

**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 Monterey
(County File No. 1271012)

Docket. No. 179

DECISION

**Gardener's Friend, Inc.
605 Redwood Drive
Sand City, California 93955**

Appellant/

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners 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, the Monterey County Agricultural Commissioner found that the appellant, Gardener's Friend, Inc., violated Title 3 of the California Code of Regulation (3 CCR) section 6614(b)(1) making an application of a pesticide when there was a reasonable possibility of contamination to the bodies or clothing of persons not involved in the application process. The commissioner imposed a total penalty of \$1,000 for the violation.

Appellant appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

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, 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 August 4, 2009, Mr. Charles Jones, an employee of the Appellant, began an application of a tank mix of Orthene Turf, Tree and Ornamental Spray 97, registration number 59636-91, bearing the signal word, "Caution," and Tengard, registration number 70506-6, bearing the signal word, "Caution," using a pressurized hose-line with a hand-held spray gun. The application was made to the canopy of oak trees located at a residence. There is information in the record that Ms. Nancy Ripken, a neighbor, was sitting at her table in her yard adjacent to the application site, when she felt spray mist contact her person, her table setting, and her food. Ms. Ripken contacted Mr. Jones and communicated to him that his application was drifting onto her person and property. Mr. Jones ceased the application. After some police involvement, the pesticides being applied were revealed by Mr. Jones. After Ms. Ripken reported the event to the CAC's office, she decontaminated her person and clothes, and areas of her home exposed to the pesticide drift because of an open door and windows.

An investigation was conducted by Mr. Casey McSwiggin, biologist with the CAC's office. Mr. McSwiggin's investigation included taking two swab samples which were later analyzed by the California Department of Food and Agriculture's Center for Analytical Chemistry. The sampling results showed a positive result for the presence of acephate, the active ingredient in Orthene. Ms. Ripken did not experience symptoms from the exposure nor did she seek medical attention.

Appellant's Contentions

The Appellant alleges bias and unfairness by the hearing officer in his decision, as well as alleging that the hearing officer ignored very important facts; i.e., Appellant's employee¹ testified that the applicator, Mr. Jones, would have been "drenched" well before Ms. Ripken felt any drift; the post-application tests conducted by the Appellant with its high-pressure hose and handheld nozzle proved that a "cloud of drift [wa]s impossible;" Mr. Jones would have seen Ms. Ripken in her front yard; Ms. Ripken was on notice of the application by the presence of the Appellant's work truck parked on the street outside the application area; Ms. Ripken's actions were not reasonable when she confronted Mr. Jones about his application; the swap sampling was not indicative of a drift and that the testing was outside of the area that Ms. Ripken felt the mist contact her person; the CAC's witness made a false statement in his report; more swab samples were taken than was introduced into evidence; Ms. Ripken destroyed evidence by decontaminating/laundrying her clothes and showering; the delay in the hearing put them at a great disadvantage; Mr. Jones' unavailability² placed the Appellant at a disadvantage; and the hearing officer gave too much weight to Ms. Ripken's testimony.

¹ Appellant's "expert" witness was not subjected to voir dire as to his expertise; hence, the witness testified as the Appellant's representative and not an expert witness. The only credential possessed by the Appellant's witness was a Qualified Applicator's License.

² Mr. Jones was laid off by the Appellant some months prior to the hearing.

3 CCR Section 6614(b)(1)

3 CCR section 6614(b)(1) provides, "Notwithstanding that substantial drift would be prevented, no pesticide application shall be made or continued when: (1) There is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process; . . ."

Analysis

Ms. Ripken testified at the hearing that she felt misting contact her person almost immediately after Mr. Jones began his application to the oak tree canopy in her neighbor's yard. The Appellant stipulated that Ms. Ripken was not involved in the application process.

During the hearing, the CAC's investigator testified about his report and the laboratory results which tested positive for the active ingredient in Orthene. The sampling protocol used by Mr. McSwiggin was fully examined by the Appellant. Ms. Ripken provided direct testimony, subject to cross-examination by the Appellant. Ms. Ripken testified that the spray mist contacted her arms, her face, her hair and her shirt, and that she smelled a strong pesticide-like odor. The Appellant introduced drift sampling protocol from DPR's Internet Web site in an attempt to counter the sampling protocol used by Mr. McSwiggin. Appellant failed to comprehend that there was the witness and victim of the event, and the swab sample test results confirmed movement of the material offsite. Witness veracity was considered by the hearing officer; hence, Ms. Ripken's testimony was accepted as truthful by the hearing officer.

Mr. Robert Edgull, an employee of the Appellant, gave testimony of the training that the Appellant's employees receive when applying pesticides, the Appellant's policies regarding spraying techniques, oak spray gun use, tank mix rates, the spraying techniques employed by the Appellant's employees, the testing of pressure values of the spray rigs involved in the application at issue, that Mr. Edgull never was found to have violated any drift laws, and that some residents of Carmel were unsettled by pesticide applications. Mr. Edgull's testimony was not relevant to the elements of the violation.

Reasonable inferences from the hearing record are that Appellant, through his employee, made an application of the tank mix of the two pesticides when there was a reasonable possibility of contamination of the body and clothing of Ms. Ripken, a violation of 3 CCR section 6614(a)(1).

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 commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$1,000 fine.

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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: 27 January 2011

By: Mary Ann Warmerdam

Mary-Ann Warmerdam, Director