



IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORANDA ALUMINUM HOLDING CORPORATION,

Plaintiff Below,
Appellee/Cross-Appellant,

v.

XL INSURANCE AMERICA, INC.,
TALBOT UNDERWRITING SERVICES
(US) LTD., FACTORY MUTUAL
INSURANCE COMPANY, AXIS
INSURANCE COMPANY, LIBERTY
MUTUAL FIRE INSURANCE
COMPANY, LIBERTY SURPLUS
INSURANCE CORPORATION, ACE
AMERICAN INSURANCE CO., ASPEN
INSURANCE UK LTD., STEADFAST
INSURANCE COMPANY, AIG
EUROPE LIMITED, SCOR UK
COMPANY LIMITED, SWISS RE
INTERNATIONAL S.E., AND
CERTAIN UNDERWRITERS AT
LLOYD'S LONDON,

Defendants Below,
Appellants/Cross-
Appellees.

No. 444, 2019

APPEAL FROM THE SUPERIOR
COURT OF THE STATE OF
DELAWARE, C.A. No. N17C-01-
152 WCC (CCLD)

**APPELLEE/CROSS-APPELLANT NORANDA
ALUMINUM HOLDING CORPORATION'S
REPLY BRIEF ON CROSS-APPEAL**

Dated: February 24, 2020

Of Counsel:

David B. Goodwin
Christine S. Haskett
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
T: (415) 591-6000
F: (415) 591-6091
dgoodwin@cov.com
chaskett@cov.com

David J. Baldwin (No. 1010)
BERGER HARRIS LLP
1105 North Market Street, 11th Floor
Wilmington, DE 19801
T: (302) 566-1140 x202
F: (302) 655-1131
dbaldwin@bergerharris.com

*Attorneys for Plaintiff Below,
Appellee/Cross-Appellant Noranda
Aluminum Holding Corporation*

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I. NATURE OF PROCEEDINGS

After the jury found for Noranda on the Potline Freeze claim, awarding damages of \$20,727,946.50, the Insurers moved for judgment as a matter of law on several grounds, one of which was that a component of Noranda's claim, referred to as "electrical inefficiency," was inconsistent with the language of the Insurers' Policy. The Superior Court denied the Insurers' JMOL motion, apart from the portion directed to the electrical inefficiency issue, which the court granted.

Noranda has cross-appealed the latter ruling. In reviewing this cross-appeal, this Court must give "enormous deference" to the jury's verdict and must reverse a JMOL order unless "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." (Super. Ct. Civ. R. 50(a)(1); *Young v. Frase*, 702 A.2d 1234, 1236–37 (Del. 1997) ("Under Delaware law, enormous deference is given to jury verdicts. In the face of any reasonable difference of opinion, courts will yield to the jury's decision. It follows that, in the absence of exceptional circumstances, the validity of damages determined by the jury should likewise be presumed.") (citations omitted); *see also Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998) (this Court will defer to a jury verdict when "under any reasonable view of the evidence the jury could have justifiably found for" the party that prevailed).)

The Insurers raise two principal arguments in their attempt to justify the JMOL ruling. First, they say that the electrical inefficiency number is not authorized by the insurance policy. That is incorrect. As discussed below, the normal costs of achieving production are an essential component of a business interruption claim, and the undisputed evidence below was that electricity is a normal cost of running an aluminum potline. The methodology that both sides' accounting experts used to determine Noranda's loss took these operating costs into account, as required by the Policy. (*See* Sections II.A–D, *infra*.)

Second, the Insurers argue that the opinion on the electrical inefficiency issue that Noranda's accounting expert offered was not sufficiently reliable to be admitted. But the Insurers did not object to this testimony below and therefore cannot complain about it on appeal. And even if the Insurers had objected, the Superior Court would not have abused its discretion in allowing the testimony: Noranda's expert was amply qualified to offer opinions on the issue, having worked on 15 prior aluminum smelter potline freeze claims over his 25 years as an expert forensic accountant, including a prior potline freeze at Noranda's New Madrid plant at which the expert was able to observe personally the electrical inefficiency that occurs as potlines consisting of hundreds of pots are brought back into operation one or a few pots at a time. The Insurers offered no contravening evidence. (*See* Sections II.E–F, *infra*.)

In sum, Noranda's claim is fully consistent with the insurance policy and is amply supported by undisputed evidence. This Court accordingly should reinstate the jury's verdict on the electrical inefficiency issue.

II. ARGUMENT

A. The Methodology That The Accountants Used At Trial

To place in context the Insurers' arguments on Noranda's cross-appeal, it is necessary to start with the methodology for calculating Noranda's business interruption loss for the Potline Freeze claim—a methodology used by the testifying accountants for both Noranda and the Insurers when they offered opinions to the jury concerning the amount of Noranda's covered business interruption insurance loss. (*See* Noranda's Op. Br. 20–27.)

As the jury learned, after the Potline Freeze, Noranda was unable to repair the damage and restore operations because it was forced to file for bankruptcy. (A1446; A1692–A1693.) Although the Insurers argued that Noranda's business interruption claim was cut off as of March 12, 2016, the date on which the debtor-in-possession lenders forced Noranda to close the New Madrid plant, the jury found that Noranda was entitled to recover its lost "GROSS EARNINGS" during the entire Period of Liability, a finding that the Insurers did not appeal. (A2196–A2197.)¹ That meant that the loss was calculated by reference to a hypothetical time period: the time that would have been needed with the exercise of due

¹ The Policy defines "GROSS EARNINGS" as "Gross Earnings" minus charges and expenses. "Gross Earnings" (with initial capital letters) is a thus component of "GROSS EARNINGS" (in all capitals), and the two terms are not synonymous. (Noranda's Answering Brief on Appeal/Opening Brief on Cross-Appeal at 16 & n.5; *see* A1650–A1651; A1669.)

diligence and dispatch to repair the damage and restore operations to pre-loss conditions. (A2152–A2153; A2197.)

The parties further agreed that if, hypothetically, Noranda had repaired the damage caused by the Potline Freeze, it would have brought the frozen pots back into operation one or a few at a time, over the course of the Period of Liability, and as each pot was brought back on line, that pot would have produced aluminum and thereby mitigated a portion of Noranda’s Potline Freeze loss. (A1662–A1664; A1971; *see also* A2079–A2098.) Both Noranda’s accounting expert, Christopher Hess, and the Insurers’ accounting expert, Peter Karutz, agreed that to calculate the loss correctly, they had to take that hypothetical mitigation into account. (*Id.*)

Accordingly, both accountants used the following methodology:

(1) Both started by determining the “Gross Earnings” that Noranda would have earned, minus costs, during the Period of Liability, had there been no accidents.

(2) Then, both accountants subtracted from those “Gross Earnings” (in the “but for” world with no accidents) the “Gross Earnings” that Noranda would have received if, during the Period of Liability, Noranda had repaired the potlines and restored operations to pre-loss conditions. Both accountants understood that this would be a gradual process as several hundred pots were repaired individually and brought back into operation. (A1660–A1664; A2079–2098.)

(3) In doing so, both accountants recognized that they had to account for certain costs of obtaining those offsetting “Gross Earnings,” such as the cost of electrical power and supplies (A1658–A1660; A2077–A2079), and both therefore reduced the offsetting “Gross Earnings” to reflect the opinions that each had about the expenses that Noranda would have incurred to obtain that production during the Period of Liability. (A1658–A1664; A2111; A2077–A2079.)

(4) The result of this calculation performed by both sides’ accountants is Noranda’s lost “GROSS EARNINGS,” which is the measure of Noranda’s insured loss under the Policy. (A0205–A0206.) This loss is simply the difference between (a) Noranda’s Gross Earnings minus charges and expenses, had the accidents not happened, and (b) Noranda’s Gross Earnings minus charges and expenses, had Noranda repaired the New Madrid plant.

Both accountants were in the same general range on all items in these calculations apart from electrical power and labor, and the jury ultimately accepted Noranda’s numbers and rejected those of the Insurers. (A2196–A2197.) As the Superior Court found, “[t]he jury decided to give more credibility to the witnesses and experts of Plaintiff and that was clearly within the jury’s province to do.” (Insurers’ Br., Ex. 5 at 1.)

Noranda’s cross-appeal concerns the jury’s determination of the proper amount of the electrical power deduction from the offsetting “Gross Earnings,” a

deduction that the Superior Court reduced in its post-trial order notwithstanding the jury's finding that Noranda's calculations on this item were correct.

B. The Insurers Argued Below That The Methodology That Both Experts Used Was Correct And Required By The Insurance Policy

On appeal, the Insurers argue that they did not waive the right to complain about the methodology that their expert used because they say they told the Superior Court that a comparison of the “but for” world with the “hypothetical” world would be “nonsense.” (Reply Br. at 13.) However, what the Insurers described below as “nonsense” was how Noranda accounted for payroll costs (A0449, A0453, A0457, A0459, A0462, A0463, A0465), not the basic methodology that both accountants employed to determine lost “GROSS EARNINGS.”

When it came to the basic methodology for calculating Noranda's loss, the Insurers in fact told the Superior Court that the “dual hypothetical worlds” model of which they now complain was a “requirement” under the insurance policy—a position directly contrary to the one the Insurers are arguing to this Court.

The Insurers explained below in an *in limine* motion directed to Noranda's accounting expert, Mr. Hess, that their insurance policy is a “Grand Bargain: the Insurer will pay Noranda even if it does not repair the potlines, but will never have to pay more than the amount the Insurers would have had to pay if Noranda were a

diligent insured who repaired the potlines in a timely fashion.” (A0470.) As to the methodology for calculating the loss in light of that “Grand Bargain,” they then said:

To reflect this Grand Bargain, we must adjust the revenue figures to account for the fact that Noranda did not mitigate or use due diligence. ***To accomplish this, we compute revenues by starting with the amount Noranda would have produced from the two potlines absent the freeze, and then subtracting any amounts it could have generated if it had diligently repaired the potlines. Both experts recognize this requirement and compute revenues this way.***

(A0471 (emphasis added).) In other words, the Insurers explicitly recognized that the Policy requires a comparison of “the amount Noranda would have produced from the two potlines absent the freeze”—that is, the Noranda’s “GROSS EARNINGS” in the “but for world”—with “any amounts it could have generated if it had diligently repaired the potlines”—that is, “GROSS EARNINGS” in the “hypothetical world.” This was, as the Insurers told the Superior Court, a “requirement” under their insurance policy. (*Id.*)

Consistent with that “requirement,” the Insurers’ accounting expert, Mr. Karutz, unequivocally testified that the “dual hypothetical worlds” method was the correct way to calculate Noranda’s lost margin:

Q. [Y]ou agree that the correct comparison for assessing Noranda’s lost margin is between what would have happened if there had been no accidents and what would have happened if there were accidents but Noranda had gone ahead and made repairs; right?

A. Correct.

(A1971; *see also* A2079–A2098.) Although the Insurers now argue that they and their expert disagreed with Noranda on the methodology for calculating Noranda’s loss, that was only true with respect to certain *costs* of a hypothetical rebuild, not with respect to the *revenues* from such a rebuild. (*See, e.g.*, Insurers’ Br. at 13 (“[T]he Insurers and their expert, Peter Karutz, repeatedly objected to and rejected Noranda’s methodology—specifically disputing that Noranda could claim *costs* involved in hypothetically rebuilding the damaged facility.”) (emphasis added).) At no time did the Insurers or their expert dispute that the comparison of the “but for world” with the “hypothetical world” is the correct way to calculate Noranda’s lost *revenues*. Indeed, in all of his expert reports in this case, from the very beginning, Mr. Karutz calculated Noranda’s lost revenues by comparing what Noranda would have earned absent the accidents with what it would have earned had it rebuilt the facility. (BR0038–BR0053; B0125; A1971.)

The reason the Insurers are in favor of the “dual hypothetical worlds” model when it comes to calculating revenues, but not all costs, is abundantly clear. When the “dual hypothetical worlds” comparison is used to calculate lost revenues, it counts against Noranda’s claim because the claim is reduced by the amount that Noranda would have earned had it rebuilt the facility. The hypothetical costs that would have been needed to earn those hypothetical revenues, however, serve to offset that decrease in Noranda’s claim. It is disappointing, but not surprising, that

the Insurers are in favor of their model when it works to their advantage, but try to disclaim their model when it does not. Regardless, all parties and all experts in this case have agreed from the beginning of the matter that the “dual hypothetical worlds” model is the right way to calculate Noranda’s lost revenues. Having used that model to calculate lost revenues, and having never objected to it below, the Insurers cannot argue otherwise before this Court. (*See Shuck v. CNH Am., LLC*, 498 F.3d 868, 874 (8th Cir. 2007) (“When a litigant clearly believes a certain methodology is acceptable as shown by his or her own expert’s reliance on that methodology, it is disingenuous to challenge an opponent’s use of that methodology.”).)

C. The Insurers’ Accountant Used The Hypothetical Rebuild Scenario To Determine Some Of The Costs To Be Subtracted From Noranda’s Lost Revenues

Although the Insurers argue on appeal that it is improper to subtract from the revenues that Noranda would have obtained during a rebuild the *cost* of obtaining those revenues, that is precisely what their accountant did below.

To make the comparison required by the Policy between the “GROSS EARNINGS” under the “but for” scenario (absent the accidents) and the “GROSS EARNINGS” under the hypothetical rebuild scenario, the accountants calculated “GROSS EARNINGS” in both scenarios by starting with revenues and subtracting expenses. In *any* scenario, it would be illogical to consider revenues without

taking into account the costs that must be incurred in order to obtain those revenues. As the Superior Court found, a contrary interpretation “is simply incorrect and would lead to an absurd and unfair result that would never have been contemplated by the parties.” (Insurers’ Br., Ex. 5 at 6.)

As discussed in Section II.B above, at trial, both the Insurers and their expert recognized that Noranda’s lost *revenues* must be determined by reference to the hypothetical rebuild scenario. Critically, however, the Insurers and their expert did not stop there. Rather, they also went on to recognize that at least *some* costs must be considered when calculating the offsetting revenues during the hypothetical rebuild. Mr. Karutz explained that if Noranda’s lost revenues are to be evaluated by reference to a hypothetical scenario, then the costs of achieving those hypothetical revenues must also be taken into account:

Q. Is the next step in the analysis of a time element claim to take out from the value of the products that *would have been made* the cost of making it?

A. Correct.

Q. And so can you tell the jury in general what costs you have to take out to represent making it?

A. Sure. Once we make the product, you have a volume of metal. Right? But what goes into making that metal. Right? And I’m sure you’ve heard here this week, we have the main component, of course, is alumina. And then in order to take that alumina and melt it down, it requires energy, and a great deal of electric energy. It requires cathodes, which are—anodes and cathodes. The anodes are what is introduced in order to get that electrical power turned into heat. So

that's an expense. There's also supplies, and I mentioned before, maintenance supplies; sometimes outside contractors.

Q. And just so it's clear for the jury, can you explain why you are taking those expenses out of the sales value of the product?

A. Right. In order to sell that product, you have to make the product. In order to make the product, I have to incur all of these expenses.

Q. Right. And so when we're talking about the insurance policy giving Noranda the sales value of those products, is it appropriate to need to take out the expenses that would be needed to make that product?

A. Right. In order to sell the product, they have to make it. So I don't just get the selling price, I have to invest all of the various expenses I was mentioning and more in order to make that product.

Q. And do your calculations do that?

A. Yes, they do.

(A2077–A2079 (emphasis added).)

Consistent with his trial testimony, Mr. Karutz deducted certain costs from the revenues that he assumed Noranda would have earned during the rebuild period in calculating Noranda's loss. He did this because, in making the comparison between the "but for" (no accident) scenario and the hypothetical rebuild scenario, certain expenses would have been "saved" in that second scenario; in other words, during a hypothetical rebuild, certain categories of expenses would have been lower than they would have been had the accidents not happened. Therefore, in making the comparison between the two scenarios, the "saved" expenses must be deducted from the lost revenues in order to avoid a windfall to Noranda. (*See, e.g.,*

A2076 (“I measured more maintenance materials as saved than Mr. Hess did.”)
(Karutz testimony).²

Mr. Karutz’s expert report shows the detailed breakdown of the saved costs that he deducted from Noranda’s earnings, to arrive at the value of Noranda’s business interruption claim (which he termed “BI Value”). Those costs included “Operating Supplies,” “Natural Gas,” “Electricity,” “Outside Contracts,” “Maintenance Materials,” and “Factory Overhead Applied”:

² From a mathematical perspective, there are two equivalent ways to calculate Noranda’s lost “GROSS EARNINGS.” One is to start by determining the “GROSS EARNINGS” (revenues minus expenses) in both the “but for” world and the hypothetical rebuild world and then comparing the two. The other is to determine Noranda’s lost revenues (revenues in the “but for” world minus revenues in the hypothetical rebuild world) and then subtract Noranda’s saved expenses (expenses in the “but for” world minus expenses in the hypothetical rebuild world). The two methods are mathematically equivalent, they will lead to the same result, and they both require an evaluation of Noranda’s expenses in the hypothetical rebuild scenario.

Calculation of Estimated BI Value By Month - Rod
 Noranda Aluminum, Inc. - New Madrid, MO
 Date of Loss - January 7, 2016

		\$ 1,869,083	\$ 1,284,407	\$ 513,627	\$ 813,242
Gross Earnings					
<u>Non-Continuing</u>					
Operating Supplies	7.1	0.0123	0.0123	0.0123	0.0123
Natural Gas	7.1	0.0054	0.0054	0.0054	0.0054
Electricity	7.1	0.0050	0.0050	0.0050	0.0050
Outside Contracts	7.1	0.0003	0.0003	0.0003	0.0003
Maintenance Materials	7.1	0.0077	0.0077	0.0077	0.0077
Factory Overhead Applied	7.1	-	-	-	-
Subtotal		0.0307	0.0307	0.0307	0.0307
Non-Continuing Hot Metal %	12	3.67%	3.67%	3.67%	3.67%
Non-Continuing Hot Metal		0.0331	0.0330	0.0332	0.0332
Total Non-Continuing		0.0638	0.0637	0.0640	0.0640
BI Value per Lb.		\$ 0.1644	\$ 0.1918	\$ 0.1768	\$ 0.1768
BI Value		\$ 1,346,591	\$ 964,219	\$ 377,190	\$ 597,218
		To Sch 2	To Sch 2	To Sch 2	To Sch 2

(BR0054 (highlighting added); *see also* BR0055–BR0060 (applying same methodology to the other types of aluminum products manufactured at the smelter).)³

As is shown by Mr. Karutz’s calculation of saved expenses—which the Insurers set forth in Mr. Karutz’s first expert report and which they stood by throughout the trial—it is simply not true, as the Insurers state in their Answering Brief on Cross-Appeal (at 33), that “the Insurers believe that the contract bars all hypothetical rebuilding costs.” The saved expenses that Mr. Karutz listed in his

³ This document, DX232, was marked as a trial exhibit but was not admitted into evidence because the Superior Court sustained Noranda’s objection to the ordinary payroll methodology contained in it. (A2057–A2059.) However, Mr. Karutz was examined extensively on DX232 in voir dire and affirmed that it accurately set forth the basis for his opinions. (A1966–A1996.)

report, as depicted above, are determined by comparing the expenses that Noranda would have incurred in the absence of the accidents with the expenses that Noranda would have incurred in the hypothetical rebuild scenario. The Insurers themselves, therefore, took into account several categories of “hypothetical rebuilding costs” in their calculations. And one of those hypothetical rebuilding costs that they counted as a saved expense is “Electricity,” the subject of this cross-appeal.

D. The Electrical Inefficiency Cost Presented By Noranda’s Expert Was A Normal Operating Expense

The Insurers next contend that even if hypothetical repair costs are to be taken into account—which they must be, as explained above and as accepted by the Insurers’ expert in his calculations—then the “electrical inefficiency” cost presented by Noranda’s expert should be an exception. The Insurers base this argument on language in the Policy describing the expenses to be deducted from revenues as “normal charges and expenses.” (A0206.)

The electrical inefficiency cost presented by Noranda at trial, however, is an integral component of the overall electrical costs of the plant. Next to raw materials, electricity is the single largest cost item that an aluminum smelter incurs. (A1653; A1681.) The Insurers and their expert implicitly recognized this by breaking out “Electricity” as a separate category in the saved expenses that they

deducted from Noranda's loss, as shown in the excerpt from Mr. Karutz's report depicted on page 14 above.

"Electrical inefficiency" is not a different type of cost from "Electricity"; rather, it is a number required by the fact that the smelter's consumption of electricity is more inefficient during a potline startup than when all or most of the pots in a potline are up and running. (A1659–A1660 (explaining that more electricity is required per pot when only some pots in a potline are in operation because the electrical current under those circumstances is not steady).) The additional electricity per pot that is required during the startup of a potline is the cost that Mr. Hess classified as "electrical inefficiency" in his calculations. (A1659.)

There was nothing unusual about taking these electrical costs into account. In his report and trial testimony, the Insurers' accounting expert, Mr. Karutz, acknowledged that electricity is a type of expense that should be considered when determining Noranda's lost "GROSS EARNINGS." In other words, he calculated an amount of electricity as "saved" in his comparison between the "but for" scenario (absent the accidents) and the hypothetical rebuild scenario. Mr. Karutz and the Insurers therefore recognized that electricity is one of the "normal charges and expenses" within the language of the Policy. Mr. Karutz calculated the electricity cost during the hypothetical rebuild, however, based on the electricity

per pound that the plant consumed in the time period prior to the accidents (August 2014 through July 2015), when all three potlines were running at normal capacity:

Detail of Variable Other Costs - Rod

Noranda Aluminum, Inc. - New Madrid, MO

Date of Loss - January 7, 2016

Description	August 14 thru July 15	
	Total (Sch 7.2)	Per Lb (Sch 7.2)
Lbs		
Net Production		133,769,074
Expenses		
Hot Metal	\$ 127,944,490	\$ 0.9565
Scrap	(396,689)	(0.0030)
Alloy additives	560,052	0.0042
Purchased Metal	51,572	0.0004
Labor	4,725,439	0.0353
Supplies	1,651,628	0.0123
Electricity	662,913	0.0050
Natural Gas	723,964	0.0054
Miscellaneous	86	0.0000
Fully Deductible	6,870	0.0001
Rental	3,711	0.0000
Outside Contracts	393,769	0.0029
Maintenance	1,376,058	0.0103
Depreciation	1,106,758	0.0083
FOH Applied	754,629	0.0056
FOH Applied - RME	-	-
FOH Applied - Depr	1,612	0.0000
Total Cost	\$ 139,566,862	\$ 1.0433

Source: Costbooks.

(BR0061 (highlighting added); *see also* BR0065–BR0066, BR0068–BR0070, BR0074–BR0079.) By using this pre-accident number to determine the amount of electricity required during the hypothetical rebuild, Mr. Karutz assumed, without support in the record, that the electricity, per pound of production, needed during a gradual rebuild of the potlines would be the same as the electricity, per pound of production, needed during pre-accident operation when all three potlines at the plant were in operation.

As Mr. Hess testified, however, the amount of electricity needed during a gradual potline restart is higher than the amount needed when the entire potline is running. (A1659–A1660.) Mr. Hess confirmed that there was nothing abnormal about this expense, telling the jury that he had observed this electrical inefficiency when potlines were brought back into operation in the fifteen potline freeze business interruption insurance claims he had worked on, including the 2009 potline freeze at Noranda’s New Madrid plant, which was paid. (A1647–A1648.)

As to the Policy, the reference to “normal charges and expenses” does not mean that the charges and expenses must be of precisely the same *magnitude* after the accident as before the accident. By definition, variable costs, which vary with production levels, will be different when the production is different. Mr. Karutz reflects this in each of the expense categories in his report. (BR0062; BR0066; BR0069–BR0070; BR0074–BR0079.) Moreover, different operating conditions may also result in different levels of expenses per unit of production—as noted, electricity costs are higher per pound of production if a potline is being brought back online one or a few pots at a time. This too is normal. (A1647–A1648.) Also, the Policy nowhere requires the post-accident charges and expenses to be proportional to production levels. In fact, the Policy explicitly recognizes that proportionality calculations, or other mathematical formulas, should not be used in

place of the damaged facility's actual experience, or probable experience, with respect to revenues and costs:

In determining the amount of loss payable, the Company will consider the experience of the business before and after and the probable experience during the PERIOD OF LIABILITY.

(A0205.)

Rather than referring to the precise charges and expenses that the insured was incurring pre-loss, the Policy's use of the term "normal charges and expenses," read in context, in light of the considerations discussed above, instead must mean that those *types* of charges and expenses that are considered "normal" will be taken into account in calculating the insured's loss. (*See Am. Heritage Dict. of the English Language* 894 (1970) ("normal" means "a usual or typical pattern, level or type"). And, as discussed above, electricity is exactly the type of expense that is normal for an aluminum smelter, regardless of whether the electrical expense is at a level commensurate with ordinary aluminum production or is higher, on a per pot basis, due to the inefficiencies that always occur during the gradual startup of a potline. Accordingly, the amount of electricity that Noranda would have "saved" during a rebuild must be evaluated by comparing the electricity that would have been consumed had the accidents not occurred (in the "but for" scenario) with the electricity that would have been consumed during a hypothetical rebuild, taking into account the "probable experience" during that

rebuild. This is precisely the calculation that Noranda's expert, Mr. Hess, performed.⁴

E. Mr. Hess's Computation Of The Electrical Inefficiency Cost Was Undisputed And Supported By Undisputed Evidence

As to the factual basis for the electrical inefficiency calculation, Mr. Hess is a licensed certified public accountant and certified fraud examiner, with twenty-five years of experience in preparing business interruption and property damage insurance claims. (A1647.) Mr. Hess has extensive experience working with aluminum smelters, including 15 prior potline freeze insurance claims, one of which was a business interruption claim for a potline freeze suffered by Noranda's New Madrid plant in 2009, which gave him "direct experience" with these potlines. (A1647–A1648; A1659–A1660.) Mr. Hess traveled to the New Madrid plant "[m]any times related to the 2009 loss and the casthouse and potline losses" at issue in this case. (A1648.) He spent more than 380 hours on just the Potline Freeze claim that is the subject of this cross-appeal. (BR0001–BR0032.)

Based on this extensive experience, Mr. Hess described to the jury his calculation of Noranda's lost "GROSS EARNINGS," including the electrical costs

⁴ At the very least, the Policy could perhaps be considered ambiguous on the issue of whether "normal charges and expenses" refers to the magnitude of the expenses or the types of expenses. And if ambiguous, the Policy must be construed against the Insurers and in favor of Noranda. (*Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256 (Del. 2008).)

that Noranda would have incurred while making repairs. (A1648–A1651.) Mr. Hess explained that Noranda’s electrical costs during the Period of Liability, if Noranda had repaired the potlines, would have been elevated due to the fact that, “[w]hen you’re restarting a potline, you experience a huge electrical inefficiency, that is, you’re using the same amount of electricity to get not as much out of it.”

(A1659.) This electrical inefficiency occurs because

a potline is a charged line of these humongous containers containing molten aluminum and you’re firing electricity at it....If you have a continuous line of these [pots], it’s going to be much more efficient. It’s going to go right through a steady current, versus ... this one [pot] is out, that one [pot] is out, this one [pot] is out, it kind of has to be routed around and will be much less efficient.

....[Electrical inefficiency] is a claim we made [for Noranda’s potline freeze insurance claim] in 2009. It’s a claim I’ve made on every other smelter claim I’ve done.

(*Id.*) He testified further that Noranda’s insurers paid the 2009 claim. (A1648.)

The Insurers did not object to any of the questions that elicited this testimony.

As to the 2016 Potline Freeze claim, the Insurers likewise never objected below to Mr. Hess’s calculation of the *amount* of additional electricity that would have been needed for the rebuild due to the inefficiencies about which he testified. (A0478–A0479; A1356–A1358; A1601–A1603; A1633; A1659–A1660.) Nor did the Insurers cross-examine Mr. Hess on how he arrived at his number of \$7,461,117 for electrical inefficiency costs. (A1667–A1669.) Although the Insurers objected to the consideration of electrical inefficiency costs as not falling

within the “normal charges and expenses” requirement of the Policy (as discussed in Section D above), they never contested the *values* that Mr. Hess assigned to that cost item, should its consideration be allowed. Accordingly, the Insurers have waived their right to challenge Mr. Hess’s calculation on appeal. (*Mammarella v. Evantash*, 93 A.3d 629, 636 (Del. 2014); *see also* Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review”).)

For their part, the Insurers made no attempt to calculate their own number for the cost that Noranda would have incurred due to electrical inefficiency during the potline restart, and they therefore presented no competing number to the jury. Nor did they offer evidence to dispute Mr. Hess’s testimony that electrical efficiency decreases during a potline rebuild. The jury’s determination that this cost to Noranda was in the amount of \$7,461,117 was therefore supported by the evidence, and was commensurate with the only evidence on this issue that the jury heard.

F. The Insurers Have Waived Any *Daubert* Challenge To Mr. Hess’s Computation Of The Electrical Inefficiency Cost

Finally, the Insurers argue that the Superior Court should have disallowed Mr. Hess’s calculation of electrical inefficiency costs under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But the Insurers never made a *Daubert* challenge below as to Mr. Hess’s qualifications to offer this calculation. Although the Insurers moved *in limine* to preclude Mr. Hess’s testimony, their

motion was focused on the “ordinary payroll” issue, an issue on which the Insurers lost at trial and have appealed to this Court. Nowhere in their motion or in any of their other challenges did the Insurers argue that Mr. Hess was not qualified to opine on the magnitude of the electrical inefficiency cost or that his methodology for assigning a value to that cost was flawed. (A0478–A0479; A1356–A1358; A1601–A1603; A1633.) Having failed to preserve the issue below, the Insurers cannot raise it for the first time on appeal. (Supr. Ct. R. 8.)

But even if the Insurers had raised the issue below, the Superior Court would not have abused its discretion by allowing Mr. Hess to testify. As noted, Mr. Hess has extensive experience with calculating the types of costs about which he testified at trial, based in part on his work more than 20 prior insurance losses in the aluminum industry of which 15 involved potline freezes. (A1647–A1648; A1659–A1660.) Accordingly, there would be no basis to challenge Mr. Hess’s qualifications or his calculation of the amount of additional electricity that would have been needed to start up the potlines, had Noranda rebuilt the plant.

III. CONCLUSION

For all of the foregoing reasons, the Insurers have failed to show the absence of a legally sufficient evidentiary basis for the jury's verdict on the electrical inefficiency component of Noranda's business interruption claim. Accordingly, the Court should reverse the JMOL ruling on electrical inefficiency with instructions to reinstate the full jury verdict.

Respectfully submitted,

BERGER HARRIS LLP

Of Counsel:

David B. Goodwin
Christine S. Haskett
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
T: (415) 591-6000
F: (415) 591-6091
dgoodwin@cov.com
chaskett@cov.com

By /s/ David J. Baldwin

David J. Baldwin (No. 1010)
1105 North Market Street, 11th Floor
Wilmington, DE 19801
T: (302) 566-1140 x202
F: (302) 655-1131
dbaldwin@bergerharris.com

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*Attorneys for Plaintiff Below,
Appellee/Cross-Appellant
Noranda Aluminum Holding
Corporation*