



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
City of Wilkes-Barre and A.R. Popple, Inc. ) DOCKET NO: CAA-03-2005-0053  
and Wyoming S.&P., Inc. )  
 )  
Respondents )

ORDER ON COMPLAINANT'S MOTION IN LIMINE

This civil administrative penalty proceeding arises under the authority of Section 112(a)(3) and (d) of the Clean Air Act, as amended, 42 U.S.C. § 7413(a)(3) and (d). On December 30, 2004, the United States Environmental Protection Agency ("Complainant") filed a Complaint against the City of Wilkes-Barre, A.R. Popple, Inc., and Wyoming S.&P., Inc. ("Respondents"). Specifically, the issues concern asbestos removal and the asbestos NESHAP involved in demolishing the former Wilkes-Barre Steam Heat Plant ("Steam Heat Plant"). The Complaint charges violations for inadequate asbestos notification, failure to keep asbestos materials wet, failure to have a supervisor present at demolition, and failure to dispose of asbestos-containing waste materials as soon as practical.

On August 2, 2005, Complainant filed a Motion in Limine. In that motion, Complainant seeks to exclude all documents, exhibits, and testimony in relation to the financial condition of the Respondents and demolition activities involving other parties not named in the proceeding. First, Complainant argues that the evidence of inability to pay or adverse effect on the ability to continue to do business should be excluded because Respondents failed to produce any financial documents. Second, Complainant contends that any evidence of demolition activities at the Steam Heat Plant prior to June 20, 2002, should be excluded on the basis that it is irrelevant.

On August 17, 2005, Respondent A.R. Popple, Inc. filed a Reply to the Complainant's Motion in Limine. Respondent A.R. Popple, Inc.'s response does not mention the exclusion of evidence pertaining to financial condition. The reply does, however, argue that the Motion in Limine should be denied because evidence pertaining to demolition activities at the site is relevant (Reply to Complainant's Motion in Limine at 2-5).

**Standard of Review for Motion in Limine**

An Administrative Law Judge has the authority to rule on the admissibility of evidence and is required to admit all evidence unless "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40 C.F.R. § 22.22(a) (2004). Motions in limine are generally disfavored and "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp.2d 966, 969 (N.D. Ill. 2000);

*Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). Granting a motion in limine may benefit the court because of it will increase efficiency, decrease costs, and prevent the inclusion of prejudicial evidence. *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996); *Pivot Point Int'l, Inc. v. Charlene Products, Inc.*, 932 F. Supp. 220, 222 (N.D. Ill. 1996). However, a court cannot grant a motion in limine solely on those terms. The movant must show that the evidence is “inadmissible on any relevant ground.” *Starling v. Union Pacific R.R. Co.*, 203 F.R.D. 468, 482 (D. Kan. 2001).

### **Exclusion of Evidence of ay Exhibits, Documents, or Testimony Relating to the Financial Condition of the Respondents.**

Complainant seeks to exclude evidence of financial condition at the hearing on the grounds that the Respondents have neither made a claim of inability to pay nor produced any financial information in the prehearing submittals (Motion in Limine at 1). Specifically, Complainant contends that any failure to submit financial information in the prehearing exchange precludes any claims of inability to pay (Motion in Limine at 5).

As a general rule, evidence that has not been provided or specified during the prehearing exchange will not be admitted. 40 C.F.R. § 22.19(a) (2004). The Consolidated Rules of Practice states that if “a party fails to provide any document, exhibit, witness name or summary of expected testimony . . . at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party has good cause for failing to exchange . . . .” 40 C.F.R. § 22.22(a). Complainant filed the Motion in Limine nineteen days before the scheduled hearing. None of the Respondents have submitted any financial information. At this point in time, any submissions by the Respondents would be submitted fifteen days prior to the hearing. Thus, under 40 C.F.R. § 22.22(a), any documents, testimony, and exhibits submitted by the Respondents regarding financial condition would not have been admissible in the hearing.

However, failure to provide information is not synonymous with preclusion of any evidence probative of any claims of the Respondents’ inability to pay or adverse effect on the Respondents’ ability to continue to do business. While financial information may not be admissible during the hearing, the issues could be addressed in other forms. The court may address objections on individual exhibits or testimony as they arise at trial. *See Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1034 (N.D. Ohio 2002).

In addition, consideration of “the economic impact of the penalty on the business” in administering a penalty is a statutory mandate. 42 U.S.C. § 7413 (2005). This factor is required and no penalty may be given without considering it. *Merritt v. United States*, 960 F.2d 15, 18 (2d Cir. 1992). The fact that Respondents have not submitted financial documents does not remove the Complainant’s burden of introducing evidence on that issue. *Id.* at 18 (“If Congress had intended a different result when a defendant’s lack of resources is an issue, it could have written [the factor] into the statute as an affirmative defense and shifted the burden of going forward with evidence onto the defendant.”); *see In the Matter of New Waterbury, Ltd.*, Docket No. TSCA-I-88-1069, 1993 EPA LEXIS 168, \*25 (ALJ May 7, 1993) (“[I]t is one thing to apply . . . a presumption that respondent has the ability to pay a proposed penalty at the time a

complaint is issued and quite another to apply a such a presumption in evaluating evidence after an adjudicatory hearing in accordance with the Consolidated Rules of Practice.”). Evidence of inability to pay and adverse effect on the ability to continue business is inherently relevant to an assessment of economic impact. Preclusion of these issues is impermissible if they play relevant roles in penalty assessment.

Thus the Motion in Limine requesting preclusion of exhibits or testimony regarding inability to pay or adverse effect on the Respondents’ ability to continue to do business is denied.

**Exclusion of Evidence by Respondent A.R. Popple, Inc. Regarding Demolition and Related Activities at the Steam Heat Plant Prior to June 20, 2002.**

Complainant also seeks to exclude the any and all documents, exhibits, and testimony relating to the demolition and related activities at the Steam Heat Plant prior to June 20, 2002 (Motion in Limine at 1). In particular, Complainant seeks to bar testimony of two witnesses that a Respondent specified in the prehearing exchange. In Respondent A.R. Popple, Inc.’s Prehearing Exchange, Anthony Popple and Jim Hayward are listed as potential witnesses and the discussion of them reads as follows:

Subsequently, a partial collapse of the subject structure occurred an in approximately March 2002, the City contracted with Brdaric Excavation (“Brdaric”) to perform said demolition and to abate the partial collapse of the Steam Heat Plant. Brdaric commenced said demolition and in doing so improperly mixed asbestos material with other debris. Brdaric’s commencement of the demolition created another emergency in that a wall of the Steam Heat Plant was in danger of collapsing onto an adjacent home. At this time, the City contracted Popple to abate the emergency situation created by Brdaric’s actions.

(Prehearing Exchange of Respondent A.R. Popple, Inc. at 2).

Complainant argues that this evidence should not be admitted because it is irrelevant, immaterial, and of little probative value to any of the counts before the court (Motion in Limine at 7-8). The Complainant lists each of the counts and conclusively states that prior demolition activities would have no bearing on a violation analysis. *Id.* On the other hand, Respondent A.R. Popple, Inc. argues that such evidence is highly relevant. The Respondent claims that evidence of demolition activities could “absolve Popple of liability for actions taken by a party the EPA failed to name in the action.” (Reply to Complainant’s Motion in Limine at 3). Respondent A.R. Popple, Inc. assures that evidence of activities of a party external to this proceeding will show that A.R. Popple, Inc. did not improperly mix asbestos material with other debris.

As stated above, an Administrative Law Judge is required to admit all evidence unless “irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.” 40 C.F.R. § 22.22(a)(1). While the question of whether evidence is relevant or of probative value within the meaning of 40 C.F.R. § 22.22(a)(1) is ultimately a question of law, the admission of evidence is within the discretion of an Administrative Law Judge. *In re Julie’s Limousine & Coachworks,*

*Inc.*, 2004 EPA App. LEXIS 23, CAA Appeal No. 03-06, slip op. at 36 (EAB, July 23, 2004), 11 E.A.D. \_\_\_; *In the matter of General Electric Company*, Docket No. TSCA-III-520, TSCA-V-C-93-90, 94-90 & 95-90, TSCA-VI-477C, & TSCA-1090-02-14-2615, 1994 EPA ALJ LEXIS 19, \*3 (ALJ, August 30, 1994).

Here, Respondent A.R. Popple, Inc. makes a satisfactory argument as to the relevancy of demolition and related activities at the Steam Heat Plant prior to June 20, 2002. Evidence that establishes liability of a third party could clear the Respondent of any penalties. Further, Respondent states that this evidence will be informative in the determination of whether there was a contract between the corporation and the City of Wilkes-Barre. The relationship between the parties may provide vital information to assist a trier-of-fact.

Further, if evidence is admissible or the court is unable to determine whether the evidence should be excluded, a motion in limine should be denied. *In the Matter of U.S.A. Remediation Services, Inc.*, Docket No. CAA-03-2002-0159, 2003 EPA ALJ LEXIS 6, \*3-4 (ALJ, February 10, 2003). The evidentiary rulings would then be “deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context.” *Id.* at \*4 (citing *Hawthorne Partners* at 1401).

Complainant has not made a sufficient showing that evidence of relating to the demolition and related activities at the former Steam Heat Plant prior to June 20, 2002, should be excluded during the hearing. Further, Complainant has not adequately shown why testimony by Anthony Popple and Jim Hayward should be excluded. Complainant supports its Motion in Limine by listing the counts. Complainant, however, does not explain how testimony regarding prior demolition activity would be irrelevant to each of the charges. A summary of counts before the tribunal does not sufficiently explain the reasoning behind the admissibility of evidence. In essence, Complainant has failed to show how information about demolition activities would be *clearly* inadmissible or inadequate to assist the trier of fact.

When it is unclear whether evidence should be excluded, a motion in limine must be denied. A motion in limine may only be granted if there is no doubt as to the irrelevancy or immateriality of the evidence. Here Complainant has not sufficiently shown that the testimony of Anthony Popple and Jim Heywerd is clearly inadmissible. Without the context of trial, the admissibility regarding the testimony of Anthony Popple and Jim Hayward cannot be determined without doubt.

Therefore, the Complainant’s Motion in Limine in relation to demolition activities prior to June 20, 2002, is denied.

So ordered.

Dated: \_\_\_\_\_  
Washington, D.C.

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Spencer T. Nissen  
Administrative Law Judge