IN RE JAMES C. LIN AND LIN CUBING, INC.

FIFRA Appeal No. 94-2

FINAL ORDER

Decided December 6, 1994

Syllabus

Respondents James C. Lin and Lin Cubing Inc. appeal from the Initial Decision assessing a civil penalty of $38,000 for violations of FIFRA arising out of the application of the restricted use pesticide GASTOXIN to semi-tractor trailers loaded with alfalfa cubes. In their appeal, Respondents raise the follow issues: (1) whether the evidence on which the complaint is based is the fruit of an inspection conducted in violation of FIFRA section 9(a)(2), 7 U.S.C. § 136(g)(a)(2); (2) whether the penalty assessed by the Presiding Officer is excessive because it jeopardizes Respondents' ability to remain in business and because it overestimates the gravity of the offenses charged; and (3) whether Counts I through VII of the complaint (relating to the application of a restricted use pesticide without a certified applicator being present) are independently assessable charges under the Agency's FIFRA penalty policy.

Held: (1) The first issue was not raised in the proceedings below and, accordingly, may not be raised on appeal; (2) the penalty assessed by the Presiding Officer will not jeopardize Respondents' ability to continue in business; (3) the penalty assessed by the Presiding Officer is based on an overestimation of the gravity of the violations and, as such, should be reduced; and (4) the applications of a restricted use pesticide alleged in Counts I through VII occurred on different occasions and are therefore independently assessable charges under the FIFRA penalty policy. Respondents are ordered to pay a civil penalty of $17,000.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

Respondents James C. Lin and Lin Cubing, Inc. appeal from the Initial Decision of Senior Administrative Law Judge Gerald Harwood ("Presiding Officer") assessing a civil penalty of $38,000 for violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136 *et seq.* Respondents produce alfalfa cubes for export to Japan. The violations alleged in the complaint arise out of the application of the restricted use pesticide GASTOXIN to semi-tractor trailers loaded with alfalfa cubes. In their appeal, Respondents raise the follow issues: (1) whether the evidence on which the com-

plaint is based is the fruit of an inspection conducted in violation of FIFRA section 9(a)(2), 7 U.S.C. § 136(g)(a)(2); (2) whether the penalty assessed by the Presiding Officer is excessive because it jeopardizes Respondents' ability to remain in business and because it overestimates the gravity of the offenses charged; and (3) whether Counts I through VII of the complaint (relating to the application of a restricted use pesticide without a certified applicator being present) are independently assessable charges under the Agency's FIFRA penalty policy. For the reasons set forth below, we conclude that: (1) The first issue was not raised in the proceedings below and, accordingly, may not be raised on appeal; (2) the penalty assessed by the Presiding Officer does not jeopardize Respondents' ability to continue in business; (3) the penalty assessed by the Presiding Officer is based on an overestimation of the gravity of certain violations and should be reduced accordingly; and (4) the applications of a restricted use pesticide alleged in Counts I through VII are independently assessable charges under the FIFRA penalty policy.

I. *BACKGROUND*

Respondent Lin Cubing, Inc., is a Nevada corporation, and Respondent James C. Lin is a shareholder and President of Lin Cubing, Inc. On February 21, 1991, Charles Moses of the Nevada State Department of Agriculture inspected Respondents' facility in Fernley, Nevada, to determine compliance with FIFRA. After the inspection, Mr. Moses obtained Respondent James Lin's pesticide application records. These records showed that on eight separate occasions between September 1990 and April 1991, James Lin had applied 50 to 75 pellets of the restricted use pesticide GASTOXIN to semi-tractor trailers loaded with alfalfa cubes. Respondents' Prehearing Exchange; Stipulation, Exhibit A, Respondents' Appeal Brief. Respondent James Lin did not become certified as a restricted use pesticide applicator by the State of Nevada until March 29, 1991, although at all relevant times he was a certified applicator in the State of California and had been since 1980. Stipulation, Exhibit A, Respondents' Appeal Brief.

Based on the February 21, 1991 inspection of Respondents' facility and subsequent review of James Lin's application records, the Region filed a complaint on October 26, 1992, charging Respondents with 12 violations of FIFRA. Counts I through VIII of the complaint charge that on eight separate occasions, Respondents violated section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), by applying the restricted use pesticide GASTOXIN to alfalfa cubes

without the presence at the facility of a certified applicator.[1] Counts IX through XII charge that Respondents violated section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), prohibiting the use of any registered pesticide in a manner inconsistent with its labeling, by storing GASTOXIN in an area that was not posted, not having warning signs posted on all sides of the fumigated truck trailer, not having a full-face gas mask phosphine canister combination at the application site, and transporting the alfalfa cubes over public roads and highways without aeration. The complaint proposed a penalty of $5,000, for each of the twelve violations, for a total penalty of $60,000.

A hearing was held on October 13, 1993, at which the parties submitted the case on a stipulation of facts. *See* Exhibit A, Respondents' Appeal Brief. The parties then filed post-hearing briefs. After considering the stipulated facts, the documents submitted and other matters of record in the proceeding, the Presiding Officer issued an Initial Decision on April 14, 1994. In that decision, the Presiding Officer dismissed Count VIII of the complaint (charging that in April of 1991, a restricted use pesticide was applied without a certified applicator present), because the violation charged therein occurred after Respondent James Lin had become a certified applicator in Nevada. Initial Decision at 10. The Presiding Officer also dismissed Count XI (charging that respiratory protection was not used as required on the label), because the Region had not met its burden of proof and Count XII (charging that a container was not properly aerated), because the Region's factual basis for the charge was not part of the record. Initial Decision at 11-12. The Presiding Officer found that the violations alleged in the other counts had been proven and assessed the $38,000 penalty, which Respondents appealed on May 9, 1994.[2]

II. *DISCUSSION*

A. *Allegations of Illegal Inspection*

The first issue raised by Respondents is whether the evidence submitted by the Region to support its claim is inadmissible because it is the fruit of an inspection conducted in violation of FIFRA Section 9(a)(2). Respondents assert that even though the foreman at Respondents' facility consented to the inspection, such consent was not valid,

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[1] Section 12(a)(2)(F) of FIFRA makes it unlawful "to use * * * any registered pesticide classified for restricted use for some or all purposes other than in accordance with section [3(d)] * * *." 7 U.S.C. § 136j. Section 3(d) provides, *inter alia*, that a restricted use pesticide may be applied only "by or under the direct supervision of a certified applicator." 7 U.S.C. § 136a(d)(1)(C).

[2] The Region did not appeal, but did file a brief in opposition to Respondents' appeal.

because the inspector did not inform the foreman at the facility that a violation was suspected, as is required under section 9(a)(2), 7 U.S.C. § 136g(a)(2). Respondents' Appeal Brief at 4-5. This issue was not raised at any stage in the proceedings below, although it certainly could have been. Accordingly, Respondents may not raise the issue now. The scope of an appeal under Part 22 is limited to issues that were raised by the parties below. *See In re Mobil Oil Corporation*, EPCRA Appeal No. 94-2, at 23 n.31 (EAB, Sept. 29, 1994) (declining to consider issue raised for first time on appeal); *In re Genicom Corp.*, EPCRA Appeal No. 92-2, at 16-17 (EAB, Dec. 15, 1992)(dismissing appeal of issue because it had not been raised below). Under section 22.30(a), only adverse rulings and orders of the Presiding Officer may be appealed. Because the Presiding Officer cannot issue an adverse order or ruling on an issue that was never raised during the proceedings below, it follows that section 22.30(a) does not contemplate appeals of such issues. We are therefore dismissing this issue.

B. *The Penalty Calculation*

The second issue raised by Respondents is whether the penalty assessed by the Presiding Officer is excessive. Respondents argue that the penalty is excessive because it will jeopardize their ability to continue in business. They also argue that the violations were merely technical in nature and that the gravity of the offenses, therefore, was not as serious as the Presiding Officer had concluded. For the following reasons, we conclude that Respondents have not shown that the proposed penalty would jeopardize their ability to continue in business. We do conclude, however, that the Presiding Officer overestimated the gravity of certain of the offenses and the penalty should be reduced to more accurately account for their gravity.

The regulations governing this proceeding give the Presiding Officer the discretion "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as he] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). Although the Presiding Officer must "consider" any penalty guidelines, he is not bound by them.[3] *Id.* The regulations also give the Board the discretion to increase or decrease

[3] In this case, the applicable guidelines are the Revised FIFRA Enforcement Response Policy, issued by EPA's Office of Compliance Monitoring on July 2, 1990 ("Penalty Policy"). The Presiding Officer used the Penalty Policy to determine the appropriate penalty for the violations charged in the complaint.

the penalty assessed in the initial decision. 40 C.F.R. § 22.31(a). In addition, as the Board has noted on numerous occasions, while penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed. *In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 23-24 (EAB, June 29, 1994) (addressing respondent's contention that rigid application of penalty policy is inappropriate because the policy is not a regulation promulgated in accordance with the Administrative Procedure Act) (citing *In re Genicom Corp.*, EPCRA Appeal No. 92-2 (EAB, Dec. 15, 1992); *In re ALM Corporation*, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991)).

1. *Ability to Pay*

Under the Consolidated Rules, the Region has the burden of proving that the proposed civil penalty is appropriate. 40 C.F.R. § 22.24. One of the statutory factors to be considered in determining an appropriate penalty is the effect of the proposed penalty on the company's ability to continue in business. Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4). The nature of the Region's burden in this regard was discussed at length in a recent Board decision, *In re New Waterbury, Ltd., A California Limited Partnership*, TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994).

In the initial stages of a proceeding, a respondent's ability to pay may be presumed. However, if a respondent puts its ability to pay (or continue in business)[4] at issue going into a hearing, the Region must show as part of its prima facie case that it considered the appropriateness of the proposed penalty in light of the penalty's effect on respondent's ability to continue in business. *Id.* at 17. The Region can make this prima facie showing by producing "some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount." *Id.* at 15 (emphasis in the original). If the respondent cannot offer sufficient, *specific* evidence as to its inability to continue in business to rebut the Region's prima facie showing, then the Presiding Officer may conclude that the penalty is appropriate, at least insofar as it affects the respondent's ability to continue in business.

Applying these standards to this case, we conclude that the penalty assessed by the Presiding Officer is appropriate in respect to its effect on Respondents' ability to continue in business. In its pre-hearing exchange, the Region included a report by Dunn and Bradstreet

[4] The Penalty Policy equates the terms "ability to continue in business" and "ability to pay." Penalty Policy at 23.

projecting Lin Cubing's 1991 sales to be $4,000,000. On the basis of this general financial information, the Region inferred that the proposed penalty would not jeopardize Respondents' ability to continue in business. This information clearly met the Region's burden in establishing a prima facie case.

At the hearing, the parties submitted the case on a stipulation of facts. Each party then filed a post-hearing brief. In its brief, Respondents argued that the proposed penalty would jeopardize their ability to continue in business. The entirety of their argument was as follows:

> Although "Dunn and Bradstreet" projects Lin Cubing's 1991 sales to be $4,000,000, approximately 70 percent of the sales are attributable to transportation cost. As evidenced by the December 31, 1991 balance sheet income[] from the operations of Lin Cubing for the year 1991 was only $35,123.00. (See Respond[e]nt's Preliminary Exchange). The penalty sought by complainant would severely hamper respondent's ability to remain in business and therefore must be reduced.

Post-Hearing Brief at 11-12. In its Reply Brief, the Region responded to this argument by merely asserting that:

> Complainant reiterates the contention that the civil penalty proposed by Complainant was calculated in accordance with Section 14 of FIFRA [7 U.S.C. § 136*l*] and that Respondents are not entitled to any of the downward adjustments provided in the Environmental Response Policy for FIFRA dated July 2, 1990.

Region's Reply Brief at 4.

The question before us is whether the uncontradicted proof that Respondents' income from operations in 1991 was only $35,123.00 (despite sales of $4 million) was sufficient *specific* evidence of their inability to continue in business to rebut the Region's prima facie case. We find that it does not. The Presiding Officer, in addressing this issue, held that:

> The financial data for 1991, for Lin Cubing, Inc., submitted by Respondents shows that the penalty is within Respondents' ability to pay and will not have a significant adverse [e]ffect upon Respondents' ability to continue in business. True, the penalty is somewhat more

> than the corporate operating net income for 1991 (which income is shown as being substantially reduced by a charge for depreciation), but the capital account appears large enough to cushion whatever adverse impact this may have on the corporation.

Initial Decision at 13. Respondent has not shown that this conclusion is contradicted by any record evidence. We note in particular that the large depreciation write-off, mentioned by the Presiding Officer and not contradicted by Respondents, suggests that cash will be available to pay the penalty despite the seemingly large size of the penalty in relation to Respondents' net income.

We also note that under the FIFRA Penalty Guidelines, one measure of the effect of a penalty on a company's ability to continue in business is whether the penalty will be greater or less than 4% of the company's average gross annual income from all sources of revenue for the current year and the prior three years. The Guidelines provide that:

> Even where the net income is negative, four percent of gross income will be used as the "ability to continue in business/ability to pay" guidance, since companies with a positive gross income will be presumed to have sufficient cash flow to pay penalties even where there have been net losses.

Penalty Policy at 23 (July 5, 1990). *See In re New Waterbury, Ltd., A California Limited Partnership*, TSCA Appeal No. 93-2, at 25 (EAB, Oct. 20, 1994) (assessing a penalty equal to 4% of gross income). In this case, there is not enough information to determine the *average* gross income of the current year and the three immediately preceding years, but the gross income for at least one year was $4,000,000. Four percent of that amount is $160,000. The $38,000 penalty assessed by the Presiding Officer, therefore, is less than 1% of Respondents' gross sales and less than one-fourth the amount a company with similar gross sales should be able to pay, according to the Penalty Policy. The fact that the penalty amount exceeds Respondents' operating income for the year 1991 by $3,000 does not change the analysis. As noted in the passage quoted above, the four percent rule may be applied if appropriate even where net income is negative. *See New Waterbury, supra*, at 22 (four percent of gross sales should be used as the ability to pay guideline even where net income is negative, since even in such cases companies with high gross sales will be presumed to have sufficient cash to pay penalties).

Therefore, the Dunn and Bradstreet evidence relied on by the Region provides strong support for the Presiding Officer's conclusion that the

penalty amount was appropriate in light of its effect on Respondents' ability to continue in business. Respondents did not present sufficient evidence in rebuttal to the Dunn and Bradstreet report to show that the penalty would nevertheless jeopardize Respondents' ability to continue in business. We conclude, therefore, that the penalty amount assessed by the Presiding Officer was appropriate insofar as it affects Respondents' ability to continue in business.

2. *Gravity of the Harm*

Respondents also argue that the penalties assessed for Counts I through VII of the complaint are excessive because they overestimate the gravity of the offenses. For the following reasons, we conclude that penalties assessed for those offenses are excessive, even though they were assessed in accordance with the Penalty Policy.

Under the Penalty Policy, a civil penalty is determined by calculating a base penalty reflecting the gravity level of the general type of offense involved and the size of the business (as measured by gross revenues). This base penalty figure is then adjusted to reflect the gravity of the harm and the gravity of the misconduct of the offense under the particular circumstances of the case. In this case, with respect to each of Counts I through VII, the Presiding Officer assessed a penalty of $4,000. To arrive at this figure, the Presiding Officer, following the Penalty Policy, first determined a base penalty figure for each offense. The Presiding Office determined that the base penalty figure for each offense was $5,000. The Presiding Officer then reduced the penalty for each offense by 20% to reflect the gravity of harm and gravity of misconduct under the particular circumstances of this case, yielding a penalty of $4,000 for each of Counts I through VII.[5] In the Initial Decision, the Presiding Officer specifically

[5] The Penalty Policy requires consideration of five types of circumstances for purposes of adjusting the base penalty: (1) the toxicity of the pesticide; (2) the harm to human health; (3) the harm to the environment; (4) the respondent's compliance history; and (5) culpability. Appendix B, Penalty Policy. The first three circumstances reflect the gravity of the harm and the last two circumstances reflect the gravity of the misconduct. For each of these circumstances, values are assigned for various gravity levels. These values are then added up for a "total gravity adjustment value." The magnitude of the total gravity adjustment value dictates the percentage by which the base penalty figure should be increased or decreased to reflect the actual circumstances of the case. In this case, the Presiding Officer assigned for each of Counts I through VII: (1) a value of 2 for the toxicity of the pesticide because the pesticide was an RUP; (2) a value of 1 for harm to human health because the offense caused only a "[m]inor potential or actual harm to human health, neither serious nor widespread;" (3) a value of 1 for harm to the environment because the offense caused only a "[m]inor potential or actual harm to the environment, neither widespread nor substantial;" (4) a value of 0 for compliance history presumably because Respondents had "[n]o prior FIFRA violations"; and (5) a value of 2 for culpability because the offense was a "[v]iolation resulting from negligence." Appendix B-1, Penalty Policy. The total gravity adjustment value, therefore, was 6. Under the Penalty Policy, a total gravity adjustment value of 6 warrants a 20% reduction in the base penalty figure. Table 3, Appendix C-1, Penalty Policy.

found that "the potential injury present in having the pesticides applied by an incompetent applicator is not present here." Initial Decision at 12. The Presiding Officer also found that "the violation was not intentional but arose from Mr. Lin's negligent reading of the label as not requiring that the applicator had to be certified in Nevada." The Presiding Officer observed, however, that: "The real harm lies in undercutting the State's own regulatory program for the certification of restricted-use applicators." *Id.*

In their appeal, Respondents argue that the penalties for Counts I through VII should have been reduced by more than 20% because, although James Lin had not been certified as an applicator in Nevada, he had been certified in California since 1980 and was a competent applicator. Respondents argue, therefore, that the infractions charged in Counts I through VII were merely "technical" and that the gravity of the misconduct was "slight."[6]

Respondents cite the Agency's decision in *In re High Plains Cooperative, Inc.*, FIFRA Appeal No. 87-4 (CJO, July 3, 1990) for the proposition that "[w]here the infraction is technical, as where a competent applicator has not been certified by the state in which the application occurred, it has been held that the gravity of the misconduct is slight." Respondents' Appeal Brief at 12. In that case, as in this one, the application of a restricted use pesticide was performed by or under the supervision of a person who was not a certified applicator in the State where the application took place (Wyoming), but was certified applicator in another State (Nebraska). The Agency's Chief Judicial Officer upheld the decision of the Presiding Officer to depart from the penalty guidelines and reduce the recommended penalty from $5,000 to $500 on the ground that both the gravity of the harm and the gravity of the misconduct were slight.

We believe the strong similarities between this case and *High Plains Cooperative* support a conclusion that the gravity of the harm should be assessed without regard to the complex formulation used in the penalty policy because that formulation overstates the actual gravity. However, we also note some differences between the cases.

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[6] In its response to the appeal, the Region argues that the Presiding Officer's decision to reduce the penalties for Counts I through VII was erroneous and that the Board should reinstate the penalties proposed in the complaint for those counts. Appellee's Response to Appellate Brief at 12-13. These arguments are in the nature of a cross-appeal, which we decline to consider since the Region failed to timely appeal. If the Region wanted to challenge the Presiding Officer's decision to assess a penalty lower than that proposed in the complaint, it was required to file an appeal within the same period applicable to any other appeal. *See In re General Electric Company*, TSCA Appeal No. 92-2a, at 29, n.32 (EAB, Nov. 1, 1993) ("[U]nlike the Federal Rules of Appellate Procedure (Rule 4(a)(3)), the Agency's rules do not provide additional time for the filing of a cross-appeal."). *See, infra* n.8.

The Presiding Officer in *High Plains Cooperative* relied on the fact that the applicator had at one time been certified in Wyoming, but had inadvertently allowed the certification to lapse. Further, the Presiding Officer found that the applicator had been unaware that his Wyoming certification had lapsed and immediately took action to correct the problem when he became aware of it. By contrast, in this case, Respondent James Lin had never been certified in Nevada when the violations in Counts I through VII occurred. The State's interests, therefore were undercut to a greater extent in this case than in *High Plains Cooperative.* In addition, there is no evidence in the record suggesting that Mr. Lin was unaware that he was not certified in Nevada. In addition, this case involves a course of conduct involving repeated violations over an extended period of time. Therefore, we believe the violations in this case to be of greater gravity than those in *High Plains Cooperative*, thus warranting a higher penalty assessment for each violation. We therefore assess a penalty of $1,000 for each of Counts I through VII.[7]

C. *Independently Assessable Charges*

Respondents argue that Counts I through VII of the complaint are not independently assessable charges and that they should not result in separate civil penalties under the Penalty Policy:

> Charges I through VII are indistinguishable. To prove each of these claims, Complainant has offered the same evidence, to wit: the application was made and James Lin was not certified by the State of Nevada when the application was made.

Respondents' Appeal Brief at 8. For the following reasons, however, we conclude that this argument is fatally flawed.

The Penalty Policy provides that:

> A separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation of the Act. A violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different.

[7] The assessment of $5,000 for each of the two remaining counts (IX & X) is unaffected by this issue and thus the total penalty is $17,000 (*i.e*, $1,000 for each of Counts I through VII, $5,000 for Count IX, and $5,000 for Count X.).

> Dependent violations may be listed in the complaint, but will not result in separate civil penalties.

Penalty Policy at 25. Under this standard, Counts I through VII are clearly independently assessable charges. Each of the applications charged in those counts resulted from an act that was *not* the result of any other application charged in those counts. Moreover, the elements of proof for the violations are different in that each count requires proof of allegedly violative activity at a time different than each other count. *Cf. Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 309 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.") (quoted in *In re Cooperative Grain and Supply Company and David Wademan*, FIFRA Appeal No. 87-5, at 4, n. 2 (CJO, July 12, 1990)).

This conclusion is expressly endorsed in the Penalty Policy, as follows:

> [T]he Agency considers violations that occur from * * * each individual application of a product to be independent offenses of FIFRA. Each of these independent violations of FIFRA are subject to civil penalties up to the statutory maximum of $5,000 for section 14(a)(1) and $1,000 for section 14(a)(2). * * * A commercial applicator that misuses a restricted use product on three occasions (either three distinct applications or three separate sites) will be charged with three counts of misuse, and assessed civil penalties of up to $15,000.

Penalty Policy at 25. Any other interpretation would mean that a respondent, having violated the restricted use limitations once, could then repeatedly violate them with impunity, an obviously nonsensical result. For all the foregoing reasons, we conclude that the violations charged in Counts I through VII are independently assessable charges.

III. *CONCLUSION*

Pursuant to FIFRA, section 14(a)(1), 7 U.S.C. § 136*l* (a)(1), a civil penalty of $17,000 is hereby assessed jointly and severally against Respondents. Respondents shall pay the full amount of the civil penalty within sixty (60) days after this order has become final. Payment

shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA—Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

So ordered.[8]

[8] In its brief responding to the appeal, the Region requests that the Board alter several aspects of the Initial Decision. Such requests are really attempts to appeal the Initial Decision. Because the period for appealing the Initial Decision has expired, we are dismissing such requests as untimely. *See* n.6 *supra*.