BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING AND SERVICE

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, January 26, 2018, I have filed with the Clerk of the Pollution Control Board the attached "Illinois Department of Transportation's Motion for Reconsideration of Board's December 21, 2017 Opinion and Order" and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

By: s/ *Evan J. McGinley*

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ILLINOIS DEPARTMENT OF TRANSPORTATION'S MOTION FOR RECONSIDERATION OF BOARD'S DECEMBER 21, 2017 OPINION AND ORDER

NOW COMES Respondent, the ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT"), which hereby moves the Illinois Pollution Control Board ("Board") to reconsider its December 21, 2017 Opinion and Order ("December 21st Order") denying IDOT the right to take discovery from third-party Commonwealth Edison. IDOT states the following in support of this motion:

I. INTRODUCTION

The Board erred when it denied IDOT the opportunity to take discovery from third party Commonwealth Edison, regarding whether it has made any payments to Johns Manville for the same work which it now seeks reimbursement from IDOT. While the Board's December 21st Order deemed such discovery to "stray from the narrow issues" which the Board has identified for further hearing, the Board's determination is inconsistent with the "wide latitude" that Illinois courts have held are to be afforded to parties conducting discovery. The Board's December 21st Order directly impacts IDOT's ability to prepare its defense to what will be Johns Manville's claims for reimbursement of its costs. The December 21st Order will also fundamentally impede IDOT's ability to verify any future claim by Johns Manville for reimbursement. As such, the

Board has abused the discretion which it is vested with to manage the conduct of discovery and the December 21st Order must be rescinded, so that IDOT may take this critical discovery.

II. STATEMENT OF FACTS

On August 12, 2016, after five days of hearings in May and June 2016, Johns Manville filed its Motion for Leave to File Third Amended Complaint ("Complaint"), which the Board accepted for filing on September 8, 2016. Fifteen of the 96 paragraphs in the Complaint plead allegations of Johns Manville's and Commonwealth Edison's joint obligations under the 2007 Administrative Order on Consent ("AOC") with the United State Environmental Protection Agency, to conduct site investigation and removal work at Sites 3 and 6, including:[1]

> 11. ComEd is also a party to the AOC. As the current owner of Site 3 and Site 4/5, and pursuant to the terms of the AOC has agreed to undertake certain response activities at these sites.
>
> * * *
>
> 35. Pursuant to the terms of the AOC, on June 13, 2008, JM and ComEd submitted to EPA for its review and approval an initial "Engineering Evaluation and Cost Analysis" ("EE|/CA") for a proposed response action at the Southwestern Sites.
>
> * * *
>
> 74. JM contends that because IDOT's violations of the Act have directly impacted the scope of the proposed remedy for Sites 3 and 6, including the need to excavate buried portions of Transite® pipe and create clean corridors around the six utilities (portions of the remedy not proposed by JM and ComEd but ordered by EPA in 2012), IDOT should be required to participate in the response actions for Sites 3 and 6.

On November 30, 2016, Johns Manville filed a Status Report, in which it advised the Board that "[a]s of the date of this Status Report, JM has just completed the majority of the active cleanup work on the Sites necessary to implement the RAWP ("Remedial Action Work Plan"). (Status Report, p.2.)

[1] The Complaint's references to Commonwealth Edison's involvement at the Sites can be found at Paragraphs 9, 11, 35-36, 40-41, 43-44, 47, 49, 51, 73-74, and 93-94.

On December 15, 2016, the Board issued its Interim Order and Opinion ("December 15th Order"), which chose to treat the Status Report as a motion to amend the Complaint, specifically, by changing the relief sought by Johns Manville through its Complaint (December 15th Order, p. 19.) The Board then went on to review its authority to award Johns Manville the reimbursement of its cleanup costs. (Id., pp. 19-21.) Finally, the December 15th Order directed the Hearing Officer "to conduct a hearing for evidence on the following issues:

* * *

2. The amount and reasonableness of JM's costs for this work.

In the Spring of 2017, the parties began conducting discovery related to the issues identified for further hearing in the December 15th Order.

On May 30, 2017, IDOT served a subpoena on third party Commonwealth Edison for production of documents. Subsequently, on June 23, 2017, IDOT issued a subpoena for the deposition of a corporate representative on various topics, including whether Commonwealth Edison had ever paid any money to Johns Manville for the work to be conducted under the terms of the AOC or about the existence and scope of any agreements between those two companies, relative to the performance of work under the AOC at Sites 3 and 6. The purpose of this discovery was to determine whether Commonwealth Edison, who committed to perform work under the AOC, had either performed work or paid or committed to pay money to Johns Manville, thereby reimbursing Johns Manville for its "costs".

Over the course of the next five months, the parties filed a series of briefs and, in the case of Commonwealth Edison and Johns Manville, *ex parte* applications for treating certain information sought by IDOT through discovery as confidential business information, pursuant to the Board's regulations at 35 Ill. Adm. Code 101.130.

On December 21, 2017, the Board issued its order denying IDOT the opportunity to take any of the discovery it had sought to take from Commonwealth Edison ("December 21st Order").

III. ARGUMENT

A. Relevant Legal Standards for a Motion for Reconsideration on Discovery

1. Legal Standards for a Motion for Reconsideration

Under the Board's rules, there are three grounds upon which a motion for reconsideration can be brought: the discovery of new evidence that was unavailable at the time that the Board issued its original decision in question; new law; or, an error by the Board in its application of law. 35 Ill. Adm. Code 101.902; *See also, People v. Freeman Coal*, PCB 10-61 and 11-02 (Feb. 7, 2013), *2. Additionally, the Board's cases have recognized a fourth ground upon which a motion for reconsideration can be brought, specifically, to bring to the Board's attention facts that were overlooked by the Board. *American Disposal Serv. Inc., v. County Bd. of Mclean County*, PCB 11-60 (Oct. 16, 2014) *9. IDOT's Motion is brought because the Board erred in ruling that IDOT was not entitled to obtain discovery from third party Commonwealth Edison and, additionally, to bring to the Board's attention facts which - in IDOT's view - it apparently failed to consider in issuing its December 21st Order.

2. Legal Standards Governing Relevancy of Discovery

As the Board notes in its December 21st Order, "[t]he Board's procedural rules do not define 'relevant information' or 'relevant evidence,'" and that relevancy has been decided on "a fact-specific basis." December 21st Order, p. 4. Given the silence of the Board's rules on what constitutes "relevant evidence," the Board may look to the Illinois Supreme Court's rules for guidance on this matter. *Id.* The Board therefore looks to Illinois Rule of Evidence for guidance on how to determine what constitutes "relevant evidence," *Id.* Rule 401, in turn, defines:

> '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 probably or less probable that it would be without the evidence.
> *Id*.

Illinois courts have determined that "information is relevant and discoverable if it is germane to a 'claim or defense' in a case; that is, where issue is joined by the pleadings." *United Nuclear Corp. v. Energy Conversion Devices*, 110 Ill.App.3d 88, 103 (1st Dist. 1982). While trial courts are vested with discretion to determine whether discovery is relevant, it is an abuse of that discretion for a court to deny a party the right to take discovery if in so doing, it "prevents the ascertainment of truth or substantially affects a crucial issue in the case . . ." *United Nuclear Corp.*, 110 Ill.App.3d at 104-5.

B. The Board Erred When it Barred IDOT From Taking Discovery on Whether Commonwealth Edison Had Paid for any of the Work Which has Been Performed at Sites 3 and 6

1. <u>The Discovery which IDOT Sought to Take from Commonwealth Edison is Directly Relevant to the Issues to be Addressed in the Next Round of Hearing in this Matter</u>

Initially, Johns Manville had requested that the Board order IDOT to participate in the USEPA-mandated cleanup of Sites 3 and 6. (Compl., Prayer for Relief, ¶ C.) However, after filing the Status Report, the Board, on its own motion, decided to convert the relief which Johns Manville originally sought through its Complaint (i.e., injunctive relief) to "reimbursement." (Dec. 15th Order, pp. 19-21.) By definition, "reimbursement" is a payment made by one party to another, to compensate the second party "for loss or damage sustained." *St. Farm Mut. Auto Ins. Co. v. Ill. Farmers Ins. Co.*, 368 Ill.App.3d 914, 921 (1st Dist. 2006) (citing *Black's Law Dictionary*, 8th Ed. (2004)), aff'd in part, vac. in part by *St. Farm Mut. Auto Ins. Co. v. Ill. Farmers Ins. Co.*, 226 Ill.2d 395 (2007).

In order to calculate the amount of money required to reimburse Johns Manville, the Board must first determine the amount of money that Johns Manville has spent remediating the asbestos contamination in the relevant the portions of Sites 3 and 6, for which the Board previously found IDOT liable, i.e., the amount of Johns Manville's "loss" incurred in conducting this remedial work. Since Commonwealth Edison was also required by the AOC to remediate the asbestos contamination, the question of whether Commonwealth Edison paid any money to Johns Manville to cover the costs of remediating Sites 3 and 6 is directly relevant to the issue of the amount of money that Johns Manville is entitled to receive as reimbursement. If Commonwealth Edison did not pay Johns Manville any money, or has not agreed to pay Johns Manville any money in the future, a representative form Commonwealth Edison can say that at a deposition. In short, in order to calculate Johns Manville's costs for purposes of reimbursement, <u>all information</u> related to Johns Manville's out of pocket expenses is necessary and relevant, including any monies paid by Commonwealth Edison, or any commitments to pay, which have been made by Commonwealth Edison to Johns Manville. Thus, the Board erred when it denied IDOT the opportunity to take discovery on these matters from Commonwealth Edison.

2. <u>The Board's Narrow View of What Constitutes "Relevant" Discovery Cannot be Squared with Caselaw</u>

The Board states in its December 21st Order that IDOT's discovery requests to Commonwealth Edison:

> [S]tray from the narrow issues articulated by the Board for the remedy hearing, which solely concerns 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.
> (Dec. 20th Order, pp. 1-2.)

The Board's finding in its December 21st Order on the scope of permissible discovery is contrary to the principle that parties are to be given "great latitude" in conducting discovery. *Elliot*

v. Bd. of Ed. Of City of Chicago, 31 IllApp.3d 355, 357 (1st Dist. 1975). In *Elliot*, plaintiffs brought a class action suit against the Board of Education, alleging that the Board unconstitutionally limited tuition payments for special education students attending schools outside the Chicago school district. *Id.* During a deposition in the case, the Board of Education sought to question the father of one of the student plaintiffs in the case about matters such as whether his son had "ever exhibited any interest in weapons . . .?" or "had ever threatened bodily harm to either you or his mother?" *Id.*, at 356.

The father refused to answer these questions, arguing that they were irrelevant to the issues underlying the case. *Id.* at 357. The Board filed a motion to compel the father to answer and the trial court dismissed the action, after being advised by the father's attorney that his client was "adamant" that he would not answer such questions. *Id.* at 357.

The appellate court affirmed the trial court's dismissal, noting that "discovery includes not only what is admissible at trial, but also that which leads to what is admissible at trial." *Id.* (citing *Monier v. Chamberlin*, 35 Ill.2d 351 (1966).) The appellate court went on to state that:

> In our opinion, the instant questions conceivably could lead to admissible evidence. For example, the answers could produce evidence which permits defendant to challenge the breadth of plaintiff's class.
> *Id.*

If the appellate court was able to find that the Board of Education's questions about a special education student's possible propensity for violence in a class action lawsuit challenging whether the Board was meeting its funding obligations fell within the "great latitude" provided for conducting discovery, then certainly the discovery which IDOT has attempted to take from Commonwealth Edison is within the scope of that "great latitude," as well. IDOT's efforts to find out whether Commonwealth Edison has made any payments to or otherwise compensated Johns Manville for the work that Johns Manville has

conducted at Sites 3 and 6, is far more closely related to the matters on which the Hearing Officer will conduct further hearing, than was the case with the discovery at issue in *Elliot.* Given the "wide latitude" standard for conducting discovery in Illinois, the Board erred when it denied IDOT the opportunity to take discovery from Commonwealth Edison.

C. The Board Apparently Failed to Consider the Entire Record, Especially the Issues Framed by Johns Manville's Complaint, in Denying IDOT the Opportunity to Take Discovery from Commonwealth Edison

In its December 21st Order, the Board notes that: "[a]s JM correctly states, the only one found to have violated the Act is IDOT." (December 21st Order, p. 4.) The inclusion of such a statement in the Board's order is curious. It has no relevancy to the issues which are presently before the Board. Additionally, it ignores the fact that Johns Manville and Commonwealth Edison are both jointly obligated under the AOC they entered into with USEPA for addressing the asbestos contamination at Sites 3 and 6. And, just as significantly, the Board's statement completely ignores the fact that Johns Manville's Complaint makes multiple references to its joint obligations with Commonwealth Edison under the terms of the AOC for performing the required work at Sites 3 and 6.

The Complaint is considered part of the record before the Board. *Unity Ventures v. IEPA,* PCB 80-175 (2/9/84), *1 ("pleadings, once filed, become part of the record which the Board must consider [in ruling on a motion for reconsideration]). In its December 21st Order, the Board gave no consideration of Commonwealth Edison's joint obligation with Johns Manville for conducting the removal work at Sites 3 and 6. As alleged in Johns Manville's Third Amended Complaint, Commonwealth Edison "has agreed to undertake certain response activities at" Sites 3 and 6. (Compl. ¶ 11.) Additionally, both Johns Manville and Commonwealth Edison have jointly submitted documents to USEPA that have analyzed options for conducting removal work which the USEPA has directed them to undertake at the sites (*See e.g.*, Compl. ¶¶ 35, 36, 40, 42-44, 47,

and 49), as well as the final Remedial Action Work Plan ("RAWP"), which served as the basis for conducting the removal work for which Johns Manville now seeks reimbursement from IDOT. (Compl. ¶ 51; *See also*, RAWP, Ex. 67-11, "This Final Remedial Action Work Plan (RAWP or Work Plan) is submitted on behalf of Respondents, Johns Manville and Commonwealth Edison (ComEd) . . .")

The Board's apparent failure to consider Commonwealth Edison's involvement with the remedial work at the Sites 3 and 6 means that its December 21st Order is based on an incomplete analysis of highly relevant facts which are contained in the record. This incomplete analysis, in turn, fails to consider the critical nature of the discovery sought by IDOT to its ability to prepare its defense for the upcoming hearing. The Board's December 21st Order effectively bars IDOT from ascertaining whether Johns Manville has already been reimbursed by Commonwealth Edison for any of the costs for which it now seeks reimbursement. By barring IDOT from obtaining this discovery, the Board has abused its discretion over the conduct of discovery. *United Nuclear Corp.*, 110 Ill.App.3d at 104-5. Accordingly, the Board should rescind its December 21st Order and allow IDOT the opportunity to conduct necessary and critical discovery on whether Commonwealth Edison has compensated or reimbursed Johns Manville for any of the work that it has conducted at Sites 3 and 6.

IV. CONCLUSION

For the reasons set forth herein, IDOT requests that the Board rescind its December 21st Order and allow IDOT to take discovery from Third Party Commonwealth Edison which it sought through its May and June subpoenas.

WHEREFORE, Respondent, the ILLINOIS DEPARTMENT OF TRANSPORTATION, requests that the Board:

1. Rescind its December 21st Order barring IDOT from obtaining third party discovery from Commonwealth Edison and permitting IDOT to take discovery from Commonwealth Edison, consistent with its May and June 2017 subpoenas; and,
2. Granting IDOT such other relief as the Board deems to be appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

***Johns Manville v. Illinois Department of Transportation*, PCB 14-3 (Citizens)**

I, EVAN J. McGINLEY, do hereby certify that, today, January 26, 2018, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of "Illinois Department of Transportation's Motion for Reconsideration of Board's December 21, 2017 Opinion and Order" on each of the parties listed below:

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