COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRYAN LATKANICH	:	
	:	
v.	:	**EHB Docket No. 2023-043-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT CHAP, LLC, Permittee	:	**Issued: March 27, 2025**

OPINION AND ORDER ON MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO MEDICAL CONDITIONS AND TOXICOLOGY REPORTS

By MaryAnne Wesdock, Judge

Synopsis

A Permittee's motion in limine to exclude evidence related to medical conditions and toxicology reports in connection with a landowner's appeal of the Department's determination that his water supply was not impacted by oil and gas operations is denied where it is unclear that the documents are not relevant.

O P I N I O N

Background

This matter involves an appeal filed by Bryan Latkanich (the Appellant), challenging an April 20, 2023 letter (the determination letter) from the Department of Environmental Protection (Department). The determination letter stated that, following an investigation into the Appellant's water supply, the Department could not conclude that the water supply had been adversely affected by oil and gas operations, including oil and gas activities conducted by Chevron Appalachia, LLC

(Chevron). The Appellant appealed the determination letter on May 8, 2023 and filed an amended notice of appeal on May 31, 2023.[1]

According to the notice of appeal, the Appellant owns property and resides in Frederickstown, Washington County, Pa. (the property) with his minor son who was age 13 at the time of the filing of the appeal. The property is served by a private groundwater well (the water supply). In 2009 the Appellant entered into oil and gas lease agreements with Phillips Exploration, Inc., effective March 2010, that were subsequently held by Chevron. (Notice of Appeal, para. 12; Exhibit B to Notice of Appeal.)[2] Chevron constructed a well site and drilled two unconventional gas wells approximately 500 feet from the water supply on what is known as the "Latkanich well site." (Notice of Appeal, para. 19a and 19b; Exhibit A to Notice of Appeal.) Drilling, well development and operations commenced at the Latkanich well site in 2011. (*Id*.) The wells were plugged in 2020. (Exhibit A to Notice of Appeal, p. 2.)

On April 22, 2022, the Appellant filed a complaint with the Department requesting an investigation of his water supply pursuant to 58 Pa. C.S. § 3218(b) of the Oil and Gas Act, Act of February 14, 2012, P.L. 87, *as amended*, 58 Pa. C.S. §§ 2301-3504, at § 3218.2 According to the notice of appeal, the Appellant "requested that the Department investigate environmental complaints involving his property's water, air, and soil." (Notice of Appeal, para. 1.) Approximately one year later, on April 20, 2023, the Department issued its determination letter

[1] Because the amended notice of appeal is virtually identical to the original notice of appeal, with the exception of a few paragraphs and the addition of an exhibit, we refer to the documents collectively as "notice of appeal."

[2] References to paragraphs in the "notice of appeal" are to the amended notice of appeal. References to exhibits to the "notice of appeal" are to the original notice of appeal.

stating that it could not conclude that oil and gas operations had impacted the Appellant's water supply. This appeal ensued.

In his appeal, the Appellant alleges that he and his minor son have had ongoing medical issues and health complications which he attributes to oil and gas operations. The notice of appeal includes the following assertions:

- On May 1, 2018, during a visit to University of Pittsburgh Medical Center (UPMC), the Appellant's son was treated for "hydraulic fracking/volatile hydrocarbon exposure" with differential diagnoses of "#1 respiratory irritation from hydrocarbon exposure, #2 neurotoxicity, # 3 radiation exposure." (Notice of Appeal, para. 85-86, Ex. II to Notice of Appeal.)
- The Appellant's son was chemically burned in April 2013 when taking a bath using water from the private water well. Additionally, his son has developed rashes. (Notice of Appeal, para. 87.)
- The Appellant suffered a heart attack on March 11, 2023 and has been diagnosed with stage IV kidney failure and neuropathy. (Notice of Appeal, para. 80.)
- Urine tests conducted on the Appellant and his son showed the presence of harmful chemicals. (Notice of Appeal, para. 81-84; Ex. GG to Notice of Appeal.)

In support of the above, the Appellant provides toxicology reports and a copy of his son's May 1, 2018 medical report.

In addition to his appeal before the Environmental Hearing Board (Board), the Appellant is also pursuing a civil action against EQT[3] and other defendants in the Court of Common Pleas of Washington County. Discovery in the common pleas action was stayed, and during that time

[3] EQT CHAP, LLC (EQT) is the successor in interest to Chevron. (Ex. P & Q to Notice of Appeal.)

the appeal before the Board was also stayed while allowing for limited discovery. Following the lifting of the stay of discovery before the common pleas court, the stay before the Board was also lifted. While some discovery has been undertaken in the appeal before the Board, the parties have advised the Board that more discovery needs to be done.

Pending before the Board is a motion in limine filed by EQT seeking to exclude evidence related to medical conditions and toxicology. The Department filed a response and memorandum of law in support of the motion. The Appellant filed a response opposing the motion.

Discussion

By its motion, EQT seeks to "preclude the admission of any evidence of medical conditions, physical reactions, and/or toxicology results." It cites to various statements in the notice of appeal, discovery responses and emails among counsel which it contends show a reliance by the Appellant on evidence of medical conditions and toxicology testing in support of his claim that oil and gas operations have impacted his water supply. EQT argues that such evidence is not probative of contamination of the Appellant's water supply. It asserts that even if an expert were to opine that a particular medical condition or toxicity result were caused by toxic exposure, it does not prove that the Appellant's water supply was contaminated by oil and gas development. Acknowledging that discovery is still ongoing, EQT states that it "seeks an early determination on the admissibility of medical conditions and/or physical reactions because such a determination would increase the efficiency of discovery, reduce the cost of discovery and limit discovery related disputes between the parties." (EQT Motion, para. 20.) The Department supports EQT's motion and agrees with EQT that evidence of medical conditions and toxicology results for the Appellant and his son are irrelevant to the issue before the Board. It further argues that permitting the

introduction of such evidence would unreasonably and unnecessarily escalate the time and cost to litigate this matter.

In his response, the Appellant states that he intends to introduce only two pieces of medical evidence: 1) the May 1, 2018 medical report in which his minor son was diagnosed with hydrocarbon exposure and radiation exposure and 2) toxicology results for him and his son contained in Exhibit GG of his notice of appeal. He strongly disagrees with EQT's and the Department's assertions that this information has no relevance. He states that he intends to introduce this information in support of his claim that the Department failed to fulfill its duties under the Oil and Gas Act and the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, to conduct a reasonable and lawful investigation. The Appellant argues that the reports lend support to a finding that his water supply has been contaminated by oil and gas operations, and had the Department properly considered this information it would have been on notice to test for certain constituents in his water and other media.

EQT argues that the Appellant cannot simply point to alleged errors in the Department's investigation – i.e., things the Department failed to do or information that the Department should have considered – to meet his burden of proof in this case. Rather, asserts EQT, he must show that the evidence makes a difference in the final outcome. In support of its position, EQT cites *Kiskadden v. DEP*, 2015 EHB 377, in which the Board held:

> Thus, it is not enough for Mr. Kiskadden simply to demonstrate that the Department did not consider certain evidence in making its decision; rather, he must show that the evidence makes a difference in the final outcome. It is not enough for Mr. Kiskadden to provide hundreds of pages of laboratory data that were not reviewed by the Department. He must demonstrate to us, the Board, that the laboratory data proves that Range's operations at the Yeager site contaminated his water well.

Id. at 409-10.

It is important to note that the Board's ruling in *Kiskadden* was made in an adjudication after a hearing on the merits in which the parties presented evidence in support of their case, rather than in the context of a motion in limine seeking to preclude evidence prior to the hearing. While we recognize EQT's desire to streamline discovery in this matter, we cannot conclude at this time that the Appellant's and his son's medical records and toxicology results are not relevant to this proceeding. At this stage, it difficult for us to know what evidence may or may not be relevant. Some discovery has been conducted, but much of it was put on hold during the stay. There is no indication that expert reports have been prepared or exchanged. We understand that the purpose of EQT's motion is precisely for the very purpose of limiting discovery; however, at this stage of the proceeding, we are hesitant to exclude evidence that may well turn out to be probative. These reports, "when presented in context and with a proper foundation at the hearing might well prove to be admissible" notwithstanding EQT's and the Department's arguments to the contrary. *Liberty Township v. DEP*, 2023 EHB 87, 89.

Furthermore, we must keep in mind that the purpose of a motion in limine is to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Morrison v. DEP*, 2020 EHB 404, 405. A motion in limine may not be used for the purpose of disposing of issues in a case. *The Florence Mining Co. v. DER*, 1991 EHB 1301. Although EQT's motion is carefully worded to ask for the exclusion of evidence rather than a ruling on any of the issues in the case, it nonetheless requires us to consider the viability of some of the Appellant's claims. A motion in limine is not the proper vehicle to resolve such disputes. *Benner Township v. DEP*, 2017 EHB 1228, 1233-34. In *Florence Mining*, the Board explained the difference between a motion in limine and a dispositive motion:

> Our review of DER's motion leads us to conclude that what DER is seeking here is a de facto partial summary judgment rather than the barring of certain

> evidence at the hearing on the merits….Our granting of a party's motion in limine requires the decision of only one Board Member, whereas for us to grant a motion which finally disposes of an issue, such as a motion for summary judgment or for judgment on the pleadings, at least a majority of the Board's Members must agree to grant judgment. In the present motion, DER is not seeking to preclude a piece or type of evidence's admission while allowing other evidence on that issue to come in, but, rather, is requesting that we find in its favor on most of the issues raised by Florence's notice of appeal with such a finding precluding further consideration of those issues. In such a circumstance, it would be inappropriate for us to disregard the dispositive effect which our granting of DER's motion would have merely because it is called a motion to limit issues as opposed to a motion for summary judgment.

Id. at 1306-07.

As further explained in *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235:

> Motions in limine…should not be used as motions for summary judgment in everything but name. A typical (and perfectly acceptable) motion in limine is presented on the eve of a hearing and otherwise does not usually comply with all of the procedural requirements that relate to a motion for summary judgment….There is obviously good reason for those requirements, and we must be wary of permitting parties to disregard them by using the vehicle of a motion in limine to obtain a ruling on the merits. Thus, a motion in limine generally should only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. Of course, this principle can be easier to state than to apply. One clue to determining whether a motion is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.

Id. at 237.

Here, EQT has asked for the exclusion of all "evidence of medical conditions, physical reactions, and/or toxicology results." To the extent EQT is seeking to dismiss any claims in the notice of appeal alleging that the Department failed to fulfill its duties under the Oil and Gas Act or Article I, Section 27 by failing to consider toxicology results and the Appellant's son's May 2018 diagnosis when conducting its investigation, this determination cannot be made in the context of a motion in limine.

Finally, the Department argues that even if the Board finds the toxicology and medical evidence to be relevant, it should nonetheless be excluded because its probative value is insufficient to warrant the extensive discovery that will be needed to litigate these claims. The Department cites Pennsylvania Rule of Evidence 403 which states in relevant part as follows:

> The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues…undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa. R.E. 403. It is the Department's contention that the medical evidence and toxicology information should be excluded under Rule 403 because the evidence lacks reasonable probative value and would greatly expand the litigation.

The Appellant disagrees and asserts that extensive discovery is not needed. He states that he intends to introduce his son's medical report and the toxicology results solely to lend support to his claim that his water supply was impacted by oil and gas operations. As we noted earlier, at this stage of the proceeding we cannot say that the probative value of the evidence is outweighed by concerns over extensive discovery. Moreover, during a Board conference call with the parties on March 25, 2025, the parties agreed to discuss the discovery remaining in this matter and, if possible, reach an agreement on how to proceed. If the parties are unable to reach an agreement, the Board can address any issues in the context of a discovery motion.

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O R D E R

AND NOW, this 27th day of March, 2025, it is hereby ordered that the Motion in Limine to Exclude Evidence Related to Medical Conditions and Toxicology Reports is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: March 27, 2025

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Richard Watling, Esquire
Anna Zalewski, Esquire
(via electronic filing system)

For Appellant:
Lisa Johnson, Esquire
Michael Bruzzese, Esquire
Jakob Norman, Esquire
Erin Power, Esquire
Ansley O'Brien, Esquire
Brian Ward, Esquire
(via electronic filing system)

For Permittee:
Kathy Condo, Esquire
Jean M. Mosites, Esquire
Joshua Snyder, Esquire
Edward Phillips, Esquire
(via electronic filing system)