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, June 14, 2016, Respondent, Illinois Department of Transportation, filed and served its "Respondent's Motion to Strike Complainant's Objections to IDOT's Use of Exhibits as Evidence Without Accompanying Witness Testimony" and its "Response to Complainant's Brief in Support of Its Objections to Expert Testimony," with the Clerk of the Pollution Control Board, copies of which are hereby served upon you.

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, June 14, 2016, I caused to be served on the individuals listed below, by electronic mail, true and correct copies of Respondent, Illinois Department of Transportation's "Respondent's Motion to Strike Complainant's Objections to IDOT's Use of Exhibits as Evidence Without Accompanying Witness Testimony" and "Response to Complainant's Brief in Support of Its Objections to Expert Testimony."

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S MOTION TO STRIKE COMPLAINANT'S OBJECTIONS TO IDOT'S USE OF EXHIBITS AS EVIDENCE WITHOUT ACCOMPANYING WITNESS TESTIMONY

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, which moves the Pollution Control Board ("Board"), pursuant to Board Rule 101.502(a), 35 Ill. Adm. Code 101.502(a), to strike Complainant's recently-filed "Objections to IDOT's Use of Exhibits as Evidence Without Accompanying Witness Testimony." In support of its Motion, IDOT states as follows:

I. INTRODUCTION

On May 16, 2016, counsel for Johns Manville sent IDOT's counsel an email which, in part, stated the following:

> Evan: As I understood our conversation earlier, IDOT is willing to stipulate to the genuineness and admissibility of all of JM's exhibits on the prior list filed with the Board other than # 5, 31, 47, 54 and 55 (maybe). You are willing to stipulate to IDOT's 104(e) response with the exception of the statement attributed to Mr. Mapes. #46.
>
> I am still going through your First Amended Exhibit List, but in order to save some time. I can tell you the following: we are likewise willing to stipulate to genuineness and admissibility of the documents on that First Amended Exhibit List with the exception of the following documents listed below. It is possible that we might change our mind on some of these over the next day or so. I just need to review them more carefully.[1]

[1] A true and correct copy of the referenced May 16th email is attached hereto as Exhibit A.

The parties' mutual agreements to stipulate to the authenticity and admissibility of exhibits was affirmed by Johns Manville's counsel on May 23, 2016, early the first day of hearing and similarly affirmed by IDOT's counsel. (Transcript of May 23rd Hearing, p. 14:9-15.)

On May 25, 2016, at the end of three days of hearing, during which time Johns Manville made numerous objections regarding the purported "new opinions" offered by Steven Gobelman, IDOT's expert witness, the Hearing Officer directed the parties to file written briefs that addressed the question of whether and to what extent, if any, Mr. Gobelman had offered new opinions during IDOT's direct examination of him on May 24 and 25, 2016. The Hearing Officer's directive was subsequently set forth in his June 1, 2016 Order ("Order").

On June 9, 2016, as directed to by the Hearing Officer's Order, the parties filed their respective briefs on the issues related to Mr. Gobelman's May 24th and 25th testimony in this matter. But, in addition to its brief on the issues related to Mr. Gobleman's testimony at hearing, Johns Manville also filed a seven page brief, going beyond the scope of the Hearing Officer's Order, taking issue with almost every exhibit which IDOT has identified for this matter ("Exhibit Brief"), and which were the subject of a prior stipulation to between the Johns Manville and IDOT regarding the authenticity and admissibility of the majority of the parties' anticipated exhibits for hearing.

II. ARGUMENT

IDOT moves to strike Johns Manville's Exhibit Brief, as being beyond the scope of the issues which the Hearing Officer directed the parties to address, both in his remarks during the hearing and in his Order, and because it imposes an improper and unnecessary burden on IDOT. Moreover, through the positions articulated in its Exhibit Brief, Johns Manville essentially reneges on a prior agreement between Johns Manville and IDOT regarding the authenticity and

admissibility of the majority of exhibits that the parties sought to enter into the record in this proceeding (an agreement which IDOT agreed to and has held by). Were Johns Manville's position to be adopted by the Hearing Officer, it will most likely result in the need for a number of additional days of hearing, in order for IDOT to enter into the record the exhibits that it will rely upon in its post-hearing brief.

A. The Parties' Stipulation Was Not Limited to Foundation

Johns Manville argues in its Exhibit Brief that the "stipulation was limited to foundation." (Exhibit Brief, at 10.) That is clearly not the case, as JM's counsel's May 16th email contains no such limitation.

Moreover, there is nothing improper about any exhibit, having been stipulated to by the parties as its authenticity and admissibility, being entered into the record and then considered as evidence by the Board. *See, e.g., Alden Nursing Center-Lakeland, Inc. v. Patla*, 317 Ill.App.3d 1, 2 (1st Dist. 2000) (the appellate court noting that exhibits having been stipulated to were subsequently entered into the record for a hearing before the Department of Public Aid); *See also, In re Marianna F.M.*, 2015 IL App (1st) 142897, ¶8.

B. Johns Manville's Due Process Rights will not be Prejudiced By Having the Stipulated Exhibits Considered as Evidence without Accompanying Testimony

Johns Manville also argues that its due process rights would be denied if IDOT were simply allowed to make use of these exhibits in its post-hearing brief, without having utilized any witness testimony regarding the exhibits in its case. (*See generally,* Exhibit Brief, at 11-15.) Johns Manville's concerns in this regard are without merit. Indeed, one of the cases cited by Johns Manville clearly demonstrates that it is being afforded more than sufficient opportunity to prosecute its case against IDOT. In *Scott v. Dept. of Comm. and Community Affairs*, 84 Ill.2d 42 (1981), the Illinois Supreme Court noted that: "Due process, is however, a flexible concept . . .

[and] is not a technical conception with fixed content unrelated to time, place and circumstances." *Id.* at 51. As the *Scott* court went on to note, "the statement of the charges, was in our judgment, sufficient to advise plaintiffs of the nature and substance of the complaints against them." *Id.* at 53.

And, as the Court noted in *In re Estate of Levin,* 134 Ill.App.3d 866 (1st Dist. 1985):

> Procedural due process requires that notice be given of the claim asserted. The right to a hearing includes not only the right to present evidence, but also a reasonable opportunity to know fully and clearly, to persons of reasonable intelligence, what claims the hearing presents and what consequences it proposes. The test is whether an interested party can anticipate the possible effects and orders of the hearing.
> *Id.*, at 870.

Johns Manville cannot credibly argue that having to abide by its agreement with IDOT on the authenticity and admissibility of exhibits - without IDOT having to introduce those exhibits through witness testimony – will result in some sort of denial of due process. Johns Manville is aware of what it must do to make out its *prima facie* case against IDOT. Johns Manville is also aware of the nature and scope of IDOT's of affirmative defenses. And, given the extensive pre-hearing motion practice in this case, Johns Manville could not credibly argue that that both parties' positions on the substantive issues in this case have not been fleshed out in this case. Finally, Johns Manville is aware of the exhibits that IDOT has identified for use in this hearing and which it intends to make a part of the record upon which the Board will ultimately decide this matter.[2]

As the Hearing Officer is all to aware, extensive pre-hearing motion practice and discovery was conducted in this case prior to the start of the first day of hearing in this matter. Moreover, IDOT identified most of the exhibits that it expected to use in this case almost four

[2] Indeed, many of the exhibits that Johns Manville takes issue with in its Exhibit Brief are the very same exhibits which IDOT initially identified in its very first exhibit list for this matter, which it filed back on February 18, 2016.

months ago, in advance of the initial March 15, 2016 hearing date. Furthermore, Johns Manville has yet to present its rebuttal case in this matter.

Given all of this, Johns Manville's claims that it will somehow be prejudiced if it must now abide by its agreement on the authenticity and admissibility of exhibits at hearing, rings hollow. To the extent that Johns Manville wishes to take issue with IDOT's exhibits, the proper place to do so is either in its rebuttal case or in its post-hearing brief, where it is free to make any and all arguments it wishes to make to the Board, regarding the weight and credibility that the Board should give to any of IDOT's exhibits.

CONCLUSION

Because the Exhibit Brief goes beyond the scope of the issues that the parties were directed to address by the Hearing Officer, and because it essentially amounts to Johns Manville's having reneged on its prior agreement with IDOT regarding the authenticity and admissibility of exhibits in this matter, it should be struck by the Hearing Officer. In the alternative, if the Hearing Officer decides to accept Johns Manville's position, as articulated in its Exhibit Brief, IDOT requests that it be given such time as may be necessary for it to adequately make its record in this hearing and to be afforded a full and fair opportunity to defend itself against Johns Manville's claims, as set forth in their Second Amended Complaint.

WHEREFORE, Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION, moves the Hearing Officer to:

1) Strike the Exhibit Brief in its entirety
2) Require Johns Manville to its abide by its agreement on the authenticity and admissibility of IDOT's exhibits, subject to the limitations noted in Johns Manville's counsel's email of May 16, 2016, which is attached hereto as Exhibit 1; or,

3) In the alternative to requests for relief 1 and 2, above, if the Hearing Officer decides not to strike Johns Manville's Exhibit Brief, to grant IDOT such additional time as it may need to adequately make its record in this hearing and to be afforded a full and fair opportunity to defend itself against Johns Manville's claims; and
4) To grant such other relief as the Hearing Officer determines to be proper, and in the interests of justice and the expedient completion of the hearing in this matter.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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McGinley, Evan

From: Brice, Susan <Susan.Brice@bryancave.com>
Sent: Monday, May 16, 2016 4:51 PM
To: McGinley, Evan; Caisman, Lauren; O'Laughlin, Ellen
Subject: Stips

Evan: As I understood our conversation earlier, IDOT is willing to stipulate to the genuineness and admissibility of all of JM's exhibits on the prior list filed with the Board other than # 5, 31, 47, 54 and 55 (maybe). You are willing to stipulate to IDOT's 104(e) response with the exception of the statement attributed to Mr. Mapes. #46.

I am still going through your First Amended Exhibit List, but in order to save some time. I can tell you the following: we are likewise willing to stipulate to genuineness and admissibility of the documents on that First Amended Exhibit List with the exception of the following documents listed below. It is possible that we might change our mind on some of these over the next day or so. I just need to review them more carefully.

You mention the ELM 1999 reports several times and it is attached to various depositions. We will admit to its genuineness and admissibility except for certain statements made in the text of the report, including the statement Mr. Gobelman relies on in his Report.

4(H) because we cannot read it.

I cannot tell if all the documents in 9 and 10 have been produced. Please provide Bates numbers.

Please send a copy of #13. The Board regulations from 1973. They have not been produced and we do not currently have a copy.

#25
#26
#27
#29
#30
#36
#38
#50
#51
#52. It has never been produced.

While I think this is completely accurate, I reserve my right to change my mind after my final review. I will let you know tomorrow.

Susan Brice
Partner

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EXHIBIT
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

ILLINOIS DEPARTMENT OF TRANSPORTATION RESPONSE TO COMPLAINANT'S BRIEF IN SUPPORT OF ITS OBJECTIONS TO EXPERT TESIMONY

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, which files this Response to Complainant's Brief in Support of its Objections to Bar IDOT's Use of (allegedly) Undisclosed Opinion Testimony and Bases as directed by the Hearing Officer during the hearing on May 25, 2016 and by Order of June 1, 2016.

Johns Manville ("JM") argues that IDOT witness, Steven Gobelman, offered new opinions. JM is wrong, there are no new opinions. JM's arguments reveal that it believes one set of rules should apply to them, but a different set of rules to IDOT. JM is trying to game this hearing.

1) Contrary to JM's arguments, it is not a "new opinion" that IDOT did not place fill material on Site 6 or in the embankment area that contains asbestos containing material ("ACM"). See *e.g.* Exhibit 8, Expert Rebuttal Report of Steven L. Gobelman, ("Gobelman Report"), pgs.8, 9 and 11, and as further set out in Respondent's Brief Regarding JM's Objections to the Expert Testimony of IDOT Witness Steven Gobelman. Testimony regarding where the embankment began to rise to meet the bridge over the railroad just shows that no or

little fill was needed for the embankment in the areas where samples showed Transite pipe. Gobelman should be allowed to show why and how IDOT would not have placed ACM when building the embankment. JM objects to explanations of his already proffered opinion but as case law shows, this discussion is appropriate. Mr. Gobelman's testimony does not vary from that previously expressed and should be allowed here. [1] Moreover as further discussed below, Gobelman did previously testify that the fill to the embankment could be part of the existing fill. Exhibit 4C, Gobelman Deposition, p. 187:15-16.

2) Exhibit 52: Gobelman is of the opinion that in order to build the parking lot, fill would have been needed to raise the level so that it could be used as a parking lot, and that this fill material could well have contained ACM as this material was readily available to JM at the time the area would been filled. Gobelman disclosed this opinion in his report. [2] The picture that JM objects to is a picture of the parking lot from the 1950s which shows the level was raised. JM does not dispute the picture is evidence, as JM used it in their case in chief. The picture of the parking lot from the 1950s merely shows the fill was added to raise the lot, which is consistent with Mr. Gobelman's previously proffered opinion. JM incorrectly argues that Mr. Gobelman is offering a new opinion based upon Exhibit 52. Further, IDOT should be allowed to use this picture as a demonstration of his opinion.

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[1] This is supported by case law provided by Complainant, *Coleman v. Abella*, 322 Ill.App.3d 792, 798 (2001). ("There is no evidence that there was any variation from the opinion expressed in her deposition testimony to that given at trial. Susnis v. Radfar, 317 Ill.App.3d 817, 251 Ill.Dec. 27, 739 N.E.2d 960 (2000). Because the prior deposition taken by the defense of Dr. Legato contained the same opinions that she gave at trial, it was an abuse of discretion to strike her entire testimony. Unless we are prepared to put expert witnesses in space or the deep freeze during the period between the deposition and the testimony at trial, deepening of a witness' understanding of some of the issues that were the subject of the deposition testimony must be a common matter for a doctor who writes articles, sees patients, attends conferences and interacts with the medical community at large after having given her discovery deposition.")

[2] "In order for Johns Manville to create a level and dry parking area for their employees, Johns Manville 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." p.8 of Gobelman Report.

3) Mr. Gobelman has offered the opinion that a better explanation of how ACM came to be in Sites 3 and 6 is through the installation and maintenance of the many utility lines in the area. Again, contrary to JM's desperate objections, this also is not a new opinion and JM should not successfully broadcast erroneous characterizations of Mr. Gobelman's opinions.[3]

4) Mr. Gobelman reviewed aerial photographs. He listed the (stereo) aerial photographs in his bibliography and testified in his deposition that he has viewed hundreds and hundreds of aerial photographs. The fact that he can view aerial photography with stereoscopic analysis is a skill he uses. This skill came out in hearing as Mr. Dorgan, JM's expert, apparently does not have this ability, although one would think its expert would if he is asked to interpret stereo images of aerial photography. And yet even though he lacks this ability, Dorgan was willing to testify that an aerial photograph appeared to show piles. Dorgan had not testified to apparent piles previously in either of his reports or in his deposition, yet JM solicited these opinions at hearing. JM now ungenuinely argues that while its expert should be able to interpret aerial photographs, IDOT's expert should not. It would be abuse of this proceeding for JM to be successful in this attempt at gamesmanship. [4]

Demonstrative figures: JM argues that it is permissible for its expert to use a last minute demonstrative, but not for our expert to use Dorgan's last minute demonstrative or the

[3] "Only that Transite pipe is scattered throughout Site 3, which could have been a result of 25 years of using the pipe as car bumpers, the ACM material used to create the parking lot, number of years this area sat adjacent to the Johns Manville site, and **the number of utility lines that go through this area.**" p. 10 of the Gobelman report (emphasis added); and Section 6, "It is my opinion that over the years the installation and maintenance of these lines would have disturbed the existing conditions and potential asbestos material could have been buried when these underground utility lines were installed or during maintenance." p. 7 of the Gobelman report (emphasis not added.)

[4] JM is using its objections for the purpose of tactical gamesmanship, contrary to the purpose of Rule 213 and is specifically what the courts sought to discourage. See e.g. *Sullivan v. Edward Hosp.*, 209 Ill.2d 100, 110 (2004) ("To allow either side to ignore Rule 213's plain language defeats its purpose and encourages tactical gamesmanship. *Department of Transportation v. Crull*, 294 Ill.App.3d 531, 537, 228 Ill.Dec. 834, 690 N.E.2d 143 (1998)").

demonstrative that Mr. Gobelman provided (IDOT produced a demonstrative exhibit on May 18, 2016 (Exhibit 164) which was corrected with some minor typos at trial (Exhibit 202).) JM painstakingly argues that any new testimony from Mr. Dorgan regarding new figures and the fill line to the embankment of Greenwood Avenue were not new opinions, and therefore, the demonstratives and Dorgan's testimony should be allowed and that any objection was waived. JM then argues that IDOT should not be allowed to rebut Mr. Dorgan's new testimony or to show why his new demonstrative is misleading. Gobelman is of the opinion that IDOT's contractor would not have buried ACM material in the embankment to Greenwood Avenue and consistent with that opinion, he should be allowed to point out where and why Mr. Dorgan's new figures and new testimony are wrong.

IDOT argues Mr. Gobelman changed his opinion, and cites to deposition testimony but it cuts off the citation and does not include the portion where Gobelman states that "or if it was not part of the existing", when referring to the fill of the embankment. This therefore shows Mr. Gobelman did in fact previously testify that the fill to the embankment could be part of the existing fill previously there. Gobelman deposition, p. 187:15-16.

JM's arguments demonstrate why Mr. Gobelman should be allowed to testify as to Dorgan's new information and figures. Gobelman's opinions are not new and as we argued in our brief, IDOT should be allowed to explain the mischaracterizations in Mr. Dorgan's demonstrative and show why Mr. Dorgan could not be more wrong in his conclusions and opinions.

Conclusion

Contrary to JM's false arguments, Mr. Gobelman is not offering new opinions or contrary opinions. JM's desperate attempts merely show that it fears Mr. Gobelman's testimony as he

has the better explanation and understanding of what is most likely to have occurred during the Amstutz bridge project. JM must not be successful is these false attempts and IDOT should be allowed to present its case and theory.

Respectfully Submitted,

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