

Old Docket Number: 3628

A.G. CULLEN CONSTRUCTION, INC.

Richard D. Kalson, Esquire

VS.

**COMMONWEALTH OF PENNSYLVANIA
STATE SYSTEM OF HIGHER EDUCATION**

~~Jeffrey Cooper, Chief Counsel~~

Thomas J. Madigan, Esquire

John W. Fletcher, Esquire

Karen M. Stemland, Esquire

(Cohen & Grigsby)

11 Stanwix Street

15th Floor

Pittsburgh, PA 15222

CLOSED

May 7, 2003

Plaintiff filed Claim and filing fee. Amount of Claim:
\$290,364.20+

May 13, 2003

Board forwarded copies of Claim to Defendant and Chief Deputy Attorney General. ***Answer due from Defendant June 17, 2003.***

May 16, 2003

Defendant filed Acceptance of Service of Claim. Receipt of same acknowledged by Defendant May 15, 2003.

May 20, 2003

Chief Deputy Attorney General filed Acceptance of Service of Claim. Receipt of same acknowledged by Chief Deputy Attorney General May 14, 2003.

June 17, 2003

Defendant filed Answer and New Matter. ***Plaintiff=s Reply due July 7, 2003.***

September 3, 2003

Defendant filed Motion for Consolidation (of Docket Nos. 3468, 3520, 3628 and 3629), Brief in Support of Motion for Consolidation, and Proposed Order. Copy forwarded to Plaintiff.

September 10, 2003

Plaintiff filed Reply to Defendant=s Motion for Consolidation (of Docket Nos. 3468, 3520, 3628 & 3629). Copy forwarded to Defendant.

September 17, 2003

Plaintiff filed Reply to New Matter. Copy forwarded to Defendant.

September 19, 2003

Board issued Opinion and Order. Order as follows: **AND NOW, this 19th day of September, 2003, the hearing on the actions at Docket Nos. 3468 and 3520 is hereby CONTINUED, and Defendant=s Motion to Consolidate Board of Claims Docket Nos. 3468, 3520, 3628 and 3629, is hereby GRANTED. All four cases shall be consolidated for the purpose of hearing and decision under**

Docket No. 3468, A.G. Cullen Construction, Inc. vs. Commonwealth of Pennsylvania, State System of Higher Education (hereinafter the AConsolidated Case Caption and Docket Number®). The respective pleadings in the actions hereby consolidated shall remain as the respective pleadings in the consolidated action, and separate findings shall be entered with regard to each upon decision, provided, however, that a single, unified judgment shall be entered for the consolidated case as a whole. For the purpose of clarity, the parties shall observe the following conventions: 1) All subsequent filings shall utilize the Consolidated Case Caption and Docket Number; 2) All subsequent filings that relate only to activities in one or more (but not all) of the originally separate actions shall, in addition, display in parentheses in the caption a reference to the old docket number(s) of the original action(s), e.g. (Old Docket No. 3520), or (Old Docket No. 3468), or (Old Docket Nos. 3468 and 3628) as the case may be; and 3) All subsequent filings that relate to activities in all of the originally separate cases shall, in addition, display in the caption the parenthetical notation A(ALL)®. The consolidated matter shall be conducted in accordance with the following schedule: 1. Discovery in all matters shall be completed no later than November 14, 2003; 2. Pre-Trial Statements in the consolidated matter shall be filed with the Board no later than December 1, 2003; 3. A Pre-Trial Conference shall be held at the Board of Claims located at 200 North Third Street, Fulton Building, 7th Floor, Harrisburg, PA 17101, at 10 a.m. on December 15, 2003; 4. All Pre-Trial Motions shall be filed with the Board no later than January 16, 2004; 5. A hearing on the consolidated matter shall be held in Courtroom No. 1, 6th Floor, Fulton Bank Building, Harrisburg, PA 17101, commencing at 9:30 a.m. March 8, 2004 and continuing through March 12, 2004; resuming, as necessary, on March 15, 2004 and continuing through March 19, 2004, as necessary.® Copy forwarded to Plaintiff and Defendant.

September 24, 2003

(ALL) Defendant filed Acceptance of Service of Opinion and Order dated September 19, 2003. Receipt of same acknowledged by Defendant September 22, 2003.

September 25, 2003

(ALL) Plaintiff filed Acceptance of Service of Opinion and Order dated September 19, 2003. Receipt of same acknowledged by Plaintiff September 22, 2003.

October 1, 2003

(Not Identified) Defendant filed Notice of Service of Notice of
Deposition Duces Tecum. Copy forwarded to Plaintiff.

October 14, 2003

(Not Identified) Board issued letter to Defendant returning unidentified Notice of Service of Notice of Deposition Duces Tecum. Copy forwarded to Plaintiff.

October 14, 2003

(Old Docket No. 3628) Defendant filed Notice of Service of First Set of Interrogatories Directed to Plaintiff Relating to Claim at Original Docket No. 3628. Copy forwarded to Plaintiff.

October 14, 2003

(Not Identified) Plaintiff filed Notice of Service of Discovery. Copy forwarded to Defendant.

October 14, 2003

(Not Identified) Defendant filed Notice of Service of First Requests for Production of Documents Directed to Plaintiff. Copy forwarded to Plaintiff.

October 15, 2003

(ALL) Defendant filed Notice of Service of Notices of Deposition Duces Tecum directed to Joseph Beck and Karen Getz. Copy forwarded to Plaintiff.

October 17, 2003

(Not Identified) Board issued letter to Plaintiff returning unidentified Notice of Service of Discovery. Copy forwarded to Defendant.

October 17, 2003

(Not Identified) Board issued letter to Defendant returning unidentified Notice of Service of First Requests for Production of Documents Directed to Plaintiff. Copy forwarded to Plaintiff.

October 17, 2003

(ALL) Defendant filed Notice of Service of Discovery.

October 24, 2003

(ALL) Plaintiff filed Notice of Service of Discovery.

October 27, 2003

(ALL) Defendant filed Notice of Service of First Requests for
Production of Documents Directed to Plaintiff.

November 24, 2003

(ALL). Defendant filed Notice of Service of Discovery.

November 24, 2003

(ALL). Defendant filed Notice of Deposition of Corporate Designee of Plaintiff A.G. Cullen Construction, Inc.

November 24, 2003

(All) Defendant filed Notice of Service of Discovery.

November 26, 2003

(ALL) Defendant filed copy of Deposition of Paul A. Cullen.

December 1, 2003

(ALL) Defendant filed Motion for Sanctions. Copy forwarded to Plaintiff.

December 1, 2003

(ALL) Plaintiff filed, via facsimile, Pre-Trial Statement. Copy forwarded to Defendant.

December 1, 2003

(ALL) Defendant filed Consolidated PreTrial Statement. Copy forwarded to Plaintiff.

December 2, 2003

(ALL) Defendant filed First Supplement to Consolidated Pre-Trial Statement. Copy forwarded to Plaintiff.

December 2, 2003

(ALL) Plaintiff filed, via U.S. Mail, Pre-Trial Statement. Copy forwarded to Defendant.

December 8, 2003

(All) Defendant filed Motion for Admission Pro Hac Vice of Karen McMillan Stemland as well as Proposed Order. Copy forwarded to Plaintiff.

December 10, 2003

(ALL) Plaintiff filed Reply to Defendant's Motion for Sanctions, via facsimile. Copy forwarded to Defendant.

December 11, 2003

(ALL) Plaintiff filed Reply to Defendant's Motion for Sanctions, via U.S. Mail. Copy forwarded to Defendant.

December 11, 2003

(ALL) Plaintiff filed letter requesting the Pre-Trial Conference, scheduled for Monday, December 15, 2003, be held via telephone, due to possibility of inclement weather predicted for December 15, 2003.

December 12, 2003

(ALL) Defendant filed Supplemental Motion for Sanctions via facsimile. Copy forwarded to Plaintiff.

December 12, 2003

(ALL) Defendant filed letter, via facsimile, objecting to the Pre-Trial Conference being held via telephone and requesting that the Pre-Trial being rescheduled rather than be held via telephone.

December 12, 2003

(ALL) Board issued letter to parties, via facsimile and U.S. Mail, granting Plaintiff's request for the Pre-Trial Conference, scheduled for December 15, 2003, to be held via telephone.

December 12, 2003

(ALL) Defendant filed Notice of Service of Deposition of Paul Cullen.

December 12, 2003

(ALL) Defendant filed Notice of Service of Deposition of Corporate Designee of Plaintiff A.G. Cullen Construction, Inc.

December 15, 2003

(ALL) Pre-Trial Conference scheduled for this date postponed.

December 15, 2003

(ALL) Defendant's Memorandum of Law in Support of Its Motion for Sanctions via facsimile. Copy forwarded to Plaintiff.

December 15, 2003

(ALL) Defendant filed Supplemental Motion for Sanctions via U.S.

Mail. Copy forwarded to Plaintiff.

December 17, 2003

(ALL) Board issued Opinion and Order. Order as follows: AND NOW, this 17th day of December, 2003, Defendant's motion and supplemental request for sanctions is hereby DENIED. Defendant's motion to extend the deadline for discovery is GRANTED. Defendant's motion for extending the deadline for SSHE to file its pre-trial statement and expert report is GRANTED. Further, Defendant's motion to compel Plaintiff to fully and adequately respond to interrogatories and requests is GRANTED. Additionally a revised Scheduling Order shall be issued. Plaintiff shall identify the person or persons who will testify at hearing as to the damage calculations by December 29, 2003. Plaintiff shall make the same available for deposition prior to the close of discovery. Plaintiff shall specifically respond to the following interrogatories by December 29, 2003: Old Docket Nos. 3468 and 3520 Interrogatory No. 6; Old Docket No. 3468 Interrogatory No. 9; Old Docket No. 3520 Interrogatory Nos. 7 and 8; Old Docket Nos. 3628 and 3629 Interrogatory No. 5; Old Docket No. 3629 Interrogatory Nos. 4, 6, 7, 8, 9, 13 and 14. Discovery shall close January 14, 2004. Pretrial statements and amendments thereto shall be filed no later than January 23, 2004. Pretrial motions shall be filed no later than January 30, 2004. Responses to pretrial motions shall be filed no later than February 16, 2004. A pretrial conference shall be held at the office of the Board of Claims at 200 North Third Street, Suite 700, Harrisburg, PA at 1:00 p.m. on February 10, 2004. Hearing in this matter shall remain scheduled to begin at 9:30 a.m. on March 8, 2004 and continue as necessary through March 19, 2004. @
Copy forwarded to Plaintiff and Defendant.

December 24, 2003

(All) Plaintiff filed letter advising he has no objection to Defendant's Motion for Admission Pro Had Vice of Karen McMillan Sternland. Copy forwarded to Defendant.

December 24, 2003

(ALL). Defendant filed Acceptance of Service of Opinion and Order dated December 17, 2003. Receipt of same acknowledged December 22, 2003.

January 16, 2004

(ALL) Board issued Opinion and Order. Order as follows: ~~AND~~ **NOW**, this 16th day of January, 2004, after review of Defendant's Motion for Admission Pro Hac Vice of Karen McMillan Stemland, and Plaintiff's response thereto, it is hereby **ORDERED** that: 1) Effective upon the date of this Order, Karen McMillan Stemland shall be **ADMITTED** pro hac vice to the bar of the Commonwealth of Pennsylvania under Pennsylvania Bar Admission Rule 301 for the limited purpose of serving as co-counsel on behalf of Defendant in this matter; 2) Karen McMillan Stemland shall abide by all the rules of, and applicable to, practice before this Board, including all attorney disciplinary rules; and 3) Karen McMillan Stemland shall immediately notify this Board of any matter affecting her standing at the bar of any other court or jurisdiction where she may be admitted to practice.@ Copy forwarded to Plaintiff and Defendant.

January 23, 2003

(ALL) Plaintiff filed Second Pre-Trial Statement. Copy forwarded to Defendant.

January 23, 2004

(ALL) Defendant filed Second Supplemental Consolidated Pre-Trial Statement. Copy forwarded to Plaintiff.

January 26, 2004

(ALL) Defendant filed Acceptance of Service of Opinion and Order dated January 16, 2004. Receipt of same acknowledged January 23, 2004.

January 30, 2004

(ALL) Defendant filed Motion for Sanctions/Motion to Exclude Claims. Copy forwarded to Plaintiff.

February 5, 2004

(ALL) Board issued letter to Plaintiff, via facsimile and U.S. Mail, with copy to Defendant, granting extension of filing Responses to PreTrial Motions to February 23, 2004, and postponing the PreTrial Conference until Wednesday, February 11, 2004.

February 23, 2004

(ALL) Plaintiff filed, via facsimile, Response to Defendant's Motion for Sanctions, Motion to Exclude Claims and Brief in Opposition to Defendant's Motion for Sanctions/Motion to Exclude Claims. Copy forwarded to Defendant.

February 24, 2004

(ALL) Plaintiff filed, via U.S. Mail, Response to Defendant's Motion for Sanctions, Motion to Exclude Claims and Brief in Opposition to Defendant's Motion for Sanctions/Motion to Exclude Claims. Copy forwarded to Defendant.

February 24, 2004

(Old Docket No. 3520) Plaintiff filed, via U.S. Mail, Response to Defendant's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment on the Claims at Docket No. 3520 and Brief in Opposition. Copy forwarded to Defendant.

February 26, 2004

(ALL) Plaintiff filed, via facsimile, deposition testimony that they will be introducing into the record during its case in chief at trial. Copy forwarded to Defendant.

February 26, 2004

(ALL) Defendant filed referenced deposition exhibits of Evan Keebler, Mario Rosa and John Paulina. Copy forwarded to Plaintiff.

March 2, 2004

(All) Defendant filed counterdesignates of certain portions of same depositions for introduction into the record at trial, via facsimile. Copy forwarded to Plaintiff.

March 3, 2004

(ALL) Defendant filed counterdesignates of certain portions of same depositions for introduction into the record at trial. Copy forwarded to Plaintiff.

March 4, 2004

(ALL) Defendant filed counterdesignates of certain portions of same depositions for introduction into the record at trial, via facsimile. Copy forwarded to Plaintiff.

March 4, 2004

(ALL) Plaintiff filed letter advising Defendant that their Notices to Attend fail to comply with Section 4651-7 of the Board of Claims Act and accordingly, they will not be honored.

March 4, 2004

(ALL) Board issued Opinion and Order. Order as follows: **AND NOW**, this 4th day of March, 2004, it is hereby **ORDERED** and **DECREED** that Defendant's Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment on all Lead Paint Claims; Motion for Summary Judgment as to all Claims for Delay Related Damages; and Motion in Limine to Exclude Opinion Testimony Regarding the Cause and Extent of the Claimed Project Delays are hereby **DENIED**. Defendant's Motion for Sanctions/Motion to Exclude Claims is **GRANTED**. Plaintiff, A.G. Cullen Construction, Inc. Will be precluded from presenting testimony or other evidence at trial respecting: 1) unabsorbed home office overhead; 2) lost bonding capacity; and 3) delay damages and other related costs claimed in Paragraph 36 of the Complaint at Old Docket No. 3629.@ Copy forwarded to Plaintiff and Defendant.

March 8, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.

March 9, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.

March 10, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.

March 11, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.

March 12, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.

March 15, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.

March 16, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.

March 17, 2004

(ALL) Hearing held in Board's Courtroom No. 1, 6th Floor, 200 North Street, Harrisburg, Pennsylvania, commencing at 9:30 a.m.
Case Completed.

March 17, 2004

(ALL) Defendant filed Acceptance of Service of Opinion and Order dated March 4, 2004. Receipt of same acknowledged March 14, 2004.

April 7, 2004

(ALL) Testimony of hearing held March 8, 9 and 10, 2004 filed.

April 9, 2004

(ALL) Board forwarded copy of testimony of hearing held March 8, 9 and 10, 2004 to Defendant.

April 14, 2004

(ALL) Testimony of hearing held March 11, 12, 15, 16 & 17, 2004 filed.

April 19, 2004

(ALL) Copy of testimony of hearing held March 11, 12, 15, 16 & 17, 2004 forwarded to Defendant.

April 23, 2004

(ALL) Defendant filed Acceptance of Service of testimony of hearing held March 11, 12, 15, 16 & 17, 2004. Receipt of same acknowledged April 21, 2004.

May 13, 2004

Defendant filed Acceptance of Service of Testimony of hearing held March 8, 9 and 10, 2004. Receipt of same acknowledged April 14, 2004.

May 24, 2004

(All) Defendant filed Motion for Leave to Supplement Record and Amend Answer to Conform to the Evidence. Copy forwarded to Plaintiff.

June 3, 2004

(ALL) Defendant filed Proposed Findings of Fact, Conclusions of Law and Brief in Support of Findings of Fact and Conclusions of Law. Copy forwarded to Plaintiff.

June 3, 2004

(ALL) Plaintiff filed, via facsimile, Proposed Findings of Fact, Conclusions of Law and Brief in Support. Copy forwarded to Defendant.

June 4, 2004

(ALL) Plaintiff filed, via U.S. Mail, Proposed Findings of Fact, Conclusions of Law and Brief in Support. Copy forwarded to Defendant.

June 7, 2004

(ALL) Defendant filed Brief in Support of Motion for leave to Supplement Record and Amend Answer to Conform to the Evidence. Copy forwarded to Plaintiff.

June 9, 2004

(Old Docket Nos. 3628 & 3629) Plaintiff filed copy of Settlement Agreement between A.G. Cullen, Cooper Trading, McClure-Johnston and Weather Shield. Copy forwarded to Defendant.

July 2, 2004

(ALL) Plaintiff filed Response to Motion for Leave to Supplement Record and Amend Answer to Conform to the Evidence, Brief in Opposition to Motion for Leave to Supplement Record and Amend Answer, as well as Exhibit 170B, demonstrating Plaintiff's legal fees and costs in this matter. Copy forwarded to Defendant.

July 15, 2004

(ALL) Defendant filed Motion for Leave to Submit Reply Brief in Support of Motion for Leave to Supplement Record and Amend Answer to Conform to the Evidence. Copy forwarded to Plaintiff.

July 15, 2004

(ALL) Defendant filed Reply Brief to Plaintiff's Response to Motion for Leave to Supplement Record and to Conform to the Evidence. Copy forwarded to Plaintiff.

July 15, 2004

Defendant filed Objection to Plaintiff's Proposed Exhibit 170B.
Copy forwarded to Plaintiff.

March 4, 2005

Board issued Opinion and Order. Order as follows: **"AND NOW,** this 4th day March, 2005, upon consideration of the motions of Defendant, Commonwealth of Pennsylvania, State System of Higher Education and the response of Plaintiff, A.G. Cullen Construction, Inc., thereto, it is hereby **ORDERED** and **DECREED** as follows: Defendant's motion for leave to supplement record and amend answer to conform to the evidence is **DENIED**. Defendant's motion for leave to submit reply brief in support of motion for leave to supplement record and amend answer to conform to the evidence is **DENIED**. Defendant's objection to Plaintiff's proposed exhibit 170B is **GRANTED**." Copy forwarded to Plaintiff, Defendant and Chief Deputy Attorney General.

March 4, 2005

Board issued Opinion and Order. Order as follows: **"AND NOW,** this 4th day of March 2005, after a hearing, **IT IS ORDERED** and **DECREED** that judgment be entered in favor of plaintiff, A.G. Cullen Construction, Inc. and against defendant, Commonwealth of Pennsylvania, State System of Higher Education, as follows:

1. in the sum of sixty-three thousand seven hundred thirteen dollars and seventy-five cents (\$63,713.75) for the extra cost of lead based paint abatement, with interest thereon at the rate of six percent (6%) per year from January 11, 2002;
2. in the sum of thirty-one thousand five hundred dollars (\$31,500) for liquidated damages rebate, with interest thereon at the rate of six percent (6%) per year from January 11, 2002;
3. in the sum of fifty-nine thousand twenty-one dollars and twenty-seven cents (\$59,021.27) for the contract balance improperly withheld, with interest thereon at the rate of six percent (6%) per year from January 11, 2002.
4. in the sum of twenty-eight thousand nine hundred ninety-eight dollars and ninety-five cents (\$28,998.95) for project delay occasioned by the defendant, with interest thereon at the rate of six percent (6%) per year from

January 11, 2002; and
5. in the sum of thirteen thousand three hundred sixty-four dollars and ninety-six cents (\$13,364.96) of additional interest for unjustified late payment of certain contract balance amounts.

IT IS FURTHER ORDERED that plaintiff's petition for an award of penalty and attorneys' fees is **DENIED**. Each party herein to bear its own costs and attorneys' fees." Copy forwarded to Plaintiff, Defendant and Chief Deputy Attorney General.

April 11, 2005

Commonwealth Court filed Notice of Filing Petition for Review in Commonwealth Court. (No. 666 C.D. 2005)

April 15, 2005

Certified list comprising the record from the Board of Claims transmitted to Commonwealth Court.

April 18, 2005

Courtesy Copy of Petition for Review, as filed in Commonwealth Court, received from Defendant.

April 19, 2005

Commonwealth Court filed Notice of Filing Petition for Review in Commonwealth Court. (No. 776 C.D. 2005)

March 16, 2006

Commonwealth Court issued Opinion and Order. Order as follows:
"AND NOW, this 15th day of March, 2006, the order of the Board of Claims is **AFFIRMED** in part and **REVERSED** and **REMANDED** in part. The order is **REVERSED** to the extent the Board of Claims failed to award A.G. Cullen Construction, Inc. attorney's fees on its claim for lead paint abatement work, and the case is **REMANDED** for calculation of an award of attorney's fees limited to the lead paint abatement claim. The Board of Claims order is **AFFIRMED** in all other respects. Jurisdiction relinquished." Concurring and Dissenting Opinion by President Judge Colins: I dissent. I cannot conclude, as does the majority, that the State System's conduct in this matter was vexatious within the

intent of the statute. Therefore I must dissent from that portion of the majority opinion. I join the majority in their resolution of all the remaining issues."

May 15, 2006

Defendant filed a copy of Motion to Withdraw Application for Reargument before the Court En Banc as filed in Commonwealth Court [666 C.D. 2005 & 776 C.D. 2005].

June 19, 2006

Board forwarded letter to parties requesting parties try to stipulate to the attorney's fees or dates available for hearing, if stipulation is not possible.

June 30, 2006

Plaintiff filed Praecipe to Settled and Discontinue. Copy forwarded to Defendant.

July 3, 2006

Board rendered an Order. Order as follows: **"AND NOW**, this 3rd day of July, 2006, upon receipt of a praecipe to settle and discontinue requesting the Board to "Kindly mark the above-captioned case settled and discontinued with prejudice.", executed by Richard D. Kalson, Esquire, attorney for Plaintiff, and docketed with this Board under date of June 30, 2006, it is **ORDERED** and **DECREED** that said case be marked "settled and discontinued with prejudice." Copy forwarded to Plaintiff and Defendant.

July 14, 2006

Commonwealth Court rendered Order. Order as follows: **"NOW**, May 15, 2006, upon consideration of respondent's motion withdraw application for reargument, the motion is granted."
