated with each person's deposition" are costs that must be paid by the Department. The Department compared the fees claimed and the specifics of the depositions and concluded that only \$1,134.75 of the total claimed amount of \$3,761.50 is payable by the Department. The Department identified as improper the costs claimed for parking dated November 12, 19, and 26, since no depositions took place on those dates.

Responding to the Department's assertions, the Brandts' submitted affidavits from Barr Engineering (the experts' employer) regarding the amounts billed to the Department. The dates for which the amounts were identified, November 5 and 12, 1999, were the weekly totals, not daily billings. The time spent per day by each expert was itemized, along with copies of time sheets (where available).

¹ Minn. R. 1400.5500 D and J.

² Minn. R. 1400.6600.

Upon examining the time sheets, the claimed amounts matched the time spent for preparation before the dates of the depositions and attendance at the depositions. The single exception to that correlation is the claim of 1.1 hours for Ray Wuolo on Wednesday, November 10, 1999. Wuolo's time sheet for that date indicates that the work done was "review AG's material for hearing." Wuolo's deposition in this matter was taken on November 4, 1999.

As stated above, payment of fees for obtaining discovery of expert witnesses is governed by Minn. R. Civ. Proc. 45.06. There is no discretion afforded to awarding this compensation.³ The only questions that remain to be decided are whether the amounts billed are reasonable and whether the work billed is actually for deposition attendance or preparation.

The Department's claim of unreasonableness is partly based on the assumption that the hours on the invoice were incurred solely on the single date of the invoice, rather than over that week. With the explanation by Barr Engineering and the documentation provided for how each witness spent time on this matter, that is not a basis for concluding that the hours claimed are unreasonable.

The Department also maintained that the hours spent in preparation for the deposition were disproportionate to the hours each witness spent being deposed. The Administrative Law Judge heard the testimony of the experts at the hearing and reviewed their reports and other documents. Their investigation and analysis of the facts involved in this case was detailed and complex. Despite the fact that the Administrative Law Judge did not agree with some of their ultimate conclusions, there is no doubt that their work was of high quality, technically accurate, and intellectually honest. Barr Engineering is a reputable firm in our community. Moreover, there was no way for these experts to know what they would be asked during their depositions and what they would have to recall to defend their research and analysis. The hours spent in preparation were not unreasonable.

The only facially unreasonable fee is the claim of 1.1 hours for Ray Wuolo on Wednesday, November 10, 1999. The time was incurred after Wuolo's deposition and his time sheet indicates that the time was spent on hearing preparation. The only facially unreasonable costs were the parking costs identified on the November 19 and 26 invoices. The fee and cost totals listed above have been reduced by these amounts. Those totals are reasonable fees and costs and the Department is obligated to pay those costs.

SMM

³ *Bowman v. Bowman*, 493 N.W.2d 141, 144 (Minn. App. 1992) ("Rule 45.06 leaves no room for the trial court to exercise any discretion in deciding whether or not to award costs.")