BEFORE THE DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Orange
(County File No. 31-SCP-ORA-13/14)

Docket. No. S-025

Sergio Solorio
920 Armorlite Drive
San Marcos, CA 92069
Appellant/

DECISION

Procedural Background

Under Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner 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 Orange County Agricultural Commissioner (CAC) found that Sergio Solorio (appellant or Mr. Solorio) violated California Code of Regulations (CCR) title 3, section 6600 by failing to perform pest control in a careful manner. The CAC classified the violation as "moderate" and levied a $400 fine.

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 John Tengan for the structural pest control industry, Susan Saylor for the Structural Pest Control Board (SPCB), and Daniel Rubin 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 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 21, 2013, Statewide Fumigation San Diego fumigated the residential structure located at 22031 Newport Circle in Huntington Beach, California using Vikane. (Stipulation 5.) Vikane is a U.S. EPA and DPR-registered-pesticide product (U.S. EPA Reg. No. 62719-4) labeled with the signal word "DANGER." (County Exhibit 4.) Appellant, Sergio Solorio, was the Statewide Fumigation San Diego employee and licensee in charge of aerating the fumigation site. (Stipulation 6.) Mr. Solorio is licensed in Branch I fumigations, license number FR40109. (Stipulation 4.)

On May 23, 2013, Orange County Inspector J. Gibbs (Inspector Gibbs) performed an aeration inspection of the fumigation site and documented her findings in a Structural Fumigation Use Monitoring Inspection Report (Inspection Report.) During the inspection, Inspector Gibbs observed that the back slider door of the structure was unlocked. After questioning Mr. Solorio, Inspector Gibbs determined that Mr. Solorio entered the structure earlier that day because of a medical emergency that necessitated the use of the restroom, and that he exited through the back slider door—leaving that door unlocked. (County Exhibit 3.) Mr. Solorio entered the structure without a self-contained breathing apparatus (SCBA) and did not continuously monitor with a spectros or interscan device. (Testimony of J. Gibbs at 15:12.)

On January 30, 2014, the CAC issued a Notice of Proposed Action (NOPA), charging Mr. Solorio with violating CCR title 3, section 6600 by failing to perform pest control in a careful manner. On June 18, 2014, a hearing was held before Richard Tipper, the hearing officer appointed by the CAC.

Applicable Statutes and Regulations

CCR title 3, section 6600, subdivision (b) states that each person performing pest control shall perform all pest control in a careful and effective manner.

CCR title 16, section 1922, subdivision (c) classifies repeat violations that do not create or pose a reasonable possibility of an actual health or environmental effect, or violations that pose a reasonable possibility of creating a health or environmental effect as "moderate".

Appellant's Contention

Appellant argues that he entered the fumigation site because of a medical emergency. Appellant does not challenge the fine classification or amount.

The CAC Decision

The CAC classified the violation as a "moderate" violation of CCR title 3, section 6600, subdivision (b) and proposed a fine of $400. The hearing officer found that Mr. Solorio did not

perform pest control in a careful manner because he violated Step 4 of the California Aeration Plan (CAP) during the aeration of the fumigation site. Specifically, the CAC found that Mr. Solorio entered the fumigation site prior to certifying the structure for reentry and without SCBA or continuous monitoring. The hearing officer upheld the proposed fine classification and amount because the violation posed a reasonable possibility of creating a health effect and based on Mr. Solorio's history of noncompliance. The CAC adopted the hearing officer's proposed decision in its entirety.

Analysis

a. The CAC decision that appellant did not perform pest control in a careful manner is supported by substantial evidence in the record.

The hearing officer found that Mr. Solorio did not perform pest control in a careful manner because he violated Step 4 of the CAP during the aeration of the fumigation site. The CAP is a statewide-aeration process for structural fumigations that includes six (6) steps. Under the CAP, the fumigator pulls the fumigant from the fumigation site while the tarp is still in place. This process is designed to protect fumigation-company employees from unsafe exposure to fumigants while ensuring that the fumigation site reaches clearance standards.

CAP Step 4 states:

> "Remove all tarpaulins and/or seals from the structure. Do not enter the structure without SCBA or continuous monitoring until the completion of Step 6."

CAP Step 6 states:

> "Measure the concentration of sulfuryl fluoride in breathing zones (where people typically stand, sit, or lie down) using an approved detection device as per sufuryl fluoride product labeling. If the concentration of sulfuryl fluoride is greater than 1 ppm or warning properties of chloropicrin are detected, continue ventilation with doors and windows open until aeration is completed. Confirm sulfuryl fluoride concentrations are 1 ppm or less. Structure may be reoccupied when the concentration of sulfuryl fluoride is 1 ppm or less."

Thus, the CAP prohibits persons from entering a structure without SCBA or continuous monitoring, prior to certifying the structure for reentry. The hearing officer found that Mr. Solorio violated Step 4 of the CAP and that in doing so, Mr. Solorio did not perform pest control in a careful manner. That decision is supported by substantial evidence in the record.

The hearing officer's decision is based on statements made by Mr. Solorio during the County's aeration inspection and recorded in the Inspection Report. During her inspection, Inspector Gibbs observed that the back slider door was unlocked. Upon being questioned, Mr. Solorio explained that he had entered the structure because "He had to go to the bathroom and couldn't wait." (County Exhibit 3.) Inspector Gibbs testified at the hearing that Mr. Solorio indicated that he was not wearing SCBA or continuously monitoring when he entered the

structure. (Testimony of J. Gibbs at 15:12.) Appellant does not challenge these facts or present any contrary evidence. Mr. Solorio admitted that—although he "knew" he wasn't supposed to—he entered the structure in violation of the CAP. (Testimony of S. Solorio at 24:23.) Thus, the hearing officer's decision that Mr. Solorio violated Step 4 of the CAP during the aeration of the fumigation site is supported by substantial evidence in the record.

The hearing officer found that by violating Step 4 of the CAP during the aeration of the fumigation site, Mr. Solorio failed to perform pest control in a careful manner. The Committee agrees. Appellant violated the CAP—a statewide safety protocol for the structural pest control industry—when he entered a structure with an unknown level of fumigant and without the required safety equipment. Performing pest control in this manner is not "careful," as required by CCR title 3, section 6600, subdivision (b).

On appeal, appellant reasserts his argument from the hearing—that a medical emergency necessitated his immediate use of the restroom in the structure and justified his failure to comply with the CAP. The hearing officer decided that in spite of Mr. Solorio's emergency, the County proved all of the elements of CCR title 3, section 6600, subdivision (b). The Committee agrees. As stated above, the hearing officer's decision is supported by substantial evidence in the record.

b. The fine levied by the CAC is not excessive.

The CAC classified the violation as "moderate" because the violation posed a reasonable possibility of creating a health effect. The CAC levied a fine in the middle of the "moderate" violation range based on Mr. Solorio's history of noncompliance.

Appellant does not challenge the fine classification or amount, and the fine classification and amount are supported by the record and not excessive. Mr. Solorio entered the fumigation site prior to certification and without the required safety equipment. As such, he exposed himself to an unknown level of fumigant and created the reasonable possibility of a health effect. Additionally, the CAC previously levied a fine against Mr. Solorio within the last year.[1] Thus, the fine classification and amount are appropriate.

Conclusion

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

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[1] *See* Orange County File No. 82-SCP-ORA-12/13. In that case, the CAC decided that Mr. Solorio violated BPC section 8505.7 by—as in this case—failing to secure a fumigation site by leaving a door unlocked. As such, the CAC could have found a violation of BPC section 8505.7 in this case as well. This is further evidence that Mr. Solorio failed to perform pest control in a careful manner.

Disposition

The Orange CAC's decision is affirmed. The CAC's order is stayed until thirty (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 $400 civil penalty levied by the CAC against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" thirty (30) days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board
2005 Evergreen Street, Ste. 1500
Sacramento, CA 95815

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: SEP 19 2014

By: Daniel Rubin
Daniel Rubin, Member
For the members of the Disciplinary Review Committee