

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: New England Paint Mfg. Co., Inc.
AAD No. 08-001/AGE
Notice of Violation M 3008
December 2010

DECISION AND ORDER

This matter came on before Hearing Officer David Kerins for Administrative Hearing on July 27, 2010 on the appeal of New England Paint Mfg. Co., Inc. ("New England" or "Respondent"). New England filed its notice of appeal on December 17, 2008 from a Notice of Violation ("NOV") dated September 18, 2007 and forwarded to New England by letter dated December 1, 2008. At the Administrative Hearing the Division of Agriculture ("Division") was represented by Susan Forcier, Esq. and the Respondent was represented by Michael F. Horan, Esq. The parties filed post hearing Memoranda on November 8, 2010 followed one week later by Reply Memoranda.

SUMMARY OF HEARING

The Division presented one witness in support of its case, Steven Scandariato. Mr. Scandariato testified that he has been employed as a senior plant pathologist for the Division for eleven (11) years. He is familiar with the laws of the State of Rhode Island relating to pesticides and does most of the inspections. He testified that a pesticide producer in Rhode Island must have both an U.S. Environmental Protection Agency ("E.P.A.") and state establishment registration number. A pesticide producer must also register each pesticide product with the E.P.A. and state. The producer number and product number are required on all pesticide product labels. Mr. Scandariato testified that he conducted two inspections at New England. The first inspection was on September 2, 2008. He visited New England's paint store in Central Falls, checking to see if they had bottom coat paint in their inventory. He said that the division considers bottom coat paint, which is used on the hulls of boats, as a pesticide and that many paint stores sell it. Mr. Scandariato testified that during his inspection he observed what he considered as improperly labeled bottom coat paint. He said that the label on the bottom coat paint failed to display the proper pesticide establishment registration number or product registration number. Mr. Scandariato identified a document entitled "Notice of Inspection" and dated September 2, 2008 which was marked, without objection, as Div. Exhibit # 3 Full. Mr. Scandariato testified that he returned to New England on September 4, 2008 for a follow up inspection. He identified Division's Exhibit # 7 as a Notice of Inspection relative to the September 4, 2008 visit to New England and the document was entered as a full exhibit. At that time Mr. Scandariato collected evidence including photographs and a label from one of the suspected cans. He left a receipt of samples with New England and compiled an inventory list. He identified a document as a "receipt for samples" which was entered as Division's Exhibit # 4 Full. He also identified a hand written document as an "inventory list" which was entered as Division's Exhibit # 8 Full. Mr. Scandariato next was shown and identified a copy of a label from a can of New England Paint for anti-fouling bottom coat paint. The label showed an E.P.A. # 59938 and a notation "contains 40% Copper Oxide". This document was marked as Division's Exhibit # 9 Full. The witness next identified a group of three (3) photographs of a paint can at New England on September 4, 2008. This document was entered into evidence as Division's Exhibit # 10 Full. Mr. Scandariato testified that he collected several documents during his September 4, 2008 inspection at New England. He identified one document as a letter from New England to the U.S. E.P.A. Office of Pesticides Programs dated September 28, 1994. This document which requested

an OPP Pesticides Number was marked and entered as Division's Exhibit # 1 Full. The witness next identified a document from the U.S. E.P.A. Office of Prevention, Pesticides and Toxic Substances to New England dated October 6, 1994. This document which assigned a company number/ distributor number to New England of 59938 was marked and entered as Division's Exhibit # 2 Full.

Mr. Scandariato testified that he issued a "Stop Sale, Use or Removal Order" on September 4, 2008. That document was identified and marked as Division's Exhibit # 5 Full. He advised that the bottom coat paint was removed from the shelf, shrink wrapped, tagged and moved to rear of the store. The witness next identified a document as an "Establishment Inspection Report" dated September 4, 2008 which was marked and entered as Division's Exhibit # 4 Full. The witness next identified a document as a "Collection Report" for documentary evidence and this document was marked and entered into evidence as Division's Exhibit # 12 Full.

Witness Scandariato identified a document from the data base of the Division which appears to be the registration of Kop-Coat, Inc. of a pesticide product "Pettit Anti-Fouling Copper Bronze Color 1933". This document was marked and entered into evidence as Division's Exhibit # 13 Full. The witness next identified a document as a pesticide registration record and in which producer Sherwin Williams Company identifies a product "Seaguard Ablative Anti-fouling Coating" which contains cuprous oxide. This document was marked and entered into evidence as Division's Exhibit # 14 Full.

Mr. Scandariato testified that he participated in the preparation of the NOV. He provided information and answered questions of the preparer of the NOV, Kenneth D. Ayars. He said that he had no role in the determination of the Administrative Penalty. He reviewed the NOV before issuance and determined that it was accurate.

On cross examination Mr. Scandariato briefly reviewed his educational background and experience with the Division. He said that he does all the pesticide producer inspections and does two (2) producer establishment inspections a year. He said that there are 7-9 pesticide producer establishments registered in Rhode Island. In September of 2008 the Respondent was not registered with the state as a pesticide producer or market place and his inspection of New England was a random selection.

Witness Scandariato identified a document as a "Report to E.P.A." dated September 10, 2008. This document was marked and entered into evidence as Respondent's Exhibit # 1 Full. He described the exhibit as a narrative to E.P.A. Region 1 from which he received no written response. The witness identified a certificate of Assay from American Chemet dated 4/14/08 relative to a product "LoLo Tint 97" shipped to New England Paint. The document was marked and entered into evidence as Respondent's Exhibit # 2 Full. An invoice from American Chemet to Respondent dated 4/14/08 was identified by the witness as a document obtained by him on September 4, 2008 at New England Paint. This document was marked and entered into evidence as Respondent's Exhibit # 3 Full.

The witness was next shown a document which he identified as part of records taken from New England on September 4, 2008. It is entitled US E.P.A. Pesticide Report for Pesticide- Producing and Devise-Producing Establishments. The document was marked and entered into evidence as Respondent's Exhibit # 4 Full. Mr. Scandariato testified that the number listed on Respondent's Exhibit # 4 Full is not New England's E.P.A. registered producer number. The E.P.A. told him that there was some confusion but the issue was never resolved with the E.P.A.

Witness Scandariato expressed his understanding of the definition of the words "Pesticide" and "Pests". The label was mislabeled because it didn't contain the E.P.A. and State registered product number and because it failed to identify the pest. He said the pest is a barnacle or marine micro organism. He doesn't know if a barnacle is a "shellfish".

Witness Scandariato testified that the label indicated that the paint contained 40% copper oxide but didn't take a sample for testing. The Respondent didn't voluntarily give a sample and he didn't

exercise the Department's power to obtain a sample. He acknowledged that he was not certain what was in the paint. After a brief redirect and re-cross the state rested.

The Respondent presented Steve Main as its only witness. He advised that he is a co-owner of New England. He said that he was present at the store during the inspections on September 2 and 4 of 2008. He identified a paint can label which was marked and entered into evidence as Respondent's Exhibit # 5 Full. He said that the label contained an E.P.A. registration number 59938 that they received in 1994. He was unaware of the fact that a Rhode Island registration number was required. He prepared the paint which contained 40% copper oxide which creates an anti-fouling bottom coat used to prevent barnacles. He said that the copper oxide doesn't kill the barnacles but they will not adhere to the hull. He said that he doesn't think that a barnacle is a pest.

Mr. Main identified certain tax documents which were marked and entered into evidence as Respondent's Exhibit # 7 Full. The 2009 tax returns show a loss. He has been required to obtain a sixty thousand (\$60,000.00) dollar line of credit. A document was identified as evidence of the line of credit which was marked and entered into evidence as Respondent's Exhibit # 8 Full. The Division conducted a brief cross examination of Mr. Main. He acknowledged that he requested and obtained a pesticide number from the E.P.A. so that he could sell bottom coat paint. Mr. Main was questioned by use of Division's Exhibit # 2 Full. He said he has been making anti-fouling paint since 1994 and put the E.P.A. number on the label because he had it. He said that he hasn't sold any more bottom coat paint since the batch he made in April, 2008. He has not attempted to obtain a state registration number since the Stop Order. Upon the completion of the cross examination the Respondent rested. An appendix is attached hereto which lists all exhibits entered into evidence.

Analysis

The authority of the Division to regulate the use of pesticides is established in the Rhode Island Pesticide Act, R.I.G.L. § 23-25-1 et seq. Section 9 of chapter 25 directs the Director of the Department of Environmental Management (“DEM”) to establish rules and regulations. On October 19, 2006 DEM adopted the “Rules and Regulations Relating to Pesticides.” (“Regulations”)

The NOV, Division's Exhibit # 6 Full, alleged the following violations against Respondent:

Violation 1: Pursuant to R.I. General Laws § 23-25-5 (2) (i) of The Rhode Island Pesticide Control Act States that a pesticide is misbranded if the labeling does not contain a statement of the EPA use classification under which the product is registered. Your labeling does not contain a statement of the EPA use under which the product is registered and is a violation of this section of the law.

Violation 2: Pursuant to R.I. General Laws § 23-25-5 (2) (iii) (F) of The Rhode Island Pesticide Control Act states that a pesticide is misbranded if the label does not bear the EPA registration number assigned to each establishment in which it was produced and the EPA registration number assigned to the pesticide, if required by regulation under FIFRA. Your labeling does not bear an EPA registration number and is a violation of this law.

Violation 3: Pursuant to R.I. General Laws § 23-25-5 (2) (v) of The Rhode Island Pesticide Control Act states that a pesticide is misbranded if the pesticide container does not bear a registered label. Your pesticide container does not bear a registered label and is a violation of this law

Violation 4: Pursuant to R.I. General Laws § 23-25-6 (a) every pesticide which is distributed in the State of Rhode Island shall be registered with the director subject to the provisions of this chapter. The pesticides you offered for sale were not registered with the state of Rhode Island. This is a violation of this law.

The first question which needs to be answered is; “Was the anti-fouling bottom coat paint produced and sold by the Respondent a ‘pesticide’ under the statutes and regulations?.”

R.I.G.L. § 23-25-4 Definitions subsection (20) states “‘Pesticide’ means: (i) Any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest”. Subsection (19) states “‘Pest’ means: (i) Any insect, rodent, nematode, fungus, or weed; and (ii) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living humans or other living animals) which the Director declares to be a pest under § 23-25-9 (a) (i).”

The State of Rhode Island by reference establishes specific pesticides in Rule 5 (A) of the regulations to the “Restricted Use” Pesticides classified by the administrator of E.P.A. under 7 USC 136 (a) Sec. 3 (d) (1). Under this section “cuprous oxide” is specifically listed as a pesticide with an active ingredient in “antifouling paint”. Mr. Scandariato testified that “copper oxide” and “cuprous oxide” are the same thing. It is clear that under the provisions of the Regulations that anti-fouling paint which contains copper oxide is a pesticide. The Respondent raises the issue that the bottom coat paint found at the Respondent's place of business was not analyzed and therefore the Division cannot prove what was in the paint. The Respondent's witness Mr. Main acknowledges, however, that he prepared the paint with copper oxide to create anti-fouling bottom coat which is used to prevent barnacles. In addition the labels on the paint cans indicate that it “contains 40% Copper Oxide”.

The Respondent registered with the E.P.A. as an establishment distributing pesticides and displays its establishment number on its paint labels. The Respondent's witness testified that they did not know that they needed to register as an establishment with the state or register its pesticide products with the E.P.A. and state. The Rhode Island Pesticide Control Act and the regulations required that New England register with the E.P.A. and state and obtain an establishment and product number. These registration numbers are required to be displayed on the paint label. Failure to fully register and display registration information on the paint labels is a violation of both state and Federal law. The Division has sustained its burden by a preponderance of the evidence that the Respondent has violated the Rhode Island Pesticide Control Act as alleged in the NOV. The remaining question is “Was the Administrative Penalty calculated in accordance with statutory and regulatory authority?”

The Administrative Penalty was included in the record as part of the NOV (Division's Exhibit # 6 Full). The total penalty assessed against the Respondent in the NOV was Twelve Thousand (\$12,000.00) Dollars. The Division did not produce any witness to testify about the calculation of the Administrative Penalty. The only witness presented by the Division, Mr. Scandariato, testified that he participated in the preparation of the NOV in an indirect way by answering questions from Eugene Pepper. He had no role in the determination of the penalty. The NOV was authored by Kenneth D. Ayars, Chief of the Division of Agriculture, who did not testify. The Division, in its Prehearing Memorandum, identified Eugene Pepper who would “testify as to the calculation of the penalty in the Notice of Violation and the DEM Penalty Regulations”. Mr. Pepper did not testify.

In its Post Hearing Memorandum the Division argues at page 20 that “the administrative penalty was assessed in accordance with the Penalty Regulations, and the Division has established, in evidence, by a preponderance of the evidence that this is the case. The penalty amount and its calculations were established in evidence through the introduction of a copy of the NOV with attached Penalty Summary and Penalty Matrix Worksheets, as well as the testimony of Mr. Scandariato”.

The Division refers to Rule 12 (c) of the Penalty Regulations for the proposition that once it establishes the violations it has no obligation to present evidence on the penalty. The Division cites In re: Richard Fickett, AAD No. 93-014/GWE as precedent in support of its position. Fickett, however, does not support the Division's position but stands for the proposition that the

Division must present some evidence relating to the penalty and the calculation thereof. (A copy of Fickett is annexed hereto for reference as Appendix B).

Fickett at pages 7 and 8 states “Specifically, once the Division discharges its initial duty to establish in evidence the penalty amount and its calculation, Section 12 (c) shifts the burden of proof to the Respondent 1) to produce evidence of record and 2) to bear the burden of persuasion that the Director failed to assess the penalty and economic benefit portion of the penalty in accordance with the Penalty Regulations”.

In Fickett the Hearing Officer referred to the requirements of the Administrative Procedures Act (“APA”) for the proposition that a decision must be based on evidence and matters officially noticed. Pleadings are part of the administrative record but are not evidence. The NOV is part of the record as a pleading but is not evidence of the facts which it contains. The Hearing Officer in Fickett states at page 8 “In the present matter the hearing record is bereft of evidence of an administrative penalty. Since the APA provides that findings of fact must be based exclusively on the evidence and matters officially noticed, the absence of evidence concerning the administrative penalty precluded the necessary factual findings to uphold the assessment of the administrative penalty”.

The Division has not presented any evidence that the Administrative Penalty has been calculated in accordance with the Regulations. Only testimony by a witness with knowledge and experience in the application of the Regulation can be considered in evidence. The Regulations specify numerous factors to be considered in the calculation of the penalty. The Hearing Officer cannot be expected to determine if the Administrative Penalty was properly calculated without the testimony of a competent witness.

Conclusion

In conclusion, the Division has met its burden by a preponderance of the evidence that the bottom coat anti-fouling paint produced and sold by the Respondent is a pesticide. The Division has met its burden that the Respondent has not registered as a pesticide producing establishment with the State of Rhode Island. The Division has met its burden of proof that the Respondent has mislabeled the pesticide product by not displaying a proper pesticide producing establishment number or product number. Finally, the Division has failed to introduce any evidence that the Administrative Penalty was calculated in accordance with the Regulations and therefore no penalty will be sustained.

FINDINGS OF FACT

After consideration of the documentary and testimonial evidence of record I find as fact the following:

1. The Respondent New England Paint Manufacturing Company, Inc. (“New England”) is the owner of premises located at 51 Higginson Avenue, Central Falls, RI (“premises”).
2. On September 2, 2008, Steven Scandariato, Senior Plant Pathologist for the Rhode Island Department of Environmental Management (“DEM”) conducted a routine market place inspection at Respondent's premises.
3. On September 4, 2008, Steven Scandariato conducted a follow up inspection at Respondent's premises.
4. Steven Scandariato discovered that anti-fouling bottom coat paint was being offered for sale by New England.
5. The anti-fouling bottom coat paint contained 40% copper oxide and is a pesticide under the Rhode Island Pesticide Control Act.
6. On September 28, 1994 Respondent applied for and received a company number reflecting registration with the E.P.A. for the production of pesticides.

7. The Respondent has not registered with the State of Rhode Island as a pesticide producing establishment.
8. The Respondent has not registered with the State of Rhode Island or the EPA the pesticide product which it produces and offers for sale on its premises.
9. The label on the anti-fouling bottom coat paint offered for sale at Respondent's premises displayed an E.P.A. establishment number of 59938 but does not display a Rhode Island pesticide establishment number.
10. The label on the anti-fouling bottom coat paint offered for sale at Respondent's premises did not display an E.P.A. or State of Rhode Island pesticide product number.
11. The Respondent is in violation of the Rhode Island Pesticide Control Act.
12. The Division has not presented evidence of the amount and calculation of the Administrative penalty.

CONCLUSIONS OF LAW

Based upon all of the documentary and testimonial evidence of record, I conclude as a matter of law:

1. The Respondent is the owner of the premises.
2. The Division has proved by a preponderance of the evidence that the Respondent has violated R.I.G.L. § 23-25-5 (2) (i) of the Rhode Island Pesticide Control Act in that it's pesticide has been mislabeled in that it does not contain a statement of EPA registered establishment number together with the Rhode Island registered establishment number.
3. The Division has proved by a preponderance of the evidence that the Respondent has violated R.I.G.L. § 23-25-5 (2) (v) of the Rhode Island Pesticide Control Act in that it's pesticide is mislabeled in that it does not bear a label registered with the State of Rhode Island.
4. The Division has proven by a preponderance of the evidence that the Respondent has violated R.I.G.L. § 23-25-6 (a) of the Pesticide Control Act in that it has not registered its pesticide product with the State of Rhode Island.
5. There is no evidence in the record to establish the amount or method of calculation of the Administrative Penalty.

Based on the forgoing Finding of Fact and Conclusions of Law it is hereby

ORDERED

1. The Respondent shall cease the production and sale of unregistered pesticide products.
2. The Respondent shall comply with all requirements enumerated in the NOV if it wishes to engage in the production and sale of pesticides.
3. The Respondent shall comply with all requirements enumerated in the NOV relating to removal or disposal of pesticide products in its possession.
4. No Administrative Penalty shall be assessed against Respondent.

Entered as an Administrative Order this _____ day of December, 2010 as a Final Agency Order.

David Kerins

Chief Hearing Officer

Appendix A

Division's Exhibits:

Div. Ex. # Letter from New England Paint to U.S. E.P.A. Office of Pesticides Programs dated
1 Full September 28, 1994.

Div. Ex. # Correspondence from U.S. E.P.A. to New England Paint dated October 6, 1994 re:
2 Full Assignment of New Company Number.

Div. Ex. # Copy of Notice of Inspection of New England Paint Co. dated September 2, 2008.
3 Full

Div. Ex. # Copy of receipt for samples from New England Pain Mfg. Co. dated September 4,
4 Full 2008.

Div. Ex. # Copy of DEM "Stop, Sale, Use or Removal Order" to New England Paint Mfg. Co.
5 Full dated September 4, 2008.

Div. Ex. # Copy of NOV from DEM to New England Pain Mfg. Co. dated December 1, 2008.
6 Full

Div. Ex. # Copy of Notice of Inspection from DEM to New England Paint Mfg. Co. dated
7 Full September 4, 2008.

Div. Ex. # Copy of inventory list.
8 Full

Div. Ex. # Copy of label from one of the cans.
9 Full

Div. Ex. # Copy of photos taken on September 4, 2008.
10 Full

Div. Ex. # Copy of Establishment Inspection Report dated September 4, 2008.
11 Full

Div. Ex. # Copy of Collection Report dated September 4, 2008.
12 Full

Div. Ex. # Copy of record of DEM re; Kop-Coat, Inc. as registered pesticide producer for Pettit
13 Full Anti-Fouling Copper Bronze. Chemical name "cuprous oxide" with attachments.

Div. Ex. # Copy of record of DEM re: Sherman Williams Company as registered pesticide
14 Full producer for Seaguard Ablative anti-fouling coating.

Respondent's Exhibits

Resp. Ex. # Report of Steven Scandariato to Kan S. Tham dated September 10, 2008 re: New
1 Full England Paint Mfg. Company.

Resp. Ex. # Certificate of Assay from American Chemet Corporation dated April 14, 2008 re:
2 Full shipment to New England Paint Mfg. Company.

Resp. Ex. # Copy of Invoice from American Chemet Corporation to New England Paint & Mfg.
3 Full Company dated April 14, 2008.

Resp. Ex. # Pesticide Report for Pesticide-Producing and Device-Producing Establishments
4 Full dated January 3, 2007.

Resp. Ex. # Anti-Fouling Bottomcoat Paint label.
5 Full

Resp. Ex. # Material Safety Data Sheet Red Copp 97 N, Purple Copp 97N
6 Full

Resp. Ex. #
7 Full Copies of Respondent's income tax returns for 2009.

Resp. Ex. #
8 Copy of Respondent's Citizens Bank line of credit statement

APPENDIX B