

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

In the Matter of the Decision of
Agricultural Commissioner of
the County of San Luis Obispo
(County File No. 005-ACP-SLO-07/08)

Administrative Docket No. 157

DECISION

Tri-Cal, Incorporated
Post Office Box 1327
Hollister, California 95024

Appellant/

Procedural Background

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

After giving notice of the proposed action and providing a hearing, the San Luis Obispo CAC found that the appellant, Tri-Cal, Incorporated (Tri-Cal), violated FAC section 12973. The commissioner levied a total penalty of \$1,000.

Tri-Cal appealed the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Factual Background

On October 5, 2006, Tri-Cal, a pest control business, applied the soil fumigant Inline (EPA reg. no. 62719-348), for Hugo Diaz, under his restricted materials permit, by injection into his irrigation system.

Before the application began, Tri-Cal informed Mr. Diaz of the relevant label and personal protective equipment (PPE) and offered him all the necessary PPE. Mr. Diaz refused the respirator, and stated that his brother was bringing him one soon, and Tri-Cal should begin the fumigation. During the application, Tri-Cal's employee stopped the injection because of a leak in the irrigation system and flushed the system for 10-15 minutes. Mr. Diaz began repairing the irrigation system without wearing a respirator.

Appellant's Contentions

Appellant contends that, though Mr. Diaz may have violated section 12973, it did not.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. The Director affirms the commissioner's decision if it is supported by substantial evidence. The substantial evidence test requires sufficient relevant evidence and inferences from that evidence to support a conclusion by a reasonable person, even though a reasonable person might also have made

different findings. Witnesses sometimes present contradictory testimony; however, issues of witness credibility are the province of the Hearing Officer.

Where a commissioner's decision presents a question of the law, the Director decides that issue using her independent judgment.

Findings and Analysis

The CAC's decision is not supported by substantial evidence.

The CAC appears to recognize that, as a matter of law, Tri-Cal cannot be held vicariously liable for Mr. Diaz's acts or omissions, because Mr. Diaz is not Tri-Cal's agent or employee.¹ (See Commissioner's argument on appeal at page 4.) Mr. Diaz was acting on his own behalf. Tri-Cal did not hire Mr. Diaz, and it cannot fire or discipline him. Nevertheless, the Commissioner found that Tri-Cal violated section 12973 by using the pesticide Inline in conflict with its registered label.

The Hearing Officer identified two relevant label instructions. (Proposed Decision at page 4.) First, the Inline label states, "For retail sale to and use only by Certified Applicators or persons under their direct supervision ..." To fine a person for using Inline in conflict with this label instruction, the Commissioner must show: (1) the person used Inline; and (2) the person was neither a Certified Applicator nor supervised by a Certified Applicator. Both Tri-Cal and Mr. Diaz "used" Inline on October 5, 2006, but the Hearing Officer found that Andrew Fuller, a Certified Applicator, supervised that application. (Proposed Decision at page 4, Finding of Fact #4.) Thus, the Hearing Officer's findings do not support a conclusion that Tri-Cal used Inline in conflict with this label restriction.

The Inline label also states:

"Handlers performing direct contact tasks must wear: Full-face respirator with either an organic-vapor-removing cartridge with a prefilter for pesticides ... or canister approved for pesticides..., or a NIOSH approved respirator with an organic vapor (OV) cartridge or canister with any N, R, P, or HE prefilter".

To fine a person for using Inline in conflict with this label instruction, the Commissioner must show that the person: (1) is a handler performing a direct contact task; (2) did not wear a respirator that met the specified standards while doing so. The parties do not dispute that Mr. Diaz performed direct contact tasks without wearing a respirator. However, the Hearing Officer made no finding, and the Commissioner offered no evidence, that Tri-Cal, or any its agents or employees, performed a direct contact task while not wearing a respirator.

¹ I.e. Tri-Cal does not stand in Mr. Diaz's shoes. By the same token, Tri-Cal did not have the same duty to "assure" Mr. Diaz's compliance with PPE requirements, as it does for its employees under the Department's worker safety regulations.

The Hearing Officer concluded that Tri-Cal used Inline in conflict with its registered label because its inadequate supervision “contributed to Mr. Hugo Diaz being at the site of the leak without a respirator in conflict with the requirements of the Inline label . . .” (See Proposed Decision at 6.) As discussed below, Tri-Cal must adequately supervise Mr. Diaz, show due care to avoid his injury, and in general to be careful when applying pesticides. However, these requirements are not in the label restrictions that the CAC cited and found were violated. The label instructions do not provide standards of adequate supervision or care, nor do they say anything about contributing to the occurrence of another person’s violation.

Thus, the CAC’s finding that Tri-Cal violated section 12973 is not supported by substantial evidence in the record.

Tri-Cal must supervise and otherwise show due care for property operators’ compliance and safety.

The Inline label contemplates that the grower or its employees are responsible for the irrigation system during an application. “Only a person knowledgeable of the chemigation system and responsible for its operation . . . shall operate the system and make necessary repairs.” (Exhibit U at page 16.) In San Luis Obispo, where only commercial applicators may apply Inline, the CAC’s permit condition specifies, “a representative of the grower who is knowledgeable of the irrigation system, shall be present at the treatment site during the application.” (Exhibit W at page 2.)

Though Tri-Cal and Mr. Diaz were not principal/agent or employer/employee, they did have a relationship. Insofar as Mr. Diaz handled Inline, he did so expressly under Tri-Cal’s supervision. Tri-Cal is not liable for Mr. Diaz’s actions, as it would be for the actions of its employees. However, the Commissioner is correct that Tri-Cal had a duty to avoid Mr. Diaz’s violation by its supervision. The difficulty the CAC faced was properly selecting and charging the law or regulation that enforces this general duty.

The Department’s regulations do require that each person performing pest control do so in a careful manner. [3 CCR section 6600(b).] To be careful means to exercise reasonable precautions. “Performing pest control in a careful manner” includes taking reasonable precautions to avoid unsafe, illegal exposure to the pesticide. What precautions are “reasonable” depends on the circumstances. The circumstances in this case dictated that Tri-Cal be extremely careful. Inline is a highly dangerous and a restricted material due to its high acute inhalation toxicity and carcinogenicity. (See Exhibit U at pages 1 and 2.) Tri-Cal is a licensed pest control business with particular expertise in fumigation. Mr. Diaz is not. Tri-Cal was the putative supervisor of the application and, as such, had a duty to clearly instruct Mr. Diaz and direct his activities insofar as he handled and risked exposure to Inline.

Under these circumstances, reasonable precautions certainly include verifying prior to the application that the grower, or grower’s employees understand all PPE requirements, have been trained in conformity with section 6724, have had an opportunity to review and understand the label and Material Data Safety Sheet, and have all necessary PPE available and in working

condition. Reasonable precautions also include observing the grower or grower's employees when they are called upon to perform direct contact tasks, and immediately informing them if they are doing so unsafely or illegally.

The record suggests that Tri-Cal may not have taken reasonable precautions to avoid Mr. Diaz's exposure. For example, Tri-Cal began the application when Mr. Diaz did not have a respirator. Also, a Tri-Cal employee signaled to Mr. Diaz, presumably that the irrigation system needed repair, and then went out of sight to flush the system. Further, if the level of care had been directly placed at issue, other facts would probably have been explored that relate to whether Tri-Cal exercised the requisite level of care. When Mr. Diaz told Tri-Cal that his brother was bringing him a respirator, did Tri-Cal confirm with him that the respirator met the label requirements and was in good working order? When Tri-Cal's employee signaled to Mr. Diaz that the irrigation system was leaking, did he offer a respirator again? Did he signal in such a way that a reasonable person would think he was being asked to make the repairs? Did he signal that Mr. Diaz should stay away? Witnesses with direct knowledge of these and other questions bearing on what precautions Tri-Cal took that day, e.g. Mr. Ysabel Lopez and Mr. Hugo Diaz, were not asked to present any testimony at the hearing. However, Tri-Cal was not charged with a failure to exercise the appropriate level of care, and evidence related to that issue was not clearly at issue in the hearing and is not relevant to this review.

Constitutional due process as reflected in the requirements of section 12999.5 provide that respondent must be given notice of the alleged violation sufficient to allow it to challenge the government's evidence and prepare its defense to the charge. Because the Commissioner only charged Tri-Cal with using a pesticide in conflict with the label, the only evidence Tri-Cal needed to present in its defense was that Mr. Hugo Diaz was not working for them. The record in this case does not support the charged violation of use in conflict with the label and due process prohibits the Director from finding on appeal that Tri-Cal committed any other violation.

Conclusion

For the foregoing reasons, the commissioner's decision to levy a penalty of \$1,000 against Tri-Cal for violating FAC section 12973 is not supported by substantial evidence.

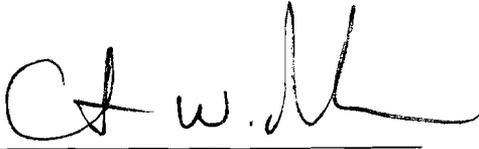
Disposition

The commissioner's decision is reversed.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: SEP 30 2008

By:


Mary-Ann Warmerdam, Director