

**BEFORE THE DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Kern
(County File No. 029-SCP-KER-19/20)

Docket No. S-037

**Jaime and Sons Pest Control Company
P.O. Box 70595
Bakersfield, CA 93387**

DECISION

Appellant/

Procedural Background

Under section 8617 of the Business and Professions Code (BPC) and section 15202 of the Food and Agricultural Code (FAC), a County Agricultural Commissioner (CAC) may levy a penalty up to \$5,000 for a violation of California’s structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Kern CAC found that Jaime and Sons Pest Control Company (Appellant) failed to perform a pesticide application in a careful and effective manner, resulting in drift onto a third party, in violation of California Code of Regulations, title 3, (3 CCR) section 6600(b). The CAC then classified the violation as a “Class A” violation under 3 CCR section 6130 and levied a \$3,000 fine on Appellant.

Appellant appealed the CAC’s decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of this appeal under BPC section 8662. Members serving on the Committee were Mr. John Tengan for the structural pest control industry, Ms. Susan Saylor for the Structural Pest Control Board (SPCB), and Ms. Kristen Driskell for the Department of Pesticide Regulation (DPR). No party requested oral argument and the Committee determined oral argument was not necessary.

Standard of Review

The Committee decides this appeal on the record before the hearing officer. The Committee decides matters of law using its independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Committee determines whether there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer’s findings and the CAC’s decision. The Committee notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the hearing officer.

The substantial evidence test only requires there be enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In applying the substantial evidence test, the Committee draws all reasonable inferences from the information in the record to support the hearing officer's findings and reviews the record in the light most favorable to the CAC's decision. If the Committee finds substantial evidence in the record to support the CAC's decision, the Committee affirms the CAC's decision.

Relevant Authorities

3 CCR section 6600(b) provides:

Each person performing pest control shall: . . .

(b) Perform all pest control in a careful and effective manner.

California Code of Regulations, title 16 (16 CCR) section 1922 (Civil Penalty Actions by Commissioners) states in relevant part:

- (a) When taking a civil penalty action pursuant to section 8617 of the Business and Professions Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount.
- (1) For purposes of this section, violation classes shall be designated as "serious," "moderate," and "minor."
 - (A) "Serious": Violations that are repeat violations of those in subparagraph (B) or violations which created an actual health or environmental hazard. The fine range for serious violations is \$700-\$5,000.
 - (B) "Moderate": Violations that are repeat violations of those in subparagraph (C) or violations which pose a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$250-\$1,000.
 - (C) "Minor": Violations that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect. The fine range for minor violations is \$50-\$400.

Factual Background

On August 20, 2019, Mr. Javier Mendivil (Structural Pest Control Board Operator License number 10751) and Mr. Sneyder Ortiz (Structural Pest Control Applicator License number 62894) were making an application of the pesticide Essentria® IC³ with a pressurized hose line to the outside perimeter of the Edgewater Condominium Main Office, located at 8200 Kroll Way, Bakersfield, California, 93311. (Stipulated Fact 5.) Mr. Mendivil and Mr. Ortiz work for Appellant, Jaime and Sons Pest Control Company (Structural Pest Control Business Operator License PR4354), the licensee responsible for the pesticide application on August 20, 2019. (Stipulated Fact 7.) Essentria® IC³ contains the warning label “Caution,” active ingredients rosemary oil, geraniol, and peppermint oil, and is exempt from pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 25(b) (7 U.S.C. § 136w(b); 40 C.F.R. § 152.25) and 3 CCR section 6147. (Stipulated Fact 6.)

While making the application, the pesticide drifted onto and came into contact with a third-party, Mr. Gabriell Tarin, as he was exiting the building after making a delivery to Edgewater Condominiums. (Exhibit 5(C) [statement of Mr. Mendivil], 5(D) [statement of Mr. Ortiz], and 5(F) [description of incident by Mr. Tarin].) Mr. Tarin washed off the pesticide and was provided eye rinse by Edgewater Condominiums. (*Ibid.*) Mr. Tarin sought medical treatment that day from Concentra Urgent Care, as he experienced symptoms of burning eyes, blurred vision, headache, and dizziness. (Exhibit 5 [pesticide episode investigation report].) He subsequently sought additional medical treatment on August 30, 2019, due to symptoms of dizziness and light sensitivity. (Exhibit 5(B) [pesticide incident report].)

On September 17, 2019, the Kern County Department of Agricultural and Measurement Standards received the pesticide incident report (Exhibit 5(B)) from Los Angeles County for Mr. Tarin, and began its investigation. On November 7, 2019, Ms. Michelle Sans Soucie, senior agricultural biologist, completed the pesticide episode investigation report for the incident. (Exhibit 5.) Ms. Sans Soucie issued a violation notice to Appellant on December 9, 2019, for violating 3 CCR section 6600(b), by failing to make an application of Essentria® IC³ in a careful and effective manner. (Exhibit 4.)

On December 9, 2019, the CAC mailed Appellant the Notice of Proposed Action charging Appellant with violating 3 CCR section 6600(b) for failing to make an application of Essentria® IC³ in a careful and effective manner, which resulted in drift onto Mr. Tarin. Appellant timely requested a hearing. Following a hearing at which both representatives for the County and the Appellant presented evidence, the hearing officer issued a proposed decision in favor of the County. The Kern CAC issued its Notice of Decision, Order, and Right to Appeal on April 2, 2020 ordering Appellant to pay a fine of \$3,000 for a “Class A” violation of 3 CCR section 6600(b). Appellant timely appealed the decision to the Committee.

Appellant's Argument

In its request for appeal, Appellant does not challenge the facts or the finding of a violation of 3 CCR section 6600(b). Appellant's sole argument on appeal is the incident should not be classified as a "Class A" violation because the incident did not cause any health, property, or environmental hazard due to the type of chemical used, lack of proof of physical harm, a lack of history of previous violations, and complete cooperation by the company.

The CAC Decision

Hearing Officer Donald O. Cripe heard the matter on behalf of the CAC on February 20, 2020. The hearing officer found by a preponderance of the evidence that Appellant violated 3 CCR section 6600(b) for failing to perform an application of the pesticide Essentria® IC³ in a careful and effective manner, which application resulted in drift onto Mr. Tarin. Although there were some inconsistencies regarding the exact location of the pesticide application, and although the county did not present medical records from Mr. Tarin, the hearing officer found that, the statements from Appellant's employees, Mr. Mendevil and Mr. Ortiz, supported that drift from the pesticide application contacted Mr. Tarin, and Mr. Tarin was not involved in the pesticide application. The hearing officer further found that allowing a pesticide to drift onto a person not involved with the pesticide application creates a health hazard whether or not there is actual harm to the person. As a result, the hearing officer found the fine level of \$3,000 for a "Class A" violation was consistent with the definition of a "Class A" violation in 3 CCR section 6130. The CAC adopted the hearing officer's proposed decision in its entirety.

Analysis

Appellant argues the violation of 3 CCR section 6600(b), should not be a "Class A" violation and the fine should be reduced because no harm actually occurred to Mr. Tarin. For the reasons described below, the Committee reverses and remands the decision to the CAC for further proceedings.

A. Substantial evidence supports the CAC's finding of a violation of 3 CCR section 6600(b).

The CAC found that Appellant did not perform pest control in a careful and effective manner because the pesticide application resulted in drift onto a third party who was not involved in the pesticide application. The CAC's decision is based in part on undisputed facts in the record that Mr. Mendevil and Mr. Ortiz made a pesticide application at Edgewater Condominiums (Stipulated Fact 5), that a pesticide, Essentria® IC³, was used during that application (Stipulated Fact 6), and Appellant is responsible for the actions of its employees, Mr. Mendevil and Mr. Ortiz (Stipulated Fact 7). The CAC's finding that pesticide drifted onto Mr. Tarin was based on statements from Mr. Ortiz and Mr. Mendevil (Exhibit 5(C) and 5(D)), Appellant's own employees, indicating the pesticide drifted onto Mr. Tarin, as well as a contemporaneous

statement from Mr. Tarin to Edgewater Condominiums (Exhibit 5(F)) that he felt the pesticide drift onto him, as well as corroborating contemporaneous statements from the manager and an employee at Edgewater Condominium regarding the incident (*Ibid.*). Although the record contains some conflicting evidence regarding the location of the parties during the incident, the amount of drift that occurred, and the effect of the drift, the CAC gave appropriate weight to conflicting evidence in making his determination. The Committee finds that the record contains substantial evidence to support the CAC's finding that the pesticide drifted onto Mr. Tarin.

The CAC further found that the drift of a pesticide onto a non-participating third party means the pesticide applicator did not perform the pesticide application in a careful and effective manner. The Committee agrees. Performing pest control in a manner that results in drift onto a third party is neither careful nor effective, as required by 3 CCR section 6600(b). Therefore, the Committee finds the record contains substantial evidence to support the finding that Appellant violated 3 CCR section 6600(b), for failing to perform pest control in a careful and effective manner.

B. The CAC applied the incorrect regulation governing fine classifications.

- (1) The CAC must use 16 CCR section 1922 to determine the violation class and fine amount.

16 CCR section 1922 states, "When taking civil penalty action pursuant to section 8617 of the Business and Professions Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount." The underlying action in this appeal was for violation of structural pest control regulations and was taken under the CAC's authority in BPC section 8617. Instead, the CAC applied section 6130 of title 3 of the California Code of Regulations to determine the violation was a "Class A" violation.

- (2) The CAC did not make necessary findings to support a "Serious" violation under 16 CCR section 1922.

In this matter, the CAC did not make a finding on whether the violation was one that created an "actual health hazard" as required to support a "Serious" violation under 16 CCR section 1922. In his decision, the hearing officer stated: "Allowing a pesticide drift to a person not involved with the spraying operation creates a health hazard whether or not any actual harm to the person is proven." (Decision, p.4.) The hearing officer then affirmed the fine for the "Class A" violation, per 3 CCR section 6130, and the CAC adopted the decision in its entirety.

The record is undisputed that the Appellant did not have any prior violations and the incident did not cause any environmental effects. Therefore, the County needed to prove, by a preponderance of the evidence, that the violation created an actual health hazard to support a "Serious" violation and corresponding fine. However, the CAC rendered a decision based on whether the evidence

supported a “Class A” violation and did not make any findings on whether the violation was “Serious.”

The record may very well support a finding of a “Serious” violation, but the Committee is not the appropriate entity to make that finding in the first instance where, as here, there is conflicting evidence. Therefore, the Committee remands the matter to the CAC to make findings on the violation class and fine under 16 CCR section 1922.

Conclusion

The CAC’s decision that Appellant violated 3 CCR section 6600(b) is based on substantial evidence in the record. Appellant’s application of Essentria® IC3 in a way that drifted onto a person who was not involved in the pesticide application was neither careful nor effective. However, the CAC’s decision that the violation was a “Class A” violation is based on 3 CCR section 6130, which is the wrong legal standard. Instead, the CAC must determine the violation class and fine level under 16 CCR section 1922.

Disposition

The CAC’s decision and levy of fine is remanded to the CAC to determine the violation class and fine level under 16 CCR section 1922.

STATE OF CALIFORNIA DISCIPLINARY REVIEW COMMITTEE

Dated: July 1, 2020

By: *Kristen M. Driskell*
Kristen Driskell, Member
For the members of the Disciplinary
Review Committee