

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
CAVCO INDUSTRIES, L.L.C.,) DOCKET NO. EPCRA-9-2000-0018
)
RESPONDENT)

ORDER DENYING RESPONDENT’S MOTION FOR ACCELERATED DECISION

In this proceeding under Section 325(c) of the Emergency Planning and Community Right-To-Know Act (“EPCRA” or “Act”), 42 U.S.C. §§ 11011 et seq., the Respondent is charged with having violated the Act on eight separate occasions by having failed to timely file Form Rs for three of its facilities.

On January 8, 2001, Respondent filed a Motion for Accelerated Decision on the issue of the appropriate penalty.¹ The Respondent claimed that it was entitled to file the alternate Form A, in lieu of Form R, since it met the necessary requirements as set forth in 40 C.F.R. § 372.27. It pointed out that the “Enforcement Response Policy for Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act (1990),” as issued by the EPA on August 10, 1992, (“ERP”), does not mention Form As, but refers only to a failure to timely file a Form R. Respondent’s Motion For Accelerated Decision at 6. The Respondent went on to claim that the Complainant’s use of the ERP in this case was therefore improper, and asked for an accelerated decision that the ERP was inapplicable to the Respondent’s failure to file a Form A.

In the alternative, assuming that the ERP is found to apply to the case at hand, the Respondent asks for an accelerated decision, stating that the minimal amount of the reportable

¹The Respondent also moved for Partial Accelerated Decision as to liability at that time, but the issues raised by the Respondent regarding the deficiencies of the Complaint have been addressed in my previous order Granting Leave to Amend the Complaint, .

substance actually released warranted a deviation from the ERP in this case, as such deviations are within the discretion of the trial judge. Respondent's Motion For Accelerated Decision at 8. Respondent further stated that strict application of the ERP in this case would be inconsistent with the ERP's stated purpose of ensuring "that enforcement actions for violations of EPCRA § 313 ... are arrived at in a fair, uniform, and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations." Respondent's Motion, pg. 8 (citing ERP at 1). The Respondent contends that the application of the ERP in this case would result in an unfair and inappropriate penalty.² Respondent's Motion, at 8-9.

In response³, Complainant alleges that the Form R and Form A both fulfill the same obligation to report under § 313 of EPCRA, and that Form A is merely a more convenient substitute version of Form R. Complainant's Response to Respondent's Motion For Accelerated Decision, at 9. The Complainant asserts that Respondent mischaracterizes the reporting obligations by asserting that "Cavco was required to submit Form As, not Form Rs, for the

²Respondent also argues that the penalty is inconsistent with penalties assessed for other similar violations, citing one case, *Catalina Yachts v. EPA*, 2000 WL 1268784. Respondent's Motion, pg. 9. However, due to the highly fact-specific nature of penalty determination, the comparison of penalties generally may not be used to show the inappropriateness of a penalty, and may only be used to demonstrate abuse of discretion when the cases have substantial identity. See, e.g., *Briggs and Stratton Corporation*, 1 E.A.D. 653 (EAB 1981); *Chatauqua Hardware Corporation*, 3 E.A.D. 616 (EAB 1991); *Titan Wheel Corporation of Iowa*, 2000 EPA ALJ LEXIS 91. Since the motion is unclear as to whether the Respondent is merely claiming that the penalty is inappropriate or that it constitutes an abuse of discretion, and insufficient facts were provided to determine the factual similarities of the cases, this argument is rejected at this time.

³During a conference call with the parties, the Court made inquiry as to whether EPA filed a timely response to Respondent's Motion. With the Respondent's Motion filed on January 8, 2001 and EPA's Response not file until February 5, 2001, the filing was, by any measure under the procedural rules, late filed. Complainant's Counsel submitted a letter to the Court regarding this issue on June 21, 2001. Although the letter raises points about the nature of the Respondent's Motion and a host of other topics, including the assertion that EPA Counsel and Respondent's Counsel *agreed* that no response would be due from EPA until February 5th, it does not deny that the Response was late filed under the procedural rules. It concerns the Court that Counsel for EPA appears to suggest that the parties could agree between themselves for an extension for responses to motions without the Court's approval. The wiser course of action when deadlines are missed is for the tardy party to admit error and seek the Court's indulgence and acceptance of a late response. If not part of a pattern, the Court is inclined in many instances to allow relief from such a lapse. Here, Respondent did not voice an objection to consideration of the late response from EPA. With the admonition that, in the future, filing dates are to be met, the Court has decided to consider EPA's Response in this instance.

years in question.” Complainant’s Response, at 10 (quoting Respondents’ Motion at 6). Rather, EPA restates the Respondent’s obligation as a duty to file Form Rs although, potentially, one could choose to meet that requirement by filing, in the alternative, the Form A. Complainant’s Response, at 9-10. Complainant further asserts that, as the Form A is available merely as a substitute for the Form R, all references to Form R in the ERP apply equally to Form A. Complainant’s Response at 11. Complainant also declares that the ERP had in fact been revised to specifically include Form As, by virtue of an internal memorandum issued on March 17, 1997. Complainant’s Response, at 9.

In response to the Respondent’s alternative argument that the circumstances of the case warrant a deviation from the ERP, Complainant responds that although such a decision is within the Administrative Law Judge’s discretion, the circumstances in this case do not justify such a deviation. Complainant’s Response at 13-14. The Complainant notes that the reporting duty imposed by EPCRA § 313 does not depend upon the amount of toxic chemical released, but upon whether the toxic chemical threshold has been met. Since the regulation defines the toxic chemical threshold in terms of the amount used, manufactured, or processed, the issue of the amount released is inapplicable. Complainant also cites case law in support of the proposition that reporting failures are significant violations in their own right, and thus are entitled to significant penalties. Complainant’s Response at 14.

In its reply, the Respondent notes that the Complainant cited no authority for its claim that all references to Form R in the ERP apply equally to Form A. Respondent’s Reply at 3-4. Respondent reiterates that EPA’s statements and citations, regarding the ability to substitute Form R with Form A, do not affect the fact that the ERP does not address the situation of persons who are entitled to file a Form A. Respondent’s Reply at 3. The Respondent further states that the internal memorandum cited by the EPA as an authority for applying the ERP to Form A was not made available to the public, and contrary to the statement contained within the memorandum, the ERP itself was not revised to reflect this policy, and therefore remain inapplicable. Id.

Standard of Review

Section 22.20 of the Rules of Procedure provides that

“[t]he Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, 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.”

This standard for granting accelerated decision is equivalent to the standard for summary judgment under the Federal Rules of Civil Procedure. Chem Lab Products, Inc., 2001 EPA ALJ LEXIS 10. The moving party has the burden of demonstrating that there are no genuine issues of material fact; i.e., no factual issues capable of altering the outcome of the case that a reasonable trier of fact could find in the non-moving party's favor. This burden can be difficult to meet, since the evidence must be viewed in the light most favorable to the non-moving party. Kaw Valley, Inc. v. Environmental Protection Agency, 844 F. Supp. 705, 707 (D. Kan. 1994). However, once the moving party has met that initial burden, the non-moving party may not refute it by "mere allegations or denials of pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Upon consideration, the Court rejects Respondent's assertion that, because it was only obligated to file Form A, allegations of a failure to file a Form R are immaterial. Filings of Form A are only a potential alternative means of complying with the reporting obligation, an alternative for which a Respondent has the burden of demonstrating the applicability of its provisions. Although the Court agrees with the Respondent's assessment of the grounds on which an Administrative Law judge may depart from the ERP, the Court considers it prudent to defer its ruling until after the hearing testimony and post-hearing briefs have been considered.

Accordingly, Respondent's Motion for Accelerated Decision regarding the applicability of the ERP is, at this time, DENIED. **The Court also advises the parties that no further motions may be filed after July 10, 2001. Any motions filed by the deadline are to be sent to the Court by facsimile or next-day delivery.**

William B. Moran
United States Administrative Law Judge

Dated: July 2, 2001
Washington, DC