9/19/95

ENVIRONMENTAL PROTECTION AGENCY
UNITED STATES
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Gordon Head and William Spangler	)	Docket No. TSCA-V-C-057-93
	)	
	)	
Respondents	)	

ORDER DENYING MOTION FOR DEFAULT AND RENDERING ACCELERATED DECISION ON THE ISSUE OF LIABILITY

I. Background

The complaint in this proceeding was filed against Gordon Head and William Spangler ("Respondents") on August 30, 1993, under section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). Respondents own a place of business known as H & H Enterprises ("site"), which was inspected by EPA on August 7 1992. The complainant, United States Environmental Protection Agency ("EPA"), alleges that Respondents stored at the site the non-metallic remnant of shredded automobiles (commonly referred to as "fluff"), which contained polychlorinated biphenyls ("PCBs") in concentrations exceeding 50 parts per million ("ppm").

The complaint charges Respondents with failure to comply with Federal regulatory requirements for the disposal, storage, and marking of PCBs, and for notification to EPA of PCB waste handling activities, in violation of 40 C.F.R. Part 761, and of section 15 of TSCA, 15 U.S.C. § 2614. The violations are alleged in five counts for a total proposed penalty of $3,760,000.

Specifically, Respondents are alleged to have violated: (1) 40 C.F.R. § 761.65(d) by accepting and storing PCB waste generated by others without submitting an application for commercial storage of PCB waste or receiving approval for commercial storage from the EPA Regional Administrator; (2) 40 C.F.R. § 761.205(a) by accepting and storing PCB waste generated by others without notifying the EPA by filing EPA Form 7710-53 with the EPA prior to engaging in PCB waste handling activities; (3) 40 C.F.R. § 761.65(b) by failing to use a proper storage facility to store a PCB item; (4) 40 C.F.R. § 761.65(a) by failing to dispose of the PCB-contaminated fluff within one year from the date when it was first placed into storage for disposal; and (5) 40 C.F.R. § 761.40 by failing to mark the storage area with the required M_L label. Each of these violations also

constitutes a violation of section 15 of TSCA.

Respondents answered the complaint on September 15, 1993, and requested an administrative hearing. On March 1, 1994, Respondents filed a motion to dismiss, which was denied. An order was issued in this proceeding on March 24, 1994, directing the parties to exchange prehearing documents on or before April 25, 1994. Complainant timely filed its prehearing documents, but Respondent failed to do so.

Respondent William R. Spangler, who served as counsel for both Respondents, passed away in April 1994. Thereafter, Complainant sent a letter, dated July 28, 1994, to Respondents seeking the filing of the prehearing exchange documents and requesting them to contact Complainant at once to discuss it. The letter included notice that if Complainant did not hear from them by August 15, 1994, a motion for default would be prepared.

Complainant submitted a motion for default ("Motion") and proposed default order on May 23, 1995, for Respondent's failure to comply with a prehearing order. Complainant asserts therein that no prehearing documents have been filed by Respondents, although it had been "in contact with Michael Ramsey, of Rocamp, Witcher and Threlkeld, counsel for Respondents, regarding Respondent's prehearing exchange, and Mr. Ramsey agreed to file the Prehearing Exchange by the end of 1994." (Motion ¶ 8) Complainant further asserts that it attempted to contact Mr. Ramsey by telephone, but got a recorded message that the telephone number had been disconnected. Complainant therefore moves for issuance of a default order under 40 C.F.R. § 22.17, and a judgment against Respondents in the amount of the penalty proposed in the complaint.

Respondent Gordon Head, appearing pro se ("Respondent"), opposed the Motion by submitting an Objection to Motion for Default, dated June 6, 1995. He agrees with the allegations relating to the issue of default as set forth in the Motion, but asserts that he was never notified in 1995 that the counsel who agreed to file the prehearing exchange documents had not done so. Respondent also states that Mr. Ramsey's telephone at Rocamp, Witcher and Threlkeld was at no time linked to a recorded message that the telephone number had been disconnected.

Respondent sets forth some defenses to the violations and amount of penalty proposed, and asserts that it provided EPA with a document concerning Respondent's bankruptcy and inability to pay any penalty.

In reply, Complainant points out that there is no indication that Respondents ever intend to file prehearing exchange documents. Therefore, Complainant argues, it is impossible to determine the validity of any defenses Respondents have raised.

Complainant maintains its position that issuance of a default order is appropriate in this case, and seeks a default order finding that the facts alleged in the complaint are admitted and Respondents have waived their right to a hearing.

Complainant requests both an assessment of the amount of penalty proposed in the complaint, and an opportunity for Respondents to demonstrate an inability to pay that amount. Complainant proposes that final judgment on the penalty amount be reserved until opportunity is afforded for Respondents to document their claimed inability to pay, and for Complainant to review the materials and for the parties to attempt to reach an agreement on a penalty amount which Respondent is able to pay.

II. Discussion

Under the applicable procedural rules, 40 C.F.R. Part 22, "A party may be found to be in default (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . . ." 40 C.F.R. § 22.17(a) (emphasis added). The question of whether or not to find Respondent in default is a matter within the Administrative Law Judge's discretion.

The fact that Respondents have failed to file any response to the prehearing order dated March 24, 1994, provides a basis upon which to find them in default under 40 C.F.R. § 22.17(a).[1]

However, a finding of default is not warranted in the

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[1] Even if Respondent Gordon Head relied on an attorney's assurance that required documents would be filed, such reliance does not provide a defense to a finding of default. Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962) (A party is deemed bound by the acts of its lawyer, and "cannot . . . avoid the consequences of the acts or omissions of this freely selected agent"); Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2693 at 489 (1983)("It is clear that the neglect of counsel will be imputed to the client and that a litigant has no right to relief simply because his attorney was responsible for the default."). Respondent has not demonstrated that he followed up with an attorney or with EPA regarding the prehearing exchange. *See,* Inryco, Inc. v. Metropolitan Engineering Company, 708 F.2d 1225, 1234 (7th Cir.), *cert. denied,* 464 U.S. 937 (1983) (Relief from default allowed where it is shown that a "diligent, conscientious client" regularly inquired of the lawyer or the court as to the case's current status.)

circumstances of this case for the following reasons.

The procedural rules provide the following with respect to default on the part of a respondent:

> Default by respondent constitutes . . . an admission of all facts alleged in the complaint and a waiver of the respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

40 C.F.R. § 22.17(a) (emphasis added). After a default is found, the Part 22 rules do not contemplate consideration of any defenses on the merits of the case or mitigating facts with respect to the penalty.[2] The penalty assessed on default is fixed and constitutes the initial decision in the proceeding, which becomes the final order of the Environmental Appeals Board within 45 days after its service upon the parties, if it is not appealed or reviewed by the Board sua sponte. 40 C.F.R. §§ 22.17(b), 22.27(c). The penalty assessment in a default order is not open to negotiation by the parties.

Therefore, Complainant's proposal to allow the parties to consider Respondent's alleged inability to pay after issuance of a default order does not come within the scope of the applicable procedural rules.

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[2] It is noted that the rule for default under the Civil Rules of Civil Procedure, Rule 54, does allow the court to consider evidence in a default situation:

> Judgment by default may be entered as follows:
> (2) *By the court*. * * * *
> If the party against whom judgment by default is sought has appeared in the action, the party . . . shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

The Federal Rules of Civil Procedure do not apply to administrative proceedings under TSCA.

Moreover, in view of their harshness, default orders are not favored by the law and as a general rule cases should be decided on their merits whenever possible. Eitel v. McCool, 782 F2d 1470, 1471-72 (9th Cir. 1986). Several factors exist in this case which, while they do not provide a defense to a finding of default, collectively tend to weigh against the issuance of a default order. They take on added significance in light of the sizable penalty proposed--$ 3.76 million. Let's examine those factors.

The co-Respondent and counsel for Respondents passed away. Respondent Gordon Head alleges that he entered bankruptcy, and responded to the motion for default pro se. There is no evidence in the record that an attorney was retained to represent him in this proceeding. Respondent has set forth several defenses, including inability to pay, which if shown by evidence to be true, could bear on the assessment of a penalty. For example, Respondent contends that "Penalty Calculations were assested [sic] from August 7 1992, to December 7, 1992 the Complaintant [sic] cannot assess a penalty for PCB contaminated material (greater than 75 drums) which was not on the property." (Opposition at 4)

In light of all the considerations mentioned above, it is concluded that the motion for default order will be denied.

However, a partial accelerated decision on the issue of liability is an appropriate ruling at this time. Section 22.20(a) of the procedural rules provides, in pertinent part:

> The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

Respondents have not raised a genuine issue of material fact as to liability for the violations alleged in the complaint.

Paragraphs 7 through 14 of the Complaint allege in essence that at the time EPA conducted an inspection, at least 40 cubic yards of fluff containing PCBs in concentrations greater than 50 ppm was stored for disposal at the site, and Respondents have violated the Federal regulations regarding the disposal, storage, marking and notification requirements of the PCB regulations.

Respondents' Answer responds to those allegations as follows:

> [R]espondents state that they are without sufficient

> information and/or knowledge as to the truth of such allegations by reason of the fact that these respondents have never been provided with the fact that "at least 40 cubic yards of PCB contaminated material known as "fluff" which [sic] was generated by others." (Answer, Response to General Allegations, ¶ 2.)

Under the applicable procedural rules, 40 C.F.R. Part 22, an answer must:

> clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied.
> * * * *
> Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation. (40 C.F.R. § 22.15(b) and (d)).

Respondents do not clearly and directly admit, deny or explain each of the allegations in the Complaint. The assertion of lack of sufficient information and/or knowledge is made with regard to several factual allegations and legal conclusions, and not as to any particular factual allegations.

Even if such a response in the Answer is treated as a general denial, Respondents have not demonstrated that a hearing is warranted on the issue of liability for the alleged violations. Complainant has presented proposed evidence in its prehearing exchange which supports findings of liability for the violations alleged in the complaint. This proposed evidence has not been rebutted. Furthermore, Respondents have not presented grounds for providing any further opportunity to present evidence on the issue of liability.

Other responses in the Answer do not amount to defenses to liability. Respondents state that they did not know that fluff which was generated by others was on the property at any time until litigation was instituted by the Indiana Department of Environmental Management. They reiterate that "at no time did the respondents accept and store at the facility with any knowledge whatsoever that 'PCB waste was generated by others,'" and that they "have no knowledge to this date that there were [sic] any PCB contaminated fluff deposited on the property at any time." (Answer, Responses to Count I, ¶ 2, and to Count V).

Knowledge of a violation is not an element of Complainant's prima facie case; and Respondents' lack of knowledge with regard to the facts alleged in the complaint is not a defense. Indeed,

if Respondents knowingly or willfully violated TSCA (section 15), a criminal action could have been brought against them under section 16(b) of TSCA.

Respondents also contend were not provided with notice of the alleged violations until receipt of a complaint, and that they have been in continuous communication with EPA to eradicate any contaminated material on the property. (Answer, Response to General Allegations, ¶¶ 3, 4).

There is no requirement in TSCA or in regulations promulgated therender that EPA provide notice of violations prior to issuing a complaint. Section 16(a)(2)(A) of TSCA provides that, before issuing an order made on the record after opportunity for hearing, "the Administrator shall give written notice to the person to be assessed a civil penalty under such order of the Administrator's proposal to issue such order and provide such person an opportunity to request . . . such a hearing on the order." The "written notice" referred to is the complaint itself. Continuous communication with EPA officials also does not excuse liability.

Count I alleges that Respondents stored PCB waste without submitting an application, and obtaining approval, for commercial storage of PCB waste. Respondents deny that they stored commercial waste "for the reasons heretofore mentioned in the Response to General Allegations." (Answer, Response to Count 1, ¶ 3) The responses in the Answer to the General Allegations in the Complaint, as discussed above, do not state a defense to liability. Complainant has produced sufficient information to support a finding of violation as alleged in Count I, and Respondent has not presented facts to rebut it.

In his opposition to the Motion, Respondent Head lists six arguments under the heading "Respondents summary review of penalty calculation." Some of the six arguably could provide defenses to liability: "This material was in the process of being recycled, not stored" and "Respondent contends that there is not 40 cubic yards of contaminated fluff (PCBs) which is above Federal and State Guidelines." However, Respondent has not presented them as such and, in the absence of any explanation or elaboration on these statements, they are not persuasive defenses to liability.

Respondents have not produced any evidence to rebut any of the allegations of violation in this proceeding. Respondents have had over one year to file any such evidence since receipt of the order dated March 24, 1994, directing the parties to file prehearing exchange documents. No such documents have been filed. (Affidavit of Donald Ayres, attached to Motion). Even with notice of Complainant's request for a default order, and having been provided a lengthy opportunity to present evidence,

Respondents have opted not to do so. Respondents have therefore not shown that any genuine issues of material fact exist for a hearing on the issue of liability.

Accordingly, I find that the facts alleged in the complaint as to Respondents' liability for Counts I through V exist without substantial controversy.

As to the question of the amount of penalty to assess for the five counts of violation, material facts remain controverted.

III. Conclusion and Order

In the circumstances of this case, a default order and judgment against Respondents assessing the penalty proposed in the Complaint is not warranted. Accordingly, the motion for default is denied.

No genuine issues of material facts exist as to the question of Respondents' liability, and as a matter of law, Respondents are found to be liable for the violations alleged in the complaint.

The issue of the amount of the civil penalty which should be assessed in this proceeding remains controverted. The parties are directed to confer and attempt to reach an agreement on the amount of penalty to be assessed for the violations found herein.

Complainant shall report the results of such settlement discussions on or before December 1, 1995.

Jon G. Lotis
Chief Administrative Law Judge

Dated: September 19, 1995
Washington, D.C.

IN THE MATTER OF GORDON HEAD AND WILLIAM SPANGLER, Respondents
Docket No. TSCA-V-C-057-93

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Motion for Default and Rendering Accelerated Decision on the Issue of Liability, dated September 19, 1995, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Regional Hearing Clerk
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Dated: September 19, 1995
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