

**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. 444-ACP-SD-13/14

Administrative Docket No. 202B

DIRECTOR'S DECISION

**Davey Tree Surgery Company
1914 Mission Road, Suite N
Escondido, California 92029**

Appellant/

Procedural Background

Under Food and Agricultural Code section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations. When levying fines, the commissioner must follow the fine guidelines established in California Code of Regulations, title 3, section 6130¹, 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, providing a hearing on March 25 and 26, 2015, and reviewing the Hearing Officer's proposed decision, the San Diego County Agricultural Commissioner (Commissioner) found on June 15, 2015, that Appellant Davey Tree Surgery Company (Davey Tree) violated the following Sections:

- Charge A. Section 6739(a)(1) – Failing to assure that employees use approved respiratory equipment when handling a pesticide where a respirators are required by the product label. Class B violation.
- Charge B. Section 6739(c) – Failing to select and provide an appropriate respirator. Class B violation.
- Charge C. Section 6627 – Failing to submit accurate monthly summary pesticide use reports. Class C violation.
- Charge D. Section 6739(a)(2) – Failing to establish a written respiratory protection program with work site specific procedures. Class B violation.
- Charge E. Section 6739(d) – Failing to ensure a medical evaluation is conducted to determine the employees' ability to use a respirator. Class B violation.
- Charge F. Section 6739(e) – Failing to assure that an employee is fit and tested before wearing a respirator. Class B violation.

1 All further Section references will be to Title 3 of the California Code of Regulations, unless otherwise indicated.

The Commissioner classified the violations in accordance with Section 6130 and levied a total fine in the amount of \$4,000. (See Notice of Decision, Order and Right of Appeal for File No. 444-ACP-SD-13/14, dated June 15, 2015 (Commissioner's Decision).)

Davey Tree appeals the Commissioner's civil penalty decision only as to Charges B, E, and F. The violations appealed by Davey Tree are as follows: two violations for \$400 each of Section 6739(c) for failing to select and provide an appropriate respirator (Charge B); two violations for \$400 each of Section 6739(d) for failing to ensure a medical evaluation is conducted to determine the employee's ability to use a respirator (Charge E); and two violations for \$400 each of Section 6739(e) for failing to assure that an employee is fit tested before wearing a respirator (Charge F). The Director has jurisdiction to review the appeal under Food and Agricultural Code section 12999.5. (See Appellant Davey Tree's Written Argument in Support of Appeal, by letter dated July 20, 2015 (Appeal) at pp. 14-18.)

Standard of Review

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 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 August 28, 2013 and January 23, 2014, Inspector A. Amador (Inspector Amador) and Supervising Agricultural Standards Inspector Holbrook (Supervisor Holbrook) conducted an initial and follow-up Headquarters and Employee Safety Inspection and Licensed Pest Control Business Records and Storage Inspection at a Davey Tree storage facility located at the intersection of Valley Center Road and Old Road in Valley Center, in San Diego County.

(County Exhibits (Exs.) 3 and 5.) Area Supervisor for Davey Tree, Bruce Williams, was present at both inspections. (Testimony of Bruce Williams (Williams Testimony).) Mr. Williams stated that Davey Tree applied *Sprakil SK-26 Granular Weed Killer (Sprakil SK-26)* (Reg. Number 34913-16-AA) in November 2012 and October 2013. (Ex. 6; Williams Testimony.)

The label for *Sprakil SK-26* required the use of a respirator during any loading process. (Ex. 7.) During the August 28, 2013-inspection, Mr. Williams stated that he was the only employee that poured the pesticide into the bucket and handheld shaker; that he did not believe a respirator was required for these actions; that he did not wear a respirator, and that Davey Tree did not provide a respirator to him. (Exs. 3 and 5; Williams Testimony.) Mr. Williams further testified that Davey Tree did not have a written respiratory protection program and as a result, he had not been evaluated by a physician or fit tested for a proper respirator. At the follow-up inspection on January 23, 2014, Inspector Amador found that Davey Tree did not correct the non-compliances identified in the August 28, 2013-inspection. (County Exs. 3 and 5; Amador Testimony.)

On October 19, 2014, the Commissioner issued a Notice of Proposed Action charging Appellant Davey Tree with violating Sections 6739(a)(1), 6739(c), 6627, 6739(a)(2), 6739(d), and 6739(e). (Ex. 1.) Davey Tree requested a hearing on November 10, 2014. The Commissioner granted Davey Tree's request and on March 25 and 26, 2015, Hearing Officer Thomas L. Marshall held a hearing on the matter. (See Commissioner's Decision; also refer to Audio Recording of Hearing.)

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Davey Tree had the opportunity to present evidence and question witnesses. The Hearing Officer noted that Davey Tree withdrew its challenge of Charge C for two violations of \$100 each, or \$200. The Hearing Officer also found that although Davey Tree violated multiple regulations, the County improperly sought duplicative fines for the same underlying conduct. As a result, the Hearing Officer struck Charges B, E and F and their associated fines, proposing a total fine of \$1,600. (See Proposed Decision of Hearing Officer in File No. 444-ACP-SD-13/14, dated April 13, 2015 (Hearing Officer Decision) at pp. 4-7.)

The Commissioner's Decision

On June 15, 2015, the Commissioner issued a decision to adopt the Hearing Officer's Proposed Decision with respect to Charges A, C, and D, but disagreed with the Hearing Officer's decision to strike the fines for Charges B, E, and F. The Commissioner stated that since the Hearing Officer found that Davey Tree violated the regulations concerning a respiratory program,

the Hearing Officer did not have the authority to levy a fine outside the Class B fine range provided in Section 6130. Accordingly, the Commissioner reinstated the total fine in the amount of \$4,000 (\$1,600 for Charges A and B; \$200 for Charge C; \$600 for Charge D; and \$1,600 for Charges E and F). (See Commissioner's Decision.)

Appellant's Contention on Appeal

Appellant Davey Tree only appeals Charges B, E, and F of the Commissioner's Decision. Davey Tree's sole contention on appeal is that the Commissioner's Decision is "duplicative, unnecessary and clearly punitive as the County already sought fines for Davey Tree's alleged violations of 3 CCR §6739(a)(1), and (a)(2) based on the same underlying conduct." (See Appeal at pp. 14-18.)

Relevant Laws and Regulations

California Code of Regulations, title 3, section 6739(a) states in relevant part:

Respiratory Protection

(a) General Requirements.

.....

- (2) In any workplace where respirators are required by label, restricted material permit condition, regulation, or employer, the employer shall establish a written respiratory protection program with work site-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following provisions, as applicable:
 - (A) Procedures for selecting respirators for use in the workplace;
 - (B) Medical evaluations of employees required to use respirators;
 - (C) Fit testing procedures for tight-fitting respirators;
 - (D) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
 - (E) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;
 - (F) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;
 - (G) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations, including Immediately Dangerous to Life or Health (IDLH) atmospheres, if appropriate;

- (H) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and
- (I) Procedures for evaluating the effectiveness of the program pursuant to subsections (n)(1) and (2).

California Code of Regulations, title 3, section 6739(c) states:

- (c) Selection of Respirators. The employer shall select and provide an appropriate respirator certified by the National Institute for Occupational Safety and Health (NIOSH) based on the respiratory hazard(s) and relevant workplace and user factors to which the worker is exposed; and the appropriate pesticide label, restricted materials permit condition, regulation, or employer requirements, whichever is most protective.

California Code of Regulations, title 3, section 6739(d) states:

- (d) Medical Evaluation. The employer shall ensure a medical evaluation is conducted to determine the employee's ability to use a respirator before the employee is fit tested or required to use the respirator in the workplace.

California Code of Regulations, title 3, section 6739(e) states:

- (e) Fit Testing. The employer shall assure that employees using a tight-fitting facepiece respirator pass an appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT).

When levying fines, the Commissioner must follow the fine guidelines in Section 6130. Under Section 6130, violations shall be designated as Class A, Class B, or Class C. A Class B violation is "a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A." The fine range for a Class B violation is \$250 to \$1,000. The Commissioner shall use relevant facts, including severity of actual or potential effects and the 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 of Regs., tit. 3, § 6130.)

The Director's Analysis

As stated above, Davey Tree only appeals the fines associated with violating Sections 6739(c), (d), and (e), also referred to as Charges B, E, and F.² (Appeal at pp. 14-18.) Specifically, Davey Tree takes issue with the Commissioner's Decision to fine them for not having a written respiratory protection program and then separately fine them for not having specific mandated elements that make up the program. Thus, the only issue on appeal is whether the County correctly cited Davey Tree for violating Sections 6739(c), 6739(d), and 6739(e), in addition to Sections 6739(a)(1) and (a)(2). Based on the specific underlying facts of this case, the Director finds Davey Tree's arguments persuasive and reverses the Commissioner's Decision as to Charges B, E, and F.

The specific regulations at issue in this appeal, Section 6739 and its subparts, concern respiratory protection for employees when it is required by a pesticide label, restricted material permit condition, or regulation, and the need for an employer to have a written respiratory protection program that contains specifically required elements. Section 6739(a)(2) states in relevant part:

In any workplace where respirators are required by label...the employer shall establish a written respiratory protection program with work site-specific procedures. ...The employer shall include in the program the following provisions, as applicable: (A) Procedures for selecting respirators for use in the workplace; (B) Medical evaluations of employees required to use respirators; (C) Fit testing procedures for tight-fitting respirators. ...

Subsections (c), (d), and (e) then go on to describe the employer's obligations for properly executing mandated elements of the respiratory program, such as selecting appropriate respirators, and conducting medical evaluations and fit tests on its employees, respectively. (*See* Cal. Code of Regs., tit. 3, § 6739, subs. (c), (d), (e).)

In reviewing and interpreting an administrative agency's regulations, reviewing courts generally give regulatory language its plain, commonsense meaning and read regulations as a whole, interpreting it to make it reasonable and workable. (*Price v. Starbucks Corp.* (2011) 192

² At the hearing, Davey Tree extensively argued that (1) the *Sprakil SK-26* label only required a person loading the pesticide into a tractor-drawn spreader to use a respirator; and (2) even if the respirator requirements applied to any loader of the pesticide, that Davey Tree's employee was "transferring," as opposed to "loading" the pesticide into a shaker container, and therefore their employee did not need a respirator. (Williams Testimony; Audio Recording of Hearing.) However, by limiting its appeal to only Charges B, E, and F, Davey Tree concedes that at the time of the violation, its employee needed to use a respirator (Charge A - Section 6739(a)(1)) and as a result, it needed a written respiratory protection program (Charge D - Section 6739(a)(2)).

Cal.App.4th 1136, 1145-1146; *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1235.) Here, Davey Tree initially did not believe that its employees used any pesticide that required a respirator, and as a result, it did not have a written respiratory protection program. (Appeal at pp. 14-15.) The Director finds that based on the specific facts of this case, it is unreasonable and violates principles of fairness to fine Davey Tree for failing to have a respiratory protection program and then proceed to fine them again for failing to have mandated elements that comprise the underlying program. Stated another way, if an employer does not have any respiratory protection program, it necessarily follows that the employer is not going to have the required elements that make up the program. Although Section 6739(a)(2) and 6739(c), (d), and (e) can be separate citable offenses and contain distinct obligations on the employer, it is not appropriate to cite an employer for not having a respiratory protection program and also separately cite them for not having the individual elements that make up the program.³

Although the County argues that it would be unfair to those employers who already have a respiratory protection program, but lacked some of the requirements, to be cited for fewer violations than an employer who fails to have an entire program, this situation should be addressed by the Commissioner's selection of an appropriate Class and fine within the range. The purpose of the fine range is to allow the Commissioners to exercise their discretion to select a fine based on the specific facts of a case, considering aggravating or mitigating circumstances. (Cal. Code of Regs., tit. 3, § 6130, subd. (d).) For example, if an employer has a written respiratory protection program, but fails to comply with some of the required elements, the County could fine the employer at the lower end of the Class B fine range for each violation. If, however, an employer has been previously warned that it did not have a required written respiratory protection program, and continues to blatantly disregard its obligations, the Commissioner could either elevate the violation to a Class A violation based on compliance history or the employer's disregard for a specific hazard, or propose a fine at the top of the Class B fine range. (Cal. Code of Regs., tit. 3, §§ 6130, subd. (b) and (d).)

Although the Director appreciates the specificity and thoroughness of the County's inspection and investigation, and sympathizes with the County's frustrations with Davey Tree's continued disregard for pesticide laws and regulations, the Director will not uphold Charges B, E, and F, and therefore reverses.

³ That is not to say that if an employer has a written respiratory program, but the program is missing certain elements or is defective, the employer cannot be cited for violating more than one subsection of Section 6739. For example, if an employer has a written respiratory protection program, but fails to (1) include one of the required provisions (i.e. §6739(a)(2)(C) - fit testing procedures), and also (2) fails to correctly execute a separate, enumerated element in its program (i.e. §6739(d) - fails to use the required questionnaire in its medical evaluation), the Commissioner could fine the employer for violating both Section 6739(a)(2)(C) and Section 6739(d). However, this is not the case here.

Conclusion

Charges B, E, and F of the Commissioner's Decision, citing Appellant Davey Tree for violating Title 3, California Code of Regulations Sections 6739(c), (d), and (e) are REVERSED.

Disposition

The Commissioner's Decision to levy fines totaling **\$2,400** for Charges B, E, and F is REVERSED.

The Commissioner's Decision to levy fines totaling **\$1,600** for Charges A, C, and D, not appealed in this case, is AFFIRMED.

The Commissioner shall notify Appellant Davey Tree Surgery Company of how and when to pay the outstanding **\$1,600 fine**.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: DEC 01 2015

By: Brian Leahy
Brian Leahy, Director