

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA DEPARTMENT)	
OF AGRICULTURE AND CONSUMER)	
SERVICES,)	
)	
Petitioner,)	
vs.)	CASE NO. 93-6525
)	
HULETT ENVIRONMENTAL SERVICES,)	
INC., a Florida corporation, and)	
EDWARD WEST,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Susan B. Kirkland, held a formal hearing in this case on February 21, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert G. Worley, Esquire
Richard Tritschler, Esquire
Department of Agriculture and
Consumer Services
Room 515, Mayo Building
Tallahassee, Florida 32399-0800

For Respondent: George P. Ord, Esquire
340 Royal Palm Way
Palm Beach, Florida 33480

STATEMENT OF THE ISSUES

Whether Respondents made an improper application of a termiticide to the soil of two pre-construction sites for the prevention of subterranean termites, and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Agriculture and Consumer Services (Department) filed a nine count administrative complaint against Respondents, Hulett Environmental Services, Inc. (Hulett) and Edward West (West), alleging that West, acting at the direction of his employer, Hulett, improperly applied termiticide treatments at three pre-construction sites. Respondents requested an administrative hearing and the matter was forwarded to the Division of Administrative Hearings on November 12, 1993 for formal proceedings. The hearing was scheduled for February 7, 1994. On January 11, 1994, Petitioner filed a Motion for Continuance. The motion was granted and the hearing was rescheduled for February 21, 1994. The parties filed a prehearing stipulation

wherein Petitioner withdrew Counts 7, 8, and 9 of the Administrative Complaint. The parties stipulated to certain facts which are included in the Findings of Fact. Petitioner filed an unopposed Motion to Amend Administrative Complaint. At the hearing the Motion to Amend Administrative Complaint was granted. The citation to Rule 10E-14.106(8), Florida Administrative Code in paragraphs 8, 14, and 20 of the Administrative Complaint was amended to read Rule 5E-14.106(8). The Proposed Agency Action of the Administrative Complaint was amended to seek suspension of Hulett's license in the termite category for one year; suspension of West's Identification Card for one year; administrative fines of \$5,000 for each violation against each respondent; and such other penalties as may be proper under Chapter 482.

The Department presented the testimony of Steven Rutz, Frederick Hassut, and Frank Valdes. The Department's exhibits 1-6 were admitted into evidence. Respondents presented the live testimony of Edward West, Scott Armand, and Timothy Hulett and published a portion of the deposition of Michael McDaniel. Respondents' exhibits 1 and 2 were admitted into evidence.

The parties agreed to file proposed recommended orders within ten days of the filing of the transcript. The transcript was filed on March 9, 1994. The parties timely filed proposed recommended orders. The parties' proposed findings of fact are addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Respondent, Hulett Environmental Services, Inc. (Hulett), is engaged in the business of general structural pest control, including the application of termiticide to the soil of pre-construction sites for the prevention of subterranean termites. Hulett is licensed by Petitioner, Department of Agriculture and Consumer Services (Department), under Chapter 482, Florida Statutes, as a pest control business and maintains its primary place of business at 1959 West 9 Street, Riviera Beach, Florida. Respondent Edward West (West) is employed by Hulett as a pesticide applicator technician.

2. On May 20, 1993, West performed termiticide treatments to two pre-construction sites located at Lot 4 of Block 13, Willow Bend, Coconut Creek, Florida (site one); and Lot 3 of Block 13, Willow Bend, Coconut Creek, Florida (site two) where he applied the chemical pesticide "Prevail Termiticide" to the soil for the prevention of subterranean termites. The labels of "Prevail Termiticide" provide for a specific amount and concentration of the pesticide to be applied to soil for the prevention of subterranean termites.

3. From May 17-21, 1993, the Department was conducting a surveillance investigation of pre-construction termiticide applications to determine if there were violations of Chapter 482, Florida Statutes. This investigation was known as Operation Spray Right. Frederick Hassut (Hassut), Frank Valdes (Valdes), and Michael McDaniel were Department employees working on Operation Spray Right.

4. On the morning of May 20, 1993, Hassut and Valdes went to the construction site of Willow Bend Development. They parked their van about one block from sites one and two where West was working.

5. West tamped the soil on the first site to compact the soil. After tamping the soil, he sprayed the site for five minutes and thirty-two seconds as timed by Hassut and Valdes, resulting in 29 percent of the pesticide required by the termiticide label being applied during that application.

6. West went to site two, which was adjacent to site one, and tamped the soil. After tamping, he sprayed the soil for six minutes and forty seconds, resulting in 24 percent of the pesticide required by the termiticide label being applied during that application.

7. After he sprayed site two, West returned to his truck. Using the radio in his truck, he called the Hulett office and told Timothy Mark Hulett, the president of Hulett, that he thought that inspectors were in the area but he had not completed the job. Mr. Hulett advised West that he was coming out to the site. Mr. Hulett asked his operations manager, Scott Armand, to accompany him to the site. The Hulett office is located approximately 45 minutes from the site.

8. West began to roll up his hose, when Valdes approached him and introduced himself to West. Hassut parked the van near West's truck, came to West, introduced himself, gave him his business card, and served him with a Notice of Inspection.

9. West advised both Hassut and Valdes that he had not completed spraying the two sites. Hassut and Valdes performed a calibration test to measure the flow rate of the chemicals. No tests were performed to determine the amount of the pressure used in the spraying.

10. Hassut showed West affidavit forms and filled in the blanks. West wrote on the affidavit forms, "Job not done at time of inspc," and signed the affidavits in the presence of Hassut and Valdes.

11. West would not sign the affidavits unless he could be provided copies of the affidavits; thus, Hassut and Vales left the site in search of a copying machine. When they returned West was spraying another lot nearby.

12. When Mr. Hulett and Mr. Armand reached the site, they found West spraying and Hassut standing near the Hulett truck. Mr. Hulett went to West, who told Mr. Hulett that the site was not ready. The bathroom areas were not dug out properly and some form boards were down. West told Mr. Hulett he had told the construction workers to come back and dig out the site in the bathroom areas. Mr. Hulett advised him to tell the construction company personnel again. There were construction workers who were sitting and watching at a nearby lot.

13. Mr. Hulett went to talk with Hassut, whom he had known for several years. Hassut advised Mr. Hulett that West had sprayed improperly to which Hulett responded that West had not finished the job. There was a general discussion between them concerning problems in the pest control industry, particularly since the use of Chlordane had been banned.

14. Construction workers came and worked on sites one and two.

15. Mr. Hulett requested Hassut to come look at sites one and two and to watch West finish the spraying. Hassut declined to do so, and he and Valdes left the site.

16. A notice is required to be placed on the site after a termite treatment is completed. It is Hulett's policy that the applicator post a termite sticker on the permit board at the site once the application is complete. The termite sticker indicates the company and technician who performed the treatment, the location where the treatment was performed, the chemical used and the date of treatment.

17. After Valdes and Hassut left the sites, West finished spraying sites one and two and posted a termite sticker at each site, indicating the site had been treated.

18. When Valdes and Hassut inspected the sites, West had not posted termite stickers nor had he made any attempt to post termite stickers at sites one and two. Valdes and Hassut did observe that there were Hulett termite stickers posted at other sites in the West Bend Development where Hulett had applied termiticide.

19. When Hassut and Valdes inspected sites one and two, West had not completed spraying the sites.

20. West applied the "Prevail Termiticide" to sites one and two in accordance with the label requirements.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

22. Petitioner has the burden to prove by clear and convincing evidence all the essential allegations against the Respondents. See Ferris v. Turlington, 510 So.2d 292 (Fla. 1987); Pic N' Save v. Department of Business Regulation, 601 So.2d 245 (Fla. 1st DCA 1992); Munch v. Department of Professional Regulation, 592 So.2d 1136 (Fla. 1st DCA 1992); Newberry v. Florida Department of Law Enforcement, 585 So.2d 500 (Fla. 3rd DCA 1991).

23. The court in Solomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983) stated the requirements for clear and convincing evidence as follows:

[T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

24. Section 482.051(1), Florida Statutes, provides that the Department of Agriculture and Consumer Services adopt rules which require the following:

That all pesticides or economic poisons be used only in accordance with the registered labels and labeling or as directed by the United States Environmental Protection Agency or the department.

In compliance with this requirement, Petitioner adopted Rule 5E-14.106(8), Florida Administrative Code which states:

Pesticides used for pre-construction soil treatments for prevention of subterranean termites shall be applied in the specific amounts, concentration, and treatment areas designated by the label. The pesticide, in its original formulation, shall be mixed at the pre-construction treatment site immediately prior to application. A copy of the label of the registered pesticide being used shall be carried in the vehicle from which the application is performed. The licensee shall maintain records for 3 years of each pre-construction soil treatment indicating the date of treatment, address of property treated, total square footage of structure treated, pesticide used, percent concentration of mixture applied and total volume applied.

25. Sections 482.161 (1)(e) and (f), Florida Statutes, provide:

(1) The department may issue a written warning to or fine a licensee, certified operator, limited certificate holder, identification cardholder, or special identification cardholder or may suspend, revoke, or stop the issuance or renewal of any license, certificate, limited certificate identification card, or special identification card coming within the scope of this chapter, in accordance with chapter 120, upon any one or more of the following grounds as the same may be applicable:

* * * *

(e) Knowingly making false or fraudulent claims with respect to pest control; knowingly misrepresenting the effects of materials or methods used in pest control; or knowingly failing to use material or methods suitable for the pest control undertaken.

(f) Performing pest control in a negligent manner.

26. In Count One of the Administrative Complaint, Petitioner alleged that the Respondents failed to apply pesticide to site one in the specific amounts and concentration designated by the label, violating Section 482.051(1), Florida Statutes and Rule 5E-14.106(8), Florida Administrative Code. Petitioner failed to meet its burden of proof to show that Respondents violated Section 482.051(1), Florida Statutes and Rule 5E-14.106(8), Florida Administrative Code. West applied "Prevail Termiticide" to site one in the amounts and concentration designated on the label.

27. In Count Two of the Administrative Complaint, Petitioner alleged that Respondents performed pest control on site one in a negligent manner, violating Section 482.161(1)(f), Florida Statutes. Petitioner has failed to meet its burden of proof to show that Respondents violated Section 482.161(1)(f), Florida Statutes. West applied the termiticide according to the label to sites one and had not completed the application when Hassut and Valdes inspected the site.

28. In Count Three of the Administrative Complaint, Petitioner alleged that the Respondents knowingly failed to use materials or methods on site one suitable for the control of subterranean termites, violating Section 482.161(1)(e), Florida Statutes. Petitioner failed to show that Respondents violated Section 482.161(1)(e), Florida Statutes. West used suitable materials and methods in applying the termiticide to site one.

29. In Count Four of the Administrative Complaint, Petitioner alleged that the Respondents failed to apply pesticide to site two in the specific amounts and concentration designated by the label, violating Section 482.051(1), Florida Statutes and Rule 5E-14.106(8), Florida Administrative Code. Petitioner failed to meet its burden of proof to show that Respondents violated Section 482.051(1) and Rule 5E-14.106(8). West applied "Prevail Termiticide" to site two in accordance with the label. West had not finished applying the termiticide to site two when Hassut and Valdes made their inspection.

30. In Count Five of the Administrative Complaint, Petitioner alleged that Respondents performed pest control on site two in a negligent manner, violating Section 482.161(1)(f), Florida Statutes. Petitioner failed to demonstrate that Respondents violated Section 482.161(f), Florida Statutes. West applied "Prevail Termiticide" to site two in accordance with the label and had not completed spraying site two when Hassut and Valdes made their inspection of site two.

31. In Count Six of the Administrative Complaint, Petitioner alleged that Respondents knowingly failed to use materials or methods on site two suitable for the control of subterranean termites, violating Section 482.161(1)(e), Florida Statutes. Petitioner failed to show that Respondents violated Section 482.161(e), Florida Statutes. West used suitable materials and methods in applying the termiticide to site two.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered dismissing all counts in the Administrative Complaint against Hulett Environmental Services, Inc., and Edward West.

DONE AND ENTERED this 5th day of April 1994, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Hearing Officer
Division of Administrative Hearings
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-6525

To comply with the requirements of Section 120.59(2), Florida Statutes (1993), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

1. Paragraph 1: Accepted.
2. Paragraph 2: Rejected as unnecessary detail.
3. Paragraph 3: Accepted.
4. Paragraph 4: The first three sentences are accepted in substance.
5. Paragraph 5: Rejected as subordinate to the facts actually found.
6. Paragraph 6: The first sentence is rejected as recitation of testimony. The second, third and fourth sentences are accepted in substance. The last sentence is rejected as subordinate to the facts actually found.
7. Paragraph 7: The first, second, fourth, and fifth sentences are rejected as subordinate to the facts actually found. The third sentence is rejected as constituting argument.
8. Paragraph 8: The first sentence is rejected as not supported by the greater weight of the evidence. The last sentence is rejected as constituting a conclusion of law.

All of Respondent's Proposed Findings of Fact are not numbered. The following rulings are numbered to correspond to the order in which the paragraphs appear in Respondent's Proposed Findings of Fact.

1. Paragraph 1: Accepted.
2. Paragraphs 2-6: Accepted in substance.
3. Paragraphs 7-12: Rejected as argument.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.