

**BEFORE THE DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Los Angeles
(County File No. SCP-LA-17/18-220)

Docket No. S-036

Juan Gutierrez
C/O Mega Fume, Inc.
P.O. Box 17716
Anaheim, California 92817

DECISION

Appellant/

Procedural Background

Under section 8617 of the Business and Professions Code (BPC) and section 15202 of the Food and Agricultural Code (FAC), a County Agricultural Commissioner may levy a 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 Los Angeles County Agricultural Commissioner (CAC) found that Juan Gutierrez (Appellant) used a pesticide in conflict with labeling, in violation of California Food and Agricultural Code section 12973. The CAC then classified the violation as "moderate" and levied a \$250 fine on Appellant.

Appellant appealed the CAC's decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of this appeal under BPC section 8662. Members serving on the Committee were Mr. John Tengan for the structural pest control industry, Ms. Susan Saylor for the Structural Pest Control Board (SPCB), and Ms. Lynette Komar 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 this appeal on the record before the hearing officer. The Committee decides matters of law using its independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Committee determines whether there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer's findings and the CAC'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 only requires there be enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In applying the substantial evidence test, the Committee 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 CAC's decision. If the Committee finds substantial evidence in the record to support the CAC's decision, the Committee affirms the CAC's decision.

Relevant Authorities

California Food and Agriculture Code section 12973 states in relevant part:

Use not to conflict with label

The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.

California Code of Regulations, title 16, section 1922 (Civil Penalty Actions by Commissioners) states in relevant part:

- (a) When taking a civil penalty action pursuant to section 8617 of the Business and Professions Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount.
- (1) For purposes of this section, violation classes shall be designated as "serious," "moderate," and "minor."
 - (A) "Serious": Violations that are repeat violations of those in subparagraph (B) or violations which created an actual health or environmental hazard. The fine range for serious violations is \$700-\$5,000.
 - (B) "Moderate": Violations that are repeat violations of those in subparagraph (C) or violations which pose a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$250-\$1,000.
 - (C) "Minor": Violations that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect. The fine range for minor violations is \$50-\$400.

Factual Background

On March 7, 2018, Mega Fume, Inc. (Mega Fume) fumigated a structure located at 16308 Benwich Street, La Puente, California, using the pesticide Zythor (EPA Reg. No. 19713-596). (Stipulated Fact 4.) Zythor's labeling provides the following instructions:

When and to the extent needed, use tarpaulin(s) made of material that effectively confines and is sufficiently impermeable to the passage of the fumigant through it such as vinyl coated nylon or polyethylene sheeting of at least 4 mil thickness to cover the structure or portion of the structure containing the space to be fumigated. Seal all seams between adjacent tarpaulins. Seal all edges of the tarp that touch the ground or ground level surface to that surface with, for example, soil, sand, or weighted snakes resting on the edge of the tarp.

(Exhibit H.) Juan Gutierrez on behalf of Mega Fume was the licensee responsible for the fumigation. (Stipulated Fact 6.)

On March 9, 2018, Dagnachew Teshome, an Agricultural/Weights and Measures Inspector III with the County of Los Angeles Department of Agricultural Commissioner/Weights and Measures, arrived at the location and conducted an inspection. (Exhibit D.) No Mega Fume employees were present during the inspection. At the time of the inspection, the tarps were still on the structure and fumigation was in the aeration phase. Inspector Teshome observed on the southwest corner of the fumigated structure, an empty water snake that measured approximately 12 feet and 3 inches in length. A water snake is a tube that is meant to be filled with water and used as a weight. Inspector Teshome took photographs of the flattened water snake during his inspection. (Exhibit F, photographs a-f.) The photographs clearly show what appears to be a water snake that is flat. During the inspection, Inspector Teshome pressed on the water snake to see if water was inside, but he only felt air. (Testimony of Dagnachew Teshome (Teshome Testimony).) Inspector Teshome completed an Inspection Report and documented in photographs the empty water snake.

On August 7, 2018, the CAC mailed Appellant the Notice of Proposed Action charging Appellant with violating FAC section 12973 for failure to seal the tarp adequately in conflict with the Zythor label.

Appellant's Argument

Appellant does not challenge the facts or the classification of the violation. Appellant's argument on appeal is that the empty water snake complied with Zythor's label. Appellant argues that the label's use of the term "for example" means that he could have used anything to maintain the seal. Appellant also asserts that the seal was maintained and the fumigation was effective so there was no violation.

The CAC Decision

Hearing Officer Robert G. Atkins heard the matter on behalf of the CAC on October 2, 2018. The Hearing Officer found by a preponderance of the evidence that Appellant violated FAC section 12973 on March 9, 2018, when he used an empty water snake during an application of Zythor, in conflict with labeling. Zythor's label requires the user to "seal all edges of the tarp that touch the ground or ground level surface to that surface with, for example, soil, sand, or weighted snakes resting on the edge of the tarp." (Exhibit H.) Upon inspection of the fumigation during the aeration stage, Inspector Teshome discovered that a 12 foot and 3 inch section of a water snake was deflated and lying flat. (Exhibit E.) Inspector Teshome believed that no other material was used to maintain an adequate seal on the tarp. During the hearing, Appellant did not deny that the water snake was empty. Instead, Appellant argued the label does not require a water snake to weigh a specific amount, so using an empty water snake was sufficient. Additionally, Appellant argued he should not be issued a violation because Inspector Teshome did not know whether pesticide had actually escaped.

The Hearing Officer found the Zythor label requires "weighted snakes" to be used to seal a tarp to the ground. As a result, Appellant's use of the empty water snake to maintain a seal was inconsistent with Zythor's label. Additionally, the Hearing Officer concluded the lack of evidence that the tarp in fact blew open or actually leaked does not relieve Appellant of the obligation to comply with Zythor's labeling. The Hearing Officer then recommended the CAC uphold the action proposed in the Notice of Proposed Action and the Appellant be ordered to pay a \$250 fine. The CAC adopted the Hearing Officer's proposed decision in its entirety.

Analysis

Substantial evidence in the record supports the CAC's decision that Appellant violated FAC section 12973 because he used a pesticide in conflict with its labeling. On appeal, Appellant does not contest the water snake was empty. Instead, Appellant contends using an empty water snake to seal a tarp to the ground is consistent with Zythor's label. Appellant also argues he should not be issued a violation due to the lack of evidence that the tarp actually blew open or released pesticide. For the reasons described below, both of Appellant's arguments fail and the Committee affirms the CAC's decision.

A. Appellant's use of an empty water snake to seal a tarp to the ground conflicted with pesticide labeling and violated Food and Agricultural Code section 12973.

The Committee finds that Appellant's use of the empty water snake conflicted with Zythor's labeling. Pursuant to FAC section 12973, "[the] use of any pesticide shall not conflict with labeling." (Food & Agr. Code, § 12973.) On March 7, 2018, Appellant fumigated a structure using the pesticide Zythor. (Stipulated Fact 4.) Zythor's label requires the user to "seal all edges of the tarpaulin that touch the ground or ground level surface to that surface with, for example, soil, sand, or weighted snakes resting on the edge of the trap." (Exhibit H.)

On appeal, Appellant asserts that using the empty water snake to seal the tarp was consistent with Zythor's labeling. The Zythor label provides examples of weighted items. As examples, the label includes "soil, sand, or weighted snakes resting on the edge of the tarpaulin." Appellant asserts the label's list of examples is not exhaustive, and therefore, anything can be used to seal the tarp to the ground, including an unweighted water snake.

Appellant's arguments are not convincing. The label's use of the term "for example" does not imply that anything can be used to seal the tarp to the ground. The purpose of the term "for example" is to illustrate materials that comply with the label. The label specifies that a "weighted snake" must be used to create a seal. The use of the word "weighted" means the snake must be filled with water. The label's requirement for a filled water snake is intuitive; a water snake must be filled to serve its purpose as a weight to prevent the tarp from moving and allowing pesticides to release from the intended application site. Moreover, if a non-weighted snake could seal the tarp to the ground, the label would not specify that a "weighted" snake could be used to seal the tarp. Rather, the label would just state that a snake generally could be used. As a result, the Committee finds that Appellant's use of an unweighted water snake is in conflict with Zythor's labeling requires a water snake must be filled with water when used. Here, Appellant used a non-weighted snake in violation of FAC section 12973.

B. Food and Agricultural Code section 12973 does not require that pesticide actually escape for Appellant to be in violation.

Appellant asserts that he did not violate FAC section 12973 because the seal was maintained and the fumigation was effective. Appellant's argument attempts to add an element that is not required by FAC section 12973. FAC section 12973 requires "[the] use of any pesticide shall not conflict with labeling." (Food & Agr. Code, § 12973.) FAC section 12973 does not require proof that pesticide actually escaped, but only requires that use of the pesticide not be in conflict with the label's instructions. Appellant's luck that wind did not blow the tarp out of place and harm a person or the environment, does not excuse him from the label's requirement that a weighted snake be used to seal the tarp. Appellant's use of the empty water snake conflicted with the label's requirements, and therefore, he violated FAC section 12973.

The CAC was within his discretion to charge this violation as a "moderate" violation because it created a reasonable possibility of a health or environmental effect. (Cal. Code Regs. tit. 16, § 1922.) The \$250 fine is within the \$250-\$1,000 fine range for a moderate violation.

Conclusion

The CAC's decision that Appellant violated FAC section 12973 is affirmed. Appellant's use of an empty water snake to seal a tarp to the ground during the aeration phase of a fumigation was inconsistent with Zythor's label, which posed a reasonable possibility of creating a health or environmental effect.

Disposition

The CAC's decision and levy of fine is affirmed. The CAC shall notify the Appellant of how and when to pay the \$250 fine.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: 2/13/19

By: Lynette Komar
Lynette Komar, Member
For the members of the Disciplinary
Review Committee