2018 IL App (5th) 160533-U

NO. 5-16-0533

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JAMES REICHERT LIMITED FAMILY PARTNERSHIP, Petitioner, v. THE ILLINOIS POLLUTION CONTROL BOARD and THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondents.	)	Petition for Review of an Order of the Illinois Pollution Control Board dated November 17, 2016. AC 16-7 IEPA No. 344-15-AC (Administrative Citation)

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Barberis and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Pollution Control Board's finding that a landowner was responsible for open dumping and burning of waste on its property was not supported by the evidence.

¶ 2 This is a direct appeal by the petitioner, James Reichert Limited Family Partnership, under Illinois Supreme Court Rule 335 (eff. Jan. 1, 2016) for a review of an administrative decision of the Illinois Pollution Control Board (Board). The petitioner challenges the Board's finding that it violated sections 21(p)(1), 21(p)(3), and 21(p)(7) of

the Illinois Environmental Protection Act (Act) by causing or allowing the open dumping and burning of waste, litter, and construction or demolition debris on its property. 415 ILCS 5/21(p)(1), (p)(3), (p)(7) (West 2014). For the following reasons, we reverse the Board's decision.

¶ 3 BACKGROUND

¶ 4 The Illinois Environmental Protection Agency (Agency) initiated proceedings against the petitioner on December 18, 2015, by issuing an administrative citation that assessed $4500 in civil fines for the alleged violations of the Act. The respondent filed a petition for review with the Board, and the Board conducted the review hearing on June 8, 2016.

¶ 5 At the hearing, the petitioner denied responsibility for any open dumping or burning on its property. The Agency presented the testimony of one of its field inspectors, Maggie Stevenson, and the petitioner presented the testimony of its manager, James Reichert.

¶ 6 The testimony established that the property at issue was located at 1406 Cornell Street in Marion, Illinois, and included a warehouse that was divided into two units, Unit A and Unit B. The petitioner leased Unit A to a business called Airgas and, for some period, leased Unit B to a business that installed television satellite dishes. The exact period during which the satellite installation company occupied Unit B is unclear from the record. The open dumping and burning occurred behind Unit B on the petitioner's property and consisted of materials commonly used for satellite installations.

¶ 7 At the hearing, Stevenson explained that the Agency began investigating the petitioner's warehouse property because overhead satellite images of the property taken on May 18, 2015, indicated the presence of a waste pile on the property. In October 2015, Stevenson inspected the property and discovered nails and charred wood in an area on the property that appeared to be an open burning site. She estimated that the burn pile was approximately five feet by six feet. At the time of her inspection, she was not aware that the property consisted of two warehouse units. She observed signage for only Airgas and incorrectly concluded that it occupied the entire building. As a result of her inspection, the Agency issued a notice to Airgas of the improper open dumping and burning. Stevenson testified that she also sent a copy of the notice to the petitioner as the property owner, but the petitioner's manager, James Reichert, testified that he did not receive the notice.

¶ 8 Airgas's office manager and its director of environmental safety spoke with Stevenson shortly after Airgas received the notice. At the hearing, Stevenson explained to the Board that, after speaking with the Airgas employees, she learned that the warehouse consisted of two units, that Airgas occupied Unit A, that the burn pile was located behind Unit B, and that the previous tenant of Unit B was a television satellite installation company. She testified that she believed that the satellite company no longer occupied the warehouse when she conducted her October 2015 inspection because she did not see any signs for the company on the property. She testified that she believed that the satellite company either went out of business or moved locations and had left materials inside the building when it left. Based on her conversation with the Airgas employees, Stevenson

determined that Airgas was not responsible for any of the open dumping or burning on the property.

¶ 9 Stevenson testified that she returned to the property on November 4, 2015, to perform a follow-up inspection. During this follow-up inspection, she again observed charred remains of lumber, nails, and various metals similar to those used in the installation of satellite dishes in the same burn pile. She testified that she also noticed that larger pieces of metal had been added to the burn pile since her October 2015 inspection. She described these larger pieces of metal as "holders that hold satellite dishes up."

¶ 10 In her inspection report, Stevenson wrote that the larger pieces of metal were originally coated with a plastic that was burned off, leaving metal acceptable for recycling. At the hearing before the Board, she testified that, in her experience, people usually burn metal "to take off some kind of coating so that they can recycle it or detach it from something that is burnable so they can recycle it." On cross-examination, she admitted that she did not have any evidence that Reichert burned the metal in order to recycle it.

¶ 11 Stevenson testified that she sent a letter to the petitioner the same day of her November 4, 2015, inspection, informing it of the inspection and providing it with a copy of the inspection report. Reichert testified that he received this letter, contacted Stevenson, and asked her what he "should do to correct the action." According to Reichert, Stevenson responded, "clean it up." He then cleaned up the burn pile sometime in December 2015.

¶ 12 The Agency did not present any testimony from Airgas's manager or its director of environmental safety. During the cross-examination of Stevenson, the petitioner's attorney asked Stevenson to describe to the Board what the Airgas employees told her when she met with them after her October 2015 inspection. In response, Stevenson testified that Airgas's manager told her that "she had received a phone call from Mr. Reichert saying that they were going to be burning pallets in the back and he just wanted to give her notice of that." The petitioner's attorney asked Stevenson whether the Airgas manager told her when this phone call took place. In response, Stevenson testified that the manager told her that Reichert made the call in May or June. Stevenson also testified, in response to cross-examination questioning, that the Airgas manager told her that the satellite installation company left behind the waste on the property and that Reichert "chose to burn the waste instead of dispose [*sic*] of it properly."

¶ 13 At the conclusion of Stevenson's testimony, the Agency moved to admit into evidence Stevenson's inspection report for her November 2015 follow-up inspection. The report included a summary of Stevenson's conversations with the Airgas employees, including the manager's statement that Reichert told her he would be burning pallets behind Unit B and the manager's statement that Reichert was burning waste left behind by the satellite company rather than disposing of it properly. The petitioner did not object to the admission of Stevenson's report, but did object to admitting any portion of the report that was hearsay. The hearing officer admitted the report, explaining that she would "let the Pollution Control Board make any decisions regarding [the petitioner's] objection."

¶ 14 Reichert testified at the hearing that, as of May 15, 2015, the tenants of the property were Airgas and the satellite installation company. When asked who was leasing the property in November 2015, he said Airgas and he "assume[d] the satellite company." On cross-examination, he testified that he was not sure when the satellite company left the property. Neither party presented any evidence to establish the specific period during which the satellite installation company occupied Unit B.

¶ 15 Reichert testified that, as the manager of the warehouse property, his duties included only negotiating leases and collecting rent. He left the tenants "alone so that they can enjoy the peace of the space they occupy." He testified that he manages over 100 properties and that, prior to receiving the administrative citation in December 2015, he did not know there was a trash pile that had been burned on his property. He also testified that he did not get along with the Airgas office manager and denied telling her that he was going to burn pallets on the property. He denied dumping or burning any waste on the property.

¶ 16 The Agency's administrative citation alleged that the petitioner committed the following violations of the Act:

(1) "caused or allowed the open dumping of waste in a manner resulting in litter, a violation of Section 21(p)(1) of the Act, 415 ILCS 5/21(p)(1) (2014)[;]"

(2) "caused or allowed the open dumping of waste in a manner resulting in open burning, a violation of Section 21(p)(3) of the Act, 415 ILCS 5/21(p)(3) (2014)[;]" and

(3) "caused or allowed the open dumping of waste in a manner resulting in deposition of general construction or demolition debris: or clean construction or demolition debris, a violation of Section 21(p)(7) of the Act, 415 ILCS 5/21(p)(7) (2014)."

¶ 17 The Agency assessed a civil penalty of $1500 for each violation, for a total of $4500 in civil penalties.

¶ 18 At the conclusion of the hearing, the Agency filed a post-hearing brief with the Board arguing that the petitioner was liable because it was the owner of the property and failed to take steps to prevent the open dumping and burning on its property. In its brief, the petitioner did not deny that open dumping and burning occurred on its property. Instead, it argued that it should not be held liable for causing or allowing the pollution because it did not actively participate in the open dumping and burning and did not have control over the area when the waste was deposited.

¶ 19 On September 22, 2016, the Board issued an interim opinion and order finding that the petitioner had violated sections 21(p)(1), 21(p)(3), and 21(p)(7) of the Act by causing or allowing the open dumping that resulted in litter, open burning, and deposition of construction and demolition debris. The Board did not find that Reichert personally dumped or burned the materials on the property. Instead, as the basis for its ruling, the Board found that the petitioner was capable of exerting control over the area where the open dumping and burning had occurred. Specifically, the Board reasoned that Reichert's removal of the waste in December 2015 illustrated the petitioner's control over the premises.

¶ 20 With respect to the allegation of open dumping, the Board noted as follows: "[I]n his post hearing brief, Reichert acknowledged control of the property by stating that he cleaned up the property in December 2015." The Board found "that subsequent efforts to clean up the Reichert Site are not relevant to the alleged violations of open dumping, but those efforts do illustrate control over the premises." The Board, therefore, concluded that the "[the petitioner] caused or allowed the open dumping of waste in a manner resulting in litter, in violation of Section 21(p)(1) of the Act."

¶ 21 With respect to the allegation of open burning, the Board reiterated its finding that "[the petitioner] caused or allowed open dumping on the Reichert Site" and then noted that the Agency documented that the waste was burned at the site. The Board, therefore, concluded that "[the petitioner] violated Section 21(p)(3) of the Act."

¶ 22 With respect to the allegation of open dumping of construction or demolition debris, the Board found the materials that Stevenson found included construction or demolition debris. Therefore, the court found that "Reichert's open dumping of waste resulted in the deposition of construction or demolition debris in violation of Section 21(p)(7) of the Act."

¶ 23 On November 17, 2016, the Board issued a final opinion and order that adopted the interim order and opinion. The Board assessed the petitioner $4500 in civil penalties plus $652.19 for hearing costs. The petitioner timely filed a petition for review for this matter to be directly reviewed by this court.

¶ 24 ANALYSIS

¶ 25 The legislature enacted the Act to establish a unified, statewide program to restore, protect, and enhance the quality of Illinois's environment. *People ex rel. Madigan v. Lincoln, Ltd.*, 2016 IL App (1st) 143487, ¶ 21. "The Act is to be liberally construed to effect its purposes." *Id*. ¶ 22. The primary purpose of the Act is to assure that "adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (West 2014).

¶ 26 The Act prohibits the open dumping or burning of waste and open dumping of construction or demolition debris. Specifically, section 21(p) of the Act provides that no person shall "cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site: (1) litter; *** (3) open burning; *** (7) deposition of: (i) general construction or demolition debris." 415 ILCS 5/21(p)(1), (p)(3), (p)(7)(i) (West 2016). The Act defines "open dumping" as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305 (West 2014). "Open burning" is defined as "the combustion of any matter in the open or in an open dump." 415 ILCS 5/3.300 (West 2014). "[K]nowledge, awareness, or intent are not elements of a violation of section 21(a) and (p) of the Act." *Lincoln, Ltd.*, 2016 IL App (1st) 143487, ¶ 24. Instead, "[l]iability is found when [the Agency] shows the alleged polluter had the capability of controlling the pollution or at least had control of the premises where the pollution occurred." *Id*.

¶ 27 I

¶ 28 Hearsay

¶ 29 The first argument we address is the petitioner's claim that the Board improperly admitted and considered hearsay evidence. The petitioner notes that Stevenson's report and her testimony were based, in part, on hearsay statements made by the Airgas office manager with respect to Reichert burning waste on the property. The petitioner argues that it was improper for the Board to rely on this hearsay evidence to find that its office manager, Reichert, personally conducted the dumping and open burning of waste at the property. In response to the petitioner's argument, the Agency argues that the Board did not consider the hearsay evidence in reaching its findings. During oral argument, counsel for the Agency stated that "hearsay was never part of the Agency's case before the hearing officer" and that it was not relied on by the Board in its decision.

¶ 30 We agree with the Agency that the Board did not rely on the hearsay statements of the Airgas office manager in making any of its findings. The Board did not find that Reichert personally conducted open burning on the premises in violation of the Act. Instead, the Board found that Reichert's removal of the burned waste in December 2015 "illustrate[d] [the petitioner's] control over the premises." This finding was not based on the hearsay statements of the Airgas manager but was based on Reichert's testimony at the hearing.

¶ 31 Because the Board did not base its decision on the hearsay statements of the Airgas office manager, we need not determine whether the Board improperly admitted the hearsay evidence.

¶ 32 II

¶ 33 Sufficiency of the Evidence

¶ 34 Next, the petitioner argues that the evidence that the Board did rely on was insufficient to establish that it violated the Act. The petitioner does not dispute that Stevenson found open dumping of waste on its property and that open burning occurred there. It argues that there was no evidence presented to establish that it controlled the waste or the property at the time of the open dumping. The petitioner concludes that, without evidence that it controlled the waste or the property when the dumping occurred, the Board cannot find it responsible for the open dumping merely because its manager cleaned up the open dumping after the pollution occurred. We agree.

¶ 35 Judicial review of administrative decisions extends to "all questions of law and fact presented by the entire record." *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272 (2009). "The standard of review to be employed depends on what is disputed: the facts, the law, or a mixed question of fact and law." *Housing Authority of the County of Lake v. Lake County Zoning Board of Appeals*, 2017 IL App (2d) 160959, ¶ 37. "The Board's findings of fact will be upheld unless they are against the manifest weight of the evidence." *Gonzalez v. Pollution Control Board*, 2011 IL App (1st) 093021, ¶ 32. We will reverse a decision under the manifest weight of the evidence standard only if the opposite conclusion is clearly evident. *Id*. Here, the petitioner's argument does not rely on disputed historical facts.

¶ 36 "Where the historical facts are admitted or established, the controlling rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, the case

presents a mixed question of fact and law, and the standard of review is 'clearly erroneous.' " *Housing Authority of the County of Lake*, 2017 IL App (2d) 160959, ¶ 37. "The 'clearly erroneous' standard is between the *de novo* and the against-the-manifest-weight-of-the-evidence standards and provides a measure of deference to the agency's experience and expertise." *Id*. In the present case, we will apply the "clearly erroneous" standard of review.

¶ 37 The facts that the Board relied on in finding the petitioner in violation of the Act are not in dispute. The relevant facts include the Board's finding that open dumping and burning occurred on the petitioner's property; that Stevenson discovered the open dumping and burning during inspections of the property that occurred in October and November 2015; that in November 2015, Stevenson sent the petitioner notice of the open dumping and burning violations; that upon receiving the notice, the petitioner's manager, Reichert, contacted Stevenson and asked what he needed to do to correct the violations; and that Stevenson told him to "clean it up," which he did sometime in December 2015.

¶ 38 The Agency issued the petitioner a citation for three violations of the Act stemming from the open dumping and burning. The petitioner denied responsibility, noting that a satellite installation company occupied the premises. The Board correctly concluded that evidence that Reichert cleaned up the burn pile in December 2015, after the open dumping and burning had occurred, was "not relevant to the alleged violations of open dumping." However, the Board incorrectly concluded that "those efforts do illustrate control over the premises" sufficient to hold it responsible under the Act for the open dumping.

¶ 39 As noted above, the Agency can establish liability under the Act by showing that "the alleged polluter had the capability of controlling the pollution or at least had control of the premises where the pollution occurred." *Lincoln, Ltd.*, 2016 IL App (1st) 143487, ¶ 24. See also *People v. Fiorini*, 143 Ill. 2d 318, 346 (1991) ("The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution."); *People v. Brockman*, 143 Ill. 2d 351, 373 (1991) (citing authority from various jurisdictions for the proposition that there is an "oft-stated rule that liability for the pollution requires that the defendant be in control of the pollution"); and *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793 (1993) ("The State must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred.").

¶ 40 For example, in *Phillips Petroleum Co. v. Illinois Environmental Protection Agency*, 72 Ill. App. 3d 217 (1979), a train derailment resulted in a punctured tank car that leaked anhydrous ammonia into the air. *Id*. at 218. Phillips Petroleum owned the tank car and loaded it with the anhydrous ammonia, but the railroad maintained control over the tank car until the derailment. *Id*. The Board found that Phillips Petroleum violated section 9(a) of the Act as a result of the anhydrous ammonia leak for causing or allowing the discharge or emission of a contaminant into the environment causing air pollution. *Id*. See Ill. Rev. Stat. 1975, ch. 1111½, § 1009(a).

¶ 41 On direct review, the court reversed the Board, noting that, although knowledge and intent on the part of the polluter is not required under the Act, there were no cases

that have imposed strict liability on an alleged polluter under the Act. *Id*. at 220. The court noted that the record in that case did not show that Phillips Petroleum "exercised sufficient control over the source of the pollution in such a way as to have caused, threatened, or allowed the pollution." *Id*. at 220-21. Therefore, the court concluded, there was no evidence to support the Board's finding that Phillips Petroleum violated the Act. *Id*. at 221.

¶ 42 Likewise, in the present case, there was no evidence presented at the hearing to support the Board's finding that the petitioner caused or allowed the open dumping. Evidence that Reichert cleaned up the burn pile *after* the open dumping occurred did not establish that the petitioner controlled the source of the pollution or the premises when the dumping occurred.

¶ 43 The open dumping and burning at issue here occurred sometime before Stevenson's inspection of the property on November 4, 2015. The open dumping was located behind Unit B of the warehouse facility, and the evidence established that the petitioner had leased Unit B to the satellite installation company. Reichert testified that he believed that the satellite installation company was still occupying Unit B in November 2015. He further explained that he managed over 100 properties and that he left tenants "alone so that they can enjoy the peace of the space they occupy." Stevenson testified that the contents of the open dumping on the property consisted of materials commonly used for the installation of television satellite dishes.

¶ 44 The Board relied on evidence that Reichert cleaned up the burn pile in December 2015, but his cleanup effort took place after the open dumping and burning had occurred.

Evidence that a property owner cleans up open dumping on its land, without any additional evidence, does not establish that the property owner caused or allowed the open dumping on the property. The Agency must present evidence to show that the landowner "exercised sufficient control over the source of the pollution." *Lincoln, Ltd.*, 2016 IL App (1st) 143487, ¶ 26. The Board's decision in the present case is not supported by the record and is clearly erroneous.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we reverse the Board's November 17, 2016, final opinion and order.

¶ 47 Reversed.