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 San Diego
(County File No. 852-ACP-SD-07/08)

Administrative Docket. No. 160

Lilac Valley Ranch
Attn: Duane Urquhart, Owner
5256 S. Mission Road, Suite 905
Bonsall, CA 92003
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 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing on August 27, 2008, the San Diego CAC found that on March 21, 2008, appellant violated 3 CCR sections 6702 and 6734 and levied a fine of $500.

Mr. Duane S. Urquhart appealed from 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.

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 commissioner'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 commissioner'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 commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

On March 21, 2008, a CAC inspector conducted a pesticide use monitoring inspection after noticing two workers using backpack sprayers to apply a substance in an avocado orchard. The workers could not tell the inspector what they were spraying and refused to give their names. The inspector noted that the workers were not wearing chemical resistant gloves or protective eyewear. There was no pesticide container or label at the site. One worker told the inspector that he had not been trained to handle pesticides. There were no decontamination facilities or supplies at the site.

The inspector contacted her office and learned that the orchard was operated by Lilac Valley Farms. On April 16, 2008 the CAC inspectors visited Lilac Valley Farms and spoke to the owner, Mr. Duane Urquhart. Mr. Urquhart was able to identify the workers and advised the inspectors that the workers had been applying Roundup Pro. A violation notice was issued for failing to have the pesticide label on site (section 6602), failure to assure that the employees were wearing protective eyewear and chemical resistant gloves [section 6738(b)(c)], failure to properly train pesticide handlers (section 6724), and failure to provide proper decontamination supplies (soap and single use towels) at the site [section 6734(a)(b)(c)].

The CAC used its discretion to charge appellant with two violations by lumping the violations of sections 6602, 6738, and 6724 into one violation of section 6702 (employer-employee responsibilities), and by charging appellant with one violation of section 6734. The CAC determined that the violations created a reasonable possibility of a health or environmental hazard and were properly charged as Class B violations. The CAC proposed the fines each be set at the minimum level of Class B, which is $250.

Relevant Statute and Regulations

Section 6702 Employer-Employee Responsibilities, reads as follows:

"(a) The employer shall comply with each regulation in this subchapter which is applicable to the employer's action or conduct.
(b) The employer:
(1) is responsible for knowing about applicable safe use requirements

specified in regulations and on the pesticide product labeling;

(2) shall inform the employee, in a language the employee understands, of the specific pesticide being used, pesticide safety hazards, the personal protective equipment and other equipment to be used, work procedures to be followed, and pesticide safety regulations applicable to all activities they may perform;

(3) shall supervise employees to assure that safe work practices, including all applicable regulations and pesticide product labeling requirements, are complied with;

(4) has the duty to provide a safe work place for employees and require employees to follow safe work practices; and

(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.

(c) Employees shall utilize the personal protective equipment and other safety equipment required by pesticide product labeling or specified in this subchapter that has been provided by the employer at the work site in a condition that will provide the safety or protection intended by the equipment."

Section 6734 Handler Decontamination Facilities, requires the employer to assure that sufficient water, soap, and single use towels for routine washing of hands and face and for emergency eye flushing and washing of the entire body are available for employees. The facilities and supplies shall be at the mixing/loading site and not more than ¼ mile from other handlers. One pint of water for emergency eye flushing is to be immediately available to each handler.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard, is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897, or is a repeat of a Class B violation. The fine range for Class A violations is $700-$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a repeat of a Class C violation. The fine range for Class B violations is $250-$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is $50-$400.

Appellant's Allegations

At hearing appellant stipulated to the facts surrounding the violations and the violations. However, appellant contended that the workers had previously been trained by a certified trainer, and received yearly training from the foreman who attends Worker Protection Standard (WPS) Training classes yearly. Thus, appellant contended, the workers knew their responsibilities to

wear protective gear and chose not to. Appellant contended that he should not be fined for the poor judgment of his workers. Appellant further contended that the application did not result in a health hazard, and that the fine of $500 was extremely heavy handed and excessive for a first violation. Appellant asserts that the CAC should have used his discretion to charge the violations as a Class C and waive fines.

The Hearing Officer's Decision

Since the parties stipulated to the facts and violations, the Hearing Office limited his determination to one issue---did the CAC properly determine the violation class levels and fine amounts? In his proposed decision, the Hearing Officer stated the county's and the appellant's positions and made findings without stating any analysis. The Hearing Officer found that there was no unreasonable multiplication of charges, that each violation created an actual health hazard to the handlers, and that accordingly each violation was a Class B violation. He further found that the minimum fine for a Class B violation is $250 and fines are mandatory. The Hearing Officer decided that the proposed fine of $500 for the two violations met the guidelines as established in 3 CCR section 6130. Since the appellant stipulated to the facts and the violation, the Hearing Officer did not need to analyze the evidence relied upon and lay out the rationale to support a violation. However, the Hearing Officer also did not include analysis to support the determination that the violations were properly charged as Class B. Although not necessary to support upholding the decision, the Director will make a determination as to whether sufficient evidence was presented to support Class B violations and minimum fines.

The Director's Analysis

Although the appellant stipulated to the violations, he continued to argue that his workers were properly trained and chose not to use eyewear and gloves and that he should not be fined for their actions. The employees were identified as Valentine and Jose Ramirez. 3 CCR section 6724 addresses pesticide handler training. The section requires the employer to have a written training program. No evidence of a written training program was provided. Appellant provided sign in sheets for safety training meetings on October 15, 2007, October 3, 2006, and October 1, 2005. Training is to be repeated at least annually [section 6724(d)]. Valentine Ramirez did not sign the 2007 sign-in sheet and appeared not to have received training since October 2006. On March 21, 2008, one of the employees told the inspector he had not received pesticide handling training. Jesus Ramirez was identified at hearing as the trainer at the safety meetings. Appellant admitted that Jesus had been unable to become qualified in any of the qualifying categories listed in section 6724(f). Appellant asserts that since Jesus Ramirez attended WPS Training given by the CAC and by the U.S. Environmental Protection Agency (U.S. EPA) that he believed Jesus Ramirez was qualified to provide pesticide handler training. The WPS Training is to train field workers and is not for training pesticide handlers. The county provided a copy of a headquarters records inspection conducted on October 10, 2007, and signed by

Mr. Duane Urquhart that advised appellant that Jesus Ramirez was not qualified to do handler training and that the handler trainer must be qualified as required by regulation (section 6724). The report also contained the admonishment that "No workers may handle pesticides until training is completed as required." The evidence is clear that appellant failed to provide proper yearly training to his employees regarding the handling of pesticides.[1] After the inspection, appellant instituted a disciplinary program to punish employees that fail to follow the pesticide handling requirements, and had the employees sign the policy on April 15, 2008. This action after the fact does not absolve appellant of his earlier violations. Moreover, appellant admits that it still does not have a qualified handler trainer and admits that his workers cannot lawfully apply pesticides until they are properly trained. The evidence would support a finding that the employer failed to assure that his employees follow the law and that a fine is properly assessed against the employer and not the employees for both violations.

The CAC asserts, and the Director agrees, that the failure to provide proper training in the handling of pesticides, which would lead to the failure of the employees to wear proper protective equipment, the failure to have the label at the site, and the failure to have decontamination supplies available as required creates a reasonable possibility of health or environmental harm. The Hearing Officer found that each violation created an actual health hazard to the handlers. There is no evidence to support this finding. However, for a Class B violation as charged, the standard is whether a reasonably possibility of harm was created. The evidence supports that standard and the imposition of Class B fines. The CAC used its discretion in lumping together the violations and charging only two violations, at the Class B level, and in proposing fines at the minimum level. Under the facts of this case, and the policy of the enforcement response policy found in 3 CCR section 6130, as asserted by the CAC, these violations cannot properly be charged as Class C violations.

Conclusion

The commissioner's decision that Appellant violated 3 CCR sections 6702 and 6734 is supported by substantial evidence. The commissioner's decision to levy a fine of $500 is also supported by substantial evidence, and is well within his discretion.

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[1] Appellant did not address the violation of failing to have the pesticide label at the site. This, combined with the fact that the workers did not know what they were applying negates the usefulness of any training. Further, appellant explained that decontamination supplies are kept in the foreman's truck because the supplies seemed to disappear. Appellant stipulated to both these violations and the stipulation is sufficient to support the proposed fines.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the $500 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: 16 Dec 2008 By: Mary-Ann Warmerdam
Mary-Ann Warmerdam, Director