UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	TSCA Docket No. VI-478C
Jimelco, Inc.	)	
	)	
Respondent	)	

Toxic Substances Control Act -- Accelerated Decision, Moving Party's Need to Negate Other Party's Denial -- Complainant's motion for accelerated decision on liability was granted for all of the requested charges except two, which Respondent had denied; Complainant's argument that it need not negate these denials because Respondent had offered no evidence to support them was rejected, since it is Complainant that bears the burden of proof on the charges; and Complainant's stated intention to present evidence at a hearing regarding the charges was insufficient to eliminate the issue of material fact created by Respondent's denials.

Appearances

For Complainant:
Sherry L. Brown, Esq.
Assistant Regional Counsel
Region VI
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202-2733

For Respondent:
Mr. Richard Priest
Registered Agent for Jimelco, Inc.
215 S. Redmond Road
Jacksonville, AR 72076

Before

Thomas W. Hoya
Administrative Law Judge

RULING ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ORDER FOR SUPPLEMENT TO PREHEARING EXCHANGE

This Ruling And Order grants in part and denies in part a Motion for Accelerated Decision on Liability filed by Complainant--the Director of Air, Pesticides and Toxics Division, Region VI, U.S. Environmental Protection Agency ("EPA")--against Respondent Jimelco, Inc. The Ruling and Order further directs the parties to supplement their prehearing exchanges.

This case was initiated under the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 ("TSCA"), and under regulations issued pursuant to TSCA at 40 C.F.R. Part 761 ("the Regulations"). Respondent is Jimelco, Inc., an Arkansas corporation doing business as a manufacturer and rebuilder of transformers in Jacksonville and Little Rock, Arkansas.

Background

This case grew out of a PCB spill involving one of Respondent's trucks, which occurred on or about September 2, 1988, near Bartlesville, Oklahoma. During remediation of the contaminated truck, it was discovered that the truck's fuel tanks had a PCB concentration of 23 parts per million (ppm). Subsequent inspections of Respondent's facilities[1] by EPA officials resulted in the filing of a Complaint on September 27, 1990.

The Complaint contained five counts. Count I charged Respondent with improper burning of used oil contaminated with PCBs, in violation of 40 C.F.R. § 761.20(e)(3).[2] Count II charged Respondent with improper disposal of PCBs, in violation of 40 C.F.R. § 761.60(a).[3] Count III charged Respondent with the processing and distribution in commerce of PCBs for purposes of servicing transformers, in violation of 40 C.F.R. § 761.20(e)(3).[4] Count IV charged Respondent with improper storage of PCBs, in violation of 40 C.F.R. § 761.65(b)(1).[5] Finally, Count V charged Respondent with failure to prepare and implement a Spill Prevention Control and Countermeasure Plan, as required by 40 C.F.R. §

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[1] The inspections took place on September 14, 1988, November 2 and 3, 1988, and March 20, 1990.

[2] Complaint at 4-6 (September 27, 1990).

[3] Id. 6.

[4] Id. 6-7.

[5] Id. 7-8.

761.65(c)(7)(ii).[6] The Complaint proposed a total civil penalty of $103,500.00.[7]

Respondent filed an Answer to the Complaint on October 18, 1990, admitting some of the allegations and denying others. In March 1991, the parties completed a prehearing exchange. Subsequent attempts by the parties over an extended period to negotiate a settlement failed to resolve the case. Ultimately on May 27, 1994 Complainant moved for an accelerated decision on liability for the first three Counts and part of the fourth Count of the five-Count Complaint. Respondent did not reply to Complainant's Motion.

Discussion of Complainant's Motion

Procedure in this case is governed by the Agency's Consolidated Rules of Practice, 40 C.F.R. Part 22 ("Consolidated Rules"). Section 22.20(a) of the Consolidated Rules, applying to motions for accelerated decision, provides in pertinent part that:

> The Presiding Officer, upon motion of any party . . . may at any time render an accelerated decision in favor of the complainant or respondent as to all or any part of the proceeding, without further hearing . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

Complainant has moved for an accelerated decision on liability in the manner required by Section 22.20(a). For the reasons set forth below, Complainant is entitled to its accelerated decision on liability for all of the requested charges except for two of the four alleged violations of Count I.

Count I

Count I charged that Respondent violated 40 C.F.R. § 761.20(e)(3) by burning used oil containing quantifiable levels of PCBs in four vehicles:[8] the truck involved in the PCB spill, and two trucks and one tractor that were checked during the subsequent

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[6] Id. 8-9.

[7] Id. 9.

[8] Id. 5, ¶ 26. 40 C.F.R. § 761.20(e)(3) provides that used oil containing any quantifiable levels of PCB may be burned for energy recovery only in "combustion facilities." A motor vehicle's internal combustion engine does not qualify as a "combustion facility." See 40 C.F.R. § 761.20(e)(3), (1).

EPA inspections of Respondent's facilities.[9] As to the truck involved in the spill and the tractor, Respondent in its Answer admitted the allegations.[10] Accordingly, for this truck and the tractor, Complainant is entitled to its requested accelerated decision on liability, since "no genuine issue of material fact exists."

The two trucks inspected at Respondent's facilities are a different story. The basis of the charges involving them is that, in the inspections of Respondent's facilities, it was discovered that they had quantifiable levels of PCBs in their fuel tanks.[11] Respondent, however, denied these charges on the ground that it was unable to determine that the vehicles had ever been started at a time when PCBs were located in their fuel tanks.[12]

To overcome these denials, Complainant's Motion cited two cases, and advanced an argument using their holdings. But neither case sustains Complainant's position.

Complainant cited first In the Matter of Ensco, Inc., Docket No. TSCA-532c, Orders (May 7, 1992). In that case, the complainant was granted an accelerated decision as to liability for the respondent's improper disposition of PCBs, PCB containers, and PCB articles. The respondent's defense, asserted in its second amended answer, was that its PCB disposition occurred in an incineration system approved by EPA. The complainant's rebuttal, in the form of an affidavit by an EPA employee, denied that EPA had approved the system.

In the instant case, Complainant cited Ensco for two propositions. First, Complainant quoted from that decision as follows.

> An accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. Minor factual disputes would not preclude an accelerated decision. Disputed issues must involve "material facts"

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[9] These alleged infractions were designated in the Complaint as Violation 1 for the truck involved in the spill, Violations 2 and 3 for the two trucks inspected at Respondent's facilities, and Violation 4 for the tractor. Complaint at 5, ¶¶ 26-29 (September 27, 1990).

[10] Answer to the Complaint at 4, 5, ¶¶ 26, 29 (October 18, 1990).

[11] Complaint at 5, ¶¶ 27, 28 (September 27, 1990).

[12] Answer to the Complaint at 4, ¶¶ 27, 28 (October 18, 1990); Respondent's Prehearing Exchange at 3, ¶¶ 27, 28 (March 4, 1991).

> or those which have legal probative force as to the controlling issue. A "material fact" is one that makes a difference in the litigation.[13]

This Ensco proposition is true, but unrelated to the issue in the instant case. Here, Respondent has denied that PCBs were ever burned in the two trucks inspected at its facilities. Clearly that denial goes to a material fact in Complainant's case. Nor does Complainant claim otherwise. Thus the quoted Ensco proposition dismissing the significance of "[m]inor factual disputes" has no application to the instant case.

Second, Complainant cited Ensco for the proposition that it is not required to produce evidence to negate Respondent's defense.[14] Ensco, however, does not support this proposition. In Ensco, the complainant did rebut the respondent's defense with an affidavit of an EPA employee. That affidavit was crucial to the complainant's overcoming the Ensco respondent's defense. As stated in Ensco, "Complainant's Reply to Respondent's Opposition to the Motion for an Accelerated Decision is well-documented and persuasive."[15]

In the instant case, by contrast, Complainant offered (in its prehearing exchange) only suggestions as to what evidence it intended to present at a hearing.

> Complainant intends to show at hearing that these trucks were not being merely used for storage, but were indeed run. Both trucks were hooked up to trailers during the inspections, photographs appear to indicate fairly fresh tire tracks in the gravel, and Respondent is known to have run other vehicles with PCBs in the fuel.[16]

This statement of intentions does not merit the weight accorded the affidavit of the EPA employee in Ensco; and the record of these two cases consequently contains this important difference between them.

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[13] Complainant's Memorandum in Support of Complainant's Motion for Accelerated Decision on Liability at § II.A (May 27, 1994).

[14] Complainant's Memorandum, supra note 13, at § II.B (May 27, 1994).

[15] In the Matter of Ensco, Inc., Docket No. TSCA-532c, Orders (May 7, 1992) at 21. Moreover, there is no dicta in Ensco supporting the proposition that the complainant is not required to produce evidence to negate the respondent's defense.

[16] Complainant's Prehearing Exchange (March 5, 1991) at 5, ¶ 4.

The second case cited by Complainant--Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)--comes closer to Complainant's situation here. In Celotex, respondent administratrix (plaintiff in the trial court) filed a wrongful death action against 15 corporations (the defendants), including petitioner, alleging that her husband's death had been caused by exposure to asbestos that they had manufactured or distributed. Petitioner corporation moved for summary judgment, arguing that during discovery respondent had produced no evidence to support her allegation that her husband had been exposed to petitioner's products. Petitioner itself presented no evidence (in the form of affidavits or otherwise) to negate the possibility of such exposure.

The question for the Court was whether petitioner's failure to present evidence negating exposure was fatal to its motion for summary judgment. The Court held that petitioner's motion would lie, notwithstanding such failure.

Complainant cited Celotex as follows.

> In a motion for an accelerated decision, the Complainant is not required to produce evidence to negate Respondent's defenses. The Complainant may discharge its burden of proof for its motion for an accelerated decision by showing there is an absence of evidence to support the Respondent's defenses. Celotex Corp. v. Catrett [citation omitted]. As shown below, Complainant asserts that it meets this burden of proof and Respondent has not produced any evidence to support their defenses and therefore, Complainant is entitled to an accelerated decision on the issue of liability on this matter.[17]

This quotation misinterpreted the holding of Celotex. The key to that case was that respondent administratrix had the burden of proof on the issue of her husband's exposure to petitioner corporation's asbestos. That point becomes clear in the following quotation from the Court's opinion (the Rule 56(c) referred to comes from the Federal Rules of Civil Procedure, and the quotations are from that Rule).

> The plain language of Rule (56c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's

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[17] Complainant's Memorandum, supra note 13, at § II.A.

> case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.[18]

In the instant case, the essential element of the cause of action is whether PCBs were burned in the trucks, and it is Complainant, the moving party, that bears the burden of proof as to this element. Respondent's denial as to such burning creates a genuine issue of a material fact. Complainant's statement of intentions for a hearing fails to eliminate that issue.

Since it is Complainant that has the burden of proof on this element, the Celotex holding does not relieve Complainant from the obligation, in its motion for accelerated decision, to show the absence of any genuine issue of fact regarding this element. Because Complainant's presentation falls short of satisfying that obligation, Complainant's motion is denied for the alleged violations regarding the two trucks that were checked during the EPA inspection of Respondent's facilities.

Count II

Count II of the Complaint charged Respondent with improperly disposing of liquids containing greater than 50 ppm of PCBs at one of its facilities in violation of 40 C.F.R. § 761.60(a).[19] During the September 14, 1988 inspection, samples taken of oil floating on the surface of a siphon pond showed PCB concentrations of 49.6 ppm (EPA's sample) and 80 ppm (Respondent's sample).[20] Respondent admitted these sample readings in its Answer.[21] During remediation efforts, one source of the contamination at the siphon pond was found to be a small tank laying on its side, the contents of which were determined to contain a PCB concentration of 2,200 ppm.[22] Respondent admitted also these facts regarding the small tank in its Answer.[23]

Nevertheless, Respondent denied the allegation in Count II, stating that "the siphon pond was a collection facility which was

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[18] Celotex, 477 U.S. at 322 (emphasis added).

[19] Complaint at 6, ¶ 36.

[20] Complaint at 3, ¶ 14.

[21] Answer to the Complaint at 3, ¶ 14 (October 18, 1990).

[22] Id. at ¶ 15.

[23] Id. ¶ 15.

contained and utilized for the purpose of containing contaminated oil."[24] Respondent contended that, "because of ... [the pond's] nature as a collection facility, it was not being utilized as a disposal facility but rather a storage facility."[25]

Respondent's argument is unpersuasive. While there may be a genuine issue of material fact as to the siphon pond and the conflicting samples, no question exists as to the small tank laying on its side. That tank's allowing some of its contents--of a PCB concentration of 2,200 ppm--to enter the pond clearly constituted improper disposal under 40 C.F.R. § 761.60(a). Neither the tank nor the pond qualified as a facility for storing for disposal PCBs at concentrations of 50 ppm or more.[26] Consequently, Complainant is entitled to an accelerated decision on liability as to Count II of the Complaint.

Count III

Count III of the Complaint alleged that respondent violated 40 C.F.R. § 761.30(a)(2)(vii) by using PCBs drained from electrical equipment to service other electrical equipment.[27] This section of the Regulations provides that "processing and distribution in commerce of PCBs for purposes of servicing transformers is permitted only for persons who are granted an exemption under TSCA Section 6(e)(3)(B)."

Respondent admitted in its prehearing exchange that it violated this regulatory section by using PCBs drained from

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[24] Respondent's Prehearing Exchange at 3-4, ¶ 34 (March 4, 1991).

[25] Id.

[26] Section 761.65 of the Regulations "applies to storage for disposal of PCBs at concentrations of 50 ppm and PCB Items with PCB concentrations of 50 ppm or greater." 40 C.F.R. § 761.65. "Storage for disposal" is defined as "temporary storage of PCBs that have been designated for disposal." 40 C.F.R. § 761.3 (emphasis added). Respondent made no claim, nor does anything in the case file suggest, that either the tank or the pond was so designated.

As a further defense, Respondent stated that it had no knowledge of the existence of the small tank. Answer at 3, ¶ 15. But Respondent's ignorance of the tank is irrelevant, as TSCA is a strict liability statute. In the Matter of Leonard Strandley, TSCA Appeal No. 89-4, Final Decision at 8 (November 25, 1991).

[27] Complaint at 6-7 (September 27, 1990).

electrical equipment to service other electrical equipment.[28] Accordingly, in the language quoted above from Section 22.20(a) of the Agency's Consolidated Rules, "no genuine issue of material fact exists, and ...[Complainant] is entitled to judgment as a matter of law" as to Count III.

Count IV

Count IV charged, as one of its two allegations, that Respondent improperly stored PCBs with a concentration of 71 ppm in an unmarked drum whose origin was unknown, in violation of 40 C.F.R. § 761.65(b)(1).[29] Respondent denied this allegation.[30] Respondent admitted, however, that "during the remediation [of its facility with the siphon pond involved in Count II], a drum of oil containing a PCB concentration of 71 ppm was noted."[31] Respondent added that "[t]his drum's origin was unknown."[32]

Respondent's denial of the charge was based on a contention that "the definitional section of the applicable regulation is an intent to store."[33] Respondent maintained that it had no intent to store, because the origin of the drum found on its facilities was unknown.

But Respondent cited no language in any definitional section to support its contention, nor has any been found. Moreover, as Complainant correctly asserted,[34] TSCA is a strict liability statute. In the Matter of Leonard Strandley, TSCA Appeal No. 89-4, Final Decision at 8 (November 25, 1991). Respondent's intent is therefore irrelevant, and Complainant is entitled to judgment as a matter of law as to this allegation of Count IV.

Discussion of Supplement to Prehearing Exchange

This Ruling and Order clarifies the legal situation of this case, and it may now proceed to hearing. So that the hearing may

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[28] Respondent's Prehearing Exchange at 4, ¶ 39 (March 4, 1991).

[29] Complaint at 7-8 (September 27, 1990).

[30] Answer to the Complaint at 6, ¶ 45 (October 18, 1990).

[31] Id. 3, ¶ 16.

[32] Id.

[33] Respondent's Prehearing Exchange at 4, ¶ 44 (March 4, 1991).

[34] Complainant's Memorandum, supra note 13, at 8.

take advantage of this clarification, the parties are directed to supplement, by June 15, 1995, their prehearing exchanges to accommodate the effect of this Ruling and Order. This direction for a supplement is a prehearing order within the meaning of Section 22.17(a) of the Agency's Consolidated Rules; accordingly, failure to comply may result in a default order against the noncomplying party, pursuant to Section 22.17.

RULING AND ORDER

Complainant's Motion for Accelerated Decision on Liability is granted for Count I as to the truck involved in the PCB spill and as to the tractor, for Count II, for Count III, and for Count IV as to the unmarked drum. Complainant's Motion is denied for Count I as to the two trucks that were checked at Respondent's facilities.

The parties are directed to supplement their prehearing exchanges by June 15, 1995 to adjust them to the effect of this Ruling and Order.

Thomas W. Hoya
Administrative Law Judge

Dated: April 24, 1995

IN THE MATTER OF JIMELCO, INC, Respondent,
Docket No. TSCA-VI-478C

Certificate of Service

I certify that the foregoing **Ruling on Complainant's Motion For Accelerated Decision Order For Supplement To Prehearing Exchange**, dated April 28, 1995, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Ms. Lorena S. Vaugh
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region VI
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Regular Mail to:

Counsel for Complainant:

Sherry L. Brown, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region VI
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Certified Mail, Return Receipt to:

Counsel for Respondent:

Richard Priest
Registered Agent for Jimelco, Inc.
215 S. Redmond Road
Jacksonville, Arkansas 72076

Maria Whiting
Legal Staff Assistant

Dated: April 28, 1995