

**BEFORE THE STRUCTURAL PEST CONTROL
DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of San Diego
(County File No. 657-SCP-SD-05/06)

Docket. No. S-19

DECISION

Cartwright Termite & Pest Control, Inc.
1376 Broadway
P.O. Box 2398
El Cajon, California 92021

Appellant/

Procedural Background

Pursuant to Business and Professions Code (BPC) section 8617, the San Diego County Agricultural Commissioner may levy a civil penalty up to \$5,000 for each “serious” violation of certain State pesticide laws.

After notice and a hearing, the Commissioner found that Cartwright Termite & Pest Control, Inc. (“Cartwright”) violated the California Code of Regulations, title 3, (3 CCR) section 6702(b) by failing to assure its employee wore required protective equipment and violated the Food and Agricultural Code (FAC) section 12973 by failing to aerate the house for one hour. The CAC imposed a total fine of \$1,603.

Cartwright appealed the Commissioner’s action to the Structural Pest Control Disciplinary Review Committee (“Committee”). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were John Tengan for the structural pest control industry, Dennis Patzer for the Structural Pest Control Board (“Board”), and Eric Walts for the Department of Pesticide Regulation (“Department”). The Committee heard oral argument via telephonic conference on March 26, 2009. Paul Sorrentino represented the appellant, and Sally Lorang represented the Commissioner.

Factual Background

On the morning of January 5, 2006, Cartwright aerated a residence it had fumigated with Vikane. After the tarpaulins had been removed, Mr. Schallock, the licensee in charge of the aeration, entered the house without wearing a self-contained breathing apparatus (SCBA), and opened the garage door at 7:11 a.m. About a half an hour later, two more Cartwright employees, Mr. Dunn and Mr. Howe-Sutton, entered the house without wearing SCBAs. The garage door was closed at 7:43 a.m. and the front door was locked at 7:45 a.m.

Appellant's Contentions

Cartwright contends on appeal that: 1) the Commissioner lacked jurisdiction; 2) the Structural Pest Control Board violated a settlement agreement by authorizing the Commissioner to proceed with a fine action in this case; 3) Cartwright properly raised and proved a defense to the violations under section 8616.9; and 4) common sense requires that Messrs. Shallock, Dunn and Howe-Sutton, rather than Cartwright, be held responsible for the violations. Cartwright also claims that it established its defense under the California Code of Regulations, title 3, sections 6000 (definition of “assure”) and 6702(b)(3).

Standard of Review

The Committee decides the appeal on the record of the hearing. If substantial evidence in the record supports the Commissioner’s decision, we affirm it. Under the substantial evidence standard of review, the Committee defers to the Hearing Officer’s determination of facts if a reasonable fact finder could have reached the same conclusion, based on the evidence in the record and inferences from that evidence, even if the record could also support a different conclusion. Issues of witness credibility are the province of the Hearing Officer. The Committee decides questions of law using its independent judgment.

Analysis

- The Commissioner has Jurisdiction.

Cartwright contends that the Commissioner lacks jurisdiction because 1) he is an agent of the Board that derives his authority to fine Cartwright from the Board and otherwise has no right to proceed against Cartwright; and 2) the Board agreed in settlement of a disciplinary action not to take an action based on this incident. Cartwright further contends that the Board violated that agreement when it authorized the Commissioner to proceed with this fine action.

The Commissioner is authorized by statute to fine Cartwright.

Cartwright asserts that the Commissioner acts simply as an agent of the Board under authority conferred by the Board whenever he enforces pesticide law against structural pest control companies because of the “agency” language used in BPC section 8616 and 8616.4. This contention ignores the context of those sections and thus incorrectly characterizes the source of the Commissioner’s jurisdiction and his relationship to the Board. Reading the relevant statutes as a whole shows that the Commissioner enforces state pesticide laws against structural pest control licensees as an independent public agent, subject to oversight by the Department and, to a lesser extent, the Board. The Commissioner may, in some sense, act on the Board’s behalf. However, he does so under authority derived from the legislature, not from the Board.

First, it was the legislature, not the Board, who decided that the Department would be the Board’s “agent” and the Commissioner would be the Department’s “representatives.” Section 8616 *required* the Board to designate the Department as its “agent,” and section 8616.4 *required* the Department to designate the commissioners as its representatives, for the purpose of investigating the pesticide use of, and levying fines under section 8617 against board licensees and registered companies, and persons engaged in unlicensed

structural pest control. The Board may suspend the Commissioner's enforcement activities under the BPC if it decides he has not fulfilled his responsibilities, but only temporarily. (Bus. & Prof. Code, §8616.6.) Furthermore, the Board must first give the Department notice of the deficiency and an opportunity to remedy it. (*Ibid.*) The Department may remove a person from the office of commissioner only for cause, but it may not delegate the enforcement power provided to the commissioner under the BPC to some other person or office. (Food & Agr. Code, section 15201.)

Second, the statute grants the commissioners enforcement powers that it does not grant the Board, which is hardly consistent with Cartwright's theory that their authority is derivative of the Board's. Unless the agricultural commissioner of a particular county is currently suspended under section 8616.6, *only* the commissioner, not the Board, may conduct inspections, routine investigations and levy penalties pursuant to section 8617 in that county. (*Id.*, § 8616.7.) It makes no difference whether the commissioner has actually commenced a penalty action under section 8617 by issuing a NOPA in a particular case.

Finally, the statute, not the Board, authorizes the Commissioner to levy an administrative penalty against Cartwright for each violation of FAC section 12973 and 3 CCR, section 6702(b).

The board or county agricultural commissioners, when acting pursuant to Section 8616.4, . . . for a licensee, registered company, or an unlicensed individual acting as a licensee, may levy an administrative fine . . . for each violation of . . . Chapter 2 (commencing with Section 12751) . . . of Division 7 of the Food and Agricultural Code, or any regulations adopted pursuant to those chapters, relating to pesticides.¹

(Bus. & Prof. Code, § 8617.)

The reference to section 8616.4 does not mean the commissioners also need authorization from the Board, or the Department, to exercise this penalty authority. As noted above, after notice to the Department, the Board may temporarily suspend the Commissioner's enforcement activities under its BPC authorities. During such a suspension the Commissioner would not be "acting pursuant to section 8616.4," and thus could not bring an action under section 8617. However, even then commissioners may still levy fines against structural pest control companies pursuant to FAC section 12999.5, and the Commissioner could have done so in this case.

In lieu of civil prosecution by the director, the commissioner may levy a civil penalty against a person violating . . . Article 10 (commencing with Section 12971) or Article 10.5 (commencing with Section 12980) of [chapter 2 of the FAC] . . . or a regulation adopted pursuant to any of these provisions. . .

(Food & Agr. Code, § 12999.5, subd. (a).)

¹ In the Notice of Proposed Action, the Commissioner correctly cited section 8617, not sections 8616 or 8614.4, as the basis of his jurisdiction. (See Exhibit 1.) FAC section 12973 and 3 CCR section 6702(b) are a provision in and a regulation adopted pursuant to chapter 2 of Division 7 of the Code.

The penalty authority granted to commissioners under BPC section 8617 is in addition to the authority granted under FAC section 12999.5. (See Food & Agr. Code, § 15202.²) A structural pest control operator or company is a “person” under the Food and Agricultural Code. (Food & Agr. Code, section 38.)

When the relevant statutes are read together a scheme emerges that is consistent with the legislative intent expressed in statute. (See Food & Agr. Code, § 15201.³) Commissioners levy administrative penalties for violations of state pesticide use law committed by structural pest control companies and operators, subject to the Department’s extensive oversight powers and responsibilities. (See, e.g., *Id.*, § 2281.) If the case involves only violations of the FAC and implementing regulations, the commissioner can choose to bring an action to levy penalties either under FAC section 12999.5 or BPC section 8167. If the case involves violations of both Codes, the commissioner can bring a single action for penalties under BPC section 8617 for both types of violations.⁴ Of course, if the case involves only BPC violations then the commissioners can only levy penalties under their section 8617 authority.

The commissioners refer matters to the Board where it may be appropriate to revoke to respondent’s license or registration or suspend it for more than three days pursuant to BPC section 8620. If the Board is not satisfied with a commissioner’s enforcement, after notice to the Department, the Board may temporarily suspend the commissioner’s ability to levy penalties under the BPC, and investigate and levy penalties itself.

The Board’s Decision and Order of July 2007 is outside the scope of this review.

The Board issued a consent order on July 26, 2007, resolving an action it had brought under BPC section 8620 to suspend or revoke company registration PR 389 (issued to Cartwright), operator license OPR 4563, and field representative licenses FR 17649, FR 19858, and FR 30491. (Exhibit 11-B.) Cartwright argues that in that consent order, the Board agreed not to take any disciplinary action against it for the incident at issue in this case, and thus the Committee must overturn the Commissioner’s decision.

If substantial evidence supports the Commissioner’s decision, then the Committee *must* affirm it. (Bus. & Prof. Code, § 8662, subd. (b)(5).) As discussed above, the Commissioner has independent statutory authority to fine Cartwright, not derivative of

² “In addition to the enforcement authority granted to the director and commissioners by this code, a commissioner, when acting pursuant to Section 8616.4 of the Business and Professions Code, may suspend the right of a structural pest control licensee to make pesticide applications in the county for up to three working days or levy a fine upon a licensee or unlicensed individual acting as a licensee as specified in Section 8617 of the Business and Professions Code . . .”

³ “The Legislature hereby finds and declares that it is the joint responsibility of the Department of Food and Agriculture, the commissioner of each county under the direction and supervision of the director, and the Structural Pest Control Board to regulate the activities of structural pest control licensees. The Structural Pest Control Board has responsibility for licensing persons and companies engaged in structural pest control work. The department has primary responsibility for enforcing pesticide laws and regulations.” “Director” and “department” now refer to the Department of Pesticide Regulation. (Food & Agr. Code, §§ 12500 & 12500.5.)

⁴ As noted above, if the commissioner’s activities were suspended by the Board pursuant to section 8616.7, it could still levy penalties under FAC section 12999.5.

the Board. The Commissioner was not a party to, or a beneficiary of, the Board's agreement with Cartwright. Thus, the consent order is simply not relevant to our review of his action. We are not permitted to overturn the Commissioner's action based on promises the Board may or may not have made to Cartwright.⁵ If Cartwright believes that the Board has violated the terms of its consent order, it may seek whatever remedy it believes is available from whomever it believes has jurisdiction to provide it.

However, we note that Cartwright's reading of the consent order as an agreement to preclude this action by the Commissioner has no support in the document itself. The order provides, in pertinent part:

January 2006 Incident. The incident in January 2006 involving Cartwright employees will not be deemed a violation of probation or grounds for discipline by the Structural Pest Control Board against Company Registration No. PR 389 and Operator's License No. OPR 4563. No acts that occurred prior to the commencement of the probation, will be grounds for violation of the probation.

(Exhibit 11-B, page 8)

This paragraph is one of twelve that specify the terms of probation for Operator License number OPR 4563. (See Exhibit 11-B at page 6, "... OPR 4563 is placed on probation for two (2) years on the following terms and conditions.") It means that the Board will not consider the incident at issue here to be a violation of that probation and that the Board will not to use it as grounds for any further action *under section 8620*. The paragraph does not cite section 8620 or use the phrase "revoke or suspend", but "discipline" in this context obviously refers to an action under section 8620 to revoke or suspend a license and not to an action under 8617 to levy an administrative penalty.

First, the text refers to discipline against a registration and a license. Actions taken under section 8617, levying fines or suspending the right to work for up to three days, are against *people* (a licensee, a registered company, or an unlicensed individual acting as a licensee.) The only available action against a *registration or license* is under section 8620 ("After a hearing, the board may temporarily suspend or permanently revoke a license. . .")

Second, the paragraph promises that the incident will not be deemed "grounds for discipline." A license may be revoked or suspended under section 8620 if the holder "commits any one or more of the acts or omissions constituting *grounds for disciplinary action*." (Bus. & Prof. Code, § 8620. Emphasis added.) A licensee may be penalized "for each *violation*" (*Id.*, § 8617. Emphasis added.)

Third, the paragraph refers to "discipline by the Structural Pest Control Board." Unless the Commissioner is under suspension pursuant to section 8616.6, the Board

⁵ Contrary to Cartwright's assertions, this Committee is not the Board. We are an ad hoc body set up to review whether commissioner penalty actions taken under BPC section 8617 are supported by substantial evidence and otherwise lawful. (See Bus. & Prof. Code, §§ 8660 & 8662.)

cannot fine Cartwright under section 8617.⁶ The Board can take an action under section 8620, based on the incident at issue here, though apparently it has agreed not to do so. Regardless, the paragraph does not represent that the Commissioner will take no action.

- BPC Section 8616.9 is not a Defense.

Section 8616.9 addresses the commissioners' exercise of enforcement discretion. It is not a defense. (Bus. & Prof. Code, § 8616.9, "the commissioner shall have the option to use discretion in citing an employer only if evidence of all of the following is provided: . . .") Section 8616.9 instructs the commissioners to cite the employer when they find an employee failing to wear required personal protective equipment, unless certain criteria are met. If all the criteria in section 8616.9 are not met, then the commissioner must cite the employer. If all the criteria are met, the commissioner may choose whether or not to cite the employer.

- Holding Cartwright Responsible does not Offend Common Sense.

Cartwright hires, trains and promotes its employees, it directs and reaps financial reward from their activities, it has the obligation to supervise them, and it has the power to discipline and fire them. The company has greater resources and expertise than any individual employee. Thus, Cartwright has a greater obligation and ability than anyone else, including the Commissioner, to assure that its employees follow the law in their conduct of Cartwright's business.⁷ Holding Cartwright responsible for its employees' behavior in this case makes sense because that is the most effective way to get compliance.

Allowing Cartwright to escape the responsibility for short-timing the aeration is inappropriate because it undermines enforcement of a requirement intended for the benefit of the public. That consideration outweighs any potential "unfairness" to the company in holding it vicariously liable with respect to this violation. A requirement to wear personal protective equipment (PPE) is somewhat different because it is intended solely for the benefit of the employee who wears it. In a situation where the company has genuinely informed the employee of the requirement and the reasons to wear PPE, and has genuinely provided the employee with the means and necessary motivation to do so, the law reflects the position that letting the employee bear sole responsibility for his or her violation can be appropriate because it does not undermine enforcement designed primarily to protect the public.

However, in practice it is very difficult to reliably distinguish between a company whose training and policies are not adequately implemented – and so bears a share of the blame – and a company who genuinely did everything it could to train and motivate the employee, and create a corporate culture that takes PPE requirements seriously, but just had a rogue employee. Letting the former type of company escape responsibility undermines compliance with crucial safety requirements for workers and unfairly

⁶ In any case the Board's power to suspend the Commissioner, would not effectively prevent a section 8617 action altogether because it is temporary. However, it would allow the Board itself to take a case under section 8617.

⁷ Under a well-established common-law rule (*respondent superior*), the employer is liable for its employees' acts committed within the scope of their employment.

disadvantages companies that do everything right. Regardless, the Commissioner must prove each element of the violation charged.

- Substantial Evidence does not Support the Conclusion that Cartwright Failed to “Supervise to Assure.”

The Commissioner found Cartwright in violation of 3 CCR section 6702, subdivision (b)(3), which provides:

The employer . . . shall supervise employees to assure that safe work practices, including all applicable regulations and pesticide product labeling requirements are complied with . . .

(See Exhibit 1.)

The hearing officer fulfilled the minimum requirement that a decision must state the factual and legal basis for the decision. (See Gov. Code, § 11425.50, subd. (a).) He explicitly concluded that Cartwright violated section 6702(b)(3) based on Inspector Avina’s observations of three men without respirators or detection devices entering a house fumigated with Vikane shortly after they began the aeration, and on Mr. Cartwright’s identification of each individual. (Decision at 12-13)

However, it is difficult to review a decision that is not accompanied by any analysis of those facts. The hearing officer’s “analysis” of *why* this evidence shows a violation of the regulation cited consists of a single phrase; “[a]s a result of these occurrences, Avina found, inter alia, the following violations: . . .” The Notice of Proposed Action to which the hearing officer is probably referring, does not contain any analysis and, more to the point, neither did the County’s arguments at hearing.

To fine Cartwright for violations of section 6702(b)(3), Commissioner must show:

- 1) the employee engaged in an unsafe work practice or failed to comply with an applicable regulation or label requirement; and
- 2) Cartwright was his employer at the time; and
- 3) Cartwright did not supervise the employee to assure that he would comply with that law or safe work practice.

As to the first element, the Commissioner or hearing officer never identified an “applicable regulation” and why the evidence shows a violation of it. In a sense this failure does not really matter. Notwithstanding the lack of a pre-hearing stipulation, plainly both parties agreed that the employees’ behavior was unsafe and illegal, and immediately recognize the employees’ behavior as such, without the bother of actually identifying the specific law or hazard.⁸ As to the second element, Cartwright stipulated

⁸ Analyzing the elements of the violations alleged reveals that citing section 6702(b)(3) was a poor choice. Though section 6702(b) is technically citable, it is really a general instruction that should probably never be cited as a basis for levying a penalty. In virtually all cases, using section 6702(b)(3) as a citable section merely layers another element of proof (of inadequate supervision) onto the underlying violation, i.e. the real citable section.

that all three men were working for it at the time. As to the third element, the Commissioner has to prove that Cartwright did not “supervise the employee to assure.” As an initial matter, the phrase “the employer shall supervise to assure” is not simply equivalent to the phrase “the employer shall assure.”

“Assure” means to take all reasonable measures so that the behavior, activity, or event in question occurs. . . . includ[ing] 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 . . . (Cal. Code Regs., tit. 3, §6000, definition of “Assure”)

Thus, for example, section 6738(b), which provides that “the employer shall assure” its employees wear eye protection, means the employer shall take all reasonable measures including, among others, supervising the work activity, so that its employees wear eye protection. This is a very high standard of care for the employer. The employer has to genuinely inform, facilitate, supervise, discipline, cajole, and, in short, do anything else necessary to get employees to comply. Furthermore, the information on whether the employer has met this standard is normally only in the hands of the company. Thus, under certain circumstances, a reasonable hearing officer can infer that *all* measures were not taken from the fact that the employee violated, even if the County cannot identify specifically what the company failed to do. For example, where a company’s employees have a history of repeatedly not wearing eye protection, a reasonable hearing officer can infer from that fact that the company does not take “all reasonable measures” so that its employees wear eye protection. Of course, the company has the opportunity to rebut that inference.

“Supervise to assure” means “the employer shall undertake all supervision reasonably necessary to make sure employees comply.” It does not mean the same thing as “assure” – take all reasonable measures.⁹ Supervision is oversight, control, and inspection of *day-to-day* activities of employees and availability to observe, assist and instruct employees. (See Cal. Code Regs., tit. 19, §1918.) Thus, the question is not whether Cartwright took all reasonable measures to avoid violations. The question is whether it provided reasonable oversight, control and inspection of its employees’ daily activities to avoid these violations. In reviewing the hearing officer’s decision we examine the record as a whole, but draw all inferences in favor of the hearing officer.

The record shows that all parties agreed that the employees entered a house that had been fumigated with Vikane without respirators, and were generally acting, in the words of Cartwright’s counsel, like the Three Stooges. Mr. Shallock went into the house first, followed some time later by the two junior licensees. Mr. Shallock, the senior licensee, was identified as the supervisor by Mr. Cartwright and a counseling memo shows that Mr. Shallock was represented as a “supervisor” to Mr. Dunn on another occasion. (Exhibit K.) All three employees were licensed and had signed statements that

⁹ Such a reading would ignore the word “supervise” used in section 6702(b)(3) and render portions of section 6000 and 6130(b) superfluous.

they had been trained in proper tarpaulin removal and aeration. According to Mr. Cartwright's testimony, none of the employees bothered to face him and explain or apologize for their behavior. They chose instead to find new jobs. Because they were each a licensed field representative, legally, any one of the three employees could have supervised the aeration. (Bus. & Prof. Code, §8505.2.) Cartwright testified, and the County's witness agreed, that putting three field representatives on an aeration is unusual. Both parties agreed that it was not reasonable to expect Mr. Cartwright to be present at each job.

Finally, we find it highly relevant that the Commissioner fined each employee for violating section 6702(c) (failure to use personal protective equipment or other safety equipment) based on this incident. A commissioner may bring an action against an employee for violations of section 6702(c) *only if* the commissioner determines, among other conditions, that the employer "supervised the licensee or certificate holder to assure that the equipment was properly used. . ." (Cal. Code Regs., tit. 3, §6130, subd. (b)(5).) We presume the Commissioner properly performed this duty when he brought the actions against each of the three employees. Thus, we can presume each employee charged was held responsible because he was "supervised to assure." (Evid. Code, §664, *Cal. Highway Patrol v. Superior Court*, 158 Cal.App.4th 726, 740, (6 Dist., 2008).)

However, contrary to the case against the employees, in this case, the Commissioner charged that Cartwright had not supervised the employees to assure compliance. Here, the Commissioner makes a determination of a key element in the case inconsistent with a fact needed to support the previous penalties. Further, there is not substantial evidence that Mr. Shallock was not adequately supervised. He had been licensed for six years, was a supervisor himself, and was accompanied by two licensees when he went into the house without a respirator. Cartwright does not need to have supervisors on-site to oversee its on-site supervisors. By itself, the fact that their on-site supervisor set such a poor example would be substantial evidence that that Messrs Howe-Sutton and Dunn were not "supervised to assure." Cartwright may not be automatically liable for Mr. Shallock's failure to wear PPE himself, but it is liable for his supervision of its other workers.¹⁰ However, we feel fairness does not allow the Commissioner to determine a fact in this case inconsistent with the basis upon which penalties were levied in the previous cases.¹¹

- Substantial Evidence Supports the Conclusion that Cartwright used Vikane in Conflict with the Label.

The approved label requires that structures fumigated with Vikane, U.S. EPA reg. no. 62719-4, be aerated for one hour. (Exhibit 9) Cartwright's records and the video taken by Inspector Avina, shows that Cartwright's employees aerating a house that had been fumigated with Vikane for about half an hour. (Exhibits 8 & 15) Thus,

¹⁰ It was Cartwright that put Moe in charge of Larry and Curly. See also footnote 7.

¹¹ It is possible to fine the employer even if all the conditions in section 6130(b) are met; for example if the employer is charged with failure to assure and the Commissioner can show that the company has a history of employees not wearing PPE, or does not actually impose the discipline called for by its policy.

there is substantial evidence to support the hearing officer's conclusion that Cartwright used Vikane in conflict with its label, in violation of FAC section 12973.

Disposition

The \$1,203 penalty for violations of section 6702(b)(3) of title 3 of the California Code of Regulations is reversed. The \$400 penalty for a violation of FAC section 12973 is sustained. A \$400 civil penalty levied by the commissioner against Cartwright is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. Please mail payment along with a copy of this decision to:

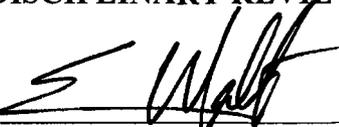
Structural Pest Control Board
2005 Evergreen Street, Ste. 1500
Sacramento, CA 95815

Judicial Review

The appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure § 1094.5. (See Bus. & Prof. Code, § 8662.)

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: 5/21/2009

By: 
Eric Walts, Member
for and with the concurrence of all members
of the Disciplinary Review Committee