

**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 Sutter
(County File No. ACP-SUT-07/08-044)

Administrative Docket No. 162

DECISION

**Mr. Raj Kumar Sharma, Owner
Sunrise Orchards
4750 Bear River Drive
Rio Oso, California 95672**

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 (CACs) may levy a civil penalty up to \$5,000 against a person who violates certain California pesticide laws.

After giving notice of the proposed action and providing a hearing, the Sutter CAC found that the appellant, Mr. Sharma, violated section 6702 of 3 CCR based on his employee's failure to wear gloves and eye protection while handling a pesticide. The CAC levied a total penalty of \$250.

Mr. Sharma appealed the CAC'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 March 24, 2008, Deputy CAC Stephen Sheer observed Mr. Sharma's employee, Mr. Heyer, at work.

Mr. Scheer testified that, using binoculars, he observed Mr. Heyer load a pesticide, Kocide 2000 (U.S. EPA reg. no. 352-665), into a spray rig and dispose of the empty bag without wearing gloves or eye protection. According to estimates at the hearing, Mr. Scheer could have been up to 600 feet away at the time. Mr. Scheer also testified that he drove to the site and saw Mr. Heyer putting water in the sprayer. Mr. Sharma translated Mr. Heyer's testimony that Mr. Scheer had not seen him loading Kocide into the spray rig, but only disposing of emptied Kocide bags left from an earlier mix/ load operation.¹ Mr. Sharma also testified that Mr. Heyer was not mixing pesticides, but emptying excess water into the sprayer, after having washed his hands.

¹ Mr. Sharma translated to and from Punjabi for Mr. Heyer.

Appellant's Contentions

On appeal, Mr. Sharma contends that the hearing officer's findings of fact are unsupported because Mr. Scheer could not have seen whether Mr. Heyer was loading the spray rig from 600 feet away, even with binoculars, because there are obstacles in the way. Mr. Sharma also contends that, though Mr. Heyer was disposing of empty Kocide bags, he was wearing gloves at the time and then took them off to wash his hands. Mr. Sharma contends that Mr. Heyer was not asked if he was wearing gloves and eye protection during the hearing.

Standard of Review

The Director decides the appeal on the record before the hearing officer. The Director affirms the CAC's decision if it is supported by substantial evidence. The substantial evidence test requires sufficient relevant evidence and inferences from that evidence to support a conclusion by a reasonable finder of fact, even though a reasonable hearing officer might also have made different findings. Witnesses sometimes present contradictory testimony; however, issues of witness credibility are the province of the hearing officer.

Where a CAC's decision presents a question of the law, the Director decides that issue using her independent judgment.

Findings and Analysis

An employer must supervise its employees and take all reasonable measures to assure that its employees handle and use pesticides in accordance with the law and pesticide product labeling requirements [Cal. Code Regs., tit. 3, § 6702, subd. (b)(5)]. The Kocide label requires handlers to wear chemical-resistant gloves and protective eyewear (Exhibit C-3). "Handlers" include people who handle equipment used to apply pesticides that may contain residues and who work with opened (including emptied but not rinsed) pesticide containers.² (See Cal. Code Regs., tit. 3, § 6000, definition of "Handle.")

Substantial evidence in the record supports the hearing officer's conclusion that Mr. Sharma failed to assure his employee wore eye protection or gloves while handling Kocide. Mr. Scheer testified that he saw Mr. Heyer loading Kocide and running water into a spray rig that had noticeable Kocide residue without wearing eye protection or gloves. Mr. Heyer testified that he was disposing of emptied bags that had held Kocide and Mr. Sharma admitted that the spray rig in question may contain Kocide residue. Despite his testimony that he disposed of Kocide bags, Mr. Heyer also testified that he did not handle Kocide. Further, he testified that he was following Mr. Sharma's instructions and the rules, which Mr. Sharma did not deny at the

² "Handler" does not include local, state, or federal officials performing inspection, sampling, or other similar official duties.

hearing. This is substantial evidence that Mr. Sharma did not instruct his employee properly, for example that he was required to wear gloves and eye protection when handling empty Kocide bags.

On appeal, Mr. Sharma claims that Mr. Scheer's view of the load site was obstructed and submits numerous photographs to support his contention. However, there was no evidence in the record of any such obstacles. The Director decides this appeal on the record before the Hearing Officer and, thus, cannot consider this claim or the photographs. Mr. Sharma was given ample opportunity to present his own evidence and cross-examine Mr. Scheer during the hearing. He failed to assert this claim or offer any evidence at the hearing when the County could have responded, or the Hearing Officer could have considered it.

On appeal, Mr. Sharma also claims that Mr. Heyer was wearing gloves when he was handling the Kocide bags, but that he took the gloves off to wash his hands for lunch. Again, Mr. Sharma offered no testimony or other evidence of this at the hearing. In addition, Mr. Sharma stated during the hearing that Mr. Heyer had coveralls, long sleeves, shoes, and socks on already and was *going to* put on the gloves. This is consistent with Mr. Scheer's undisputed testimony that when he arrived on scene, moments after observing Mr. Heyer, and asked to see his gloves and eyewear, Mr. Heyer retrieved them from a "tightly-wrapped" package on the tractor. Mr. Sharma complains that no one asked Mr. Heyer whether he was wearing gloves and eye protection while handling the Kocide. The County apparently was not relying on an admission from Mr. Heyer to establish that he was not wearing gloves and eyewear. Of course, Mr. Sharma was free to pose that question to his own witness, but did not.

On appeal Mr. Sharma also complains that Mr. Scheer did not take a picture of the sprayer basket to show the Kocide residue. Mr. Scheer testified that he saw residue in the basket, while Mr. Heyer testified that he did not. It makes no difference that Mr. Scheer did not provide a photograph to support his testimony. Handling equipment used to apply a pesticide that may contain residue is "handling" the pesticide. (See Cal. Code Regs., tit. 3, § 6000, definition of "Handle.") Mr. Sharma admitted that the sprayer was used to apply Kocide and that it may contain residue. Furthermore, as discussed above, the Hearing Officer's finding that Mr. Sharma failed to assure Mr. Heyer wore gloves and eyewear while disposing of empty Kocide bags is supported by substantial evidence in the record, and is sufficient grounds to find a violation occurred.

Conclusion

For the foregoing reasons, the CAC's decision to levy a penalty of \$250 against Raj Kumar Sharma as owner of Sunrise Orchards for violating section 6702 is supported by substantial evidence.

Disposition

The CAC's decision is affirmed. The CAC will notify Respondent when and how to pay the penalty.

Judicial Review

Under FAC section 12999.5, the Appellant may seek judicial 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 under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: 8 December 2008

By: Mary-Ann Warmerdam
Mary-Ann Warmerdam, Director