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 Joaquin
(County File No. 030-ACP-SJ-12/13)

Administrative Docket No. 197

DIRECTOR'S DECISION

Marvin Nies
9269 E. Kettleman Lane
Lodi, California 95240

Appellant/

Procedural Background

Under section 12999.5 of the Food and Agricultural Code, county agricultural commissioners (CACs) may levy a civil penalty up to $5,000 for certain violations of California's pesticide laws and regulations. When levying a penalty, CACs must follow the guidelines established in California Code of Regulations, title 3, section 6130 (3 CCR § 6130). 3 CCR § 6130 requires CACs designate each violation as Class A, Class B, or Class C. Each class has a corresponding fine range.

After giving proper notice of the proposed action and providing a hearing on September 4, 2013 in Stockton, California, the San Joaquin County Agricultural Commissioner (Commissioner) found that Appellant, Marvin Nies, violated 3 CCR section 6614, subdivision (b)(1) (3 CCR § 6614(b)(1)). The Commissioner classified this violation as Class A and levied a $4,000 penalty. The Commissioner also found that Appellant violated 3 CCR section 6618, subdivision (a)(3) (3 CCR § 6618(a)(3)). The Commissioner classified this violation as Class B and levied a $1,000 penalty.

Appellant appeals the Commissioner's decision to the Director of the California Department of Pesticide Regulation (Director). The Director has jurisdiction over this appeal under section 12999.5 of the Food and Agricultural Code.

Standard of Review

The Director decides this appeal on the record before the Hearing Officer. In reviewing the Commissioner's decision, the Director determines whether there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. Witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test only requires there be enough relevant information and

inferences from that information to support a conclusion, even though other conclusions might have also been reached. In applying the substantial evidence test, the Director draws all reasonable inferences from the information in the record to support the Hearing Officer's 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

Appellant, Marvin Nies, is the owner/operator of several orchards in San Joaquin County, including a cherry orchard on site 4-2, known as Tonn Ranch. (County Exhibits C & J.) On November 22, 2011, Mid Valley Ag Service issued Appellant a pest control advisor recommendation to apply Bordeaux to sites 1-4, 2-4, 3-3, and 4-2. (County Exhibit E.) This recommendation was valid from December 1, 2011 through December 15, 2011. (County Exhibit E.) On December 7, 2011, Appellant submitted a pesticide use report, dated December 15, 2011, for an application of Bordeaux to site 4-2. (County Exhibit D.)

Bordeaux is a mixture of IAP Organic 440 Spray Oil (CA Reg. No. 71058-6-AA), Western Lime High Calcium Hydrated Lime (CA Reg. No. 1051042-50001-AA), and Copper Sulfate Crystals (CA Reg. No. 56576-1-ZA). (Appellant Exhibit 2; County Exhibit A; Testimony of N. Smith.) Western Lime High Calcium Hydrated Lime's product label states that it is corrosive and causes eye damage and skin irritation. (County Exhibit B-1; Testimony of N. Smith.) Copper Sulfate Crystals' product label states that it is corrosive, causes eye damage, and causes irritation to skin and mucous membranes. Copper Sulfate Crystals' product label also states that it may cause skin sensitization reactions to certain individuals. (County Exhibit B-2; Testimony of N. Smith.)

On December 14, 2011, the date of the spray incident, Mr. Lee Smith was Appellant's employee. (Stipulated Fact 1.) Mr. Carlos Salmeron, a certified private applicator (License No. 3900541), was also Appellant's employee. (Appellant Exhibit 21.) Mr. Fernando Patino and Mr. Noa Aguilara were employees of an outside labor contractor; however on December 14, 2011, they received primary direction from Appellant. (Testimony of F. Patino; Testimony of N. Aguilara.)

On the morning of the spray incident Appellant met with his employees, including Mr. Patino and Mr. Aguilara, to give their daily work assignments. (Appellant Exhibit 21; Testimony of F. Patino; Testimony of L. Smith; Testimony of N. Aguilera.) Appellant instructed Mr. Patino, Mr. Aguilara, and Mr. Smith to prune cherry trees on site 4-2. (Appellant Exhibit 21; Testimony of F. Patino.) In a written statement, Appellant asserts that he instructed Mr. Salmeron to apply Bordeaux to Baumbach Ranch, not Tonn Ranch. (Appellant Exhibit 21.)

Between 10:00 a.m. and 11:00 a.m. on December 14, 2011, Mr. Smith was pruning trees in the sixth row from the east edge of site 4-2. (Testimony of L. Smith.) Mr. Patino and Mr. Aguilara were working in the same row, approximately thirty feet north of Mr. Smith. (Testimony of F. Patino; Testimony of L. Smith.) During this time, Mr. Salmeron began applying Bordeaux to cherry trees in the southeast corner of site 4-2. (Testimony of F. Patino; Testimony of L. Smith.) Mr. Salmeron was using an orchard air-blast sprayer, which sprays approximately five to six rows at a time and moves at approximately two to three miles per hour. (Testimony of L. Smith; Testimony of N. Aguilara.) Mr. Patino and Mr. Aguilara ran to avoid being sprayed with Bordeaux. (Testimony of F. Patino; Testimony of N. Aguilara.) Mr. Smith was unable to avoid the Bordeaux spray and was contaminated with Bordeaux on his hands, arms, and shirt. (Testimony of F. Patino; Testimony of L. Smith; Testimony of N. Aguilara.) After Mr. Patino and Mr. Aguilara stopped the Bordeaux application, Mr. Patino, Mr. Aguilara, and Mr. Smith continued pruning trees on site 4-2. (Testimony of L. Smith.)

Mr. Smith, Mr. Patino, and Mr. Aguilara did not receive any verbal notice of the December 14, 2011 Bordeaux application to site 4-2. (Testimony of F. Patino; Testimony of L. Smith.) Additionally, no signs were posted to inform Mr. Smith, Mr. Patino, and Mr. Aguilara of the Bordeaux application to site 4-2. (Appellant Exhibit 2; County Exhibit A; Testimony of F. Patino.)

On December 15, 2011, the day following the spray incident, Mr. Smith suffered a headache and a rash. (Appellant Exhibit 2; County Exhibit A; Testimony of L. Smith.) Mr. Smith did not report his symptoms nor seek medical attention until December 20, 2011. (Appellant Exhibit 2; County Exhibit A; Testimony of L. Smith.) On December 20, 2011, Dr. Mobin Ghavami diagnosed Mr. Smith with dermatitis due to a chemical exposure. (Appellant Exdhibit 4; County Exhibit H.) After several subsequent appointments, on February 2, 2012, Dr. Ghavami questioned his initial diagnosis; however, Dr. Ghavami never made a different diagnosis. (Appellant Exhibit 5; County Exhibit H.)

Relevant Laws and Regulations

No pesticide application shall be made or continued when "[t]here is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process." (Cal. Code Regs., tit. 3, § 6614, subd. (b)(1).)

"The operator of the property shall assure that notice of the scheduled application is given to employees covered under section 6700 (which includes fieldworkers) and their employers working on the operator's property." (Cal. Code Regs., tit. 3, § 6618, subd. (a)(3).)

The Commissioner may "levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with section 12971), or Article 10.5 (commencing with Section 12980) of this chapter . . . or a regulation adopted pursuant to any of

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

When levying a penalty, the Commissioner must follow the guidelines provided in 3 CCR § 6130. Under 3 CCR § 6130, violations shall be designated as Class A, Class B, or Class C.

A Class A violation is one of the following:

(A) A violation that caused a health, property, or environmental hazard.

(B) A violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A.

1. The respondent has a history of violations;
2. The respondent failed to cooperate in the investigation of the incident or allow a lawful inspection; or,
3. The respondent demonstrated a disregard for specific hazards of the pesticide used;

(C) A violation of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, 11897, or 13102 of the Food and Agricultural Code.

(Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A).)

"A Class B violation is a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(2).)

The fine range for a Class A violation is $700 to $5,000. The fine range for a Class B violation is $250 to $1,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c).)

Appellant's Assertions

On appeal, Appellant contends that (1) Appellant did not violate 3 CCR § 6614(b)(1) because Appellant was not the "applicator," (2) Appellant did not violate 3 CCR § 6618(a)(3) because the Bordeaux application to site 4-2 was not a "scheduled application," and (3) any violation of 3 CCR § 6614(b)(1) should not be a Class A violation.

The Hearing Officer's Decision

The Hearing Officer found by a preponderance of the evidence that Appellant violated 3 CCR § 6614(b)(1) on December 14, 2011. Mr. Smith, Mr. Patino, and Mr. Aguilara were pruning cherry trees on site 4-2. Contemporaneously, Appellant's employee, Mr. Salmeron, began applying Bordeaux, a pesticide mixture, to the same cherry trees on site 4-2. Mr. Smith, Mr. Patino, and Mr. Aguilara were not involved in the Bordeaux application. Mr. Patino and Mr. Aguilara had to run to avoid being contaminated with the pesticide spray. Mr. Smith was unable to avoid the pesticide spray and was actually physically contaminated with Bordeaux. Accordingly, the Hearing Officer found that Bordeaux was applied to site 4-2 when there was a reasonable possibility that Mr. Smith, Mr. Patino, and Mr. Aguilara would be contaminated with Bordeaux. The Hearing Officer held Appellant liable under 3 CCR § 6614(b)(1), despite not being the actual pesticide applicator, classified Appellant's violation as Class A, and levied a $4,000 penalty.

The Hearing Officer also found that Appellant failed to notify his employees of the Bordeaux application, which is a violation of 3 CCR § 6618(a)(3). Appellant did not verbally notify Mr. Smith, Mr. Patino, or Mr. Aguilara of the December 14, 2011 Bordeaux application to site 4-2. Appellant also did not post any signs informing employees of the Bordeaux application to site 4-2. The Hearing Officer found that Appellant's Bordeaux application to site 4-2 was scheduled because the pest control advisor's recommendation expired on December 15, 2011 and Bordeaux had not previously been applied to the cherry trees on site 4-2. The Hearing Officer classified Appellant's violation of 3 CCR § 6618(a)(3) as Class B and levied a $1,000 penalty.

The San Joaquin County Agricultural Commissioner adopted the Hearing Officer's proposed decision in its entirety.

The Director's Analysis

A. Substantial evidence supports the Commissioner's decision that Appellant violated 3 CCR § 6614(b)(1) by allowing a pesticide application when there was a reasonable possibility of contaminating persons not involved in the application.

The Commissioner's decision that Appellant violated 3 CCR § 6614(b)(1) is supported by substantial evidence. 3 CCR § 6614(b)(1) prohibits pesticide applications when "[t]here is a *reasonable possibility* of contamination of the bodies or clothing of persons not involved in the application process." (emphasis added.) On December 14, 2011, Mr. Smith, Mr. Patino, and Mr. Aguilara were pruning cherry trees on site 4-2. (Testimony of F. Patino; Testimony of L. Smith.) Therefore, they were not involved in the Bordeaux application process. At the same time that Mr. Smith, Mr. Patino, and Mr. Aguilara were pruning trees on site 4-2, Mr. Salmeron began applying Bordeaux to the southeast corner of site 4-2. (Testimony of F. Patino; Testimony

of L. Smith.) Mr. Patino and Mr. Aguilara testified that they had to run to avoid being sprayed with Bordeaux. Mr. Smith did not notice the pesticide application in time to avoid the Bordeaux spray and was physically contaminated with Bordeaux on his hands, arms, and shirt. (Testimony of F. Patino; Testimony of L. Smith; Testimony of N. Aguilara.) This evidence demonstrates that there was not only a *reasonable possibility* that persons not involved with the Bordeaux application would be contaminated, but that someone not involved with the Bordeaux application was *actually* contaminated. Accordingly, the Commissioner's decision that Appellant violated 3 CCR § 6614(b)(1) is supported with substantial evidence.

On appeal, Appellant contends that he cannot be liable for violating 3 CCR § 6614(b)(1) because he was not the "applicator." Appellant argues that 3 CCR § 6614(b) must be interpreted in conjunction with 3 CCR § 6614(a) and that these sections only apply to an "applicator." The Director disagrees. Unlike 3 CCR § 6614(a), which explicitly limits its applicability to "an applicator," 3 CCR § 6614(b) does not explicitly limit its applicability to "an applicator." Therefore, the plain language of 3 CCR § 6614(b)(1) indicates that it applies broadly to all persons, including Appellant. A recent California court interpreted 3 CCR § 6614 in the same way, finding that 3 CCR § 6614 applies to property operators and employers. (*Raj Kumar Sharma v. State of California, Department of Pesticide Regulation* (Super. Ct. Sutter County, 2012, No. CVCS 11-1343).) Accordingly, the Director affirms the Commissioner's decision that Appellant violated 3 CCR § 6614(b)(1).

B. Substantial evidence supports the Commissioner's decision that Appellant violated 3 CCR § 6618(a)(3) by not assuring that his employees received notice of the pesticide application.

3 CCR § 6618(a)(3) requires the property operator give notice of a scheduled pesticide application to his employees covered under 3 CCR § 6700. Mr. Smith, Mr. Patino, and Mr. Aguilara are covered under 3 CCR § 6700. Mr. Smith, Mr. Patino, and Mr. Aguilara did not receive any verbal notice of the December 14, 2011 Bordeaux application to site 4-2. (Testimony of F. Patino; Testimony of L. Smith.) Further, no signs notifying fieldworkers of a Bordeaux application on site 4-2 were posted or visible. (Testimony of F. Patino; Testimony of L. Smith.) Accordingly, the Commissioner's decision that Appellant did not notify his employees of the Bordeaux application on site 4-2 in violation of CCR § 6618(a)(3) is supported by substantial evidence.

On appeal, Appellant asserts that the Bordeaux application was not a "scheduled application," and therefore he cannot be liable for violating 3 CCR § 6618(a)(3). In a written statement Appellant claims that the December 14, 2011 Bordeaux application was scheduled for Baumbach Ranch, not Tonn Ranch. (Appellant Exhibit 21.) Nonetheless, as stated above, under the substantial evidence test, the Director draws all reasonable inferences from information in the record to support the Commissioner's decision. In this instance, the Director finds there is substantial evidence in the record to support the Commissioner's decision that the Bordeaux

application to site 4-2 was scheduled. Appellant's pest control advisor recommendation expired on December 15, 2011 and Bordeaux was not previously applied to site 4-2 prior to December 14, 2011. This supports the Commissioner's determination that the Bordeaux application to site 4-2 was scheduled because Appellant only had one day remaining on his pest control advisor recommendation to apply Bordeaux. Further, Appellant submitted a Pesticide Use Report on December 7, 2011 indicating that Bordeaux would be applied to site 4-2. (County Exhibit D.) This evidence further supports the Commissioner's decision that Appellant intended and scheduled the December 14, 2011 Bordeaux application for site 4-2.

Moreover, regardless of whether the Bordeaux application was scheduled, Appellant is liable for violating 3 CCR § 6618(a)(3), because Appellant is responsible for Mr. Salmeron's pesticide applications. An employer is ordinarily liable for his or her employee's actions during the course of the employee's normal employment. (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 803.) Mr. Salmeron's application of Bordeaux to site 4-2 was made within the scope of his normal employment, for Appellant's benefit, and pursuant to Appellant's pest control advisor recommendation. Therefore, Appellant, as Mr. Salmeron's employer, is liable for Mr. Salmeron's Bordeaux application. Further, a California court recently found an employer's argument that his employee's misconduct caused a pesticide use violation to be an invalid argument. (*Raj Kumar Sharma v. State of California, Department of Pesticide Regulation* (Super. Ct. Sutter County, 2012, No. CVCS 11-1343).) Accordingly, the Director affirms the Commissioner's decision that Appellant violated 3 CCR § 6618(a)(3).

C. The Commissioner's decision to classify Appellant's violation of 3 CCR § 6614(b)(1) as Class A and to levy a $4,000 penalty is supported by substantial evidence.

A Class A violation is any "violation that caused a health, property, or environmental hazard." (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(1)(A).) The product labels for Western Lime High Calcium Hydrated Lime and Copper Sulfate Crystals, the pesticides used to make Bordeaux, state that the pesticides are corrosive and cause eye damage and irritation to skin and mucous membranes. (County Exhibit B.) Mr. Smith testified that he suffered a headache and a rash following his Bordeaux exposure. Mr. Smith's health symptoms are consistent with the symptoms caused by Bordeaux contamination. Furthermore, Dr. Ghavami initially determined that chemical exposure caused Appellant's rash. (Appellant Exhibit 4; County Exhibit H.) This evidence supports the Commissioner's determination that Appellant's violation of 3 CCR § 6614(b)(1) caused a health hazard.

On appeal, Appellant argues that Mr. Smith's symptoms were not actually caused by Appellant's violation of 3 CCR § 6614(b)(1) because after subsequent appointments, Dr. Ghavami questioned his initial determination that chemical exposure caused Mr. Smith's rash. Appellant also relies on a written statement made by Appellant's allergist, Dr. George Bensch, stating that Bordeaux exposure will only cause reactions on the skin exposed to the pesticide. (Appellant Exhibit 25.) However, at the hearing, Mr. Smith testified that he experienced negative health symptoms following his Bordeaux exposure. Mr. Smith's

symptoms are consistent with those listed on the product labels for Western Lime High Calcium Hydrated Lime and Copper Sulfate Crystals, the products used to make Bordeaux. Further, there is no evidence in the record indicating any other cause for Mr. Smith's symptoms. As the Director reviews the record in the light most favorable to the Commissioner's decision, the Director finds there is substantial evidence to support the Commissioner's finding that Appellant's violation of 3 CCR § 6614(b)(1) caused Mr. Smith's negative health symptoms.

In addition, Appellant argues that his compliance history, his cooperation with the investigation, and the fact that Appellant's employee, not Appellant, demonstrated a disregard for specific hazards collectively justify classifying his violation of 3 CCR § 6614(b)(1) as Class B. CACs are required to follow the guidelines set forth in 3 CCR § 6130 when classifying pesticide use violations. Contrary to Appellant's claims, Appellant's compliance history, cooperation with the investigation, and stated lack of personal disregard for specific hazards are only relevant when elevating a Class B violation to a Class A violation. 3 CCR § 6130 does not authorize CACs to classify a violation that causes a health hazard as a Class B violation. As Mr. Smith suffered negative health symptoms, Appellant's violation caused a health hazard and the Commissioner's decision to classify Appellant's violation as a Class A violation is affirmed.

The Commissioner's decision to levy a $4,000 fine for Appellant's Class A violation of 3 CCR § 6614(b)(1) is appropriate. The fine range for a Class A violation is $700 to $5,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c).) Therefore, the Director finds that the $4,000 fine is a reasonable exercise of the Commissioner's discretion

Conclusion

The Commissioner's decision that Appellant violated 3 CCR § 6614(b)(1) and that the violation is a Class A violation is affirmed. The Commissioner's decision that Appellant violated 3 CCR § 6618(a)(3) and that the violation is a Class B violation is also affirmed. The civil penalties assessed are within the Commissioner's discretion and accordingly the Director upholds the $5,000 civil penalty.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant how and when to pay the $5,000 penalty.

Judicial Review

Under section 12999.5 of the Food and Agricultural Code, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. 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: FEB 19 2014

By: Brian Leahy
Brian Leahy, Director