ILLINOIS POLLUTION CONTROL BOARD
August 8, 2002

GLADYS L. KNOX and DAVID A. KNOX,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 00-140
	)	(Citizens Enforcement - Noise)
TURRIS COAL COMPANY and AEI RESOURCES, INC.,	)	
	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on Respondent Turris Coal Company's (Turris) objections to evidentiary rulings filed on June 11, 2002. On July 23, 2002, Gladys L. Knox and David A. Knox (complainants) filed a response to the Turris' objections. In the objection, Turris requests that the Board strike hearing officer rulings made at hearing regarding the testimony and report of complainants' witness, Greg Zak, as well as complainants' rebuttal evidence.

For the reasons articulated below, the Board denies Turris' objections to evidentiary rulings.

BACKGROUND

On February 25, 2000, the complainants filed a formal noise complaint against Turris and AEI Resources, Inc. (AEI). The complaint concerns noise emanating from a mine ventilation fan located on a Turris facility adjacent to the complainants' residence. In January 2002, the parties exchanged discovery. A pre-hearing conference was held on June 3, 2002. This matter proceeded to hearing on June 11, 2002.

At hearing, Turris moved to bar the testimony of Greg Zak.[1] Tr. at 7. Zak was first contacted by the complainants in late 1999, regarding noise concerns about a mine ventilation fan located close to their property, and was called to testify on the complainants' behalf at hearing. Tr. at 68. Zak testified that he toured the Turris facility on May 10, 2001, and December 3, 2001. Tr. at 74. Prior to hearing he visited the Knox residence on May 22, 23, and 25, 2002. Tr. at 82. As a result of his investigations, he prepared a written report dated June 2, 2002, titled "Noise Emission from the Turris Coal Company Mine Vent Fan to an

[1] The transcript of the June 11, 2002 hearing will be cited as "Tr. at __."; the objection to evidentiary rulings will be cited as "Obj. at __."; the response to the objection will be cited as Resp. at __."

Abutting Residential Area." Tr. at 83. The hearing officer accepted the exhibit into evidence over objections by Turris. Tr. at 86. The hearing officer set a briefing schedule at hearing. The complainants' post-hearing brief is due on or before August 5, 2002. Turris' post-hearing brief is due on or before September 12, 2002. The reply brief, if any, is due on or before September 25, 2002. Tr. at 220.

ARGUMENT

Turris' Objection to Evidentiary Rulings

Turris objects to two of Hearing Officer Brad Halloran's rulings at hearing. First, Turris objects to Zak's testimony and the admission of his report into evidence based on complainants' untimely disclosure of the report. Obj. at 1. Turris asserts that 35 Ill. Adm. Code 101.616 provides that all discovery must be completed at least ten days prior to a scheduled hearing; and that a party must amend any prior discovery responses if the party learns that the response is incomplete or incorrect, and the additional or correct information has not otherwise been made known to the other parties during the discovery process or in writing. Obj. at 1-2.

Turris argues that Illinois Supreme Court Rule 213 provides that upon written interrogatories, a party must disclose the conclusions, opinions and all reports of any witness who will offer opinion testimony. Obj. at 2.

Turris contends that it served interrogatories and a request for production of documents on the complainants seeking information on any opinion or expert witnesses that complainants might call at hearing. Obj. at 3. Turris further asserts that it made a formal written request upon the complainants shortly before the hearing, to obtain supplemental or additional discovery, and that complainants produced none. *Id*. Obj. at 3. According to Turris, the complainants produced Zak's report less than ten days prior to the hearing. *Id*. Turris asserts that it did not object to the late disclosure at the pre-hearing conference, because complainants had repeatedly indicated they would make Zak available for deposition or interview prior to the hearing, but that they did not do so. *Id*.

Turris argues that it was ambushed at hearing, and that the results of Zak's report were significantly different than what he had previously reported. Obj. at 4. Turris asserts that complainants violated the spirit and letter of the Board's procedural rules and the Illinois Supreme Court Rules, and that Turris was prejudiced by Hearing Officer Halloran's ruling that Zak could testify, relative to newly disclosed matters. *Id*.

Turris also objects to Hearing Officer Halloran's decision to allow complainants to put on a rebuttal case. Obj. at 4. Turris contends that during the complainants' case in chief, Zak testified that the enclosure for the mine fan should be lined with fiberglass at least 3 1/2 inches thick and that the fiberglass was a slight investment. Obj. at 4.5. Turris argues that, aside from this testimony, Zak did not testify about the structural construction of the building, any

other material to use to accomplish noise reduction, or the cost of the building. Obj. at 5.

Turris contends that the complainants called Zak to improperly rebut their witness' testimony that noise control measures would cost $470,000 or more, based on the requirements Zak testified to in complainants' case in chief. Obj. at 5. Turris argues that rebuttal evidence must either disprove an affirmative defense or meet new points raised by Defendant's evidence, and that a defense expert's opinion which is contrary to an opinion of a plaintiff, does not constitute a new issue allowing for rebuttal testimony. *Id*.

Complainants' Response

The complainants respond that Zak was disclosed, during discovery, as a person with knowledge of the facts, who had been retained by them, and would take additional noise measurements and prepare a written report. Resp. at 2. The complainants assert that Zak's written report was hand delivered to Turris on the same day the complainants received it –on June 3, 2002, eight days prior to the hearing. Resp. at 2-3. The complainants contend that they extended to Turris an invitation to speak with Zak on a formal or informal basis, but that no specific request was made. Resp. at 2.

The complainants maintain that at the June 3, 2002 pre-hearing conference, they informed Turris that they could depose Zak or speak to him informally prior to the June 11, 2002 hearing at Turris' convenience. Resp. at 3. The complainants assert that Turris could have arranged to depose Zak or speak with him informally about his report, but that it elected not to pursue these options despite the complainants' invitation to do the same. *Id*.

The complainants argue that 35 Ill. Adm. Code 616(c) gives the hearing officer discretion and latitude to allow discovery within ten days of hearing, and that when a party such as Turris does not object to a deviation from the rule, an agreement among the parties to the deviation approved by the hearing officer is clearly within the purview of the rule. Resp. at 4.

The complainants assert that the Board has previously held that it may look to the Code of Civil Procedure or the Supreme Court rules where the Board's procedural rules are silent; that it will be guided by the principle of preventing injustice to the parties as a result of unfair surprise; and that it would not strike otherwise admissible testimony due to failure to precisely meet technical requirements of the Supreme Court Rules. Resp. at 4-5, citing McDonough v. Robke, PCB 00-163 (Mar. 7, 2002).

The complainants argue that no unfair surprise or injustice to any part was present in this situation, and that Zak testified that the results contained in the report were not significantly different than he had recommended before. Resp. at 5-6.

In addressing the rebuttal testimony in question, the complainants assert that rebuttal evidence explains, repels, contradicts or disproves evidence introduced by the defendant during

his case in chief, that allowance of rebuttal evidence lies within the discretion of the trial court, and that the court's ruling will not be set aside, absent abuse of discretion. Resp. at 6-7, citing Derrico v. Clark Equipment Co., 46 Ill. Dec. 232, 413 N.E.2d 1345, 1352 (1980). Finally, the complainants contend that the mere fact testimony would be admissible in their case in chief does not render it improper for rebuttal. Resp. at 7.

DISCUSSION

Section 101.616 of the Board's rules address discovery before the Board, and does provide, as asserted by Turris, that all discovery must be completed at least ten days prior to a scheduled hearing. 35 Ill. Adm. Code 101.616. The section also provides that a party must amend any prior discovery responses if the party learns that the response is incomplete or incorrect, and the additional or correct information has not otherwise been made known to the other parties during the discovery process or in writing. 35 Ill. Adm. Code 101.616.

In the instant matter, the complainants delivered Zak's noise report to Turris on the same day they received it. The Board is not persuaded by Turris' contention it was ambushed at hearing. Turris had over a week to review the report in preparation for hearing. In addition, it appears that the complainants did make Zak available for deposition or interview after the report was delivered and prior to hearing. Turris did not attach the complainants' discovery responses, and determining whether or not amendment of the response to interrogatories was necessary is, therefore, not possible. Regardless, the report was made known to Turris on the same day the complainants received it. Because the additional information was made known to Turris, amendment of the discovery in this circumstance was not necessary.

The requirement of Section 101.616(c) that all discovery must be completed at least ten days prior to the scheduled hearing is discretionary, as the hearing officer may order otherwise. Discovery may, therefore, then occur within ten days of the hearing as ordered by the hearing officer. In addition, under Section 101.616(h), a party is required to amend any prior discovery responses if that party learns that the response is in some material respect incomplete, and the other party has not been otherwise made aware of the additional or corrected information. This duty to amend must, necessarily, allow a party to amend or supplement discovery within ten days of the hearing if the information is discovered within that time frame, as was the case here.

Further, Turris has not shown that Zak was unavailable for deposition. Each party offers a different interpretation of the events leading up to hearing. However, it is undisputed that Turris did not contact the hearing officer or file a motion seeking to compel the appearance of Zak for a deposition or interview prior to the hearing. Accordingly, Hearing Officer Halloran's decision to allow the testimony and the report of Zak is upheld.

The Board also upholds Hearing Officer Halloran's decision regarding the rebuttal testimony. The testimony in question was elicited in response to testimony regarding the cost

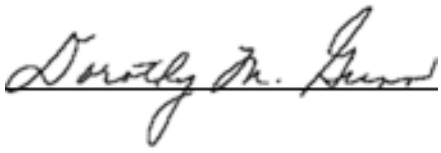
of remediation. Zak's testimony addresses new points raised by Turris regarding cost and is appropriate rebuttal testimony.

CONCLUSION

The Board finds that the hearing officer correctly ruled to allow the testimony, report, and rebuttal testimony of Greg Zak. Accordingly, Turris' objections to evidentiary rulings are denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 8, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board