2014 IL App (3d) 120629-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
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Appellate Court of Illinois,
Third District.

COMMUNITY LANDFILL CO., an Illinois corporation, Edward Pruim and Robert Pruim, Petitioners–Appellants,
v.
ILLINOIS POLLUTION CONTROL BOARD, and People of the State of Illinois, ex rel. Lisa Madigan, Attorney General of the State of Illinois, Respondents–Appellees.

No. 3–12–0629. | July 9, 2014.

Petition for Review of an Order of the Illinois Pollution Control Board, Board Nos. 97–193 and 04–207.

ORDER

Justice CARTER delivered the judgment of the court:

*1 ¶ 1 *Held:* In a case involving a civil penalty assessed to a landfill company and its two corporate officers, the Illinois Pollution Control Board, on remand, apportioned $25,000 of the $250,000 civil penalty to the landfill company solely and $225,000 to the landfill company and the two corporate officers jointly and severally. On appeal, the appellate court found no error in the Board's apportionment decision and therefore confirmed the Board's order.

¶ 2 The State brought charges against the petitioners, Community Landfill Company (CLC), Edward Pruim, and Robert Pruim (the Pruim brothers) for alleged violations of the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (West 2012)). The Illinois Pollution Control Board (Board) found CLC and the Pruim brothers liable on numerous counts, although it found that the Pruim brothers were not individually liable on some of the counts for which CLC was found liable. The Board imposed a $250,000 civil penalty for the violations and found that CLC and the Pruim brothers were jointly and severally liable for the entire amount. On direct appeal, this court confirmed the Board's ruling in all respects except for the finding of joint and several liability for the entire amount of the civil penalty. *Community Landfill Co. v. Illinois Pollution Control Board (Community Landfill I),* 2011 IL App (3d) 091026–U, ¶ 62. This court set aside that portion of the Board's order and remanded for the Board to apportion the penalty between the counts for which CLC was solely liable and the counts for which CLC and the Pruim brothers were both liable. *Community Landfill I,* 2011 IL App (3d) 091026–U, ¶ 62.

¶ 3 On remand, the Board apportioned $25,000 of the civil penalty for the CLC-only counts and $225,000 for the counts for which both CLC and the Pruim brothers were jointly and severally liable. CLC and the Pruim brothers appealed. On appeal, they argue that: (1) the Board's apportionment inequitably placed the liability for the penalty on Edward Pruim; and (2) the Board's apportionment was arbitrary and capricious and against the manifest weight of the evidence. We confirm the Board's order.

¶ 4 FACTS

¶ 5 The background facts of this case have been set out in a previous order issued by this court in *Community Landfill I,* 2011 IL App (3d) 091026–U. Accordingly, we will set forth only those facts necessary for the disposition of this particular appeal.

¶ 6 Beginning in 1997, the State filed charges against CLC and the Pruim brothers, alleging violations of the Act with regard to the operation of the Morris landfill. The Pruim brothers are the sole owners and officers of CLC, and the charges filed included the Pruim brothers in their individual capacities.

¶ 7 In August 2009, the Board issued its decision. The Board found that CLC had violated numerous sections of the Act and that the Pruim brothers in their individual capacities were also liable for some of these violations. The Board found that CLC was solely responsible for the following nine violations: (1) failure to adequately manage refuse and litter; (2) failure to prevent leachate flow; (3) improper disposal of landscaping waste; (4) causing, threatening, or allowing water pollution; (5) causing or allowing the improper disposal of used tires; (6) failure to prevent blowing litter in violation of a

permit condition; (7) failure to notify the Illinois Environmental Protection Agency before operation of a landfill gas collection system in violation of a permit condition; (8) failure to take corrective action when cracks greater than one inch developed, there was erosion, and ponding in violation of a permit condition; and (9) improper disposal of landfill leachate in violation of a permit condition. The Board also found that CLC and the Pruim brothers were jointly liable for the following eight violations: (1) failure to provide adequate financial assurance; (2) failure to timely file a required request for significant modification of permit; (3) depositing refuse in unpermitted portions of a landfill; (4) conducting a waste disposal operation without a permit; (5) causing or allowing open dumping; (6) depositing waste in violation of a permit condition; (7) failure to obtain required increases in the amount of financial assurance in violation of a permit condition; and (8) failure to timely provide a revised cost estimate for facility closure and post-closure care in violation of a permit condition.

*2 ¶ 8 After weighing the evidence presented to it in light of the appropriate statutory factors, the Board determined that a $250,000 penalty was appropriate, and that CLC and the Pruim brothers would be jointly and severally liable for the entire amount. CLC and the Pruim brothers appealed the Board's decision. In 2011, this court decided the appeal in *Community Landfill I*, 2011 IL App (3d) 091026-U. In that decision, this court confirmed the Board's findings regarding the aforementioned violations, including the Pruim brothers' personal liability. *Id.* ¶ 56. However, this court set aside the Board's decision to impose joint and several liability on CLC and the Pruim brothers for the entire $250,000 penalty, as the Board's findings indicated that the Pruim brothers were not individually liable for all of the violations. *Id.* ¶ 60. Further, this court remanded the case for the Board "to apportion the penalty between the violations for which CLC is liable and those for which both CLC and the Pruims are personally liable. The Board may then impose joint liability on the violations concurrent to CLC and the Pruims individually." *Id.*

¶ 9 On remand, the parties filed briefs with the Board that contained their respective positions on the apportionment of the $250,000 penalty. The State argued that the CLC-only violations were minor in comparison to the joint violations such that the CLC-only violations should total $12,700, while the joint violations should total $237,300. The State also noted that in 2010, CLC was involuntarily dissolved by the Illinois Secretary of State, and that in 2011 Robert Pruim filed for bankruptcy in the federal court system. The State contended that neither had any impact on the Board's apportionment decision, however. CLC and the Pruim brothers argued that an appropriate apportionment would be $100,000 for the CLC-only violations and $150,000 for the joint violations; however, they contended that only $10,000 of the $150,000 should be joint and severable. CLC and the Pruims also argued that the dissolution of CLC and Robert Pruim's bankruptcy should in fact impact the Board's apportionment decision.

¶ 10 The Board issued its decision on April 5, 2012. First, with regard to the dissolution of CLC and to the bankruptcy of Robert Pruim, the Board found that neither one would affect the apportionment decision. The Board stated that there was no authority to suggest that CLC's dissolution somehow constrained the Board's ability to apportion civil liability. The Board also cited federal law for the propositions that bankruptcy's automatic stay provisions do not apply in this type of a situation and that Robert Pruim's bankruptcy had no effect on the liability of any other party held jointly liable.

¶ 11 Second, the Board ruled that the joint and several penalty was statutorily mandated to be at least equal to the amount of the financial benefit realized, which was $146,286.

*3 ¶ 12 Third, with regard to the CLC-only violations, the Board found that the typical statutory penalty of $500 was appropriate as a floor for these violations. At 36 violations, the penalty would be $18,000. However, the Board continued, some of the violations went "beyond merely daily management violations for which an administrative citation might be appropriate." Accordingly, the Board apportioned additional penalties totaling $7,000 for the water pollution and permit violations, which the Board found were "more egregious and existed for a more substantial period of time." Thus, the Board apportioned a total of $25,000 for the CLC-only violations.

¶ 13 Fourth, with regard to the violations for which CLC and the Pruim brothers were jointly and severally liable, the Board noted that "the time-adjusted economic benefits" stemming from the failure to timely secure financial assurance and from the failure to timely seek and obtain the permit modification totaled $146,286. The Board also noted that while no figure had been placed on the economic benefits gained from the overheight violation, "some economic benefit did occur." Further, the Board noted that it had found that the failure to update financial assurance for over three years, the failure to seek a permit modification, and the failure to make biennial cost revisions were grave violations. The Board also noted the lengthy duration of some of the violations,

including that the overheight violations began in 2000 and continued even through the time of the Board's initial ruling back in 2009, and that the failure to timely file cost estimates lasted 579 days ("[t]he violation was significant because the cost estimates for facility closure and post-closure care form the basis for determining adequate financial assurance"). For these reasons, the Board found that the record supported an apportionment of a majority of the penalty as joint and several between CLC and the Pruim brothers. Accordingly, the Board apportioned $225,000 jointly and severally between CLC and the Pruim brothers. In so ruling, the Board noted that such an apportionment constituted $146,286 for economic benefits realized and $78,714 "to account for the duration, gravity and to serve as a deterrent against future violations."

¶ 14 CLC and the Pruim brothers filed a motion for reconsideration in which they posited several arguments, including one for the first time that the Board lacked the authority to impose joint and several liability on the civil penalty. After that motion was denied, CLC and the Pruim brothers appealed the Board's decision to this court.

¶ 15 ANALYSIS

¶ 16 On appeal, CLC and the Pruim brothers argue that: (1) the Board's apportionment inequitably placed the liability for the penalty on Edward Pruim; and (2) the Board's apportionment was arbitrary and capricious and against the manifest weight of the evidence.

¶ 17 As this court has stated previously in an appeal from an administrative agency's imposition of a monetary civil penalty, a dual standard of review applies to such cases. *Toyal America, Inc. v. Illinois Pollution Control Board,* 2012 IL App (3d) 100585, ¶ 37. Specifically, the Board's factual findings are reviewed to determine whether they were against the manifest weight of the evidence. *Id.* Also, the Board's discretion is invoked with regard to the imposition of the civil penalty itself; accordingly, the Board's decision to impose that penalty will be set aside only if it was arbitrary, capricious, or unreasonable. *Id.; ESG Watts, Inc. v. Illinois Pollution Control Board,* 282 Ill.App.3d 43, 50–51 (1996). "Agency action is arbitrary and capricious when the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an implausible explanation contrary to agency expertise." *Hoffelt v. Illinois Department of Human Rights,* 367 Ill.App.3d 628, 632 (2006).

*4 ¶ 18 First, CLC and the Pruim brothers argue that the Board's apportionment inequitably placed the liability for the penalty on Edward Pruim. Specifically, CLC and the Pruim brothers claim that due to CLC's dissolution and Robert Pruim's bankruptcy proceedings, the Board's order "effectively places 90% of the liability and burden for the $250,000 fine on Edward Pruim."

¶ 19 In its order, the Board ruled that CLC and the Pruim brothers failed to provide any authority to suggest that the Board's ability to apportion the penalty was constrained by the dissolution or the bankruptcy proceedings. We note that in their brief on appeal, CLC and the Pruim brothers also failed to present any authority in support of their claim. In fact, their argument on appeal actually refers more to the collection of the penalty, rather than the apportionment of the penalty, including their contention that the penalty imposed an unreasonable hardship on Edward Pruim. Our review of the Board's order in this regard reveals no error. Without any support for the argument put forth by CLC and the Pruim brothers, there is no basis from which we could set aside the Board's ruling in this regard. See Ill. S.Ct. R. 341(h)(7) (eff.Sept.1, 2006); *Reddick v. Suits,* 2011 IL App (2d) 100480, ¶ 50 (holding that the failure to provide citation to authority to support an argument results in forfeiture of the argument).

¶ 20 Second, CLC and the Pruim brothers argue that the Board's apportionment was arbitrary and capricious and against the manifest weight of the evidence. In this regard, CLC and the Pruim brothers argue that the Board lacked the authority to impose joint and several liability on the civil penalty, and that the Board's apportionment was inequitable given the Board's erroneous culpability assessment. They also argue that the Board misweighed the Act's statutory factors in arriving at its apportionment decision.

¶ 21 With regard to the argument that the Board lacked the authority to impose joint and several liability on the civil penalty, we note that CLC and the Pruim brothers did not raise this argument before the Board until their motion for reconsideration and have thereby forfeited the argument on appeal. *Gonzalez v. Illinois Pollution Control Board,* 2011 IL App (1st) 093021, ¶ 38; see also *Jackson v. City of Chicago,* 2012 IL App (1st) 111044, ¶ 21 ("[g]enerally, issues or defenses not raised before the administrative agency will not be considered for the first time on administrative review"). Moreover, the argument is disingenuous in light of the fact that on remand before the Board, CLC and the Pruim brothers argued that joint and several liability was acceptable, albeit for a much lower amount than what the State sought. Furthermore,

we also note that in our remand instructions in *Community Landfill I*, 2011 IL App (3d) 091026–U, ¶ 60, we stated that the Board must "apportion the penalty between the violations for which CLC is liable and those for which both CLC and the Pruims are personally liable. The Board may then impose joint liability on the violations concurrent to CLC and the Pruims individually." If CLC and the Pruim brothers wanted to challenge the Board's authority to impose joint and several liability on a civil penalty, they had ample time to do so before this appeal. For all of these reasons, we decline to address the merits of this argument.

***5** ¶ 22 With regard to the arguments that the Board's apportionment was inequitable given the Board's erroneous culpability assessment and that the Board misweighed the statutory factors, we first note that "[t]he Board is vested with broad discretionary powers in the imposition of civil penalties." *ESG Watts, Inc.*, 282 Ill.App.3d at 50–51. However, the Board's decision must have an adequate basis apparent from the record and the penalty itself must be commensurate with the severity of the violations. *Id.* at 51.

¶ 23 Two sections of the Act contain factors relevant to the Board's apportionment decision. First, section 33(c) provides:

> "(c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
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> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
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> (ii) the social and economic value of the pollution source;
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> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> (v) any subsequent compliance." 415 ILCS 5/33(c) (West 2012).

Second, section 42(h) of the Act provides:

> "(h) In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
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> (1) the duration and gravity of the violation;
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> (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
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> (3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
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> (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
>
> (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
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> (6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency;
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> (7) whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform; and
>
> ***6** (8) whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.
>
> In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set

> in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." 415 ILCS 5/42(h) (West 2012).

¶ 24 In this case, we first note that in its order, the Board noted that section 42(h) required it to apportion a penalty at least as much as the economic benefits accrued by CLC and the Pruim brothers, which, in the original case before the Board, was determined to be $146,286.

¶ 25 Next, the Board discussed the CLC-only violations, noting that in the nine counts for which CLC was found solely liable, a total of 36 violations had occurred. The Board also summarized its findings from the original case regarding these violations, which were assessments made under sections 33(c) and 42(h) of the Act and included mitigation and aggravation assessments. The Board noted that there were 36 total violations in the nine counts, and the Board noted that some of the violations were administrative in nature and not as serious as others, such as the water pollution violations. The Board used the $500 administrative violation penalty (415 ILCS 5/42(b)(4) (West 2012)) as a floor for all 36 violations, but increased the penalty for the water pollution and permit violations because those were "more egregious and existed for a more substantial period of time." Thus, the Board apportioned an additional $3,500 for the two counts involving water pollution violations and an additional $3,500 for the count involving the permit violations, for a total CLC-only apportionment of $25,000.

¶ 26 Next, the Board discussed the eight joint violations. The Board noted its findings from the previous case that it made under sections 33(c) and 42(h), including: (1) the time-adjusted economic benefits for the failure to timely secure financial assurance, and for the failure to timely seek and obtain a significant modification of permit, totaled $146,286; (2) "some economic benefit did occur" from the overheight violation, but the exact amount was not calculated; (3) CLC and the Pruim brothers did attempt to obtain financial assurance, but not until over three years late; (4) the duration of the overheight violations lasted from 2000 through the Board's August 20, 2009, decision; and (5) the 579–day duration of the failure to file timely revised cost estimates was significant because "the cost estimates for facility closure and post-closure care form the basis for determining adequate financial assurance." The Board then stated that the record supported apportioning the majority of the civil penalty jointly and severally: "[t]he apportionment of $225,000 jointly and severally will recoup the economic benefit accrued and add an additional $78,714, to account for the duration, gravity and to serve as a deterrent against future violations."

*7 ¶ 27 Our review of the Board's decision in this case reveals nothing to indicate that the Board's decision was arbitrary and capricious or was against the manifest weight of the evidence. The Board's apportionment decision was based in large part upon factual findings it made in the original case before it. This court confirmed those findings in *Community Landfill I* and the propriety of those factual findings of the Board are not at issue in this appeal. The Board acknowledged that the calculated economic benefit statutorily required it to impose at least $146,286 jointly and severally (415 ILCS 5/42(h) (West 2012)). Given this required amount, CLC and the Pruim brothers are essentially arguing that the Board erred when it apportioned the remaining $105,714 as $25,000 to CLC only and $78,714 to CLC and the Pruim brothers jointly and severally. We are unconvinced by the arguments posited by CLC and the Pruim brothers that this apportionment was erroneous. The Board addressed the relevant statutory factors in reaching its decision, specifically finding that the gravity and duration of the joint violations were more substantial than the CLC-only violations. In particular, the durations of the joint violations included 579–day, three-year, and over nine-year durations, which were far more lengthy than the CLC-only violations, the longest of which had not been precisely calculated but was stated to have occurred for " 'at least a month.' " Our previous decision contained a limited remand for the Board to re-apportion the $250,000 civil penalty, and we have found nothing to indicate that the Board's apportionment on remand was erroneous under the circumstances.

¶ 28 CONCLUSION

¶ 29 The order of the Illinois Pollution Control Board is confirmed.

¶ 30 Confirmed.

Justices McDADE and SCHMIDT concurred in the judgment.

Parallel Citations

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