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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
EMPIRE ACE INSULATION MFG. CORP.,	)	Docket No. TSCA-ASB-8a-85-0216
	)	
	)	
Respondent	)	

Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. Respondent found in violation of Section 15, 15 U.S.C. § 2614, for failure to submit certain information pertaining to the importation of asbestos within the time frame set forth in 40 C.F.R. §§ 763.65, 763.71.

APPEARANCES:

For Complainant:

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Office of Regional Counsel
Region II
U.S. Environmental Protection Agency
26 Federal Plaza
New York, New York 10278

For Respondent:

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Woodbury, New York 11797

Leon Lebensbaum, Esquire
550 Old Country Road
Hicksville, New York 11801

INITIAL DECISION

Introduction:

This matter concerns a proceeding brought pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). The complaint charged that respondent violated Section 8(a) of TSCA, 15 U.S.C. § 2607(a) and the regulations promulgated thereunder, namely 40 C.F.R. Part 763, Subpart D, which regulations, broadly stated, concern reporting requirements of persons who manufacture, import or process asbestos. The complaint charged that respondent had not submitted to complainant herein, United States Environmental Protection Agency (EPA), a completed EPA Form 7710-36 (hereinafter the Form); that the pertinent regulations 40 C.F.R. §§ 763.65(a), 763.71(a) required that asbestos importers and primary processors submit the Form by November 28, 1982; and that respondent's failure or refusal to comply with C.F.R. § 763.71(a) constituted a violation of Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B).

EPA promulgated regulations setting forth certain requirements for persons who manufacture, import or process

asbestos. The regulations became effective on August 30, 1982. 47 Fed. Reg. 33198 (July 30, 1982). Pertinent to this proceeding, the regulations required importers of bulk asbestos in 1981 to report certain information on the Form within 90 days of the effective date of the regulation, or by November 28, 1982. (The regulations were subsequently codified as 40 C.F.R. § 763 Subpart D.) Respondent maintains, in part, that it timely filed the Form and that there should be no imposition of a penalty. (Resp. Op. Br. at 23).

To be determined here is whether or not the alleged violation is supported by the preponderance of the evidence.* "Preponderance of the evidence" is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

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* The applicable section of the Consolidated Rules of Practice, 40 C.F.R. § 22.24, provides, in pertinent part, that: " . . . Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of evidence."

FINDINGS OF FACT

Based upon a review of the evidence these are the findings of fact.* Respondent is in the insulation business. It was incorporated in 1959 and is located at One Cozine Street, Brooklyn, New York. In 1981, it had about 30 employees. The plant is located in an economically depressed neighborhood in which most of the respondent's employees live. The President of the respondent is Nathan Kevelson, and his brother Al Kevelson is the Vice President and Secretary. Steven Kevelson is the respondent's Production Manager, and Alter Kevelson is its Sales Manager. In addition to this function, the latter also takes care of "government papers on the asbestos that comes in, all of the lawsuits." (Tr. at 259). Respondent prodduced two witnesses: Al Kevelson and Leon Lebensbaum, respondent's attorney of record and its current accountant. During

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* The findings necessarily embrace an evaluation of the credibility of witnesses testifying upon particular issues. This involves more than observing the demeanor of a witness. It also encompasses an evaluation of his testimony in light of its rationality or internal consistency and the manner in which it blends with other evidence. Wright & Miller, Federal Practice and Procedure § 2586 (1971).

the year of 1981 respondent imported 1,077 tons of asbestos fiber. Most of the product was shipped directly by the manufacturer to other processors. (Tr. at 238-241,272; Exs. C-4, C-5). The Form is necessary for EPA functions. It is vital in enabling EPA to evaluate the risk assessment concerning asbestos. The failure of persons who are legally obligated to report data hobbles the agency in evaluation of toxicity and adversely effects its statutory mission. (Ex. C-8). Al Kevelson (Kevelson) testified on direct examination that sometime after 1981 there came a time when he became aware that the Form should be filed; that this information was given to him by Alter Kevelson from whom he received the Form; that the Form was taken to the respondent's accountant where it was filled out; that Kevelson signed the Form and that copies were made; that the envelope containing it was properly addressed stamped and sent by ordinary mail. Respondent's counsel asked Kevelson "Did you mail it? His response was "I would say yes. I think so, yes." Kevelson stated he mailed the Form in "January of 1983, or something like that" and to his knowledge he did not hear anything further about the Form never being filed. A copy of the original Form was allegedly retained by the respondent's accountant who subsequently died; and that there was a successor accountant who also died. No copy of the Form could be located, nor was it ever produced by respondent (Tr. at 241-247). At another point, respondent's counsel asked Kev-

elson "Did there come a time when in fact you filed a duplicate of what you had filed in 1981 with the government?" Kevelson's response was "yes." (Tr. at 251, emphasis supplied). Still later respondent's counsel asked, with regard to the Form purportedly filed in January 1985, "Is that Form, sir, that you filed a duplicate of the one that was filed with the government in or about 1982 and lost by them?" Kevelson's response was "to the best of my knowledge, it is." (Tr. at 252-253, emphasis supplied). The undersigned finds Kevelson's testimony concerning the filing of the Form in either 1981, 1982 or 1983 not believable; his testimony is just not credible in this regard. This results from observing the demeanor of the witness while testifying, buttressed by the inconsistencies in the evidence proffered. It is found that the respondent did not file the Form by the required date of November 28, 1982.

By letter dated December 28, 1982, Alter Kevelson on behalf of respondent wrote the following to EPA:

> Please be advised that we have never recieved [sic] a copy of the Federal Register, informing us to the forms we have to fill out, nor were we aware of any deadline. Please forward all the infomation to my attention. (Ex. C-1).

This letter was addressed to the U.S. Environmental Protection Agency, P.O. Box 2070, Rockville, Maryland 20852. (An organization known as Informatics, located in Rockville, had the contract with EPA to keep a record concerning whether or not the Form was filed by those persons required to do so under the pertinent regulations. (Tr. at 43-45, 49,111). Subsequently, Alter Kevelson on June 24, 1983, acknowledged to Informatics that he received the Form a month or two following his December 1982 letter; that respondent was still working on it; that it had been delayed because of law suits; and that it had "dropped between the cracks." Informatics requested that the Form be completed as quickly as possible. (Ex. C-2; at 53, 54). Alter Kevelson informed Ed Gross (Gross), Office of Toxic Substances, EPA Headquarters in Washington, D.C., in a telephone conversation of July 14, 1983, that the first mailing of the Form was never received because EPA had the wrong address. A second mailing was sent to him. He informed Gross that this mailing was also not received because someone at the Post Office was not forwarding the mail; that such action was attributed to spite on the part of someone bearing a grudge; and that he, Alter Kevelson, requested a third mailing be sent to him. On August 19, 1983, Alter Kevelson told Gross that the Form was expected to be completed in 10 days and that the delay

was attributed to vacation time. On October 10, 1983, Gross spoke to Alter Kevelson again. The latter stated he had been in the hospital with a heart problem, but that the Form would be completed October 21, 1983. (Ex. C-2). In approximately July 1984, Exhibits C-1 and 2, together with other documentation, were forwarded by EPA Headquarters to its Region II with the request to investigate respondent for possible violation. (Tr. at 44, 58). The investigation was conducted by Donald Duane (Duane), a Chemical Engineer assigned to the Environmental Services Division, Edison, New Jersey. When the file arrived in or about July 1984, Duane telephoned the respondent and asked to speak with Alter Kevelson. For reasons not clear, Duane did not speak to Alter Kevelson, and he left a message with the receptionist requesting that the latter return his telephone call. This did not occur. Duane called again in a few days. As before he was unable to speak to Alter Kevelson. Duane left the same message, but there was no return telephone call. On November 6 or 7, 1984, Duane spoke with Steve Kevelson and arranged to visit the respondent's facility the next day. On November 8, 1984, Duane and Frank Freiherr went to respondent's facility. (Freiherr is a Chemical Engineer in EPA's Environmental Services Division, Toxic Substances Section.) The purpose of the November 8 inspection was to determine if respondent was an importer of asbestos and

if it met the requirements for submitting the Form. Among others, Alter and Steven Kevelson were advised that the inspection concerned the Asbestos Reporting Rule and that EPA had information that the respondent had not submitted the Form. Steve and Alter Kevelson cooperated fully and completely in the inspection and provided Duane and Freiherr with any information and documentation that they requested. The inspection disclosed that the respondent was in the asbestos insulation business in 1981; that respondent imported asbestos from Canada, some of which was sold to others without processing; that Alter Kevelson stated that he had been contacted by EPA regarding respondent's failure to file the Form but he thought he was told that he did not have to file same because respondent was selling the asbestos without processing it; that Alter Kevelson was told that the Form was required because respondent was an importer and in 1981 it was a primary processor of asbestos; and that Alter Kevelson stated that respondent employed more than 10 full time employees in 1981. During the inspection Steven and Alter Kevelson were advised that because respondent was an importer and processor in 1981 it should have submitted the Form by November 28, 1982; that no documentation was received as of the time of the in-

spection showing the Form had been filed; and that respondent was advised that it should get the Form from the Industry Assistance Office of EPA and submit it. (Tr. at 35, 58-61, 64, 113-116; Ex. C-4).

Another inspection of respondent was conducted on January 3, 1985. Steve Kevelson was contacted the day before to inform him of such, and to assure that a responsible company official was on the site for the inspection. The purpose of the inspection was to obtain documentation that respondent imported asbestos in 1981. During the inspection, Duane spoke to Steve Kevelson and Gary Kevelson, and he obtained documents confirming that respondent imported 1,077 tons of asbestos from Canada. During the inspection, Duane discussed the need of respondent to submit the Form, but he did not receive a copy of it. During the inspections, EPA did not receive from the respondent all the information that normally would be set forth on the Form. (Tr. at 65-66, 68 152, 229; Ex. C-5).

Kevelson viewed the 1,077 tons as a "very, very minute amount" as compared with what is dealt with in the nation. (Tr. at 241). However, this opinion lacks significance without some point of reference. The record does not appear to show the total amount of asbestos imported into the nation

in 1981, and how respondent's importation was related to that figure. Without this evidence a finding cannot be made concerning whether or not respondent's imports were a "very, very minute amount."

There is evidence that as of January 11, 1985, EPA had not received the Form from respondent. (Ex. C-6). On or about July 17, 1985, Duane telephoned Alter Kevelson to advise him that EPA had not received the Form and that a complaint was about to be issued against the respondent. Alter Kevelson called back Duane and stated to him that shortly after the January 3, 1985 inspection respondent had sent the Form to EPA in Washington, D.C., and that respondent had a United Parcel Service (UPS) receipt evidencing delivery. Duane then got in touch with Washington, D.C. He received a response from Rose Burgess, Document Control Officer at EPA in Washington, D.C., who stated that the Form had not been received from respondent. (Tr. 95-96).

Kevelson stated that in January 1985 he filed a duplicate of what he filed in 1981 with EPA. At another point he acknowledged the Form as a duplicate filed with EPA in or about 1982. This copy of the Form was signed by "Nathan Kevelson 8/27/85 as of 1/3/85." Kevelson could not explain the meaning of the dates because the signature on the Form was not his. The purported UPS receipt for the delivery of the Form stated that

one parcel was delivered on January 9, 1985 to U.S. Environment [sic], Box 2070, Rockville, Md. 20852. The merchandise delivered was described as "RUPERS." Kevelson did not know what that meant, and he did he inquire of UPS what it signified. Nor could he remember if he told Alter Kevelson that he sent the Form, even though he acknowledged the latter handled asbestos matters. During the cross-examination Kevelson acknowledged that he sent the Form in January 1983, but he was unaware of Alter Kevelson's December 28, 1982 letter; and that respondent was unaware of the regulations requiring the submission of the Form by a specified date. Kevelson did not remember telling Alter Kevelson that he, Kevelson, had allegedly filed the Form previously. Broadly stated, Kevelson was unaware or could not remember what transpired between Alter Kevelson and EPA. (Tr. at 95, 251, 253-254, 258, 260-263; Exs. R-4, R-6). Assuming that respondent mailed the Form to EPA in January 1985, it is not germane to the central issue concerning whether or not it was submitted within the required time period. If submitted at all, it was filed long after the required date of November 28, 1982.

Regarding the ability to pay question, the following occurred between Kevelson and his counsel on direct examination:

Q. Would you tell the Court how much you owe to the government with respect to taxes.

A. They claim over $3 millon.

Q. Now, sir, can you pay that?

A. No.

Q. Can you pay the $25,000 penalty that is here being sought?

A. It would be quite difficult.

Q. If you had to pay any of this money, isn't it a fact that you would go into bankruptcy?

A. I would say so. (Tr. at 250).

It is unclear whether or not the last response has reference to the $3 million plus figure, or this plus the $25,000 penalty, or just the $25,000. In the context used it is found Kevelson's response has reference to the combined $3 million and the $25,000 figures.

The testimony of Leon Lebensbaum (Lebensbaum), respondent's other witness, centered about respondent's financial condition and what the impact of a $25,000 penalty would have upon its financial stability. Lebensbaum reviewed a financial report concerning respondent's operations for the year September 30, 1983 to September 30, 1984, which report had been prepared by Joseph Margulies, Certified Public Accountant.This report, Exhibit R-7, showed sales of nearly $6 million, a gross profit of over $1.3 million, with a net profit slightly over $20,000. Lebensbaum also submitted a post-hearing financial statement concerning respondent's financial condition as of

September 30, 1985. (Ex. R-8). From his analysis of the financial data Lebensbaum opined that the respondent owed between $3.5 to $4 million in combined federal, state and city taxes, and he, Lebensbaum, has been in the process of negotiating the tax liability for four to five years. In Lebensbaum's view respondent is "insolvent" and the payment of the proposed penalty of $25,000 would be an "extreme hardship." Lebensbaum recommended to respondent that it go into bankruptcy. He then gave his opinion why respondent had not done so. Among the reasons offered were: "Mr. Kevelson has been in business for a good many years;" the brothers are "well into their seventies;" "they have standing in the community" and there is a "lot of prestige riding . . . and he is most reluctant not to meet all his obligations." It is observed that these opinions came from a third party, respondent's accountant and attorney of record. It is significant in the undersigned's view that questions concerning respondent's attitude toward bankruptcy were not directed to Kevelson or Nathan Kevelson, the latter who was not called to testify. In light of this, plus observing the demeanor of the witness, the undersigned does not find Lebensbaum's testimony credible concerning respondent's great reluctance to file for bankruptcy. (Tr. at 270-273, 275).

On direct examination, Lebensbaum was asked the following question: "Given your knowledge of the corporation, when the EPA Forms came in, isn't it likely that Alter never told Al,

and Al never told Alter, nobody told David and nobody told Steve or - - ". The answer was: "Possibly they would look at that as one more governmental form. Routine." (Tr. at 275). It is found that lack of internal communications existed within respondent's organization concerning the Form.

DISCUSSION AND CONCLUSIONS OF LAW.

Section 8(a) of TSCA, 15 U.S.C. § 2607(a) provides, in substance, for the reporting of data to EPA, and the retention of information. In this regard, the Section directs the Administrator to promulgate rules and regulations. Section 15 (a) of TSCA, 15 U.S.C. § 2614(3) provides that:

> It shall be unlawful for any person to -
>
> (3) fail . . . to . . . . (B) submit reports . . . or other information . . . . as requred by this chapter or a rule thereunder . . . .

The Asbestos Reporting Requirements designate, in part, Who Must Report and the Schedule for Reporting.

> Who Must Report.
>
> (a) Persons who were . . . primary processors of asbestos, or importers of bulk asbestos in 1981

> must complete and submit a separate EPA Form 7710-36 . . . . 40 C.F.R. § 763.65(a).
>
> Schedule for Reporting.
>
> (a) All . . . primary processors and importers of bulk asbestos subject to reporting under § 763.65(a) shall submit required data on EPA Form 7710-36 within 90 days after the effective date of this Rule. 40 C.F.R. § 763.71 (a).

As found above, respondent did not file the Form on November 28, 1982. If filed at all, it was not until January 1985, more than two years beyond the required date, following many communications and urgings by EPA for the respondent to do so. It is concluded that respondent violated Section 15 of TSCA, 15 U.S.C. § 2614, and 40 C.F.R. §§ 763.65 (a), 763.71(a).

One of the defenses asserted by the respondent was that it was unaware of the regulation requiring reporting. Even if respondent did not get actual notice of the regulation it is charged with knowledge of same.

> Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

As found above, during the inspections, and notwith-

standing cooperation of respondent and its production of documents, EPA did not receive the type and quantity of information that would normally be provided on the Form. The mission of the inspections was to determine whether or not respondent was in violation for failure to submit the Form timely. The inspectors advised the respondent of its failure to file the Form and the necessity to submit same. Neither they, nor EPA had a legal duty to gather data to compensate for, or attempt to remedy respondent's violation.

Respondent also urges, with apparent reference to Alter Kevelson, or any other employees or agents situated similarly, that they were not acting within the scope of their authority and their declarations did not bind the principal (Ex. R-3). The law expressed in that Exhibit is a frail reed, indeed, to support respondent's claim when laid alongside the facts of this case. Observed initially, is that Alter Kevelson was not called as a witness by respondent, and thus the forum never heard evidence from his own lips concerning the issue of his authority. What the record shows is Kevelson's testimony which, in pertinent part, was that he did not impart knowledge to Alter Kevelson, and the latter acted likewise with him, which displayed carelessness in communication within the respondent's organization. The record however, is devoid of any convincing evidence that Alter Kevelson did not have expressed authority to act for his principal in EPA matters, or that his principal

let it known to EPA the limits of Alter Kevelson's authority, if any, in EPA matters. To the contrary, Kevelson admitted that Alter Kevelson took "care of government papers on asbestos . . . he takes care of everything that pertains to the asbestos that has to do with the lawsuits and all that stuff." (Tr. at 259). The facts show that Alter Kevelson had expressed authority to act for his principal. Assuming arguendo that he did not, there was apparent authority. The principles of law on the issue are as follows: Apparent or ostensible authority is such power as a principal holds his agent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence. 2 C.J.S. Agency, § 96(a). Further,

> The scope of the apparent or ostensible authority of an agent is to be gathered from all the facts and circumstances surrounding the transaction. The considerations which fix and determine it are the same as those applicable to determinations of whether an apparent agency, or agency by estoppel exists. The authority arises from the facts of the particular case. The test is found in a determination of the exact extent the principal held the agent out or permitted him to hold himself out as authorized, and what a prudent person, acting in good faith, would reasonably believe the authority to be. 2 C.J.S. Agency § 96(d).

Respondent also argues that considering the small amount of asbestos imported that the violation is de minimis non curat. For the reasons mentioned in the findings above a conclusion

cannot be made whether or not respondent's violation is of a de minimis nature. What is certain, however, is that at the time the respondent was required to submit the Form, and until its data was considered with submissions by others, EPA would have no way of knowing where respondent stood in the total picture. Further, it must be kept in mind, though there is an interrelationship, that the violation in issue is not the amount of asbestos imported by respondent but its failure to submit data on the Form.

Appropriateness of Proposed Penalty

EPA seeks a proposed penalty of $25,000. The pertinent provision of TSCA, Section 16(b), 15 U.S.C. § 2615(B) provides:

> (B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of violation or violations and, with respect to the violator, the ability to pay, effect on ability to continue to do business, any history of prior such violations,the degree of culpability, and such matters as justice may require.

These considerations are restated and amplified upon in EPA's Guidelines for Assessment of Civil Penalties Under Section 16 of TSCA (Guidelines). The purpose of the Guidelines is to provide internal procedural guidelines to EPA personnel for assessing appropriate penalties. The purpose of the general civil penalty system is to assure that TSCA

civil penalties are assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated; and that persons will be deterred from committing TSCA violations. 45 Fed. Reg. 59770 (September 10, 1980). EPA also used the criteria set forth in the Enforcement Response Policy (ERP) to arrive at the proposed penalty. This document makes it crystal clear that failure to report is both a "major" and "Level 1" violation of sufficient gravity to warrant a proposed penalty of $25,000. (Ex. C-7 at 7-8, 10-12). Once the gravity of the violation has been determined and a proposed penalty arrived at, the Guidelines provide that the penalty may be adjusted upwards or downwards taking into consideration the following factors: Culpability, history of such violations, ability to pay and continue in business; and such other matters as justice may require. 45 Fed. Reg. 59770 (September 10, 1980).

Giving the respondent the benefit of the doubt that the Form was filed in January 1985, it was two years past due and came about only through great effort on the part of EPA. The first question for resolution is to what extent did culpability on respondent's part contribute to this delay. In the respondent's favor is that the record shows that it made written inquiries of EPA in December 1982 concerning the Form and ex-

pressed its desire to submit same. Additionally, during the inspections respondent was cooperative in providing documentation requested by EPA. There is no gainsaying that respondent was blameworthy in not submitting the Form in a timely manner. However, this is not a proceeding where the evidence showed that there was a raw refusal by respondent to submit the Form. The evidence is convincing that respondent's failure to to submit the Form stemmed from apparent confusion, a lack of communication within its organization, a dearth of understanding, and put bluntly, what appears to be a certain amount of stupidity on respondent's part. Respondent appeared to be under the impression that the Form was just another routine government document, and it failed to grasp the importance of its timely submission.

The record does not show that respondent has a history of past violations of TSCA. In discussing this factor, the Guidelines only speak of an upward adjustment in the event of prior violations. They are absolutely mute about any downward adjustment in the absence of prior violation. 45 Fed. Reg. 59773, 59774 (September 10, 1980). The respondent is not entitled to any relief because of prior compliance.

Turning to the issue of ability to pay and the effect of the proposed penalty on the ability to continue in business, respondent had sales of over $6 million for the year ending

September 30, 1985. (Ex. R-8). Lebensbaum was of a mind that respondent was "insolvent." This opinion apparently stems from respondent's tax deficiencies in prior years in the excess of $3 million and possible claims from asbestos related injuries. (Ex. R-8). "Insolvency" may be defined as:

> The condition of a person who is insolvent; inability to pay one's debts; lack of means to pay one's debts. Such a relative condition of a man's assets and liabilities that the former, if all made immediately available would not be sufficient to discharge the latter. Or the condition of a person who is unable to pay his debts as they fall due, or in the usual cause of trade or business . . . . Black's Law Dictionary 716 (5th ed. 1979)

Similarly, under the Federal Bankruptcy Act "insolvent" means:

> (A) with reference to an entity other than a partnership, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at fair valuation, exclusive of -
>
> (i) property transferred, concealed or removed with intent to hinder, delay or defraud such entity's creditors; . . . . 11 U.S.C. § 101(26).

Certain observations are apposite here. When respondent submitted its answer of July 28, 1985, (Exhibit 6b), Lebensbaum, its attorney of record, did not allege respondent's inability to pay. Nor was the issue raised in prehearing submis-

sions. There were two financial statements of respondent that were admitted into evidence. These were respondent's Exhibits R-7 and R-8. The date of the covering letter showing when Exhibit R-7 was sent to respondent was November 30, 1984. The first time it was produced by the respondent was at the hearing. Exhibit R-8 was a post-hearing Exhibit. Deferring to Lebensbaum as an expert in matters financial, it is assumed that his use of the term "insolvent" fell within the above definitions. Lebensbaum, however, did not state that the payment of the proposed penalty would imperil respondents ability to continue in business. He merely states it would be an "extreme hardship." Also, Kevelson merely said "It would be quite difficult." The Guidelines are edifying concerning respondent's ability to pay when its gross sales are considered. "Four percent of the average sales will serve as the guideline for whether the company has the ability to pay." Exhibit R-8 at 4 shows respondent with a net sales of over $6 million and a net income of nearly $48,000. "Even when net income is negative, four percent of the gross sales should still be used as the 'ability to pay' guideline since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses." 45 Fed. Reg. 59775,(September 10, 1980). It is concluded that the respondent has the ability to pay the penalty set out in the order at the conclusion of this decision, and still have the ability to continue in business.

The last element to be considered are such other matters as justice may require. While respondent would have the ability to continue in business with payment of a penalty, the payment of the proposed penalty would be a hardship and could possibly result in diminished business activity by respondent, resulting in the discharge of some of respondent's employees who come from the economically depressed area where respondent's facility is located. Based upon the totality of evidence and adjustment factors,the appropriate penalty in this matter is $15,000.

ORDER *

Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a), the following order is entered against Empire Ace Insulation Mfg. Corp.:

a. A civil penalty of $15,000 is assessed against the respondent for violations of the Toxic Substances Control Act.

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* Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. § 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

b. Payment of the civil penalty shall be made by submitting a cashier's or certified check payable to the Treaurer, United States of America, and mailed to:

EPA - Region II
(Regional Hearing Clerk)
P.O. Box 360188M
Pittsburgh, Pa. 15251

c. Payment shall be made within sixty (60) days after receipt of the final order unless prior thereto, upon application from respondent, the Regional Administrator approves a delayed payment schedule or an installment plan, with interest, in which case payment shall be made according to said schedule or installment plan.

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 11, 1986
Washington, D.C.