STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

Hartz Mountain Industries, Inc.,	:	DECISION REJECTING ORDER FOR SANCTIONS AND REMANDING FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO N.J.A.C. 1:1-18.7
Petitioner,	:	
v.	:	OAL DOCKET NO. TRP-12402-19
New Jersey Department of Transportation,	:	(Remand of TRP-02196-16)
	:	AGENCY REFERENCE NO. 75708
Respondent.	:	

Hartz Mountain Industries, Inc. ("Hartz") seeks to erect an off-premise billboard in Secaucus, New Jersey that would be visible to south-bound vehicles on the New Jersey Turnpike ("Turnkpike"). The New Jersey Department of Transportation's ("NJDOT") Office of Outdoor Advertising ("OOA") denied Hartz's application because the proposed billboard did not meet the requirements of the Roadside Sign Control and Outdoor Advertising Act, N.J.S.A. 27:5-1 to -33, and regulations, N.J.A.C. 16:41C. After a seven-day trial in the Office of Administrative Law ("OAL"), the assigned administrative law judge ("ALJ") issued an initial decision granting a motion filed by Hartz for sanctions against the NJDOT.

Based upon a de novo review of the record presented, I hereby reject the order for sanctions and remand to the OAL for findings of fact and conclusions of law consistent with the Appellate Division's remand instructions in In re Denial of the Outdoor Adver. Application No. 75708, Docket No. A-5468-16T1, 2019 N.J. Super Unpub. LEXIS 1397 (App. Div. 2019).

Background

In February 2015, Hartz applied for a permit to erect an off-premise multi-message digital commercial billboard that would be visible to south-bound vehicles on the Turnpike near milepost 113.8 N.R.D. Hartz sought to erect the billboard on the north-facing side of an existing, permitted

south-facing billboard on the Turnpike's Eastern Spur in Secaucus, immediately to the east of the northbound lanes and north of Exit 17, which provides access to I-495 and the Lincoln Tunnel. The proposed billboard would be located 374 feet north of where the Turnpike expands from three to five lanes as it approaches Exit 17, which is the beginning of pavement widening. Approximately 1,900 feet from the beginning pavement widening, the two added lanes split off and exit the Turnpike.

On June 17, 2015, the OOA denied Hartz's application because the proposed billboard would have been "located within 500 feet of an interchange, intersection at grade, or safety rest area" in violation of N.J.A.C. 16:41C-8.7(b)(2).[1] Hartz requested an informal hearing, which was held before the OOA on October 22, 2015, and denied in a letter decision issued November 5, 2015. Hartz then requested a formal appeal, and the matter was transmitted to the OAL as a contested case.

On April 5, 2017, ALJ Leland S. McGee issued an initial decision granting the OOA's motion for summary decision. On June 29, 2017, NJDOT Commissioner Richard T. Hammer issued a final agency decision accepting ALJ McGee's initial decision and affirming the denial of Hartz's application.

Hartz appealed. On June 18, 2019, the Appellate Division reversed the NJDOT's final agency decision in part and remanded the case to the OAL "for development of a factual record to help determine whether the distance restriction applied to Hartz's proposed billboard promotes traffic safety." In re Denial of Outdoor Adver. Application No. 75708, No. A-5468-16T1, 2019 N.J. Super. Unpub. LEXIS 1397, at *2 (App. Div. June 18, 2019) ("A.D."). The Appellate

[1] N.J.A.C. 16:41C-8.7(b)(2) was subsequently renumbered as N.J.A.C. 16:41C-8.1(d)(2).

Division also directed the OAL to consider Hartz's equal protection "class-of-one" claim and determine whether the NJDOT had "intentionally treated [Hartz] differently from other sign-owners without a rational basis for doing so." (A.D. at *25-26).

On remand, the parties engaged in discovery, which included the exchange of expert reports.[2] Trial commenced in May 2023 before ALJ John P. Scollo. Five witnesses testified. Andrew Feller, the OOA's enforcement supervisor, testified on May 3, 2023 (Day 1)[3] and May 4, 2023 (Day 2).

Jaime Oplinger, P.E., executive manager of the NJDOT's Bureau of Traffic Engineering and State Traffic Engineer, began her testimony on May 8, 2023 (Day 3). The OOA introduced Ms. Oplinger's expert report into evidence in two forms. The original report, R-1, was dated January 12, 2021, and included a table summarizing the minimum distance requirement from an interchange for billboard placement in all 50 states. R-1 also included a statement that Ms. Oplinger had "reviewed all federal agreements for each of the 50 states." The amended report, R-13, which was served on Hartz on May 4, 2023, did not include either the table or the statement.

During Ms. Oplinger's testimony, Hartz objected to admission of R-13. The ALJ carefully analyzed the differences between R-1 and R-13, which included removal of the table and statement, an updated hyperlink, an increase in Ms. Oplinger's tenure with the NJDOT, and correction of a distance that had been rounded from 504 feet to 500 feet. The ALJ admitted both

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[2] Although discovery concluded in 2021, trial was delayed to await the United States Supreme Court's decision in City of Austin v. Reagan Nat'l Adver. of Austin, LLC., 596 U.S. 61 (2022).

[3] A portion of Mr. Feller's testimony on Day 1 was not transcribed, presumably due to an issue with the audio recording that was not discovered contemporaneously.

R-1 and R-13 after finding that "there was no real substantive difference" between the two reports or "any prejudice" to Hartz. (3T27:14 to 3T51:25).[4]

Hartz's cross-examination of Ms. Oplinger did not begin until May 6, 2024 (Day 4). That day, Hartz reviewed agreements between the federal government and 32 other states with Ms. Oplinger to demonstrate that the majority of states require the minimum 500-foot distance only outside of incorporated municipalities.[5] Hartz also questioned Ms. Oplinger about her participation in a different contested outdoor advertising case, Outfront Media, LLC v. NJDOT, OAL Docket No. TRP 06927-20 ("Outfront Media"), for which she had prepared a similar report in 2022 but not testified.

Ms. Oplinger was scheduled to continue cross-examination that week but was hospitalized. On May 8, 2024 (Day 5), Hartz made an oral motion for sanctions, which the ALJ ruled must be submitted in writing. That day, Derick Blatt and Anthony Filloramo, employees of Lamar Advertising and Hartz, respectively, testified as Hartz's fact witnesses.

On May 17, 2024, Hartz submitted a written motion for sanctions. The motion sought to (1) suppress the NJDOT's "claim that the 500 foot interchange regulation advances the governmental interest in traffic safety based on a showing of '[a] long history, a substantial consensus and simple common sense'"; (2) preclude the NJDOT from citing either the initial or

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[4] 1T refers to the May 3, 2023 transcript. 2T refers to the May 4, 2023 transcript. 3T refers to the May 8, 2023 transcript. 4T refers to the May 6, 2024 transcript. 5T refers to the May 8, 2024 hearing transcript. 6T refers to the June 17, 2024 transcript. 7T refers to the June 18, 2024 hearing transcript.

[5] Hartz introduced agreements and regulations for ten states: Alabama, Arizona, Wyoming, Michigan, North Carolina, Illinois, Texas, California, Colorado, and South Carolina (P-19 to P-29). Hartz introduced agreements without regulations for 22 states: Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, West Virginia, Wisconsin, Minnesota, South Dakota, Tennessee, Idaho, and Washington (P-37 to P-37V). Idaho's agreement did not support Hartz's argument. See 4T19:1-4T64:16.

final decisions from Outfront Media; and (3) exclude the expert reports (R-1 and R-13), addenda (R-2 through F-2F),[6] and testimony of Ms. Oplinger. The OOA filed opposition on June 26, 2024, and Hartz submitted a reply.

Hartz's cross-examination of Ms. Oplinger concluded on June 17, 2024 (Day 6). On the final day of trial, June 18, 2024 (Day 7), Michael Maris, Hartz's expert, testified. At the conclusion of testimony, the parties and ALJ discussed the timeline for receipt of transcripts and written summations. However, no dates were set, and the parties were not informed when the record would be closed.

The parties inquired about the status of Hartz's motion and schedule for post-hearing briefs multiple times over the next five months. On November 27, 2024, the ALJ informed the parties that "[s]hould Post-Hearing Briefs be necessary, the due date for same shall be February 28, 2025," with responses due by March 13, 2025.

On November 30, 2024, the ALJ issued an initial decision granting Hartz's motion for sanctions and entering "judgment" in favor of Hartz. (Initial Decision at 23). The initial decision, which indicated that the record had been closed on June 26, 2024, was transmitted to the parties on December 9, 2024. The record was returned to the NJDOT on December 12, 2024. The OOA submitted exceptions on January 6, 2025, to which Hartz replied on January 16, 2025. On January 16, 2025, the 45-day statutory period for issuing a final decision was extended until March 10, 2025, pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8. With the parties' unanimous consent, the time limit for issuing the final decision was extended once more until April 9, 2025.

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[6] The addenda to R-1 consisted of the following: Ms. Oplinger's resume (R-2); N.J.A.C. 16:41C-8.1 (R-2A); Highway Beautification Act of 1965, P.L. 89-285 (R-2B); Memorandum of Lawrence Jones, Deputy FHWA Administrator (R-2C); New Jersey FHWA agreement dated December 29, 1971 (R-2D); NJDOT's 2015 straight line diagram sheets (R-2E); and N.J.S.A. 39:4-183.27 (R-2F).

Analysis

Pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -31, ALJs presiding over contested cases in the OAL must issue a report and decision containing recommended findings of fact and conclusions of law "based upon sufficient, competent, and credible evidence." N.J.S.A. 52:14B-10(c). Upon review of the record, "the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision," as long as it "state[s] clearly the reasons for doing so." N.J.S.A. 52:14B-10(c); see also N.J.A.C. 1:1-18.1(d) ("No substantive finding of fact or conclusion of law . . . shall be binding upon the agency head, unless otherwise provided by statute."). The agency head may also "make new or modified findings supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c).

Pursuant to N.J.A.C. 1:1-18.7(a), "[a]n agency head may enter an order remanding a contested case to the Office of Administrative Law for further action on issues or arguments not previously raised or incompletely considered." The remand order "shall specifically state the reason and necessity for the remand and the issues or arguments to be considered" and be returned to the OAL with a transmittal form and the case record. N.J.A.C. 1:1-18.7(a).

ALJ Scollo's initial decision contained the following errors of fact and law, which demand rejection of the order for sanctions and remand for new findings of fact and conclusions of law:

i. Ms. Oplinger's involvement in Outfront Media

The initial decision mischaracterized Ms. Oplinger's involvement in Outfront Media, as well as the basis for the initial and final decisions in that case. (Initial Decision at 10). Although Ms. Oplinger prepared a report, she did not testify during the Outfront Media hearing. The parties in that case stipulated that her report would not be admitted or considered. (Outfront Media Initial Decision at n.3). ALJ Susana E. Guerrero's initial decision did not rely on the unadmitted report,

but rather on the evidence presented before her, which included two days of testimony from different experts and fact witnesses than those who testified before ALJ Scollo in this case, and the legal arguments of different counsel.

ii. Number of state agreements reviewed during cross-examination

The initial decision states that Hartz reviewed with Ms. Oplinger agreements between the Federal Highway Administration ("FHWA") and 46 states related to highway beautification and traffic safety. (Initial Decision at 13). In fact, Hartz only introduced 32 such agreements during its cross-examination of Ms. Oplinger, 31 of which supported its argument that the federally-required minimum distance between billboards and interchanges only applied outside of incorporated municipalities. (4T19:1-4T64:16).

iii. Relevance of other states' agreements to the OOA's denial of Hartz's application

The initial decision suggests that the 50-state table in R-1 was "material" to the OOA's decision to deny Hartz's application. (Initial Decision at 15). However, the evidence presented at trial showed that the OOA applies New Jersey regulations to the outdoor advertising applications it reviews. No evidence was presented suggesting that other states' regulations influenced the OOA's 2015 denial of Hartz's application.

iv. Possibility of misleading the tribunal

The initial decision found that "Ms. Oplinger testified in a manner that would have misled the tribunal if not for [Hartz's] efforts to shed light on the truth of the matter." (Initial Decision at 15). However, the record clearly demonstrates the opposite. Ms. Oplinger did not testify to any other state's agreement on direct examination. She testified about other states only when Hartz cross-examined her about 32 other states' agreements. The report the OOA asked the ALJ to

consider, which was admitted into evidence as R-13, had no reference to any other state's agreement.

Moreover, Ms. Oplinger explained sincerely, apologetically, and repeatedly how the other state table came to be part of her 2021 report. Under oath, she explained that a former Deputy Attorney General ("DAG"), who was prosecuting the matter at the time but left the Division of Law in November 2021, had reviewed the other states' agreements and prepared the table included in R-1. Never having prepared an expert report for litigation before, Ms. Oplinger thought that the process was collaborative and that her attorney's review of those agreements, and her review of the table he prepared, was adequate to support the statement that she had reviewed the other states' agreements. In early May 2023, Ms. Oplinger expressed her concern about the inaccurate statement to the DAG who represented the OOA at trial. On May 4, 2023, Ms. Oplinger removed the statement and table from her report. The trial DAG immediately served the amended report, R-13, on Hartz, prior to Ms. Oplinger's testimony, which began on May 6, 2023. There was no evidence in the record demonstrating any effort to mislead the tribunal, nor any possibility of doing so.

v. Submission of tainted evidence

The initial decision found that the NJDOT "attempted to submit into evidence tainted evidence containing materially false statements." (Initial Decision at 16). While Hartz provided evidence at trial that 31 other states have agreements with the federal government requiring similar minimum distancing only outside of incorporated municipalities, Hartz did not disprove the fact that a 500-foot requirement is common among the majority of states.

R-1 contained one misstatement – that Ms. Oplinger had reviewed 50 state agreements. She removed this statement and all references to other states from her amended report, which was

admitted into evidence as R-13. As discussed above, she credibly explained the reason for this misstatement. Moreover, expert reports produced in discovery detail the opinions, and the bases thereof, that expert witnesses intend to offer in testimony. See Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011). At trial, it is not the expert's report but testimony that matters. See N.J.A.C. 1:1-15.9(b); see also N.J.R.E. 702.

The ALJ determined that Ms. Oplinger's report and testimony should be excluded after considering the factors set forth in Gaido v. Weiser, 227 N.J. Super. 175 (App. Div. June 29, 1998). (Initial Decision at 17-18). In that case, the Appellate Division enumerated three factors which would "strongly urge" the trial judge to suspend the imposition of sanctions: (1) "absence of a design to mislead"; (2) "absence of the element of surprise if the evidence is admitted"; and (3) absence of prejudice which would result from the evidence's admission. Gaido, 227 N.J. Super. at 192 (citing Westphal v. Guarino, 163 N.J. Super. 139, 145-146 (App. Div. 1978), aff'd o.b. 78 N.J. 308 (1978)). Each of these factors favor admitting Ms. Oplinger's report and testimony.

The record makes clear that Ms. Oplinger did not intend to mislead the tribunal. She had never previously prepared an expert report or testified as an expert at trial. She relied on the prior DAG's research and incorrectly assumed that the report was collaborative. Before her testimony began, she realized that the statement in R-1 was incorrect and asked the trial DAG what to do. She affirmatively came forward to correct her mistake.

There was no surprise to Hartz from admitting R-13 or Ms. Oplinger's testimony. R-13 contained no new information or opinions. Everything Ms. Oplinger testified to on direct examination was contained within R-1, which Hartz had received in 2021.

There was no prejudice to Hartz from admitting Oplinger's testimony and R-13 into evidence. Although the OOA produced R-13 after discovery had concluded and trial had

commenced, it contained no new information. Hartz never sought the opportunity to amend its own expert reports to respond. Indeed, Hartz's expert did not address the other state agreements from R-1 in his initial or rebuttal reports, perhaps because they constituted legal information that was not relevant to the traffic analysis within his field of expertise. In any event, R-13 was provided to Hartz prior to Ms. Oplinger's testimony, and Hartz had a full year to prepare its cross-examination after receiving it.

The ALJ's reference to spoliation of evidence is similarly contrary to the law and record. No evidence was destroyed or concealed. Other states' agreements with the federal governments and outdoor advertising regulations are public information. Ms. Oplinger did not destroy or conceal them. Indeed, the issue arose because she had never reviewed any other state's agreement prior to cross-examination.

vi. The trial DAG's awareness of the misstatement in R-1

The initial decision states that the trial DAG "was fully aware of the false nature of the statements contained in New Jersey DOT's expert's report and failed to rectify the issue during discovery proceedings." (Initial Decision at 16). There is no support in the record for this serious accusation. Ms. Oplinger testified about her communications with various DAGs in this matter and the Outfront Media matter. She testified that she informed the trial DAG in this case of the inaccurate statement in R-1 in May 2023.[7] (4T75:4-14). In response to a question from Hartz, Ms. Oplinger explained: "I asked my attorney, because that statement wasn't true, what do I do." (4T75:13-14). Ms. Oplinger corrected and signed the report on May 4, 2023, and the trial DAG

[7] Ms. Oplinger testified that she "believe[d]" she'd spoken to the trial DAG about this issue "the evening of May 3rd." (4T75:6). In response to Hartz's motion, the trial DAG submitted a certification confirming that Ms. Oplinger informed her of the misstatement and 504-500 foot rounding error for the first time on May 2, 2023.

served it upon Hartz that evening. As such, the trial DAG clearly fulfilled her duty of candor to the tribunal. There is no evidence in the record that the trial DAG was aware of the misstatement in R-1 at any point before May 2023. Hartz's unsupported accusations do not constitute evidence upon which findings of fact can be made.

vii. The OOA's burden on remand

The initial decision repeatedly referenced DOT's burden to prove "that the 500-foot requirement has maintained a long history and substantial consensus across the entire country." (Initial Decision at 16; see also Initial Decision at 15). The NJDOT was not required to prove that other states have similar regulations or that the 500-foot restriction has a long history.

On remand, the Appellate Division instructed the OAL to apply intermediate scrutiny to OOA's denial of Hartz's application. To prevail, the NJDOT needed to provide a "modicum of support" for its assertion that the prohibition on billboards within 500 feet of an intersection, "particularly as applied to a pavement widening roughly a third of a mile from an exit ramp," furthers the state's interest in traffic safety. (A.D. at *21-23). The NJDOT's "evidence need not necessarily be rigorous or unchallenged to survive a constitutional challenge." (A.D. at *24). Courts may "consider '[a] long history, a substantial consensus, and simple common sense' to show that a law is necessary to advance the governmental interest." (A.D. at *24) (citing Burson v. Freeman, 504 U.S. 191, 211 (1992)).

The Appellate Division specifically noted that traffic safety "has long been recognized as a legitimate and substantial government interest[], particularly related to billboards." (A.D. at *21) (citing E&J Equities v. Bd. of Adjustment of Franklin Twp, 226 N.J. 549, 583 (2016)). The court further noted that in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), the United States Supreme Court "did not reject 'the accumulated, common-sense judgments of . . . lawmakers and

of many reviewing courts that billboards are real and substantial hazards to traffic safety' when there was 'nothing . . . to suggest that these judgments [were] unreasonable.'" (A.D. at *24) (citing Metromedia, 453 U.S. at 509). The OOA's denial of Hartz's application could survive intermediate scrutiny so long as its evidence was "reasonably believed to be relevant to the problem" of traffic safety. (A.D. at *24) (citing Interstate Outdoor Advert., LP v. Zoning Bd. of Mount Laurel Twp., 706 F.3d 527, 533-34 (3d Cir. 2013)). Nor was the NJDOT required to justify, "with absolute precision" the 500-foot requirement over a difference distance requirement. (A.D. at *24-25).

In entering judgment for Hartz, the ALJ entirely disregarded the Appellate Division's specific instructions. The ALJ did not consider any of Ms. Oplinger's testimony about the need to enforce the 500-foot regulation at this location, nor the risk of losing ten percent of federal highway funding by violating the NJDOT's 1971 agreement with the FHWA. The ALJ considered only what 31 other states' agreements with the FHWA permitted. Nor did he consider any evidence raised by any other witness or address Hartz's equal protection "class-of-one" argument.

Conclusion

For the foregoing reasons, I reject the initial decision order for sanctions and remand the case to the OAL for findings of fact and conclusions of law in accordance with In re Denial of the Outdoor Adver. Application No. 75708, Docket No. A-5468-16T1, 2019 N.J. Super Unpub. LEXIS 1397 (App. Div. 2019). On remand, an ALJ must weigh the entirety of the evidence presented, including but not limited to both experts' testimony, and issue findings of fact and conclusions of law on the two questions before it. First, does the regulatory prohibition on Hartz's proposed billboard promote the state's interest in traffic safety? This question must be answered using intermediate scrutiny. Second, has the NJDOT treated Hartz differently than other billboard

applicants without a rational basis? This is the equal protection "class-of-one" claim. Prior to rendering an initial decision, the assigned ALJ should provide the parties with the opportunity to submit written post-trial summations since they have not yet done so.

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

DATED: 4/3/2025

Francis K. O'Connor

Francis K. O'Connor
Commissioner