12/30/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Jeffrey Springer d/b/a Aable Termite & Pest Control,	)	**IF&R Dkt. No. VII-1120C-91P**
Respondent	)	

Federal Insecticide, Fungicide, and Rodenticide Act -- Accelerated Decision, Pre-Litigation Admissions -- Where parties cross moved for accelerated decision, Complainant's motion was denied because Respondent was not conclusively bound by his pre-litigation admissions, and Respondent's motion was denied because the record lacked sufficient evidence to support it.

Appearances

For Complainant:
Henry F. Rompage, Esq.
Assistant Regional Counsel
Region VII
U.S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent:
Mr. Jeffrey Springer (pro se)
Aable Termite & Pest Control
6710 N.W. Timberline Drive
Des Moines, Iowa 50313

Before

Thomas W. Hoya
Administrative Law Judge

RULING DENYING MOTIONS FOR ACCELERATED DECISION

This Ruling denies motions for accelerated decision filed both by Complainant--the Director of the Air and Toxics Division, Region VII, U.S. Environmental Protection Agency--and by Respondent--Jeffrey Springer, doing business as Aable Termite and Pest Control. Complainant initiated this proceeding by issuing a September 10, 1991 complaint under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. §§ 136-136y ("the Act").

Respondent is a Des Moines, Iowa pest control firm. This case grew out of an application by Respondent of the pesticide Safrotin in a State of Iowa office building in Des Moines, Iowa. The application occurred on Friday afternoon, October 12, 1990; and the following Monday several employees said that over the weekend they had felt nauseous. These employee statements prompted Iowa officials to investigate the incident.

As a result of that investigation, Complainant charged Respondent with applying Safrotin in a manner inconsistent with its labeling in two respects, each such inconsistency violating Section 12(a)(2)(G) of the Act, 7 U.S.C. § 136j(a)(2)(G). The complaint charged that Respondent applied the pesticide using a 1 percent solution, rather than the 0.5 percent solution prescribed by the label, and that Respondent applied the pesticide while State employees were present in the area, contrary to label directions. For these alleged violations, the complaint proposed a $5,000 civil penalty.

Respondent filed a September 20, 1991 pro se "Answer and Motion for Summary Judgment with Prejudice Based Upon Submittals." Procedure for this case is governed by the Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 C.F.R. Part 22). These Consolidated Rules contain no provision for a summary judgment.

Section 22.20 of the Consolidated Rules (40 C.F.R. § 22.20), however, provides for an accelerated decision, which is essentially like a summary judgment, such as a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In general, justice is better served when a motion is reviewed on its merits, rather than when it is resolved on procedural grounds turning on legal nomenclature. To achieve that objective of justice here, Respondent's motion will be treated as a motion for accelerated decision under the Agency's Consolidated Rules.

Two other factors relate to this treatment of Respondent's motion. First, Respondent is appearing pro se, and thus may legitimately be accorded special consideration in matters of legal

nomenclature.[1] Second, treating Respondent's motion as a request for an accelerated decision works no significant hardship on Complainant, because Complainant filed a reply that acknowledged the problem of nomenclature and addressed Respondent's motion as though it were a request for an accelerated decision. Complainant itself then moved for an accelerated decision to declare that Respondent violated the Act in each of the two respects charged in the complaint.

Discussion

To succeed, a motion for accelerated decision must establish, in the words of Section 22.20(a) of the Consolidated Rules, that "no genuine issue of material fact exists." Neither Complainant's nor Respondent's motion meets that test.

Complainant's Motion re Excessive Concentration

The effort that comes closest to succeeding is Complainant's motion to declare that Respondent violated the Act by applying Safrotin against fleas with a 1 percent solution, rather than the 0.5 percent solution directed by the label for fleas. The record does contain statements by Respondent to support both the 1 percent solution point and the point regarding fleas. But Respondent's answer and motion contain also statements that challenge both these points sufficiently to create a "genuine issue of material fact" regarding both.

As to the 1 percent solution, Respondent stated, in an October 24, 1990 affidavit,[2] that he had used that concentration, and stated in his answer and motion (at 3) that he "had ... been ...using ... [a] 1% mix solution [in state buildings]...." But he also stated twice in his answer and motion (at 2, 3) that the concentration for the Safrotin application in question here "was less than 1%."

The legal effect of these various statements by Respondent is that there still exists a "genuine issue of material fact" as to the concentration of the solution used. The statement in the affidavit is not conclusive against Respondent; like pre-litigation

---

[1] See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se pleadings, "however inartfully drafted," must be held to "less stringent standards than formal pleadings drafted by lawyers").

[2] Complainant's Response to Respondent's Motion for Summary Judgment (Accelerated Decision) and Complainant's Motion for Accelerated Decision (October 7, 1991), Exhibit 6.

admissions generally, it is simply a piece of evidence to be weighed along with all the other evidence.[3]

The statements in Respondent's pro se answer and motion, on the other hand, are judicial admissions made during the course of this case. As such, they are conclusive against Respondent.[4] But the exact meaning of the above quoted statements of "1%" and "less than 1%" is too unclear to say that they establish, beyond any "genuine issue of material fact," that the concentration used by Respondent exceeded 0.5 percent.[5]

For Complainant's motion regarding excessive concentration of Safrotin to succeed, the record must also establish that Respondent was applying the Safrotin against fleas. The reason is that, although the label concentration is 0.5 percent for fleas, it is 1 percent for cockroaches. Therefore, if Respondent was treating the state office for cockroaches, his application of Safrotin was consistent with label directions even if he did use a 1 percent solution.

On this point, there is significant evidence that Respondent was treating for fleas. Two affidavits signed by Respondent[6] and an affidavit signed by two employees of the office that was

---

[3] In the Matter of Marcal Paper Mills, Inc., Docket No. II-TSCA-PCB-91-0110, Order Granting in Part Motion for Accelerated Decision (April 20, 1993)(pre-litigation statements are non-judicial admissions, which may be rebutted); In the Matter of Kaw Valley, Inc., IF&R Docket No. VII-1076C-91P, Order Denying Motion for Partial Accelerated Decision (April 28, 1993)(same); In the Matter of Caschem, Inc., Docket No. II-TSCA-PMN-89-0106, Order upon Cross-Motions for Partial Accelerated Decision (October 30, 1992) at 9 n.14 (same).

[4] 9 Wigmore, Evidence §§ 2588, 2589, 2590 (Chadbourn rev. 1981).

[5] One other piece of evidence was an inspection report prepared by a State of Iowa official that stated that a 1 percent solution had been used. Complainant's Response and Motion, supra note 2, Exhibit 5, at 2. This 1 percent figure was based on information obtained from Respondent. At any rate, this report is apparently, like Respondent's October 24, 1990 affidavit, a pre-litigation admission that Respondent is entitled to dispute. Complainant did not cite this report as a basis for its motion for accelerated decision. See Complainant's Response and Motion, supra note 2, at 9-10.

[6] Complainant's Response and Motion, supra note 2, Exhibits 6, 7.

treated[7] so state, as does an invoice prepared by Respondent.[8] In addition, an affidavit signed by the government purchasing agent who telephoned Respondent to request the treatment states that "the employees had complained about a problem with fleas."[9] But all these documents are simply pre-litigation admissions and other evidence that Respondent is entitled to dispute.

Respondent did attach to his answer and motion one of his own affidavits.[10] That attachment makes the affidavit a part of Respondent's filing in this case[11] and thus possibly a judicial admission, conclusive against him. But apparently Respondent attached the affidavit, not to affirm it, but for the purpose of disputing it in its status as a pre-litigation admission, as he is entitled to do.

Apparently to register this dispute, Respondent discussed his affidavit in the excerpt quoted below from his pro se answer and motion. The exact meaning of this excerpt is unclear. But it can reasonably be read as explaining that Respondent's statement to the investigator that he had been treating for fleas was simply a mistake, because he had in fact been treating for German cockroaches, as in other state buildings. Respondent spoke of the affidavit as follows.

> Aabel [sic] Pest control was in agreements with the state of Iowa to treat the state buildings on a [sic] ongoing basis. Our major problem the the [sic] state buildings is a german roach control problem. We had at the time of Complaint been treating for german roaches and using the material SAFROTIN at the 1% mix solution which is withen [sic] lable [sic] rights. This is were [sic] I made my mistake in reporting to the investigator if I would have said that I was treating for roaches I would not be writing this response to you.[12]

---

[7] Complainant's Response and Motion, supra note 2, Exhibit 1.

[8] Service invoice for services provided by Aable Pest Control to the Department of Employment Services.

[9] Complainant's Response and Motion, supra note 2, Exhibit 4.

[10] The October 24, 1990 affidavit. See supra note 2 and accompanying text.

[11] See Fed. R. Civ. P. 10(c).

[12] Respondent's Answer and Motion for Summary Judgment with Prejudice (September 20, 1991) at 3.

In sum, on the point of whether Respondent was treating for fleas or for cockroaches, there exists a "genuine issue of material fact." The above quoted excerpt from Respondent's answer and motion can be read as disputing his own pre-litigation admissions. In light of that dispute by Respondent, the affidavits of the state employees do not establish the point beyond a "genuine issue."

Consequently, Complainant's motion for an accelerated decision regarding an excessive concentration of Safrotin is denied. The record is factually unclear as to both the concentration of the mixture actually used and also as to whether the treatment was for fleas or for cockroaches.

Complainant's Motion re Persons Present During Treatment

The second possible ground for granting Complainant's motion for an accelerated decision would be the charge that Respondent applied the Safrotin in the presence of office employees, contrary to label directions that nobody be in the sprayed area until the pesticide had dried. Supporting Complainant's position were two affidavits[13] of office employees stating that employees were present during the spraying.

Respondent in his answer and motion, however, disputed these affidavits. The answer and motion asserted that arrangements had been made for no employees to be present in the treated area when the Safrotin was applied, that no employees were in fact present then, and that, if anybody later entered the area before the Safrotin had dried, it was a matter that had been under the control of the state office. These assertions by Respondent create a "genuine issue of material fact" on this point, as Complainant itself conceded in its motion.[14] Hence Complainant's motion for accelerated decision cannot be granted for the charge that persons were present during the application of Safrotin.

Respondent's Motion

Respondent's answer and motion advanced various arguments, and concluded by requesting a summary judgment. Three of the arguments were those noted above: that the concentration of Safrotin used was less than 1 percent; that the treatment was for cockroaches; and that nobody was present during the application. These arguments were mere assertions by Respondent. As such, they are enough to put in issue the contrary contentions by Complainant. But, lacking as they do any corroboration in the record, they are insufficient to disprove Complainant's evidence and thus justify an accelerated decision for Respondent.

---

[13] Complainant's Response and Motion, supra note 2, Exhibits 2, 3.

[14] Complainant's Response and Motion, supra note 2, at 8-9.

Respondent put forward also other arguments: that no medical care was required or work lost in consequence of Respondent's actions; that the complaint incorrectly evaluated Respondent's financial condition in proposing a civil penalty; and that the inspector's report was inaccurate in certain respects. The arguments regarding no medical care or work lost and regarding Respondent's financial condition relate only to the amount of any sanction that would be appropriate if a violation is found; they are irrelevant to the question of whether a violation was committed. The argument regarding the inspector's report could possibly show that the concentration of Safrotin used was permissible for fleas as well as cockroaches, but Respondent's arguments failed to rebut the report anywhere near that effectively. Hence there is no basis in the record for granting Respondent's motion for accelerated decision.

Settlement

Since Respondent filed his motion together with his answer, the parties may have had little chance to explore the possibilities for settlement. The parties now have the benefit of Complainant's extensive filings in reply to Respondent's motion and in making its own motion, and the benefit of this Ruling for some aspects of the case.

Therefore the parties will be directed to discuss settlement with each other, and Complainant will be directed to report the status of these discussions. The Agency's policy regarding settlement is set forth in Section 22.18(a) of the Consolidated Rules of Practice (40 C.F.R. § 22.18(a)).

Order

Respondent's motion for accelerated decision is denied. Complainant's motion for accelerated decision also is denied.

The parties are directed to discuss settlement with each other. Complainant is directed to report by February 15, 1995 on the status of their discussions.

Thomas W. Hoya
Administrative Law Judge

Dated: December 20, 1994

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on December 30, 1994.

Shirley Smith for

Maria Whiting
Legal Staff Assistant
for Judge Thomas W. Hoya

NAME OF RESPONDENT: **Jeffrey Springer d/b/a Aable Termite & Pest Control**
DOCKET NUMBER: **IF&R-VII-1120C-91P**

Ms. Venessa Cobbs
Regional Hearing Clerk
Region VII - EPA
726 Minnesota Avenue
Kansas City, KS 66101

Henry F. Rompage, Esq.
Assistant Regional Counsel
Region VII - EPA
726 Minnesota Avenue
Kansas City, KS 66101

Mr. Jeffrey Springer (pro se)
Aable Termite & Pest Control
6710 N.W. Timberline Drive
Des Moines, Iowa 50313