

**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 Stanislaus
(County File No. ER-50-2018-086)

Docket No. 217

Brian Skonovd
11118 Roeding Road
Denair, CA 95316

Appellant/

Procedural Background

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

After giving notice of the proposed action and providing a hearing on February 21, 2019, the Stanislaus County Agricultural Commissioner (Commissioner) found that appellant Brian Skonovd (Appellant or Mr. Skonovd) violated 3 CCR section 6614(b)(2). The Commissioner classified the violation as Class A in accordance with 3 CCR section 6130. The Commissioner levied a \$700 fine for the violation.

Mr. Skonovd appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (Director). The Director has jurisdiction to review the appeal under FAC section 12999.5.

Standard of Review

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

Appellant owns and operates an orchard for the production of almonds identified as site 4006N27 in Denair, California, which is in Stanislaus County. (County Exhibit (Ex.) A.) Appellant's almond orchard shares a border with a mobile home park. (*Id.*) Complainant lives in the mobile home park in a home located at 3418 N. Waring Road, Denair, California. (*Id.*) Ms. Marsh's property is adjacent to, and shares a border with, Appellant's almond orchard. (*Id.*) The properties are separated by a chain link fence. (*Id.*)

On the morning of May 5, 2018, Appellant made an airblast application of the insecticides Bifenture EC (EPA Reg. No. 70506-57-AA, active ingredient bifenthrin) and Agri-Mek SC (EPA Reg. No. 100-1351-ZA, active ingredient abamectin) to his almond orchard. (*Id.*) Both products are federally restricted use products and therefore California restricted materials. (*See* 3 CCR § 6400(a).) Appellant received a restricted materials permit from the Commissioner to apply the insecticides to his orchard. (*Id.*) Bifenture EC's label warns that it is harmful if absorbed through the skin and may be fatal if swallowed. (*Id.*)

At 7:34 a.m., on the same day as Appellant's pesticide application, Ms. Marsh contacted the Commissioner's Office to file a complaint that a pesticide application was drifting onto her property. (County Ex. A.) Ms. Marsh was in her house when she heard loud farm equipment and saw mist coming in through her window. (*Id.*) Complainant went into her yard to see what was happening and saw that "a cloud of pesticide mist" covered her yard and house. (*Id.*) While Complainant did not smell anything, she felt mist on her face and could "taste something." (*Id.*) After a period of time, Complainant felt a burning sensation on her tongue and lips, so she washed her face and rinsed her mouth with water several times. (*Id.*) Complainant did not experience any other symptoms and the symptoms eventually went away. (*Id.*)

The Commissioner conducted an investigation of the incident, interviewed witnesses, and recorded findings in the Pesticide Episode Investigation Report. (*Id.*) On May 7, 2018, Amit Sandhu, an investigator from the Commissioner's Office, interviewed Complainant and collected two (2) swab samples and one foliage sample from her property to test for the presence of pesticides. (*Id.*) The investigator took one (1) swab sample from the outside wall of Complainant's home, right below the window. The sample taken from the wall tested negative for bifenthrin and abamectin, the active ingredients in Bifenture EC and Agri-Mek SC, respectively. (*Id.*) Mr. Sandhu took another swab sample from the pole of the chain link fence that separates the properties, which tested positive for bifenthrin and negative for abamectin. (*Id.*) Mr. Sandhu took a foliage sample from a rosemary bush located in Complainant's backyard by the fence line between the properties, which also tested positive for bifenthrin and negative for abamectin. (*Id.*) According to Marline Azavedo, the advocate for the Commissioner's Office during the hearing, pesticide use reports reveal there were no other

applications of Bifenture EC, or other products containing its active ingredient bifenthrin, in the area surrounding Complainant's home from May 1, 2018, through May 10, 2018. (County Ex. B; Azevedo testimony.)

Mr. Sandhu also interviewed Appellant Brian Skonovd on May 7, 2018, and asked permission to sample his property for pesticides. (*Id.*) Appellant denied Mr. Sandhu permission to take samples on his property because Appellant "did not see the point." (*Id.*)

On January 7, 2019, the Commissioner issued a Notice of Proposed Action (NOPA) charging Appellant with violating 3 CCR section 6614(b)(2). (*Id.*) The Commissioner proposed a fine of \$700. (*Id.*) Appellant requested a hearing. (*Id.*) On February 21, 2019, the hearing was held in Modesto, California before Donald Cripe (Hearing Officer). (*Id.*)

Relevant California Regulations

California Code of Regulations, title 3, section 6614(b)(2) states:

Protection of Persons, Animals, and Property

(b) Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when:

...
(2) There is a reasonable possibility of damage to nontarget crops, animals or other public or private property;...

When levying fines, the Commissioner must follow the fine guidelines set forth in California Code of Regulations, title 3, section 6130. Under CCR section 6130, violations shall be designated as a Class A, Class B, or Class C. A Class A violation is "a violation that caused a health, property, or environmental hazard." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).)

The Commissioner shall use relevant facts, including severity of actual or potential effects and respondent's compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (Cal. Code Regs., tit. 3, § 6130, subd. (d).)

The Hearing Officer's Proposed Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Appellant had the opportunity to present evidence and question witnesses. On the record, the Hearing Officer asked Appellant if he stipulated that he applied Bifenture EC to his almond orchard and that it drifted onto Complainant's property. In response, Appellant answered, "Yes." (Skonovd Testimony.) In addition to Appellant's stipulation, the Hearing Officer found that the Commissioner's Office supported its case with direct testimony and documentary evidence, including that evidence that residue of bifenthrin, the active ingredient

contained in the product applied by Appellant on the same day as the drift complaint, was found on nontarget property. (See Hearing Officer's Proposed Decision, p. 2.) The Hearing Officer also noted that Appellant presented testimony and evidence that the bifenthrin residue could have come from another source, such as a home use product available at home improvement stores. (*Id.*)

The Hearing Officer's proposed decision states, "In reaching a proposed decision, the Hearing Officer considered the entire record of the Hearing, including facts, evidence and stipulations, as well as Respondent and County arguments presented at the Hearing," and "relied only upon such evidence and exhibits deemed credible and supported by fact or other evidence." The Hearing Officer found that Appellant violated CCR section 6614(b)(2) and that the Commissioner's proposed fine of \$700 was appropriate and properly classified within the Class A category. On March 5, 2019, the Commissioner adopted the Hearing Officer's proposed decision in its entirety. (See Notice of Decision, Order and Right of Appeal.)

Appellant's Allegations

On appeal, Appellant argues that the Commissioner's decision to fine him \$700 for violating section CCR 6614(b)(2) was incorrect for a number of reasons. (Notice of Appeal¹.) First, Appellant asserts that he did not stipulate that his pesticide application drifted onto Complainant's property, and that if he did, it was unintentional, as is evidenced by his active opposition. Second, Appellant argues that when the stipulation is "properly disregarded," there is insufficient evidence to find that he violated CCR section 6614(b)(2). As support, Appellant argues that Complainant's allegations should be disregarded because she sprayed him with a garden hose during the application. Appellant also asserts that the bifenthrin residue found on Complainant's property came from a source other than his application of Bifenture EC, such as a home-use product containing bifenthrin available to consumers. As an alternate theory, Appellant posits the bifenthrin found on Complainant's property could have been applied by the mobile home park's pest control company.² Appellant also asserts that his pesticide application included Bifenture EC and Agri-Mek SC, and therefore, the swab and foliage samples should have tested positive for both active ingredients, and not just bifenthrin. Finally, Appellant asserts that the Hearing Officer erred in how he compared the concentration of bifenthrin in Home Defense, which is available to any consumer, to the concentration of bifenthrin in Bifenture EC. As a result, Appellant asserts that the Director should reverse the Commissioner's decision that Appellant violated CCR section 6614(b)(2).

¹ Appellant submitted three separate letters to assert his arguments on appeal. The letters are dated April 3, April 10, and May 8, 2019. All of the letters are referred to collectively as "Notice of Appeal."

² Appellant makes this argument for the first time on appeal and further provides no evidence in the record or outside of the record in support of this theory.

The Director's Analysis

A. It is unclear if Appellant intended to stipulate that his application of Bifenture EC drifted onto nontarget property.

On appeal, Appellant argues that he did not stipulate that his pesticide application drifted onto Complainant's property; that if he did make such a stipulation, it was unintentional; and that the Hearing Officer improperly relied on his supposed stipulation to support his proposed decision that Appellant violated section 6614(b)(2). (*See* Notice of Appeal.)

Based on the Director's review of the hearing record and testimony, it is clear that Appellant did in fact stipulate to drifting onto nontarget property at both the pre-hearing conference and on the record. However, based on Appellant's subsequent testimony and arguments at the hearing, it appears that Appellant may not have intended to stipulate, or fully understood the consequences of his stipulation. At the beginning of the hearing, the Hearing Officer asked Appellant on the record if he stipulated that his application of Bifenture EC drifted onto Complainant's property. In response, Appellant answered an unequivocal, "Yes." (Skonovd Testimony). However, shortly after, Appellant asserted that the bifenthrin detected on Complainant's property could have come from another source and presented evidence to support his assertion. (*Id.*) The Hearing Officer then reminded Appellant that he stipulated that his application of Bifenture EC drifted onto the nontarget property. (Audio Recording of Hearing.) In response, Appellant continued to argue that the bifenthrin found on Complainant's property could have come from another source. Appellant's stipulation and subsequent testimony conflict. Due to the lack of clarity on this issue, the Director will not consider Appellant's stipulation and review the record to determine if there was substantial evidence before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision.

B. There is substantial evidence in the record to support the Commissioner's decision that Appellant's application of Bifenture EC drifted onto nontarget property in violation of CCR section 6614(b)(2).

Even though it is unclear if Appellant meant to stipulate to the violation, there is substantial evidence in the record to support the Commissioner's decision that Appellant violated CCR section 6614(b)(2). Appellant does not deny that he made an airblast application of Bifenture EC and Agri-Mek SC to his almond orchard on May 5, 2018. Complainant's property is adjacent to, and shares a border with, Appellant's almond orchard. (County Ex. A.) On the same day as Appellant's pesticide application, Complainant contacted the Commissioner's Office to file a complaint that a pesticide application was drifting onto her property. (*Id.*) Complainant saw mist coming in through her window, so she went outside and saw that "a cloud of pesticide mist" covered her yard and house. (*Id.*) Complainant also felt mist on her face and could "taste something." (*Id.*) After a period of time, Complainant felt a burning sensation on her tongue and lips. (*Id.*)

Complainant's claims are supported by the swab and foliage samples that Mr. Sandhu collected from Complainant's property. Two of the three samples that Mr. Sandhu collected from Complainant's property tested positive for bifenthrin, the active ingredient of Bifenture EC, the pesticide that Appellant applied to his almond orchard. (*Id.*) According to pesticide use reports, there were no other applications of Bifenture EC, or other products containing its active ingredient bifenthrin, in the area surrounding Complainant's home from May 1, 2018, through May 10, 2018. (County Ex. B; Azevedo Testimony.) Therefore, there is substantial evidence in the record to support the Commissioner's decision that Appellant's application of Bifenture EC drifted onto nontarget property in violation of CCR section 6614(b)(2).

C. Appellant's other arguments on appeal lack evidentiary support.

Appellant makes a number of arguments on appeal that are either irrelevant to the violation or without evidentiary support. First, Appellant argues that Complainant's allegations are unreliable and contradict the other evidence presented by the Commissioner. Appellant then asserts that the results of the samples taken from Complainant's property do not support the Commissioner's decision. Lastly, Appellant argues that the Hearing Officer erred when he compared the concentration of bifenthrin in Bifenture EC to the concentration of bifenthrin in Home Defense, a product available to the public.

1. There is substantial evidence to support Complainant's allegations.

Complainant was not present at the hearing, but Appellant testified that Complainant stood on a ladder and sprayed him with a garden hose while he was using an airblast applicator to make the pesticide application at issue. (Skonovd Testimony.) On appeal, Appellant asserts the Director "should give no weight to Complainant's claims" because she "attacked [Appellant] with a garden hose." (*See* Notice of Appeal.)

Appellant's argument that Complainant's claims do not have merit is not convincing. Appellant does not specify why Complainant's claims that his application drifted onto her property are not credible. (*Id.*) Appellant simply states that Complainant sprayed him with a garden hose and then reported him to the Commissioner, which is not probative to whether Complainant's claims are credible. (*Id.*) Additionally, there is substantial evidence in the record that corroborates Complainant's claims. Complainant told Mr. Sandhu that she saw mist coming in through her window. (County Ex. A.) Complainant went into her yard to see what was happening and saw that "a cloud of pesticide mist" covered her yard and house. (*Id.*) Complainant also felt "mist" on her face, could "taste something," and felt a burning sensation on her tongue and lips. (*Id.*) These claims are substantiated by the samples taken from the fence pole and rosemary bush on Complainant's property that tested positive for bifenthrin. Moreover, Appellant does not dispute that he was applying a product containing bifenthrin at the time that Complainant claims she saw pesticide mist drift onto her property. (*See* Notice of Appeal.) As a result, the Director finds that there is substantial evidence in the record to support Complainant's allegations.

2. Appellant's argument that the bifenthrin found on nontarget property was from another source is without evidentiary support.

Appellant also asserts that the bifenthrin residue found on Complainant's property came from a source other than his application of Bifenture EC. (*See* Notice of Appeal.) The sample taken from the wall of Complainant's mobile home tested negative for bifenthrin and abamectin, the active ingredients in Bifenture EC and Agri-Mek SC, respectively. (County Ex. A.) However, the samples taken from the fence pole and the rosemary bush along Complainant's property line both tested positive for bifenthrin. (*Id.*) Appellant asserts that he used Bifenture EC and Agri-Mek SC, and therefore, both of the products' active ingredients bifenthrin and abamectin should have been detected. (*See* Notice of Appeal.) Since only bifenthrin was detected in the samples, Appellant argues that the detected bifenthrin must have come from another source. At the hearing, Appellant offered a home-use product as the potential source of the bifenthrin. On appeal, Appellant makes the argument for the first time that the mobile home park's pest control company is also a potential source of the bifenthrin.

The possibility that the bifenthrin found on Complainant's property could have come from another source does not outweigh the substantial evidence in the record that supports a finding that Appellant was the source of the bifenthrin. Appellant does not provide evidence that a home-use product was applied on, or around, Complainant's property, or that the mobile home park applied a product containing bifenthrin in the area. (*See* Notice of Appeal.) Appellant does not deny that he made a pesticide application with a product containing bifenthrin to his almond orchard on the morning of May 5, 2018. Moreover, according to pesticide use reports, Appellant's pesticide application was the only application involving bifenthrin in the area surrounding Complainant's home between May 1, 2018 and May 10, 2018. (County Ex. B; Azevedo Testimony.) Therefore, Appellant's argument that the bifenthrin found on Complainant's property came from another source is not convincing. There is substantial evidence in the record to support the Commissioner's decision that Appellant's application of Bifenture EC drifted onto nontarget property in violation of CCR section 6614(b)(2).

3. The difference in concentration of the active ingredient bifenthrin in Bifenture EC and Home Defense is irrelevant.

Lastly, Appellant asserts that the Hearing Officer erred when he compared the concentration of bifenthrin in Bifenture EC to the concentration of bifenthrin in Home Defense. (*See* Notice of Appeal.) At the hearing, Appellant's witness, Jeff Beeson, testified that a product called "Home Defense" contains 0.05% bifenthrin and is available to the public, while Bifenture EC contains 25.1% of bifenthrin. (Beeson Testimony.) In his proposed decision, the Hearing Officer notes that Bifenture EC contains a much higher concentration of bifenthrin than the publicly available Home Defense. (*See* Hearing Officer's Proposed Decision.) On appeal, Appellant argues that the Hearing Officer erred when he compared the concentrations of bifenthrin in the two products because the Hearing Officer did not consider that the Bifenture EC label requires it to be diluted. (*See* Notice of Appeal.) Appellant asserts that before he

applied Bifenture EC to his almond orchard, he diluted it to a solution that contained only 0.00025% of its active ingredient bifenthrin.

The difference between the concentration of bifenthrin in Bifenture EC and Home Defense is irrelevant. Appellant did not present proof that Home Defense was actually applied to, or around, Complainant's property. Even if the Hearing Officer peripherally compared the concentration of bifenthrin in the two products, this incorrect comparison does not require that the entire proposed decision be reversed, as Appellant asserts. The relevant standard on appeal is whether there is substantial evidence in the record to support the Hearing Officer's finding that Appellant violated CCR section 6614(b)(2). Setting aside the difference in concentrations of bifenthrin in Home Defense and Bifenture EC, the Hearing Officer's proposed decision still stands. There is substantial evidence in the record to support the Commissioner's decision that Appellant's application of Bifenture EC drifted onto nontarget property in violation of CCR section 6614(b)(2).

D. The Commissioner's decision to classify the violation as a Class A violation and issue a \$700 fine was appropriate.

When levying fines, the Commissioner must follow the fine guidelines set forth in California Code of Regulations, title 3, section 6130. On appeal, Appellant does not challenge the class or fine amount set by the Commissioner; however, the Director finds that there is substantial evidence to support the Commissioner's decision that this was a Class A violation and that the fine of \$700 is appropriate. At the hearing, Ms. Azavedo pointed out that Bifenture EC's label warns that it is harmful if absorbed through the skin and may be fatal if swallowed. (Azavedo Testimony.) Ms. Azavedo also pointed out that the reentry interval after application of Bifenture EC is twelve hours. (Azavedo Testimony.) When Appellant was applying Bifenture EC, Complainant claimed that she saw mist enter her window; felt mist on her face when she went into her yard; and felt a burning sensation on her tongue and lips. (County Ex. A.) Therefore, there is substantial evidence to support the Commissioner's decision that Appellant's violation of CCR section 6614(b)(2) was a Class A violation, because it "caused a health, property, or environmental hazard." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).)

The fine range for Class A violations is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).) The Commissioner fined Appellant \$700, the lowest end of the Class A fine range. The Director finds that the \$700 fine is a reasonable exercise of the Commissioner's discretion given the warning on Bifenture EC's label and Complainant's symptoms.

Conclusion

The Director affirms the Commissioner's decision that Appellant violated 3 CCR 6614(b)(2) and that the violation qualified as a Class A violation. The total fine is upheld.

Disposition

The Director affirms the Commissioner's decision and levy of fines. The Commissioner shall notify Appellant of how and when to pay the \$700 in total fines.

Judicial Review

Under Food and Agricultural Code section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. 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: **JUL 03** 2019

By: 
Val Dolcini, Acting Director