

**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 San Luis Obispo
(County File No. 027-ACP-SLO-05/06)

Administrative Docket No. 139

DECISION

**Western Farm Service
P.O. Box 669
Santa Maria, CA 93456**

Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5, and Title 3 of the 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.

After giving notice of the proposed action and providing a hearing, the San Luis Obispo County Agricultural Commissioner found that the appellant violated FAC section 12973 by failing to use a pressure gauge on each irrigation set during an application of InLine™ as required by permit. The commissioner levied a total penalty of \$700.

Western Farm Service 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 21, 2005, at Alcantar Brothers Farming, the appellant, Western Farm Service, applied a pesticide containing 1,3-Dichloropropene (InLine™, U.S. EPA registration number 62719-348) through a drip application system without using a pressure gauge. (County's Exhibit P-19, testimony of Mr. Schmitz; not disputed.) Mr. Esparaza, the employee of Western Farm Service and qualified applicator that supervised the application, had been trained to use pressure gauges and had pressure gauges in his possession at the time. (Exhibits P-19, R-5, R-9, testimony of Mr. Nichols, testimony of Mr. Schmitz; not disputed.)

Appellant's Contentions

Appellant contends that it is entitled to assert the "Independent Employee Action Defense" (IEAD) citing 3 CCR section 6702(c), which requires employees to utilize personal protective equipment and "other safety equipment." Appellant contends that the pressure gauge is "other safety equipment" within the meaning of that section. Appellant further contends that the commissioner should have cited a more specific requirement in regulations rather than FAC section 12973.

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 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 question of the law, the Director decides that issue using her independent judgment.

Findings and Analysis

San Luis Obispo Restricted Material Permit Condition 16 requires that pressure gauges be used on each irrigation set when applying InLine™ through drip application systems. (Exhibit P-18.) The use of any pesticide shall not conflict with the conditions of any permit issued by the commissioner. (Food & Agr. Code, § 12973.) Appellant performed the application at issue under a permit issued by the commissioner, which included Condition 16. (Restricted Materials Permit # 40-05-4010192, Exhibit P-16.) Appellant does not dispute that its employees applied InLine™ through a drip application system without using a pressure gauge in violation of Section 12973; and substantial, uncontradicted evidence in the record supports that conclusion. (Exhibit P-19, testimony of Mr. Schmitz.)

- *The Independent Employee Action Defense is not Applicable to this Case.*

An employer is responsible for the mistakes of its employees committed while acting within the scope of their employment, or on the employer's behalf. Mr. Esparza supervised the application, and Mr. Negrete injected the InLine™ into the drip system as agents of appellant, and on appellant's behalf. When its agents failed to use the pressure gauge, Western Farm Service (an entity that can *only* act through agents) failed to use the pressure gauge. There is no question that its employees were acting within the scope of their employment, and appellant does not argue otherwise. Appellant argues that it should be excused from responsibility for its permit violation, because it qualifies for an affirmative defense, the "Independent Employee Action Defense" (IEAD).

Western Farm Service argues on appeal that it may assert the defense pursuant to 3 CCR section 6702(c) because a pressure gauge is "other safety equipment." Appellant's argument is flawed. Whether or not the pressure gauge is "other safety equipment" under section 6702(c), that section does not provide a defense for employers. It states, "*Employees shall utilize the*

personal protective equipment and other safety equipment” (Cal. Code Regs., tit. 3, § 6702, subd. (c) [emphasis added].) Section 6702(c) sets forth an obligation of employees.¹ Similarly, section 6130(b), which the appellant also cites, does not provide a defense for employers, but limits the commissioner’s discretion to cite an employee for a violation of section 6702(c).

DPR allows the IEAD as a matter of enforcement policy--it is not established in any regulation. Whether the commissioner must allow the defense in this case depends on whether that would be a consistent, common sense, and appropriate application of that policy. While careful examination of regulations may help clarify the policy,² abstracting terms from their regulatory context only obscures the issues and arguments. Essentially, Western Farm Service argues that the defense applies where an employee fails to use equipment that may reduce risks to workers in the area (even if that is not its only purpose), not exclusively to the situation where an employee fails to use *personal* protective equipment (PPE) designed to protect the employee who wears it. Using a pressure gauge when applying InLine™ allows the applicator to maintain the pressure in the irrigation set at the level required by the label, thereby mitigating risks to the environment, any and all workers in the area, and the public generally, not just the individual who chooses whether or not to use it. Appellant’s position is unprecedented, and to adopt it would substantially weaken our pesticide regulatory program.

The IEAD has been considered a defense only to an action penalizing the employer for its employee’s failure to wear PPE. Enforcement Letter 2001-55, which established the defense, only raises the defense when the employer has been cited under FAC section 12973 for the employee’s failure to wear label-specified PPE. (Exhibit P-25 at page 5.) Other portions of the Enforcement Letter, and the Hearing Officer Roundtable Project, also discuss the defense only in the context of PPE. (Exhibit P-25; Exhibit R-1.)

The IEAD is an exception to the general rule that an employer is responsible for the actions of its employees while they are carrying out the work of the employer. Keeping this exception narrow is sound enforcement policy. The employer is better able to ensure compliance than individual employees due to its resources, expertise, and ability to control its employees. Furthermore, holding the employer responsible assures that it will have the motivation to do so. Also, it would be unfair for employees to bear the ultimate responsibility for violations while the employer initiates, directs, and benefits from the regulated activity. Allowing companies to shift responsibility for violations to their employees is generally an ineffective way to obtain compliance, and thus an inappropriate enforcement policy for laws enacted to protect public health and the environment.

It is not an historical accident that Department policy documents always mention IEAD in connection with PPE. The hallmark of a requirement to wear PPE is that it is *solely* for the protection of the individual worker who uses it. PPE does not mitigate risks to other people or

¹ The Hearing Officer did pose the issue of whether the pressure gauge was “other safety equipment.” However, as explained in this decision, he was correct not to reach it.

² For example, the criteria listed in paragraphs (1)-(5) of section 6130(b) are a model for what an employer must prove to successfully assert the IEAD.

the environment from pesticide use. If an employee rejects a requirement that the employee is fully informed about, has been provided the means and motivation to comply with, and *which is solely for his or her individual benefit*, then that decision and its consequences can logically be held their responsibility. Furthermore, in such a case, it does not undermine enforcement goals as much to let the employee assume full responsibility for compliance. However, if the regulation to *any degree addresses risks to other people (including another employee) or the environment*, then ultimate responsibility rests with the employer.

Whether a pressure gauge is “other safety equipment” within the meaning of section 6702(c) is irrelevant. For the reasons discussed above, independent employee action is only a defense to a charge that that employee failed to wear PPE. As appellant conceded, the pressure gauge is not PPE and is not worn. Unlike PPE, the requirement to use a pressure gauge is not purely for the benefit of the individual employee who decides whether or not to use it. The pressure gauge mitigates risk to other people and the environment.

- *The Commissioner Cited the Most Specific Law.*

Commissioners should cite the most specific law that applies to the particular act or occurrence. Where a general and more specific law conflict when applied to the circumstances, the more specific law controls. Where a general and specific law can be reconciled, both control. It is good practice for a regulator to cite the law that best fits the particular act or harm it is targeting. That is precisely what the commissioner did in this case. The occurrence was the chemigation application of InLine™ without a pressure gauge. The commissioner cited Western Farm Service for failure to comply with a condition of a commissioner’s permit under FAC section 12973. As the basis of that citation, the commissioner alleged, and proved, that Western Farms Service did not comply with Condition 16. Condition 16 requires that pressure gauges be used on each irrigation set when applying InLine™ through drip application systems. (Exhibit P-18.) This is the law most specific to the act or occurrence that was the subject of the commissioner’s action. There is no more specific regulation.

- *The Fine Amount*

County agricultural commissioners shall levy a fine between \$700 and \$5,000 for violations that repeat another Class B violation within two years. (Cal. Code Regs., tit. 3, § 6130, subd. (a).) A “Class B” violation includes one that created the reasonable possibility of a health or environmental effect. (*Id.*) The record reflects that appellant committed a Class B violation within the previous two years. (Exhibit P-23.) This violation created a reasonable possibility of an environmental effect. The commissioner chose to levy the minimum Class A fine to account for the circumstance that the violation occurred despite significant efforts by Western Farm Services to comply. For example, the employee supervising the application had pressure gauges available and had been trained to use them. The fine level is appropriate.

Conclusion

For the foregoing reasons, the commissioner's decision to levy a penalty of \$700 on Western Farm Service for its violation FAC section 12973 is supported by substantial evidence,

and there is otherwise no cause to reverse or modify that decision.

Disposition

The commissioner's decision is upheld. The commissioner shall notify the appellant how and when to pay the \$700 fine.

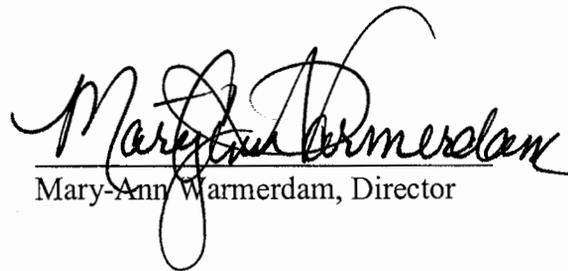
Judicial Review

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: 15 November 2006

By:


Mary-Ann Warmerdam, Director