

**BEFORE THE STRUCTURAL PEST CONTROL  
DISCIPLINARY REVIEW COMMITTEE  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
Agricultural Commissioner of  
the County of Contra Costa  
(County File No. SPC-2070507)

Administrative Docket No. S-012

**DECISION**

**Coulson-Moseley Pest Control  
1140 Saranap Avenue  
Walnut Creek, CA 94595**

Appellant/

**Procedural Background**

Pursuant to Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the Contra Costa County Agricultural Commissioner (CAC) may levy a civil 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 Contra Costa CAC found that Coulson-Moseley Pest Control (appellant) violated California Code of Regulations (CCR), title 3, section 6738 by failing to assure that its employee wear gloves as required by the product label during an application of the pesticide Termidor. The CAC levied a fine of \$300.00 for the violation.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were Peter Giammarinaro for the structural pest control industry, Kelli Okuma for the Structural Pest Control Board (SPCB), and Jodi Clary for the Department of Pesticide Regulation (DPR). The Committee heard oral argument via telephonic conference on May 18, 2006. The appellant was represented by Jim Moseley. The Contra Costa CAC did not participate in the conference.

**Standard of Review**

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner'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 requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In making the substantial evidence determination, the Committee draws all

reasonable inferences from the information in the record to support the findings and reviews the record in the light most favorable to the commissioner's decision. If the Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

### **Factual Background**

On May 4, 2005, a CAC inspector noticed a Coulson-Moseley spray rig operating at a location in Alamo, California. The CAC inspector stopped at the application site to conduct a Branch 3 pesticide use monitoring inspection and observed that the applicator was not wearing gloves during the application. The applicator explained that the gloves kept filling up with sand and he took them off. After the inspector spoke with the applicator, the applicator finished the application while wearing gloves. The CAC inspector issued a violation notice.

The CAC determined that a fine of \$200 was levied on the appellant based on a Notice of Proposed Action (NOPA) issued on February 2, 2004, for a previous violation of CCR, title 3, section 6738 when a different employee was found to be applying a pesticide without wearing the required safety glasses. The CAC issued a NOPA for the current violation and proposed a fine at the moderate level for a repeat violation within two years.

### **Appellant's Contentions**

The appellant contended at hearing and during oral argument that the CAC made a false statement in the current NOPA that tainted the CAC's determination of the fine level. The appellant also contended that the CAC should not have charged it with a repeat violation since the prior violation was of a different subsection of CCR, title 3, section 6738, regarding the failure to assure that an employee wear safety glasses and because the prior violation involved a different employee<sup>1</sup>.

### **The Hearing Officer's Determination**

The Hearing Officer found, based on the testimony of the applicator and the inspector, that the applicator was not wearing chemical gloves when observed by the CAC inspector, in violation of CCR, title 3, section 6738. The Hearing Officer discussed that in determining the appropriate fine level, the CAC must determine if the violation falls within the same violation class (minor, moderate, or serious), occurred within two years of the date of the prior Notice of

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<sup>1</sup> At hearing the appellant argued additional issues that were addressed in the Hearing Officer's decision. However, the appellant did not address the additional issues in his written request for appeal or during the oral argument before the Committee. Therefore, the Committee will not address the additional issues other than to note the Hearing Officer's resolution of the matter.

Proposed Action, and was taken by the same county proposing the current action. If the CAC finds these three criteria, the CAC is to levy a fine based on a repeat violation. The Hearing Officer found that the findings of the Contra Costa CAC met these criteria and justified the finding of a repeat violation. The Hearing Officer felt that the CAC could have placed the fine in the serious class since it was a repeat of the moderate class violation charged in the February 2, 2004 NOPA. However, the Hearing Officer stated that she did not have authority to increase the fine levels from those charged in the NOPA.

The Hearing Officer addressed four additional concerns raised by Mr. Moseley at hearing. First addressed was appellant's concern about an incorrect statement found in the current NOPA. The incorrect statement, as relevant here, is as follows: "your company has been found applying pesticides without all of the proper personal protective equipment four times in the last two years." At hearing the CAC admitted that one of the four actions is still on appeal and could not be considered in determining a repeat violation and another of the four actions occurred in March 2003, beyond the two years of this June 2005 NOPA. The Hearing Officer determined that, notwithstanding the incorrect statement, the fine level was appropriate in the moderate range because it was undisputed that a previous violation in the moderate range had occurred in February 2004, clearly within two years of the current NOPA.

Second, the Hearing Officer addressed Mr. Moseley's concern that the CAC should not have found a repeat violation since the current NOPA involved a different employee and a different subsection of the regulation (not wearing safety glasses.) The Hearing Officer found these concerns "irrelevant" and determined what was important was that a second moderate violation was found in a two-year period.

Third, the Hearing Officer addressed Mr. Moseley's assertion that the CAC should fine the employee, not the employer, under BPC section 8616.9. The Hearing Officer found that it is the employer's ultimate responsibility to supervise employees to assure safe work practices and that it is within the CAC's discretion to decide whether to fine employees or employers.

Last addressed was Mr. Moseley's assertion that enforcement was not consistent from county to county. The Hearing Officer pointed out the new Enforcement Response Policy put in place to address this concern and promote integrity for the statewide regulatory process.

#### Analysis

The evidence is uncontradicted that the applicator was not wearing gloves as required by the Termidor label at the time the inspector viewed the application. The Hearing Officer's determination of a violation is clearly supported by the record.

The evidence is also uncontradicted that the appellant was fined for a previous violation of the same regulation concerning the use of personal protective equipment within a two-year time frame. In addition, the failure of the applicator to use gloves as required by the Termidor

label created a reasonable possibility of creating a health effect that would also qualify the violation for a moderate fine.

CCR, title 16, section 1922 defines a "moderate" violation as one that is a repeat minor violation or a violation which poses a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$151-\$400. Also under section 1922, repeat moderate violations can be charged as "serious" violations with a fine range of \$401 to the maximum fine amount. The violation in this instance was classified as moderate. However, as a repeat moderate violation, it could have been classified as serious. The \$300 fine ordered here is not inappropriate regardless of the whether the violation was considered a "repeat" violation.

Appellant argues that the county cannot charge a repeat violation unless the same employee is found twice to have violated the same subsection of the regulation (i.e. to have twice failed to wear gloves). CCR, title 16, section 1922 does not define "repeat" violation. However, the analogous regulation in CCR, title 3, section 6130, governing CAC fine determinations for pesticide use violations, as well as guidelines issued by the Department of Pesticide Regulation to CACs with respect to their enforcement of structural pest control laws (Enforcement Letter, ENF-2003-027) support the Hearing Officer's interpretation of the term "repeat" as a violation by the employer in the same violation class within 2 years.

Appellant also argues that the employee and not the employer should have been charged with the violation. BPC section 8616.9 allows the CAC discretion not to cite the employer if it can be shown that the employer met certain criteria involving training, provision of personal protective equipment, compliance with regulations, disciplinary action, and repeat violations. Even if all these criteria are met, the CAC still has discretion to cite the employer. The Hearing Officer correctly found that the CAC has the discretion to charge the employer for personal protective equipment violations.

#### **Conclusion**

The record demonstrates that the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

#### **Disposition**

The Contra Costa CAC's decision is affirmed. The Commissioner's order is stayed until 30 days after the date of this decision to provide opportunity for the appellant to seek judicial review of the Committee's decision as set forth below.

The \$300 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date

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of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board  
1418 Howe Avenue, Suite 18  
Sacramento, California 95825

**Judicial Review**

BPC section 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA  
DISCIPLINARY REVIEW COMMITTEE**

Dated:     MAY 31 2006    

By:     Jodi Clary      
Jodi Clary, Member  
For and with the concurrence of all members  
of the Disciplinary Review Committee