

ILLINOIS POLLUTION CONTROL BOARD
November 2, 2000

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 00-127
) (Enforcement - Cost Recovery)
DAYNE ROGERS, an individual, and BLACK)
GOLD INTERNATIONAL, a dissolved Illinois)
corporation,)
)
Respondents.)

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

This matter is before the Board on the complainant's September 14, 2000 motion for summary judgment (motion). Respondents, Dayne Rogers (Rogers) and Black Gold International (Black Gold), did not file responses to the motion. The Board grants the complainant's motion for summary judgment for the reasons explained below.

BACKGROUND

On January 31, 2000, the People of the State of Illinois (State) filed a complaint on behalf of the Illinois Environmental Protection Agency (Agency) against respondents, Rogers, Black Gold, and Crosby & Associates. The Board dismissed Crosby & Associates from the case in response to its motion to dismiss on April 20, 2000. The complaint alleges that Rogers was president of Black Gold during the time that the company operated at the site, located at or near 1140 Harrison Avenue, Rockford, Winnebago County, Illinois (site). Comp. at 2.¹

The complaint seeks reimbursement of \$38,730.46 for costs incurred by the Agency in the cleanup of accumulated used and waste tires at the site, pursuant to Section 55.3 of the Environmental Protection Act (Act). See 415 ILCS 5/55.3 (1998). The complainant also seeks punitive damages pursuant to Section 5/55.3(g) of the Act. See 415 ILCS 5/55.3(g) (1998). Respondents Rogers and Black Gold did not answer the complaint.

The State served a Request to Admit Facts upon Black Gold and Rogers on or about July 31, 2000. See Motion at 2, State Exh. C². The respondents failed to respond to the request. In that request, complainant sought admission of the following relevant facts:

¹ The complaint by the State in this matter will be cited to as "Comp. at ____."

² The exhibits attached to the State's motion for summary judgment will be cited to as "State Exh. at ____."

- a. Respondent admits that during the relevant time period he operated the site located at or near 1140 Harrison Avenue, Rockford, Winnebago County, Illinois site.
- b. Respondent admits that during the relevant time period, he accepted used and waste tires at this site.
- c. Respondent admits that he was served with a Violation Notice on or about March 31, 1998, informing him to cease and desist the open dumping and remove all waste and tire piles from the site.
- d. Respondent admits that he was served with Notice pursuant to Section 55.3(d) of the Act (Section 55.3(d) Notice) requiring respondent to remove all used and waste tires from the site. If respondent did not conduct the removal, he would be liable for all costs incurred by the State in performing the clean up and two times the amount of the clean up costs in punitive damages.
- e. Respondent admits he did not respond to the Section 55.3(d) Notice.
- f. Respondent admits he did not perform any of the clean up required by the Section 55.3(d) Notice.
- g. Respondent admits that the State performed the removal of approximately 197.38 tons of waste tires from the site.
- h. Respondent admits that he did not reimburse the State for any costs incurred by the State in removing the waste tires from the Site.

Complainant maintains that pursuant to Section 103.162 of the Board's procedural rules, the respondents' failure to file a response to complainant's request to admit facts causes these facts to be deemed admitted by operation of law. See 35 Ill. Adm. Code 103.162. Section 103.162(c) provides, in relevant part:

Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 20 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters. . . .
35 Ill. Adm. Code 103.162(c).

Complainant argues that once the facts for which admissions were sought are deemed admitted, there is no genuine issue of material fact remaining. The complainant states it is entitled to a judgment as a matter of law as to Rogers' and Black Gold's liability. In its motion, complainant requests that the Board order respondents to pay the State the amount of \$38,730.46 for corrective action, pursuant to 415 ILCS 5/55(k) (1998). The State further requests the Board

to order respondents to pay twice this amount in punitive damages, pursuant to 415 ILCS 5/55(h) (1998).

DISCUSSION

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should only be granted when the movant’s right to the relief “is clear and free from doubt.” Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The Board finds that the failure by respondents, Rogers and Black Gold, to respond to the complainant’s request for admissions and motion for summary judgment has resulted in each of those factual matters being deemed admitted pursuant to 35 Ill. Adm. Code 103.162(c). We find that these admitted facts are sufficient to demonstrate the following:

1. Rogers and Black Gold were operators at the site.
2. Rogers and Black Gold accepted used and waste tires at the site.
3. Rogers received Notice pursuant to Section 55.3(d) of the Act, which required him to remove all of the tires from the site or be liable for cleanup costs, plus up to double the amount in additional punitive damages.
4. Rogers failed to respond to the Section 55.3(d) Notice and did not perform the acts required by the Notice.
5. The State performed the removal of approximately 197.38 tons of waste tires from the site.
6. Rogers failed to reimburse the State for the cost of cleanup.

These facts, in conjunction with an affidavit and other uncontested exhibits attached to the motion by the State in this matter, sufficiently prove that complainant is entitled to a judgment under 415 ILCS 5/55.3(k) as a matter of law. Rogers, a site operator, accepted used and waste tires at the site. The Section 55.3(d) Notice, as served on Rogers by the Agency, states that the accumulation of used or waste tires at the site presents a threat to public health or the

environment. State Exh. B at 2. Rogers failed to respond to the notice. The Agency, as authorized under Section 55.3(e) of the Act, took corrective action by arranging and paying for the removal of used or waste tires at the site. See 415 ILCS 5/55.3(e) (1998). The State provided a report by the Agency and receipts in the amount of \$38,730.46, which demonstrated that the Agency paid for the contractor to clean up the site. See State Exh. I. Rogers failed to pay the Agency for the cost of the cleanup. Section 55.3(k) of the Act provides in part that the Board may impose costs and damages provided for by this section. 415 ILCS 5/55.3(k) (1998). Since the State met its burden for summary judgment, and the respondents did not provide any evidence to present a factual basis, which arguably entitled it to a judgment, the Board finds respondents are liable for the cost of the tire-removal.

TIRE REMOVAL COSTS

The State is entitled to costs and damages from cleaning up the site, pursuant to Section 5/55.3(k) of the Act. 415 ILCS 5/55.3(k) (1998). The State provided sufficient evidence that the Agency paid the amount of \$38,730.46 to a contractor to remove and dispose of the used and waste tires on the site. The State filed an affidavit by Todd Marvel, attesting to the total cost incurred by the Agency. See State Exh. D at 1. The State further provided the Board with an Agency report describing the cleanup as well as correspondence with and receipts from the contractor who removed the tires from the site. See State Exh. I. The receipts verify the amount the Agency alleged in its motion that it spent to complete the removal action. Since the State has provided sufficient evidence concerning the cost of the tire removal, the Board finds that the respondents should reimburse the Agency for costs in the amount of \$38,730.46.

PUNITIVE DAMAGES

The State requests that the Board order the respondents to pay punitive damages in the amount of \$77,460.92, pursuant to Section 55.3(h) of the Act. See 415 ILCS 5/55.3(h) (1998). Section 55.3(h) of the Act provides that any person liable to the Agency for costs “may also be liable to the State of Illinois for punitive damages in an amount at least equal to, and not more than two times the costs incurred by the State if such person failed without sufficient cause to take preventative or corrective action pursuant to notice issued under subsection (d) of this Section.” 415 ILCS 5/55.3(h) (1998). The statute dictates that, if punitive damages are imposed, they must be equal to, but not greater than, the actual costs incurred by the Agency from its tire removal operations. Therefore, if the Board chooses to impose punitive damages on respondents Rogers and Black Gold, it must impose such damages in an amount ranging from \$38,730.46 to \$77,460.92. The Board has no discretion to impose less than one time or greater than two times the costs incurred by the Agency.

Respondent’s failure to abide by Section 55.3 of the Act is clear from the record. Respondents failed to take preventative or corrective action pursuant to the Section 55.3(d) Notice. Rogers and Black Gold failed to respond to the notice, and did not clean up any of the used or waste tires on the site. They further did not respond to the complaint by the State in this matter, and failed to respond to the State’s Request to Admit Facts. The failure to expend even a minimal effort in this matter may justify imposing punitive damages.

However, neither of the parties included sufficient information in the record to show whether respondents had sufficient cause to fail to take such action as required under 55.3(d) of the Act. Since the record is unclear, and a genuine issue of material fact remains, the Board finds the record concerning punitive damages must be supplemented and clarified at hearing, which should be held as expeditiously as practicable.

CONCLUSION

In conclusion, the Board finds that the complainant is entitled to costs pursuant to Sections 55.3(g) and (k) of the Act for monies expended by the Agency in removing waste and used tires from the site operated by Rogers. See 415 ILCS 5/55.3(g) and (k) (1998). In accordance with Section 55.3(g) of the Act, the Board awards complainant \$38,730.46 in corrective action costs. Since a genuine issue of material fact remains as to whether respondents had sufficient cause to fail to abide by Section 55.3(d) of the Act, the Board directs that the hearing be held as expeditiously as practicable on the issue of whether and what amount, punitive damages should be imposed on the respondents.

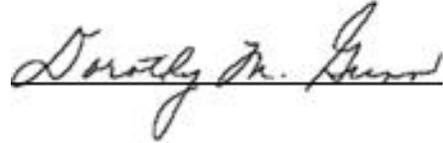
ORDER

1. The Board hereby grants the complainant's motion for summary judgment for the cost of corrective action.
2. The Board orders respondents, Dayne Rogers (Rogers) and Black Gold International (Black Gold), to reimburse the Illinois Environmental Protection Agency in the amount of \$38,730.46 for costs incurred in the clean up of accumulated used and waste tires at the site located at or near 1140 Harrison Avenue, Rockford, Winnebago County, Illinois.
3. Payment shall be made in the form of a certified check or money order, payable to the Used Tire Management Fund. The case number, name, and respondents' social security number or federal employer number should also be included on the check or money order.
4. The check or money order shall be sent to:

Illinois Environmental Protection Agency
Used Tire Management Fund
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
5. The Board directs that a hearing be held as expeditiously as practicable on the issue of whether and what amount punitive damages should be imposed on the respondents.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 2nd day of November 2000 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board