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 Orange
(County File No. 8-ACP-SB-12/13)

Administrative Docket No. 201

DIRECTOR'S DECISION

Hoag Hospital
One Hoag Drive
Newport Beach, California 92663

_____Appellant/

Procedural Background

Under section 12999.5 of the Food and Agricultural Code, county agricultural commissioners (CACs) may levy a civil penalty up to $5,000 for certain violations of California's pesticide laws and regulations. When levying a penalty, CACs must follow the guidelines established in California Code of Regulations, title 3, section 6130 (3 CCR § 6130). 3 CCR § 6130 requires CACs designate each violation as Class A, Class B, or Class C. Each class has a corresponding fine range.

After giving proper notice of the proposed action and conducting a hearing on April 13, 2015, the Orange County Agricultural Commissioner (Commissioner) found that on October 24, 2013, Appellant, Hoag Hospital, violated 3 CCR § 6738(b). The Commissioner classified Appellant's violation as Class A and levied a $700 civil penalty.

Appellant appeals the Commissioner's decision to the Director of the California Department of Pesticide Regulation (Director). The Director has jurisdiction over this appeal under section 12999.5 of the Food and Agricultural Code.

Standard of Review

The Director decides this appeal on the record before the Hearing Officer. The Director decides matters of law using his independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director determines whether there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. Witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test only requires there be enough relevant information and inferences from that information to support a conclusion, even if other conclusions might have also been reached. In applying the substantial evidence test, the Director draws all reasonable inferences from the information in the record to support the Hearing Officer's 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 October 24, 2013, Ms. Maria E. Garcia, an employee of Appellant, used the pesticide, *Super Sani-Cloth Germicidal Disposable Wipes* (hereinafter referred to as "Sani-Cloth") to clean an intravenous machine. (Stipulated Fact 2.) While cleaning the intravenous machine, liquid from the Sani-Cloth wipe fell into Ms. Garcia's right eye causing irritation. (Exhibits A & K.) Ms. Garcia was wearing disposable gloves and prescription eyeglasses. (Exhibit A.) However, Ms. Garcia was not wearing eye protection. (Exhibit A.) At the time of the incident, Ms. Garcia was not working in a room where HIV-1, HBV or HCV infected blood or body fluids were present. (Testimony of Ms. Provost.)

Appellant uses Sani-Cloth solely to clean intravenous machines. (Testimony of Ms. Provost.) An intravenous machine is approximately six inches by six inches. (Testimony of Ms. Garcia.) Ms. Garcia cleans a maximum of twelve intravenous machines in a workday and it takes Ms. Garcia about one minute to clean each machine. (Testimony of Ms. Garcia.) Ms. Garcia's eye irritation is the only known incident at Hoag Hospital involving Sani-Cloth in the past four or five years. (Testimony of Ms. McGavack.)

Appellant's "Safety and Injury & Illness Prevention" policy sets forth Appellant's policies and procedures for minimizing hazards and preventing injury and illnesses. (Exhibit I-10.) Appellant created this policy to comply with the eye protection standards set forth in CCR, Title 8. (Testimony of Ms. McGavack.) Following this policy, Appellant assessed whether eye protection is necessary when using Sani-Cloth by reviewing Sani-Cloth's registered-label and SDS. (Testimony of Ms. Provost.) Appellant determined that employees must wear eye protection when using Sani-Cloth when working in a "contact isolation room" where infectious diseases, blood and body fluids may be present. (Testimony of Ms. Provost.)

Sani-Cloth is registered with the Department of Pesticide Regulation (CA Reg. No. 9480-4-AA). (Exhibit G.) Sani-Cloth's registered-label provides a signal word "DANGER" and cautions that Sani-Cloth "[c]auses irreversible eye damage." (Exhibit G.) Sani-Cloth's registered-label instructs users to "wear disposable protective gloves, protective gowns, masks, and eye coverings when handling HIV-1 (AIDS Virus), HBV or HCV infected blood or body fluids." (Exhibit G.)

Relevant Laws and Regulations

The worker safety provision set forth in Title 3 that is at issue in this matter is as follows:

> Employers shall assure that "employees wear protective eyewear when . . . employees are" applying a pesticide by hand. (Cal. Code Regs., tit. 3, § 6738, subd. (b).)

The following are exceptions to the worker safety provisions set forth in Title 3:

> When antimicrobial agents, used only as sanitizers, disinfectants, or medical sterilants, or pool and spa chemicals are handled, the employer is exempt from complying with the provisions of Title 3, California Code of Regulations sections specified below, provided the employer instead complies with any applicable requirements in the following corresponding provisions of Title 8, California Code of Regulations.
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> | *Title 3, CCR* | *Title 8, CCR* |
> | --- | --- |
> | . . . | . . . |
> | 6738-6738.4 | 3380 through 3385 |
> | . . . | . . . |
>
> (Cal. Code Regs., tit. 3, § 6720, subd. (c).)
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> The provisions of this subchapter do not apply to employees handling consumer products packaged for distribution to, and use by, the general public, provided that employee use of the product is not significantly greater than the typical consumer use of the product. (Cal. Code Regs., tit. 3, § 6720, subd. (e).)

The regulations of the Department of Industrial Relations, Division of Occupational Safety and Health (CalOSHA) set forth in Title 8 that correspond to 3 CCR § 6738(b) state:

> (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
>
> (A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
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> (B) Communicate selection decisions to each affected employee; and,
>
> (C) Select PPE that properly fits each affected employee.
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> (2) The employer shall verify that the required workplace hazard assessment has

> been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.
>
> (Cal. Code Regs., tit. 8, § 3380, subd. (f).)

> Employees working in locations where there is a risk of receiving eye injuries . . . which are inherent in the work or environment, shall be safeguarded by means of face or eye protection. (Cal. Code Regs., tit. 8, § 3382, subd. (a).)

The following regulations outline the Commissioner's jurisdiction to levy penalties for violating California's pesticide use laws:

> In lieu of civil prosecution by the director, the county agricultural commissioner may levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with section 12971), or Article 10.5 (commencing with Section 12980) of this chapter . . . or a regulation adopted pursuant to any of these provisions.
> (Food & Agr. Code, § 12999.5, subd. (a).)

> When levying a penalty, the Commissioner must follow the guidelines provided in 3 CCR § 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class A violation is one of the following:
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> (A) A violation that caused a health, property, or environmental hazard.
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> (B) A violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A.
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> 1. The respondent has a history of violations;
> 2. The respondent failed to cooperate in the investigation of the incident or to allow a lawful inspection; or
> 3. The respondent demonstrated a disregard for specific hazards of the pesticide used.
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> (C) A violation of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, 11897, or 13102 of the Food and Agricultural Code.
>
> (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A).)

> The fine range for a Class A violation is $700 to $5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c).)

Appellant's Assertions

On appeal, Appellant contends that it is exempt from 3 CCR § 6738(b) because (1) it met the exemption contained in 3 CCR § 6720(c) by complying with the corresponding CalOSHA provisions in Title 8, and (2) it met the exemption contained in 3 CCR § 6720(e) because Sani-Cloth is a consumer product and Ms. Garcia did not use it significantly more than a typical consumer.

The Hearing Officer's Decision

The Hearing Officer found by a preponderance of the evidence that on October 24, 2013, Appellant violated 3 CCR § 6738(b). Ms. Garcia applied the pesticide, Sani-Cloth, by hand to an intravenous machine. Ms. Garcia stated she was wearing prescription eyeglasses and protective gloves. Appellant provided Ms. Garcia with eye protection but did not require Ms. Garcia to wear her eye protection when applying Sani-Cloth at the time of the incident. Consequently, Appellant failed to assure Ms. Garcia was wearing eye protection when making a hand application of a pesticide.

The Hearing Officer found that the exemption provided under 3 CCR § 6720(e) does not apply. Ms. Garcia stated she always uses Sani-Cloth and her employment as a housekeeper involves significantly greater use of Sani-Cloth than the general public.

The Hearing Officer classified Appellant's violation as Class A and levied a $700 penalty. Appellant's violation is Class A because Appellant's failure to assure Ms. Garcia wore protective eyewear caused a health effect. Ms. Garcia stated that "liquid from wipe fell into my right eye" and caused irritation. The penalty amount is within the Class A fine range provided in 3 CCR § 6130. The Commissioner adopted the Hearing Officer's proposed decision in its entirety.

The Director's Analysis

Appellant contends it is exempt from complying with 3 CCR § 6738(b) because it met the exemption provided in 3 CCR § 6720(c). 3 CCR § 6720(c) states that an employer is exempt from 3 CCR sections 6738 through 6738.4 when an employee is using an antimicrobial to disinfect or sanitize and the employer complies with the corresponding provisions of Title 8, which are adopted and implemented by CalOSHA. The Director will exercise his independent judgment on this issue because this issue involves a question of law and the Hearing Officer did not address this issue in his decision.

At the time of the incident, Ms. Garcia was using Sani-Cloth to clean an intravenous machine. (Stipulated Fact 2.) Sani-Cloth is an antimicrobial disinfectant. (Exhibit G.)

Therefore, Appellant is exempt from 3 CCR § 6738(b) if Appellant complied with the corresponding sections of Title 8.

During the hearing and on appeal, Appellant asserted that 8 CCR § 3382 is the corresponding provision to 3 CCR § 6738(b). However, 3 CCR § 6720(c) actually states that sections 3380 through 3385 of Title 8 correspond to sections 6738 through 6738.4 of Title 3.[1] Therefore, the Director looks to sections 3380 through 3385 of Title 8 to determine if the employer is exempt from 3 CCR § 6738(b).

8 CCR § 3380 requires employers assess their workplaces and determine what hazards are present necessitating personal protective equipment. The hazard assessment must state that the document is a hazard assessment and must provide the workplace evaluated, the person certifying that the evaluation was performed, and the date(s) of the hazard assessment. (3 CCR § 3380(f)(2).)

Appellant implements a "Safety and Injury & Illness Prevention" policy. (Exhibit I-10.) This policy was created to comply with the personal protective equipment requirements set forth in 8 CCR and specifically complies with Title 8's requirements regarding eye protection. (Testimony of Ms. McGavack.) Under this policy, Appellant's Environment of Care Committee conducts routine hazard surveillance rounds to assess mitigation of identified hazards and to identify new workplace hazards. (Exhibit I-10.) This policy applies to "all Hoag owned and operated facilities and Hoag employees and affiliates" and is revised at least every three years. (*Ibid.*) The most-current version of this policy, Version 5, was approved by five identified officers of Appellant and became effective on November 13, 2013.[2] (*Ibid.*) This policy appears to be Appellant's hazard assessment required by 8 CCR § 3380.

8 CCR § 3382 requires that employers safeguard employees with eye protection when the employee faces an inherent risk of eye injury in its work environment. Consistent with Appellant's "Safety and Injury & Illness Prevention" policy, Appellant determined whether use of Sani-Cloth posed a risk of eye injury requiring eye protection by reading Sani-Cloth's registered-label. (Testimony of Ms. Provost.) Sani-Cloth's registered-label requires users "wear disposable protective gloves, protective gowns, masks, and eye coverings when handling HIV-1 (AIDS Virus), HBV or HCV infected blood or body fluids." (Exhibit G.) Accordingly, under Appellant's "Safety and Injury & Illness Prevention" policy, employees are only required to wear eye protection when using Sani-Cloth in a "contact isolation" room where infected blood or

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1 California Code of Regulations, title 8, sections 3381, 3383, 3384, and 3385 pertain to head, body, hand, and foot protection respectively. Head, body, hand, and foot protection are not at issue in this matter. Sections 3380 and 3282 are quoted above.

2 There is no testimony in the record confirming that a prior similar version of this policy was effective during the time of Ms. Garcia's exposure. However, since this policy is to be revised at least every three years, the Director is assuming that a similar version of this policy was effective at the time of Ms. Garcia's exposure.

body fluids are present. (Testimony of Ms. Provost; Exhibit I-11.)

Appellant informs Ms. Garcia and other employees that a hospital room is a "contact isolation" room by placing a standard precaution sign outside of the hospital room door. (Testimony of Ms. Provost.) This standard precaution sign specifies what personal protective equipment is required prior to entering the room. (*Ibid.*) Ms. Garcia received training on following the standard precaution signs when using Sani-Cloth on March 1, 2013. (Testimony of Ms. Provost; Exhibit I-11.)

At the time of the incident, Ms. Garcia was not working in a room where infected blood or body fluids were present. (Testimony of Ms. Provost.) Therefore, under Appellant's hazard assessment, Ms. Garcia was not facing a risk of eye injury and consequently was not required to wear eye protection under 3 CCR § 3382. As Appellant complied with sections 3380 through 3385 of Title 8, Appellant is exempt from 3 CCR § 6738(b).[3]

Conclusion

The Commissioner's decision that Appellant violated 3 CCR § 6738(b) is reversed because Appellant is exempt from complying with 3 CCR § 6738(b) under 3 CCR § 6720(c).

Disposition

The Commissioner's decision and levy of fine is reversed.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

Dated: AUG 19 2015

By: Brian Leahy
Brian Leahy, Director

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3 Appellant also contends it is exempt from complying with 3 CCR § 6738(b) because its employee was not using a consumer product significantly more than a typical consumer and therefore is exempt under 3 CCR § 6720(e). While the Director agrees with the Hearing Officer that the 3 CCR § 6738(b) exemption does not apply, it is unnecessary to discuss that argument having found Appellant exempt from 3 CCR § 6738(b) because it complied with 8 CCR § 3382.