IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M & M Stone Co.,	:	
Petitioner	:	
	:	
v.	:	
	:	
Department of Environmental	:	
Protection,	:	No. 383 C.D. 2008
Respondent	:	Argued: September 11, 2008

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI[1] FILED: October 17, 2008

M & M Stone Co. (M&M) petitions this Court to review an Environmental Hearing Board (Board) order upholding the Department of Environmental Protection's (Department) suspension of M&M's Noncoal Surface Mine Operator's permit, the Department's order to cease pumping water at the quarry it operates, and to restore or replace lost water it supplies at four specific locations (four private wells and one public water well operated by Intervenor Telford Borough Authority (TBA)).

[1] This matter was argued before a panel consisting of Judge Pellegrini, Judge Friedman and Judge Leavitt. Following argument, Judge Friedman found it necessary to recuse, and the case was submitted on briefs to Judge Simpson on September 17, 2008, for consideration as a member of the panel.

M&M is a Pennsylvania corporation engaged in the mining of noncoal minerals using a surface mining method. In 1977, M&M obtained a permit to operate the quarry located in West Rockhill Township, Bucks County. TBA owns and operates several municipal drinking water supply wells, supplying drinking water to approximately 3,000 users. In the early 1990s, the Department received various complaints of water loss from other parties owning wells near the quarry. In 1994, the Department conducted an investigation from which it determined that M&M's pumping of the quarry's pit had dewatered private wells and had a minor impact on TBA's drinking supply well #4 (TBA 4). After receiving a commitment from M&M to replace the water supply, the Department issued M&M a permit to conduct a lateral expansion of the quarry. Again, in 1998, the Department received complaints of water loss from TBA, specifically in TBA 4, but after conducting an investigation, it concluded that there was insufficient evidence that the quarry pumping caused TBA 4's decreased production.

In 1999, the Department granted M&M permission to deepen the quarry by 50 feet and included several conditions to this permit involving groundwater monitoring and remediation.[2] M&M began drilling of the quarry in

[2] Special Condition No. 10 established a groundwater monitoring program. Special Condition No. 11 stated that M&M "shall restore or replace the Telford Borough Authority (TBA) public water supply Well No. 4 [TBA 4] … provid[ed] that specific monitoring as outlined in Special Condition No. 12 supports the determination that the permitee has impacted this well by his mining activities." (Findings of Fact 13c, d, e; Board's January 31, 2008, Adjudication.) In order to provide a determination of a potential dewatering to TBA 4, Special Condition No. 12 contained an outline for monitoring the site and a procedural plan to adequately restore or replace the water supply if dewatered by M&M's mining activities. In addition, Special Condition No. 12c.(3) provided, in relevant part:

> If the Department determines through additional statistical analyses, where valid and applicable, of any data submitted

(Footnote continued on next page…)

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> pursuant to the monitoring requirements of this permit, or data submitted by TBA or any data collected by the Department personnel that TBA 4 is adversely affected by the permitee's mining activities, the Department shall notify the permittee accordingly. In making the determination of adverse effects (i.e. significant decline of static water level or specific capacity or quality) pursuant to this paragraph, the Department shall make such determination through parametric or non-parametric statistical analyses of data from any water year (defined as October 1 through September 30) or statistical analyses of fate from any relevant water period (e.g. October 1 through April 30, and May 1 through September 30). The permittee shall then commence the procedures outlined in 12.c within thirty (30) days of receipt of the notice *unless the permittee is able to affirmatively demonstrate that the dewatering to TBA Well No. 4 [TBA 4] has been caused by factors not attributable to the mining operation.* In attempting to make this an affirmative determination, the permittee may submit and the Department may consider additional statistical analysis of the data contained in Table 1 or the raw data compiled to make Table 1.
>
> All costs for the above listed procedures shall be borne by the permittee. The Department reserves the right to determine the permittee's responsibility for restoring or replacing TBA's well No. 4 if only one of the conditions set forth in Special Condition No. 12b. is met, based on other supporting information that an affirmative determination can be made that mining activities impacted this water supply well.
>
> Should permittee fail to comply with the terms of this Special Condition, this permit will be suspended and mining operations will be ceased immediately without prior notice to the permittee. (Emphasis added.)

Special Condition No. 14 provided, in relevant part:

> The permittee shall also restore or replace any [private water supply outside the 1500 foot area or north of the East Branch of the Perkiomen Creek which the Department determines to be affected as a result of the permittee's mining activities in accordance with the Noncoal Surface Mining Conservation and Reclamation Act

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August 2002 and reached the new permitted depth in December 2002. TBA conducted its own water loss investigation from 2002 to 2004, which served as the basis for its September 2004 complaint to the Department claiming that M&M's activities caused the dewatering of TBA 4. M&M denied responsibility for TBA's water loss.

The Department conducted an investigation of water loss at TBA 4 and at several nearby private water wells. On February 2, 2005, the Department notified M&M that it believed the quarry mining adversely affected TBA 4. After M&M refused to voluntarily restore or replace TBA 4, the Department issued two compliance orders on November 15, 2005. These orders required M&M to cease pumping and mining activities at the quarry and to restore or replace the affected water supplies at TBA 4 and the Raffaele, Shema and Brunner private wells. Additionally, after finding that M&M's failure to restore or replace TBA 4 was in violation of Special Conditions Nos. 11 and 12 of the permit; Section 11(g) of the Noncoal Surface Mining Conservation and Reclamation Act (the Act);[3] and 25 Pa.

(continued…)

> (Act 219 f 1984), Section 11(g) and 25 Pa. Code §77.533 of the Department's rules and regulations. If the Department determines from groundwater monitoring that any water supply well will be significantly dewatered by development of the lowest lift, the Department may require the permittee to replace the well(s) that may be dewatered prior to actual interruption or diminution of the water supply(s) … Should the permittee fail to comply with the terms of this condition, this permit will be suspended and mining operations will be ceased immediately and without prior notice to the permittee.

[3] Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §3311(g).

Code §77.533; and its failure to restore, replace or reimburse costs related to the affected water supplies at the private wells constituted a violation of Section 11(g) of the Act, 25 Pa. Code §77.533, and Special Condition No. 14, the Department suspended M&M's permit and ordered M&M: 1) to immediately restore or replace TBA 4 to an adequate quantity and quality for the purposes served; 2) to continue to provide bottled drinking water to the Brunner and Shema residences; 3) to immediately reimburse TBA for all expenses that it had incurred in lowering the pump in TBA 4; and 4) to restore and replace the water supplies to the Raffaele, Shema and Brunner residences by providing a permanent source of water adequate in quantity and quality for the purposes served by the affected supplies.[4]

On November 15, 2005, M&M suspended its quarry operations pursuant to the Department's orders. M&M appealed the Department's action, along with all three orders, which were then consolidated for hearing before the Board.

Hearings were held from May 21, 2007, through June 6, 2007. On January 31, 2008, the Board dismissed M&M's appeals because the Department satisfied its burden of proving that the two November 14, 2005 orders and the March 9, 2006 order were lawful and reasonable. The Board's opinion contained 165 findings of fact spanning over 50 pages. Of significance, the Board found the

[4] In December 2005, the Department received another complaint regarding water loss at a private well owned by Linda Jencson. After an investigation, the Department issued a report in which it determined the quarry had also impacted the Jenscon well. On March 9, 2006, the Department issued an order regarding the Jencson well to which M&M declined responsibility for its replacement. This matter was docketed under No. 2005-343-L and consolidated with Nos. 2005-344-L, 2006-110-L and 2007-098-L.

opinions of the Department and TBA's expert witnesses "to be the most credible" and went on to acknowledge its acceptance of their explanations of the "hydrogeologic reality" in the study area. (Board's January 31, 2008 Adjudication at 36.) The Board also credited the Department's experts' opinions of "how M&M's operation at the [q]uarry caused the water losses at TBA 4 and the [p]rivate [w]ells" and that "pumping out of the quarry adversely affected and would continue to adversely affect the wells." (Board's January 31, 2008 Adjudication at 36.)

M&M then took this appeal[5] in which it contends that the Board did everything wrong: that it erred in finding the testimony of its witnesses not credible, that the findings made by the Board were not based on substantive evidence, and that the Board erred in admitting and excluding evidence.

I.

We turn first to M&M's claim that the Board improperly rejected its experts' testimony as not credible while erroneously accepting the testimony of the Department's experts. In its brief, M&M painstakingly reviews the testimony of each of its experts and contends that the Board improperly disregarded the "stark contrast in utility" between its experts' presentations and those of the Department

[5] Our review of an Environmental Hearing Board order is limited to determining whether its findings are supported by substantial evidence and whether constitutional violations or errors of law were committed. *Leatherwood, Inc. v. Department of Environmental. Protection,* 819 A.2d 604 (Pa. Cmwlth. 2003).

in finding that its experts were less credible.[6] M&M argues that the Board, when making credibility determinations, must provide a justification for its decision to choose one expert's testimony as credible over that of another and must state "substantive reasons" to distinguish the weight given to one expert's opinion over another. This argument is both legally and factually wrong.

M&M's argument is legally wrong because in *Birdsboro and Birdsboro Municipal Authority v. Department of Environmental Protection,* 795 A.2d 444, 447-48 (Pa. Cmwlth. 2002), this Court expressly stated that "the EHB [Board] need not provide specific reasons for finding one witness credible over another." *See also Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.),* 666 A.2d 383 (Pa. Cmwlth. 1995). It is wrong factually because the Board did explain in detail the reasons that it deemed each of M&M's witnesses not credible.[7]

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[6] M&M's technical experts included Gary M. B. Kribbs, P.G. (Kribbs); Val A. Britton; P.G. (Britton); Phillip S. Getty; P.G. (Getty); Michael J. Schnieders (Schnieders); and Timothy M. Lutz, Ph.D (Dr. Lutz).

[7] For example, in findings of fact 69-70, the Board discusses that it found Kribbs to be a "well qualified hydrogeologist," but did not credit his opinion that TBA 4 is fouled because of several reasons, including:

> a. His opinion is based in large part upon the poor-quality shuttles video. Tellingly neither Kribbs (nor any other M&M expert) successfully challenged the Fennimore video (T. (6/1) 170-177).
>
> b. Kribbs' opinion regarding the well was primarily a result of the process of elimination and his opinion (discussed below) that the Quarry was not causing the losses. Kribbs conducted limited investigation of the well itself. (T. (5/29) 150-151).

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We also reject M&M's contention that the Board's determination that Department witnesses were more credible is arbitrary and capricious. As we have indicated, the Board's adjudication is a detailed decision containing 165 findings of fact developed after a six-day hearing on the matter. The findings show the Board's careful and well-reasoned consideration of each expert's testimony and the respective exhibits. What M&M essentially asks this Court to do is revisit all of the testimony and find that its experts were more qualified and their opinions credible. We cannot do so. As we have stated over and over and over again, "[q]uestions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the fact finding agency, and are not usually matters for a reviewing court." *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877, 880 (Pa. Cmwlth. 1986); *Martin v. Department of Environmental Resources*, 548 A.2d 675 (Pa. Cmwlth. 1988).

M&M also contends that the Board capriciously disregarded the uncontradicted testimony of its experts, Schnieders and Getty, regarding the

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> c. Kribbs has very limited experiencing in reviewing video surveys (T. (6/1) 53); waited a year before preparing a report of the video (M&M Ex. 136 (App. E.)).
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> d. Kribbs' opinion was based in part on the amount of growth accumulated in 2 ½ years. (T. (6/1) 179 (6/4) 34; M&M Ex. 27.) In fact, most of the hardware, including the pump, had been in the well for 15 years. (T. (6/6 230-237; DEP Ex. 35).
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> (Findings of fact 69-70; Board's January 31, 2008 Adjudication.)

assessment of TBA 4's chemical and physical properties. A capricious disregard of the evidence occurs "when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result." *Arena v. Packaging Systems Corp.*, 510 Pa. 34, 38, 507 A.2d 18, 20 (1986); *see also Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002). In this case, the Board did not disregard their testimony; it just found their testimony not credible, explaining in detail why it did so.

II.

M&M essentially contends that all findings of fact by the Board are unsupported by substantial evidence.[8] In doing so, M&M habitually references evidence and testimony put forth by witnesses that the Board found to be not credible.[9] However, M&M does pinpoint findings of fact by the Board that it contends are not supported by substantial evidence. While its argument

[8] Substantial evidence is defined as evidence which a reasonable mind can accept as adequate to support a conclusion. *Pine Haven Residential Care Home v. Department of Public Welfare*, 512 A.2d 59 (Pa. Cmwlth. 1986). When reviewing an administrative order, the prevailing party is "entitled to the benefit of every inference which can be logically drawn from the evidence when viewed in a light most favorable to the prevailing party." *Doerr v. Pennsylvania Liquor Control Board*, 491 A.2d 299, 302 (Pa. Cmwlth. 1985).

[9] Consistent with M&M's other arguments as to the Board's findings, M&M's last challenges relate to its contentions that Kribbs' testimony concerning his drilling of MW2Pz2 and the Leatherman well proves that Leatherman is not in the lower, semi-confined aquifer and its argument that there is no evidence that the four private wells access the semiconfined aquifer. M&M supports these arguments by citing to Kribbs' testimony. As we stated above, the Board deemed Kribbs' testimony to be not credible and we cannot disturb this credibility determination. As such, M&M misunderstands the standard and scope of review of this Court by advancing this argument and ignoring the credible testimony of the Department's experts Brady and Hill, whose testimony the Board relied on for this specific finding.

concerning those findings also suffers the aforementioned defects, nonetheless, we will address them in the interest of "completeness."

First, it contends that there is no basis for the Board finding that the fractures in the rock are "variable and irregular." (Finding of Fact 95; Board's January 31, 2008 Adjudication at 19.) The Board supported its finding of fact that the rock fractures were irregular and variable with the expert testimony of Keith Brady (Brady), Chief of the Surface Mining Permit section of the Department's Bureau of Mining and Reclamation; Michael D. Hill (Hill), a qualified expert in hydrogeology and hydrogeology statistical analysis; and the Department's report on its "Hydrogeological Investigation of Effects of M&M Stone Quarry Pumping on Potential Well Water Loss and/or diminution of Private Water Supply Wells and TBA No. 4 Public Water Supply Well." After reviewing the experts' testimonies and the Department's report, we find that the Board's findings regarding the rock composition are supported by substantial evidence.

When testifying about the geologic character of the area, Brady explained the variability between the different wells in terms of the differences in the values for one piezometer to another as related to the variability in the fractures. (Reproduced Record (R.R.) at 3159a.) Also, Brady testified in response to a question as to whether or not there was a transition zone between the two aquifers concluding, "[t]here would almost have to be, simply because it's not a stratigraphic dividing." (R.R. at 3159a.) Brady also testified that there was variability in this transition and that "[i]t's not going to be a uniform layer for a variety of reasons … but weathering is not - - it's not uniform because it's based on things like fracturing, how many fractures you have." (R.R. at 3153a.)

The Board also relied on the Department's report, "DEP Ex. 4," which stated in its "Analysis of Data" section: "The reason for some of this uncertainty [as to the location of the wells with respect to the aquifers] is that both aquifer systems are reported to occur in the same argillite lithologic unit, and the difference between upper and lower aquifer systems is attributed to depth of weathering and characteristics of fracture and joint systems." (R.R. at 2294a.) This report later goes on to state:

> One of the problems in delineating cones of depression (ZOI) and evaluating water level data from wells in the mining regions of Pennsylvania and elsewhere is that we are not typically dealing with *isotropic and homogenous media*. If we were, the groundwater contours around pumping wells and quarries would be neat concentric circles. Instead, the hydrogeologic setting in most mining areas exhibits anisotropy, due to preferential flow paths that are typically parallel to the strike of the bedding of the rocks, especially in carbonate lithologic units. Also, most of the groundwater flow in these mining regions is *fracture controlled*, wherein the secondary porosity and permeability in these fractured rock zones is much greater than the intrinsic porosity and permeability of the non-fractured bedrock. This is especially important in rock units with relatively low hydraulic conductivity, such as the argillite rocks in this case. Therefore it is not unusual that the ZOI is elliptical or elongated in this case, or that some wells in the monitoring well group do not behave like all of the other wells, due in part to whether the wells are on *fracture traces* or not. (Emphasis added.)

Hill testified before the Board that there was variability in the geology and that conditions in the rock surrounding the area were "not uniform in every direction." (R.R. at 2851a.) In response to a question as to why one would see different reactions from monitoring wells in the same general area and whether or

not it was based on geology, Hill responded that it was based on a number of variables, including geology, and added, "the orientation of the beds, the number of fractures controlling groundwater flow, and the variability within the aquifer, and where the monitoring well was located" were all factors. (R.R. at 2852a.) In light of the testimony of Brady and Hill and the Department's report, there is more than enough evidence from which a reasonable mind could conclude that the fractures were variable within in the system and irregular.

Second, M&M contends that there is not substantial evidence to support the Board's finding that the most dramatic declines [in drawdown, specific capacity and pumping volume] were (aside from TBA 4) observed at monitoring points "MW2Pz2, MW2Pz3, Leatherman and Heckler," which is what would be expected if the quarry penetrated for the first time into multiple fractures in the semiconfined zone. (Finding of Fact 123; Board's January 31, 2008 Adjudication at 26.) To support this finding, the Board again cites to the testimony of Brady, Hill, the Department's Report (Exhibit 4) and several other exhibits of the Department.

Hill's testimony concerned the conclusions that he drew from box plot data on certain wells. For example, for the Heckler well, he stated:

> [T]here's a period of time in the first part of the plot where there's a relatively steady state. There appears to be – there's a decline in the overall static water level that appears to be trending either for a specific period of time at a flat trend and then at some point the overall trend is much greater in its decline, corresponding to the discharge record from the quarry previously – previous time when the static water levels were dropping in the

> Heckler well, that there's an increase trend in overall quarry pumping.

(R.R. at 2850a.)

Hill also testified that the Leatherman monitoring point was similar to Heckler in that water fluctuations were occurring to some point and then, at some later point in time, the trend was "dramatically different, where water levels dropped after a period of time where quarry discharging was increasing." (R.R. at 2850a.) Hill further testified as to the effect of the quarry on the monitoring points in the wells adding: "[i]n terms of the hydraulic regime, there is something influencing these water levels beyond normal seasonal fluctuation or what we'd expect to see in the precipitation that was occurring at this time. During this time period, water levels were declining while precipitation again in 2003 was at record levels." (R.R. at 2850a.)

Brady's testimony also supported the Board's finding on this issue because he explained the data from several of the Department's exhibits, including "D-89," which contained the box plots specifically for the "deeper wells" that the Department believed were to be in the lower or confined aquifer (these wells included Leatherman, Heckler, MW2Pz2, MW2Pz3). Brady testified that while the shallow wells were not to be "dewatered," the deeper wells demonstrated a consistent pattern of water level decline. He further stated that prior to M&M's deepening of the quarry by 50 feet, the quarry's depth was in the unconfined zone, but then went deeper, went into the confined zone, and "essentially dewatered the lower aquifer." (R.R. at 3161a.) Brady further testified that: "what happened is, when the quarry went deeper, they [M&M] pretty much pulled the lid off of the

confined zone, it flowed in to the pit, and they were pumping the water out, and in the process the water level dropped in all these deeper piezometers." (R.R. at 3161a.)

This testimony, along with the numerous Department exhibits, constitutes ample evidence to support the Board's finding as to the declines at monitoring points MW2Pz2, MW2Pz3, Leatherman and Heckler and its finding stating that the quarry dewatering was the reason behind such declines.

Finally, M&M challenges the Board's rejection of the testimony of its expert, Kribbs, who opined that if the quarry deepening intercepted the semiconfined aquifer, massive amounts of groundwater would very quickly flood the quarry and drain anything and everything else around it that had also penetrated that artesian unit because that was not consistent with the complex and irregular fracturing that controlled groundwater flow in the study area. (Findings of Fact 112a.-112d.; Board's January 31, 2008 Adjudication at 22-23.) To support this argument, M&M again cites to the testimony of is experts (Kribbs and Brian Carpenter (Carpenter)), who testified before the Board that they conducted test drilling of the quarry by using drilling boreholes to see if any water flow would could be observed. (R.R. at 3216a, 3218a-3219a, 3240a.)

The Board acknowledged Kribbs' testimony concerning the drilling of boreholes in finding of fact 112.b., but refused to credit his opinion and instead deferred to the prior testimony by the Department's experts concerning the irregular fractures after Kribbs essentially admitted that the drilled boreholes might not necessarily hit the artesian unit each time. The Board was entitled to make a

credibility determination, not credit the testimony of one expert witness, and instead find that the testimony of another expert, the Department's, in this case, was more persuasive when making a finding of fact. Thus, the Board's finding of fact with regard to the borehole drilling and presence of artesian water flow at the quarry floor is supported by substantial evidence.

III.

M&M contends that the Board erred in either allowing or not allowing witnesses to testify. It contends that the Board erred in allowing Hill, a Department witness, to testify as an expert statistician. The Board made a specific finding of fact as to Hill, which stated: "Michael D. Hill of the Department is a qualified expert in hydrogeology, including hydrogeological statistical analysis. Hill has much more experience dealing with water loss issues than any of M&M's witnesses. (T. (5/21) 19-73.)" (Finding of Fact 106; Board's January 31, 2008 Adjudication at 21.) M&M filed a motion in limine to preclude Hill's expert testimony, but this motion was denied on April 16, 2007. (R.R. at 202a.) M&M again challenged the qualification of Hill as an expert witness at the hearings. (R.R. at 2793a, 2796a.) However, M&M failed to challenge Hill's qualifications as an expert in statistics in its post-hearing brief. Instead, M&M discusses the substantive nature of the Department's statistical assessment. Under 25 Pa. Code §1021.131(c), "an issue which is not argued in a posthearing brief may be waived." *See also Lucky Strike Coal v. Department of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988); *Wilbar Realty, Inc. v. Department of Environmental Resources*, 663 A.2d 857 (Pa. Cmwlth. 1995). Because M&M failed to raise the

issue of Hill's qualification as an expert witness in its post-hearing briefs, this issue is deemed waived.[10]

M&M then argues that the Board erred in denying its request to present surrebuttal testimony after the Department presented testimony and exhibits, which it alleges were revealed to M&M for the first time at the final hour

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[10] Even if we were to permit M&M's argument regarding Hill's qualification as an expert witness in hydrogeological analysis, we do not believe it has merit. It is well settled that "matters of evidence taking, and the admission of testimony and exhibits, are committed to the sound discretion of the hearing body." *Pennsylvania Game Commission,* 509 A.2d at 887. The Court may not substitute judicial discretion for administrative discretion in matters involving technical expertise and which are within the special knowledge and competence of the Board. *Swartwood v. Department of Environmental Resources,* 424 A.2d 993 (Pa. Cmwlth. 1981). The applicable standard under Rule 702 of the Pennsylvania Rules of Evidence provides:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. Pa. R.E. 702.

A review of Hill's qualifications reveals that he is competent to testify as an expert in hydrogeology and hydrogeological statistical analysis. During *voir dire,* Hill testified as to his experience with statistical analysis in conjunction with hydrogeology and his statistics coursework when he pursued an undergraduate degree in geology. Hill also testified concerning his experience while working with the Department. (R.R. at 2786a–2796a.) A witness is properly qualified as an expert when he or she "has any reasonable pretension to specialized knowledge on the subject under investigation." *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480, 664 A.2d 525, 528 (1995). In addition, whether a witness is qualified to testify as an expert is within the trial court's discretion, and the Commonwealth Court will not reverse unless there is a clear abuse of discretion. *Swift v. Department of Transportation*, 937 A.2d 1162 (Pa. Cmwlth. 2007). The fact that Hill does not have an undergraduate degree in statistics does not render him an incompetent expert, but instead goes to his credibility and the weight of the evidence. Thus, we find that the Board did not abuse its discretion in allowing Hill to be qualified as an expert in this matter.

of the trial. M&M correctly points out that "some rebuttal evidence may be offered as a matter of right, while other rebuttal evidence, even evidence which should have been given in the case-in-chief, can be admitted within the discretion of the trial court provided that the action of the court is not arbitrary or capricious." *Mitchell v. Gravely International, Inc.*, 698 A.2d 618 (Pa. Super. 1997). Rebuttal is also proper "where facts discrediting the proponent[']s witnesses have been offered." *Flowers v. Green*, 420 Pa. 481, 484, 218 A.2d 219, 220 (1966) (quoting *Schoen v. Elsasser*, 315 Pa. 65, 66, 172 A. 301, 302 (1934)).

M&M contends that the Board erred when it denied the testimony of Britton and Kribbs to rebut Brady's testimony concerning the use of certain values in a study to evaluate the quarry and to rebut three of the Department's exhibits (D-91, D-92, D-93). Again, M&M failed to raise this issue in its post-hearing brief to the Board, thus deeming the issue waved under 25 Pa. Code §1021.131(c). Even if we permit this issue to be addressed before this Court, when counsel for M&M made his request for surrebuttal, he admitted that the information he wished to present with surrebuttal of Britton and Kribbs was available in the record, if "we read through it and examine the figures correctly." (R.R. at 3441a-3442a.) Counsel for M&M went on to request surrebuttal using another M&M witness (Carpenter), proposing that Carpenter could describe the "pumping regime and how it cycles between these various facilities." (R.R. at 3442a.) The Board then permitted rebuttal of Carpenter to occur, while disallowing the surrebuttal of Kribbs and Britton after counsel's admission clearly indicated that rebuttal as to those witnesses would be unnecessary. After a review of the circumstances surrounding these surrebuttal requests, the Board did not abuse its discretion in

disallowing surrebuttal testimony where counsel admitted that the evidence was already present in the record.[11]

IV.

M&M challenges the Department's orders as an excessive exercise of regulatory authority. Essentially, M&M contends that the orders requiring it to cease all of its mining and processing of noncoal mineral were not directly related to the alleged condition because the Department failed to make any findings or present any evidence that other enforcement procedures, penalties and remedies, including rehabilitation of TBA 4, would be inadequate to effect prompt and effective correction of the conditions or violations. M&M also argues that because

[11] M&M's claims that the Department "willfully avoided seeking an objective second opinion from the Delaware River Basin Commission (DRBC)" and the Board should have required the Department to seek DRBC involvement are without basis in law or fact. Instead, the Board noted in its adjudication that the Department "did, in fact, consult with the DRBC, which indicated that it had no interest in the matter." (Board's January 31, 2008 Adjudication at 46.) The Board also stated:

> If the DRBC had wished to participate in the investigation or litigation, it would have been free to do so. We do not know what more the Department could have done. But more to the point, the Department has the greater expertise when it comes to water loss investigations involving mining. DRBC's participation would have been superfluous and added another level of complication and bureaucracy to an already complicated situation. By way of illustration, not less than ten experts testified in this case. We doubt that DRBC's involvement would have added much incremental value. (Board's January 31, 2008 Adjudication at 46.)

In addition, M&M argues that the Board abused its discretion in failing to apportion responsibility among "the contributors" who were jointly responsible for effects on TBA 4 and the private wells. However, M&M offers no legal basis for this argument and the relevant provisions of the Act, 52 P.S. §§ 3303-3311, and does not discuss any requirement that the Department must apportion fault or determine a "relative share" between TBA and M&M.

TBA 4 is not currently in use due to arsenic levels in violation of current national standards, the cessation orders were unreasonable and unnecessary.

The Board responded to these arguments in the discussion portion of its opinion by explaining that the quarry could not operate without pumping water from its pit, and that the record demonstrated this pumping continued to have an adverse effect on the wells. The Board also highlighted the fact that M&M refused to voluntarily restore the wells, and that due to its' initial refusal to replace the lost water supplies, there were no less restrictive means to restore and replace the damage caused by M&M's pumping. In addition, the Board correctly noted that M&M's permit contemplated cessation in that if it failed to comply with Special Condition 12, the permit would be suspended. The permit specifically provided:

> All costs for the above listed procedures shall be borne by the permittee. The Department reserves the right to determine the permittee's responsibility for restoring or replacing TBA's well No. 4 if only one of the conditions set forth in Special Condition No. 12b. is met, based on other supporting information that an affirmative determination can be made that mining activities impacted this water supply well. Should permittee fail to comply with the terms of this Special Condition, this permit will be suspended and mining operations will be ceased immediately without prior notice to the permittee.

Thus, M&M knew that if it failed to comply with the terms of the permit, the Department would suspend the permit and mining operations at the quarry would cease. Also, we agree with the Board that even though TBA 4 suffered from an arsenic contamination, this in no way impacted or relieved

M&M's responsibility for its quarry pumping actions that lead to the decreased quantities of water in TBA 4.

We also agree with the Board that the Department had the authority to issue the orders in this matter. Section 11(g) of the Act, 52 P.S. §3311(g), provides:

> Any surface mining operator who *affects* a public or private water supply by contamination, interruption or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purpose served by the supply. If any operator fails to comply with this subsection, the secretary [of the Department] may issue orders to the operator as are necessary to assure compliance. (Emphasis added.)

In addition, the Department has the authority to "issue such orders as are necessary to aid in the enforcement of the provisions" of the Act, which "shall include, but shall not be limited to, orders modifying, suspending or revoking permits or licenses and orders requiring persons to cease operations immediately." Section 11(b) of the Act, 52 P.S. §3311(b).

Contrary to M&M's contention, the Board correctly identified that the Department's standard of proof required it to establish that the two November 15, 2005 orders and order of March 9, 2005 were properly issued. 25 Pa. Code §1021.122(b); (Board's January 31, 2008 Adjudication at 34.) The Board also noted that the Department was required to prove by a preponderance of the evidence: "(1) the facts necessary to support its Orders, (2) that the Orders were

authorized by and accordance with applicable law, and (3) that the Orders were a reasonable exercise of the Department's discretion." (Board's January 31, 2008 Adjudication at 34.) The Board added that the Department essentially had the burden of proving that it was more probable than not that M&M's mining activities caused the water losses. Acknowledging that this matter turned on a factual dispute as to the relationship between "the quarry dewatering the lowered water levels and reduced performance of TBA 4 and the private wells," the Board found that the Department clearly and credibly presented evidence linking M&M's quarry to the vast majority of the water losses at TBA 4 and the private wells. **(**Board's January 31, 2008 Adjudication at 35-36.) After a thorough review of the evidence supporting the Board's findings and the law upon which their decision was based, we cannot agree with M&M that the Board committed errors of law in not finding that the Department's actions were unreasonable or outside its authority. Therefore, we agree with the Board's determination that the cessation orders were reasonable and in accordance with the law in all respects.

Accordingly, the order of the Board to dismiss M&M's appeals of the Department's orders is affirmed.

DAN PELLEGRINI, JUDGE

Judge Friedman did not participate in the decision of this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M & M Stone Co.,	:	
Petitioner	:	
	:	
v.	:	
	:	
Department of Environmental Protection,	:	
Respondent	:	No. 383 C.D. 2008

O R D E R

AND NOW, this 17th day of October, 2008, we affirm the Adjudication and Order of the Environmental Hearing Board, dated January 31, 2008, to dismiss M&M's appeals of the Department's orders docketed at 2005-343-L, 2005-344-L, and 2006-110-L.

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DAN PELLEGRINI, JUDGE