ILLINOIS POLLUTION CONTROL BOARD
May 19, 2005

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 04-82
	)	(IEPA No. 270-04-AC)
JOHN BROWN d/b/a JOHN BROWN PAINTING,	)	(Administrative Citation)
Respondent.	)	

MICHELLE RYAN, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; and

JOHN BROWN APPEARED *PRO SE*.

INTERIM OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Today the Board finds that respondent John Brown d/b/a John Brown Painting (Brown) violated Sections 21(p)(1) and (p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(7) (2002)) at a site just north of Metropolis, in Massac County. Brown violated the Act by causing or allowing the open dumping of waste resulting in litter and in the deposition of general construction or demolition debris. The violation was alleged in an administrative citation issued by the Illinois Environmental Protection Agency (Agency). As described below, Brown is therefore subject to a statutorily mandated $3,000 civil penalty, and must pay the hearing costs of the Agency and the Board.

After finding the violations in this interim opinion and order, the Board directs the Agency and the Clerk of the Board to provide hearing cost documentation, to which Brown may respond. After the time periods for these hearing cost filings expire, the Board will issue a final opinion and order assessing the civil penalty and any appropriate hearing costs.

Below, the Board first provides the legal framework for administrative citations. Next, the Board sets forth the procedural history of this case and rules on an offer of proof made at hearing. This is followed by the Board's findings of fact. The Board then discusses the Agency's alleged violations and Brown's claimed defenses and mitigating circumstances before the Board renders its legal conclusions.

LEGAL FRAMEWORK

Under the Act (415 ILCS 5 (2002)), an administrative citation is an expedited enforcement action brought before the Board seeking civil penalties that are fixed by statute.

Administrative citations may be filed only by the Agency or, if the Agency has delegated the authority, by a unit of local government, and only for limited types of alleged violations at sanitary landfills or unpermitted open dumps. *See* 415 ILCS 5/3.305, 3.445, 21(o), (p), 31.1(c), 42(b)(4), (4-5) (2002); 35 Ill. Adm. Code 108.

The Agency or delegated local authority must serve the administrative citation on the respondent within "60 days after the date of the observed violation." 415 ILCS 5/31.1(b) (2002)); *see also* 35 Ill. Adm. Code 108.202(b). The Agency or delegated local authority also must file a copy of the administrative citation with the Board no later than ten days after serving the respondent. *See* 415 ILCS 5/31.1(c) (2002).

To contest the administrative citation, the respondent must file a petition with the Board no later than 35 days after being served with the administrative citation. If the respondent fails to do so, the Board must find that the respondent committed the violations alleged and impose the corresponding civil penalty. *See* 415 ILCS 31.1(d)(1) (2002); 35 Ill. Adm. Code 108.204(b), 108.406.

If the respondent timely contests the administrative citation, but the complainant proves the alleged violations at hearing, the respondent will be held liable not only for the civil penalty but also for the hearing costs of the Board and the complainant. *See* 415 ILCS 5/42(b)(4-5) (2002); 35 Ill. Adm. Code 108.500. However, if the Board finds that the respondent "has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty." 415 ILCS 5/31.1(d)(2) (2002); *see also* 35 Ill. Adm. Code 108.500(b).

PROCEDURAL MATTERS

Procedural History

On June 4, 2004, the Agency filed with the Board the administrative citation against Brown. The Agency served the administrative citation on Brown on the same date. According to the administrative citation, the Agency site inspection resulting in the citation took place on April 7, 2004. On July 15, 2004, Brown filed with the Board a petition to contest the administrative citation. Because the postmark date of the petition was within the 35-day appeal period, the petition was timely filed.[1] *See* 35 Ill. Adm. Code 101.300(b)(2). In a July 22, 2004 order, the Board accepted the petition for hearing.

Board Hearing Officer Carol Webb held this case's hearing on November 9, 2004, at the Metropolis City Hall. Three witnesses testified: Agency field inspector Kent Johnson (Johnson); Brown; and Mrs. Kim Brown (K. Brown).[2] Hearing Officer Webb found all three witnesses credible. Tr. at 52. The Agency offered one exhibit at hearing, an open dump

[1] The Board cites the administrative citation as "AC at_" and Brown's petition as "Pet. at _."

[2] The Board cites the hearing transcript as "Tr. at _."

inspection report dated April 7, 2004, which was admitted into the record.[3] Brown made an offer of proof at hearing, which the Board discusses below. The Agency filed a brief on December 14, 2004. Brown had the opportunity but failed to file a response brief.[4]

Offer of Proof

Brown moved to enter, as a hearing exhibit, eight photos allegedly showing that the site had been cleaned up and that the site had areas of wet soil. Tr. at 13-15. The Agency objected to entry of Brown's photos, arguing that the photos were irrelevant to whether the alleged violations existed at the site on April 7, 2004, the date of the Agency inspection that led to issuance of the administrative citation. Tr. at 15. The photos were received by the hearing officer solely as an offer of proof. Tr. at 18.

Under the Board's procedural rules, the hearing officer may admit evidence that is "material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs." 35 Ill. Adm. Code 101.626(a). There have been circumstances in administrative citation actions where evidence of a respondent's cleanup of dumped waste is relevant. *See, e.g.*, IEPA v. Jack Wright, AC 89-227 (Aug. 30, 1990) (Board held administrative citation was improperly issued where Agency site inspector had previously represented citation would not issue if cleanup was done within a given time frame, and the waste was cleaned up within that time frame).

To be clear, Brown does not claim, and there is no evidence in this record, that the Agency gave Brown a time frame within which he could clean up his property to avoid an administrative citation. Instead, Brown claims that because his cleanup was delayed due to wet weather, he should not be held liable. Brown suggests that these weather conditions amounted to "uncontrollable circumstances." As noted above, where a respondent proves that the administrative citation violation resulted from "uncontrollable circumstances," there is no liability. *See* 415 ILCS 5/31.1(d)(2) (2002).

The Agency does not contest that a cleanup at Brown's property was completed or that there were wet areas on Brown's property. Moreover, there is already testimony in the record to this effect. Tr. at 13, 17. Therefore, whether the Board admits or excludes the photos has little impact on the Board's fact finding. The Agency is also correct that, generally, a subsequent cleanup by a respondent is without legal significance in an administrative citation action for open dumping. *See* Jack Wright, AC 89-227, slip op. at 7 ("The Act, by its terms, does not envision a properly issued administrative citation being dismissed or mitigated because a person is cooperative or voluntarily cleans-up the site").

Here, however, the photos in Brown's offer of proof do *help* to establish that the cleanup was accomplished and that areas of the site were wet, and so are relevant to Brown's *claim* of "uncontrollable circumstances," which claim is contested by the Agency. Agency Br. at 3-4.

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[3] The Board cites the Agency's hearing exhibit as "Exh. 1 at _."

[4] The Board cites the Agency's brief as "Agency Br. at _."

The Board therefore accepts Brown's offer of proof and designates the photos as Exhibit 2.[5] Whether Brown's claim of "uncontrollable circumstances" has any legal merit will be decided below by the Board.

FACTS

On April 7, 2004, Johnson, an Environmental Protection Specialist with the Agency, inspected a property located at 955 Country Club Road, just north of Metrolpolis, in Massac County. Exh. 1, Narrative at 1; Tr. at 5-6. At the time, Brown owned the site and used it as both a residence and a headquarters for his water tower painting business called "John Brown Painting." Exh. 1, Narrative at 1; Tr. at 6-7, 9, 16.

The site, which lacks any waste disposal or storage permit from the Agency, is assigned land pollution control #1270155057 by the Agency. Exh. 1, Checklist at 1, Narrative at 1-2. The April 7, 2004 inspection was conducted as a follow-up to an October 23, 2003 Agency inspection of the site. Exh. 1, Checklist at 1, Narrative at 1; Tr. at 9-10, 11-12.

During the April 2004 inspection, Johnson, the inspector, was accompanied by K. Brown. Johnson observed a pile of debris and other material on the ground at the site's north end. The pile consisted primarily of metal and wood, which had been part of an off-site building that had burned. Exh. 1, Narrative at 1-2, Site Sketch, Photos 001-003; Tr. at 7-8, 10.

Johnson estimated that the pile on the site was approximately 20 feet in diameter and contained roughly 25 to 30 cubic yards of material. The pile was in largely the same condition as it was during the Agency's October 23, 2003 inspection of the site, though Johnson estimated that there were approximately 30 to 40 cubic yards of material present in October 2003. Exh. 1, Narrative at 1-2; Tr. at 12. According to Johnson, the act of loading the 30 to 40 cubic yards of material and removing the pile from the site would take no more than "a couple weeks." Tr. at 12.

Brown brought the debris from the burned building to his property and intended to burn the debris. Tr. at 10. Brown testified he did not know that hauling the burned debris to his property and dumping it was illegal. *Id*. Brown's mother had resided at the building that burned. *Id*.

K. Brown stated during the April 2004 inspection that she would take care of the cleanup, but that no cleanup had yet taken place because the ground had been too wet, Johnson explained. Exh. 1, Narrative at 1-2. Brown testified that that he "had a lot of trouble with rain." Tr. at 13. Johnson described the site's soil at the time of the inspection as dry, but admitted at hearing that there were also wet areas on-site and that the access road to the pile had muddy ruts. Exh. 1, Narrative at 1; Tr. at 10.

With the use of a tractor and a 20 yard dumpster, Brown completed removing all of the pile from his property in October 2004. At that time, some soil on the ground in and around the

[5] The Board cites Brown's hearing exhibit as "Exh. 2 at _."

cleaned-up location was wet and exhibited muddy ruts from the tractor tires. Tr. at 12-14, 17; Exh. 2. Brown testified that he lacked the financial resources to conduct the cleanup any sooner: "When we could afford it, we done it." Tr. at 13.

In addition, according to K. Brown: "we don't have the money to pay for a bunch of fines, okay, we done the best we could. Financially, John Brown Painting no longer exists, you know. I [mean] we've even had to sell our house. *** I don't know when we can get you the money." Tr. at 16.

DISCUSSION

The Agency issued an administrative citation to Brown, alleging two open dumping violations. Brown petitioned to contest the administrative citation and the Board held a hearing. Below, the Board discusses the alleged violations and Brown's claimed defenses and mitigating circumstances before rendering the Board's legal conclusion on whether Brown violated the Act. The Board then concludes by discussing civil penalties and hearing costs.

Alleged Violations

The Agency's administrative citation alleges that Brown violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2002)). AC at 2. Sections 21(p)(1) and (p)(7) of the Act provide in relevant part:

> No person shall: In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
>
> 1. litter;
>
> * * *
>
> 7. deposition of:
>
> i. general construction or demolition debris as defined in Section 3.160(a)of this Act . . . . 415 ILCS 5/21(p)(1), (p)(7) (2002).

Section 21(a) of the Act, which is referred to in Section 21(p), provides:

> No person shall:
>
> Cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2002).

The Agency bases its allegations on the April 7, 2004 site visit conducted by Agency inspector Johnson. AC at 1-2.

Brown's Claimed Defenses and Mitigating Circumstances

Brown asserts several purported defenses to the administrative citation. First, Brown argues that his clean up of the site was delayed because of "excessive water holding on the ground." Pet. at 1. Brown states that he "tried numerous time to clean the debris but was unable due to trucks getting stuck in the mud." *Id*. In effect, Brown maintains that he is not liable because delays in his cleanup resulted from circumstances beyond his control or "uncontrollable circumstances." Second, Brown testified that the cleanup was delayed because of his limited financial resources, and that he completed the cleanup as soon as he could afford it. Tr. at 13. Third, Brown maintains that he did not know that hauling the debris to his property and dumping it there was illegal. Tr. at 10. Lastly, regarding the alleged violation of Section 21(p)(7) of the Act, Brown maintains that the debris pile consisted of burned remnants from the building that had the fire, and so does not constitute "construction" debris. Tr. at 10, 13.

Brown also alleges extenuating circumstances in an apparent attempt to mitigate civil penalties. Specifically, Brown claims that the company "John Brown Painting" no longer exists and that he and K. Brown, as individuals, cannot afford to pay these "very steep" fines. Pet. at 1.

The Board addresses each of Brown's claims below in discussing the elements of a violation of Sections 21(p)(1) and (p)(7), and the civil penalties for violating those sections.

"Open Dumping" of "Waste"

As a threshold matter, to prove a violation of Section 21(p)(1) or (p)(7), the Agency must first prove a violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2002)). Section 21(a) provides that "[n]o person shall: Cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2002). "Open dumping" is defined as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305 (2002). "Refuse" means "waste." 415 ILCS 5/3.385 (2002). The Act defines "waste" as:

> [A]ny garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . . 415 ILCS 5/3.535 (2002).

The record shows that Brown brought to his property many cubic yards of miscellaneous materials from a burned building, primarily pieces of wood and metal. Brown deposited the materials in a pile on the ground. Some six months after the pile was first observed by the Agency, the pile remained largely unchanged. Brown admits that he brought the materials to his site to burn them.

The Board finds that under these circumstances, the materials were "discarded" and therefore constitute "waste" under the Act. Further, it is undisputed that Brown's site does not meet the requirements for a sanitary landfill. The Board also finds that in bringing the materials

to his property and depositing them in a pile, Brown "open dumped" the waste.

Resulting in "Litter"

The Board finds that this open dumping of waste resulted in "litter." The Board has adopted the definition of "litter" provided in the Litter Control Act for purposes of Section 21 of the Act. *See* St. Clair County v. Mund, AC 90-64, slip op. at 4, 6 (Aug. 22, 1991). The Litter Control Act defines "litter" as:

> [A]ny discarded, used or unconsumed substance or waste [and] may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings, or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers . . . or anything else of any unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2002).

Consistent with the discussion above, the Board finds that the pile of materials on Brown's property from the burned building were discarded substances, and as such fall within the definition of "litter."

Resulting in the Deposition of "General Construction or Demolition Debris"

Section 3.160(a) of the Act defines "general construction or demolition debris" as:

> non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials.
>
> General construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the uncontaminated soil is not commingled with any general construction or demolition debris or other waste. 415 ILCS 5/3.160(a) (2002).

Brown argues that the pile of burned remnants from a building fire cannot be considered "construction" debris: "There was no construction waste there. That was waste from the building that burned. * * * [T]his was not off a construction site." Tr. at 10, 13.

The Agency argues that the materials piled on the property by Brown meet the definition of "general construction or demolition debris" under the Act. Agency Br. at 2. Specifically,

quoting from the statutory definition, the Agency states that the materials resulted from the "demolition" of "structures," and include "wood" and "metals." *Id*. The Agency notes that the Act does not define "demolition," but the Agency quotes the definition of the word from the *American Heritage Dictionary, Second College Edition* (1991): "The act or process of destroying, esp. destruction by explosives." *Id*. at 3. The Agency argues that "demolition" therefore requires no intent and so would include unintentionally "destroying" a building by fire. *Id*. This is especially so here, the Agency maintains, where the resulting debris needed to be disposed. *Id*.

The Board agrees with the Agency. Brown argues only that the material is not from a "construction" site, ignoring that the statutory term includes "demolition debris." In this context, there is nothing inherent in the term "demolition" that would necessarily limit its meaning to *intentional* destruction. The Board finds that the wood and metal from the burned building meets the plain meaning of the Act's definition of "general construction or demolition debris," and therefore that Brown's open dumping of waste resulted in the deposition of such debris on his property.

Brown's Alleged Ignorance of the Law

Brown states he did not know that hauling the debris to his property and dumping it there was illegal. Tr. at 10. The Agency argues that Brown's "alleged ignorance of the law is no defense." Agency Br. at 3.

The Agency is correct. That Brown allegedly did not intend to violate, or did not know he was violating, the Act is of no aid to Brown. The Illinois Supreme Court has established that one may "cause or allow" a violation of the Act without knowledge or intent. *See* People v. Fiorini, 143 Ill. 2d 318, 336, 574 N.E.2d 612, 621 (1991) ("knowledge or intent is not an element to be proved for a violation of the Act. This interpretation of the Act . . . is the established rule in Illinois."); *see also* Freeman Coal Mining v. PCB, 21 Ill. App. 3d 157, 163, 313 N.E.2d 616, 621 (5th Dist. 1974) (the Act is *malum prohibitum* and no proof of guilty knowledge or *mens rea* is necessary to find liability).

Brown's Alleged "Uncontrollable Circumstances"

Brown argues that his clean up was delayed for two reasons. First, Brown claims that the ground was too wet from rains to access the back of his property to remove the debris pile. Tr. at 10, 13, 17. Second, according to Brown, he did not have enough money to perform the work sooner. Tr. at 13.

The Agency argues that it would have taken no more than two weeks to remove the waste, and Brown had let it remain on-site for at least six months at the time of the April 2004 inspection. The Agency maintains that the ground was likely "dry and/or frozen during at least some part of the period between October 2003 and April 2004." Agency Br. at 4. The Agency adds that Brown "did not have the waste removed until October 2004, approximately a year after it was first observed by Illinois EPA." *Id*. As for Brown's purportedly limited finances, the

Agency states that Brown "offered no documentary evidence of his financial condition, either by way of tax returns, bank account statements, or credit card reports to verify his claims." *Id*.

In an administrative citation, the Board must determine whether the violation resulted from "uncontrollable circumstances." 415 ILCS 5/31.1(d)(2) (2002); *see also* 35 Ill. Adm. Code 108.500(b). Section 31.1(d)(2) provides:

> [I]f the Board finds that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty. 415 ILCS 5/31.1(d)(2) (2002).

This defense is therefore available only where the *violation* resulted from uncontrollable circumstances.

The violations alleged and found here are based on the pile of waste that (1) Brown open dumped on his property; and (2) the Agency observed on April 7, 2004. The violations existed when the Agency observed them on April 7, 2004. On this record, any delay in *removing* the waste pile due to wet weather or limited finances is irrelevant to the statutory defense of "uncontrollable circumstances." Even if weather and finances delayed Brown's cleanup, they did not cause the violation of Sections 21(p)(1) and (p)(7) of the Act. The Board therefore finds that Brown has not proven the violations resulted from uncontrollable circumstances.

Finding of Violations

Having found that Brown caused or allowed the open dumping of waste resulting in litter and in the deposition of general construction or demolition debris, and that no uncontrollable circumstances were established, the Board finds that Brown violated Sections 21(p)(1) and (p)(7) of the Act.

Civil Penalty and Hearing Costs

The Agency seeks the statutory $1,500 civil penalty for each of the two alleged violations, for a total civil penalty of $3,000. The Agency also requests that Brown pay its hearing costs. AC at 2-3. Because Brown violated Sections 21(p)(1) and (p)(7), the Board now addresses the issues of civil penalty and hearing costs. Both are addressed in Section 42(b)(4-5) of the Act:

> In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 of this Act shall pay a civil penalty of $1,500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency, except that the civil penalty amount shall be $3,000 for each violation of any provision of subsection (p) of Section 21 that is the person's second or subsequent adjudicated violation of that provision. 415 ILCS 5/42(b)(4-5) (2002).

Brown claims the company "John Brown Painting" no longer exists and that he and K. Brown, as individuals, cannot afford to pay the civil penalties. Pet. at 1.

When the Board finds a violation in a formal enforcement action brought under Section 31 of the Act, the Board has the discretion to impose a penalty and if the Board decides to impose one, the Board may consider factors that mitigate the amount of penalty. *See* 415 ILCS 5/31, 33(c), 42(h) (2002). The Board has no such discretion after finding a violation in an administrative citation action. The Board must impose a civil penalty on Brown and, further, the amount of that penalty is fixed by the Act.

There is no indication that this is a second or subsequent adjudicated violation for Brown. Therefore, the civil penalty for Brown's first violations of Sections 21(p)(1) and (p)(7) is statutorily set at $1,500 for each violation, totaling $3,000. *See* 415 ILCS 5/42(b)(4-5) (2002); 35 Ill. Adm. Code 108.500(b)(2). The Board will assess the $3,000 penalty in its final opinion and order.

In addition, by unsuccessfully contesting the administrative citation at hearing, Brown must pay the hearing costs of the Agency and the Board. *See* 415 ILCS 5/42(b)(4-5) (2002); 35 Ill. Adm. Code 108.500(b)(3). However, no information on those costs is in the record. The Agency and the Clerk of the Board are therefore each ordered to file a statement of costs, supported by affidavit, and to serve the filing on Brown. Brown will have an opportunity to respond to the requests for hearing costs, as provided in the order below.

CONCLUSION

The Board finds that Brown violated Sections 21(p)(1) and (p)(7) of the Act by causing or allowing the open dumping of waste resulting in litter and in the deposition of general construction or demolition debris. Having found the violations in this administrative citation action, Brown must pay a civil penalty of $3,000 and the hearing costs of the Agency and the Board. As set forth in the order below, the Board directs the Agency and the Clerk of the Board to file hearing cost documentation, to which Brown may respond. After the time periods for the filings on hearing costs have expired, the Board will issue a final opinion and order imposing the civil penalty on Brown and assessing against him any appropriate hearing costs.

This interim opinion constitutes the Board's interim findings of fact and conclusions of law.

ORDER

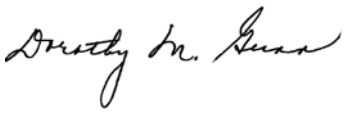
1. Respondent John Brown d/b/a John Brown Painting (Brown) violated Sections 21(p)(1) and (p)(7) of the Act (415 ILCS 5/21(p)(1), (p)(7) (2002)).

2. By June 8, 2005, the Illinois Environmental Protection Agency must file a statement of its hearing costs, supported by affidavit, with service on Brown. By June 8, 2005, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit, with service on Brown.

3. By June 28, 2005, Brown may file a response with the Board to the filings required in paragraph 2 of this order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on May 19, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board