

SEP 29 2015

STATE OF ILLINOIS  
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD  
September 29, 2015

JOHNS MANVILLE, a Delaware Corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 14-3
	)	(Enforcement)
ILLINOIS DEPARTMENT OF	)	
TRANSPORTATION,	)	
	)	
Respondent.	)	



ORIGINAL

**HEARING OFFICER ORDER**

On August 31, 2015, the complainant Johns Manville (JM) filed an "Objection To Notice Of Deposition" (Obj.) in response to the Illinois Department of Transportation (IDOT) notices of deposition for Douglas A. Dorgan and Denny Clinton. Attached to the Objection is an affidavit of Susan Brice (Brice Aff.), an attorney appearing on behalf of JM. On September 3, 2015, IDOT filed a "Motion For Leave To Reopen Discovery For Limited Purposes" (Mot.). On September 16, 2015, JM filed a "Response To Motion for Leave To Reopen Discovery" (Resp.). IDOT has not filed a response to JM's Objection nor has IDOT sought leave to file a reply to JM's Response.

**IDOT's Motion For Leave To Reopen Discovery For Limited Purposes**

IDOT seeks leave to reopen discovery to re-depose JM's expert, Douglas G. Dorgan, and to depose Denny Clinton, an employee of JM. IDOT argues that Mr. Dorgan's statements made in his initial expert report (Dorgan Report), dated March 16, 2015, his testimony during his May 6, 2015 deposition and his July 27, 2015 expert rebuttal report conflict. Mot. at 5-6. Mr. Dorgan's "new opinion" found in his July 27, 2015 expert report is apparently based on discussions he had with Mr. Clinton. *Id.* at 2, 6. IDOT argues that the alleged conflict lies in whether the whole parking lot constructed by JM contained asbestos-containing material (ACM) or only the Transite pipes that were used as curb bumpers in the parking lot. *Id.* at 2. The alleged new statements regard critical issues in the case. *Id.* at 6.

IDOT states that the Dorgan Report was devoid of details of the parking lot other than its size, years used, and "that asbestos containing Transite pipes were used as curb bumpers in the Parking Lot. Mot. at 2. "Mr. Dorgan offered no opinions regarding the construction of the Parking Lot in his initial expert report". *Id.*

IDOT states that in the Dorgan Report, Mr. Dorgan cites to a 1999 report prepared by ELM Consulting, LLC (ELM Report). The ELM Report was one of the documents Mr. Dorgan used as a reference to arrive at his opinion. Mot. at 2. IDOT states that at page 4 of the ELM Report, it notes that “ACM in the subsurface was mostly concentrated in the area of the former parking lot. This can be expected since the materials used to build the former parking lot contained ACM.” *Id.* at 3.

At Mr. Dorgan’s May 6, 2015 deposition, and in pertinent part, IDOT’s counsel, referencing the Elm Report, asked Mr. Dorgan the following:

Q. (IDOT counsel) The next sentence says: ACM in the subsurface was mostly concentrated in the area of the former parking lot. This is to be expected since the materials used to build the former parking lot contained ACM. Would it be fair to read this as suggesting that ACM may have been used in the construction of the parking lot beyond simply putting Transit pipe on top of the parking lot?

A. (Dorgan) I could not come to that conclusion with the information that’s presented in this paragraph. Mot. at 4.

IDOT named a former IDOT employee, Steven Gobelman, as its rebuttal expert. Mot. at 4. Mr. Gobelman issued his rebuttal report on May 29, 2015 (Gobelman Report). *Id.* Relative to the question of the parking lot construction, Mr. Gobelman opined that:

In order for Johns Manville to create a level and dry parking lot area [it] would have added fill material to bring up the parking area to a similar elevation as Greenwood Avenue and to keep the parking lot dry during the wet times of the year. According to the 1999 ELM Report, ‘the parking lot was constructed with materials containing asbestos containing materials.’ *Id.* at 4-5.

IDOT argues that when Mr. Dorgan subsequently issued his Expert Rebuttal Report (Dorgan Rebuttal) on July 27, 2015, he opines for the “first time” that the parking lot was not constructed out of ACM. Mot. at 5. To arrive at this opinion, Mr. Dorgan stated that he spoke with Mr. Clinton where “Mr. Clinton indicated that the sentence in ELM’s 1999 Report regarding the parking lot being ‘constructed with materials containing asbestos containing materials’ was referring only to the concrete Transite pipes used as parking bumpers on the surface of the parking lot.” *Id.* at 5.

IDOT argues that it needs to re-depose Mr. Dorgan for the limited purpose of “fully understanding Mr. Dorgan’s newly-disclosed opinion . . . .” Mot. at 6. IDOT further argues that it should be allowed to depose Mr. Clinton for the limited purpose of learning what information he provided Mr. Dorgan for Mr. Dorgan to arrive at his opinion in the Dorgan Rebuttal. *Id.* at 7-8. “In order for IDOT to adequately prepare to re-depose Mr. Dorgan regarding his new opinion about the construction of the Parking Lot, it must be allowed to depose Mr. Clinton.” *Id.* at 8.

### Complainant's Response To Motion For Leave To Reopen Discovery

In JM's response, JM adopts and incorporates its Objection to Notice of Deposition and further argues that IDOT's position has no merit because "Mr. Dorgan's statements in his rebuttal report regarding the construction of the Parking Lot do not represent a new opinion of any kind." Resp. at 2. JM argues that the statements made by Mr. Dorgan in his rebuttal report:

are offered solely in rebuttal to the erroneous factual assertion made by IDOT's expert, Mr. Steven Gobelman, that JM used ACM to build the Parking Lot. All of the information provided by Mr. Dorgan in his rebuttal report on this point is information that IDOT could have determined through fact discovery. Indeed, if the composition of the materials used to construct the Parking Lot were central to its case, as IDOT now argues, IDOT should have thoroughly investigated this issue during fact discovery by deposing the persons JM identified in its written discovery responses as having knowledge of matters at issue in this case, including Denny Clinton. *Id.* at 2.

JM states that it served IDOT with Mr. Dorgan's rebuttal report in a timely fashion and "[a]lthough IDOT had a copy of Mr. Dorgan's report for 15 days, it waited until 4:00 p.m. on the date expert discovery closed to request to take his deposition." Obj. at 6.

JM specifically objects to deposing Mr. Clinton for two reasons. First, Mr. Clinton was identified by JM in its response to written interrogatories as having historical knowledge of the JM parking lot and IDOT chose not to depose him. Obj. at 4. Second, JM states that Mr. Clinton is on an extended vacation through mid-October and that "[t]he resolution of this matter would therefore need to be delayed by at least an additional six weeks in order to accommodate a deposition of Mr. Clinton." *Id.*

JM next argues that the deposition notices identified as subpoenas were not issued pursuant to Section 101.622 of the Board's procedural rules. Obj. at 6. The subpoenas were not issued by the Clerk of the Board, the subpoenas were not served on the Clerk of the Board nor were they served on the hearing officer. *Id.* at 6-7.

Finally, JM states that it will be prejudiced by any further delay in that:

JM has specifically requested that the Board issue an order "requiring Respondent to participate in the future response action on Sites 3 and 6 [Parking Lot] implementing the remedy approved or ultimately approved by the EPA-to the extent attributable to IDOT's violations of the Act, pursuant to the Board's broad authority to award equitable relief under Section 33 of the Act, 415 ILCS 5/33." Amended Complaint at 16. However, JM is already in the process of implementing an EPA-approved remedy on the Southwest Sites. Brice Aff. par. 16. If IDOT cannot depose Mr. Clinton until he is back from vacation in mid-October, it is unclear whether this case will be resolved until remediation of Sites 3 and 6 are well underway or potentially completed. Obj. at 7-8.

### **Discussion And Ruling**

JM is correct when it argues that if the construction of the parking lot was central to IDOT's case, IDOT should have deposed Mr. Clinton during fact discovery because IDOT was well aware that he and other identified employees had historical knowledge of the parking lot in question. Nevertheless, I am persuaded that the apparent conflict in expert opinions is at least potentially material and should be the subject of limited further discovery. Whether or not IDOT has been diligent in pursuing discovery, IDOT must be allowed to depose Mr. Dorgan and depose Mr. Clinton in an effort to clear up any conflict of opinions on an issue that even JM does not deny is central to this case.

JM argues that any further delay "might materially prejudice JM's ability to secure the relief it has requested in this case." Obj. at 7. JM also argues that it has previously agreed to several extensions of time regarding expert discovery deadlines to accommodate IDOT's schedule. *Id.* at 3.

JM's civility and professionalism in agreeing to the extensions for discovery are to be commended, but the extensions were nevertheless agreed. I further note that JM's speculation that it may be prejudiced if IDOT's motion is granted fails because it is speculation.

### **Conclusion**

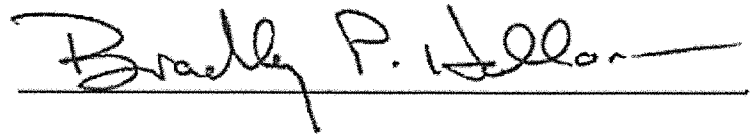
IDOT's motion to reopen discovery for the limited purpose of re-deposing Mr. Dorgan and deposing Mr. Clinton is granted. Mr. Dorgan is to be re-deposed regarding his opinion about the construction of the parking lot. Mr. Clinton is to be deposed only for the purposes of what he conveyed to Mr. Dorgan regarding the construction of the parking lot.

Because JM notes that Denny Clinton is on vacation will not be available until mid-October, close of discovery, including for purposes of depositions, will be November 6, 2015, unless the deponents remain unavailable. If the deponents are unavailable by November 6, 2015, I will entertain a motion for an extension of time.

IDOT is reminded to serve the subpoenas pursuant to Section 101.622 of the Board's procedural rules.

Finally, at the September 24, 2015 telephonic status conference, JM requested that the dispositive motion due date be extended as the due date for the motions was previously set for October 2, 2015. The parties were advised that the dispositive motion due date will be discussed at the October 6, 2015, status conference.

IT IS SO ORDERED.



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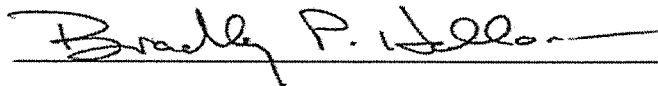
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on September 29, 2015, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on September 29, 2015:

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