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, November 13, 2017, I have filed with the Clerk of the Pollution Control IDOT's Response to Complainant's Brief Regarding Relevance of Discovery Sought by IDOT and have served each person listed on the attached service list with a copy of the same.

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, November 13, 2017, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's Complainant's Brief Regarding Relevance of Discovery Sought by IDOT on each of the parties listed below:

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	)	
	)	
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IDOT'S RESPONSE TO COMPLAINANT'S BRIEF REGARDIND RELEVANCE OF DISCOVERY SOUGHT BY IDOT

NOW COMES Respondent, the ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT") who herewith files its response to the Complainant's Brief Regarding Relevance of Discovery Sought by IDOT ("Brief").

INTRODUCTION

Approximately six months ago, on May 19, 2017, IDOT served a subpoena on third party Commonwealth Edison to obtain any documents in the company's possession that might pertain to any payments made by Commonwealth Edison to Johns Manville, for work performed by Johns Manville at Sites 3 and 6. Subsequently, on June 20, 2017, IDOT served a subpoena on Commonwealth Edison's counsel for the deposition of a corporate representative on a number of issues. Since IDOT served its first subpoena on Commonwealth Edison, Commonwealth Edison and Johns Manville have sought to stymie IDOT's efforts to take discovery on matters that are potentially relevant to issues that Johns Manville and IDOT will be called upon to address during future hearings before this Board.[1]

[1] Johns Manville asserts that IDOT's attempts to take discovery from Commonwealth Edison have resulted in "[u]ndue delay." (Brief, p.2.) It is worth recalling that in response to similar assertions made earlier in the case, the Board found that IDOT had done nothing wrong. (Interim Order, p.21.)

Johns Manville's substantive arguments against the relevance of the discovery sought through IDOT's two subpoenas and its motion to retake Scot Myers's deposition appear to be based upon a fundamental misconstruing of what they are entitled to receive from IDOT by way of reimbursement, as well as the nature and purpose of future proceedings in this matter. In order to properly analyze what amounts Johns Manville may seek reimbursement for from IDOT, it should first be established the extent to which Johns Manville is "out of pocket" for specified work performed at specified portions of Sites 3 and 6. It is IDOT's position that to the extent that Johns Manville has already received any sums from Commonwealth Edison for any of this work, it should not then be allowed to seek reimbursement from IDOT for these same amounts.

As for the now long-pending question of whether IDOT July 18, 2017 motion to retake the deposition of Scot Myers, Johns Manville's Director of Environmental Programs should be granted, IDOT believes that its right to retake this deposition is clear. IDOT's motion documents repeated instances of improper objections and conduct by complainant's counsel which served to fundamentally impede its ability to properly depose Mr. Myers. IDOT's motion should therefore be granted.

ARGUMENT

A. The Discovery Sought by IDOT is Directly Relevant to the Issues Which the Board Has Specified for Further Hearing[2]

[2] IDOT has already set forth at length its arguments in favor of the relevancy of the information sought through its two subpoenas to Commonwealth Edison and its motion to retake the deposition of Scot Myers in its October 27th Response to Hearing Officer's Order of October 5, 2017. IDOT incorporates by reference herein all arguments made in its October 27th filing, so as to avoid having to make those arguments again here, in response to Johns Manville's Brief. Additionally, IDOT advanced many of the arguments that it made regarding the relevancy and necessity for the discovery of information such as payments between Johns Manville and Commonwealth Edison and any agreements between them, in its June 22nd response to Commonwealth Edison's motion to quash, its July 18th motion to retake the deposition of Scot Myers, and its September 15th response to Johns Manville's and Commonwealth Edison's respective applications for non-disclosure and protective orders. All of the arguments advanced in each of the aforementioned pleadings are incorporated herein by reference.

In its December 15, 2016 Interim Order and Opinion ("Interim Order"), the Board discussed and analyzed its authority to order one party to reimburse the costs that another party had expended for cleanup costs. (*See generally*, Interim Order, pp. 19-21.) Black's Law Dictionary defines "reimburse" as meaning, among other things, to "make whole." Black's Law Dictionary, Abridged Sixth Edition, p. 891.

As has been noted numerous times by the parties in the 11 months since the Board issued its Interim Order, among the issues which the Board has directed the parties to go back to hearing on are:

2. The amount and reasonableness of JM's costs for this work.

3. The share of JM's costs attributable to IDOT.

Johns Manville contends that "[t]he information that IDOT now seeks – information regarding any payments by ComEd to JM for work at the Sites and any cost sharing agreement between the parties-is immaterial to these narrow questions." (Brief, p.5.) This contention is wrong and is based on a self-serving interpretation of the Board's directions on the additional issues to be addressed at hearing. The Board's Interim Order determined that the Board has the authority to order IDOT reimburse Johns Manville for the costs which it has incurred in performing the work under the AOC.[3]

But reimbursement only means that Johns Manville is to be made whole; it does not mean that it is entitled to a financial windfall. Thus, to the extent that Johns Manville has already been reimbursed by Commonwealth Edison for some of the costs which it has incurred in performing the work specified under the AOC, IDOT is entitled to take discovery regarding any such

[3] As the Board has noted, reimbursement is the very remedy that Johns Manville has asked the Board to impose on IDOT. (Interim Order, p.2.)

payments, as such payments are highly material to future proceedings in this matter and should, in turn, result in a reduction of the amount which Johns Manville should be allowed to seek as reimbursement from IDOT.[4]

As part of its further arguments as to why IDOT should be barred from taking the discovery sought through its two subpoenas (and presumably its motion to retake Scot Myers' deposition), Johns Manville raises a number of irrelevant issues. Johns Manville makes a particular point of noting that only IDOT has been found liable by the Board for its violations of the Act. (Brief, pp. 5-6.) While it may be true that the Board has only found IDOT liable for a portion of the openly dumped ACM waste at Sites 3 and 6, it should never be forgotten that the United States Environmental Protection Agency ("USEPA") has found both Johns Manville and Commonwealth Edison jointly and severally responsible for the removal of the ACM waste at Sites 3 and 6.

Johns Manville also categorically states that the "Board has already held that apportionment does not apply in this case . . ." (Brief, p.6), even though the Board's Interim Order plainly says that apportionment "does not directly apply because the sites are subject to a USEPA order." (Interim Order, p.22. Emphasis added.) Johns Manville's assertions about the inapplicability of apportionment are a straw man argument, as the Board has already indicated that they will be determining what amount IDOT will be required to reimburse Johns Manville for IDOT's violations of the Act.[5] Thus, the question becomes: what amount of the costs for the

4 IDOT notes that in the almost 11 months since the Board issued its Interim Order, Johns Manville has yet to identify just what costs it seeks reimbursement for from IDOT.

[5] Johns Manville's argument that apportionment does not apply to the question of how the Board will deal with the reimbursement issue somewhat disingenuous. It is highly likely that Johns Manville and Commonwealth Edison have entered into at least one agreement to address how they will address their joint and several liability for conducting the AOC's prescribed scope of work. (Ex. 63-2, AOC, ¶ II.6 "Respondents are jointly and severally liable for carrying out all activities required by" the AOC.)

portions of the work at Sites 3 and 6 that IDOT has been found liable for has Johns Manville yet to be reimbursed for? To the extent that Johns Manville may have already received any payment for this work from Commonwealth Edison, Johns Manville should not now be entitled to seek payment for this work from IDOT. However, in order for IDOT to be able to ensure that its determine whether it is being asked to pay more than Johns Manville is entitled to in reimbursement, it must be allowed to conduct the discovery sought through its two subpoenas.

B. The Discovery Which IDOT Seeks to Obtain is Not Barred by the Collateral Source Rule

Johns Manville cites numerous cases for the proposition that the collateral source rule bars IDOT's discovery of the information which it has sought through its subpoenas, such as *Willis v. Roberts, Segovia v. Romero,* and *Brumley v. Fed. Bare Lines. Inc.* (Brief, p. 8.) Notably, all of the cases which Johns Manville has cited to in its Brief involve the application of the collateral source rule in personal injury cases. *See, Willis*, 229 Ill.2d 393, 395 (2008) (motorist injured in automobile accident); *Segovia*, 2014 IL App (1st) 122392 (2014), ¶ 3 (automobile accident); and, *Brumley*, 78 Ill.App.3d 799, 801 (5th Dist. 1979) (plaintiff injured in work-related accident). Not one of the cases cited to by Johns Manville involve the application of this rule by an Illinois court in a case involving a violation of the Environmental Protection Act. Nor does Johns Manville cite any cases where the Board has recognized the applicability of this rule in its proceedings.

While the collateral source rule may be applicable in tort cases, federal courts have declined to allow the application of this rule in cases arising under the federal Comprehensive Environmental Response, Compensation , and Liability Act ("CERCLA"), determining that the rule does not apply in such cases. *See, e.g., Basic Management, Inc. v. United States,* 569 F.Supp.2d 1106, 1123-24 (D. Nev. 2008) (internal citations omitted); *See also, N.Y. St. Elec. and*

Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 238 (2d Cir. 2014) (internal citations omitted); and, *United Alloys, Inc. v. Baker*, No. CV 93-4722 CBM (Ex), 2011 WL 2749641 (C.D. Cal. 2011), *26 ("The Court has found no case law in which the collateral source rule was extended to CERCLA actions.").

As the *Basic Management* court noted, the plaintiff in a CERCLA case is in a fundamentally different position from the position of a plaintiff in a personal injury case. *Basic Management*, at 1123-24. In the typical personal injury/tort case, the collateral source rule permits an injured plaintiff to receive the benefits of any financial windfall that may be available to them. *N.Y. St. Elec.*, 766 F.3d at 238. By comparison, in the CERCLA context, it is the environment that has been injured and not the plaintiff. *Basic Management*, at 1123-24. Thus, the plaintiff is only entitled to reimbursement for their share of costs that have been expended in remedying the environmental injury. *Id*. at 1124. Furthermore, the recovery of anything above the amount expended by the plaintiff "would in essence allow [p]laintiffs to profit from their own contamination." *Id.* "[T]he policy underlying the collateral source rule . . . is simply not advanced in CERCLA cases. 766 F.3d at 238. Thus, to the extent that Johns Manville has already received any sums from Commonwealth Edison relative to work performed at Sites 3 and 6, such sums could not be part of the amount that Johns Manville seeks to obtain as reimbursement from IDOT. 569 F.Supp.2d at 1124.

Of even more relevance, though, to the issues raised by the Hearing Officer's October 5th order, is that the collateral source rule has been found not to bar a defendant from obtaining information about payments received by a CERCLA plaintiff. In *Appvion, Inc. v P.H. Glatfelter Co.*, 144 F.Supp.3d 1028, 1030 (E.D. Wis. 2015), the trial court noted that:

> [A] CERCLA contribution action is not a personal injury action by an innocent plaintiff. Instead, it is a claim between two or more culpable tortfeasors, and the

> policy underlying the collateral source rule-to provide the innocent party with the benefit of any windfall is simply not advanced in such cases.
> (Emphasis added.)

As the *Appvion* court then went on to rule: "I conclude that the collateral source rule should not shield Appvion from making the disclosures sought by the Defendants." *Id.* at 1031 (the disclosures in *Appvion* involved payments which the company had obtained from various insurance companies and indemnitors). *Id.* at 1029.

As Johns Manville's case against IDOT has its genesis in the United USEPA's AOC, which it issued under its CERCLA authority (Exh. 62-3, AOC, ¶I.2), IDOT submits that the CERCLA case law cited herein provides a better rule for deciding the issues raised by the Hearing Officer's October 5th order. Thus, the Board should find that the discovery sought by IDOT – discovery about arrangements between the PRPs and any payments made by Commonwealth Edison to Johns Manville – is not barred by the collateral source rule. *Id.* at 1031. Accordingly, IDOT should be allowed to proceed with obtaining the discovery sought through its two subpoenas to Commonwealth Edison.

C. IDOT's Motion to Retake the Deposition of Scott Myers Should Be Granted

As set forth in IDOT's July 18th Motion, Johns Manville's counsel's conduct during Mr. Myers' deposition made it impossible to get answers from him regarding questions such as whether any agreement exists between Commonwealth Edison and Johns Manville with respect to any reimbursement of costs (July 18th Motion, p.3), or whether he had ever met with anyone from Commonwealth Edison when he was at the Johns Manville Site. *Id.* These were factual questions, properly put to Mr. Myers and improperly objected to by Johns Manville's counsel.[6]

[6] As noted in IDOT's July 18th Motion, on multiple occasions during his deposition, Johns Manville's counsel directed Mr. Myers not to answer questions that were entirely factual in nature, based upon improper and unfounded claims of privilege. (*See, e.g.*, July 18th Motion, pp. 3-4.)

Such questions were entirely proper and IDOT should have been allowed to question Mr. Myers about his knowledge of these matters. *In re Estate of Rennick,* 181 Ill.2d 395, 401 (1998) (noting that "[t]he purpose of discovery depositions is to explore the facts of the case, and for this reason wide latitude is given in the scope manner of questioning.")

Given counsel's conduct which thwarted IDOT's counsel's ability to meaningfully depose Mr. Myers, IDOT's Motion should be granted and IDOT should be given leave to retake his deposition and Johns Manville's counsel should be directed to limit herself to only raising proper objections.

CONCLUSION

For almost six months, IDOT has been attempting to take discovery regarding what it believes are highly relevant and materials matters that will put it in a better position to prepare for expert discovery in this matter and ultimately to prepare for future hearings in this case. IDOT's efforts to take this discovery are consistent with both the Board's and this state's courts' holdings that the right to take discovery is to be liberally construed.

Given the likelihood that Johns Manville will be seeking millions of dollars in reimbursement from IDOT, IDOT is entitled to explore the bases for all of the costs that Johns Manville will claim. Consistent with this right, IDOT is entitled to make sure that Johns Manville is not seeking reimbursement from IDOT for any amount that Johns Manville may have already received reimbursement for from Commonwealth Edison. Johns Manville is not entitled to recoup a windfall; it is only entitled to be reimbursed for amounts that it is still out of pocket and not one penny more. Accordingly, IDOT requests that the Board allow it to proceed with the discovery which it seeks under its two subpoenas and to retake the deposition of Scot Myers.

Respectfully Submitted

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