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 Santa Barbara (County File No. 012-ACP-SB-08/09)

Administrative Docket No. 167

Santa Fe Nursery, Inc.
2299 Bonita School Road
Santa Maria, CA 93444

Appellant

DECISION

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 against a person who violates certain California pesticide laws. 3 CCR section 6766(c) requires an employer to ensure an employee is immediately taken to a physician when there is reasonable grounds to suspect the employee has a pesticide illness.

After notice and a hearing, the Santa Barbara CAC levied a $1,400 penalty against Santa Fe Nursery for violating section 6766(c). Santa Fe Nursery appealed the CAC’s action to the Director of the Department of Pesticide Regulation (DPR). DPR has jurisdiction over the appeal under FAC section 12999.5.

Factual Background

On the morning of April 11, 2008, Santa Fe Nursery employees were transplanting lettuce across a road from a field that had been fumigated two days earlier with Telone C-35, U.S. Environmental Protection Agency reg. no. 62719-302. Telone C-35 is approximately 61 percent 1,3-dichlorpropene and 35 percent chloropicrin. The transplant crew consisted of seven Santa Fe Nursery field workers and eleven field workers supplied by Rancho Harvest, a farm labor contractor. The transplant crew experienced burning eyes, headaches, nausea, and dizziness. One worker vomited. They reported their symptoms to the field supervisor, Mr. Angulo. After some investigation, Mr. Angulo reported to the Director of Operations, Mr. Reccord. About a half an hour later, Mr. Reccord arrived onsite and directed the crew to stop work and return to the nursery. After finding a sign on the ground at the adjacent field with a skull and cross bones, Mr. Reccord returned to the nursery and told the transplant crew that they could go to the doctor if they wanted, and they would be paid for the rest of the day. Five employees elected to go to the doctor.

Appellant’s Contentions

On appeal, Santa Fe Nursery contends that section 6766(c) only applies to employees who enter fields treated with pesticides. Santa Fe Nursery also contends that, in any case, substantial evidence did not support the finding that Santa Fe Nursery failed to ensure employees were immediately taken to the physician upon reasonable grounds to suspect pesticide illness; the CAC misinterpreted “ensure” and “immediate.” Santa Fe Nursery also contends that it did nothing to create a hazard.
Standard of Review

The Director decides the appeal on the record before the Hearing Officer. The Director affirms the CAC’s decision if it is supported by substantial evidence. Substantial evidence is relevant evidence that a reasonable person could find sufficient to support a conclusion, even if a reasonable person might also have reached a different conclusion. Where the Commissioner’s decision presents a question of the law, the Director decides that issue using her independent judgment.

Findings and Analysis

Section 6766(c) is not limited to workers who enter treated fields.

As an initial matter, DPR may regulate in order to provide for safe working conditions of farmworkers who work in or about pesticide treated areas. (Food & Agr. Code, § 12980.) Applying section 6766(c) in this case falls well within that delegation. The employees are farmworkers who were working adjacent to a treated area, and the incident related to pesticides.

Section 6766(c) provides:

When there are reasonable grounds to suspect that an employee has a pesticide illness, or when an exposure to a pesticide has occurred that might reasonably be expected to lead to an employee’s illness, the employer shall ensure that the employee is taken to a physician immediately.

Santa Fe Nursery argues that “an employee” in this subsection really means “an employee in a treated field.” Thus, it argues, this subsection does not protect the transplant crew, which was working near, but not in, a treated field that day. We disagree. Section 6766(c) requires the employer to ensure that an employee is immediately taken to a physician if there are reasonable grounds to suspect that employee has a pesticide illness or has had an exposure that may lead to a pesticide illness, regardless of whether that employee was working in a treated field.

The “plain meaning” of the text of subsection (c) does not contain Santa Fe Nursery’s qualification, and the context does not require its addition. The purpose of section 6766 is to make sure that farmworkers in California who have a pesticide illness will receive prompt emergency medical care. Santa Fe Nursery’s gloss on subsection (c) undermines that purpose. It would remove the protections of subsection (c) from field workers exposed to pesticides through drift.

Santa Fe Nursery argues that canons of statutory construction “confer uniform application of words and phrases throughout a section.”1 Section 6766(a) requires that employers plan in advance for emergency medical care of “employees who enter fields that have been

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1 Santa Fe Nursey invokes *ejusdem generis*, the principle that a general term following an enumeration of particular persons or things is presumed limited to persons or things of the same kind as those specifically enumerated. For example, in a requirement to license “cats, dogs, ferrets, and other pets,” “pets” might be presumed not to include a pet fish. *Ejusdem generis* is not helpful in construing section 6766.
treated with pesticides.” There is nothing inconsistent about requiring an employer who sends its workers into treated fields to plan in advance for medical care, and also requiring any employer who has reasonable grounds to suspect workers have a pesticide illness to ensure they get immediate medical attention; nor does section 6766 use words or phrases inconsistently to achieve that end. Subsection (a) uses the phrase “employees who enter fields that have been treated,” while subsection (c) uses the term “an employee.”

Santa Fe Nursery also complains that it would be unfair to impose the same duty to ensure immediate medical care on an employer who does not know in advance that its employees will be working near treated fields, as on an employer who directs its workers into treated fields. However, section 6766 allows for the difference between those two cases. The employer has an obligation to ensure an employee is immediately taken to a physician “[w]hen there are reasonable grounds to suspect that an employee has a pesticide illness . . .” (Cal. Code Regs., tit. 3, § 6766, subd. (c) (emphasis added).) An employer who knows in advance that its employees would be entering a treated field is likely to have reasonable grounds to suspect a pesticide illness sooner than an employer who does not know its employees will be working near a pesticide application. Also, as discussed above, the employer whose workers do not enter treated fields are not required to have a plan to provide emergency care already in place. However, once each employer has reasonable grounds to suspect a worker has a pesticide illness, there is no principled reason to require one to react immediately, but not the other.

Santa Fe Nursery also claims that section 6766(c) should be read to only apply to workers in treated fields in order to be consistent with federal law. Whenever the context will allow, DPR’s worker safety regulations, of which section 6766(c) is a part, should be interpreted to be “at least as strict as, and consistent with,” the Worker Protection Standards (WPS) promulgated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). (Cal. Code Regs., tit. 3, § 6701.) Here, the phrase “consistent with” does not mean “the same as.” DPR’s worker safety regulations must provide all of the protections of the federal standards because DPR’s worker safety regulations are enforced by state and local authorities in lieu of the WPS. (Id.) Section 6701 allows DPR’s worker safety regulations to be read to provide a higher level of protection than the WPS, and additional protections not provided by the WPS, thus it uses the phrase “at least as strict as” as well as “consistent with.”

Santa Fe Nursery’s reading of section 6766(c) as limited to workers who enter treated fields runs afoul of section 6701. The WPS require an agricultural employer to make prompt transportation to an emergency medical facility available if there is reason to believe an employee has been poisoned or injured by exposure to pesticides that the employer used, specifically including exposure from “drift.” (40 CFR § 170.160(a).) Section 170.160 does not limit its application to workers who enter treated fields. Under Santa Fe Nursery’s reading of section 6766(c), if it had owned the field across the road, it still would have had no duty under DPR’s worker protection regulations to transport them to an emergency medical facility, though under section 170.160(a) it would. This gap in coverage is the type of “inconsistency” that section 6701 was meant to avoid.
The section 6766(c) requirement to "ensure the employee is taken to a physician immediately" is more stringent than the WPS's requirement to "make prompt transportation available," and it applies more broadly, such as in this case where employees were sickened by pesticides used by another company. Section 6766(c)'s protections also apply in every case where the WPS would. Thus, it is "at least as strict as, and consistent with," the WPS.

Substantial evidence supports the finding that Santa Fe Nursery violated section 6766(c).

An employer must ensure an employee is taken to a physician immediately upon reasonable grounds to suspect that an employee has a pesticide illness or has been exposed to a pesticide in a way that might reasonably lead to such illness. (Cal. Code Regs., tit. 3, § 6766, subd. (c).) The Commissioner found that Santa Fe Nursery violated this requirement at least once.

Substantial evidence supports a conclusion that Santa Fe Nursery had reasonable grounds to suspect that an employee had a pesticide illness by eight in the morning.

Mr. Ron Reccord, the Director of Nursery Operations for Santa Fe Nursery, testified that Mr. Mario Angulo called him close to eight a.m., "[m]aybe 7:30 to 8:00," to report that "some of the guys' eyes were burning." (Tr. at 69:4-5) He also testified, "and when I also arrived there, I didn't know which . . . exactly which field it was, until we found the smashed sign on the ground." (Tr. 70:12.) Mr. Reccord also testified that later at the nursery, he learned that an employee had vomited. (Tr. 85:3-4)

Mr. Ramiro Rico testified that he was working in the field that day. (Tr. 107.) They started at one end of the field and did not feel or smell anything until they finished the end of the field. He testified that he noticed his eyes were irritated and later, when other workers said their eyes were burning as well, he talked to Mr. Angulo from the other transplanting crew. Mr. Rico testified that he felt the symptoms more when he was near the treated field (Tr. 111:22-112:2) and that he told Mr. Angulo that the "odor and everything was at the other end of the field, not where they were." (Tr. 114:4-6.) He testified that the crew had stopped three quarters away from the treated field when Mr. Angulo went to look for, and found, the sign indicating that the adjacent field had been treated with a pesticide. (Tr. 112:17-18)

The Commissioner also offered excerpts of a "Pesticide Episode Investigation: Supplemental Report" (hereafter, "Report") which purported to summarize statements various Santa Fe Nursery employees had made to various County inspectors. (Exhibit 7)

According to page 19 of the Report, on April 21, 2008, Mr. Reccord told Inspector Bryant that "[f]ive workers reported symptoms of eyes burning beginning 7:30 to 8:10 a.m. and one vomiting." (Exhibit 7) On April 24, 2008, he told Inspector Masuda that he told Mr. Mario Angulo to investigate the cause of the symptoms and Mr. Angulo "told me that they found a sign that had fallen down, which said that the adjacent field had been treated. I arrived at the area between 8 and 8:30 a.m. . . ."
According to page 18 of the Report, on April 24, Mr. Rico told Inspector Donlon that the crew started at the northeast corner of the field at about 7:00 a.m. and worked south. His eyes started hurting at about 7:20 a.m. and about 30 minutes later his lips started hurting and he began to get a headache. He said that about 7:30-7:45 a.m., Mr. Zambrano, a member of the crew, asked him if his eyes were burning, and about 8:00 a.m. he asked Mr. Angulo if his eyes were burning. Mr. Reccord arrived at about 8:30 a.m., at which time Mr. Angulo pointed out the field postings at the field south of the one where they were working. Inspector Donlon testified that he took notes while interviewing Mr. Rico and that those notes “summarize these statements here.” (Tr. 18) According to Mr. Rico’s testimony, he is “in charge of the transplanting division.” (Tr. 107)

According to page 14 of the report, on April 23, Mr. Javier Zambrano told Inspectors Fenske and Bryant that he started to feel symptoms in the field mostly when he passed close to the field next to the Alamo field. At about 8:00 a.m. the crew stopped because they had burning eyes. According to page 16 of the Report, on April 24, Mr. Mario Angulo told Inspector Masuda that he had called Mr. Reccord about 7:20-7:30 a.m. to report that the crews’ eyes were burning, at about 7:40 a.m. Mr. Rico brought him a sign that had fallen over which showed a restricted entry interval, and Mr. Reccord arrived at about 8:00 a.m.

According to Page 11 of the Report, on April 21, Mr. Alejandro Macia told Inspector Araujo that when the crew started feeling sick their supervisor at the site noticed that there was a sign lying on the ground of the adjacent field. Inspector Araujo’s testimony indicates that she took notes during the interview (Tr. 24:12) and that the summary was prepared that day or the next from her notes. (Tr. 25:19-26:5)

Mr. Reccord’s and Mr. Rico’s testimony, especially in the context of the Report, are substantial evidence upon which the hearing officer could reasonably conclude that by at least 8:00 a.m. Santa Fe Nursery, as represented either by Mr. Reccord, Mr. Rico, or Mr. Angulo, had reasonable grounds to suspect that its employees were made ill by pesticides or had been exposed to a pesticide in a way that might reasonably be expected to lead to such illness. Based on Santa Fe Nursery’s own testimony and statements, the hearing officer could infer that its managers and supervisors were aware that several employees were experiencing burning eyes, it did, or should have, associated these symptoms with a nearby field, the odor in that area, and “restricted entry interval” signs that indicated the field had been treated.

In addition, the record indicates that Santa Fe Nursery was, or should have been, familiar with the symptoms and possibility of pesticide induced illness. Mr. Reccord testified that he trained Santa Fe Nursery employees using pesticide information series leaflet A9 that year about a month before the incident. (Tr. 90:10-11) The first page of leaflet A9 lists headache, upset stomach, or eye pain as symptoms of pesticide illness. (Exhibit 16) In fact, Mr. Reccord testified that he ordered the workers out of the field, “so their exposure symptoms could go away.” (Tr. 84:17-85:1.)
Substantial evidence supports a conclusion that Santa Fe Nursery did not ensure employees were taken to a physician immediately when it had reasonable grounds to suspect they had a pesticide illness.

Substantial evidence supports two independent grounds upon which the hearing officer reasonably could have concluded that Santa Fe Nursery failed to ensure the employees were taken to a physician immediately; its reaction was neither immediate nor adequate.

Santa Fe Nursery contends that it is apparent the hearing officer misinterpreted “immediately” as “instantaneously.” Santa Fe Nursery argues that it acted “very quickly” under the circumstances, and so fulfilled the section’s requirements to act “immediately.” The Merriam-Webster definition, “without interval of time: STRAIGHTAWAY,” suggests that “instantaneously” is a closer synonym for “immediately” than “very quickly.” (See Exhibit 10.) In any case, in the context of section 6766(c), “immediately” does not mean “very quickly,” “reasonably quickly,” or “within the hour.” Section 6766(c) requires that once the employer has reasonable grounds to suspect an employee is, or is going to be, sick from exposure to a pesticide, it must ensure the next thing that happens is that the employee goes to the doctor.

Mr. Reccord testified that he ordered the workers out of the field after he arrived. (Tr. 93:7-12) This would have been 20 to 25 minutes after Mr. Angulo told him that “some of the guys’ eyes were burning.” (Tr. 69:4-5.) Mr. Reccord also testified that one transplant machine was stopped at the North end of the field and the second was still working its way North. From this testimony and Mr. Rico’s testimony described above, the hearing officer could infer that once Mr. Angulo had reasonable grounds to suspect employees were suffering pesticide illness the next thing that happened was the employees waited in the field or continued to work. This inference is supported by hearsay evidence. Page 19 of the Report records that Mr. Reccord told Inspector Masuda that he “told [Mr. Angulo] to have them finish to the north end and stop work.” Mr. Rico testified that Mr. Angulo “said that they had to finish off the flat…” (Tr. 109:14.) In addition Mr. Reccord testified that the employee vehicles were at a yard about 700 feet from the field (Tr. 83:16-18 & 87:9-10) and after he arrived he ordered them to go to the nursery. (Tr. 84:14-15)

Regardless of any intervening steps or delays, substantial evidence supports the conclusion that Santa Fe Nursery did not ensure that employees it had grounds to suspect had pesticide illness were taken to a physician. First, Mr. Rico, who testified that he reported his symptoms to Mr. Angulo, testified that no one asked him to go to the nursery. (Tr.116:17-20.) Mr. Reccord testified that Mr. Rico and Mr. Juan Morales, another transplant crew supervisor, stayed behind at the yard. (Tr. 86:18-87:4.) The Report states that Mr. Rico told Inspector Donlon that “nobody told me to do anything.” (Exhibit 7, page 18.) The Report also states that Mr. Morales, told Inspector Donlon that Mr. Angulo was aware of his symptoms but “nobody told me to do anything so I drove the equipment to the equipment yard…” (Exhibit 7, page 15.) Inspector Donlon testified that he took notes when he interviewed both Mr. Rico and Mr. Morales and that those notes “summarize these statements here.” (Tr. 18)
Second, substantial evidence supports the conclusion that Santa Fe Nursery did not ensure that all the employees it had reasonable grounds to suspect had a pesticide illness were taken to a physician. Mr. Reccord testified that after deciding to send one employee to the doctor, he asked the employees “does anyone else want to go?” (Tr. 85:16-17.) Mr. Reccord testified that “I told everybody, if they didn’t feel good, to get to the doctor.” (Tr. 105:22.) He testified that because of their training every employee “knew they had the opportunity to go to a doctor.” (Tr. 67:19.) From this testimony the hearing officer could infer that Santa Fe Nursery gave its employees the option to go to the doctor, but did not ensure they went. In addition, the training to which Mr. Reccord referred instructs employees “If exposed wash hands face - go home take off clothes etc. and take shower and go to doctor.” (Exhibit A)

Under the federal WPS, if there is reason to believe an employee has a pesticide illness the employer must “make available to that person prompt transportation . . .” However, California law is stricter on this point. Under section 6766(c) the employer must do everything it reasonably can to get all the ill or potentially ill employees to the doctor immediately. (See Cal. Code Regs., tit. 3, § 6000, defn. of “Assure” or “Ensure.”) It is not enough to give employees that are, or may become, ill from pesticides the option to go to the doctor.

In that respect, this regulation may appear paternalistic, but it was designed to solve a problem of agricultural workers in California being exposed to pesticides and not receiving timely and appropriate medical care. For example, if employers are held to the standard of section 6766(c), then agricultural workers in this state should not be put in the situation of worrying about any adverse consequences of asking to go to the doctor, or giving the wrong answer when the employer asks them whether they want to go to the doctor or not. Nor should they be put in the situation of having appropriate treatment unnecessarily delayed. Santa Fe Nursery’s reading of the State’s requirements as essentially as no different than the federal WPS lacks support in the text and would undermine section 6766(c)’s remedial purpose.

The violation was classed properly

The Commissioner determined that Santa Fe Nursery had committed a “Class A” violation. When taking civil penalty action, the CAC must classify the violation before choosing the fine amount. “Class A” violations include those “which created an actual health or environmental hazard . . .” (Cal. Code Regs., tit. 3, § 6130, subd. (a)(1).) The fine range for Class A violations is $700-$5,000.

Santa Fe Nursery contends that there is not substantial evidence it created a hazard because it did not apply the Telone to which its workers were exposed, there is no evidence that the Telone was applied illegally, no measurement was taken of the air concentration, and the workers that went to the doctor were not found to have serious acute illnesses.

The issue is whether Santa Fe Nursery’s delay in getting some workers to the doctor, and failure to get other workers to the doctor at all, endangered anyone’s health. A “health hazard” is not necessarily a serious or an acute illness; it is the risk of an adverse health effect. There is substantial evidence to support the conclusion that the violation was properly classed.
Telone C-35 is a restricted use pesticide due to its toxicity and carcinogenicity. (Exhibit 13) Telone C-35 contains 61 percent 1,3-dichloropropene, a substance which causes tumors in laboratory animals. The label instructs that such risks can be reduced by exactly following the instructions, including wearing full face respirators and other protective equipment in treated fields. While there was no measurement of the air concentration in the field being transplanted, it is reasonable to conclude that where workers have burning eyes and lips, headaches, and vomiting, they are being exposed to unacceptable concentrations of the product and thus a health hazard. Moreover, burning eyes, headaches, and vomiting are themselves adverse health effects.

Exposures not allowed by the label are per se evidence of a health hazard. The Commissioner can rely on the U.S. Environmental Protection Agency and DPR's decision to register a label with certain warnings and conditions on use when classifying a violation. In this case it was reasonable for the hearing officer to conclude that Santa Fe Nursery's delay prolonged the workers' unacceptable exposure and thus created a health hazard and risked aggravating their symptoms.

**Conclusion**

For the foregoing reasons, the Commissioner's decision to levy a penalty of $1,400 against Santa Fe Nursery, Inc. for violating section 6766(c) of Title 3 of the California Code of Regulations is supported by substantial evidence.

**Disposition**

The Commissioner's decision and order is affirmed. The $1,400 fine levied by the Commissioner is due to within 14 days of the date of this decision.

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**STATE OF CALIFORNIA**

**DEPARTMENT OF PESTICIDE REGULATION**

Dated: DEC 23 2009

By: Mary-Ann Warmerdam, Director