

**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 Fresno
(County File No. 016-ACP-FRE-00/01)

Administrative Docket No.105

DECISION

**BORBA BROTHERS FARMS
11054 W. Mt. Whitney Avenue
Riverdale, California 93656**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Fresno County Agricultural Commissioner found that the appellant, Borba Brothers Farms (Borba Brothers), violated FAC section 12973. The commissioner imposed a penalty of \$401 for the violation.

Borba Brothers appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation requesting that the designation of the violation be reduced from "serious" to "moderate" pursuant to 3 CCR section 6130. The Director has jurisdiction in the appeal under FAC section 12999.5.

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 them on the record before the Hearing Officer. In reviewing the record, 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 in 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 findings and decision, the Director affirms the decision.

Was the Violation a Serious Violation?

At the pre-hearing conference, Borba Brothers stipulated that it violated FAC section 12973 by failing to clean up and dispose of Temik spillage in a trailer in conflict with the pesticide's registered labeling. On appeal, Borba Brothers requests that the Director reduce the designation of the violation from serious to moderate.

In relevant part, section 6130 of 3 CCR provides that serious violations are repeat moderate violations, or violations which created an actual health or environmental hazard.

There is information in the record that a backhoe operator employed by Borba Brothers operated a backhoe and removed branches from a trailer in the equipment yard at Borba Brothers Farms on May 8, 2000. There is also information in the record that there were Temik granules present on the trailer floor. Earlier in the season, the Temik had spilled into the trailer when planting equipment had been transported in the trailer from one ranch to another.

About 9:00 a.m. on May 8, 2000, the employee reported to his supervisor that he had a headache and was feeling weak, dizzy, and nauseous. The Doctor's First Report (DFR) and the county's Pesticide Episode Investigation Report and supplemental report indicate that the employee was taken to Dr. Lusby that morning to address these symptoms. In item 17 on the DFR, the patient describes "how the accident or exposure happened." Item 17 says "Removing branches from trailer. Unknown to [employee] there was [sic] some Temik granules on the bottom of the trailer. Headache, nausea, dizziness, elbow joint hurts." Item 20 is for the doctor's diagnosis. Item 20 states "Toxic exposure" and that chemical or toxic compounds were involved.

In the case of accidental spillage, the Temik 15G registered label specifies, "Do not get dust or granules on skin or in eyes. Do not breathe dust. Always stand upwind from spill when cleaning up. Sweep up and bury any small spills of excess Temik at least 18 inches deep in soil, isolated from water supplies and food crops."

The label also states that Temik is "Fatal if swallowed. May be fatal or harmful by skin or eye contact or by breathing dust. Rapidly absorbed through skin or eyes. Do not get on skin or in eyes. Do not breathe dust." The label further states that signs and symptoms of overexposure include muscle tremor, nausea, watery eyes, difficult breathing, vomiting, pinpoint eye pupils, weakness, and headache. The label directs persons to "Contact a physician immediately in all cases of suspected poisoning. Illness may be produced rapidly following over-exposure to Temik Aldicarb. If breathing stops, establish an airway and start artificial respiration, and provide oxygen. Make certain to remove all sources of continuing contamination. Remove clothing and wash skin and hair immediately with large amounts of water. Transport the patient to a physician or hospital immediately and show a copy of this label to the physician. If poisoning is suspected in animals, contact a veterinarian."

Section 6000 of 3 CCR states, in relevant part, that "pesticides in category one" mean those pesticide products which are required to prominently display the signal word "DANGER" on the label. The registered label for Temik 15G prominently states "DANGER," and is classified as a pesticide in category one.

In order for a violation to be classified as a serious violation under 3 CCR section 6130, where the county does not produce evidence that the violation at issue is not a repeat moderate violation, the violation must have created an actual health or environmental hazard. According to Merriam Webster's Collegiate Dictionary, Tenth Edition, a hazard is a "source of danger." While an actual health effect may support a finding that the violation created an actual health hazard (source of danger), it is not required that an actual health effect occur in order for a violation to be classified as serious.

A reasonable inference from the information in the record regarding the poisoning or illness that Temik can cause to people and animals exposed to Temik is that the violation created an actual source of danger to the health of persons or animals that may have been in or at the trailer. In this case, the employee, while working around the Temik granules in the trailer, became ill with symptoms consistent with those that can be caused by Temik, and was taken to a doctor who diagnosed "toxic exposure." A reasonable inference from this information is that the violation not only created an actual source of danger to the employee's health (actual health hazard), but also created an actual health effect.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence, and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$401 penalty for its violation of FAC section 12973.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

By: Paul Helliker
Paul E. Helliker
Director

Dated: MAR 6 2002