

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Lake
County File No. 06/07-ACP-LAK-001

Administrative Docket No. 144

DECISION

**Falconer Vineyards
800 A Sky Park Drive
Lakeport, California 95453**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Lake CAC found that the appellant, Falconer Vineyards (Falconer), violated 3 CCR section 6702. The CAC imposed a penalty of \$250 for the violation.

Falconer appealed from the CAC's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the CAC's decision. The Director 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 Director 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 CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

Factual Background

On June 7, 2006, Braulio Torres, an employee of Falconer Vineyards made an application of Kumulus DF (sulfur) and Champion Wettable Powder (copper hydroxide) to winegrapes by means of a tractor and ground application equipment.¹ Both pesticide product labels require that applicators and other handlers wear a long-sleeved shirt and long pants, chemical-resistant gloves made of any waterproof material, shoes plus socks, and protective eyewear. Mr. Torres wore chemical resistant gloves while mixing and loading the pesticides, but set the gloves aside and failed to wear the gloves during the actual application.² In addition, Mr. Torres did not have one pint of water for eyewash immediately available on the tractor.

The application was observed by an inspector from the Lake CAC's office who noted the noncompliances on a Pesticide Use Monitoring Inspection Report. As a result of the CAC's routine review of pesticide use monitoring inspection reports, the CAC issued a notice of violation on November 17, 2006, for a violation of FAC section 12973 for failing to follow all of the requirements listed on the pesticide label. By Notice of Proposed Action (NOPA) also issued November 17, 2006, the CAC proposed to fine Falconer the sum of \$250 for one violation of 3 CCR section 6702 which requires employers to assure that employees handle and use pesticides in accordance with the law, regulations, and product labeling requirements. The NOPA charged Falconer with the violation based on the applicator's failure to wear chemical-resistant gloves as required by the product labels and by 3 CCR section 6738(c), and for the applicator's failure to have one pint of eyewash immediately available as required by 3 CCR section 6734(c). A hearing was held on February 26, 2007, which resulted in the hearing officer's determination that Falconer violated 3 CCR section 6702 and that the fine of \$250 was appropriate. Falconer filed a timely appeal to the Director.

¹ The actual application equipment was not identified in the hearing documents or in testimony except for reference to the employee's need to get off the tractor and walk back to the equipment to manipulate switches. Therefore, the Director assumes that the application was made by ground application equipment pulled by a tractor.

² As a result of the CAC inspector's visit, Mr. Torres returned to the barn, retrieved his gloves, and wore the gloves for the remainder of the application.

Relevant Statutes and Regulations

3 CCR section 6702, Employer-Employee Responsibilities, states in relevant part:
“(b) The employer: . . . (5) shall take all reasonable measures to assure that employees handle and use pesticides in accordance with the requirements of law, regulations, and pesticide product labeling requirements.”

3 CCR section 6000, Definitions, defines “Assure” or “Ensure” as follows: “means to take all reasonable measures so that the behavior, activity, or event in question occurs. When the behavior, activity, or event in question involves or concerns an employee, reasonable measures by an employer includes determining that the employee has the knowledge to comply; providing the means to comply; supervising the work activity; and having and enforcing a written workplace disciplinary action policy covering the employer’s requirements, as well as other measures required by pesticide law or this division.”

3 CCR section 6738, Personal Protective Equipment, subsection (c) states: “[t]he employer shall assure that: (1) Gloves are worn when required by the pesticide product labeling (except as expressly provided in this section) or (unless the pesticide product labeling specifies that gloves must not be worn), when employees are engaged in: (A) mixing or loading, except as provided in 6738(i); (B) Adjusting, cleaning or repairing contaminated mixing, loading, or application equipment; and (C) Application by hand or using hand-held equipment except when applying vertebrate pest control baits using long handled implements that avoid actual hand contact with the bait or potentially contaminated areas on equipment.”

3 CCR section 6734, Handler Decontamination Facilities, subsection (c) states: “[o]ne pint of water for emergency eye flushing shall be immediately available (carried by the handler or on the vehicle or aircraft the handler is using) to each employee handling pesticides for the commercial or research production of an agricultural plant commodity if the pesticide product labeling requires protective eyewear.”

3 CCR section 6130, Civil Penalty Actions by Commissioners, states in relevant part:
“(a) When taking civil penalty action pursuant to section 12999.5 of the Food and Agricultural 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, violations shall be designated as "Class A," "Class B," and "Class C."
(A) Class A: Violations which created an actual health or environmental hazard, violations of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, or 11897 of the Food and Agricultural Code, or violations that are repeat Class B violations. The fine range

for Class A violations is \$700-\$5,000.

(B) Class B: Violations which posed a reasonable possibility of creating a health or environmental effect or violations that are repeat Class C violations. The fine range for Class B violations is \$250-\$1,000.

(C) Class C: Violations that are not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$400.”

Appellant’s Contentions

Appellant admits that his employee wore chemical-resistant gloves while mixing and loading the pesticides, then set the gloves aside and forgot to put them back on when he got back on the tractor and began the application. Appellant argues that the language of 3 CCR section 6738(c)(1)(C) should be read to require the wearing of gloves as required by the product labeling only when employees are engaged in three types of activities--(A) mixing or loading; (B) adjusting, cleaning, or repairing contaminated mixing, loading, or application equipment; and (C) application by hand-held equipment. Appellant argues that applying a pesticide by tractor does not fit into (A), (B), or (C), so his employee was not required to wear gloves during the application.

Appellant also contends that he was unaware that a regulation required his employee to carry a pint of water (eyewash) on the tractor, that this information had not been previously supplied by the CAC, and that the eyewash violation was not noted on the Notice of Violation issued by the CAC so that he should not be fined, but only educated about the requirement. Appellant also objected to being charged with the eyewash violation because the Notice of Violation did not contain any such allegations. Appellant argued that the Notice of Violation was the lead document that controlled the proceedings, not the NOPA.

The Hearing Officer’s Decision

The hearing officer determined that the applicator’s failure to comply with both 3 CCR section 6738(c) (chemical-resistant gloves) and 3 CCR section 6734(c) (eyewash) constitutes a violation of 3 CCR section 6702 that requires the employer to assure that employees handle and use pesticides in accordance with all laws, regulations, and pesticide product labeling. The hearing officer found that, in reference to the guidance found in 3 CCR section 6000 defining the term “assure,” the applicator had the knowledge to comply, had been provided the means to comply, and had been supervised, but that there was no evidence introduced that Falconer had or enforced a written workplace disciplinary policy. The hearing officer reasoned therefore, that, the requirements of 3 CCR 6702 were not met.

The hearing officer carefully explained the relationship between the Pesticide Use Monitoring Inspection Report, the Notice of Violation, and the NOPA. Appellant was advised that, by statute, the NOPA is the vehicle that triggers due process and a hearing. The NOPA contained the eyewash noncompliance, as well as the noncompliance for failing to wear chemical-resistant gloves.³

The hearing officer found that the violation was correctly classified as a “Class B” violation based on the precautionary statements found on the product labels (avoid contact with eyes, skin, or clothing) from which it is reasonable to infer that the failure to use gloves and to have eyewash immediately available poses a reasonable possibility of creating a health effect. The hearing officer upheld the proposed fine of \$250.

The Director’s Analysis

The evidence is uncontroverted that Falconer’s employee was not wearing chemical-resistant gloves during the early stages of the application and that there was no eyewash immediately available on the tractor. The hearing officer rejected Mr. Falconer’s interpretation of 3 CCR section 6738(c) that gloves must be worn when the label requires gloves only when the employee is working under the three circumstances set out in (A), (B), and (C). The Director supports the hearing officer’s interpretation of the section. Under this regulation there are two separate circumstances that require the wearing of gloves. The first circumstance is when the label requires the wearing of gloves, period. The second circumstance is when the label is silent on the issue of gloves. In the second circumstance, as long as the label does not say that gloves should *not* be worn, the applicator must wear gloves when engaging in the activities set forth in (A), (B), and (C). Mr. Falconer is incorrect in his assertion that this regulation creates an exception to the label requirement.

The hearing officer rejected Mr. Falconer’s lack of knowledge of the eyewash regulation as a defense. The Director also rejects such a defense. Mr. Falconer is a licensed private applicator and knows that he must follow all laws and regulations when applying a pesticide and is charged with knowledge of those laws and regulations. Title 3 CCR section 6734 was in effect during this application and is applicable to this situation and to Mr. Falconer’s farming operation.

³ Steven Hajik, the Lake CAC, testified at the hearing and explained his reasoning for charging the appellant with a violation of 3 CCR section 6702. Mr. Hajik could have charged the appellant with three violations--one for failing to follow the label (FAC section 12973), one for violation of 3 CCR section 6738 (gloves), and one for 3 CCR section 6734 (eyewash). Each violation would carry a \$250 fine. Mr. Hajik properly used 3 CCR section 6702 to charge only one violation and limit the fine to \$250. The CAC has authority to fine a violator only after the opportunity for a hearing has been provided. FAC section 12999.5 is the statutory basis of that authority and requires the CAC to issue a written notice of proposed action including the nature of the violation, the proposed fine, and the right to request a hearing. The Director finds that the CAC met all procedural requirements and that Falconer received due process.

The hearing officer found that Falconer failed to satisfy the requirements of 3 CCR section 6702 because there was no evidence presented that Falconer had a written workplace disciplinary policy. To establish a violation of 3 CCR section 6702, the burden rests with the CAC to prove that the employer failed to do some act that is an element of the violation. To establish that Falconer failed to take all reasonable measures to assure that his employee handle and use pesticides according to law, regulations, and the label, the CAC must present substantial evidence that the employee was not given the knowledge to comply, was not provided the means to comply, was not supervised, or that the employer did not take all reasonable measures to assure compliance, such as having a written disciplinary policy in place. The hearing officer ruled that the employer violated CCR section 6702 because no evidence was presented that the employer had a disciplinary policy. A showing by the CAC that Falconer did not have a disciplinary policy could support a finding of violation, but no evidence was provided either way on that point. The Respondent does not have the burden to disprove a potential element of the violation not raised by the CAC.

Mr. Falconer admitted at the hearing that Mr. Torres simply forgot to put his gloves back on prior to starting the application. Based on the label requirements of both pesticide products, Mr. Torres was required to wear chemical-resistant gloves during the application. The testimony of Mr. Falconer, Mr. Moston, and the CAC's inspector, Denise Patrick, established that Mr. Falconer was present during some of the application, as was Mr. Torres' supervisor, Mike Moston. Even though the hearing officer found that Mr. Torres was supervised, presumably because both Mr. Falconer and Mr. Moston were present during part of the application, it is not clear that this supervision was adequate since both missed the fact that Mr. Torres began the application without gloves. However, a determination on this issue is not necessary in this instance in order to find a violation of 3 CCR 6702. Mr. Falconer's testimony established that he failed to provide eyewash to Mr. Torres and that he was not even aware that it was a requirement of 3 CCR 6734. To know and understand the regulations related to the safe use of pesticides is not only a reasonable measure to assure compliance with those regulations, it is requirement of 3 CCR 6702(b)(1). Thus, there is substantial evidence that the employer failed to take all reasonable measures to assure his employee used pesticides in accordance with the regulations in violation of 3 CCR 6702(b)(5).

The hearing officer properly found that the violation is a "Class B" violation because the failure to have eyewash immediately available poses a reasonable possibility of creating a health effect. The CAC established the fine at the low end of the range, which is well within the CAC's discretion. The Director affirms the fine at \$250.

Conclusion

The record shows the CAC's decision is supported by substantial evidence and there is no cause to reverse or modify the decision. The Director upholds the CAC's decision and fine in its entirety.

Disposition

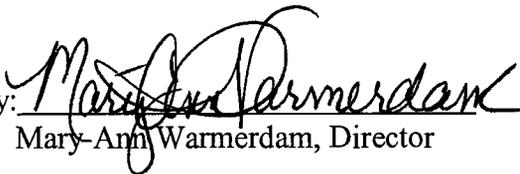
The CAC's decision is affirmed. The CAC shall notify the appellant how and when to pay the \$250 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: JUN 04 2007

By: 
Mary-Ann Warmerdam, Director