

**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 Plumas  
(County File No. ACP-PLU-2005/06-001)

Administrative Docket No. 127

**DECISION**

**Dean Brand Construction  
P.O. Box 116  
Taylorsville, California 95983**

Appellant/

**Procedural Background**

Under section 12999.5 of the California Food and Agricultural Code (FAC) and title 3, section 6130 of the California Code of Regulations (CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Plumas CAC found that the appellant violated FAC section 12973, which prohibits use of a pesticide in conflict with its registered labeling. The commissioner imposed a penalty of \$2,000 for that violation.

Dean Brand Construction appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5

**Factual Background**

Appellant applied a pesticide, Jasco Termin-8 (U.S. EPA registration number 7424-1), in the attic crawl space of the house at 221 Kinder Avenue in Greenville, California. The application was made to prepare the house for sale. After the application, the Lal family purchased and moved into that house in November of 2004.<sup>1</sup> The Lals complained of the odor, headaches, and respiratory infections.

**Appellant's Contentions**

On appeal, Dean Brand Construction contends that the Hearing Officer may have been biased and prejudiced because the Lassen and Sierra-Plumas CACs have a practice of trading hearing officer services. The Hearing Officer, Kenneth R. Smith, is the CAC for Lassen County.

---

<sup>1</sup> In a statement read into the record by his attorney, the appellant claims it made the application six months before the Lals moved in.

On May 18, 2006, at oral argument granted to consider this contention, appellant argued that the attic is “exterior” as defined under the building code; and that the commissioner did not prove that his application caused the injuries of which the residents who bought the house complained.

### **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 in the record, contradicted or uncontradicted, to support the commissioner's decision. 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. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the commissioner's decision.

If a commissioner’s decision presents a matter of an interpretation of a law or regulation, the Director decides that matter using her independent judgment.

### **Analysis**

- The commissioner’s use of Kenneth R. Smith as a hearing officer was proper.

As an initial matter, appellant has waived this claim.<sup>2</sup> At oral argument Mr. Brand, Dean Brand Construction, explained that he and his attorney did not raise the issue of hearing officer bias at the hearing, because they thought “it was unnecessary.” Given this fact, appellant cannot raise this issue for the first time on appeal. There is no evidence in the record on this issue for the Director to review, and the commissioner did not have the opportunity to consider, examine, or address any such evidence. The conclusion can be drawn that the appellant was not concerned with the hearing officer’s neutrality or bias until the hearing officer decided against it.

Nevertheless, the Director chooses to address the merits of appellant’s contention by accepting appellant’s unproven allegations as fact, because it can be decided as a matter of law. The appellant has a right to a neutral and unbiased decisionmaker in an administrative adjudication concerning the levying of a fine. A neutral decisionmaker is fundamental to the due process of law. However, the mere possibility, or unsubstantiated insinuation, of bias will not overcome the presumption that Mr. Smith discharged his public duty with integrity; that he was in fact a neutral hearing officer.<sup>3</sup> To prevail, appellant must produce concrete facts that

---

<sup>2</sup> Appellant was represented at the hearing by an attorney.

<sup>3</sup> *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir.1995).

demonstrate actual bias or an unacceptable probability of bias. The appearance of bias is not sufficient.<sup>4</sup>

The only allegation that appellant makes to support his accusation of bias, is that the Lassen and Sierra-Plumas CACs have a practice of trading hearing officer services. Assuming that allegation is true, such relationship would not show actual bias or an unacceptable probability of bias in this case. As an example, it would offend due process for the official who advocates for the agency in a case to also advise the decisionmaker in that same case.<sup>5</sup> However, one employee of an agency may act as the decisionmaker while another separately prosecutes the case.<sup>6</sup> The commissioner himself, or a designated regular employee, could have conducted the hearing without thereby offending the requirements of due process in administrative adjudications established by federal and state courts. There is a greater possibility of bias, or improper influence, where the hearing officer is an employee of the agency prosecuting the case, than the practice of which the appellant complains. Two separate agencies regularly exchanging hearing officer services does not itself create an unacceptable probability of bias. In fact, it is more protective of the appellant's right to a neutral hearing officer than the minimum process due to appellant in administrative adjudications under the federal and state constitutions.

The procedures employed by the commissioner did not violate appellant's due process right to a neutral hearing officer.

- Substantial evidence supports the conclusion that appellant violated FAC section 12973.

It is a violation to use any pesticide in conflict with the registered labeling delivered with the pesticide. (Food & Agr. Code, § 12973.) The label on Jasco Termin-8 (U.S. EPA registration number 7424-1) instructs users as follows, "DIRECTIONS: EXTERIOR USE ONLY It is a violation of Federal law to use this product in a manner inconsistent with this label." (Hearing Exhibit A-13.) "For Exterior Use Only" on the Jasco Termin-8 label, and any other Copper Naphthenate pesticide product label, means treat or apply only to exterior wood surfaces (DPR Enforcement Letter, ENF 2002-44. See Hearing Exhibit A-15). Application of Jasco to wood surfaces within crawl spaces, including the undersides of existing floors, is in conflict with its label and a violation of FAC section 12973 (ENF. 2002-44).

Substantial evidence in the record supports the conclusion that appellant applied Jasco Termin-8 inside the attic of the house at 221 Kinder Avenue, Greenville, California. Bid proposals, signed by Dean Brand and Wilma Taddei, propose to "Complete Items 1A-1B-1D-7A-11B of Lassen Pest Control Report #6534" at "221 Kinder." (Hearing Exhibit A-11). "Item 1B" of that report calls for applying Copper Naphthenate to form board to inhibit infection; "Item 7A" calls for such an application on the "substructure framing" (Hearing Exhibit A-12).

---

<sup>4</sup> *Andrews v. Agricultural Labor Relations Bd.*, (1981) 28 Cal.3d 781, 792-793, 171 Cal.Rptr. 590. See *Breakzone Billiards v. City of Torrance*, 97 Cal.Rptr.2d 467 (2d Dist. 2000). See also *U.S. v. State of Oregon*, 44 F.3d 758, 772 (9th Cir.1994).

<sup>5</sup> See *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234 (2d Dist. 2003).

<sup>6</sup> *Withrow v. Larkin*, 421 U.S. 35 (1975); *Dept of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 121 Cal.Rptr.2d 729 (4<sup>th</sup> Dist. 2002).

Photographs of the interior of the attic show blue stains (Hearing Exhibits A-6, A-7). A test of the stained portion of the insulation showed the presence of Copper Naphthenate (Hearing Exhibit A-9). Finally, in its “Response to Notice of Proposed Action,” appellant admits to “applying the product Jasco Termin-8 to the rafter members in the attic crawl space . . .” (Hearing Exhibit R-1).<sup>7</sup>

Appellant argues that the attic crawl space is “exterior” because the “2001 California Building Code” defines an “exterior wall” as “any wall or element of a wall . . . that defines the exterior boundaries or courts of a building. . .”; and “habitable space” as “space in a structure for living, sleeping, eating or cooking.” (see Hearing Exhibit R-2 at §§ 224-W, 209-H).<sup>8</sup> There are certain standards for “habitable space” such as ceiling height (see Hearing Exhibit R-2 at § 310.6.1). As an initial matter, definitions in the California Building Code have no legal, or other, relevance in this matter. The building code does not, and cannot, regulate any aspect of pesticide sales or use. Appellant was charged with violating the FAC, not transgressing building standards.

In any case, appellant misreads its own exhibit in attempting to apply it to the Jasco Termin-8 label. The product label only allows “exterior use,” because of demonstrated hazards to human health. The building code provisions define “exterior wall” and “habitable space,” so that it can use those terms in setting standards for building permits. A space can be “non-habitable” and have “exterior walls” under the building code, yet still be an interior space with interior surfaces.<sup>9</sup> The appellant applied the pesticide inside an attic crawl space. That is not an “exterior use” in the ordinary sense of the words or under the Department’s interpretation of the subject label, regardless of whether builders would call portions of the attic an “exterior wall” or “non-habitable space.”

Thus, substantial evidence supports the finding that appellant violated FAC section 12973.

- The fine levied is appropriate.

When levying a fine pursuant to FAC section 12999.5, CACs shall levy a fine between \$700 and \$5,000 for violations that created an actual health or environmental hazard. (Cal. Code Regs., tit. 3, § 6130.)

---

<sup>7</sup> Hearing Exhibit R-1 is a hearsay statement offered by appellant, even though Mr. Brand was present at the hearing and able to testify to the underlying facts, and read into the record by his attorney. However, this statement is reliable evidence that Mr. Brand applied the pesticide within the attic crawl space. It is a statement against appellant’s interests that was made in Mr. Brand’s presence without his objection. Also, it is corroborated by other evidence in the record.

<sup>8</sup> The “2001 California Building Code” to which the appellant refers is not a statute like the “Food and Agricultural Code” or “Business and Professions Code”. It is the codification of approved building standards by the California Building Standards Commission at title 24 of the California Code of Regulations.

<sup>9</sup> Regardless, the evidence supports a finding that appellant applied the pesticide to more than just the interior surfaces of the “exterior wall”. (Hearing Exhibits A-6 & A-9.)

The product label, and the description of the task force findings in the Department's letter, provide substantial evidence that Jasco is a toxic substance that poses human health risks when applied to interior surfaces or without proper ventilation (Hearing Exhibits A-13, A-15). Photographs provide evidence that Appellant applied Jasco to an attic crawl space adjacent to a room that could have been, and later was, used as a bedroom (Hearing Exhibit A-2). Thus, there is substantial evidence that appellant's violation created a health hazard in the house.

Furthermore, there is substantial evidence that this was an *actual* health hazard because people were exposed to the dangerous condition created by appellant. That evidence is as follows.

- A test of a sample of the stained insulation collected from the attic on August 2, 2005 revealed a concentration of 2751 parts per million of Copper Naphthenate (Hearing Exhibit A-9).
- The residents installed a vent to attempt to air out the attic crawl space (Testimony of Tim Gibson; Hearing Exhibits A-1, A-6).
- The residents complained of a strong odor from the pesticide (Testimony of Tim Gibson).
- Each of the three residents sought medical treatment for headaches and respiratory infection (Hearing Exhibit A-8).
- Headaches and respiratory infections are consistent with the hazards posed by inhalation of Copper Naphthenate (Hearing Exhibit A-14).

Thus, there is substantial evidence in the record to support the conclusion that appellant's violation created an actual health or environmental hazard.

Appellant appears to argue that there was no actual hazard or exposure because it applied the pesticide about six months before the residents moved into 221 Kinder Avenue (Attachment B to Hearing Exhibit R-1). Appellant also offered a statement from the manufacturer's Web site that the smell of Jasco Termin-8 "should dissipate within 7-10 days." (Attachment E to Hearing Exhibit R-1.) It is the role of the hearing officer to assess the relative weight and credibility of opposing evidence. The evidence in the record recited above supports a finding of an actual environmental hazard, even if contradicted by other evidence in the record.

In any case, it is not clear that the evidence offered by the appellant is contradictory. Uncontradicted evidence indicates that the appellant applied the pesticide in a confined interior space and extensively to fiberglass insulation, whereas the pesticide is only supposed to be used on exterior wood surfaces. Presumably the pesticide has considerably more opportunity to degrade, ventilate, or absorb into the wood when it is applied to exterior wood as directed, rather than to fiberglass insulation in a confined interior space. Also it should be noted that Mr. Brand did not actually testify as to when he last applied the pesticide in the attic crawl space, even

though he was present at the hearing.<sup>10</sup> In fact, appellant's own exhibit could have been read as evidence it applied some of the pesticide after July 26, 2004, or approximately 3-4 months before the Lal's moved in (Hearing Exhibit R-1, Attachment D (proposing to complete item "7A" and accepted "7/26/04"))).

Appellant also argues that the commissioner did not establish that its violations caused the headaches and respiratory infections complained of by the residents of 221 Kinder Avenue. The commissioner need not find that appellant's violation caused the Lals' injuries in order to levy a \$2,000 fine. The commissioner need only find that the appellant's violations created an actual *hazard*. As discussed above, substantial evidence supports that finding.

#### **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 \$2,000 fine.

#### **Judicial Review**

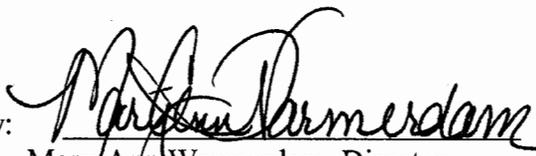
Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

#### **STATE OF CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION**

Dated: \_\_\_\_\_

9 June 2006

By: \_\_\_\_\_

  
Mary-Arn Warmerdam, Director  
Department of Pesticide Regulation

---

<sup>10</sup> Appellant's attorney, who has no personal knowledge of the events and thus is not a competent witness, testified that Mr. Brand applied the pesticide about 15 months before the sample was collected on August 2, 2005. Appellant's attorney also read a statement into the record that Mr. Brand applied the pesticide approximately six months before the Lal's moved in.