

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

In the Matter of the Decision of
Agricultural Commissioner of
the County of San Diego
(County File No. 828-SCP-SD-07/08)

Docket No. S-016

DECISION

**D & S Termite and Pest Control
3638 Bancroft Drive
Spring Valley, California 91977**

Appellant /

Procedural Background

The Business and Professions Code (BPC) section 8617 authorizes the county agricultural commissioner to levy a civil penalty of up to \$5,000 for each violation of certain State structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Diego County Agricultural Commissioner found that Appellant violated Title 3 of the California Code of Regulations (3 CCR) sections 6780(b), 6600(b) and 6600(c); 3 CCR section 6780 requires the employer shall provide and require the employee to either wear approved respiratory protective equipment during certain aspects of fumigation or to monitor the air for applied fumigant; 3 CCR section 6600(b) and 6600(c) sets forth general standards of care for pesticide applications. The commissioner imposed a penalty of \$700 for each of the two violations for a total penalty of \$1,400.

D & S Termite and Pest Control (D & S) appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee. The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were Peter Giammarinaro for the structural pest control industry, Dennis Patzer for the Structural Pest Control Board, and Gary Knutilla for the Department of Pesticide Regulation. The Committee reviewed the evidence between June 18, 2008, and July 3, 2008.

Appellant's Contentions

The Appellant contends that its employee, a licensee, should be cited instead of the company, as the Appellant requires all employees who fumigate to wear a self-contained breathing apparatus (SCBA), and trained and required its licensed employee to aerate fumigated structures for a period of one hour. The Appellant contends that there was no violation of 3 CCR section 6780, as the video taken by the county did not prove that its employee was exposed to Vikane.

Standard of Review

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner's decision. The Committee 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 Committee 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 Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

Factual Background

On November 2, 2007, D & S employees Donovan Charrette (the owner's son) and Benjamin Schallock, holder of a Field Representative license issued by the Structural Pest Control Board, commenced a Branch 1 aeration of a residence D & S had fumigated the day before with Vikane, EPA registration number 62719-4. Sulfuryl fluoride is the active ingredient in Vikane, which bears the signal word "Danger."

At the time Mr. Schallock broke the seal of the tarp, he was wearing a SCBA; however, Mr. Charrette was not wearing a SCBA even though Mr. Charrette was in close proximity of the broken seal area. Mr. Charrette, still not wearing a SCBA, was also in close proximity of the broken seal when he assisted Mr. Schallock in the fan installation required by the tarpaulin removal aeration plan (TRAP). The aeration of the residence began at 10:53 a.m. The Vikane label requires a minimum of one-hour aeration, however, the residence was aerated for a period less than one hour. The aeration ended at 11:39 a.m., 14 minutes short of the required one-hour period (23 percent less time than required by the label). The entire operation was video taped by Mr. Tony Avina, Senior Agricultural/Standards Inspector for the San Diego County Agricultural Commissioner's Office.

Was There a Violation of 3 CCR 6780(b)?

3 CCR section 6780(b) provides in relevant part:

"(b) Whenever an employee may be exposed above an exposure standard to . . . sulfuryl fluoride, or any other fumigant for which only air-supplied respirator equipment is approved, the employer shall either:

- (1) Require the use of air-supplied respirator equipment,
- (2) Employ continuous monitoring to warn employees before the PEL is reached. . ."

The Vikane label states that concentrations of Vikane exceeding one part per million (ppm) requires that "all persons in the exposed area . . . wear a . . . SCBA . . ." Thus, the "exposure standard" in this case is one ppm.

The Appellant asserted in the record that there was no proof that her employee was exposed to Vikane. The language of 3 CCR section 6780(b) is "may be exposed." If an employee helps break the seal of a recently fumigated residence he obviously "may be exposed above an exposure standard." There is information in the record that the licensee, Mr. Schallock, was wearing the only

SCBA at the site during the tarp removal and the installation of the TRAP fan. Mr. Charrette, who is not a licensee, was not provided a SCBA at the site and was not wearing a SCBA during the breaking of the seal of the tarp, or when he assisted Mr. Shallock in the installation of the TRAP fan. There was no deployment of any form of continuous air monitoring at the site; hence, since the employee was not provided with a SCBA by his employer and was within close proximity to a newly opened tarp on a recently fumigated residence and assisted in the TARP fan installation, the employee may have been exposed to concentrations above one ppm when not wearing a SCBA. These facts provide sufficient evidence to support the conclusion that the Appellant did not require its employee to wear SCBA in this instance, a violation of 3 CCR section 6780(b).

The evidence in the record supports the finding of a violation of 3 CCR section 6780(b) because D & S had Mr. Charrette do work that required a SCBA without providing a SCBA or requiring that he use one.

Was There a Violation of 3 CCR 6600(b) and 6600(c)?

Section 6600 provides in relevant part, “Each person performing pest control shall: . . .

(b) Perform all pest control in a careful and effective manner.

(c) Use only methods and equipment suitable to insure proper application of pesticides. . .”

There is information in the record that the Appellant’s two employees failed to aerate the residence for the minimum of one hour. The surveillance video in the record showed that the aeration duration was for 46 minutes, 14 minutes short of the requisite 60 minutes. Therefore, the aeration of the residence was not performed in a “careful and effective manner.” The section requires that the person performing the pest control “shall use only methods . . . to insure proper application” of the Vikane. A vital part of such an application is the aeration of the residence to exhaust any remaining Vikane. Therefore, there is sufficient evidence in the record to uphold the violation of 3 CCR section 6600(b) and 6600(c).

Did the Commissioner Cite the Correct Person?

The Appellant contends that the commissioner should only have fined her employee, Mr. Shallock (Mr. Charrette’s supervisor), because the company policy requires all employees who fumigate to wear a SCBA. Mr. Shallock failed to require that Mr. Charrette wear a SCBA in a situation where he may have been exposed to Vikane. In addition, Mr. Shallock was trained to aerate for one hour and signed a document to that effect. In other words, the Appellant claims it was really Mr. Shallock, not D & S, who failed to “require the use of air-supplied respirator equipment” and failed to aerate for one hour. Mr. Shallock committed the acts and omissions at issue here on D & S’s behalf as its employee acting in the course and scope of his employment. D & S is vicariously liable for both.

Appellant’s citations to BPC section 8616.9 and the Independent Employee Action Defense (IEAD) are unavailing to defend against either violation. Section 8616.9 gives the commissioner the discretion not to cite the employer for an employee’s failure to wear personal protection equipment (PPE), if the commissioner has evidence that all of the conditions listed in that section

are met.¹ It does not provide D & S a defense. If the commissioner has evidence that all of the conditions are met, then *the commissioner can choose* not to cite the employer. The IEAD only applies when the employer is charged with not wearing PPE based solely on an employee's decision not to wear PPE. Here D & S has not been charged with Mr. Charette's failure to wear PPE, but with not *requiring* him to wear PPE. Finally, the failure to aerate for one hour is not a PPE violation; therefore, BPC section 8616.9 and the IEAD do not apply.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The San Diego County Agricultural Commissioner's decision is affirmed. The commissioner's order is stayed until 30 days after the date of this decision to provide opportunity for the appellant to seek judicial review of the Committee's decision as set forth below.

The \$1,400 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board
1418 Howe Avenue, Suite 18
Sacramento, California 95825

Judicial Review

BPC section 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: JUL 08 2000

By: 
Gary Knutilla, Chairperson
for and with the concurrence of all members
of the Disciplinary Review Committee

¹ "If an employee is found during an inspection or investigation not wearing personal protective equipment required by regulation, the commissioner shall have the option to use discretion in citing an employer only if evidence of all of the following is provided: . . ." In fact, evidence at hearing showed two of the criteria allowing discretion were not met.

DECLARATION OF SERVICE

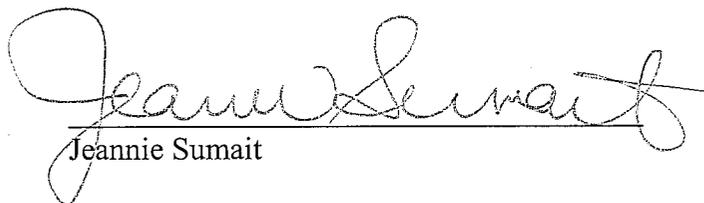
I am a citizen of the United States, over the age of 18 years, and not a party to this action. I am an employee of the Department of Pesticide Regulation, State of California, and my business address is 1001 I Street, P.O. Box 4015, Sacramento, California 95812-4015. I am readily familiar with this Department's practice for collection and processing of correspondence for mailing with the United States Postal Service. On July 8, 2008, I caused to be served the following document(s):

DPR No. S-016 – Decision

[XX] (BY CERTIFIED MAIL) By placing a true copy, in a sealed envelope prepared for certified mailing, in a designated outgoing mail area for mailing with the United States Postal Service at Sacramento, California, addressed as set forth below. I am familiar with this Department's practice whereby certified mail, after being placed in a designated area, is given the appropriate postage and is picked up by the United States Postal Service at the close of the day's business.

D&S Termite and Pest Control
3638 Bancroft Drive
Spring Valley, CA 91977

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 8, 2008, at Sacramento, Sacramento County, California.


Jeannie Sumait