UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII

IN THE MATTER OF	)	
	)	
WESLEY A. BROWN,	)	Docket No. TSCA-7-2000-0029
	)	
Respondent	)	

INITIAL DECISION AND DEFAULT ORDER

This initial decision is upon motion for issuance of a default order in this proceeding, filed by Complainant, Director of the Air RCRA & Toxics Division, Region VII, on August 29, 2000. The motion seeks an order assessing a civil penalty in the amount of eleven thousand dollars ($11,000) against Respondent, Wesley A. Brown, as a lessor of residential property in St. Louis, Missouri. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty Amount, Complainant's Motion for Default Order is hereby GRANTED.

I. FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record, I make the following findings of fact:

1. The Respondent is Wesley A. Brown, an individual located in Florissant, Missouri, and, at all times relevant to this initial decision and order, owner of a property located at 4682 Pope Avenue, 1st floor, St. Louis, Missouri (the "Property").

2. Title 42 U.S.C. §4852d(a)(1) states that the Administrator of the Environmental Protection Agency ("EPA") and the Secretary of Housing and Urban Development must promulgate regulations relating to the disclosure of lead-based paint hazards in target housing.

3. Title 42 U.S.C. §4852d(b)(5) states that it is a prohibited act under section 409 of TSCA to violate a rule promulgated pursuant to 42 U.S.C. §4852d.

4. Title 40 C.F.R. §745.100 states that 40 C.F.R. Part 745, subpart F, which includes 40 C.F.R. §§745.100 through 745.119, was promulgated to implement the provisions of 42 U.S.C. §4852d.

5. Title 40 C.F.R. §745.103, with exceptions not relevant to this initial decision, defines "target housing" to include "any housing constructed prior to 1978."

6. Title 40 C.F.R. §745.103 defines, in relevant part, the term "lessor" as "any entity that enters into an agreement to lease, rent, or sublease target housing, including but not limited to individuals... ."

7. Title 40 C.F.R. §745.103 defines, in relevant part, the term "lessee" as "any entity that enters into an agreement to lease, or sublease target housing, including but not limited to individuals... ."

8. Title 40 C.F.R. §745.107(a)(1) states, in relevant part, and with exceptions not relevant to this initial decision, that a lessor shall provide the lessee of target housing with an EPA-approved lead hazard information pamphlet, before the lessee is obligated under a contract to lease target housing.

9. The Property referenced in paragraph 1, above, was constructed prior to 1978.

10. On or about June 12, 1999, Respondent entered into a rental agreement with Nicole Smiley for the lease of the Property for residential use.

11. Nicole Smiley subsequently occupied the Property, along with her children, ages 1, 3, and 4 years old.

12. Respondent did not provide an EPA-approved lead hazard information pamphlet to Nicole Smiley prior to her entering into the rental agreement described in paragraph 10, above.

13. On June 1, 2000, Complainant initiated a civil administrative proceeding for the assessment of a civil penalty pursuant to section 16(a) of TSCA, 15 U.S.C. §2615(a), by issuing a Complaint and Notice of Opportunity for Hearing. The Complaint was sent to Respondent by certified mail, return receipt requested.

14. Respondent received the Complaint on June 5, 2000. A return receipt for the Complaint, signed by Respondent, and indicating a date of delivery to Respondent of June 5, 2000, was subsequently filed with the Regional Hearing Clerk, EPA, Region VII.

15. The Complaint alleged that Respondent had violated 40 C.F.R. §745.107(a)(1) and section 409 of TSCA, 15 U.S.C. §2689, in that he failed to provide an EPA-approved lead hazard information pamphlet to Ms. Smiley prior to her being obligated under the rental agreement described in paragraph 10, above. The Complaint proposed to assess a penalty of eleven thousand dollars ($11,000) for this alleged violation.

16. The Complaint stated that Respondent had a right to request a hearing, and that, in order to avoid being in default, Respondent was required to file a response to the Complaint within thirty days of service. The Complaint also stated that failure to file a timely answer would constitute an admission of the allegations in the Complaint, and that a default order might then be issued, resulting in the proposed penalty becoming due without further proceedings.

17. The Respondent did not file an answer or other response to the Complaint within thirty days of service.

18. On July 21, 2000, Complainant sent Respondent, by certified mail, return receipt requested, a Notice of Intent to Institute Default Proceedings, notifying Respondent that, if Respondent

did not file an answer to the Complaint within twenty days of receipt of the notice, Complainant would file a motion for a default order requesting assessment of the $11,000 penalty proposed in the Complaint.

19. The return receipt for the notice described in paragraph 18, above, indicates that it was received at Respondent's mailing address on July 24, 2000.

20. On August 29, 2000, Complainant filed a Motion for Default Order and accompanying documents, requesting assessment of an $11,000 penalty against Respondent. The motion was served on Respondent by express mail, overnight delivery.

21. The Respondent has not, to date, filed an answer to the Complaint or a response to the motion described in paragraph 20.

II. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record, I make the following conclusions of law:

1. The Complaint in this action was lawfully and properly served upon Respondent, in accordance with 40 C.F.R. §22.5(b)(1).

2. Respondent was required to file an answer to the Complaint within thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).

3. Respondent's failure to file an answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a).

4. Complainant's Motion for Default Order was lawfully and properly served on Respondent. 40 C.F.R. 22.5(b)(2) and 22.7(c).

5. Respondent was required to file any response to the motion within 15 days of service. 40 C.F.R. §22.16(b).

6. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion. 40 C.F.R. §22.16(b).

7. The Property owned by Respondent at 4682 Pope Ave., St. Louis, Missouri is "target housing" as defined in 40 C.F.R. §745.103.

8. By virtue of the rental agreement between Respondent and Nicole Smiley, on or about June 12, 1999, Respondent became a "lessor," and Nicole Smiley became obligated as a "lessee" of the Property, as those terms are defined in 40 C.F.R. §745.103.

9. Title 40 C.F.R. §745.107(a)(1) requires that Respondent have provided an EPA-approved lead hazard information pamphlet to Nicole Smiley prior to her becoming obligated as a lessee of the Property.

10. Respondent's failure to provide Nicole Smiley with an EPA-approved lead hazard information pamphlet is a violation of 40 C.F.R. §745.107(a)(1) and section 409 of TSCA, 15 U.S.C. §2689, for which Respondent is liable for a civil penalty under section 16(a) of TSCA, 15 U.S.C. §2615(a) and section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4852d(b)(5).

11. Section 16(a) of TSCA, 15 U.S.C. §2615(a), as limited by section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4852d(b)(5), and 40 C.F.R. §19.4, Table 1, authorize the assessment of a civil penalty of not more than eleven thousand dollars ($11,000) against Respondent for the violation described in paragraph 10 above.

12. Respondent's failure to file a timely answer to the complaint or otherwise respond to the Complaint, is grounds for the entry of this default order against the Respondent assessing a civil penalty for the violation described above.

13. Respondent's failure to file a response to Complainant's Motion for Default Order, dated August 29, 2000 is deemed a waiver of Respondent's right to object to the issuance of this Default Order.

III. DETERMINATION OF CIVIL PENALTY AMOUNT

Section 16(a)(2)(B) of TSCA, 15 U.S.C. §2615(a)(2)(B), provides that, in determining the amount of the civil penalty to be assessed pursuant to section 409 and section 16, the following factors must be considered: (1) the nature, circumstances, extent, and gravity of the violation; (2) ability of the violator to pay a penalty; (3) ability of the violator to continue in business, (4) any history of prior similar violations, (5) the culpability of the violator, and (6) "such other matters as justice may require." The EPA has also issued a policy document entitled "Disclosure Rule Enforcement Response Policy", February 2000, which is used as guidance in determining appropriate penalties under 40 C.F.R. Part 745, Subpart F. Pursuant to 40 C.F.R. §22.27(b), any penalty assessment is to be based on the statutory factors outlined above, and in consideration of the penalty guidance cited above.

Complainant requests the assessment of a penalty of eleven thousand dollars ($11,000) for the violation stated in the Complaint, based on its analysis of the statutory factors and the EPA policy cited above. In its Memorandum in Support of its Motion for Default Order, Complainant included a detailed explanation of the basis for the penalty requested. Memorandum at pp. 10-16. The portions of the explanation which I consider persuasive are discussed below.

Based on my review of the record, I have determined that the penalty amount proposed in the Complaint and requested in the Motion for Default Order is appropriate. With regard to the significance

of the violation, Complainant has justified imposition of a substantial penalty. The record shows that the lessee resided in the housing with her three young children, all of whom were under six years old, and therefore within the age range of persons most at risk from the adverse health effects of lead-based paint. Complainant stated that the EPA-approved pamphlet for use in Missouri, entitled *Protect Your Family From Lead in Your Home*, contains important information for parents of young children to assist in evaluating and mitigating risks from lead-based paints. Memorandum at 11. Respondent's failure to provide this information to the lessee deprived her of the opportunity to evaluate the potential lead exposure risks to her children. For these reasons, based on the nature, circumstances, extent, and gravity of the violation, I have determined that the $11,000 penalty calculated by Complainant as the gravity component of the proposed penalty[1] is appropriate.

As outlined above, section 16(a)(2)(B) of TSCA also provides that certain factors relating to the violator be evaluated in assessing a civil penalty. In its proposal to assess a penalty of $11,000, Complainant first considered whether this amount should be reduced based on Respondent's ability to pay or continue in business. Based on the available information, consisting of property ownership records from the City of St. Louis tax assessor's office, Complainant estimated Respondent's rental income and value of properties owned by Respondent, and concluded that a penalty of $11,000 was not likely to cause financial hardship or affect the ability of Respondent to continue in business. Memorandum at 12-13. Respondent did not provide any information to the contrary, despite having been given several opportunities to do so, as described in the factual findings above. Therefore, I

[1]The gravity component is the amount calculated to account for the statutory factors relating to the nature of the violation, before making any adjustments based on the statutory factors, discussed below, relating primarily to the nature of the violator.

conclude that Complainant appropriately considered Respondent's ability to pay and continue in business in proposing the $11,000 penalty.

Complainant also considered the other statutory factors, relating to the nature of the violator, including the Respondent's history of prior such violations and the degree of culpability (including, e.g., a violator's prior knowledge of the requirements or knowledge that its conduct would be hazardous to health). Based on available information, which did not indicate a prior history of violation or knowledge of the legal requirements or potential harm, Complainant did not make any adjustments based on these factors. Memorandum at 13. In addition, since the $11,000 penalty represents the statutory maximum for a single violation, as alleged in the complaint, an upward adjustment based on these factors would not be appropriate in any event. Respondent appropriately considered these statutory factors in proposing the penalty sought in the Complaint and motion.

Complainant finally considered several factors discussed in the applicable penalty policy referenced above, relating to the last statutory criterion: "other matters as justice may require." The relevant factors include absence of a risk of exposure to lead-based paint, attitude of the Respondent, efforts to comply with the rule, voluntary disclosure of violations, and nature of a violator's business (downward penalty adjustment where a violator is generally not in the business of selling or leasing property). Complainant did not make any adjustments based on a consideration of these factors[2], and I find no basis in the record for making any adjustments based on "other matters as justice may require."

[2]Complainant noted that Respondent had not established that the housing was lead-free, had not shown a cooperative attitude, and had not voluntarily disclosed the relevant violation. Memorandum at pp. 14-15. In addition, Complainant noted that the downward adjustment suggested in the penalty policy for persons not generally engaged in the business of selling or leasing property did not apply to Respondent, since Respondent leased properties as a business.

Based on the foregoing, including application of the relevant statutory factors and in consideration of the applicable penalty policy, I have determined that the proposed penalty of $11,000 should be assessed in this proceeding.

DEFAULT ORDER

Respondent is hereby ORDERED, as follows:

A. Respondent is assessed a civil penalty in the amount of eleven thousand dollars ($11,000).

B. Respondent shall, within thirty calendar days after this Default Order has become final, forward a cashier's or certified check, in the amount of eleven thousand dollars ($11,000), payable to the order of the "Treasurer, United States of America." Respondent shall mail the check to the following address:

Mellon Bank
EPA - Region 7
Regional Hearing Clerk
P.O. Box 360748M
Pittsburg, Pennsylvania 15251

In addition, Respondent shall mail a copy of the check to the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

C. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §22.17(c). This Initial Decision shall become a final order unless: (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceedings *within thirty (30) days from the date of service provided in the certificate of service accompanying this order*; (2) a party moves to set aside the

Default Order; or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated: October 26, 2000

/s/
Robert L. Patrick
Regional Judicial Officer
Region VII