10/8/74

ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF ADMINISTRATIVE LAW JUDGES

In re	
Johnson Chemical Company, Inc.,	Docket No. I.F.&R. II-11C
Respondent	Initial Decision

Preliminary Statement

By complaint dated November 2, 1973, the Director, Environmental Programs Division, Environmental Protection Agency, Region II, charged the above respondent with violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 et seq. (FIFRA) and sought the assessment of a civil penalty of $1,200 under section 14(a) of the Act, 7 U.S.C. 136 l(a). The respondent filed an answer and requested a hearing which was held in New York City on August 8, 1974. At the hearing the complainant was represented by Ms. Carol L. Dudnick of the legal staff of EPA, Region II and the respondent was represented by Mr. Frank Uddo, president of respondent who is not an attorney.

The complaint alleges that respondent violated section 12(a)(1)(E) of the Act, 7 U.S.C. 136j(a)(1)(E) in that on August 1, 1973, it held for sale in Brooklyn, New York, the pesticide called "King Spray Ant and Roach Killer" that was adulterated and misbranded. Adulteration is alleged under section 2(c)(1) of the Act, 7 U.S.C. 136(c)(1) in that the strength and purity of the pesticide fell below the professed standard of quality as expressed on the labeling under which it was sold. Misbranding is alleged under section 2(q)(1)(A), 7 U.S.C. 136(q)(1)(A) in that the label

represented the product to contain 2.2 dichlorovinyl dimethyl phosphate (hereinafter DDVP) .465% and related compounds .035% [1/] when in fact the product contained an average of .308% of this ingredient.

The respondent did not contest the allegations of the complaint relating to the violations. The respondent claimed that there were mitigating circumstances in the case and that because of its unblemished record of 35 years its record should continue to be blemish free. In substance the respondent asked for dismissal of the case or a finding of no violations.

We are concerned here only with DDVP content of the spray in question.

The complainant filed a brief and proposed findings and conclusion. The respondent submitted a letter in support of its position.

After consideration of the record we make the following

Findings of Fact

1. The respondent is engaged primarily in the sale and distribution of pesticides and has a place of business in Brooklyn, New York. The company has been in business since 1939 and its gross annual sales are approximately $5,000,000. It has 30 employees. One of the principal pesticides distributed by respondent is called King Spray Ant and Roach Killer.

1/ The trademark for this product manufactured by Shell Chemical Company is Vapona.

2. In September 1971, on application of respondent, EPA registered the product King Spray Ant and Roach Killer under registration number 5130-6. The approved label listed several ingredients including DDVP .474% and related compounds .036%. */ The product was represented as a pesticide not only for ants and roaches but for killing a number of other insects.

3. In December 1972 a revised label for the product in question under registration number 5130-6 was approved by EPA. Except for certain changes in the list of ingredients, the label approved was identical to the label earlier approved in September 1971. The change of ingredients here material reduced the DDVP and related compounds by 50%-from .474% and .036%, respectively to .237% and .018%, respectively.

4. The basic mixture of ingredients for the product in question is prepared for respondent by McLaughlin Gormley King Co. (MGK), a large chemical specialty manufacturer and formulator.

5. Under arrangements with respondent, Connecticut Aerosols, Inc. (CA), Milford, Connecticut, packages the product. MGK ships the basic mixture for this spray to CA, where it is diluted to a 10% solution with a petroleum distillate and gas-filled in aerosol cans and shipped to the respondent in Brooklyn, New York. The cans are supplied to CA by a large can manufacturing company. The label of the cans as furnished by the can supplier bears a statement of ingredients, with percentages of ingredients.

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*/ A product under this name was registered by respondent under No. 5130-2 in February 1967 and was cancelled in April 1971. This product as registered contained DDVP .460% and related compounds .040%. This product also contained dieldrin which was not an ingredient of the product registered under number 5130-6.

6. The respondent's volume for this product is about 2-1/2 million cans a year. Cans for the packaging are ordered by CA several months in advance. When the change of formula was approved in December 1972, CA ordered from the can supplier cans with the new statement of ingredients. The cans with the new statement of ingredients began to arrive May 1973 and CA began packaging under the new label on May 16, 1973. At that time CA had on hand a quantity of the basic mixture of the old formula and a substantial number of cans with the old label and it continued to package some of the product under the old formula until July 17, 1973. Thus, from May 16, 1973 to July 17, 1973, CA was packaging the product under both formulas.

7. The records of CA show that on July 23, 1973, it packaged 11,664 cans under the new formula. Some of the cans with old labels were filled with the product that was supposed to be in accordance with the new formula. Exactly how many cans were so filled does not appear, but an official of CA, based on the company records, gave an estimate of 1,000 to 2,000 cans. Shortly after packaging the cans on July 23, 1973, CA shipped a number of the cans, in case lots of 12 each, to respondent in Brooklyn, New York.

8. On August 1, 1973, the respondent was holding for sale at its premises in Brooklyn, New York 38 cases of the product in question, each case containing 12 cans of 13-3/4 ounces, of the product. On that date an inspector of EPA collected from the premises of respondent as a sample three cans of the product that were held for sale. The labels of these cans listed DDVP at .465% and related compounds at .035%. (It is noted

that this is a variation from the label approved in September 1971.) Chemical analysis by EPA chemists showed the product to contain .308% DDVP and related products rather than the .500% declared on the label (.465% and .035% related compounds).

9. The pesticide in question was adulterated within the meaning of section 2(c)(1) of FIFRA as amended (7 U.S.C. 136(c)(1)) in that its strength fell below the professed standard of quality expressed on the label under which it was sold. The said pesticide was also misbranded within the meaning of section 2(q)(1)(A) of FIFRA as amended (7 U.S.C. 136(q)(1)(A)) in that its label was false and misleading.

Conclusions

The respondent has not contested the allegations of the complaint relating to the violations. Thus, it is established that the respondent held for sale a pesticide that was adulterated and misbranded. The adulteration and misbranding arise out of the misstatement on the label as to ingredients. Although the product was in violation of the statute under two separate provisions, i.e. adulteration and misbranding, proof of the same facts will establish both violations and only one penalty may be imposed. Blockburger v. U.S., 284 U.S. 299, 304 (1932).

The complaint proposed to assess a civil penalty of $1,200. This was based on the civil penalty assessment schedule for violations of section 14(a) of FIFRA, 7 U.S.C. 136 l. [2/] Under the schedule for a

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2/ The civil penalty assessment schedule was published in the Federal Register at the same time the final rules of practice were published on July 31, 1974, 39 F.R. 27711. The schedule as published differed in some respects from the schedule previously used by EPA enforcement officials, but the penalty for violations of this type was unchanged in the schedule as published.

business with gross sales of over $1,000,000, [3/] the penalty for defective ingredient statement where the formulation differs from that on the labeling is $1,200.

In determining the amount of penalty to be assessed, Section 14(a)(3) of the statute, 7 U.S.C. 136 l(a)(3) 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.

The respondent is a relatively large company and assessment of a penalty of $1,200 will have no adverse effect on its ability to continue in business.

In the factors to be considered in assessing civil penalties, the guidelines as published in the Federal Register on July 31, 1974, 39 F.R. 27712, as to "gravity of violation" states:

> The gravity of any violation is a function of (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of the persons exposed to a risk of injury; (5) the extent to which the applicable provisions of the Act were in fact violated; (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstance.

3/ In prehearing correspondence respondent gave its gross sales as $5,000,000.

We recently expressed our view in another case under the civil penalty provision that in considering appropriateness of the penalty to the "gravity of the violation" the evaluation should be made from two aspects -- gravity of harm and gravity of misconduct. 4/

From the gravity of harm aspect we can find no basis for making a finding adverse to respondent. The respondent's product under the name King Spray Ant and Roach Killer was approved in 1971 with a label that showed .510% DDVP and related compounds. A revised label for a product under this name, with the identical representations for use and efficacy, was approved in 1972 with content of DDVP and related compounds at .255%. The samples that were collected contained an average of .308% DDVP and related compounds. We find that the product in question with a content of .308% of DDVP and related compounds would have been efficacious for the uses represented on the label and its use in accordance with directions on the label would not have resulted in any injury or adverse effects on man or the environment. Thus, we consider the gravity of harm as zero.

There was misconduct on the part of respondent in that it failed to exercise some form of quality control over the product it distributed that resulted in the violative product being held for sale. We do not find that respondent acted deliberately or with intent to violate the law. But intent is not an element of an offense under the civil penalty

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4/ This was before the assessment guidelines were published. Our views and the guidelines are not inconsistent.

provisions of FIFRA as amended. [5/] (Cf. U.S. v. Dotterweich, 320 U.S. 277 (1943)).

The label of the product showed that the respondent was the distributor. The product was manufactured for it and it held the product for sale. The fact that the product was manufactured by a company engaged by respondent, with ingredients furnished by another company, does not relieve respondent from its obligation under the statute to refrain from selling or holding for sale violative products. [6/] See United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1947), cert. den., 332 U.S. 851; United States v. Dotterweich, supra.

Analysis of the product showed that it contained .308% DDVP and related products rather than the .500% declared on the label. This was a 38% deficiency. Further, the product did not comply with the ingredient statement on the new label which was approved by EPA in December 1972. This called for .255% DDVP and related compounds. In this regard the product was over formulated by 21%. [7/]

The respondent has violated the Act and is subject to the assessment of a civil penalty. As above noted there was no potential harm in the distribution of this product. Further, the respondent's violation was not

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5/ The criminal penalty section of the Act, 14(b), requires that the violation be "knowingly".

6/ We have not considered the application of section 12(b) of the Act since there is no evidence of a guaranty under this section.

7/ While the under-formulation or over-formulation of this product did not pose potential injury to man or the environment and efficacy was not affected, deviations of such magnitude in pesticides containing certain other ingredients may have serious adverse effects in these areas.

deliberate or intentional. We also consider as significant the fact that respondent has been in business for 35 years and there is no evidence of non-compliance with FIFRA, either before or after the 1972 amendments. No citations or warning letters were ever issued to it. (See section 9(c) of FIFRA as amended, 7 U.S.C. 136g(c) and section 6(c) of FIFRA prior to 1972 amendments, 7 U.S.C. 135d(c)). Thus, there is no evidence of any history of this respondent's non-compliance with the Act. Also, there is no evidence that the respondent did not act in good faith.

Section 168.46(b) of the Rules of Practice provides that "the Administrative Law Judge may at his discretion increase or decrease the assessed penalty from the amount proposed to be assessed in the complaint."

Even though respondent is a relatively large company and well able to pay the proposed penalty of $1,200, [8/] considering the nature and gravity of the violation we are of the view that a penalty of $400 is appropriate.

Having considered the entire record and based on the Findings of Fact and Conclusions herein, it is proposed that the following order be issued.

Final Order

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1)), a civil penalty of

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8/ See respondent's letter of May 5, 1974, p. 2.

$400 is assessed against respondent Johnson Chemical Company, Inc., Brooklyn, New York for violations of said Act which have been established on the basis of complaint issued on November 2, 1973.

Bernard D. Levinson
Administrative Law Judge

October 8, 1974

I hereby certify that on October 8, 1974, the original and six copies of this decision were sent by certified mail to the Regional Hearing Clerk, Region II, Environmental Protection Agency, 26 Federal Plaza, New York, New York 10007.

Patricia M. Richards
Secretary to ALJ Levinson