

**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-16/17-185)

Docket No. S-035

Mega Fume, Inc.
P.O. Box 17716
Anaheim, CA 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 Mega Fume, Inc. (Appellant or Mega Fume) violated California Code of Regulations, Title 3 (3 CCR), section 6600 subdivision (a) by failing to keep Appellant's fumigation equipment in good repair and fined Appellant \$600.

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. Marta Barlow 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

3 CCR section 6600 states:

Each person performing pest control shall:

- (a) Use only pest control equipment which is in good repair and safe to operate.
- (b) Perform all pest control in a careful and effective manner.
- (c) Use only methods and equipment suitable to insure proper application of pesticides.
- (d) Perform all pest control under climatic conditions suitable to insure proper application of pesticides.
- (e) Exercise reasonable precautions to avoid contamination of the environment.

Factual Background

On April 3, 2017, Mega Fume, Inc. fumigated a structure at 287 Penn Street in Pasadena, California. Mega Fume, Inc. used the pesticide Zythor (EPA Reg. No. 81824-1), containing 99.3 percent sulfuryl fluoride, and .5 percent carbon dioxide. Mega Fume, Inc. also used chloropicrin as a warning agent before introducing the Zythor.

During the release of pesticides and the aeration portions of the fumigation process, Appellant used a water snake that was approximately 27 feet long. A water snake is a tube that the user fills with water. Its purpose is to hold the tarp that covers the fumigated structure in place, ensuring that the tarp does not move and the pesticides do not leave the tarped structure. The water snake used by Mega Fume had holes that Mega Fume attempted to plug with sticks and clamps.

On April 4, 2017, County Inspector Thomas Herrera inspected the Mega Fume, Inc. fumigation at 287 Penn Street in Pasadena, California. He arrived at the property at approximately 9:30 a.m., before Mega Fume completed the aeration portion of the fumigation. No Mega Fume employees were present during his inspection. Inspector Herrera completed an

Inspection Report and documented in photographs the water snake used by Mega Fume was virtually empty, with only a little bit of water remaining in some portions of the 27 foot water snake. His photographs showed the clamps and sticks used by Mega Fume in an attempt to keep the water from leaving the water snake.

Inspector Herrera wrote a violation notice to Mega Fume, Inc., charging them with violating 3 CCR 6600 subdivision (a), for failing to keep the water snake in good repair.

Appellant's Argument

Appellant does not challenge the classification of the violation or the facts. Appellant's argument on appeal is the equipment Appellant used was sufficient to maintain the fumigation seal. Appellant further argues that according to the label, Appellant could have used anything to maintain the seal around the fumigated structure. Since the fumigation seal was not broken, Appellant argues there was no violation.

The CAC Decision

The hearing officer stated the following:

Both parties agreed in the Stipulations that the incident had occurred in Los Angeles County and the County had jurisdiction over the application of a pesticide within the statute of limitations. The County presented photographs and testimony that showed the water filled snakes that were holding the tarp to the ground during the fumigation and aeration had leaked with little or no water remaining in them. They further showed the crew had known there were leaks by their attempts to plug the leaks with sticks and hand clamps. The County charged the Respondent with a violation of 3 CCR 6600(a) for using equipment which was not in good repair and safe to operate during the application of a pesticide.

The Respondent did not dispute these facts, but defended the incident by establishing that nothing in law, regulation or on the label required a specific amount of weight or method be used to secure the edge tarp to the ground. His defense was the remaining weight of the snake and water had been sufficient to maintain the seal and the County could not show there had been any leak, injury or environmental damage, so there was no violation. It is clear that the crew had chosen to use the weight of the full water snake by their attempts to plug the leaks.

Both parties agreed the water filled snakes and sand snakes had similar and sufficient weight to maintain the ground seal in reasonably anticipated adverse conditions. However, the County testified that in similar situations without the water, the snakes had allowed the tarp to blow open.

The violation was not for a leak, but that the equipment was not in good repair, which presented a possibility of a leak and risk of health or environmental effect. Saying there was no violation because there was no fumigant leak or damage despite the leaking equipment is analogous to saying there should be no violation for not wearing your seatbelt because there was no accident, damage or injury. Safety rules and laws are designed and legislated to prevent injury and damage from reasonably expected risks. Just because these things did not happen, does not mean the law was not needed or not violated.

The Respondent also said his crews are instructed to not use such damaged equipment and should have had it repaired before use. This was a second incident of a similar nature in just over 2 years, which suggests that Mega Fume needs to implement supervisory inspections and incentives and/or punishments that encourage the licensee and crews to do a better job of maintaining and replacing damaged and unsafe equipment.

The hearing officer then recommended that the Commissioner uphold the action proposed in the Notice of Proposed Action and the Appellant be ordered to pay a \$600 fine. The CAC adopted the hearing officer's proposed decision in its entirety.

Analysis

Substantial evidence in the record supports the Commissioner's decision. The evidence includes Inspector Herrera's testimony and his Inspection Report. The facts supporting the decision include the following. Appellant fumigated a structure on April 3, 2017, with the aeration portion of the fumigation completed on April 4, 2017, at 11:224 a.m. As part of that fumigation and in accordance with the label instructions for the pesticide used, Zythor, Appellant placed weights around the tarpaulin surrounding the fumigation to seal the tarpaulin in place. His chosen methods for weights was a water snake. The water snake was not in good repair and required clamps and sticks in an effort to keep the water snake filled with water. Before the end of the aeration period, Inspector Herrera arrived at the location at 9:30 a.m. on April 4, 2017. By that time, the water snake used to keep the tarpaulin in place during the fumigation and aeration portions of the fumigation was empty or nearly empty of water. The snake was no longer a weighted snake, but an almost empty snake.

The Zythor label provides examples of weighted items that Appellant could have used to maintain the seal around the fumigation. As examples, the label includes "soil, sand, or weighted snakes resting on the edge of the tarpaulin." Appellant argues that the County failed to show that the faulty water snake he used created a break in the seal. He argues essentially that the snake, even though it was empty, worked – which is all that the label requires.

Appellant is incorrect. He violated the label instructions as well as 3 CCR 6600 (a). The Zythor label provides examples of weighted items that Appellant could have used to maintain the seal around the fumigation. As examples, the label includes “soil, sand, or weighted snakes resting on the edge of the tarpaulin.” The purpose of the weighted snake, sand, soil (or other possible items) is to ensure that the tarpaulin does not move and the pesticides do not release from the intended application should environmental conditions arise. All of the examples listed on the label include weighted items intended to prevent environmental factors from removing the tarpaulin from its place. Appellant is correct that he could have used another method to hold the tarp in place, not just those listed on the label. Whatever Appellant chose needed to be something that was going to weigh down the edges of the tarpaulin and keep it in place to make sure the tarpaulin did not move. An empty, non-weighted water snake does not satisfy the purpose or requirements of the label. As Inspector Herrera testified, he witnessed cases where a strong wind can blow a tarpaulin open, potentially exposing people, animals, and the environment to the fumigant.

In this case, Appellant was lucky that no strong wind came and blew the tarpaulin out of place. His luck, however, does not excuse the requirement when Appellant chooses to use a particular method to weigh down the tarpaulin, that the method and equipment must be in good repair so that it fulfills the requirements and purpose of the label instructions. An empty water snake does not satisfy the purpose of the label and is insufficient under the label as a weighted item strong enough to hold the tarpaulin in place during adverse environmental conditions such as strong winds. Appellant’s faulty equipment created a reasonable possibility of a health or environmental effect – the tarpaulin could have blown out of place and exposed people or the environment to the pesticide. Accordingly, Appellant violated 3 CCR 6600 (a) by using faulty equipment that was not in good repair and not safe to operate.

The CAC was within his discretion to charge this violation of \$600 as a “moderate” violation because it created a reasonable possibility of a health or environmental effect. (Cal. Code Regs. tit. 16, § 1922.) The \$600 fine is within the \$250-\$1,000 fine range for a moderate violation.

Conclusion

The Disciplinary Review Committee affirms the CAC’s decision that Appellant violated 3 CCR 6600 (a).

Disposition

The CAC shall notify the Appellant of how and when to pay the \$600 fine.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: 12/11/2018

By: Marta Barlow

Marta Barlow, Member
For the members of the Disciplinary
Review Committee