IN RE FOUR STRONG BUILDERS, INC.

CAA Appeal No. 05-02

FINAL DECISION AND ORDER

Decided July 11, 2006

Syllabus

On July 6, 2005, United States Environmental Protection Agency Administrative Law Judge Carl C. Charneski ("ALJ") found Four Strong Builders, Inc. ("Four Strong") of Clifton, New Jersey, to be in default in a Clean Air Act administrative enforcement proceeding involving asbestos abatement activities at a shopping center in Tullytown, Pennsylvania. The ALJ entered a Default Order against Four Strong pursuant to section 22.17 of EPA's Consolidated Rules of Practice, which provides that in cases where a respondent fails to file a prehearing exchange or respond to a presiding officer's order, default is warranted. Four Strong now comes before the Environmental Appeals Board ("Board") and asks that the ALJ's Default Order be vacated and the matter remanded to the ALJ for a decision on the merits.

To determine the worthiness of a challenge to a default order, the Board will evaluate "the totality of the circumstances" involved in the case. This evaluation includes an examination of the alleged procedural omission that prompted the default order and whether any legitimate excuse or other justification for the omission exists. The evaluation may also include an analysis of the likelihood of the defaulting party's success on the merits.

Held: The Board affirms the ALJ's finding of default and upholds the Default Order.

Four Strong contends that the totality of the circumstances in this case justifies the setting aside of the Default Order. To support this argument, Four Strong's counsel cites his lack of familiarity with defending administrative enforcement actions in the environmental context, his confusion related to multiple asbestos cases filed against Four Strong, his associate's report (upon which he allegedly relied) that the matter had been settled as to all parties, and his engagement in other matters and heavy work load during the relevant time frame. The Board finds that none of these circumstances are legitimate bases for excusing Four Strong's repeated disregard of the ALJ's orders in this case.

Four Strong also contends that it has meritorious defenses to the charges in this case. The Board finds otherwise, holding that Four Strong proffered meager evidentiary support for its positions and thus failed to establish a "strong probability" of success on the merits.

Accordingly, the Board finds no error or abuse of discretion in the ALJ's decision to enter a default judgment in this case, affirms the Default Order, and assesses the proposed civil penalty of $24,310 against Four Strong.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

On July 6, 2005, United States Environmental Protection Agency ("EPA") Administrative Law Judge Carl C. Charneski ("ALJ") found Four Strong Builders, Inc. ("Four Strong") of Clifton, New Jersey, to be in default in a Clean Air Act ("CAA") administrative enforcement proceeding involving asbestos abatement activities at a shopping center in Tullytown, Pennsylvania. The ALJ entered a Default Order against Four Strong pursuant to section 22.17 of EPA's Consolidated Rules of Practice, 40 C.F.R. part 22, which provides that in cases where a respondent fails to file a prehearing exchange or respond to a presiding officer's order, default is warranted. Four Strong now comes before the Environmental Appeals Board ("Board") and asks that the ALJ's Default Order be vacated and the matter remanded to the ALJ for a decision on the merits. For the reasons set forth below, we affirm the ALJ's finding of default and uphold the Default Order.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Asbestos, a term used to denote any of six naturally occurring minerals (chrysotile, amosite, crocidolite, tremolite, anthophylite, and actinolite), is regulated as an "air toxic" under section 112 of the Clean Air Act and regulations promulgated by EPA pursuant to section 112 called the National Emission Standards for Hazardous Air Pollutants ("NESHAPs"). *See* CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1); 40 C.F.R. §§ 61.140-.157 ("Asbestos NESHAP"). Processed asbestos fibers are very strong and exhibit exceptional fire-retardant properties, and thus they have been used historically in a wide variety of building materials (e.g., wallboard, pipe and boiler insulation, floor and ceiling tiles, plaster, roof shingles, paint, tile glues and mastics, joint compound) as a fireproofer and insulator. Asbestos can be harmful to human health, however, when it is crumbled or pulverized and small particles of the mineral are inhaled; such exposure has in some instances caused or contributed to the development of lung and other cancers in humans. *See, e.g.*, 50 Fed. Reg. 28,530, 28,532-33, 28,535 (July 12, 1985) (discussing cancer and other chronic diseases associated with asbestos exposure); 47 Fed. Reg. 23,360, 23,361 (May 27, 1982) ("[a]sbestos is a known human carcinogen"). As a result, the Asbestos NESHAP sets forth a host of requirements for the safe manufacture, demolition and renovation, and disposal of "regulated asbestos-containing material," or "RACM," including the various types of building construction materials listed above. *See* 40 C.F.R. §§ 61.140-.157.

The instant case involves building demolition and renovation activities. The Asbestos NESHAP requires parties engaged in these types of activities to, among other things: (1) provide EPA with written notice of their intent to demolish or renovate RACM at least ten working days before such work begins; (2) keep RACM wet until it is collected and contained or treated in preparation for proper disposal; and (3) take necessary precautions to remove RACM without damaging or disturbing it (and thereby accidentally suspending asbestos particles in the air). 40 C.F.R. § 61.145(b), (c)(6)(i)-(ii). The latter two of these requirements are generally referred to as work practice standards. *See In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 641, 659 n.23 (EAB 2001); *In re Echevarria*, 5 E.A.D. 626, 631-33 (EAB 1994); *see also* CAA § 112(h), 42 U.S.C. § 7412(h). EPA has various authorities to enforce these and other Asbestos NESHAP provisions, including the authority to initiate an administrative penalty action pursuant to CAA sections 113(a)(3) and (d), 42 U.S.C. § 7413(a)(3), (d).

B. *Factual and Procedural Background*[1]

Four Strong is an asbestos removal and abatement contractor headquartered in Clifton, New Jersey. In early 2002, Four Strong entered into a subcontract to perform various aspects of asbestos abatement work at the Levittown Shopping Center in Tullytown, Pennsylvania. On three occasions in April and May of 2002, an inspector from EPA Region III observed construction demolition work at the shopping center. During each visit, he noticed RACM strewn on the ground throughout the shopping center, piled in open dumpsters, and left hanging from building ceilings and walls.

On the basis of this evidence, EPA filed an administrative complaint against Four Strong, and also against shopping center owner Levittown, L.P. and manager DLC Management, Inc. (collectively "Respondents"), pursuant to CAA sections 113(a)(3) and (d), 42 U.S.C. § 7413(a)(3), (d), alleging both notice and work practice violations. Specifically, the complaint alleged that the three Respondents had violated CAA section 112 and the Asbestos NESHAP by: (1) failing to provide EPA with timely written notice of their intent to demolish or renovate RACM at the Levittown Shopping Center, as required by 40 C.F.R. § 61.145(b); (2) failing to keep RACM adequately wet, as required by 40 C.F.R. § 61.145(c)(6)(i); and (3) failing to remove RACM without damaging or disturbing it, as required by 40 C.F.R. § 61.145(c)(6)(ii). The complaint proposed that the Respondents be assessed jointly a civil penalty of $37,400 for the alleged violations.

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[1] Under the Consolidated Rules of Practice, Four Strong's default constitutes an admission of the factual allegations contained in the administrative complaint. 40 C.F.R. § 22.17(a). Accordingly, the facts set forth in this portion of the Board's decision have been taken from the Region's complaint. For present purposes, we will treat these facts as so admitted.

Levittown, L.P. and DLC Management, Inc. engaged common counsel, filed an answer to the complaint, and initiated settlement negotiations with Region III that ultimately resulted in the two companies resolving their responsibility for the asbestos activities by means of a consent decree and payment of a $13,090 penalty. Four Strong, in the meantime, chose to proceed separately from the shopping center owner and manager, and in November 2004, the company filed its own answer to the complaint.

On February 17, 2005, the ALJ directed the parties to file opening prehearing exchanges by March 15, 2005, in accordance with section 22.19 of the Consolidated Rules of Practice. *See* 40 C.F.R. § 22.19(a). Region III complied with this order and filed its prehearing exchange with the ALJ on March 15, 2005. As of March 23, 2005, Four Strong had not similarly complied with the ALJ's evidentiary order, and thus on that day the Region filed a motion asking the ALJ to issue an order to show cause why Four Strong should not be found in default for its failure to submit prehearing exchange materials by the prescribed deadline. Meanwhile, on April 14, 2005, the Region filed a supplement to its opening prehearing exchange, in which it adjusted the penalty proposed against Four Strong to $24,310. This figure represented the penalty initially proposed against all three Respondents (i.e., $37,400) less the $13,090 sum DLC Management, Inc. and Levittown, L.P. had consented to pay to settle the charges against them.

On May 16, 2005, the ALJ acted on the Region's March 23rd motion by issuing the requested order directing Four Strong to show cause, by May 30, 2005, why a judgment of default should not be entered against it for failure to file the necessary prehearing exchange as directed. Four Strong failed to respond to this order. The ALJ subsequently scheduled a telephone conference call for June 13, 2005, at 11:00 a.m., to discuss with counsel for the Region and Four Strong the latter's failure to comply with the ALJ's show cause order. Counsel for Four Strong agreed to participate in this conference call but failed to telephone the contact number at the appointed time, which resulted in the conference call being cancelled.

As of July 6, 2005, Four Strong had not filed its prehearing exchange or a motion for extension of time to file the exchange, nor had it responded in any other way to the ALJ's evidentiary and show cause orders. Accordingly, on July 6th, the ALJ entered a default against Four Strong, pursuant to 40 C.F.R. § 22.17(a). The ALJ noted that default under section 22.17(a) of the Consolidated Rules constitutes an admission of all the facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations. Default Order at 3. The ALJ noted further that in a case of default, the relief proposed by the complainant should be ordered unless such relief is "clearly inconsistent" with the record of the proceedings or the underlying statute. *Id.* The ALJ found the proposed penalty of $24,310 to be appropriate in light of the circumstances and therefore assessed it against Four Strong.

In August 2005, Four Strong filed with this Board an appeal of the ALJ's Default Order. *See* Brief in Support of Appellant/Respondent's Notice of Appeal to Vacate Default Order ("Appeal Br."). Four Strong neglected to serve copies of its notice of appeal and supporting brief on the Region at that time but did so several weeks later after the Board ordered it to do so.[2] The Region subsequently filed its response to Four Strong's appeal on September 14, 2005. *See* Appellee's Response Brief ("Resp. Br."). The case now stands ready for decision by the Board.

II. *DISCUSSION*

A. *Standard of Review of a Default Order*

Default is generally disfavored as a means of resolving Agency enforcement proceedings. *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005) (stating principle); *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992) (same); *see, e.g., Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95-97 (2nd Cir. 1993)(reversing trial court's finding of default where court failed to consider extenuating circumstances that mitigated litigant's procedural errors). In close cases, doubts are typically resolved in favor of the defaulting party so that adjudications on the merits, the preferred option, can be pursued. *Thermal Reduction*, 4 E.A.D. at 131 (citing treatise on federal practice and procedure); *see In re Neman*, 5 E.A.D. 450, 454-60 (EAB 1994) (vacating default order where amended complaint not properly served on defaulting party). That being said, the Board has not hesitated to enter or affirm default orders in cases where circumstances clearly indicate that the imposition of such a remedy is warranted. *See, e.g., JHNY*, 12 E.A.D. at 385-91; *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 664-68, 675-82 (EAB 2004); *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191-92 (EAB 2003); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 625-38 (EAB 1996); *In re House Analysis & Assocs.*, 4 E.A.D. 501, 506-08 (EAB 1993); *Thermal Reduction*, 4 E.A.D. at 130-32.

To determine the worthiness of a challenge to a default order, the Board will evaluate "the totality of the circumstances" involved in the case. *JHNY*, 12 E.A.D. at 384-391; *Jiffy Builders*, 8 E.A.D. at 319; *Rybond*, 6 E.A.D. at 624-38; *Thermal Reduction*, 4 E.A.D. at 131. This evaluation includes an examination of the alleged procedural omission (or omissions) that prompted the

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[2] Although Four Strong's appeal was filed with the Board within the time frame specified by the applicable procedural rules (40 C.F.R. § 22.30(a)), the Region argues that filing was not perfected until several weeks later when Four Strong served the Region. Because the date of perfection would have fallen outside the period for filing an appeal, the Region argues that the Board should dismiss Four Strong's appeal as untimely. Appellee's Response Brief at 12-14. Given our disposition of the case on other grounds, as set out below, we need not address this issue.

default order and whether any legitimate excuse or other justification for the omission exists. *See, e.g., JHNY*, 12 E.A.D. at 384, 385-91; *Jiffy Builders*, 8 E.A.D. at 320-21; *Neman*, 5 E.A.D. at 454-60; *House Analysis*, 4 E.A.D. at 506-08. The evaluation may also include an analysis of the likelihood of the defaulting party's success on the merits. *See, e.g., JHNY*, 12 E.A.D. at 391-93; *Pyramid Chem.*, 11 E.A.D. at 669-81; *Rybond*, 6 E.A.D. at 628-38. In cases where "fairness" and "a balancing of the equities" dictate that a default order be vacated in light of the totality of the circumstances, such a remedy may be ordered by the Board and the case remanded for further proceedings. *See JHNY*, 12 E.A.D. at 384; *Thermal Reduction*, 4 E.A.D. at 131; *In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 699 (CJO 1991); *see also Neman*, 5 E.A.D. at 454-60; 40 C.F.R. § 22.30(f).

B. *Analysis*

1. *Totality of the Circumstances: Extenuating Circumstances*

In this case, Four Strong contends that "the totality of the circumstances and the existence of a meritorious defense justify the setting aside of the default order" entered against it. Appeal Br. at 5. Beginning with the totality of the circumstances issue, Four Strong submits an affidavit prepared and signed by its general counsel to support its view of the case. In the affidavit, Four Strong's counsel sets out five circumstances he believes excuse the company's failures to respond to the ALJ's prehearing exchange and show cause orders.

First, Four Strong's counsel asserts that he has no "specific familiarity" with defending administrative enforcement actions in the environmental context. Appeal Br. ex. 1 ¶ 2 (Certification of Paul Faugno, Esq. (Aug. 2, 2005)). Counsel implies that he nonetheless assumed the defense of this case because Four Strong could not afford to hire outside counsel at the time EPA initiated the case and thus, as general counsel, it was his job to defend the matter. *See id.* Second, counsel states that EPA filed two separate administrative complaints against Four Strong in September and December 2004, and these multiple filings caused confusion in terms of his ability to track and manage the instant case. *Id.* ¶¶ 2, 6. Third, counsel explains that, upon receipt of the ALJ's order to show cause, he directed one of his associates to prepare a response, and that this associate subsequently advised him that the matter had been settled and an order entered dismissing the matter. *Id.* ¶¶ 3-4. Counsel admits that he did not review the settlement agreement in question "in full detail" to confirm his associate's analysis. *Id.* ¶ 4. Instead, he concedes that he relied on the associate's report and thus mistakenly believed that the matter had been settled as to all parties. *Id.* Fourth, counsel concedes that he was aware of the date and time of the conference call with the ALJ and regional counsel, but he notes that he was engaged in a hearing on another matter at the appointed time and thus found he could not participate in the call after all. *Id.* ¶ 5. Fifth and finally, counsel explains that during the relevant time frame, he had

assumed responsibility for the "extensive personal injury practice" of a close colleague who was diagnosed with cancer. *Id.* ¶ 6. As a result, his work load was much heavier than usual and thus, he admits, he failed to monitor this matter as closely as he normally would have. *Id.* In light of all these factors, Four Strong argues that the Default Order should be vacated and the matter remanded to the ALJ for adjudication on the merits. Appeal Br. at 5-7.

In response, the Region contends that the ALJ had reasonable grounds on which to enter default against Four Strong and that the "totality of the circumstances" here do not warrant reversal of the Default Order. The Region points out that in its appeal, Four Strong advances no specific explanation for its failure to comply with the ALJ's prehearing exchange order. Resp. Br. at 8. The Region argues that the ALJ provided Four Strong with clear deadlines, specified the kinds of information to include in the exchange (e.g., the names of fact and expert witnesses, narrative summaries of their expected testimony, and copies of exhibits intended to be introduced into evidence), and later offered the company "extra chances"[3] to communicate with the ALJ by way of the show cause order and the invitation to participate in a conference call. *Id.* at 4, 6-7; *see* Resp. Br. attach. 1, at 1 (Order Setting Prehearing Procedures (Feb. 17, 2005)). Despite these efforts, the Region observes, Four Strong remained nonresponsive.

In the Region's view, none of Four Strong's excuses justify its failure to respond to the ALJ's orders. The Region reminds us that while Four Strong pleads unfamiliarity with the administrative process and confusion as to various legal matters, we are not dealing in this instance with a *pro se* litigant without the ready means to ascertain what needed to be known. Resp. Br. at 8. Rather, Four Strong is represented by a licensed attorney who, like all attorneys, should be expected to have the capacity to read pleadings, file motions, and otherwise manage cases in areas of law outside his own area of expertise. *See id.* Regarding the status of the case, the Region contends that Four Strong's counsel need only have glanced at the title and first paragraph of the consent agreement involving Levittown and DLC Management to learn that Four Strong was *not*, in fact, a party to that settlement. The Region points out that the agreement is titled, in bold uppercase letters, "Consent Agreement as to DLC Management, Inc. and Levittown, L.P.," and that the first paragraph of the document states that it "address[es] the violations alleged in the Complaint against Respondent DLC Management, Inc. and Respondent Levittown, L.P. only." *Id.* at 5 (quoting Resp. Br. attach. 3, at 2 (Consent Agree-

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[3] The Region notes, correctly, that the Consolidated Rules do not require an ALJ to issue an order to show cause prior to entering a default judgment against a litigant. Resp. Br. at 6 n.5 (citing 40 C.F.R. § 22.17(c)). Instead, ALJs are free to exercise their discretion in such matters. *Id.* (citing *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320 n.7 (EAB 1999)). The same holds true for telephone conference calls involving counsel for parties in peril of default. The procedural rules do not require a conference prior to an entry of default, but ALJs are free to schedule a conference call if they believe such a call will facilitate resolution of the case.

ment)). Moreover, the Region notes that in its supplemental prehearing exchange, it expressly explained that it had adjusted the proposed penalty in light of Levittown's and DLC Management's decisions to settle their portions of the case. *Id.* at 6. The Region's supplemental filing states, "'Complainant seeks the balance of the proposed penalty from the remaining Respondent, Four Strong Builders, Inc.'" *Id.* (quoting Resp. Br. attach. 3, at 10 (Complainant's First Supplement to Opening Prehearing Exchange)). Thus, the Region contends, Four Strong had clear notice of its status as an active litigant in this matter, had its counsel conducted even the most cursory of reviews of the relevant filings. *See id.* at 5-6. The Region also points out that Four Strong could at any time have filed for an enlargement of time to respond to the ALJ's orders, but the company never took steps to do so. *Id.* at 10.

Upon review of the record and the parties' briefs, we conclude that the circumstances, considered in their totality and with doubts resolved in Four Strong's favor, simply do not excuse the company's repeated failures to comply with the ALJ's orders. In its appeal, Four Strong appears to take the position that *any* reason offered to justify noncompliance with procedural rules and orders constitutes sufficient grounds for vacating a default order. *See* Appeal Br. at 5-6 (citing *Jiffy Builders* for proposition that the Board will affirm a default order only in cases where the defaulting party offers *no* reasons for its noncompliance). Such a position is not tenable. As mentioned above, the circumstances offered in this case as mitigating factors include, essentially, a lack of familiarity with applicable law and procedure, the press of other business, and a failure to devote adequate attention to the case in question. These excuses are plainly insufficient to justify a reversal of default here.

We have dealt over the years with a handful of cases similar to this one, where, for a variety of reasons, the attorney of record has failed to devote adequate attention to a matter and, as a result, default has been entered in that matter against his or her client. *See, e.g., In re JHNY, Inc.*, 12 E.A.D. 372, 382-83 & n.15 (EAB 2005); *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 665-68 (EAB 2004); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990); *In re To Your Rescue! Servs.*, FIFRA Appeal No. 04-08, slip op. at 2-4 (EAB Sept. 30, 2005) (unpublished final order). In those cases, as here, we have declined to credit as exculpatory a claim that an attorney is "too busy with other work" to monitor an EPA administrative enforcement action and respond to orders issued by the ALJ. *See, e.g., Pyramid Chem.*, 11 E.A.D. at 665-68; *Detroit Plastic*, 3 E.A.D. at 105-06. It should go without saying that EPA administrative cases, like other legal actions, are weighty matters that cannot be ignored without consequence.

Moreover, we agree with the Region that unfamiliarity with administrative process and environmental laws, and confusion over multiple filings, are not legitimate bases for vacating a default order, particularly where the defaulting party is

represented by a licensed attorney. In this regard, we find it stunning that Four Strong's counsel purports to have thought this matter settled as to "all" parties, as he asserts in his affidavit. Since counsel, as the attorney representing Four Strong in the litigation, would of necessity have been involved in the negotiation and consummation of any such settlement, it is unfathomable to us that he would have mistakenly assumed that the case had settled. The fact that even a cursory review of the relevant documents would have clearly indicated otherwise makes this excuse all the more implausible. We accept as far more credible counsel's simple concession that he failed to monitor this case as closely as he should have. However, default cannot be excused on the basis of this kind of avoidable inattentiveness. *See Pyramid Chem.*, 11 E.A.D. at 667 ("under our case law governing default determinations, the neglect of a party [by that] party's attorney does not excuse an untimely filing"; instead, "an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings"); *Detroit Plastic*, 3 E.A.D. at 106 (same); *To Your Rescue!*, slip op. at 3-4 (same).

2. *Totality of the Circumstances: Likelihood of Defenses to Prevail*

We turn next to Four Strong's contention that it has meritorious defenses to the charges in this case. As mentioned above, a "totality of the circumstances" analysis may include a consideration of the likelihood that the action would have had a different outcome had it been allowed to proceed to a hearing and adjudication on the merits. *See, e.g., JHNY*, 12 E.A.D. at 384-391-93; *Pyramid Chem.*, 11 E.A.D. at 669-81; *In re Rybond, Inc.*, 6 E.A.D. 614, 628-38 (EAB 1996). In assessing the likelihood of a different outcome, the Board will evaluate whether a defaulting party would have been likely to prevail on any defenses it had to liability. The burdens of presentation and persuasion at this juncture fall on the defaulting party, who must establish that it had more than a mere possibility of a defense. Instead, the defaulting party must proffer sufficient evidence to demonstrate a "strong probability" that litigating the defense would have produced a favorable outcome. *See, e.g., JHNY*, 12 E.A.D. at 391-93; *Pyramid Chem.*, 11 E.A.D. at 669-81; *Jiffy Builders*, 8 E.A.D. at 321-22; *Rybond*, 6 E.A.D. at 628-38.

On appeal, Four Strong argues that it has a defense with respect to each of the Region's claims. With respect to the notice violation, Four Strong claims that, contrary to the Region's allegations, it did, in fact, provide timely notice to EPA regarding the pending asbestos abatement work at the Levittown Shopping Center. Appeal Br. at 3. With respect to the work practice violations, the company argues that "at the time that violations occurred relating to the collection, disposal and removal of 'RACM'" at the shopping center, Four Strong "had already left the property and the [RACM] was in the control of * * * [DLC Management, Inc.]" *Id*. at 2-3. To support these assertions, Four Strong submits an October 25, 2004 letter from its office manager to its general counsel. *See id*. ex. 2 (Letter from Steve Pantovich, Office Manager, Four Strong Builders, Inc., to Paul Faugno, Esq. (Oct. 25, 2004)). The office manager states in the letter that, with respect to

the alleged untimely notice, "As far as I know it [the notice] was mailed out on time, but with the mail you never know." *Id*. He also asserts that some unidentified "notes" (not attached to Four Strong's exhibit) indicate that Four Strong was not present at the site and was not the party engaged in removal work at the time of the alleged RACM violations. *Id*. Four Strong provides no further evidence or argument to support its contentions that these defenses to liability are meritorious.

In response, the Region argues that Four Strong's defenses are unlikely to prevail on the merits. First, the Region observes that as the preparer of the asbestos notifications at issue, Four Strong is in the unique position to locate and produce any notifications, correspondence, or other business records that would prove compliance with the Asbestos NESHAP notification rules. Resp. Br. at 11. The Region notes that Four Strong failed, however, to submit with its appeal brief any of these kinds of documents and instead supplied only the office manager's letter with its equivocal assertion about notice presumably being mailed on time. *Id*. at 10-11. The Region concludes that Four Strong's defense on this point must fail because it is unsupported by any objective, substantive evidence. *See id*.

Second, the Region dismisses Four Strong's other defense of "not present at the time of the violations" as irrelevant. *Id*. at 12. The Region points out that the legislative history of the CAA reveals that Congress intended owners and operators of sources of toxic air pollutants to be held strictly liable for violations of NESHAP work practice standards, which include, in the asbestos context, the requirements to adequately wet and carefully handle RACM so as to minimize the risk that asbestos particles will become suspended in the air during demolition activities. In light of this strict liability standard, the Region asserts that the question whether Four Strong was present or absent at the time of the alleged violations is "simply irrelevant" to the issue of its liability as an owner or operator of a demolition or renovation activity.

In our view, Four Strong has failed to establish a "strong probability" of success with respect to these defenses because, in both instances, the company has offered only the most meager of evidentiary support for its positions. With respect to the notice violation, we agree with the Region that Four Strong would likely be unable to substantiate its defense without business records (such as proof of mailing, return receipts, or similar credible documents) to establish the precise dates Four Strong mailed and/or EPA received the company's official notice of the asbestos demolition work slated for performance at the Levittown Shopping Center. The office manager's ambiguous (and self-serving) statement in the letter to Four Strong's counsel cannot alone support a finding of a strong probability of success on this point. Similarly, with respect to the work practice violations, Four Strong proffers only the office manager's letter to support its position, without including even a copy of the unidentified "notes" referenced in the letter that purportedly establish and explain Four Strong's absence and/or lack of involvement in the RACM activities/omissions that EPA deemed unlawful. In view of this meager

proffer, and in view of the fact that the CAA is, in any case, a strict liability statute, we find that Four Strong has failed to show a "strong probability" of success on the merits of this defense. Accordingly, we have no reason to alter our view that the totality of the circumstances in this case do not support vacatur of the Default Order.

III. *CONCLUSION*

Four Strong's conduct throughout this litigation has reflected a level of indifference and neglect rarely witnessed by this tribunal. Indeed, Four Strong's omissions in the context of this appeal — i.e., its failure to serve opposing counsel, its patently insufficient explanation of its omissions below, and its casual advocacy of its purported defenses — are merely the continuation of the pattern of inattention that it has shown throughout this proceeding. These most recent omissions, if anything, serve to validate the ALJ's conclusion that default is justified here. As we have observed in other cases, the procedural requirements to which Four Strong has given such short shrift are not procedural niceties that parties are free to ignore. Rather, they are the primary means by which administrative cases proceed "in a manner that is transparent, predictable, allows for meaningful preparation by parties and the court, and permits timely repose." *In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005). Parties disregard them at their peril.

Accordingly, we find no error or abuse of discretion in the ALJ's decision to enter a default judgment in this case. The Default Order is affirmed, and Four Strong is assessed a civil penalty of $24,310.[4] Payment of the full amount of this penalty shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within thirty (30) days of the date of receipt of this decision:

U.S. Environmental Protection Agency, Region III
Regional Hearing Clerk
Post Office Box 360515
Pittsburgh, Pennsylvania 15251-6515

A transmittal letter identifying the subject case and the EPA docket number, along with Respondent's name and address, must accompany the check. Failure on the part of Four Strong to pay the penalty within the prescribed thirty-day time

[4] In its appeal, Four Strong has not specifically challenged the amount of the penalty assessed on default. Given this, and given the fact that the penalty requested by the Region and assessed by the ALJ appears to be consistent with the record of the proceeding and the CAA as required by 40 C.F.R. § 22.17(c), we treat the penalty assessment as presumptively sound for purposes of our decision.

frame may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 40 C.F.R. §§ 13.11, 22.31(c).

So ordered.