

ILLINOIS POLLUTION CONTROL BOARD
June 18, 2020

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

ORDER OF THE BOARD (by B.K. Carter)

On October 31, 2019, the hearing officer issued an order (HOO) denying several evidentiary motions: the Illinois Department of Transportation's (IDOT) Motion *in Limine* to Strike the Opinions of Douglas G. Dorgan, Jr. (Mot. in Lim.) filed on September 13, 2019; Johns Manville's (JM) Motion to Exclude Base Maps and Related Figures and Testimony at Hearing (Mot. to Excl.) filed on September 13, 2019; and IDOT's Motion to Strike Affidavit of Douglas G. Dorgan Jr. in Support of Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing (Mot. to Strike). On November 14, 2019, JM moved for interlocutory appeal of the HOO denying JM's Motion to Exclude (Int. App.). On December 10, 2019, IDOT filed its response. No other interlocutory appeal was filed regarding the HOO.

PROCEDURAL HISTORY

This case involves JM's efforts to recover cleanup costs from IDOT related asbestos-containing material (ACM) removed from two areas under IDOT control (Sites 3 and 6). After a five-day hearing in 2016, the Board issued an interim opinion and order. The Board found that IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 and adjacent areas along the north edge of Site 3. The Board further found that IDOT allowed open dumping of ACM waste on the portion of Site 3 within Parcel 0393. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3, slip op at 22-23 (Dec. 15, 2016). The Board directed the hearing officer to hold an additional hearing to develop facts necessary to derive the appropriate remedy. The Board narrowed the remedy hearing to the following three issues:

1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil.
2. The amount and reasonableness of JM's costs for this work.
3. The share of JM's costs attributable to IDOT. *Id.*

On August 13, 2019, the parties filed stipulations to issues one and two above but continue to dispute the share of JM's costs attributable to IDOT. It also appears that the parties

do not agree on “where the Board found IDOT responsible for ACM waste in the soil.” Mot. to Excl. at 3.

On September 13, 2019, IDOT filed its Motion *in Limine*, and JM filed its Motion to Exclude. On October 4, 2019, IDOT filed its Motion to Strike.

On October 31, 2019, the hearing officer denied all motions, finding *inter alia*:

1. “Mr. Dorgan has the requisite experience and qualifications to testify to the issue of cost allocation and may assist the Board, as he has in the past, in reaching its decision;”
2. “IDOT will be able to challenge Mr. Dorgan’s method of cost analysis at hearing through cross-examination if it chooses to do so;”
3. “Mr. Gobelman^[1] has vast experience in dealing with remediation and economic considerations;”
4. “Applying the same standard and reasoning used in my ruling regarding the testimony of Mr. Dorgan, . . . Mr. Gobelman has the requisite expertise to use Base Maps to determine areas of liability instead of reports and maps generated by AECOM^[2],” and
5. Finding this testimony admissible does not bind the Board to give them any weight or limit the parties from raising specific issues at hearing.

Hearing Officer Order at 3-4, 7, *citing* Thompson v. Gordon, 221 Ill.2d 414, 428-29 (Ill. 2006) (“a person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions.”).

On November 14, 2019, JM appealed the denial of its Motion to Exclude to the Board.

Section 101.518 of the Board’s regulations provides that “[a] party may take to the Board an interlocutory appeal from a hearing officer ruling by filing a motion within 14 days after the party receives the hearing officer’s written order.” (35 Ill. Adm. Code 101.518). JM’s motion was filed within this 14-day threshold. Therefore, this interlocutory appeal is properly before the Board.

This order summarizes JM’s Motion to Exclude in more detail before addressing the arguments on interlocutory appeal.

JM’s MOTION TO EXCLUDE BASE MAPS AND RELATED FIGURES AND TESTIMONY

JM requested an order barring IDOT from introducing any evidence, testimony, or exhibits/figures relating to or premised on “Base Maps.”³ Mot. to Excl. at 1. JM alleged that

¹ Mr. Gobelman is IDOT’s expert witness.

² AECOM is JM’s consultant.

³ With the exception of the Nicor Gas Line, JM also requested an order barring any related figures found in the Initial Report and Supplemental Report of Steven Gobelman and prepared by Andrews Engineering, Inc. *Id.*

Mr. Gobelman lacks the requisite knowledge, skill, experience, education, and expertise to have created the Base Maps. Mot. to Excl. at 9.

During the first hearing, JM's expert Mr. Dorgan, Mr. Gobelman and the Board relied on the reports and maps generated by AECOM which JM alleges were "ultimately approved" by the United States Environmental Protection Agency (USEPA). *Id.* at 7. For the remedy hearing, however, Mr. Gobelman created a different Base Map to determine the areas of IDOT's liability. Mot. to Excl. at 7.

JM claimed that Mr. Gobelman lacks the relevant experience and expertise required by Illinois Rule of Evidence 702 to have created the Base Maps. Mot. to Excl. at 9-11. Rule 702 provides that one must rely on expertise of their own to testify as an expert. JM argued that Mr. Gobleman could not have relied on his own expertise because he is not an expert in AutoCAD, the program used to create Base Maps. *Id.* at 12. Rather, JM argued that Mr. Gobelman relied on the AutoCAD work of Mr. Nguyen to ensure the Base Map's accuracy,⁴ but Mr. Nguyen stated in his deposition that he was "not the decision maker" and only made edits to the Base Maps at the direction of Mr. Gobleman. *Id.* at 10.

JM also argued that the Base Maps lack adequate foundation because their creation did not rely on and/or follow the appropriate applicable standards. Mot. to Excl. at 11-12. Furthermore, JM maintains the Base Maps were not created using facts or data relied upon by experts in the field. *Id.* at 12. JM asserts that Mr. Gobleman did not use AECOM, instead building the boundaries based on an aerial image from Google, which conflicted with AECOM's Final Site Survey boundaries. *Id.* at 13-14. JM alleged that failure to follow appropriate standards led to critical mistakes in creating the Base Maps. *Id.* at 13-14.

JM also argued that key features fail to align with their location as depicted on the AECOM maps. *Id.* at 15. JM claims that Mr. Gobleman did not follow established scientific principles and accepted methodologies in creating the Base Maps because the maps were built using inconsistent sources and the maps moved fixed features. *Id.* at 15-17. JM further alleged that Mr. Nguyen did not believe the documents he used to create the Base Map, including those generated by ELM Consulting, LLC⁵ (ELM) were reliable. *Id.* at 20.

Finally, JM argued that the reliance on Mr. Nguyen was unreasonable because he did not have any say or control as to what was prepared and made mistakes in the Base Maps. *Id.* at 19-21.

Summary of IDOT's Response

IDOT argued that Mr. Gobelman is qualified to provide his expert opinions on cost attribution analysis and that his Base Maps are reasonable and reliable based on his vast experience in dealing with remediation projects and economic considerations. Resp. at 12-15.

⁴ Mr. Gobelman's Base Map was created with the assistance of Michael Nguyen, a CAD manager. "CAD is a computer aided design and drafting technology which is routinely used to make maps." Mot. to Excl. at 7.

⁵ Johns Manville's consultant, ELM Consulting, LLC, drafted a "Surface and Subsurface Characterization for Site 2 and Site 3" report.

IDOT also argued that there were no USEPA approved maps or figures for the site. Even if there were, they have no bearing on how to assess cost attribution. *Id.* at 15-16.

IDOT argued that Mr. Gobelman's reliance on Mr. Nguyen's CAD work was reasonable. *Id.* at 19-20. IDOT stated that Mr. Nguyen has 17 years working for Andrews Engineering as a CAD technician. *Id.* at 19. Therefore, Mr. Nguyen's CAD work at issue here is trustworthy and has the requisite foundation. *Id.* at 20. IDOT also maintained that relying on the ELM documents was reasonable given that the USEPA relied on them when approving a remediation plan, and Mr. Dorgan and the Board relied on them in the liability portion of this proceeding. *Id.* at 20.

Throughout its response IDOT argues that Mr. Gobelman was able to and correctly relied upon Mr. Nguyen's CAD expertise. Finally, if its reliance on Mr. Nguyen was not reasonable, IDOT argues that JM's reliance on Ms. Dunton was also not reasonable. See *id.* at 20 ("then Mr. Dorgan's CAD drafter similarly lacks an adequate foundation, as his CAD drafter approached her [Riah Dunton] work similarly to how Mr. Nguyen approached his work for Mr. Gobelman.").

Discussion and Ruling

The hearing officer applied the same standard and reasoning used in his ruling regarding the testimony of Mr. Dorgan. "A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions." HOO at 3, *citing Thompson*, 221 Ill.2d at 428-29. The hearing officer found that Mr. Gobelman has the requisite expertise to use Base Maps to determine areas of liability instead of using reports and maps generated by AECOM. The hearing officer also observed that Mr. Gobelman has vast experience in dealing with remediation and economic considerations. The hearing officer found that Mr. Gobelman's reliance on Mr. Nguyen's CAD work was reasonable and Mr. Nguyen's 17 years' experience working for Andrews Engineering as a CAD drafter satisfies any foundation issues.

For these reasons the hearing officer denied JM's Motion to Exclude Base Maps and Related Figures and Testimony. The hearing officer also found that his order did not limit the Board's authority to give Mr. Gobelman's testimony the weight it deems appropriate or preclude JM from renewing its objections to specific issues at hearing.

JM's MOTION FOR INTERLOCUTORY APPEAL

JM argues that in denying JM's three arguments, the hearing officer misapplied the law, misinterpreted some of JM's arguments, and ignored significant facts. *Int. App.* at 8.

First, JM claims that the hearing officer failed to address whether Mr. Gobelman had the expertise to *create* his Base Maps, and should be barred from using them under Rule 702. *Id.* at 8-10. JM argues that the hearing officer instead addressed whether Mr. Gobelman had the expertise to *use* his Base Maps. JM then reiterated its arguments regarding the actions that Mr. Gobelman took vis-à-vis Mr. Nguyen in creating the Base Maps. *Id.* at 10-11. JM argued that Mr. Gobelman did not have the expertise in AutoCAD to create the Base Maps and the AutoCAD expert Mr. Nguyen did not have sufficient input to apply his expertise.

Second, JM claims that the hearing officer misapplied the law to JM's foundational arguments. *Id.* at 13. JM argues that, because the Base Maps are inconsistent with maps created for JM for the earlier phase of the instant case, the Base Maps lack foundation. *Id.* at 14. JM alleges that this inconsistency arises from "Mr. Gobelman's failure to select and use consistent and reliable sources and to accurately plot Key Features⁶ for his Base Maps and Figures." *Id.* at 14. JM further alleges that Mr. Gobelman's sources, including ELM 15, have inconsistent reference points and boundaries. *Id.* at 17-20. JM exhorts the Board to not "rely on evidence not supported by facts in the record and evidence that contradicts evidence it previously relied upon to identify where IDOT was liable" and "[t]o do so would call into question the veracity of either the Board's Interim Opinion or its opinion on damages." *Id.* at 17.

Third, JM claims that the hearing officer erred in finding that Mr. Gobelman reasonably relied upon Mr. Nguyen's expertise in AutoCAD in creating the Base Maps, because Mr. Nguyen did not exercise that expertise. *Id.* 25-26. JM further argues that "Mr. Nguyen was untrustworthy and did nothing to correct or validate Mr. Gobelman's faulty work." *Id.* at 26-27, *citing McKinny, McKinny v. Hobart Bros. Co.*, 2018 IL App (4th) 170333, ¶ 46.

IDOT Response

IDOT argues that JM has not provided any reason for the Board to overturn the hearing officer's order. *Resp.* at 9. IDOT first addresses through which lens the Board should review JM's arguments on appeal.

IDOT noted that neither the Board's regulations, nor its cases state the standard of review for an interlocutory appeal to the Board regarding a motion *in limine*. *Id.* at 11. However, IDOT analogizes this to the Illinois appellate courts' standard of review of trial court rulings on motions *in limine*. *Id.* at 11-12, *citing Swick v. Liataud*, 169 Ill.2d 504, 521 (1996) (trial court "has discretion in granting (or denying) a motion in limine and a reviewing court will not overturn that ruling, unless discretion was clearly abused."), *City of Chicago v. Concordia Evangelical Lutheran Church*, 2016 IL App (1st) 151864 ¶73 (trial court "abuses its discretion when its ruling is 'arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.>"). Applying this standard, IDOT argues that the hearing officer did not abuse his discretion in findings that: (1) "Mr. Gobelman has the requisite expertise to use Base Maps to determine areas of liability instead of reports and maps generated by AECOM;" and (2) Mr. Gobelman's testimony would be of aid to the Board. *Id.* at 12, *quoting* HOO at 7.

IDOT also argues that the Board should affirm the hearing officer's order, citing to several Board rulings affirming hearing officer evidentiary rulings. *Resp.* at 10, *citing Sierra Club v. Midwest Generation, LLC*, PCB 13-15, *2-3 (April 26, 2018), *Sierra Club, PCB 13-15*,

⁶ The Interlocutory Appeal identifies the "Key Features" collectively as "the boundaries of Sites 3 and 6 and Parcel No. 0393; the location of various contaminated soil borings and test pits as well as the contaminated areas they represent; and the positioning of the Removal Areas." *Id.* at 5.

*2-4 (Jan. 15, 2018), People of the State of Illinois v. Six M. Corp., Inc., PCB 12-35, *1 (May 3, 2017), Zarlenga v. Partnership Concepts, PCB 92-178, *1 (Feb. 3, 1994).

In addressing JM's specific arguments, IDOT notes that neither party found any case where the Board approved a particular method to allocate removal or cleanup costs between two or more parties. Resp. at 13. IDOT argues that the parties did not present evidence, including any maps, in order to allocate cleanup costs in the interim portion of the case. *Id.* at 13-14. IDOT further explains that Mr. Gobelman created the Base Maps because "he found he could not square the site boundaries" between the existing maps and JM's expert reports. *Id.* at 14.

In addition, IDOT argues that "[t]o the extent there are questions about the conclusions and opinions that Mr. Gobelman has reached regarding his cost allocation methodology, those are topics for the Board to deal with after the next round of hearings in this matter." *Id.* at 11.

DISCUSSION

Section 101.610 of the Board Rules gives hearing officers the authority to rule upon: (1) objections and evidentiary questions; (2) any motion directed to the hearing officer; and (3) offers of proof and receive evidence and rule upon objections to the introduction of evidence. 35 Ill. Adm. Code 101.610(l, n, q). The hearing officer has the authority to rule on all motions that are not dispositive of the proceeding. 35 Ill. Adm. Code 101.502(a).

Generally, the "hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois." 35 Ill. Adm. Code 101.626. However, some evidence may be admitted even if inadmissible in Illinois civil courts. The Illinois Administrative Procedure Act provides that evidence not admissible in Illinois civil courts may be admitted in administrative hearings when "commonly relied upon by reasonably prudent men in the conduct of their affairs." 5 ILCS 100/10-40(a) (2016). The Board's procedural rules reiterate this principle. They state that, at an adjudicatory hearing, the hearing officer "may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs." 35 Ill. Adm. Code 101.626(a), *see also* Whitfield v. Simpson, 312 F. Supp. 889, 895 (E.D. Ill. 1970) ("strict common law rules of evidence do not apply to an administrative hearing and . . . the admission of incompetent and irrelevant matter is not reversible error if there is substantial evidence to sustain the decision of the hearing body."), *citing* Yiannopoulos v. Robinson, 247 F.2d 655 (7th Cir., 1957).

Therefore, evidence is generally admissible in Board adjudicatory hearings if (1) it is admissible under Illinois civil courts' rules of evidence; or (2) it is material, relevant, and reliable.

With regard to expert testimony, it is well settled that the decision whether to admit expert testimony is within the sound discretion of the trial court. Snelson v. Kamm, 204 Ill.2d 1, 24, 272 Ill.Dec. 610, 787 N.E.2d 796 (2003). A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions. People v. Miller, 173 Ill.2d 167, 186, 219 Ill.Dec. 43, 670 N.E.2d 721 (1996). "There is no predetermined formula for

how an expert acquires specialized knowledge or experience and the expert can gain such through practical experience, scientific study, education, training or research.” Miller, 173 Ill.2d at 186, 219 Ill.Dec. 43, 670 N.E.2d 721.

In defense of its own expert, Mr. Dorgan, JM argued that “[a]n expert need only have knowledge and experience beyond that of an average citizen.” JM Resp. to Motion in Lim. at 3, *citing Thompson*, 221 Ill. 2d at 428, *Pyskaty v. Oyama*, 266 Ill. App. 3d 801, 808 (Ill. App. Ct. 1994) (“An expert’s opinion is allowed on the basis of his knowledge or experience which may aid the trier of fact.”).

Expert testimony, then, is admissible “if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence.” Snelson, 204 Ill.2d at 24, 272 Ill.Dec. 610, 787 N.E.2d 796.

Mr. Gobelman has already been qualified as an expert in the interim portion of this proceeding. The hearing officer has observed that Mr. Gobelman has vast experience in dealing with remediation and economic considerations. HOO at 7. Accordingly, Mr. Gobelman has the requisite expertise to use the Base Maps to determine the areas of liability which may aid the trier of fact. Further, Mr. Nguyen’s 17 years’ experience working for Andrews Engineering as a CAD drafter satisfies any foundation issues.

JM generally argues that the Base Maps are unreliable because they do not agree with the maps that JM’s consultant AECOM created. IDOT has alleges that Mr. Gobelman created the Base Maps to address inconsistencies with JM’s expert’s report. Resp. at 14. JM has not offered any convincing argument that the Board must exclude Mr. Gobelman’s potentially relevant evidence from the hearing when JM may address the weight of such evidence in cross-examination and post-hearing briefing. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 at 595 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”)

Therefore, the Board denies JM’s appeal and affirms the hearing officer’s denial of JM motion to exclude.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 18, 2020, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board