

ILLINOIS POLLUTION CONTROL BOARD
July 26, 2001

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
vs.)	AC 00-84
)	(IEPA No. 248-00-AC)
JAMES DAY,)	(Administrative Citation)
)	
Respondent.)	

ROBERT J. SCHERSCHLIGT APPEARED ON BEHALF OF THE AGENCY; and

PHILIP A. SUMMERS APPEARED ON BEHALF OF JAMES DAY.

INTERIM OPINION AND ORDER OF THE BOARD (by S.T. Lawton, Jr.):

On June 14, 2000, the Illinois Environmental Protection Agency (Agency) issued an administrative citation to respondent, James Day (Day). The citation alleges that Day violated Sections 21(p)(1) and (3) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1), (p)(3) (2000)), in that he caused or allowed open dumping of waste, resulting in litter and open burning. The alleged violations occurred on a vacant lot on the northwest corner of Logan and Sherman streets in Longview, Champaign County, Illinois (site).

The Board finds that Day violated the Act as alleged in the complaint. In this interim opinion and order, the Board orders the Agency and the Clerk of the Board to file a statement of hearing costs, to which Day is given leave to reply. After it receives these pleadings, the Board will issue a final order requiring Day to pay the total statutory penalty of \$3,000 and any appropriate costs.

PROCEDURAL MATTERS

The Agency filed an administrative citation with the Board on June 14, 2000, and served it on Day by certified mail on June 13, 2000, pursuant to Section 31.1(b) of the Act. See 415 ILCS 5/31.1(b) (2000). The citation alleges that Day violated Sections 21(p)(1) and 21(p)(3) of the Act. See 415 ILCS 5/21(p)(1), 21(p)(3) (2000). Sections 21(p)(1) and 21(p)(3) are enforceable by administrative citation under Section 31.1 of the Act. See 415 ILCS 5/31.1(a) (2000). Day contested the citation under Section 31.1(d)(2) by filing a petition for review with the Board on July 3, 2000. See 415 ILCS 5/31.1(d)(2) (2000).

The Board accepted this matter for hearing on July 13, 2000. A hearing was held before Hearing Officer Brad Halloran, on April 9, 2001.¹ Tr. at 2-4. The Agency presented four witnesses at the hearing. Kenneth Keigley, Environmental Protection Specialist III with the Land Pollution Control Division of the Agency in Champaign, Illinois, testified on behalf of the Agency. Tr. at 7-56. Don Webber, Lawrence Sapp, and Ron Tatman testified that they observed Day open burning at the site. Day testified on his own behalf at hearing. Edward Massie testified on behalf of Day.

No other witnesses testified at hearing. The hearing officer in this matter accepted five exhibits from the Agency and six exhibits from counsel for Day at hearing. Neither party filed post-hearing briefs.

FINDINGS OF FACT

The parties presented facts on two issues. First, several witnesses testified as to whether Day caused or allowed the open burning and litter at the site on either Saturday or Sunday, May 13 or 14, 2000. Second, the parties debated whether Day owned or operated the site at the time of the alleged violation.

Allegations of Litter and Open Burning

The Agency received an anonymous complaint on May 14, 2000, that Day open burned furniture, wood scrap and other refuse at the site. Tr. at 29; Agency Exh. 3.² Darwin Fields, a Bureau of Air inspector with the Agency, responded to the anonymous complaint on May 15, 2000, and photographed a burn pile at the site. Tr. at 35-36.

The Agency transferred the complaint to Kenneth Keigley, an Environmental Protection Specialist III with the Bureau of Land, on May 16, 2000. Tr. at 28-29, 36. Keigley inspected the site on May 17, 2000, and saw a 10-foot by 10-foot burn pile. Keigley testified that, according to his observations and field inspection report, the pile included heat-scorched springs, charred dimensional lumber and particle board, charred metal door framing, a partially burnt cushion, glass bottles and cans. Tr. at 33-35, 37; see Agency Exh. 4. Keigley stated that the photographs taken by Fields on May 15, 2000, showed the same burn pile that Keigley saw during his May 17, 2000 inspection. Tr. at 36-37. The inspection by Keigley resulted in the administrative citation in this matter.

The Agency presented three witnesses who testified that they saw Day next to a large open fire at the site on either Saturday, May 13, 2000, or Sunday, May 14, 2000. Don Webber, who operates an auto shop across the street from the site, testified that, on one of the above dates, Day, his girlfriend, his daughters, and his son, Jason Day, burned construction-type debris at the site. Tr. at 67-68. Webber stated that the group was burning waste that Jason Day stored in a trailer after remodeling his home. Tr. at 67-68. Webber testified that he saw Day and the others

¹The Board refers to the transcript of the hearing in this matter as “Tr. at ____.”

²The Board refers to Agency exhibits as “Agency Exh. ____,” and exhibits offered on behalf of Day as “Resp. Exh. ____.”

remove waste from the trailer and throw it onto a large fire. Tr. at 69-70. Webber identified the trailer in a photograph taken by Fields as the same trailer where Jason Day stored construction debris and other household items. Tr. at 71, 78-79.

Webber testified that he saw Day personally throw a mattress and rug onto the fire. Tr. at 68. Webber identified heat scorched springs in a picture taken by Fields as remnants of the mattress. Tr. at 72. Webber said the fire produced a huge cloud of black smoke that drifted across the street. Tr. at 69. Webber stated that he reported the incident to the Agency on Monday, May 15, 2000. Tr. at 77. He testified that the fire was still smoldering on that date. Tr. at 80.

Webber testified that he has known Day for approximately 20 years. Webber admitted that, although he has no animosity toward Day, the respondent previously reported Webber to the Agency for environmental violations. Tr. at 73, 77. Webber also stated that he formerly had a dispute with Jason Day over the right to access Webber's property. Tr. at 76-77.

Ronald Tatman testified that, on Saturday, May 13, 2000, he saw Day open burning at the site. Tr. at 53. He stated that he was driving past the site on the way to the post office when he observed Day, his girlfriend, and one of Day's children standing at the back of Day's truck, watching the fire. Tr. at 54-55. Tatman testified that he saw flames, but did not take notice of what in particular was burning. Tr. at 56. Tatman identified the burn pile in the Agency photograph as the same pile that he saw burning on May 13, 2000. Tr. at 58.

Tatman stated he was certain that Day was present during the open burning. Tatman, who is the village president of Longview, has resided in the town since 1971. Tr. at 51. Tatman has known Day as a resident of Longview, and testified that he has no animosity toward him. Tr. at 51, 59.

Lawrence Sapp testified as the last eyewitness to Day's open burning at the site. Sapp stated that on either Saturday, May 13, 2000, or Sunday, May 14, 2000, he drove by the site, and saw Day with other people standing around a bonfire. Tr. at 85. Sapp testified that he saw the same burn pile as depicted in the Agency's photograph of the site. Tr. at 86. Sapp stated he was familiar with Day because he has been in Longview since 1950, and previously lived in a house right next to the property. Tr. at 83.

Day testified that he solely created a pile of site-generated landscape waste on Saturday, May 13, 2000. Tr. at 113, 115. Day stated that he, Ed Massie, Lloyd Langleyer, and members of his family mowed the lot in response to a village complaint concerning noxious weeds. Tr. at 98-99. Day testified that he did not add any household or construction items, such as carpet or mattresses to the pile. Tr. at 119, 136-37. Day stated he was not present when his brother and other members of the family open burned the waste on Sunday, May 14, 2000. Tr. at 127, 131.

Day testified that he and Ed Massie were in Tuscola the following day, Sunday, May 14, 2000. Tr. at 129. However, on that date, Day testified that his brother, John Day, his son, Jason Day, and members of Jason Day's family allegedly burned the landscape waste on the site. Tr. at 139. Day said that witnesses to the fire probably mistook Day for his brother because

they have a very strong resemblance. Tr. at 134-35. Day testified that his brother told Day that he used springs and other metal pieces to keep the weeds from blowing away. Tr. at 141. However, Day testified that the burn pile that he cleaned up on Monday contained the same waste as depicted in the Agency photographs. Tr. at 130. Day could not explain how the waste ended up in the pile on Monday, May 15, 2000. Tr. at 132.

Ed Massie corroborated Day's testimony that he assisted Day in mowing weeds at the site in early May, and was with Day in Tuscola the Sunday after clearing the site of vegetation. Tr. at 152. Massie also stated that he saw old metal springs on the lot when he was mowing the grass. However, Massie could not state with confidence what weekend this took place. Tr. at 145-46, 153-54. At first, Massie only recalled that he helped Day in the spring of 2000. When counsel for Day asked him for a more specific date, Massie stated late April to early May. He agreed that he mowed the lawn in the first or second week of May only after Summers asked him if that was the correct date. Tr. at 145-46.

Massie also testified that some of the grass that he mowed was "greening up." Tr. at 151. When Massie was asked to describe the weeds that were on the site, he stated the vegetation varied from old head-high weeds to grass and new weeds that were growing in. Tr. at 149, 151.

Disputed Ownership of the Site

Both the Agency and Day testified that Day had a longstanding ownership interest in the property involved in this administrative citation. Day testified that he has had a longstanding nexus or relationship to the property for approximately 20 years, and kept his possessions on the site. Tr. at 124-25. Around 1960, Day began to acquire the lots at the northwest corner of Logan and Sherman Streets in Longview, Illinois. Tr. at 91; See Resp. Exh. 1. Day continued to buy property until he owned all of the connecting lots. Tr. at 91; See Resp. Exh. 1. Day ultimately failed to pay property taxes on the site. Tr. at 92. In response, Opal Thomas purchased tax deeds for the lots of property on the northwest corner of Sherman Street and Logan Street, including the site, between 1972 and 1991. Tr. at 92-93; Resp. Exh 1.

Day attempted to repurchase the property from Thomas. Thomas and Day signed a contract to buy back the lots in 1997. Tr. at 93; see Agency Exh. 5. Day and Thomas later fell into dispute over the payment agreement. Tr. at 93. Thomas notified Day of the intention to file a forcible detainer suit on December 10, 1999, and gave Day until December 31, 1999, to cure the defaults under their contract. Resp. Exh. 2. When Day did not pay the amount due on the property, Thomas revoked the contract with a declaration of forfeiture. See Resp. Exh. 3.

After Day received the declaration of forfeiture, he and Thomas entered into a lawsuit over the property. Tr. at 95. Although Day testified that he thought the suit was over, he did not know of a final judgment or court order concerning the property. Tr. at 123. According to Keigley, Robert Thomas, the custodian and son of Opal Thomas, stated they were still in a dispute with Day over the site. Tr. at 43.

In the spring of 2000, the Village of Longview notified Day that the property violated a local ordinance concerning noxious weeds. Tr. at 97-98. Day testified that the village gave him

seven days to mow the grass on the property involved in this administrative citation, or the village would cut the grass and charge Day for the service. Tr. at 98. Day testified that, in response to the letter, he “immediately went down [to the site] and started cutting the grass and weeds and bushes.” Tr. at 98. Day testified that he was “possessing the property and [had] physical control of the property on Saturday the 13th and [he] testified that [he] went back on Monday the 15th [of May].” Tr. at 125. Day also stated that he and his family still store their personal property on the site. Tr. at 126-27.

DISCUSSION

In this section, the Board will address whether Day violated Sections 21(p)(1) and (p)(3) of the Act (415 ILCS 5/21(p)(1), (p)(3) (2000)) as alleged in the administrative citation. The Board first discusses whether Day caused or allowed the open dumping of waste on the site. See 415 ILCS 5/21(p) (2000). The Board then discusses whether the open dumping by Day resulted in litter and open burning on the site, pursuant to Sections 21(p)(1) and (p)(3) of the Act. See 415 ILCS 5/21(p)(1), (p)(3) (2000).

Open Dumping

The administrative citation alleges that Day caused or allowed open dumping that resulted in litter and open burning at the site in violation of Sections 21(p)(1) and (p)(3) of the Act. See 415 ILCS 5/21(p)(1), 21(p)(3) (2000). The provisions read that 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 dumpsite:

1. litter;
- ***
3. open burning (415 ILCS 5/21(p)(1), (p)(3) (2000)).

Section 21(a), to which Section 21(p) refers, provides that no person shall “[c]ause or allow the open dumping of any waste.” 415 ILCS 5/21(a) (2000). Subsection (p)(1) requires the Agency to show, as a threshold matter, that Day caused or allowed open dumping. “Open dumping” means “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 5/3.24 (2000). “Refuse” means “waste,” (415 ILCS 5/3.31 (2000)), and “waste” includes “any garbage . . . or other discarded material” (415 ILCS 5/3.53 (2000)).

Day raises two defenses to violating Sections 21(p)(1) and (p)(3) of the Act. See 415 ILCS 5/21(p)(1), (p)(3) (2000). Day first argues that he did not cause the open dumping of waste resulting in a violation of the Act because he solely gathered a pile of weeds and grass on the site. Day testified that he was not present when his family open burned the landscape waste the following day. Tr. at 131. Day further stated at hearing that he also was not responsible for allowing the open dumping of waste on the site because he no longer owned the site. Tr. at 130. Day testified that he gave up an ownership interest in the site after receiving a declaration of forfeiture on the property from Thomas. Tr. at 95-96, 126. The Board finds that the record does

not support Day's arguments, and that Day was present when he and members of his family open dumped waste that resulted in litter and open burning. See 415 ILCS 5/21(p)(1), (p)(3) (2000).

Three eyewitnesses testified that they saw Day standing next to a large fire on either May 13, 2000, or May 14, 2000. Tr. at 55, 67, 85. Webber stated he saw Day and his family unload a mattress, rug, and other waste from remodeling a home from a trailer, and threw it into a large fire across the street from Webber's business. Tr. at 67-70. Webber testified that he personally saw Day throw articles such as a rug and mattress on the burn pile. Tr. at 68. Day explained at hearing that his brother used the metal springs found in the pile and other metal parts to ensure the weeds did not blow off the burn pile. Tr. at 141. However, Day could not explain how the waste, including charred lumber and dimensional wood, glass and metal drink containers, and a partially burnt cushion, was open dumped and burned on the site. Tr. at 132.

The Board finds that the testimony by Webber is credible despite the fact that Day previously reported him to the Agency. Even if the Board gave less weight to the testimony presented by Webber, both Tatman and Sapp also testified that they separately saw Day, along with his friends and family, next to a fire on the site on either Saturday or Sunday, May 13 or 14, 2000. Tatman and Sapp are long-time residents of Longview, and were previously familiar with Day and his family. Sapp testified that he had known Day for years, and previously lived next to the property involved in the administrative citation. Tr. at 83. Tatman testified that he also had known Day for quite a while from living in Longview. Tr. at 51.

Day failed to establish that the three eyewitnesses incorrectly placed him next to a fire on the site over the weekend of May 13 and 14, 2000. Day testified that the witnesses mistook him for his brother at the time of the open burning at the site. However, Day did not offer any evidence other than the statement that he and his brother resembled each other, to refute the witnesses testimony that they correctly identified him as the person near the fire. Tr. at 134-35.

The Board also finds that Day did not substantiate his claim that he was not present for the violations because he and Ed Massie were in Tuscola on Sunday, May 14, 2000. Tr. at 129. Day relied on testimony by Massie to prove that he was out of town on that date. However, Massie could not rule out that Day was on the site on the weekend that the open burning took place. Massie only testified that he helped Day mow the weeds and grass on the site, and then went to Tuscola with Day on a Sunday in May. Tr. at 152. He could not testify with certainty that he was with Day in Tuscola on Sunday, May 14, 2000. Tr. at 153. In fact, until counsel for Day suggested that it was in the first two weeks of May, Massie could only remember that he helped Day in the Spring, somewhere in late April or the first of May, 2000. Tr. at 145-46.

The testimony by Massie that he and Day mowed the lawn in the first or second week of May is consistent with the eyewitness accounts that place Day at the site on Sunday, May 14, 2000. Moreover, the testimony by Massie that some of the grass and weeds were "greening up" supports the conclusion that Day could not open burn landscape waste containing moisture, along with other waste, the day after mowing the site. Tr. at 151.

Day raised a second defense that he did not allow the open dumping of waste in violation of Section 21(p) because he is not responsible for maintaining property that he no longer owns. Day testified that he did not believe that he had any ownership rights to the site at the time of the administrative citation. Tr. at 126. This defense is based on the premise that Day did not partake in the open dumping and burning on the site. Since the Board finds that Day was present and caused open dumping under Section 21(p) of the Act (415 ILCS 5/21(p) (2000)), the Board finds that the basis of this defense is invalid.

The Board finds that the heat scorched metal springs, a partially burnt cushion, charred lumber and plywood, metal and glass drinking containers, and other waste in the burn pile constitute “discarded material” within the meaning of the term “waste.” The list includes “waste” and “refuse” as defined in the Act. The Board also finds that the pile of waste constitutes a “consolidation of refuse from one or more sources” within the meaning of the term “open dumping.” Webber testified that he witnessed Day and his family remove waste from a trailer that originated from a remodeling job at Jason Day’s home, and throw it in a pile on the site. In addition, the Board finds that the area near Day’s trailer where the waste was consolidated constitutes “a disposal site that does not fulfill the requirements of a sanitary landfill.” Accordingly, the Board finds that Day caused the open dumping of waste.

Litter

The next question is whether Day’s open dumping of these wastes resulted in “litter” under Section 21(p)(1) of the Act. See 415 ILCS 5/21(p)(1) (2000). The Act does not define “litter,” but in similar cases, the Board has looked to the definition of “litter” in the Litter Control Act:

“Litter” means any discarded, used or unconsumed substance or waste. “Litter” may include, but is not limited to, any garbage, trash, refuse, debris, rubbish . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 ILCS 105/3(a) (2000); see St. Clair County v. Louis I. Mund (Aug. 22, 1991), AC 90-64, slip op. at 4, 6.

Using this definition, the Board finds that the waste including heat scorched metal springs, a partially burnt cushion, charred lumber and plywood, and metal and glass drinking containers, constitutes “litter” under Section 21(p)(1) and that Day therefore violated that section.

Open Burning

The final question is whether the Day’s open dumping of these wastes resulted in “open burning” under Section 21(p)(3) of the Act. See 415 ILCS 5/21(p)(3) (2000). The Act defines “open burning” as “the combustion of any matter in the open or in an open dump.” 415 ILCS 5/3.23 (2000). Day caused open dumping which resulted in open burning, in that he open dumped and burned heat scorched metal springs, a partially burnt cushion, charred lumber and plywood, and metal and glass drinking containers.

Webber testified that he saw Day and his family remove waste from a trailer on the site and throw it into the fire. Tr. at 60-70. Webber stated he personally saw Day throw a rug, construction debris, and a mattress onto the fire at the site. Tr. at 68. Webber's observations are consistent with photographs taken by Agency inspector, Darwin Fields, on Monday, May 15, 2000. Tr. at 35. The photographs show heat scorched metal springs and a partially burnt cushion. Keigley testified that the springs and cushion would be consistent with a mattress or furniture cushions. Tr. at 37-38. The photographs also showed charred metal framing consistent with metal folding doors, charred particleboard and dimensional lumber. Tr. at 37. The framing and wood is consistent with Webber's testimony that he saw Day and his family throw waste from remodeling a home onto the fire. Tr. at 67-68.

Webber testified that the waste that Day and his family threw on the fire produced a large cloud of black smoke. Tr. at 69. The Board agrees with the Agency that "landscape waste, especially if it's dry, is not going to produce dark, thick smoke." Tr. at 163-64. The black smoke is further evidence that Day burned more than landscape waste on the site.

Sapp and Tatman also testified that they saw Day standing next to a large fire or bonfire at the site on the weekend of May 13 and 14, 2000. Tr. at 53, 85. Although neither person could state specifically what Day was burning, they both identified the burn pile in the Agency photographs as what they saw when they drove by the site. Tr. at 58, 86.

The Board finds that the Agency photographs and inspection report and the eyewitness testimony shows by a preponderance of evidence that Day open dumped waste in a manner resulting in open burning at the site on the weekend of May 13 and 14, 2000, in violation of Section 21(p)(3) of the Act. 415 ILCS 5/21(p)(3) (2000).

PENALTY AND COSTS

Section 42(b)(4-5) of the Act provides for penalties in an administrative citation action as follows:

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 a first offense and \$3,000 for a second or subsequent offense, plus any hearing costs incurred by the Board and the Agency. The penalties shall be deposited into the Environmental Protection Trust Fund, to be used in accordance with the provisions of the Environmental Protection Trust Fund Act; except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government. 415 ILCS 5/42(b)(4-5) (2000).

The Board will assess Day the total statutory penalty of \$3,000 for violating Sections 21(p)(1) and 21(p)(3) of the Act. The Board and the Agency are also entitled to their hearing costs under Section 42(b)(4-5) of the Act (415 ILCS 5/42(b)(4-5) (2000)), but the record does not include information on those costs. Therefore, the Clerk of the Board and the Agency are

ordered to file with the Board a statement of hearing costs, supported by affidavit, with service on Day, within 14 days. Day may file a reply as specified below.

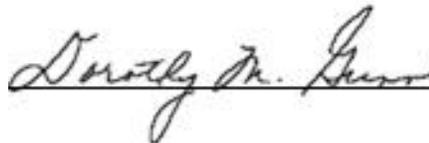
This interim opinion constitutes the Board's interim findings of fact and conclusions of law in this case.

ORDER

1. The Board finds that respondent, James Day (Day), violated Sections 21(p)(1) and 21(p)(3) of the Environmental Protection Act, 415 ILCS 5/21(p)(1), 21(p)(3) (2000).
2. The Illinois Environmental Protection Agency must file a statement of its hearing costs, supported by affidavit, with the Board and with service on Day, within 14 days of the date of this order. Within the same 14 days, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit and with service on Day.
3. Day is given leave to file a reply to the filings ordered in paragraph 2 of this order within 14 days after receipt of that information, but in no event later than 40 days after the date of this order.
4. No earlier than 40 days after the date of this order, the Board will issue a final order assessing a statutory penalty of \$1,500 for each violation, for a total civil penalty of \$3,000, and awarding appropriate costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 26th day of July 2001 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board