IN RE JIFFY BUILDERS, INC.

CAA Appeal No. 98–2

FINAL DECISION

Decided May 25, 1999

Syllabus

Jiffy Builders, Inc. ("Jiffy") appeals a default order issued against it by the Presiding Officer assessing a civil penalty in the amount of $22,000. The underlying enforcement action was based on alleged violations of the Clean Air Act ("CAA"); the default order was issued based on Jiffy's failure to timely comply with the Presiding Officer's Prehearing Exchange Order.

This case arose when Jiffy contracted with a third party, not a party to this action, to remove debris from a partially collapsed structure. After Jiffy completed this work, asbestos-containing material was discovered at the disposal site where the debris had been deposited. A complaint was issued by Environmental Protection Agency, Region VII, alleging that Jiffy had conducted demolition activities and had violated the CAA because 1) Jiffy failed to adequately inspect the structure for asbestos; and 2) Jiffy failed to inform the Regional Administrator of the pending demolition activity prior to performing the activity as required by the federal regulations implementing the CAA.

Jiffy filed a response denying its alleged liability. Ultimately, however, a default order was entered against Jiffy after Jiffy twice failed to file a required Prehearing Exchange in a timely manner. Jiffy argues that the Default Order should be reversed for two reasons: 1) based on the totality of the circumstances, the Presiding Officer abused his discretion by issuing a default order; and 2) Jiffy has raised meritorious defenses to the charges raised by EPA.

Held: The Default Order was properly issued against Jiffy and hence is affirmed. A default order is subject to reversal when, based on the totality of the circumstances, fairness and a balance of the equities so require. Failure to timely comply with a Prehearing Order is grounds for default under the Consolidated Rules of Practice. Here, the Presiding Officer exercised his discretionary authority in Jiffy's favor by relaxing the filing deadlines, and by allowing Jiffy additional time to file its Prehearing Exchange after Jiffy's first failure to timely comply with the Prehearing Exchange Order. Based on the totality of the circumstances, including the fact that Jiffy offers no explanation for its repeated failure to comply with the Prehearing Exchange Order, the Presiding Officer did not abuse his discretionary authority by issuing the Default Order after Jiffy's second failure to file a Prehearing Exchange.

Jiffy argues that it has articulated two meritorious defenses to the allegations by EPA: first, that its actions did not constitute demolition activities, and second, that some other party may have disposed of the asbestos-containing material found at the disposal site.

However, Jiffy neither offers an explanation of why its actions are nonetheless excluded from the regulatory definition of demolition activities, nor does it offer any evidence that some other party disposed of the asbestos-containing material found at the site. Jiffy has failed to offer the Board any reason to believe that it would likely prevail on either of these defenses if a hearing on the merits were held, and therefore, these defenses are rejected as grounds justifying a reversal of the Default Order.

Because the Board finds no abuse of discretion on the part of the Presiding Officer, and Jiffy has offered no other grounds that would justify reversal, the Default Order is affirmed.

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

Opinion of the Board by Judge Fulton:

Before the Environmental Appeals Board ("the Board") is the appeal of an Initial Decision entered against Respondent Jiffy Builders, Inc. ("Jiffy") on June 2, 1998, by Administrative Law Judge William B. Moran ("Presiding Officer"), finding Respondent in default for failing timely to comply with a Prehearing Exchange Order. Respondent argues on appeal that the Presiding Officer abused his discretionary authority by issuing a default order in this case. For the reasons stated herein, we find no abuse of discretion on the Presiding Officer's part. Accordingly, the Initial Decision is affirmed.

I. *BACKGROUND*

The facts as alleged in the Complaint—treated as true by the Presiding Officer[1]—are as follows. On or about July and August of 1996, Respondent entered into a contract with one Paul M. Wooldridge to remove debris from a building that had partially collapsed after a heavy rainstorm in 1991. The structure was located in the 400 block of East High Street in Boonville, Missouri. Mr. Wooldridge was the owner of the structure, but is not a party to this action. Respondent performed his duties under the contract, and the debris was later disposed of on Boonville city property. Subsequent tests conducted by Complainant revealed that the debris in question included asbestos-containing material.

Complainant, the United States Environmental Protection Agency—Region VIII ("EPA"), alleges that Respondent's activities constituted a "demolition," which is defined under EPA regulations as "the wrecking or

[1] In issuing a Default Order, the Presiding Officer accepts as true the facts alleged in the Complaint. *See* 40 C.F.R. § 22.17(a) ("Default by Respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations.").

taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility." 40 C.F.R. § 61.141. Complainant alleges that, under this definition, Respondent was required to conduct a thorough inspection of the East High Street building for the presence of asbestos.[2] According to Complainant, Respondent failed to conduct an inspection consistent with the applicable rules, thus violating section 112 of the Clean Air Act, 42 U.S.C. § 7412. Complainant further alleges that Respondent failed to provide the EPA Regional Administrator with notice of the pending demolition activity as required by 40 C.F.R. § 61.145(b).[3] Failure to provide such notice constitutes a violation of sections 112 and 114 of the Clean Air Act, 42 U.S.C. §§ 7412, 7414.

II. *PROCEDURAL HISTORY*

On August 29, 1997, Complainant filed its complaint alleging the aforementioned statutory and regulatory violations, and proposing a $22,000 penalty. Respondent answered by letter on September 4, 1997, disputing its liability for the violations. On September 30, 1997, the Presiding Officer issued a Prehearing Exchange Order, requiring Complainant to file its Prehearing Exchange by December 1, 1997; Respondent's Prehearing Exchange was due by no later than December 22, 1997. On October 31, 1997, Complainant filed its Prehearing Exchange. Respondent failed to file its Prehearing Exchange by December 22, 1997, as required. On January 13, 1998, Complainant filed a Motion for Default Order, alleging that Respondent was in default due to its failure to comply with the Prehearing Exchange Order. An Order to Show Cause was issued on February 10, 1998, to which Jiffy responded

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[2] *See* 40 C.F.R. § 61.145(a) ("To determine which requirements * * * of this section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or renovation, [one must] *thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos*.") (emphasis added).

[3] The regulation provides, in pertinent part, as follows:

> Notification requirements. Each owner or operator of a demolition or renovation activity to which this section applies shall [p]rovide the Administrator with written notice of intention to demolish or renovate * * *. [Notice shall be given] [a]t least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material) * * *.

40 C.F.R. § 61.145(b).

on February 20, 1998, requesting an enlargement of time.[4] By order dated March 3, 1998, Respondent was given twenty-four (24) hours to respond to the Order to Show Cause. Respondent timely responded to the March 3rd order; on March 25, 1998, Complainant's Motion for Default Order was denied. Respondent was given until April 20, 1998, to comply with the Prehearing Exchange Order previously issued on September 30, 1997.

On April 27, 1998, Complainant filed and served upon Respondent another Motion for Default Order because, for the second time, Respondent had failed to file a Prehearing Exchange.[5] On May 5, 1998, Respondent, through counsel, filed, out of time, a Motion to Enlarge Time to File Prehearing Exchange together with a second document entitled "Respondent's Prehearing Exchange." On June 22, 1998, a Default Order was issued against Respondent, effectively denying Respondent's May 5th motion, holding Respondent liable for two violations of the Clean Air Act, and assessing a penalty of $22,000.[6] An appeal was timely filed with the Board on June 22, 1998.

III. *DISCUSSION*

The gravamen of Respondent's appeal is that, based on the totality of the circumstances, the Presiding Officer abused his discretionary authority by issuing a Default Order. Respondent asserts that an abuse of discretion has occurred because a Default Order "prematurely precludes ruling on the merits." Jiffy Builders, Inc., Appellate Brief (Respondent's Appellate Brief), at 6. Respondent further contends that because Complainant was not prejudiced by the delay, Jiffy should be permitted to continue to defend its interests. Finally, Respondent argues that because this is its first Clean Air Act violation, its failure to comply with the Prehearing Exchange Order should be excused. For the reasons stated herein, however, the Board finds Respondent's position unpersuasive and upholds the Presiding Officer's Default Order.

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[4] Respondent filed a motion for Entry of Appearance on February 20, 1998, at which time attorneys Charles F. Speer, Truman K. Eldridge, Jr., and the firm of Armstrong, Teasdale, Schlafly, & Davis entered the case as attorneys of record for Respondent.

[5] A copy of the Complainant's April 27th motion, with a certificate of service signed by counsel for Complainant, was included with Respondent's appellate brief. *See* Respondent's Appellate Brief, at App. G.

[6] On May 21, 1998, Complainant filed a Response to Respondent's Motion for Enlargement of Time to File Prehearing Exchange together with a Motion to File Response out of Time, and Respondent filed a response to this filing on May 22, 1998. Complainant's May 21st Motion—rendered essentially moot by the Default Order—was denied.

A. *Standard of Review*

The appeal of a Default Order, which constitutes an Initial Decision, is governed by the Consolidated Rules of Practice. *See* 40 C.F.R. Part 22. We have previously stated that, when determining whether or not a Default Order should be reversed, the Board will "consider the totality of the circumstances presented." *In re Rybond*, 6 E.A.D. 614, 616 (EAB 1996). *See also In re Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (EAB 1992) ("When fairness and a balance of the equities so dictate, a default order will be set aside.")

The Board may also take into consideration "the likelihood that the action would have had a different outcome had there been a hearing." *See Rybond,* 6 E.A.D. at 625. In assessing the likelihood of a different outcome, we have considered whether the Respondent would likely prevail on any defenses to liability raised by the Respondent. *See id*. at 628–38.

B. *Justification for Issuing a Default Order*

The Consolidated Rules of Practice explicitly state that a party may be "found to be in default * * * 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).

Thus, under the regulations, the Presiding Officer unquestionably has the authority to issue a default order for failure to comply with a Prehearing Order, particularly where, as here, noncompliance has occurred more than once. Indeed, on many occasions, we have affirmed the issuance of default orders for failure to comply with a prehearing order. *See Rybond,* 6 E.A.D. at 614; *In re House Analysis & Assocs. & Fred Powell,* 4 E.A.D. 501, 512 (EAB 1993).

Further, contrary to Respondent's contentions, the facts of this case suggest that the Presiding Officer was, in fact, very accommodating of Respondent; indeed, on a number of occasions, the Presiding Officer relaxed filing deadlines in Respondent's favor. The Presiding Officer was well within his authority to enter a Default Order against Respondent

after the second failure to timely file a Prehearing Exchange.[7] The governing rules do not support the notion that a Presiding Officer must show inexhaustible patience in reckoning with a party's inattentiveness; rather, they suggest the contrary—that default is an essential ingredient in the efficient administration of the adjudicatory process. Accordingly, any contention that the Presiding Officer abused his discretion by issuing a Default Order after having taken extra measures to accommodate Respondent is unfounded and must be rejected.

C. *Totality of the Circumstances*

Respondent has pointed to several facts that it believes justify the reversal of the Default Order. First, Respondent argues that it has been active in its defense and has continuously disputed its liability. Respondent further asserts that because it responded to an earlier show cause order and filed other responsive pleadings, it has not acted wilfully to delay the proceedings. Finally, Respondent alleges that it has raised meritorious defenses to the claims against it. For these reasons, Respondent contends, the Default Order should be reversed. We disagree.[8]

Respondent's other participatory acts in the process do not excuse its failure to comply with the Prehearing Exchange Order. Implicit in Respondent's position is the notion that its first failure should be overlooked because it was not represented by counsel at that time. *See*

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[7] Notably, the Consolidated Rules of Practice do not require the issuance of a show cause order prior to the issuance of a default order; the February 10, 1998 Order to Show Cause was a purely discretionary act by the Presiding Officer. Therefore, the Presiding Officer was required neither to issue a second order to show cause prior to the issuance of the June 22, 1998 Default Order, nor to allow Respondent more time to explain the alleged default than that allotted in the Consolidated Rules of Practice. Pursuant to 40 C.F.R. § 22.17(a), Respondent is permitted twenty days to respond to a motion for default filed by the Complainant. A default order may immediately follow the expiration of the allotted twenty days. *See In re P.L.C.,* FIFRA Appeal No. 95–1 (EAB, July 12, 1995).

[8] Conspicuously absent from Respondent's list of justifications is any explanation why, after having missed an earlier deadline and having retained the services of counsel presumably, in part, to ensure timely representation, Respondent nevertheless defaulted on the obligation in question here. While, as we discussed in *Rybond,* 6 E.A.D. at 625 n.19, the "good cause" standard in 40 C.F.R. § 22.17(d) technically does not apply to a case like this, which does not involve review of a motion filed under that provision, we would ordinarily expect some articulation of the "cause" of the default to be part of a well-framed appeal of a default order. *See Rybond,* 6 E.A.D. at 625 ("[Respondent] has provided no adequate justification for failing to comply with any of the Orders."). In this case, as explained below, Respondent speaks to this point only by saying it did not purposefully commit the default. This strikes us as not enough.

Respondent's Appellate Brief, at 9. This argument must be rejected for two reasons. First, parties who choose to proceed *pro se,* while held to a more lenient standard than parties represented by members of the bar, are not excused from compliance with the Consolidated Rules of Practice. *See Rybond,* 6 E.A.D. at 627 ("'The fact that [respondent], who apparently is not a lawyer, chooses to represent himself * * * does not excuse respondent from the responsibility of complying with the applicable rules of procedure'")(quoting *In re House Analysis & Assocs. & Fred Powell,* 4 E.A.D. 501, 505 (EAB 1993)).

Second, and more importantly, Respondent's earlier status as a *pro se* litigant had already been taken into consideration by the Presiding Officer in forgiving the initial delay in filing the Prehearing Exchange. Respondent was specifically reminded of its duty to conform to the regulations in the Presiding Officer's order granting Respondent's Motion for an Enlargement of Time. "Now that Respondent is represented by counsel, Respondent is reminded of the critical importance of timely responses." *In re Jiffy Builders, Inc.,* Dkt. No. VII–97–CAA–132 (ALJ, March 3, 1998). In the face of this admonition, a second act of nonperformance—especially after counsel had been retained—was appropriately determined by the Presiding Officer to be inexcusable. Respondent's desire to represent and defend its interests should have persuaded it to timely file the Prehearing Exchange as ordered, particularly after having been given additional time to prepare the necessary documents.

Likewise, a lack of wilful intent to delay proceedings is not, by itself, sufficient to excuse noncompliance. It has not been alleged that Respondent acted wilfully to delay the proceedings; it has only been alleged that Respondent has twice failed to comply with the Prehearing Exchange Order—a failure that is clearly, even absent indicia of intent, sufficient grounds for default.[9]

Finally, Respondent argues that it has raised meritorious defenses that bear consideration here. First, Respondent alleges that its activity did not constitute "demolition activity" as described in 40 C.F.R. § 61.141. Next, Respondent asserts that an issue remains as to whether the debris it disposed of was the same asbestos-containing material discovered and tested by Complainant.

[9] *See Rybond,* 6 E.A.D. at 625 n.19 (reasoning that the Board is not bound by the Federal Rules of Civil Procedure, and that, therefore, the Respondent's contention that the Board be required to consider the defaulting party's wilfulness prior to upholding a default judgment—as have some courts applying FRCP 55(c)—would be rejected).

Significantly, to overturn a Default Order on appeal, a defaulting party must show more than the mere possibility of a defense; rather, that party bears the burden of demonstrating in the briefs filed with the Board a "strong probability" that litigating the defense would produce an outcome different from that secured by the Default Order. *See Rybond,* 6 E.A.D. at 628. In our view, this necessarily means that Respondent would need to demonstrate not only that it has a defense that, if proved, would avoid liability, but also that it would likely prevail on its defense were it litigated. Respondent has failed to meet its burden in this regard.

Respondent challenges Complainant's interpretation of 40 C.F.R. § 61.141, which defines "demolition activity," by asserting that its activities do not fall within these parameters. Respondent, however, offers no alternative interpretation of the regulations; neither does it seek to explain why its activities should be excluded from the provision in question. A conclusory statement that its actions did not constitute a demolition activity, without more, is insufficient to show that Respondent would likely prevail on this defense at a hearing.

Respondent's argument with respect to the origins of the asbestos-containing material must meet a similar fate. Respondent asserts that the asbestos-containing material could have come from some other party who disposed of debris at the same site.[10] Once again, however, Respondent fails to offer the Board any proof other than this bare assertion. Respondent does not deny disposing of debris at the site in question. Further, while Respondent claims to have conducted an "inspection" of the structure in question to determine the presence of asbestos (Respondent's Appellate Brief, at 3), it neither explains the method used to inspect the premises, nor, curiously, does it offer the Board the results of its inspection. Finally, Respondent offers the Board no evidence whatsoever that there were, in fact, other entities who disposed of debris at the time Complainant discovered the asbestos-containing material.

Respondent has thus given the Board no basis for concluding that it could at a hearing marshal the evidence necessary to prevail on these defenses. Consequently, Respondent has failed to meet its burden of showing likely success on these defenses; accordingly, we will not disturb the Default Order on these grounds.

[10] Respondent contends that "it is possible if not likely that parties unrelated to this matter also disposed of waste materials on the same site." Respondent's Appellate Brief, at 11.

IV. *CONCLUSION*

Based on the totality of the circumstances, we find no abuse of discretion on the part of the Presiding Officer. Accordingly, the Default Order issued on June 2, 1998 is affirmed, and Jiffy Builders, Inc. is assessed a civil penalty of $22,000. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days of the date of receipt of this decision:

EPA-Region VII
Regional Hearing Clerk
P.O. Box 360748
Pittsburgh, PA 15251–6748

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check. Failure on the part of Respondent to pay the penalty within the prescribed statutory time frame after the entry of the final order may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

So ordered.