

ILLINOIS POLLUTION CONTROL BOARD
December 21, 2017

JOHNS MANVILLE,)	
)	
Complainant,)	
)	
v.)	PCB 14-3
)	(Citizens Enforcement - Land)
ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

Johns Manville (JM) brought this enforcement action against the Illinois Department of Transportation (IDOT). JM alleged that IDOT violated the Illinois Environmental Protection Act (Act) through open dumping of asbestos waste, conducting an unpermitted waste disposal operation, and illegally disposing of asbestos waste at two sites in Waukegan, Lake County. Last year, after lengthy discovery and a five-day hearing, the Board found that IDOT violated the Act at some but not all specified areas within the two sites.

JM has cleaned up asbestos waste at the sites and seeks reimbursement from IDOT for the costs of the cleanup. When the Board found that IDOT violated the Act, it ruled that another hearing was necessary to determine the remedy for the violations; the record was insufficient to determine the appropriate level of reimbursement. The Board directed the hearing officer to hold a second hearing to develop a factual record concerning JM's work cleaning up the waste, the amount and reasonableness of JM's costs for this work, and the share of JM's costs attributable to IDOT.

In preparation for that hearing, IDOT seeks to discover documents and conduct depositions regarding the involvement of Commonwealth Edison Company (ComEd) in the cleanup work. IDOT seeks documents and depositions from both ComEd and JM. IDOT alleges that ComEd, not a party in this action, paid JM for some cleanup costs. ComEd and JM do not admit that any cleanup cost payment arrangement exists between them. In response to IDOT's requests, JM filed an *in camera* application for non-disclosure, protective order, and *in camera* inspection of privileged and confidential material. ComEd likewise filed an *in camera* application for non-disclosure and protective order, as well as a motion to quash. JM argues that the information IDOT requests is neither relevant nor calculated to lead to relevant evidence.

At the hearing officer's request, IDOT and JM each filed briefs addressing whether IDOT's discovery requests are seeking relevant information or are calculated to lead to relevant evidence. The Board finds that the requests are not. They stray from the narrow issues articulated by the Board for the remedy hearing, which solely concern JM's cleanup work of the specified areas where IDOT violated the Act, the amount and reasonableness of JM's costs for

that cleanup work, and the share of JM's costs attributable to IDOT. The discovery requests seek irrelevant information and are not calculated to lead to relevant information. Accordingly, the Board grants JM's application for protective order. JM's application for non-disclosure and inspection of privileged and confidential material is moot. The Board also grants ComEd's application for protective order. ComEd's application for non-disclosure and motion to quash are moot. Finally, the Board denies IDOT's motion to require JM to produce a witness for a second deposition.

First, the Board summarizes the procedural history between its order that found IDOT liable and this order. Next, the Board describes the applicable discovery rules. Finally, the Board analyzes the arguments made and rules in favor of JM and ComEd.

PROCEDURAL HISTORY

The Board's December 2016 Interim Opinion and Order Found IDOT Violated the Act and Directed a Hearing on Remedy

On December 15, 2016, the Board issued an interim opinion and order, finding IDOT violated the Act in specified areas of two sites near a JM manufacturing facility in Waukegan. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3 (Dec. 15, 2016) (Dec. 2016 Order). Specifically, the Board found that IDOT dispersed and buried asbestos waste in these areas during road construction. ComEd owns one of the two sites at which IDOT violated the Act. *Id.* at 2.

The Board also found that, in 2007, JM signed a consent order with the United States Environmental Protection Agency (USEPA) to clean up the sites. USEPA required excavation and disposal of waste soil, backfill with clean soil, and controls where waste remained. JM had conducted this work while its complaint was pending before the Board and completed it in 2016, just prior to the Board's December 2016 order. *Id.* at 4–5.

When it filed its complaint, JM asked the Board to require IDOT's participation in performing the cleanup. However, because the cleanup was completed before the Board found IDOT violated the Act, JM changed its request. Instead, JM asked the Board to require IDOT to reimburse JM's expenses in cleaning up the sites where IDOT violated the Act. *Id.* at 19. The Board agreed, finding it "appropriate that a party recover the cost of performing cleanup as a result of another party's violations," reflecting the Act's purpose "to restore and protect the environment and assure that adverse effects on the environment are borne by those who cause them." *Id.* at 21, *citing* 415 ILCS 5/2(b), 33(a) (2014).

JM estimated that it spent \$3,582,000 to investigate and clean up the waste on the two sites. Dec. 2016 Order at 19. The Board, however, did not require IDOT to pay this amount. JM did not provide details about the work it performed on the sites. Furthermore, JM merely estimated its costs; it did not provide records showing the actual amount spent on the cleanup. The Board found that the record lacked the facts necessary to "determine the reasonable costs [of the cleanup] that may be attributable to IDOT." *Id.* at 22.

The Board directed the hearing officer to hold an additional hearing to develop facts necessary to derive the appropriate remedy. The Board specifically limited the hearing to three issues: (1) the cleanup work performed by JM in the portions of the two sites where the Board found IDOT responsible for waste present in soil; (2) the amount and reasonableness of JM's costs for this work; and (3) the share of JM's costs attributable to IDOT. *Id.* at 22. Since then, the parties have been conducting discovery in preparation for the remedy hearing.

JM and ComEd Contest IDOT's Discovery Requests

IDOT made three discovery requests. First, on May 30, 2017, IDOT filed with the Board a subpoena that it served on ComEd. The subpoena, in general, requests documents related to payments from ComEd to JM for cleanup of the two sites. On June 20, 2017, ComEd filed a motion to quash or for protective order in response to this subpoena (ComEd Mot. to Quash). IDOT responded to the motion to quash on June 22, 2017. Second, on June 23, 2017, IDOT filed a subpoena that it served on ComEd for deposition of officials pertaining to cleanup cost payments between ComEd and JM. Third, on July 18, 2017, IDOT filed a motion seeking a second opportunity to depose Frederick Scott Myers, a JM official, concerning cleanup cost payments from ComEd.

On August 4, 2017, JM filed an application for non-disclosure and protective order in response to IDOT's discovery requests (Notice of Filing JM App.). ComEd also filed such an application on August 4, 2017 (Notice of Filing ComEd App.). Because these applications discuss documents that JM and ComEd argue contain non-disclosable confidential information, only the notice of filing for each application is publicly available; the underlying applications are not. IDOT responded to these applications on September 15, 2017. ComEd and JM both filed replies to IDOT's response on October 6, 2017.

On October 5, 2017, a hearing officer order directed JM and IDOT to specifically address the legal issue of whether IDOT's three discovery requests seek relevant information or are calculated to lead to relevant information, as described in 35 Ill. Adm. Code 101.616(a). IDOT and JM both filed briefs on October 27, 2017 (IDOT Br.; JM Br.). IDOT and JM also both filed response briefs on November 13, 2017 (IDOT Resp.; JM Resp.). The October 5 hearing officer order invited ComEd to file a brief; it filed a statement in response to the hearing officer's request on November 13, 2017. JM moved for leave to file a reply *instantly* on November 27, 2017. It also filed a reply on the same day. IDOT filed a response to JM's motion for leave on November 30, 2017. It also filed a motion for leave to file a sur-reply, along with the sur-reply itself, on December 20, 2017. The Board grants the parties' motions to file these briefs.

BOARD DISCOVERY RULES

Discovery is governed by Section 101.616 of the Board's procedural rules. 35 Ill. Adm. Code 101.616. Under Section 101.616(a), "[a]ll relevant information and information calculated to lead to relevant information is discoverable," subject to specified exceptions. 35 Ill. Adm. Code 101.616(a).

The Board's procedural rules do not define "relevant information" or "relevant evidence." The Board and the Board's hearing officers have applied Section 101.616(a), but in a fact-specific manner that does not provide a general interpretation of the term. *E.g.*, Timber Creek Homes, Inc. v. Village of Round Lake Park, PCB 14-99 (Apr. 3, 2014) (Board order); Fox Moraine, LLC v. United City of Yorkville, PCB 07-146 (Sept. 20, 2007) (Hearing officer order); People v. Packaging Personified, Inc., PCB 04-16 (June 28, 2006) (Hearing officer order).

Where the Board's discovery rules are silent, the Board may look to the Illinois Supreme Court Rules for guidance. 35 Ill. Adm. Code 101.616. The Supreme Court's Illinois Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401.

DISCUSSION

IDOT's Discovery Requests Seek Information That Is Neither Relevant nor Calculated to Lead to Information Relevant to the Remedy Hearing Issues

In its order finding IDOT violated the Act, the Board directed the hearing officer to conduct another hearing to gather evidence on just three issues:

- (1) The cleanup work performed by JM at the portions of the sites where the Board found IDOT responsible for waste present in soil;
- (2) The amount and reasonableness of JM's costs for this work; and
- (3) The share of JM's costs attributable to IDOT. Dec. 2016 Order at 22.

For information to be relevant, it must pertain to a "fact that is of consequence to the determination of the action." Ill. R. Evid. 401. The "determination of the action" here is the Board's determination of the three remedy hearing issues set forth above. During this discovery then, IDOT can seek information pertaining to any fact of consequence to that Board determination or calculated to lead to that information—any other information is not discoverable. *See* Ill. R. Evid. 401; 35 Ill. Adm. Code 616(a).

As JM correctly states, the only one found to have violated the Act is IDOT. The December 2016 order did not find that "JM, ComEd, or anyone else violated the Act." JM Br. at 5. Furthermore, no complaint has even been brought before the Board alleging that anyone else violated the Act.

IDOT's arguments erroneously presume that any payments from ComEd to JM necessarily reduce IDOT's liability under the Act to pay for the cleanup resulting from its violations. IDOT stresses that it must be allowed to explore "the question of whether [ComEd] has reimbursed [JM] for any of the work". IDOT Br. at 5. But IDOT fails to explain how the answer to this question pertains to any fact that is of consequence to what cleanup work was performed, how much it cost, whether the cost was reasonable, or what share is attributable to

IDOT. The Board finds that the information IDOT seeks to discover is neither relevant nor calculated to lead to information relevant to the issues for the remedy hearing.

The Board Need Not Apply the Collateral Source Rule

JM argues that the collateral source rule would also support the conclusion that the requested information is irrelevant, preventing IDOT's discovery requests. The collateral source rule is a principle in tort law. JM explains that, where a party harmed by a tortfeasor receives payments from a collateral source, *i.e.*, some third party to the tort action, evidence of that payment is not admissible in a jury trial. *See* JM Br. at 8–9 (citations omitted). Having ruled that IDOT seeks information that is not discoverable under Section 101.616 of the Board's procedural rules, the Board finds it unnecessary to decide whether the collateral source rule can apply to enforcement actions under the Act.

JM's and ComEd's Other Requests Are Moot

JM's application, ComEd's application, and ComEd's motion to quash set forth several grounds challenging IDOT's discovery requests other than relevance. Among other things, ComEd's motion to quash argues that IDOT's first subpoena is "unreasonably duplicative, overbroad and burdensome" and "unreasonably commands production of confidential information." ComEd Mot. to Quash at 4–9. Similarly, JM's and ComEd's later filings both argue that the information IDOT requests is non-disclosable for reasons of confidentiality and privilege. *See* Notice of Filing ComEd App., JM App.

Because the Board has found that IDOT requests irrelevant information, it need not also rule on whether the request is unreasonably duplicative or whether the information is non-disclosable. Because these legal arguments are moot, the Board both declines to rule on their merits and denies ComEd's motion to quash.

CONCLUSION

The Board ordered a remedy hearing on three issues. IDOT seeks to discover information that is neither relevant nor calculated to lead to information relevant to any of those issues. Accordingly, the Board grants JM's and ComEd's applications for protective order concerning IDOT's described discovery requests. The Board also denies IDOT's motion to require JM to produce a witness for a second deposition. Finally, the Board denies JM's and ComEd's *in camera* applications for non-disclosure, JM's *in camera* application for inspection of privileged and confidential material, and ComEd's motion to quash as moot.

ORDER

1. The Board grants JM's and ComEd's applications for protective order.
2. The Board denies IDOT's motion to require JM to produce Frederick Scott Myers for a second deposition.

3. The Board denies JM's and ComEd's *in camera* applications for non-disclosure, JM's *in camera* application for inspection of privileged and confidential material, and ComEd's motion to quash as moot.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 21, 2017, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk
Illinois Pollution Control Board