UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 86 APR 21 A11:45

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Corson Services, Inc., d/b/a 1/	)	Docket No. FIFRA-09-0433-C-85-12
Corson Swimming Pools,	)	
	)	
Respondents	)	

ORDER GRANTING MOTION TO DISMISS 2/

This is a civil administrative action instituted pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136 et seq. The Complainant is the U. S. Environmental Protection Agency (EPA). The Respondent is Corson Services, Inc., Corson Swimming Pools.

This Complaint serves as notice that the Complainant has reason to believe that Respondent has violated Section 12 of FIFRA. 3/

Complaint was issued April 10, 1985 and the Order Granting amendment of Complaint was issued June 25, 1986.

1/ The original Complaint was issued naming Respondent as Jack Corson d/b/a Corson Swimming Pools. The Complaint was subsequently amended to properly designate Respondent as Corson Services, Inc. d/b/a Corson Swimming Pools.

2/ This Order Granting Motion To Dismiss constitutes an Initial Decision. 40 CFR 22.20(b).

3/ FIFRA, Section 14(a)(1) provides, as follows:

> 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.

The Complaint charges Respondent with distributing into commerce three products for use with swimming pools known as Cor-Kill Granular Algaecide, Cor-Tabs and Cor-Chem Dry Chlorine Concentrate. All three are pesticides as defined in Section 2(u) of FIFRA (7 U.S.C. 136(u)).

It is alleged that these products, on or about July 26, 1984, were distributed, offered for sale, shipped or held for sale whose containers did not conform to the standards for special packaging (Child Resistant Packaging) in violation of 40 CFR 162.16 and Section 12(a)(1)(E) of FIFRA (7 U.S.C. 136j(a)(1)(E)).

Respondent filed a timely Answer admitting it distributed and sold these products as alleged in the Complaint.

Hearing was held in Phoenix, Arizona on December 5, 1985. Post hearing briefs were filed by the parties.[4/]

Findings of Fact

1. Corson Services, Inc. d/b/a Corson Swimming Pools is an Arizona Corporation with its place of business located at 2980 N. 73rd Street, Scottsdale, Arizona and a "person" within the meaning of Section 2(s) of FIFRA (7 U.S.C. 136(s)).

2. Respondent sells and distributes the products Cor-Kill Granular Algaecide, Cor-Tabs and Cor-Chem Dry Chlorine Concentrate for use with swimming pools.

4/ Respondent filed a Motion To Strike the testimony of witnesses Harder and Gavin On The Basis Of Surprise. Due to the result reached here, it will not be necessary to rule on that Motion.

3. There was no analytical evidence presented at the hearing as to the chemical composition of these products.

4. The packages in which these products were sold were not introduced into evidence.

5. There was no direct testimony as to the testing of these packages to determine if they did nor did not conform to the child resistant packaging requirements of FIFRA and regulations promulgated thereunder.

Discussion

At the conclusion of Complainant's case-in-chief, Respondent presented an oral Motion To Dismiss and requested a ruling thereon. The Court refused to rule from the bench and suggested the motion be reduced to writing and filed.

Respondent's Motion To Dismiss formalizes the oral Motion To Dismiss brought by the Respondent at the conclusion of the Complainant's case. Respondent asserts that this Motion To Dismiss will show that the evidence presented by the Complainant in its case taken in its most favorable light does not establish a prima facie case.

The three allegations of the Complaint, which are denied by the Respondent, are found in the final paragraphs of each of the three counts of the amended Complaint:

1. "On or about July 26, 1984 the respondent distributed, offered for sale, shipped or held for sale COR-KILL (sample number E401) whose container did not conform

to the standards of special packaging, in violation of 40 CFR 162.16 and section 12(a) (1) (E) of FIFRA (7 USC 136J (a) (1) (E).") (Emphasis supplied)

2. "On or about July 26, 1984, Respondent distributed, offered for sale, shipped or held for sale, COR-TABS (Sample Number E402) whose container did not conform to the standards for special packaging in violation of 40 CFR 162.16 and Section 13(a) (1) (e) of FIFRA (7 USC 136j(a) (1) (E))." (Emphasis supplied)

3. "On or about July 26, 1984, Respondent distributed, offered for sale, shipped or held for sale COR-CHEM (Sample Number E403) whose container did not conform to the standards for special packaging in violation of 40 CFR 162.16 and Section 12(a) (1) (E)a of FIFRA (7 USC 136j(a) (1) (E)). (Emphasis supplied)

Respondent alleges that the proof that had to be offered was:

1. That the chemical contained in the three packages was a chemical on the proscribed list requiring what is commonly referred to as CRP (child resistant packaging).

2. That the container itself did not meet the requisite standards of CRP.

3. That the containers themselves should have been introduced in order that the Court, in the absence of definitive tests, might make at least a common sense judgment. Respondent asserts that the Complainant proved neither.

Respondent continues: The EPA to prove their case had to prove that the containers purchased by Mr. Rex Neal on July 26, 1984, contained chemicals on the proscribed list. There was testimony that the chemical TRICHLORO-S-TRIAZINETRIONE 100% and the chemical SODIUM DICHLORO-S-TRIAZINETRIONE were on

the proscribed list. There was no competent testimony that these two chemicals were "offered for sale, shipped, or held for sale" by the Respondent on July 26, 1984. This is because the only items that the EPA proved that were sold that day were the containers purchased by Mr. Neal which were labeled E401, E402 and E403. The chemist who testified, (Mr. Harder), testified that he did not test the chemicals in these containers, he did not supervise the testing of the content of these containers, in fact, he never even saw the containers. Mr. Magnenat, the chemist who was employed by the State of Arizona at the time the samples were acquired, returned the containers to Mr. Neal who forwarded them to San Francisco on October 2, 1984. Nor did Mr. Harder ever test any other chemicals from any other packages sold by the Respondent. In short, there was no proof that the two chemicals on the proscribed list were "offered for sale, shipped, or held for sale" by the Respondent on or about July 26, 1984, as alleged by the Amended Complaint.

The essence of the allegation is that the three packages in question were not "child proof" or were not "in child resistant containers" (CRP).

The witnesses could not testify what constituted CRP. The first EPA witnesses, Messrs. Paulson, Neal, and Ms. Bessey stated that they could not state as of the time they were giving testimony what CRP consisted of, but they felt they could look it up in the book and describe it. Mr. Neal further stated that he felt it was something to do with the ability or inability of a 5 year old child to open the package. Witness Harder did not say anything about what constituted CRP and witness Gavin read a

definition which referred to a child under the age of 5 being able to open the container, and he did not know the time limit required, or if it could be any child or a child with a particular dexterity or lack thereof or whether the child was a boy or girl, handicapped, etc. But outside of the inability of the witnesses to identify with precision what constituted CRP, the important thing is there was no testimony that the three containers involved were tested and did or did not meet the standards of CRP. In fact, the containers themselves were never brought into Court so that the Court itself could make a determination on a "common sense" basis as to the child resistant nature of the containers. Respondent's witnesses Corson and Davidson stated that they did not know whether their original packages were CRP or not.

The simple fact of the matter is that by the conclusion of the case, there had been no credible evidence introduced as to the contents of the containers. The certification by Dr. Magnenat (Exhibit "A") is without foundation and does not contain on the face of the document under "analytical results" a verification that the chemicals in question, to-wit, TRICHLORO-S-TRIAZINETRIONE and SODIUM DICHLORO-S-TRIAZINETRIONE were in fact those chemicals. The box under "analytical results" next to the list of chemicals is completely blank. Most important of all, there was no testimony of any nature direct, indirect or by physical sample that the containers did or did not conform "to the standards of special packaging." The basic aspects of the case was never proved.

Respondent therefore requests that the Complaint be dismissed.

In response to this motion, Complainant filed a Motion For Clarification citing certain procedural problems and requesting the Court to indicate whether the ruling on the motion will be an initial decision or a ruling requiring further briefing. The Court ruled that should the Motion To Dismiss be granted, the Order will constitute an Initial Decision, 40 CFR 22.20.

Complainant filed a Response To Motion To Dismiss arguing that the testimony of the witnesses called by the defense was openly immaterial to the charges in the Complaint. And that the testimony of Respondent's officials would appear to have been offered in defense, but when read in the best light favorable to a defense of this action, fall far short of presenting any defense whatsoever. Further, that by the weight of the evidence, Respondent failed to meet the burden imposed by 40 CFR 22.24.

Complainant further alleges in its Response that while Respondent argues that the Complainant did not prove the chemical content of the containers purchased by Inspector Neal, this argument is made by counsel for Respondent and not by any witness called by Respondent. Respondent's witness Gary Calvin Davidson signed the document by which the Complainant sought to prove that product samples were obtained. Mr. Davidson testified extensively as to telephone calls to the State of Arizona and EPA, Region 9, there was no testimony from sworn witnesses that will put in doubt that the contents of the product samples were any different in the laboratory than that removed from the facility by Mr. Neal. Complainant's exhibits show that these samples were maintained in a chain of custody until the laboratory.

Counsel for Respondent would use the fact that Complainant did not produce the actual containers at hearing as being fatal to Complainant's case. Complainant maintains that in the circumstances Respondent is in no way prejudiced by the fact that the actual containers removed from the facility were not made available at hearing. In addition to the testimonial evidence by the Inspector who obtained the samples, Complainant presented photos showing the containers. These containers were identified by the Inspector as being the containers which gave rise to the administrative action. Complainant maintains that the containers were not an indispensible piece of evidence to Complainant's case.

Finally, counsel for Respondent would make it a fatal flaw in Complainant's case that the witnesses called by Complainant could not describe the requirements for child resistant packaging. Further, while these questions were put to Complainant's witnesses called at hearing, the decision to challenge the packaging as not meeting EPA requirements was made in the Regional office in consultation with Headquarters personnel. A description of child resistant packaging which counsel for Respondent demands of Complainant's witnesses is not germaine to establishing the charges set out in the Complaint.

Discussion and Conclusion

The Court must agree with Respondent. The three primary issues presented in this proceeding are:

1. The chemical content of the products.
2. A description of the packages.
3. Do they require child resistant packaging; and, if so,
4. Are the products contained in child resistant packaging?

1. While it may be presumed that the products contained the chemical ingredients designated on the labels, no witness was presented for cross-examination to verify this fact. Mr. Magnenat, a former State of Arizona chemist apparently conducted some tests, but even so, he did not enter the test results on EPA Exhibits 8(a), 8(b) and 8(c) under the heading "Analytical Results." Even conceding that the product contained the chemicals designated on the labels, paragraphs 2 and 3 would still be controlling.

2. While EPA 9(a), (b), (c), (d) and (e) show depictions of the containers for the products concerned, the actual containers were not in the courtroom. It is difficult to discern, even from a detailed analysis, whether these packages would be child proof under 40 CFR 162.16. Thus, any meaningful cross-examination was impossible. It would seem that a demonstration by Complainant's witnesses of the method of opening the containers would have been helpful to the Court and to Respondent's counsel.

3. No witnesses were presented by Complainant who could testify as to what constituted child resistant packaging, nor was any witness presented who knew the test procedures or whether or not any tests in accordance with 40 CFR 162.16 were actually performed. The only evidence presented in this regard was a memorandum from Rex. W. Neal to Sara Segal, EPA Region IX, in which he states "The containers used for distribution are not Child Resistant Packaging." However, upon cross-examination, Mr. Neal testified that he got that information from Ms. Bessey. Tr., p. 67. Upon cross-examination of

Ms. Bessey, she testified with regard to her knowledge of child resistant packaging, as follows:

> ". . .so determining whether or not he has to have those products in child resistant packaging is not in my realm of authority or understanding."

Therefore, again, there were no witnesses presented by Complainant for cross-examination on this subject.

4. The only conclusion to be reached here is that even after hearing there does not appear to be any party to this proceeding who can answer the question "Are the products contained in child resistant packaging?"

While the Respondent may have presented a more affirmative defense, it is the Court's opinion that Complainant did not present a prima facie case. The Complaint is therefore dismissed.[5/]

It is so ordered.

Edward B. Finch
Chief Administrative Law Judge

Dated: April 21, 1986

Washington, D. C.

5/ Unless an appeal is taken pursuant to the rules of practice, 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the Order Granting Motion To Dismiss shall become the final order of the Administrator. See 40 CFR 22.27(c).

CERTIFICATION

I hereby certify that the original of this Order Granting Motion To Dismiss was sent to the Regional Hearing Clerk, U. S. EPA, Region IX, and a copy was sent by certified mail, return receipt requested, to Respondent and Complainant in this proceeding.

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: April 21, 1986