ILLINOIS POLLUTION CONTROL BOARD
September 2, 2004

GINA PATTERMANN,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	PCB 99-187
BOUGHTON TRUCKING AND MATERIALS, INC.,	)	(Citizens Enforcement - Noise, Air)
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

On June 16, 2004, respondent, Boughton Trucking and Materials, Inc. (Boughton), moved the Board to reconsider its May 6, 2004 order granting Boughton's motion for summary judgment in part and denying it in part. On July 19, 2004, complainant, Ms. Gina Patterman, responded to the motion. Boughton replied on August 19, 2004. As discussed below, today's order denies Boughton's motion for reconsideration.

PROCEDURAL BACKGROUND

On June 17, 1999, the complainants Gina Patterman, Lisa Collins, and Deen Collins filed a citizens' enforcement complaint alleging noise and air pollution against Boughton Trucking and Materials, Inc. (Boughton). On September 23, 1999, the Board dismissed some of the violations alleged in the complaint as frivolous and accepted the balance of the complaint for hearing.

The complaint alleges air pollution, numeric noise violations, nuisance noise, and violations of the Board's impulsive sound limits. On January 24, 2003, Boughton moved the Board to dismiss complainants Lisa Collins and Deen Collins. On February 20, 2003, The Board granted the motion, dismissed the complainants, and amended the caption to reflect Gina Patterman as the sole complainant.

On November 10, 2003, Boughton moved the Board for summary judgment. On December 29, 2003, Ms. Patterman responded to Boughton's motion. Boughton replied on January 29, 2004.

On May 6, 2004, the Board granted Boughton's motion in part, finding that no genuine issues of material fact existed with respect to the alleged numerical noise violations and that Boughton was entitled to judgment as a matter of law on those claims. With respect to the nuisance noise and air pollution allegations, the Board denied Boughton's motion for summary judgment.

MOTION FOR RECONSIDERATION

Here, Boughton asks the Board to reconsider its finding that summary judgment in favor of Boughton was not appropriate with respect to the nuisance noise and air pollution claims. Mot. at 3. Boughton claims that no genuine issue of fact remains and the evidence shows that the dust and noise created by Boughton did not amount to an unreasonable interference with the lives of the complainant or her neighbors. Mot. at 8.

Ms. Patterman responded to the motion to reconsider, claiming that "a motion to reconsider an order granting or denying summary judgment 'raises the question of whether the judge erred in his previous application of existing law.'" Resp. at 3; citing Koroguylan, 213 Ill. App. 3d at 628. Ms. Patterman argues that Boughton has not identified any actual error in applying existing law but only resubmits the same argument that the Board has already decided. Ms. Patterman argues that even assuming Boughton meets the standard of review for a motion to reconsider, the issue of nuisance is not an issue properly decided by means of summary judgment. Resp. at 7-9.

DISCUSSION

A party may move the Board to reconsider and modify its decision within 35 days after receiving a final Board order. 35 Ill. Adm. Code 101.520(a). Boughton states that it received the Board's May 6, 2004 order on May 12, 2004. The Board finds that Boughton's motion for reconsideration, filed June 16, 2004, is therefore timely.

In ruling on a motion for reconsideration or modification, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902; Jersey County Sanitation v. IEPA, PCB 00-82 (Sept. 20, 2001). In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156, slip op. at 2 (Mar. 11, 1993), the Board observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991). "Reconsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probable that a different judgment would be reached." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

The Board finds that Boughton has not identified any newly discovered evidence not previously available, changes in the law, errors in how the Board applied the law, or facts in the record that the Board overlooked. Accordingly, the Board denies Boughton's motion to reconsider.

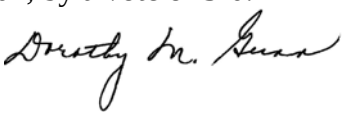
Even if the Board were to grant Boughton's motion to reconsider, summary judgment on the issue of unreasonableness is not appropriate under the facts at hand. As stated in the May 6, 2004 Board order, summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of

material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181, Ill. 2d at 483, 693 N.E.2d at 370. The United States Court of Appeals for the Seventh Circuit has held that the determination of a legal standard to given facts (such as reasonableness, negligence, or a failure to exercise reasonable care) is treated as a factual question even when the underlying facts are undisputed. Crabill v. Trans Union, L.L.C., 259 F.3d 662, 664 (7th Cir. 2001); *see also* Wheat v. Freeman Coal Mining Corp., 23 Ill. App. 3d 14, 319 N.E.2d 290, 297 (5th Dist. 1974); Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48, 52 (4th Dist. 1954) (holding the trial court was correct in submitting the question of private nuisance in an air pollution case to the jury). Here, the nature of the interference from the noise and dust emitted by Boughton remains at issue. Accordingly, summary judgment on the issue of reasonableness prior to hearing is not appropriate.

The Board affirms the May 6, 2004 order and directs the parties to hearing on the remaining issues.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 2, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board