

ILLINOIS POLLUTION CONTROL BOARD
January 17, 2019

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

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

In this enforcement action, the Board found that the Illinois Department of Transportation (IDOT) violated the Environmental Protection Act (415 ILCS 5 (2016)) by illegally dumping asbestos waste at two sites in Waukegan, Lake County. Johns Manville (JM) brought the complaint after cleaning up those areas and seeks reimbursement from IDOT. The Board ordered a hearing to develop evidence concerning the cleanup work performed by JM at the two sites, the amount and reasonableness of JM's costs for this work, and the share of JM's costs attributable to IDOT.

On November 20, 2018, JM filed a motion for sanctions (Mot.) against IDOT, which the Board rules on in this order. JM argues that IDOT improperly served an unanticipated and unannounced report in violation of the hearing officer's discovery schedule. JM requests the Board bar IDOT from using the supplemental report, its contents, and any updated opinions arising from the supplemental report in a motion or at hearing. IDOT filed a response (Resp.) on December 12, 2018, which included an affidavit of IDOT's expert witness, Steven Gobelman. JM filed a reply (Rep.) on December 21, 2018. For the reasons explained below, the Board denies the motion for sanctions.

DISCUSSION

JM asserts that the unannounced supplemental report improperly introduces new opinions, and is untimely and highly prejudicial. Mot. at 9. JM makes two arguments in support. First, JM argues that IDOT's assertion of having a duty to supplement its prior discovery response is an attempt to mask the improper introduction of new opinions. Mot. at 10-12. Second, JM argues that IDOT violated the hearing officer order setting the discovery schedule and the Board's procedural rule for seeking leave to file a document late. Mot. at 9-10. The Board first considers whether IDOT had a duty to supplement.

IDOT Had the Duty to Supplement

The Board’s procedural rules address discovery. Discovery is the pre-hearing process that can be used to obtain facts and information about an adjudicatory proceeding to prepare for hearing. 35 Ill. Adm. Code 101.202. The tools of discovery include “depositions upon oral and written questions, written interrogatories, production of documents or things, and requests for admission” to obtain the necessary facts and information. *Id.* If a party learns that its response in discovery is in some material respect incomplete or incorrect, and the additional or corrected information has not otherwise been made known to the other parties during the discovery process or in writing, that party must amend its prior response. 35 Ill. Adm. Code 101.616(h). This is the duty to supplement.

In this case, Mr. Gobelman, concluded that the base map used in his initial report¹ was incorrect after reviewing the rebuttal report of JM’s retained expert² on October 30, 2018, four days after receiving it from IDOT. Resp., Exh. A at 1-2. Mr. Gobelman then prepared a Supplemental Report³ with a corrected base map and updated calculations for specific sections from the Initial Report impacted by the corrected base map. Resp., Exh. A at 2; *compare* Mot., Exh. A. *with* Mot., Exh. B. Upon receiving the Supplemental Report from Mr. Gobelman on November 7, 2018, which identified incorrect material in the Initial Report and amended conclusions impacted by the correction, IDOT served JM with the Supplemental Report that same day, citing its duty to supplement prior discovery responses. Resp., Exh. A at 2; Mot. at 3; Resp. at 7-8. This is consistent with the duty to supplement. See Gapinski v. Gujrati, 2017 IL App (3d) 150502, ¶ 41, 77 N.E.3d 1148, 1159 (3rd Dist 2017) (“Supplemental disclosure is required as soon as the additional information is known.” (citing Lucht v. Stage 2, Inc., 239 Ill. App. 3d 679, 692, 606 N.E.2d 750, 758 (4th Dist. 1992))); *cf.* Lucht, 239 Ill. App. 3d at 692 (“. . . answers to interrogatories can be expanded or supplemented by amending those answers as additional information, including opinions, becomes known.”); McGrew v. Pearlman, 304 Ill. App. 3d 697, 705, 710 N.E.2d 125, 131 (1st Dist. 1999) (stating the party’s obligation to seasonably supplement discovery under Illinois Supreme Court Rule 213(i) (166 Ill. 2d R. 213) extends to whenever new or additional information will be relied upon by an expert as the “bases” for his or her opinion at hearing).

The Board finds that by serving the Supplemental Report IDOT complied with its duty to supplement under 35 Ill. Adm. Code 101.616(h).

¹ “Expert Rebuttal Report of Steven Gobelman on Damages Attributable to IDOT based on IPCB Order of December 15, 2016” (Initial Report). Mot., Exh. A.

² “Expert Rebuttal Report of Douglas G. Dorgan, Jr. on Damages Attributable to IDOT” (JM Report). Mot., Exh. C.

³ “Expert Rebuttal Supplemental Report of Steven Gobelman on Damages Attributable to IDOT Based on IPCB Order of December 15, 2016” (Supplemental Report). Mot., Exh. B.

IDOT Did Not Unreasonably Violate a Hearing Officer Order or Board Rule

The Board next turns to JM's argument that IDOT violated the hearing officer order setting the discovery schedule and the requirement in 35 Ill. Adm. Code 101.522 for seeking leave to file a document late. Mot. at 9-10.

First, JM argues that IDOT's service of the Supplemental Report violated the discovery schedule set by the hearing officer, subjecting IDOT to sanctions. See Mot. at 9. This argument has no merit. Sanctions are appropriate for "unreasonably fail[ing] to comply with any provisions of [the Board's procedural rules] or any order entered by the Board or hearing officer . . ." 35 Ill. Adm. Code 101.800(a). Discovery schedules, however, do not anticipate when new information will become available or if a disclosure will be incomplete or incorrect requiring amendment, but those are the specific instances in which Section 101.616(h)'s duty to supplement applies. And, supplementing is mandatory. 35 Ill. Adm. Code 101.616(h) ("A party *must amend* any prior responses . . . if . . ." (emphasis added)). Violating or disrupting a discovery schedule to comply with a requirement of the Board's procedural rules is not unreasonable and therefore not subject to sanction.

Second, JM argues that service of the Supplemental Report violated 35 Ill. Adm. Code 101.522 (Motion for Extension of Time). See Mot. at 9. This argument also has no merit. Section 101.522 requires a motion to extend the time for filing any document or doing any act that is "required by these rules to be done within a limited period." 35 Ill. Adm. Code 101.522. As noted above, discovery schedules do not anticipate and therefore do not set deadlines for filings complying with the duty to supplement. And, Section 101.616(h) sets no deadline for filings supplementing a prior disclosure. See 35 Ill. Adm. Code 101.616(h). Because there is no deadline that requires extension, Section 101.522 does not apply.

Further, the facts do not support JM's assertions that the timing of the disclosure is prejudicial. IDOT did not sit on the Supplemental Report to delay the proceeding; IDOT served the Supplemental Report during discovery, the same day it received the Supplemental Report from Mr. Gobelman, and less than two weeks after receiving the JM Report (Oct. 25th to Nov. 7th). Nor could the timing of IDOT's service of the Supplemental Report be said to intentionally delay the proceeding, because service occurred at least 4 months before a potential hearing date (see Oct. 30, 2018 Hearing Officer Order). This provided ample time to permit additional depositions and discovery in response to the Supplemental Report, should it have been necessary, without impacting the hearing schedule. See 35 Ill. Adm. Code 101.616(c) ("All discovery must be completed at least 10 days prior to the scheduled hearing . . .").

CONCLUSION

By serving the Supplemental Report IDOT complied with its duty to supplement under 35 Ill. Adm. Code 101.616(h). The Board denies JM's motion. The hearing officer is directed to amend the discovery schedule to allow for an additional supplemental rebuttal report by JM's expert and additional deposition of experts.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 17, 2019, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, circular initial "D".

Don A. Brown, Clerk
Illinois Pollution Control Board