

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Jesse Lofton
d/b/a Stumpy's,

Respondent

Docket No. C-14-1389
FDA Docket No. FDA-2014-H-0886

Decision No. CR3353

Date: September 2, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Jesse Lofton d/b/a Stumpy's, alleging facts and legal authority sufficient to justify imposing a civil money penalty of \$500. Respondent did not timely answer the Complaint, nor did Respondent request an extension of time within which to file an Answer. Therefore, I enter a default judgment against Respondent and order that Respondent pay a civil money penalty in the amount of \$500.

CTP began this case by serving a Complaint on Respondent and filing a copy of the Complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The Complaint alleges that Respondent's staff unlawfully sold cigarettes to a minor, thereby violating the Federal Food, Drug, and Cosmetic Act (Act) and its implementing regulations, found at 21 C.F.R. pt. 1140. CTP seeks a civil money penalty of \$500.

On July 1, 2014, CTP served the Complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. In the Complaint and accompanying cover letter, CTP explained that within 30 days Respondent should pay the penalty, file an answer, or request an extension of time within which to file an answer. CTP warned Respondent that if it failed to take one of these actions within 30 days an Administrative Law Judge could issue an initial decision by default ordering Respondent to pay the full amount of the proposed penalty. 21 C.F.R. § 17.11.

Respondent has not filed an answer within the time provided by regulation, nor has it requested an extension. Therefore, pursuant to 21 C.F.R. § 17.11(a), I am required to issue an initial decision by default if the Complaint is sufficient to justify a penalty. Accordingly, I must determine whether the allegations in the Complaint establish violations of the Act.

For purposes of this decision, I assume the facts alleged in the Complaint are true. 21 C.F.R. § 17.11(a). Specifically, CTP alleges the following facts in its Complaint:

- Respondent owns Stumpy's, an establishment that sells tobacco products and is located at 9001 South Ashland Avenue, Chicago, Illinois 60620. Complaint ¶ 3.
- CTP previously initiated a civil money penalty action against Respondent, CRD Docket Number C-13-1209, FDA Docket Number FDA-2013-H-1004, by filing an Administrative Complaint dated August 21, 2013, (August 21, 2013 Complaint) alleging two violations of 21 C.F.R. pt. 1140 within a 12-month period. Specifically, CTP alleged Respondent sold cigarettes to a minor on August 2, 2012, and on March 11, 2013. Complaint ¶10; August 21, 2013 Complaint ¶ 1.
- This action concluded when Jesse Lofton settled the claims on Respondent's behalf. On October 24, 2013, Mr. Lofton signed an Acknowledgment Form in which he "admitt[ed] that the violations . . . occurred, waiv[ed] his ability to contest the violations in the future, and stat[ed] that he understood that that violations may be counted in determining the total number of violations for purposes of future enforcement actions." The Administrative Law Judge closed the case on November 20, 2013. Complaint ¶¶ 10-11.
- During a subsequent inspection of Respondent's establishment conducted on February 27, 2014, FDA-commissioned inspectors documented that "a

person younger than 18 years of age was able to purchase a package of Newport Box cigarettes . . . at approximately 4:27 PM.” Complaint ¶ 1.

These facts establish that Respondent is liable under the Act. The Act prohibits misbranding of a tobacco product. 21 U.S.C. § 331(k). A tobacco product is misbranded if sold or distributed in violation of regulations issued under section 906(d) of the Act. 21 U.S.C. § 387c(a)(7)(B); 21 C.F.R. § 1140.1(b). The regulations prohibit the sale of cigarettes or smokeless tobacco to any person younger than 18 years of age. 21 C.F.R. § 1140.14(a).

Here, Respondent had three violations of regulations found at 21 C.F.R. pt. 1140 within a 24-month period. Respondent acknowledged that two violations occurred when its representative settled the previous civil money penalty action. Most recently, on February 27, 2014, Respondent sold cigarettes to a person younger than 18 years of age, in violation of 21 C.F.R. § 1140.14(a). Respondent’s actions constitute violations of law that merit a civil money penalty.

The regulations require me to impose a civil money penalty in the amount that is either the maximum provided for by law or the amount sought in the Complaint, whichever is smaller. 21 C.F.R. § 17.11(a)(1)-(2). The regulations currently allow a maximum penalty of \$500 for three violations within a 24-month period. 21 C.F.R. § 17.2. Accordingly, I find that a civil money penalty in the amount of \$500 is permissible under 21 C.F.R. § 17.2.

/s/
Steven T. Kessel
Administrative Law Judge