6/23/76

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of Cardiff Pest Control, Inc., a corporation, formerly doing business as George's Pest Control Service Respondent.	)	I.F. & R. Docket No. IX-100C

INITIAL DECISION

Preliminary Statement

This is a proceeding under Sec. 14(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136 l(a)(2)], 1973 Supp., for the assessment of a civil penalty for violation of the Act.

On June 30, 1975, the Director of the Enforcement Division, United States Environmental Protection Agency, Region IX (Complainant) issued a Complaint and Notice of Opportunity for Hearing, charging Cardiff Pest Control, Inc., a California corporation, doing business as George's Pest Control Service (Respondent) with a violation of the Act. An Amended Complaint was filed on August 6, 1975, which does not materially affect the allegations to be considered. An Answer to Amended Complaint and Request for Hearing was duly filed and dated August 12, 1975.

The Amended Complaint charged Respondent with violation of Sec. 12(a)(2)(G) [7 U.S.C. §136j(a)(2)(G)] of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. §136-136z), hereinafter referred to as the Act, by using either the pesticide DIAZINON 4E or the pesticide DIAZINON 4S on or about December 13, 1974 in violation of the provisions of the Act as specified below:

1. Used a registered pesticide in a manner inconsistent with its labeling [7 U.S.C. 136j(a)(2)(G)]. (DIAZINON 4E and DIAZINON 4S are pesticides which are registered with the Environmental Protection Agency under EPA Registration Numbers 100-463 and 100-466, respectively.)

   The labels on both the pesticide DIAZINON 4E and the pesticide DIAZINON 4S state in part:

   "Limited to Crack and Crevice Treatment Only. Apply a small amount of material in a 1/2-1% solution directly into cracks and crevices. . . Care should be taken to avoid depositing the product onto exposed surfaces or introducing the material into the air. Avoid contamination of food or food processing surfaces.

   Applications of this product in the food areas of food handling establishments other than as a crack and crevice treatment are not permitted."

When the violation here alleged ocurred, December 13, 1974, the Respondent herein was Cardiff Pest Control, Inc., a California corporation, doing business as George's Pest Control Service. G-GPCX 4A. Richard G. Sheley was the manager of said business in Butte, Glenn, and Tehama counties. Paragraph numbered 2 of a "Working Agreement" dated February 1, 1972, reads in part as follows: C-GPCX 4A.

> 2. Sheley will operate said business at all times as agent and employee of Cardiff, which assumes responsibility for maintaining books of account and payment of all obligations, subject to limitations hereinafter set forth. Sheley shall report all business accounts to Cardiff in the regular course of business and shall deposit all monies collected in the course of business in a banking institution designated by the parties.

Therefore, since Mr. Sheley was an agent and employee of Cardiff Pest Control, Inc., said corporation is the Respondent in this matter.

Complainant alleges that on or about December 13, 1974, an employee of Respondent (Mr. Alvin E. Rater) sprayed either the pesticide DIAZINON 4E or the pesticide DIAZINON 4S in the Orland Meat Market, Orland, California. Either the pesticide DIAZINON 4E or the pesticide DIAZINON 4S was sprayed along the walls and floors in food areas of the establishment at a distance of 8 to 12 inches from the floor. It was sprayed in areas where there were no cracks or crevices to which it could have been confined.

Two sawdust samples, collected on or about December 14, 1974 and December 16, 1974, which had been swept from the floors of the market were analyzed and found to contain 200 ppm and 55.4 ppm DIAZINON. respectively.

During the hearing it was disputed whether the product in question was DIAZINON 4S or DIAZINON 4E. Since both products set forth the same instructions for use in food establishments, a resolution of this fact is immaterial.

It was undisputed that Mr. Ernest L. Simpson, Agricultural Biologist 3, an employee of Glenn County Department of Agriculture, State of California, a witness for Complainant, was present at the Orland Meat Market on December 13, 1974 red-tagging a defective meat scale when the employee of Respondent, Mr. Alvin E. Rater, was actually applying the DIAZINON.

It was also undisputed that Mr. Simpson collected the two sawdust samples from the floor and trash at Orland Meat Market, submitted them to the State of California, Department of Food and Agriculture, Chemistry Laboratory Services for analysis, and received two Reports of Analysis from the laboratory, both of which indicated the presence of DIAZINON in the sawdust samples. EPAX 9 and 10 and statement of Mr. Clarence John Keeney Miller. TR p. 54-56.

The primary dispute in this matter must be resolved by analyzing the evidence and testimony on both sides with regard to the simple question of whether or not Mr. Rater was applying the DIAZINON in accordance with label instructions.

Mr. Simpson stated that while he was standing on a step ladder tagging a scale, he observed Mr. Rater for a period of 15 to 20 seconds "walking in an upright position, holding the spray wand down" TR p. 21; "and I noticed it was a fan-type spraying, that is, the spray went out in a fan-type spray, like this" (gesturing and drawing fan on blackboard. TR. p. 22, "the nozzle was about eight inches to a foot from the floor, he wasn't bent over like this (gesturing) TR. p. 23; "after he (Al Rater) had walked by. . . I noticed my eyes were burning." Mr. Simpson asked Mr. Rater what he was spraying. Mr. Rater replied that it was DIAZINON and also Mr. Simpson observed a labeled can thereof.

Mr. Rater's version of the application differs substantially from that of Mr. Simpson. Mr. Rater asserts that he was applying the DIAZINON using a wand with a pin stream tip, and bent over to a point where the tip was only about 2 or 3 inches from the floor. "And the cracks and crevices were

present where the floor meets the wall and pretty near everywhere I sprayed." TR p. 86-87. Upon demonstrating his application, it was observed by Complainant that Mr. Rater walked about twenty-five feet in less than ten seconds. TR p. 93. Complainant argues that even if Mr. Rater was using the pin stream as he claims, he did not exercise the care required for the proper direct application of DIAZINON as a crack and crevice treatment as specifically required by the product label. C-GPCX-2.

The only other question to be resolved here relates to the assessment of a civil penalty. It should be noted that neither the ALJ nor the Regional Administrator is bound by the amount of the proposed penalty in the Complaint. See 40 CFR 168.46(b) and 168.60(b)(3).

The proceedings were conducted pursuant to the applicable Rules of Practice, 40 CFR 168.01 et seq. At my request, the parties, pursuant to Sec. 168.36(e) of the Rules, corresponded with me for the purpose of accomplishing some of the purposes of a prehearing conference (see Sec. 168.36(a) of the Rules).

A prehearing conference and a hearing were held in Chico, California, on April 6, 1976. The Complainant was represented by Matthew S. Walker, Esquire and Charles Eckerman, Esquire, of the legal staff of EPA, Region IX, and the Respondent was represented by Alfred W. Driscol, III, Esquire.

The parties have filed briefs and reply briefs in support of proposed findings of facts, conclusions of law and order which I have carefully considered.

The decision I have reached in this matter was difficult to achieve. I have given due consideration to the testimony of both Mr. Simpson and Mr. Rater, which was contradictory, and to other aspects of the evidence presented at the hearing which compels me to rule in favor of complainant based upon the following findings of fact.

Findings of Fact

1. The Respondent is a corporation with its place of business located in Santa Cruz, California, with a branch division known as George's Pest Control in Chico, California. Its gross sales are approximately $500,000 annually. EPAX 4.
2. On or about December 13, 1974, the Respondent used a registered pesticide in a food establishment in a manner inconsistent with its labeling instructions.

3. The product DIAZINON was registered as required by Sec. 4 of FIFRA, 7 U.S.C. 136(b).

4. The use of a registered pesticide in a manner inconsistent with its labeling is prohibited by the Act. Sec. 12(a)(2)(G).

5. The use of the pesticide DIAZINON is restricted to crack and crevice treatment in food handling establishments. EPA 6A, 6B, 7, and 11.

6. The DIAZINON labeling defines crack and crevice treatment as follows:

> Limited to Crack and Crevice Treatment Only--Apply a small amount of material in a 1/2-1% solution directly into cracks and crevices such as expansion joints between different elements of construction or between equipment bases and the floor, wall voids or hollow equipment legs where cockroaches, ants, spiders, and silverfish hide. Apply as pin thin stream of spray. . . . (Emphasis supplied.)
>
> * * * *
>
> CARE SHOULD BE TAKEN TO AVOID DEPOSITING THE PRODUCT ONTO EXPOSED SURFACES OR INTRODUCING THE MATERIAL INTO THE AIR. AVOID CONTAMINATION OF FOOD OR FOOD PROCESSING SURFACES.
>
> APPLICATIONS OF THIS PRODUCT IN THE FOOD HANDLING ESTABLISHMENTS, OTHER THAN AS A CRACK AND CREVICE TREATMENT, ARE NOT PERMITTED.

7. A fan spray is not an appropriate method for application of the pesticide DIAZINON in food handling establishments.

8. On December 13, 1974, an employee of Respondent sprayed the pesticide DIAZINON at the Orland Meat Market, Orland, California

9. The employee of Respondent did not apply the pesticide DIAZINON directly into cracks and crevices.

10. The employee of Respondent did not exercise the care required to avoid depositing the pesticide onto exposed surfaces, to avoid introducing the material into the air, or to avoid the contamination of food or processing surfaces.

11. Respondent had previously been involved with the misuse of a pesticide which resulted in the issuance of a written warning.

12. For the above mentioned violations, the Respondent is subject to a civil penalty under Sec. 14(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(a)(2).

13. Taking into consideration the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation, it is determined that a penalty of $1,000.00 is appropriate.

Discussion and Conclusions

Even though there was conflicting testimony at the hearing relating to the method of application of the pesticide, particularly with regard to the care with which the product was "directed" into cracks and crevices and the type of tip or nozzle used, I am compelled to find that the product was used in a manner inconsistent with the labeling requirements.

There is no question in my mind that cracks and crevices did exist where Mr. Rater was applying the pesticide. Several factors, however, lead me to the above conclusion.

1. My interpretation of the statements on the label, "Apply a small amount of material in a 1/2-1% solution directly into cracks and crevices" and "Care should be taken to avoid depositing the product onto exposed surfaces or introducing the material into the air" are inconsistent with Mr. Rater's testimony as to how he applied the pesticide.
2. Even if Mr. Rater applied the pesticide using a pin stream and only two or three inches from the floor, this is not the degree of care and directness specified on the label and which was demonstrated by

Mr. Mandel, a witness for Complainant. I have considered the conditions under which Mr. Mandel conducted the demonstration, the pressure in the container, etc.

3. Mr. Simpson's testimony must be given great weight since he was a totally disinterested witness.

4. Sawdust which was swept from the floor of the Orland Meat Market three days after the application of the pesticide contained amounts of the pesticide which would indicate the pesticide was deposited onto exposed surfaces.

5. Mr. Simpson's eyes began to burn as the pesticide was being applied which would further indicate the pesticide was not being directed carefully into the cracks and crevices.

6. It would be virtually impossible to apply the pesticide with care and directly into cracks and crevices in the manner and with the speed, approximately 25 feet in less than 10 seconds, demonstrated by Mr. Rater. See depictions in EPAX 8, pages 15 and 16. Therefore, the spray was being deposited on surfaces other than cracks and crevices.

In determining the appropriateness of the penalty the statute and regulations require that the following factors be considered: size of Respondent's business; effect on Respondent's ability to continue in business; and gravity of the violation. In evaluating the gravity of the violation the regulations require that the following be considered: history of Respondent's compliance with the Act; and good faith or lack thereof.

The Respondent's gross sales in 1974 were approximately $500,000. Sec. 14(a)(2) provides that a civil penalty of not more than $1,000 may be assessed for each offense against <u>any person</u> who violates any provision of this Act (Sec. 12 (a)(2)(G)), subsequent to receiving a written warning from the Administrator.

The Respondent does not argue that its annual gross sales are not substantial or that the imposition of a penalty in the proposed amount will effect its ability to continue in business.

It has been held in other cases under Sec. 14(a) that "gravity of the violation" should be considered from two aspects--gravity of harm and gravity of misconduct.

> As to gravity of harm there should be considered the actual or potential harm or damage, including severity, that resulted or could result from the particular violation. . . .
>
> As to gravity of misconduct, matters which may be properly considered include such elements as intention and attitude of respondent; knowledge of statutory and regulatory requirements; whether there was negligence and if so the degree thereof; position and degree of responsibility of those who performed the offending acts; mitigation and aggravating circumstances; history of compliance with the Act; and good faith or lack thereof.[1/]

As to gravity of harm there should be considered the actual or potential harm or damage, including severity, that resulted or could result from the particular violation.

The potential harm which may occur from misuse of DIAZINON is evidenced by the warning statements on the label, C-GPC-2, as follows.

1/ Quoted from Initial Decision of ALJ In re Amvac Chemical Corporation, published in Notices of Judgment under FIFRA No. 1499, issue of June, 1975.

WARNING:
Keep out of reach of children. May be fatal if swallowed. May be absorbed through skin. Do not breathe spray mist. Do not get in eyes, on skin or on clothing. Wash thoroughly after handling. Avoid contamination of food and feed.

Do not reuse empty container. Destroy by perforating or crushing and burying in a safe place.

Minimum Flash Point: 105 deg. F.

Do not use or store near heat of open flame.

NOTE: The solvent used in this formulation is a petroleum distillate which may stain certain plastic, rubber, and asphalt materials such as tiles and floor coverings. Do not treat such materials. When used in dwellings, care should be taken to avoid deposits which could be frequently contacted by children. Do not allow children in treated areas until surfaces are dry. Do not contaminate food, food containers, or cooking utensils.

Thus, it is apparent that there is potential harm from the misuse of the product.

One of the purposes of registration is to prevent the marketing of pesticides that have the potential of causing harm or injury and proof of actual harm or injury is not necessary in considering gravity of harm.

As to gravity of misconduct one of the factors to be considered is whether Respondent had knowledge of the requirements of the Act. That is, the need to follow label instructions accurately. The Respondent has acknowledged that it was aware of all of these requirements.

The Respondent may not have had any intention to violate the requirements of the statute in this instance, but intent to violate is not an element of the offense in a civil penalty proceeding. Cf. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922).

As regards past history, Respondent was issued a Notice of Warning in 1974 for misuse of the pesticide Dieldrite 1.5 EC on bats when the product was not registered for that use.

While Respondent urges that no violation occurred, I find that since it knew of the requirements of the Act, its failure to carefully and directly apply the pesticide in the cracks and crevices constitutes negligence.

I have taken into account all of the factors that are required to be considered in determining the appropriateness of the penalty. I am of the view that the proposed penalty of $1,000.00 is appropriate.

The proposed Findings of Fact and Conclusions submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact, and Discussion and Conclusions herein, they are granted, otherwise they are denied, which includes Respondent's Motion For An Accelerated Decision.

Having considered the entire record and based on the Findings of Fact, and Discussion and Conclusions herein, it is proposed that the following order be issued.

FINAL ORDER

Pursuant to Sec. 14(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(2), a civil penalty of $1,000.00 is assessed against Respondent, Cardiff Pest Control, Inc., formerly doing business as George's Pest Control Service, for the violation which has been established on the basis of the amended complaint issued on August 6, 1975.

Edward B. Finch
Administrative Law Judge

June 22, 1976

Unless appeal is taken by the filing of exceptions pursuant to Sec. 168.51 of the Rules of Practice or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. (See Sec. 168.46(c).)