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 Solano
(County File No. ACP-SOL-09-10)

Administrative Docket. No. 171

DIRECTOR'S DECISION

George Green
Dixon Aviation
6711 Rio Dixon Highway
Dixon, California 95620
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 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing on September 22, 2009, the Solano CAC found that on July 16, 2008, the appellant, Mr. George Green, committed one violation of 3 CCR section 6738(d), and levied a total fine of $250.

The appellant 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.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, 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, 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 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 Commissioner's decision, the Director affirms the decision.

Factual Background

On July 16, 2008, Ms. Laura Tripp, Solano County Senior Agricultural Biologist, conducted a Pesticide Use Monitoring Inspection at Dixon Aviation. When Ms. Tripp arrived she observed an employee of Dixon Aviation loading an airplane with the pesticide *Weedar 64*. The *Weedar 64* label required all pesticide handlers to wear specified personal protective equipment and, as relevant here, chemical resistant boots. The employee was wearing noncompliant leather boots. The employee was not wearing a chemical resistant apron as an alternative to chemical resistant boots.

Relevant Regulations

3 CCR section 6738(d) states that the employer shall assure that when chemical resistant footwear is specified by the pesticide product labeling that either chemical resistant shoes or chemical resistant boots be worn, or chemical resistant coverings be worn over boots or shoes. 3 CCR section 6738(h) allows an exception when a closed system is used. Then, the person handling the pesticide may substitute coveralls, chemical resistant gloves, and a chemical resistant apron for the personal protective equipment required by pesticide product labeling.

FAC section 13000(a) is the applicable statute of limitations in this action and allows the CAC to bring an action against a violator within two years of the occurrence of the violation.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard, is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897, or is a repeat of a Class B violation. The fine range for Class A violations is $700-$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a repeat of a Class C violation. The fine range for Class B violations is $250-$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is $50-$400.

Appellant's Allegations

The Appellant argued that the case was not brought to his attention in a timely fashion before the deadline and is well past any "statue of time." The Appellant argued that the CAC relied on his interpretation of the label "instead of using the label which is available and required by all employees handling pesticides." Lastly, the Appellant argued that the CAC had worked in conjunction with another government agency and had already handed down fines, loss of license, and expenses so that this action is double jeopardy.

The Hearing Officer's Decision

The Hearing Officer found that the CAC had presented evidence to establish the requirement for chemical resistant footwear, and that the footwear made of absorptive materials such as leather does not qualify. The Hearing Officer discussed the conflicting testimony at hearing regarding when the inspector arrived the day of the incident; the Appellant testified that the loading of the plane had finished; the CAC inspector testified that when she drove up, the loading of the plane had just been completed. However, the Hearing Officer noted that Appellant and his employee testified that they were not really sure they were done. The Hearing Officer concluded that the employee was not wearing the required chemical resistant footwear handling the pesticide during the loading of the plane. Because absorbent leather boots would have caused the employee a reasonable possibility of exposure to the pesticide, the Hearing Officer found that the violation warranted a Class B fine. The CAC's proposed fine was at the lowest end of Class B and found to be appropriate. The Hearing Officer did not address a statute of limitations argument or Appellant's argument that the action is double jeopardy. Those issues were not raised at hearing.

The Director's Analysis

The violation occurred on July 16, 2008. The CAC issued a Notice of Proposed Action on March 23, 2009, that was received by Appellant on March 26, 2009. This timeframe is well within the statute of limitations of two years applicable to this action. Appellant's double jeopardy argument is not clear, and there is no evidence to support the allegation. The Director finds that this action is timely and that there was no "double jeopardy."

The testimony at hearing was conflicting as to whether Appellant's employee had finished loading the pesticide at the time the inspector arrived at the site and observed his footwear. There is no violation in this case unless the Appellant's employee was handling pesticides while he was wearing the leather boots observed by the inspector. The Hearing Officer noted, however, that the Appellant and his employee testified that they were not completely sure that the employee had completed loading, and that the inspector testified clearly that the

employee was still finishing the loading when he was observed wearing leather boots. The inspector also testified, and the employee agreed, that although he was loading the plane using a closed system, he was not wearing the alternative personal protective equipment in the form of a chemical resistant apron that would be allowed by regulation in 3 CCR section 6738(h). The Hearing Officer found the inspector's testimony to carry more weight and, based on her testimony, found the violation occurred.

In addition, the *Weedar 64* label was introduced at hearing and stipulated to by the Appellant as the proper label. The label required pesticide handlers to wear chemical resistant boots. An excerpt from DPR's Pesticide Use Enforcement Compendium was introduced at hearing defining chemical resistant boots and clearly stated that chemical resistant boots cannot be made of absorptive materials such as leather or have eyelet holes that would allow penetration. The inspector testified that the boots worn by Appellant's employee were leather, had eyelets and could not be considered "chemical resistant" under the PUE standards. The catalogue page submitted by Appellant into evidence verifies that the employee's boots were leather and had eyelets. Sufficient evidence is found in the record to support the Hearing Officer's conclusion and the CAC's finding that Appellant violated 3 CCR section 6738(d). The evidence also supports the Hearing Officer's reasoning that the violation merited a Class B fine, and the fine at the lower end of Class B is well within the CAC's discretion.

Conclusion

The Commissioner's decision that the appellant violated 3 CCR section 6738(d) is supported by substantial evidence and is upheld. The Commissioner's levy of a fine of $250 for the violation is also supported by substantial evidence, and is upheld.

Disposition

The Commissioner's decision is affirmed. The Commissioner shall notify the appellant how and when to pay the $250 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: APR - 5 2010

By: _____
Mary-Ann Warmerdam, Director