

JUN 21 2016

STATE OF ILLINOIS  
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD  
June 21, 2016

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



ORIGINAL

**HEARING OFFICER ORDER**

On June 9, 2016, Johns Manville (JM) filed two briefs: a brief supporting its objections to the Illinois Department of Transportation's (IDOT) use of undisclosed opinion testimony by Steven Gobelman (JM Obj. Ex.Test.), and a brief supporting its objections to IDOT's use of exhibits as evidence without accompanying witness testimony. (JM Obj. Ex.). Also on June 9, 2016, IDOT filed a brief regarding JM's objections of Mr. Gobelman's testimony. (IDOT Br.)

On June 14, 2016, JM filed its response to IDOT's brief regarding JM's objections to Mr. Gobleman's testimony. (JM Resp.). On the same day, IDOT filed a motion to strike JM's objections to IDOT's use of exhibits as evidence without accompanying witness testimony, (IDOT Mot.), and a response to JM's brief in support its objections to expert testimony. (IDOT Resp.).

This order first summarizes each filing and provides a ruling on the objections and the motion.

**Brief's Concerning Objections To Expert Testimony At Hearing**

**Summary of JM's Brief**

JM moves to exclude from evidence certain opinions from the testimony of IDOT expert witness Mr. Gobelman on May 24 and 25, 2016. JM Obj. Ex Test. at 1. JM claims that the testimony drastically departed from opinions disclosed a year earlier on May 29, 2015 (Trial Exhibit 08) and July 10, 2015 (Trial Exhibit 04C) and asserts that the opinions offered at trial are essentially new. *Id.*. JM identifies four purportedly new opinions proffered by Mr. Gobelman:

- (1) IDOT did not place fill containing Asbestos Containing Material (ACM) on Site 6 or the embankment area. Sub-opinions supporting this conclusion assert that embankment work concluded at Station 7 along Greenwood Ave.; construction drawings and a 1975 change order show that a percentage of unsuitable fill remained in certain areas; IDOT would not have utilized other ACM.

- (2) Trial Exhibit 052 indicates that the former JM parking lot was elevated using fill material.
- (3) ACM was initially buried by utility work on Sites 3 and 6.
- (4) A stereoscopic technique was used in reviewing aerial photographs.

Additionally, JM claims that IDOT elicited previously undisclosed testimony using Trial Exhibits 164 and 202. *Id.* at 2. Although demonstrative figures were to be submitted on the day of hearing, JM claims the amended versions of the exhibits were produced mid-way through Mr. Gobelman's direct examination. *Id.* It is JM's belief that Mr. Gobelman's "new" opinions are contrary to Mr. Gobelman's deposition testimony. *Id.* at 3.

### **Summary of IDOT's Brief**

IDOT contends that Mr. Gobelman did disclose his opinions regarding fill at Site 6 and the embankment in his Expert Rebuttal Report and during his deposition on July 10, 2015. IDOT Br. at 1. IDOT offers excerpts from the Report to rebut JM's argument. *Id.* at 2-3.. IDOT further asserts that Mr. Gobelman's testimony properly responded to "incorrect and misleading" testimony by JM expert Mr. Dorgan. *Id.* at 1. IDOT acknowledges that some of Mr. Gobelman's statements may be deemed outside the explicit opinions previously disclosed to JM, but contends that as an expert witness Mr. Gobelman is allowed to elaborate on his already properly disclosed statements. *Id.* at 2.

IDOT also responds that the stereoscopic technique is commonly used by experts in the field. *Id.* at 5. Aerial photos were produced by IDOT in stereo, which shows that stereoscopic analysis may be used to form opinions regarding the images. *Id.*

### **Summary of JM's Response**

JM reiterates that the majority of Mr. Gobelman's opinions offered at hearing were properly disclosed in his Expert Rebuttal Report or deposition. JM Resp. at 1. Also, JM points out that IDOT did not refute the claim that Mr. Gobelman's hearing opinions on Exhibits 052, 164, and 202 and that utility work buried ACM, were new. *Id.* at 1. JM states that the controversy around Mr. Gobelman's opinion about the removal of unsuitable material and use of fill on Site 6 is not about whether IDOT referenced the sites, but whether IDOT timely disclosed the opinion. *Id.* at 2. JM maintains IDOT has selectively engineered quotes and plucked references from the bibliography of Mr. Gobelman's report to counter JM's claim that the opinions were not disclosed. *Id.* at 3-4. Furthermore, JM views IDOT's reliance on references to site locations during a discussion of construction sequencing supports the position that Mr. Gobelman hearing opinions were within the scope of his disclosed opinions. *Id.* at 4.

JM states that the law requires specificity, and a general elaboration during the expert's hearing testimony cannot be used to excuse new opinions not specifically disclosed. *Id.* at 5. IDOT, according to JM, is attempting to rebut the opinion of Mr. Dorgan through new opinions that should have been disclosed because Mr. Dorgan's opinions were themselves properly disclosed. *Id.* at 6-7.

JM further contends that whether or not the use of an analytical technique is obvious, IDOT had the duty to disclose Mr. Gobelman's use of a stereoscopic analyzing technique. *Id.* at 7-8.

### **Summary of IDOT's Response**

IDOT responds that it is not Mr. Gobelman's "new" opinion that IDOT did not use ACM fill for Site 6 or the embankment. IDOT Resp. at 1. IDOT claims that Mr. Gobelman should be allowed to show the reasons why IDOT was not responsible for placing ACM fill at the embankment, and that all of the opinions to which JM objects were properly disclosed. *Id.* at 2. IDOT explains that Mr. Gobelman's conclusions from the photograph for Exhibit 52 support a previously disclosed opinion. *Id.* IDOT also asserts Mr. Gobelman's opinion that ACM could have been moved during utility line work is not new. *Id.* at 3. Also, IDOT contends JM unfairly credits its own expert witness's ability to reach topographical conclusions about aerial photographs without stereoscopic analysis. *Id.* IDOT points out that Mr. Gobelman utilizes stereoscopic means of analysis in his trade and cited (stereo) aerial photographs in his bibliography. *Id.* IDOT believes that JM's use of Mr. Gobelman's deposition is misleading and that statements invalidating JM's claim that Mr. Gobelman's opinions were new have been excluded. *Id.* at 4. Finally, IDOT argues that there is an inconsistent use of demonstratives which favors JM. *Id.*

### **Discussion and Ruling**

It is well settled that the rules of evidence are relaxed in administrative hearings. *See MJ Ontario, Inc. v. Daley*, 371 Ill. App. 3d 140, 147 (1st Dist. 2007). The Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. 35 Ill. Adm. Code 101.100(b).

Illinois Supreme Court. Rule 213(g) creates limitations on expert testimony:

The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition. Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial.

With this in mind, I look to determine whether Mr. Gobelman's testimony has adhered to the Rule 213(g)'s mandate. IDOT correctly notes that an expert witness may testify to logical corollaries and elaborations of original opinions and statements. *Wilbourn v. Cavalnes*, 398 Ill. App. 3d 837, 850 (1st Dist. 2010). And while JM is correct citing *Boehm v. Ramsey* in recognition that allowing opinions at trial without proper prior disclosure is an abuse of discretion, 329 Ill. App. 3d 357, 357 (4th Dist. 2002), I find that Mr. Gobelman is not

pontificating on wholly new matters but instead is fleshing out what he has already opined as previously disclosed.

Consistent with Rule 213(g) and the principles established in Wilbourn, Mr. Gobelman's testimony has not deviated significantly, if at all, from his properly disclosed opinions. Holding otherwise would too narrowly confine hearing testimony to precise statements disclosed during discovery. An expert witness is afforded room to elaborate on disclosed opinions, including offering commentary about those opinions. However, I recognize that an expert witness may not proffer entirely new assertions; on already there is a limit on the expert's testimony—unfair surprise. In the present case, however, I find Mr. Gobelman testimony is within those limitations. That I find Mr. Gobelman's hearing testimony admissible does not, of course, bind the Board in giving it the weight it deems appropriate.

JM's objections to Mr. Gobelman's testimony are overruled.

**Brief's Concerning Objections To IDOT's Use of Exhibits As Evidence Without Accompanying Witness Testimony**

**Summary of JM's Brief**

JM objects to IDOT moving certain exhibits into evidence without accompanying witness testimony. JM Obj. Ex. at 9. The objections concern the following exhibits: 022, 023, 024, 025, 026, 027, 028, 030, 032, 036, 038, 039, 044, 051, 062, 078, 080, 081, 086, 092, 093, 095, 102, 104, 105, 106, 108, 109, 110, 113, 114, 115, 116, 117, 118, 119, 120, 123, 124, 125, 129, 132, 133, 134, 139, 140, 142, 143, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 200, and 202 *Id.* at 17. JM believes that it will be prejudiced by not knowing how IDOT will use these exhibits in post-hearing briefs and which fact the exhibit is being used to prove or disprove, and by having no opportunity to counter the evidence at hearing *Id.* at 9-10. JM raises three grounds in support of its objections:

- (1) The stipulation was limited to foundation. JM offers e-mail correspondence between the parties' counsel to show agreement that "admissibility for foundation purposes" of certain exhibits would streamline the hearing. *Id.* at 10. JM argues that it stipulated to the "genuineness and admissibility" and not necessarily an admission into evidence without testimony tying the exhibits to facts. *Id.* at 10-11. The alleged purpose of the stipulation was to avoid having the parties call witnesses to lay the foundation for every document, thus expediting the hearing. *Id.* at 11.
- (2) IDOT's approach would violate Illinois law and prejudice JM. JM believes due process requires witnesses and testimony provide support for asserted facts. *Id.* JM cites Board procedural rules requiring a witness offering written testimony to be available for cross-examination at hearing. JM contends that IDOT's list contains exhibits stipulated to for admissibility for foundation purposes only as well as others for which there was never a stipulation. *Id.* at 12. JM argues the law entitles it to "full and fair disclosure of the facts" during the hearing. *Id.* at 13. JM states that IDOT seeks to establish its affirmative defenses without testimony, and that JM, as a matter

of due process, should be allowed to rebut the testimony by knowing what it is admitted to establish *Id.* at 14. Additionally, JM believes that there is prejudice if it is not allowed to cross examine IDOT's expert witness, Mr. Stoddard, about his written report. *Id.* at 14. JM asserts that IDOT should not be allowed to simply "move in" an expert disclosure without subjecting it to scrutiny at hearing. *Id.* at 14-15.

- (3) New evidence cannot be used in post-hearing briefs; JM argues that this means IDOT may not rely in post-hearing briefs on evidence not properly introduced through a witness. *Id.* at 15. JM requests that the hearing officer compel IDOT to introduce its exhibits through a witness, and exclude any exhibits not so introduced. *Id.*

### **Summary of IDOT's Brief**

IDOT argues that JM has reversed its position on the authenticity and admissibility of exhibits, backtracking on what JM had previously stipulated. IDOT points to e-mail correspondence that it believes reflects the parties' understanding of their stipulations. IDOT Mot. at 5.

### **Summary of JM's Response**

JM states that IDOT misrepresents that JM reversed its position on the scope of the stipulation. JM Resp. at 9. JM asserts that the list discussed on May 16, 2016 was the one agreed upon, and that a list produced by IDOT on May 17, 2016, which included additional exhibits not originally disclosed, is problematic. *Id.* Consequently, JM contends IDOT's prehearing report did not accurately represent the stipulations and exceptions to stipulations agreed upon during the parties' May 16, 2016 discussions. *Id.* JM contends it never stipulated to several exhibits on IDOT's list, and that JM mistakenly stipulated to Exhibit 102 before finding that it had never been produced by IDOT. *Id.* Furthermore, JM claims that Exhibit 167 was never produced prior to hearing. *Id.*

### **Summary of IDOT's Response**

IDOT requests that the Hearing Officer strike JM's brief on objections because it goes beyond the briefing allowed by the Hearing Officer and deviates from the parties' prior agreement regarding exhibit stipulations. Resp. Mot. at 5. Alternatively, if the Hearing Officer does not strike JM's brief, IDOT requests that it be allowed additional time to make its record at hearing so that it has a "full and fair opportunity to defend itself." *Id.* at 6.

IDOT asserts that JM's email on May 16, 2016 contained no restriction that the "stipulation was limited to foundation," so there is nothing improper about admitting any exhibit into evidence. *Id.* at 3. IDOT also maintains that its prior agreement with JM on authenticity and admissibility of exhibits belies JM's due process claim. *Id.* at 4. IDOT asserts JM is fully aware of IDOT's exhibits as well as IDOT's affirmative defenses. *Id.* IDOT claims that most of the exhibits it seeks to admit were identified four months before the previously scheduled March 15, 2016 hearing. *Id.* at 4-5.

## Discussion and Ruling

Prehearing stipulations and agreements between opposing counsel is designed to expedite the hearing and conserve administrative resources. I recognize that misunderstandings of various degrees occur, including the type at bar. Nonetheless, the issue here turns not on the scope of the parties' stipulations but basic principles of evidence. The Illinois Administrative Procedure Act offers guidance to the situation:

(a) The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.

(b) Subject to the evidentiary requirements of subsection (a) of this Section, a party may conduct cross-examination required for a full and fair disclosure of the facts.

5 ILCS 100/10-40 (2016); *see also* 35 Ill. Adm. Code 101.626

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the Board's specialized knowledge and experience of the Board.

JM persuasively argues that Hazelton v. Zoning Bd. of Appeals requires that to be admitted and considered by a tribunal, evidence must be properly introduced. Hazelton, 48 Ill. App. 3d 348, 351 (1st Dist. 1977).

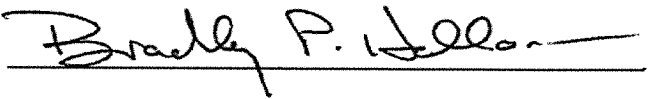
JM has a right to an opportunity to examine witnesses offering exhibits to be offered into evidence. Accordingly, I rule that IDOT must identify at hearing and properly move for admission into evidence any exhibits it intends to rely on as evidence.

As a general matter, this will require IDOT to introduce hearing exhibits through a witness. That is particularly true for documents generated by IDOT from internal files, e.g. correspondence and Mr. Stoddard's expert testimony. But no witness will be required to move into evidence publicly accessible documents; these are properly the subject of official notice. *See* 35 Ill. Adm. Code 101.630 (providing that official notice may be taken of all facts of which judicial notice may be taken and of other facts within the Board's specialized knowledge and experience of the Board). JM does not contest that the quit-claim deed, the Act (both current and prior versions) bidding details and similar materials are of public record. The authenticity and admissibility of such documents are not reasonably subject to dispute. *See DuPage Publications Company v. IEPA*, PCB 85-44, 85-70 & 85-130 (cons.), slip op. at 7 (Aug. 14, 1986). Nor has JM pointed to any reason to believe that these materials are not what they purport to be (according to IDOT). Regarding the affidavit for a motion to dismiss, which IDOT seeks to

My ruling may necessitate recalling witnesses and re-opening direct and cross-examination. This will be for the limited purpose of admitting exhibits into the record; further examination on other subjects will not be permitted. The parties are advised that this hearing will regardless close no later than June 24, 2016.

I further find nothing improper about JM's brief on objections, and therefore deny IDOT's motion to strike it. I sustain in part and overrule in part JM's objections, as set out above.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

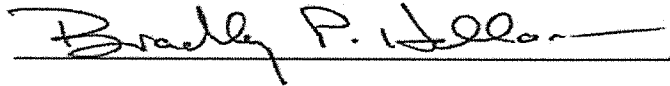
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## CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed and mailed, first class, on June 21, 2016, 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 June 21, 2016:

John T. Therriault  
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Chicago, Illinois 60601

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran  
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@ Consents to electronic service



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