10/31/76

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of

Hawk Industries, Inc.	)	I. F. & R. Docket No. II-120C
	)	
Respondent	)	Initial Decision

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended[1/] (FIFRA) for assessment of civil penalties for violations of said Act. The proceeding was initiated by complaint dated January 30, 1976 issued by the Director, Environmental Programs Division, EPA, Region II, charging respondent with violations of the Act.[2/]

It is alleged that on September 25, 1975 the respondent shipped the product known as Baygon Super Residual (Baygon) that was not in compliance with section 12(a)(2)(A) of the Act in that labeling required by the Act had been detached, defaced, altered, or destroyed in whole or in part. It is also alleged that the shipment of the product was in violation of section 12(a)(1)(E) of the Act in that it was misbranded. In each of three separate paragraphs a different mode of

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1/ The Act is codified in 7 U.S.C. 136 et seq. (Supp. V, 1975). A table of parallel citations showing Statutes at Large and United States Code is attached hereto.

2/ The proceedings were conducted pursuant to the Rules of Practice which were promulgated for the conduct of such hearings. 39 F.R. 27658 et seq., 40 CFR, Part 168.

misbranding is alleged by reason of the failure of the label to bear certain required information as follows: failure to bear the required warning or caution statements required by section 2(q)(1)(G); failure to bear adequate directions for use required by section 2(q)(1)(F);[3/] failure to bear an ingredient statement required by section 2(q)(2)(A).

A penalty of $1,540 was proposed to be assessed for violation of section 12(a)(2)(A) (defacing and destroying labeling). A separate penalty, each in the amount of $1,540, was proposed to be assessed for each mode of misbranding. Thus, penalties in the aggregate of $6,160 were proposed to be assessed.[4/]

After unsuccessful negotiations between representatives of the complainant and respondent, the respondent by its president, Jerome S. Shaw, filed an answer and requested a hearing only with respect to the amount of penalty that should be imposed. The answer did not deny any of the allegations of the complaint and failed to plead specifically to any material factual allegation contained in the complaint. Such failure constitutes a binding admission of such allegations.[5/]

3/ This section requires that the labeling contain adequate directions for use. The charge is that the label did not bear adequate directions for use. (See section 2(p) for definitions of "label" and "labeling".) As will hereinafter appear the only labeling of the product was the label.

4/The complaint as filed proposed a penalty of $2,380 for each of the alleged violations for a total of $9,520. On motion of complainant, this was reduced to $1,540 for each alleged violation.

5/Rules of Practice, section 168.33(d). The respondent was advised of this provision in the prehearing letter issued by the undersigned.

After issuance of the prehearing letter to the parties on June 7, 1976, the respondent retained counsel. A hearing was held in the case in Newark, New Jersey, on October 19, 1976. The complainant was represented by Susan Levine, Esq., attorney for EPA, Region II, and the respondent was represented by Harold Friedman, Esq., of Newark.

The complainant has filed proposed findings of fact and conclusions of law and a brief in support thereof. The respondent has filed a memorandum which includes some proposed findings and which deals with the amount of penalties that should be imposed and respondent's ability to pay. These have been duly considered.

Findings of Fact

1. The respondent Hawk Industries, Inc. (Hawk) is a corporation engaged in the distribution of specialty chemical products for cleaning activities by commercial and industrial users. The company has a place of business in Fairfield, New Jersey. Jerome S. Shaw is president of the company and the individual responsible for the operations and conduct of the business.

2. Shortly before September 25, 1975 respondent received from one of its suppliers a 55 gallon drum containing a pesticide called Pyragon. The only labeling of the product as received by Hawk was the label which contained the following which is required by FIFRA: (1) warning and caution statements, as required by

section 2(q)(1)(G); (2) adequate directions for use, as required by section 2(q)(1)(F); (3) an ingredient statement giving the name and percentage of each active ingredient, as required by section 2(q)(2)(A). One of the active ingredients was a chemical called Baygon.

3. After respondent received the container of the pesticide it firmly superimposed on the label as received its own label which completely covered the original label and could not be removed without destroying the original label.

4. The label affixed by respondent did not contain the statements and information which appeared on the original label as set forth in Finding 2, above. The failure of the label to bear these statements and information resulted in the product being misbranded.

5. The respondent's act of affixing the label above described defaced and destroyed in substantial part labeling required by FIFRA, in violation of section 12(a)(2)(A) of FIFRA.

6. After respondent affixed the label above described, it shipped the product to one of its customers in Port Reading, New Jersey, on September 25, 1975. This resulted in a violation of section 12(a)(2)(E) of FIFRA for the shipment of a pesticide which was misbranded.

7. The respondent is subject to a civil penalty for violating section 12(a)(2)(A) of FIFRA. In the circumstances of this case an appropriate penalty for this violation is $100.

8. The act of shipping the pesticide which was misbranded in the various modes described constitutes a single offense and the respondent is subject to a civil penalty for violating section 12(a)(1)(E) of FIFRA. In the circumstances of this case an appropriate penalty for this violation is $900.

Discussion and Conclusions

The respondent does not produce any chemicals. It purchases products from other companies and maintains a stock and fills orders as they are received.

Shortly before September 25, 1975 respondent received an order from one of its customers, engaged in food production, for a product that respondent did not carry in stock. Respondent ordered and received a 55 gallon drum of the product from Utility Chemical Co. (Utility), Patterson, New Jersey. The product called Pyragon was a product that had been registered by Utility for home use in 1969 with the United States Department of Agriculture (predecessor of EPA for registering pesticides). The principal active ingredient was a proprietary chemical called Baygon. In connection with the registration of Pyragon by Utility, a label was approved which, among other things, contained a list of and percentages of ingredients, detailed directions for use, and required warning and caution statements (Comp. Ex. 2). The approved label was required to be affixed to the packaged product.

The container received by respondent had the label that had been affixed by Utility and contained the information in the approved label, including the name of Utility. Respondent reshipped the product to its customer in the same container in which it was received. In reshipping it was the desire of respondent to withhold from its customer the name of its supplier and it superimposed its own label over the Utility label and completely covered the latter. The label it affixed was six inches square, on a white background which bore the following printed matter:

For Commerical And Industrial Use Only

Warning:
Keep Out of Reach of Children
See Side Panel for Additional Cautions

HAWK INDUSTRIES, INC.
Fairfield, New Jersey 07006

Between the first line and the word "Warning" there was a blank area of about 3-1/2 inches in which one of the respondent's employees had typed the words "BAYGON SUPER RESIDUAL". There was no side panel and this was the only label or labeling of the product as shipped.

The Hawk label was tightly affixed over the Utility label and could not be removed without destroying the Utility label. The affixing of the Hawk label over the Utility label resulted in defacing and destroying in part labeling required by the Act in violation of section 12(a)(2)(A) of the Act.

The only warning on the label affixed by Hawk was "Keep out of reach of children". The label did not bear other warning and caution statements which were necessary and adequate to protect health and the environment.[6/] This resulted in the product being misbranded as defined in section 2(q)(1)(G).

The label affixed by Hawk contained no directions for use.[7/] Section 2(q)(1)(F) of the Act requires directions for use which are necessary for effecting the purposes for which the product is intended and which are adequate to protect health and the environment. The product was misbranded under this provision of the Act.

6/ The approved Utility label in addition to the warning "Keep out of reach of children" contained the following cautions:

> May be harmful if swallowed, inhaled, or absorbed through the skin. Avoid breathing of spray mist and provide adequate ventilation of area being treated. Contact with skin, eyes, or clothing should also be avoided. Wash thoroughly with soap and warm water after handling. Avoid contamination of food, utensils, and food preparation areas. Remove pets and cover fish bowls before spraying.
> If illness occurs, get prompt medical attention.
> To Physician - Atropine sulfate is antidotal.
> FLAMMABLE. Do not spray into or near open flame. Do not smoke while using. Avoid excessive wetting of plastic, rubber and asphalt surfaces such as tiles and floor covering.

7/The approved Utility label contained detailed directions for use including general directions, directions for indoor and outdoor use, and for use to control brown dog ticks.

The label affixed by Hawk did not bear an ingredient statement[8/] and the product was misbranded under section 2(q)(2)(A) of the Act.

The only matter of controversy in the case is the amount of penalties that should be imposed. In making this determination section 14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation. Section 168.60(b)of the rules of practice provides that in evaluating the gravity of the violation there shall also be considered respondent's history of compliance with the Act and any evidence of good faith or lack thereof.

In previously decided civil penalty cases under FIFRA it has been held that gravity of the violation should be considered from two aspects - gravity of harm and gravity of misconduct.

As to gravity of misconduct, I conclude that the violations were not the result of any improper motive of respondent and were not a deliberate flouting of the requirements of the Act. They occurred as the result of negligence of one of respondent's employees. There is no evidence that respondent has a history of prior violations, nor is there evidence that respondent did not act in good faith. The gravity of misconduct was a moderate degree.

As to the gravity of harm, a well qualified witness for complainant testified concerning the harm that could result from the failure of the label to bear the required warning and caution statements, directions for use, and list of ingredients. There is no doubt that serious consequences could result and that the gravity of harm was of a high degree.

8/ The approved Utility label contained a list of ingredients - active and inert - with the percentage of each ingredient.

Based on the size of respondent's business and the gravity of the violation, penalties in excess of those herein assessed would be appropriate. However, as will hereinafter appear, in assessing the penalties I have relied primarily on the effect that imposition of penalties would have on respondent's ability to continue in business and I do not consider it necessary to dwell further on the gravity of the violation.

As above noted, the complaint proposes that a penalty be assessed for the violation of section 12(a)(2)(A) of the Act (defacing and destroying labeling) and that a separate penalty be assessed for each of three modes of misbranding for violations of section 12(a)(1)(E) of the Act (shipping a misbranded pesticide).

A penalty is properly assessable for the violation of section 12(a)(2)(A). The misbrandings were the result of the defacing and destroying the Utility label. However, different evidence is necessary to support the misbranding allegations and a separate penalty may be imposed for shipping a misbranded pesticide.[9/] There is a question, however, whether separate penalties may be imposed for each mode of misbranding.[10/] I am unaware of any decision, either under the criminal or civil penalty provisions of FIFRA, that discusses this question and I consider it appropriate to do so.

9/ See Blockburger v. United States, 284 U.S. 299, 304 (1932); Tesciona v. Hunter, 151 F.2d 589, 591 (10th Cir. 1945).

10/ At the prehearing stage, at my request, counsel for complainant submitted a memorandum of law on this point. The memorandum supports the proposition that separate penalties may be imposed.

I am of the view that where there is a violation of section 12(a)(1)(E) of the Act by reason of a shipment of a particular pesticide that is misbranded in more than one way, there is only one offense and only a single penalty may be imposed.

Section 12(a) of the Act which is entitled "Unlawful Acts" provides in pertinent part as follows:

> (1) Except as provided by subsection (b),[11/] it shall be unlawful for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person -
>
> (E) any pesticide which is adulterated or misbranded;

Section 2 of the Act which is entitled "Definitions" in subsections (q)(1) and (q)(2) defines "misbranded". The subsections define or describe ten separate modes of misbranding. Included are the three modes of misbranding, each of which is alleged in the complaint to be a separate offense.

It is to be observed that under section 12(a)(1)(E) it is unlawful to ship a pesticide which is misbranded and section 2(q) describes the various modes in which a pesticide may be misbranded. The Act does not declare that each mode of misbranding is unlawful but simply proscribes misbranding. The offense in this case under section 12(a)(1)(E) was the shipping of a misbranded pesticide.

Section 14 of the Act is entitled "Penalties". It sets forth in separate subsections what civil and criminal penalties may be imposed

11/ Subsection 12(b) sets forth certain exemptions not here applicable.

for violations of the provisions of the Act. This section provides, in part, as follows:

> (a) CIVIL PENALTIES -
> "(1) IN GENERAL.- Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.
>
> . . .
>
> (b) CRIMINAL PENALTIES -
> "(1) IN GENERAL.- Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who knowingly violates any provision of this Act shall be guilty of a misdemeanor and shall on conviction be fined not more than $25,000, or imprisoned for not more than one year, or both.

Aside from the element of knowledge, which is essential to support a criminal violation, the unlawful acts described in section 12 are the same whether a civil penalty or criminal penalty is sought to be imposed.

I have been unable to find any cases on the civil side to assist in my consideration of this question, but since the offenses, whether civil or criminal, are the same (except for the element of knowledge) it appears appropriate to consider the application of the criminal side of the law in the resolution of the question before me, i.e., whether each mode of misbranding is a separate violation.

In criminal cases, the question as to whether a particular act results in single or multiple offenses arises in matters relating to duplicity. In the criminal law an indictment or information is defective because of duplicity when two or more distinct offenses are charged

in a single count. See, e.g. Frankfort Distilleries, Inc. v. United States, 144 F.2d 824, 832 (10th Cir. 1944). If, then, an indictment that alleges in one count several specifics of wrongdoing is held not duplicitous, it follows that there is a single offense charged, and that the wrongdoings alleged refer to the various modes of accomplishing the prohibited act. See e.g. United States v. Lennon, 246 F.2d 24, 27 (2d Cir. 1957); United States v. Swift, 188 F. 92, 97 (N.D. Ill. 1911).

Misbranding cases which closely parallel the matter now under consideration have been prosecuted under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 331(a). See Gray v. United States, 174 F.2d 919 (8th Cir. 1949), cert. denied, 338 U.S. 848 (1949); Empire Oil & Gas Corp. v. United States, 136 F.2d 868 (9th Cir. 1943). The pattern of FFDCA and FIFRA, as here pertinent, is similar. Both prohibit shipment of misbranded (and adulterated) articles within the purview of the respective statutes[12/] and in separate sections define different modes of misbranding.[13/]

In the Gray case the trial court ruled that a count in an information charging defendant with misbranding a drug by reason of: (1) accompanying a shipment of a drug with a letter containing false statements about the drug; (2) failing to put the true name of the drug on the label; and (3) omitting from the label directions for use, was not duplicitous. The appellate court upheld this ruling, 174 F.2d at 921.

12/ FFDCA, section 301(a), 21 U.S.C. 331(a); FIFRA, section 12(a)(1)(E).
13/ FFDCA, misbranding drug, section 502, 21 U.S.C.352; FIFRA, misbranded pesticide, section 2(q).

Because the offense charged in the count was the "introducing and delivering for shipment in interstate commerce of a misbranded article", the court concluded that the count alleged a single offense and that the information was not duplicitous. The several acts and omissions charged against the defendant were deemed to be specifications of the ways in which the drug was misbranded and the offense was committed.

The same result was reached in the Empire Oil case where it was held that a count which alleged the shipment of a drug that was misbranded in two different ways (false claims as to efficacy and inaccurate statement of contents) was not duplicitous since it did not charge more than one offense - the shipment of a misbranded drug. The court, quoting from the Swift case, supra, said "Duplicity may be applied only to the result charged, and not to the method of its attainment".

Since the structure of FFDCA and FIFRA are similar with regard to violations for shipping misbranded articles it is logical to conclude that the shipment of a pesticide misbranded in more than one way is but a single offense and only one penalty may be imposed.

A similar result was reached in United States v. Lennon, 246 F.2d 24 (2d Cir. 1957). The defendant was charged with filing a fraudulent income tax return. It was alleged in a single count that the return understated income and falsified exemptions. In rejecting the claim of duplicity the court held that the act of filing a fraudulent return was a single offense, even though the return could be falsified in an unlimited number of particulars. The court said that understatement

of income and fraudulent exemptions were only different methods by which a single offense may have been affectuated.

An indictment may charge alternative modes of committing an offense and guilt may be established by proof of only one of the modes alleged. United States v. Malinowski, 347 F. Supp. 347, 351-352 (E.D. Pa. 1972), aff'd, 472 F.2d 850 (3rd Cir.), cert. denied, 411 U.S. 970 (1973). Under this principle a respondent may be charged with different modes of misbranding and proof of one mode of misbranding is sufficient to establish liability.

Applying the reasoning of the above cases, I conclude that where there is a shipment of a single pesticide that is misbranded in more than one way there is only one offense and only one penalty may be imposed. The various ways in which a product is misbranded may be considered as affecting "the gravity of the violation" [section 14(a)(3)], but in any event the penalty for a single offense may not exceed the statutory limit.

Complainant (in its memorandum, see footnote 10) cited Pearson & Co., published in Notices of Judgment under FIFRA, No. 1478, issue of June 1975, to support the proposition that each mode of misbranding is a separate offense for purposes of assessing a civil penalty against the violator. The facts and holding in the Pearson case are consistent with the conclusion that shipment of a product misbranded in more than one way is a single offense under FIFRA.

In Pearson respondent was charged, inter alia, with shipping misbranded and adulterated pesticides. The product Gulf States 5% Rotenone was deficient in its active ingredient. This deficiency resulted in both adulteration (because strength fell below professed quality under which it was sold) and misbranding (because amount of rotenone present in product was less than that claimed on label). Since the same evidence was sufficient to establish both charges, without proof of additional facts, a single penalty was imposed on the authority of Blockburger v. United States, 284 U.S. 299, 304 (1932). See also Tesciona v. Hunter, 151 F.2d 589, 591 (10th Cir. 1945); Ianelli v. United States, 420 U.S. 770, 785 (1975).

Relying on the Pearson case, complainant suggests that with regard to the product Azalea Dust, the manner in which penalties were imposed for the violations supports its position for the imposition of separate penalties for each mode of misbranding. Analysis of the Pearson case supports the conclusion that separate penalties were not imposed for different modes of misbranding. Separate penalties were imposed for non-registration, adulteration, and misbranding.

The product Azalea Dust was not registered and was adulterated and misbranded. A penalty was imposed for the non-registration violation. It was also charged that the product was misbranded because the product bore a registration number. Since this misbranding charge was so closely interrelated with the non-registration charge a separate penalty was not imposed for this mode of misbranding.

This product was deficient in an active ingredient stated on the label. This resulted in misbranding because the label was false and misleading [section 2(q)(1)(A)] and also resulted in adulteration because the strength fell below the professed standard expressed on the label [section 2(c)(1)]. Since proof of the same facts would support both charges a single penalty was imposed which may be attributed to the misbranding.

The product also contained an ingredient not stated on the label. This resulted in adulteration because a substance had been substituted for the pesticide [section 2(c)(2)] and also resulted in misbranding because the label was false and misleading [section 2(q)(1)(A)]. Since proof of the same facts would support both charges a single penalty was imposed which may be attributed to the adulteration.

The proof that was necessary to support the adulteration charge (substitution of a substance) was different from the proof that was necessary to support the misbranding charge (deficiency of an ingredient). Thus, it is seen that only one penalty was imposed for misbranding and one penalty for adulteration. The imposition of two separate penalties was appropriate because two separate offenses were committed.

The conclusion reached herein is not to be confused with the principle expressed in Blockburger v. United States, 284 U.S. 299, 304 (1932) where it was said:

> The applicable rule is that, where 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.

Where different modes of misbranding are charged, different proof may be required to establish each mode of misbranding but, as above concluded, there is only one offense and separate statutory provisions have not been violated. Further, as above explained, where different modes of misbranding are alleged, proof of one mode of misbranding is sufficient to establish the offense.

Turning now to the amount of penalties that should be imposed. Hawk Industries, Inc. was organized in October 1973. It was the successor of Hawk Chemical Co. that was in serious financial difficulties.

In each of the two years (ending with fiscal year September 30, 1975) that respondent has been in business it has lost money. Although the amount of gross sales have remained approximately the same, in the vicinity of $450,000 annually, the selling prices per unit have increased substantially and there has been a substantial decrease in unit sales. When respondent began operations in 1973 it had 14 employees. Because of decline in sales this has steadily been reduced to the present 3 full-time employees and a part-time shipping clerk.

There is in evidence the balance sheets of respondent for the years ending September 30, 1974 and September 30, 1975. These show that the company had losses of approximately $18,000 and $43,000 in

each of the years, respectively. The 1975 loss was incurred despite the addition of $20,000 of capital in that year. The accrued loss is $62,000. The current assets of the company as of September 30, 1975 were approximately $147,000[14/] and the current liabilities were approximately $153,000.[15/] The stockholders investment of $40,000 has been wiped out completely by the $62,000 losses over the two year period. It appears that the company is, in a technical sense, insolvent. However, under favorable conditions with good management the company may be able to survive.

The complainant offered testimony of an accountant who compared the balance sheets of the company for the two years. He submitted a statement entitled "Source and Application of Funds". This measured the fluctuation of the assets and liabilities over the two-year period. The statement does not show the overall health of the company and whether it improved in the second year. It appears quite clear to me that the financial condition of the company deteriorated in the second year.

It was the opinion of the accountant that the company could pay the amount assessed in the complaint ($6,160) and remain in business if payments were spread out over a period of a year.[16/] I do not accept this opinion. I am of the view that penalties in excess of

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14/ In addition, there is an asset of $32,000 for accumulated depreciation.
15/ In addition, there are long term liabilities of approximately $51,000 payable in a year or more.
16/ It is doubtful if an Administrative Law Judge can assess a penalty for installment payments beyond 60 days. See Rules of Practice, section 168.60(c).

$1,000 would adversely effect respondent's ability to continue in business.

The misbrandings resulted from the defacing and destroying of the original label of the product. I consider the misbranding violation much more serious than the defacing and destroying violation. I assess a penalty of $100 on the former and $900 on the latter.

I have considered the entire record in the case and the arguments of the parties and based on the Findings of Fact, and Discussion and Conclusions herein it is proposed that the following order be issued.

Final Order[17/]

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136 l(a)(1)] civil penalties totaling $1,000 are hereby assessed against respondent, Hawk Industries, Inc. for the violations which have been established on the basis of the complaint issued on January 30, 1976.

Bernard D. Levinson
Administrative Law Judge

December 21, 1976

17/ Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. [See section 168.40(c).]

TTACHMENT

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, (FIFRA) AS AMENDED ON OCTOBER 21, 1972, 86 STAT. 973, PUBLIC LAW 92-516 AND NOVEMBER 28, 1975, 89 STAT. 751, PUBLIC LAW 94-140

Parallel Citations

Statutes at Large	7 U.S.C.	Statutes at Large	7 U.S.C.
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 l	27	136y