

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
Agricultural Commissioner of  
the County of Amador  
(County File No. 05-05-ACP-AMA)

Administrative Docket No. 134

**DECISION**

**Continental Landscape, Inc.  
5248 Tunsen Road  
Modesto, California 95356**

Appellant/

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations (3 CCR), section 6130, county agricultural commissioners 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 Amador County Agricultural Commissioner found that the appellant violated 3 CCR sections 6738(b)(1)(C), 6738(c)(1)(C), and 6678 by failing to assure that its employees wore protective eye wear and gloves, and improperly labeling a service container, respectively. The commissioner levied a total penalty of \$900.

Continental Landscape, Inc., appealed 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**

On October 6, 2005, two employees of the Respondent, Mr. Rojas and Mr. Pinalas, applied a pesticide by hand with backpack sprayers. Neither employee wore eye protection or gloves. Eye protection and gloves were available, and Mr. Rojas had been instructed to use them. The backpack sprayers were labeled with respondent's business name and license number, but did not identify the pesticide or display a signal word. While there was pesticide left in the backpack sprayers, the employees placed them in the trailer.

**Appellant's Contentions**

Regarding the finding that it violated sections 6738(b)(1)(C) and (c)(1)(C), Continental contends that it did not fail to "assure" that its employees wore the required personal protective equipment (PPE) because it took reasonable steps to ensure its employees did so. Regarding the finding that it violated section 6678, Continental Landscape, Inc., contends that the backpack sprayers are application equipment, not service containers, hence the requirements of section 6678 are inapplicable. Continental Landscape, Inc., argues, in the alternative, that it should not be penalized because section 6678 is ambiguous as applied in this case.

### **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.

### **Findings and Analysis**

- *The Finding that Continental Violated Sections 6738(b)(1)(C) and (c)(1)(C) is not Supported by Substantial Evidence.*

The employer "shall assure" that employees engaged in application of pesticides by hand, or using hand held equipment, wear protective eyewear and gloves. (Cal. Code Regs., tit. 3, §§ 6738(b)(1)(C) & (c)(1)(C).) The parties' stipulations support the Hearing Officer's finding that Mr. Rojas and Mr. Pinalas, as Continental Landscape, Inc., employees, applied a pesticide (Roundup Pro, U.S. EPA registration number 524-475) by hand without wearing protective eyewear or gloves. The question is whether substantial evidence supports a finding that Continental Landscape, Inc., failed to "assure" that they would do so.

The Department's regulations define "assure" as "*to take all reasonable measures so that the behavior, activity, or event in question occurs.*" (Cal. Code Regs., tit. 3, § 6000.) (Emphasis added.) In the context of assuring the behavior of an employee, section 6000 defines "reasonable measures" to include "determining that the employee has the knowledge to comply; providing the means to comply; supervising the work activity; and having and enforcing a written workplace disciplinary action policy covering the employer's requirements, as well as other measures required by pesticide law or this division."

Department regulations setting forth "Employer-Employee Responsibilities" also provide guidance as to what is required of employers under section 6738. For example, an employer must inform the employee of the specific pesticide being used, the PPE and other equipment to be used, and pesticide safety regulations applicable to all activities they may perform. The employer must supervise employees to assure that safe work practices, including all applicable regulations and pesticide product labeling requirements, are complied with and otherwise take all reasonable measures to assure that employees handle and use pesticides in accordance with the requirements

of law. (*See* Cal. Code Regs., tit. 3, § 6702.) Department guidance states that when the county cites an employer for violating section 6738, it should be prepared to explain how the employer failed to fulfill one or more of its responsibilities listed in section 6702 and how this failure allowed the violation section 6738. (*See* Hearing Officer Roundtable Project (HORP) at § 2.7.<sup>1</sup>)

Thus, despite what ordinary usage of the word “assure” might suggest, in proving a violation of section 6738, it is not enough to show that the employee did not wear the required PPE. While “*all* reasonable measures” is a high standard of care for the employer, under section 6738 Continental Landscape, Inc., is not automatically responsible for its employees’ failure to use PPE. The commissioner must identify some respect in which the employer failed to undertake “all reasonable measures” to avoid that event. The Department has published guidance on how the commissioner can meet that burden. (*See* HORP at § 7.4.)

It appears that the Hearing Officer did hold Continental Landscape, Inc., strictly, or automatically, liable for its employees’ PPE violations. The Hearing Officer made no finding that Continental failed to take all reasonable measures and made no explicit findings of fact that would support such a conclusion. Neither the Hearing Officer nor the county advocate, in the decision or during the hearing, provided proof, or argued, that Continental Landscape, Inc., failed to take all reasonable measures to assure that its employees would wear PPE.<sup>2</sup> In rendering her decision the Hearing Officer stated that the violations of section 6738 were “for the failure of two Continental Landscape, Inc. employees to wear required personal protective equipment. . .” As discussed above, *Continental Landscape, Inc.*, is responsible for its employees’ failure to wear PPE only if it did not take all reasonable measures so that such behavior would occur. (*See* Cal. Code Regs., tit. 3, § 6000, definition of “assure.”) Finally, a review of the record does not reveal substantial evidence of any measure that Continental Landscape, Inc., failed to take to assure that its employees wore the proper PPE.

The County advocate stated at the hearing that the County took action against the employer in this case because it could not take an action against the employees, since they were not licensed. (*See* Cal. Code Regs., tit. 3, § 6130, subd. (b).) However, that the County cannot charge the employees does not relieve it of the need to prove all the elements of a section 6738 violation in an action against the employer, including that the employer failed to take all reasonable measures.

For the foregoing reasons, no substantial evidence in the record supports the finding that Continental Landscape, Inc., violated sections 6738(b)(1)(C) and (c)(1)(C).

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<sup>1</sup> Available at <<http://www.cdpr.ca.gov/docs/county/training/hrngofcr/hearofficer/htm>>.

<sup>2</sup> Continental Landscape, Inc.’s owners specifically asked for such information during the hearing.

- *Substantial Evidence Supports the Finding that Continental Violated Section 6678.*

Service containers must be labeled with the name and address of the person or firm responsible for the container; the identity of the pesticide in the container; and the word “Danger,” “Warning,” or “Caution,” in accordance with the label on the original container. (Cal. Code Regs., tit. 3, § 6678.) A “service container” is any container, other than the original labeled container of a registered pesticide provided by the registrant, that is utilized to hold, store, or transport the pesticide or the use-dilution of the pesticide. (Food & Agr. Code, § 12757.5.)

The parties stipulated that the backpack sprayers did not have any pesticide related information on it at the time of the inspection. Continental Landscape, Inc., argues that the backpack sprayer is not a service container because it is application equipment. A separate regulation governs labeling required for application equipment. (See Cal. Code Regs., tit. 3, § 6630.) However, there is no reason that a backpack sprayer cannot be both application equipment and a service container depending on how it is used. If the backpack sprayer is used to “hold, store or transport” a pesticide within the meaning of section 12757.5, it falls under the definition of “service container.” Department guidance states that if application equipment is used to store or hold pesticides for a prolonged period or to transport pesticides on a public road to another site, then it is, and must be labeled as, a service container. (Enforcement Letter 2001-38.<sup>3</sup>)

Substantial evidence supports a finding that Continental Landscape, Inc., used the backpack sprayer as a service container. According to Mr. Boitano’s uncontradicted testimony, its employees placed the backpacks in the back of the truck while they still contained pesticide. This supports the inference that Continental Landscape, Inc., used the backpack sprayers not only to apply pesticides, but also to transport pesticides between sites during the day. It is good practice to empty backpack sprayers at the end of the day, not after each application, to avoid unnecessary exposure of the workers to the pesticide. However, a backpack sprayer so used is a service container and must be labeled accordingly.

Section 6678 is not ambiguous as applied to this case. When a backpack is used to carry pesticides from one site to another it is plainly a container being used to transport or store pesticides. Furthermore, Continental Landscape, Inc., had constructive and actual notice that section 6678 could apply to backpack sprayers. The Department guidance discussed above specifically addressed the circumstances present in this case. In addition, Continental Landscape, Inc., has previously been cited twice under section 6678 for not having properly labeled backpack sprayers. (See County Exhibits 7 & 8.) Finally, this is not an unreasonable result, but squarely serves the purpose of section 6678. When a backpack sprayer is used to transport or store pesticides, the public, for example a first responder to an accident scene, may encounter it and has the right to know what pesticide is in the backpack and how dangerous that chemical is.

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<sup>3</sup> Available at <<http://www.cdpr.ca.gov/docs/enfcmpli/penfltrs/pen2001/2001038.pdf>>.

For the foregoing reasons, substantial evidence in the record supports the finding that Continental Landscape, Inc., violated section 6678. Furthermore, the fine of \$400 is appropriately classed and well within the commissioner's judicious exercise of discretion.

**Conclusion**

The commissioner's decision to levy a total penalty of \$500 on Continental Landscape, Inc., for violating 3 CCR sections 6738(b)(1)(C) and (c)(1)(C) by failing to assure that its employees wore required PPE is not supported by substantial evidence; and is reversed.

The commissioner's decision to levy a penalty of \$400 on Continental Landscape, Inc., for violating 3 CCR section 6678 by failing to properly label its backpack sprayers is supported by substantial evidence; and there is otherwise no cause to reverse or modify that decision.

**Disposition**

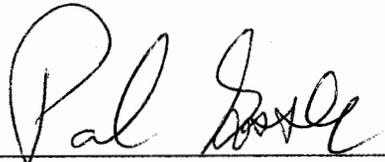
The commissioner's decision is reversed in part and affirmed in part. The commissioner shall notify the appellant how and when to pay the \$400 fine.

**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: 11/1/06

By:   
Mary-Ann Warmerdam, Director