

**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 San Diego
(County File No. 137-ACP-SD-10/11)

Administrative Docket. No. 184

**DIRECTOR'S
DECISION**

Brothers Nursery, Inc.
Attn: Pedro Mercado
5725 N. Willard Avenue
San Gabriel, California 91775-2532

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 April 6, 2011, the San Diego CAC found that on October 15, 2010, the appellant, Brothers Nursery, Inc., committed one violation of California's pesticide regulations. The CAC levied a \$250 fine for one violation of 3 CCR section 6738(b), a Class B violation.

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 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 October 15, 2010, when entering the premises of Brothers Nursery, a San Diego County Agricultural Standards Inspector observed an employee of the nursery applying a pesticide using a backpack sprayer without wearing protective eyewear. His glasses were placed on his ballcap. She observed him continue spraying without wearing the eyewear while she parked her car and walked up to him. The inspector issued a violation for failing to follow 3 CCR section 6638(b)(1)(C).

Relevant Laws and Regulations

Title 3 CCR section 6738(b)(1)(C) reads:

"(b) The employer shall assure that:

(1) employees wear protective eyewear when required by pesticide product labeling (except as expressly provided in this section) or when employees are engaged in: . . .

(C) Application by hand or using hand held equipment; except when . . . "¹

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

At hearing, the Appellant agreed with the hearing officer that the facts were basically undisputed, that the employee was not wearing his protective eyewear while applying

¹ The exceptions found in the regulation are for handling solid pesticides such as baits and lures and are not relevant here.

Roundup (Ranger Pro/Monsanto EPA number 524-517). At hearing, the Appellant asked that the hearing officer use discretion and not find a violation, or that he not issue a fine. The written appeal dated May 4, 2011, submitted by Appellant disputed statements found in the proposed decision regarding the use of a respirator since the violation was for failure to use eyewear; asserted the fact that no respirator was required to be worn; and asserted that the previous Ag Standards Inspector who did not testify at hearing told him no violation should be issued for applying a pesticide using a backpack sprayer pointed at the ground without using eyewear because there is no danger. The further argument dated May 16, 2011, discussed the fact that the October 15, 2010 inspection was a rescheduled reinspection and the CAC failed to appear at the first reinspection which cost Appellant \$450, the cost of his travel time to be present at the inspection. The Appellant asserted that the previous inspector had told him he would not write him up for such a violation. The Appellant lastly asserts that his employee only momentarily removed the glasses while allowing them to clear.

The Hearing Officer's Decision

The Hearing Officer stated that Mr. Mercado agreed that the facts were not in dispute and the only issues for the Hearing Officer to decide related to the proposed fine and its amount. The Hearing Officer found that the CAC properly charged a Class B violation and that a dismissal or warning was not proper. Without discussing the issue further and without offering evidentiary support for these findings, the Hearing Officer found that the fine levied, the lowest fine possible for a Class B violation, was not arbitrary, capricious, or an abuse of discretion in this case.

The Director's Analysis

The record supports a finding of a violation based on the inspector's undisputed testimony that she observed Appellant's employee applying Roundup using a backpack sprayer while not wearing protective eyewear. The eyewear is required by regulation, not the label. The inspector testified as to her opinion that the eyewear was becoming fogged because the applicator was also wearing a N95 dust mask type of respirator that caused his breath to exit the top of the mask and fog his glasses. As pointed out by the inspector and the Hearing Officer, a respirator was not required in this situation, either by label or regulation. The Appellant argued after hearing that the removal of the glasses was momentary. The inspector viewed the violation, drove by, parked her car, and walked back to the employee. The failure to use the glasses cannot be called momentary, nor does the regulation allow for the momentary removal of the glasses to allow them to clear. If the glasses need to be cleared, application must stop during that time.

The Appellant seems to be most concerned with the failure of the previous inspector to attend a scheduled reinspection in August 2010, and his alleged loss of money as a result of that failure. While unfortunate, this is irrelevant to this action. The Appellant also relies on alleged assertions made by another inspector that it is not a chargeable violation when an employee

