

June 5, 2019

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APPEARANCES:

On behalf of Petitioner:

MR. GARY E. SCHMIDT
Kavanagh, Scully, Sudow, White & Frederick,
P.C.
301 SW Adams Street, Suite 700
Peoria, Illinois 61602
Ph. (309) 676-1381
Email: garyschmidt@ksswf.com

On behalf of Respondent:

MS. MELANIE JARVIS
Assistant Counsel
1021 North Grand Avenue East
Springfield, Illinois 62794
Ph. (217) 782-5544

Reported by: Carla Boehl, CSR
Lic. #084-002710

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PROCEEDINGS

1
2 HEARING OFFICER WEBB: Good morning. My name
3 is Carol Webb, and this is the hearing for PCB 18-83,
4 John D. Warsaw versus IEPA. It is June 5, and we are
5 beginning at ten o'clock a.m. There are no members
6 of the public present to comment, but written public
7 comment may be filed with the clerk by June 19.

8 At issue today is the Agency's denial of
9 reimbursement for certain remedial activities at
10 Warsaw IPCO on Route 122 in Tazewell County. The
11 Pollution Control Board members will make the final
12 decision in this case. My purpose is to conduct the
13 hearing in a neutral and orderly manner so that we
14 have a clear record of the proceedings. This hearing
15 was noticed pursuant to the Act and the Board's
16 rules, and will be conducted pursuant to Section
17 101.600 through 101.632 of the Board's procedural
18 rules.

19 At this time I would like to ask the
20 parties to, please, make their appearances on the
21 record.

22 MR. SCHMIDT: Gary Schmidt, attorney for the
23 Petitioner. You want my address?

24 HEARING OFFICER WEBB: No, I don't think --

1 no, we don't need your address. Thank you.

2 MS. JARVIS: Melanie Jarvis, special
3 assistant attorney general, representing the Illinois
4 Environmental Protection Agency.

5 HEARING OFFICER WEBB: Okay. Are there any
6 preliminary matters to discuss on the record today?

7 MS. JARVIS: Yes. We would like to limit the
8 scope of this appeal because quite a few things had
9 been denied in our decision letter. But the issue in
10 this case is, one, a voucher -- and how much is that
11 voucher for?

12 MR. SCHMIDT: It's for \$5780.

13 MS. JARVIS: And it's for asphalt, and that
14 is what we're limiting this to, is whether or not the
15 Agency should reimburse for that voucher.

16 HEARING OFFICER WEBB: Okay, great. Would
17 Petitioner like to make an opening statement?

18 MR. SCHMIDT: Yes. What we will attempt to
19 show today is that back in -- I'm not sure; it's a
20 long time ago -- 1998 or 1999.

21 MR. WARSAW: 1999, the previous century is
22 when this thing started, the gas station overhaul.

23 MR. SCHMIDT: There was a leak of oil at the
24 gas station into the water supply in Minier. And

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1 when that was discovered, we'll try to prove that
2 under Early Action, examiners were called in to find
3 the source of the supply, and remediation went on for
4 a very extended period of time. One solution was
5 tried and it failed.

6 So then under Corrective Action -- and
7 that may be causing confusion here in payment of that
8 bill -- another method was approved, and it was
9 ultimately carried out, but the entire time the site
10 was left open, inoperable. And then in 2017 it was
11 closed. There was a letter of No Further Remediation
12 issued.

13 And our contention will be that there was
14 no necessity for this closure to be included in the
15 Corrective Action budget because the site was
16 initially opened under Early Action, had to be
17 reclosed, and that the invoice for the closure was
18 not required to be included in the Corrective Action
19 budget, and, therefore, should be paid.

20 HEARING OFFICER WEBB: Would the Agency like
21 to make an opening statement?

22 MS. JARVIS: Sure. Basically, what we have
23 is a situation where during the Early Action portion
24 of this, which is set out in the regulations at

1 734.210, we did not receive any requests for
2 reimbursement or any indication that the placement of
3 the -- or replacement of the asphalt was done in the
4 Early Action timeframe that we have. And the site
5 then proceeded on through Corrective Action and
6 through many years and never was this put in a
7 budget.

8 And then this received a No Further
9 Remediation letter which ended the activities at the
10 site. The budget at that point could not be amended.
11 The Agency did not feel we had the authority to do
12 any further budgets or Corrective Action plans. So
13 when the request for reimbursement came in, it was
14 denied as not being in a budget, and it was well past
15 the Early Action timeframe.

16 HEARING OFFICER WEBB: Okay. Mr. Schmidt,
17 would you like to call your first witness?

18 MR. SCHMIDT: Sure. Mr. John D. Warsaw.

19 HEARING OFFICER WEBB: Mr. Warsaw, would you,
20 please, come up here and have a seat right up here
21 next to the court reporter, and would the court
22 reporter, please, swear in the witness?

23 (Whereupon the witness was duly
24 sworn by the Notary Public.)

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1 JOHN D. WARSAW

2 called as a witness on behalf of Petitioner, having
3 been first duly sworn, was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. SCHMIDT:

7 **Q. Please state your name.**

8 A. John D. Warsaw.

9 **Q. And your address?**

10 A. I live at 102 Butternut Drive in Morton,
11 Illinois.

12 **Q. And what is the address of the property**
13 **in question?**

14 A. 210 Route 122 East, Minier, Illinois.

15 **Q. And what kind of business operation goes**
16 **on there?**

17 A. It was a gas station and right now it's a
18 motor vehicle test lane for second division vehicles.

19 **Q. Are you the owner of that property?**

20 A. The trust is, yes. It's in a land trust,
21 and I am the sole trustee at this time.

22 **Q. How was contamination initially**
23 **discovered back in -- what year did you say?**

24 A. '99, about this time of the year, in

1 June, I think, of '99.

2 **Q. And how was that discovered?**

3 A. Well, we went through -- my dad was still
4 alive, in charge of the place. And he went to
5 rebuild the gas station and, of course, we had to
6 take the old tanks out. It wasn't in compliance. It
7 didn't have the double-walled tanks and stuff. And
8 when we dug into the area where the tanks were at, we
9 hit quite a bit of gasoline that had seeped into the
10 ground. We didn't have any diesel fuel or buried oil
11 at the time; it was all gasoline.

12 **Q. Who did the digging, the excavation, for**
13 **you?**

14 A. Total Petroleum was the contractor. They
15 did some digging, but I believe they used Dick Gaunt
16 Company to do most of it.

17 **Q. And at that time the asphalt was broken**
18 **up?**

19 A. Right. Asphalt and concrete was broken
20 up in order to get to the gas tanks, yes.

21 **Q. And then when the contamination was**
22 **discovered, what did you do to remediate it?**

23 A. Well, they either -- my dad or, I think,
24 probably Total got Al Green involved in it, Midwest

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1 Environmental, and they came down to investigate.

2 **Q. And what type of work does Al Green do?**

3 A. Well, he's an environmental contractor.
4 He's supposed to be able to clean these things up and
5 go through the EPA to do it.

6 **Q. Okay. And what was the suggested method**
7 **to remediate?**

8 A. Well, we would remove the tanks, which we
9 did. The tanks were junk and they were, you know,
10 totally out of compliance. They had to go. And then
11 they would do soil samples around the area to
12 determine how much this stuff had migrated, this
13 gasoline. And then after that, they suggested a
14 trench which would draw ground water out of this
15 trench -- it was about seven, eight foot deep -- into
16 the water table and would pump it into the city
17 sanitary system.

18 **Q. About what time -- what year was that**
19 **accomplished?**

20 A. That was accomplished -- setting that up
21 was accomplished fairly early, I believe the year
22 2006, something like that. It could be looked up,
23 2005, along in there, maybe even '4 but that was --
24 they had permission to do that. They put a pump in

1 there and a motor and drew the water out and put it
2 into the sanitary system.

3 **Q. Okay. You were trying to purify the**
4 **ground water?**

5 A. Purifying the ground water. This is
6 common -- a common solution to these problems back
7 then, yeah.

8 **Q. And did that include putting pipes into**
9 **the ground at the station?**

10 A. It did, yes. Some of them may still be
11 on the property, tell you the truth.

12 **Q. And some sort of a filter device, I**
13 **assume?**

14 A. Yeah, filter some out, but it basically
15 just pumped the water out and it went to the sanitary
16 system.

17 **Q. Okay. And did that remediation effort**
18 **work?**

19 A. It did not work. I think for two
20 reasons. It would have worked -- we had some wet
21 years -- but the motor burned out in the pump. And
22 we went to get it fixed, and no one wanted to fix it
23 because the EPA was taking too long to reimburse.
24 You know, you put your money into it. We needed a

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1 bigger motor, is what one electrician told me. He
2 said, that motor, I could rewire it and keep rewiring
3 it, but it will not do the job. So then it set and
4 set and set for four or five years.

5 **Q. What year did they discover that the**
6 **purifying device pumping the water to the sanitary**
7 **district wasn't working?**

8 A. Probably by year seven, something like
9 that. It wasn't going to work. Our system wasn't
10 going to work. Then we had some dry years and
11 probably wouldn't have gotten enough water for it to
12 work.

13 **Q. And the entire time the station was not**
14 **operating as a gasoline station?**

15 A. Yes. We put new tanks in. It was
16 operating as a gasoline station.

17 **Q. Okay. But this particular area was**
18 **opened up?**

19 A. We was opened up. We filled back in
20 maybe, but it was just laying there waiting for some
21 kind of solution.

22 **Q. Was it barricaded?**

23 A. Sort of, yeah, yeah.

24 **Q. What do you mean by sort of?**

1 A. Well, you couldn't get to part of the
2 property there, but we didn't at that time have a
3 hole you could fall into. And they was waiting on
4 some kind of solution to clean it up.

5 **Q. Okay. And when did you arrive at the**
6 **next solution?**

7 A. Probably about 2015, 2016. And what they
8 did then, they went down and sampled the ground, the
9 wells they put in. And they determined one right in
10 the neighborhood of the pumps or the tanks, the old
11 tanks, that was pretty dirty. It had benzene in it,
12 in fact, which is something you want to get rid of.
13 Then they authorized the excavation at that point in
14 time to haul off material.

15 **Q. Okay. Was that under a plan, a**
16 **Corrective Action plan?**

17 A. That was another Corrective Action plan,
18 yes.

19 **Q. Okay. And was that approved by the**
20 **Illinois EPA?**

21 A. That was approved by the Illinois EPA.

22 **Q. And was it ultimately tested to be**
23 **determined that that had cleaned up the site?**

24 A. Yes. After we got that stuff hauled out,

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1 that met the requirements to have the site cleaned
2 up, yes. That was in 2017.

3 **Q. Okay. And in that year you received a**
4 **letter of No Further Remediation, is that correct?**

5 A. I don't know exactly when the NFR letter
6 was issued. It may be 20 -- that is something that
7 could be referenced. It might have been 2018 before
8 it was actually --

9 **Q. We have got a record of that. I believe**
10 **it was in September of '17.**

11 A. Okay. That might very well be so,
12 because we did that in the spring.

13 MR. SCHMIDT: I have the invoice in question
14 marked as Exhibit A. Do you want me to do it?

15 HEARING OFFICER WEBB: All right. Here, I'll
16 do it.

17 MR. SCHMIDT: I have got A, B, C & D here, if
18 you want to.

19 (Whereupon Exhibit A was
20 presented for purposes of
21 identification as of this date.)

22 THE WITNESS: I might add that, after this
23 whole tank came out, it wasn't left open because they
24 figured the ground de-watering system would solve the

1 problem. Oftentimes, they leave it open.

2 BY MR. SCHMIDT:

3 **Q. The first system?**

4 A. The first system, yeah. That was
5 backfilled, but no pavement was replaced.

6 **Q. I'm going to hand you what's been marked**
7 **as Petitioner's Exhibit A.**

8 A. Yeah.

9 **Q. Can you identify what that is?**

10 A. That is the invoice for the asphalt that
11 was put down at the gas station where the tanks were
12 at and the polluted material was at, and they
13 excavated and they went down with some new gravel
14 first so they could get a good job on their asphalt.

15 **Q. And what was the area of that asphalt?**

16 A. What was the area? It was in front of --
17 not in the front of the building, but off to the east
18 of the building, in front of the building but to the
19 east of the actual building where the tanks were at.

20 **Q. I mean, can you tell me what size of an**
21 **area does it cover?**

22 A. I don't know if I have ever measured it.
23 Sixty-four square yards is what it says here.

24 **Q. There we go.**

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1 A. And the in-depth shape and compacted
2 base, install three inches of asphalt. And most
3 asphalt contractors will not put their asphalt down
4 unless they are in control of their base. They have
5 got to have a good base under their asphalt or it
6 will break up.

7 **Q. And is this the same type of replacement,**
8 **in kind so to speak, as was there before the area was**
9 **excavated?**

10 A. Yes, yes. Right. It is the same kind
11 that was replaced.

12 **Q. Okay. And what was the date of this**
13 **invoice?**

14 A. This invoice was dated July 20, 2017.

15 **Q. Okay. And this was ultimately passed on**
16 **to be reimbursed by the Illinois EPA?**

17 A. It was, yes.

18 **Q. Closer to the project, correct?**

19 A. And they required a mechanic's lien from
20 this company here. We had to send them down.

21 **Q. And payment of it has been denied?**

22 A. Been denied.

23 **Q. Okay. Did you appeal that decision?**

24 A. Yes.

1 identification as of this date.)

2 Q. And then I'll hand you what's been marked
3 as Exhibit D, and it's been some time probably since
4 you saw that, but do you know what that is?

5 A. Paving demolition and well abandonment
6 costs. Well, there was some wells, manholes, with
7 this de-watering system we had.

8 Q. Well, what is the size shown there?

9 A. It says number of square feet 819.

10 Q. 819 square feet?

11 A. Asphalt, yes.

12 Q. In square feet that relates to 64 square
13 yards, I believe?

14 A. I think so, yes.

15 Q. That you saw earlier?

16 A. Right.

17 Q. And what does it show as the depth of the
18 blacktop?

19 A. Three inches.

20 Q. Three inches?

21 A. Which is common for commercial buildings.

22 Q. And what -- I think it also says the
23 cost?

24 A. \$5,782.14. It is \$2.14 higher than

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1 Exhibit A.

2 Q. Okay. And cost per square foot for the
3 blacktop?

4 A. \$7.06.

5 Q. Which is what you're asking to be
6 reimbursed, correct?

7 A. Yes. Well, the invoice there, which is a
8 little less than this here. That's actually what we
9 paid, 5780.

10 Q. Were you required under any state or
11 local law to cover up the area that was excavated?

12 A. Yes, we got to go back with a hard
13 surface, dust free surface. Couldn't just leave
14 gravel.

15 Q. And who requires that?

16 A. It would be the village of Minier. They
17 require that, I think, of all businesses, and it
18 probably has its source in the BOCA codes, I imagine,
19 the official code of administrators.

20 MR. SCHMIDT: No further questions.

21 MS. JARVIS: I don't have any questions for
22 this witness.

23 HEARING OFFICER WEBB: Okay. Thank you,
24 Mr. Warsaw.

1 Mr. Schmidt, do you have anything
2 further?

3 MR. SCHMIDT: I do not.

4 HEARING OFFICER WEBB: Would you like to
5 offer your exhibits?

6 MR. SCHMIDT: Yes, please.

7 HEARING OFFICER WEBB: Do you happen to know
8 off hand do they have a page number where they are in
9 the record? It's okay if you don't have it. I
10 just --

11 MR. SCHMIDT: It's a 1300 and some page
12 record. I will not know.

13 MS. JARVIS: It's possible that it is in the
14 reimbursement claim.

15 MR. SCHMIDT: Yes.

16 MS. JARVIS: Which starts at 1302.

17 HEARING OFFICER WEBB: That's fine. That's
18 fine.

19 MS. JARVIS: And ends at 1363. So it will be
20 between 1302 and 1363.

21 HEARING OFFICER WEBB: Okay. As Exhibits A,
22 B, C and D are already part of the administrative
23 record, I will go ahead and admit them as hearing
24 exhibits.

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1 (Whereupon Exhibits A, B, C and
2 D were admitted into evidence.)

3 Okay. Ms. Jarvis, you may call your
4 first witness.

5 MS. JARVIS: Okay. We call Brian Bauer.

6 HEARING OFFICER WEBB: Would the court
7 reporter, please, swear in the witness?

8 (Whereupon the witness was duly
9 sworn by the Notary Public.)

10 BRIAN BAUER

11 called as a witness on behalf of Respondent, having
12 been first duly sworn, was examined and testified as
13 follows:

14 DIRECT EXAMINATION

15 BY MS. JARVIS:

16 **Q. Please state your name?**

17 A. Brian Bauer.

18 **Q. And what is your -- what is your job?**

19 A. Good question. I'm the -- I guess I
20 would say I was the lead worker for the LUST
21 Reimbursement Claims Processor Unit.

22 **Q. And what does LUST stand for, just so we
23 have that?**

24 A. Leaking Underground Storage Tank.

1 **Q. And what does your job entail?**

2 A. I oversee all the processing and
3 assignments of reimbursement claims and --

4 **Q. And how long have you been employed at**
5 **the Agency?**

6 A. Since 1992.

7 **Q. Okay. And how long have you been**
8 **supervisor of the claims?**

9 A. I kind of eased into it, but I would say
10 about ten years.

11 **Q. And what was your position before you**
12 **became supervisor of the claims?**

13 A. I was LUST project manager.

14 **Q. Have you spent your time in the leaking**
15 **underground storage tank section your entire career?**

16 A. Entire career is in underground storage
17 tanks, yes.

18 **Q. And are you familiar with the site in**
19 **question here, the Warsaw IPCO site?**

20 A. Yeah, I am familiar with it.

21 **Q. And did you review the claim that's under**
22 **appeal for this site?**

23 A. I think the claim was actually written
24 and reviewed by Brad Dilbaitis, but I did oversee his

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1 review.

2 Q. And are you familiar with the record in
3 this case?

4 A. Yes, I did put that together.

5 Q. In this case have there been
6 reimbursement claims throughout the process?

7 A. Quite a few, I believe, yes.

8 Q. And were most of them approved? Denied?

9 A. Yeah, I'd have to say most of them were
10 approved. As I said, there might have been some
11 deductions here and there, but.

12 Q. And are you familiar with the regulations
13 governing Early Action?

14 A. Yes.

15 Q. And what is the timeframe for Early
16 Action?

17 A. For Early Action, costs have to be
18 incurred within 45 plus 14 days from the date of the
19 release or IEPA update.

20 Q. And then after that time what is the
21 normal process for getting approval of work and
22 getting reimbursement?

23 A. All costs after the Early Action
24 timeframe have to be approved in a plan and budget by

1 the technical staff.

2 Q. Does Early Action ever continue through
3 and including up until just before an NFR?

4 A. No.

5 Q. So it's strictly the 45 plus 14 days?

6 A. Yes. They can get an extension if they
7 get it pre-approved in writing within that 59 days.

8 Q. Was such an approval of an extension of
9 the Early Action timeframe asked for in this case?

10 A. No.

11 Q. Now, you put together the record. Have
12 you -- I'm assuming, have you looked through all of
13 the budgets or all of the plans and budgets?

14 A. Yeah, we looked through them.

15 Q. And at any time was the replacement of
16 asphalt approved in a plan or budget?

17 A. No, it was not.

18 Q. So then explain the thoughts behind the
19 denial of this claim for reimbursement of the
20 asphalt.

21 A. Those costs were denied because they
22 weren't approved in a plan or budget by the technical
23 staff.

24 Q. Would they have qualified as Early Action

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1 **costs?**

2 A. They would not have qualified. That
3 would have had to have been approved in a plan and
4 budget.

5 **Q. And is that because it was outside of the**
6 **14 -- 45 days plus 14?**

7 A. That is correct, yes.

8 MS. JARVIS: Okay. I have no further
9 questions.

10 HEARING OFFICER WEBB: Mr. Schmidt?

11 CROSS EXAMINATION

12 BY MR. SCHMIDT:

13 **Q. I believe the record shows the No Further**
14 **Remediation letter came down in September of 2017 on**
15 **this project. Does that sound correct?**

16 A. Yeah, that sounds about right.

17 **Q. Okay. Assuming it's correct, your**
18 **decision on this particular claim was issued in about**
19 **June of '18, does that sound correct to you?**

20 A. Yeah, I'd have to take your word without
21 looking at the actual letter.

22 **Q. Do you know was it immediately appealed?**

23 A. I believe so. I think they have 30 days
24 or 35 days to make the appeal.

1 Q. What I'm trying to establish then, that
2 the appeal was within one year of the letter of No
3 Further Remediation.

4 A. Okay.

5 Q. Does that sound correct?

6 A. Sure.

7 Q. Okay. I just bring that up because in
8 conversation I've heard that this item can't be
9 considered because we're now beyond one year from the
10 letter of No Further Remediation, but I wanted to
11 point out that the appeal was made within one year
12 from the letter of No Further Remediation.

13 A. Okay. It's -- yeah, it's cost submitted.
14 The costs have to be submitted within one year of the
15 NFR for reimbursement. And the claim. There is that
16 -- that's a rule.

17 Q. Okay. And so the claim was actually
18 submitted within that one year after the letter of No
19 Further Remediation?

20 A. Yeah, I believe so.

21 MR. SCHMIDT: Okay. And that's all I have.

22 REDIRECT EXAMINATION

23 BY MS. JARVIS:

24 Q. Can budgets be amended after the issuance

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1 of a No Further Remediation letter?

2 A. No.

3 Q. So while claims can be submitted, if it
4 doesn't meet the rules and the regulations, what
5 happens? If a claim is submitted within like -- I
6 didn't do that very articulately, and I apologize.

7 If a claim is submitted within the year
8 after the issuance of an NFR, are all of the costs
9 automatically approved?

10 A. No, we would -- we review the claim for
11 adherence to the plans and budgets.

12 Q. Right. And in this case this was denied
13 even though it was within the year for what reason?

14 A. Because it was -- those particular costs
15 were not approved in a plan or budget.

16 Q. Now, can plans or budgets be amended
17 during the year after an NFR?

18 A. No, plans or budgets have to be submitted
19 prior to the issuance of the NFR letter.

20 MS. JARVIS: I have nothing further.

21 HEARING OFFICER WEBB: Mr. Schmidt, anything
22 further for you?

23 MR. SCHMIDT: Okay, I have no further
24 questions.

1 HEARING OFFICER WEBB: Okay. Thank you,
2 Mr. Bauer.

3 HEARING OFFICER WEBB: Does the Agency have
4 anything further?

5 MS. JARVIS: No, the Agency rests.

6 HEARING OFFICER WEBB: Okay. The transcript
7 is due by June 12 and will be posted on the court's
8 website. The public comment deadline is June 19.
9 Public comment must be filed in accordance with
10 Section 101.626 of the Board's procedure rules.
11 Petitioner's brief is due by July 16 and Respondent's
12 brief is due by August 16.

13 Mr. Schmidt, would you like to make any
14 closing argument?

15 MR. SCHMIDT: No, I rest.

16 MS. JARVIS: And I would waive it for the
17 briefs.

18 HEARING OFFICER WEBB: Okay. At this time I
19 will conclude the proceedings. We stand adjourned,
20 and I thank you all for your participation.

21 DEPOSITION CONCLUDED AT 10:24 A.M.
22
23
24

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1 STATE OF ILLINOIS)
)SS
2 COUNTY OF MACOUPIN)

3 C E R T I F I C A T E

4 I, Carla J. Boehl, a Notary Public and Certified
5 Shorthand Reporter, do hereby certify that on the 5th
6 day of June 2019, the foregoing hearing was taken
7 down in shorthand by me and afterwards reduced to
8 typewritten form by me, and that the foregoing
9 transcript contains a true and accurate translation
10 of all such shorthand notes.

11 Given under my hand and seal this 10th day of
12 June 2019, at Virden, Illinois.

13 My commission expires April 13, 2023.

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22 _____
23 Notary Public
24 Certified Shorthand Reporter
Lic. #084-002710

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