

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)	
CONSUMER SERVICES,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 95-1293
)	
MICHAEL A. KAELE, d/b/a)	
TERMINIX INTERNATIONAL CO., LP.,)	
)	
Respondent.)	
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RECOMMENDED ORDER

A hearing was held in this case in New Port Richey, Florida on May 25, 1995, before Arnold H. Pollock, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: James M. Nicholas, Esquire
Post Office Box 814
Melbourne, Florida 32902

STATEMENT OF THE ISSUES

The issue for consideration in this matter is whether the Department should issue a Warning Letter to the Respondent because of his application of a pesticide in a client's home on September 16, 1994.

PRELIMINARY MATTERS

By Notice of Intent to Impose Warning Letter dated December 30, 1994, John A. Mulrennan, Jr., Ph.D, Chief, Bureau of Entomology and Pest Control, on behalf of the Commissioner of Agriculture, indicated the Department's intent to issue a warning letter to the Respondent because, it is alleged, he improperly applied a registered pesticide in the personal residence of a consumer in new Port Richey, Florida, on September 16, 1994. Respondent requested a formal hearing on the allegations and this hearing ensued.

At the hearing, Petitioner presented the testimony of Crystal S. Tipton, the consumer in question, and Terry W. Bowen, an entomologist inspector for the Department. The Department introduced Petitioner's Exhibit 1. Respondent testified in his own behalf and presented the testimony of Dr. Ellen M. Thoms, an entomologist of Dow Lanco, manufacturer of the substance in issue; Dr. John

R. Mangold, an entomologist and technical specialist for Terminix; and Byron C. Lemont, a certified entomologist and consultant. Respondent introduced Respondent's Exhibit A.

A transcript of the proceedings was furnished and both counsel submitted Proposed Findings of Fact which are hereby accepted and, as appropriate, are incorporated in this Recommended Order. There is little question as to the facts of this case other than as to whether Mr. Kaeler's application of the pesticide in issue was consistent with the packaging label.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Department of Agriculture was responsible for the registration, licensing and regulation of pest control applicators in Florida.

2. In September, 1994, Crystal S. Tipton contacted the Respondent, Michael A. Kaeler, as the representative for Terminix International, and requested that he come to her home, located at 6253 Old Trail in New Port Richey, to spray for bugs and fleas. Mrs. Tipton had a contract with Terminix, dated July 19, 1994, which called for periodic applications, and this was the second visit under the plan. On September 16, 1994, Respondent came to the home in response to the call, arriving about 9:00 AM. At that time, Mrs. Tipton advised him that she had had a bad reaction from the July spraying.

3. On September 16, 1994, Mrs. Tipton was in the house alone. Respondent started treating the house shortly after he arrived. Mrs. Tipton had told him not to spray her daughter's bedroom because of the reaction the child had had from the prior treatment. Mrs. Tipton remained in the house, cleaning, while Respondent applied the substance. At no time, she asserts, did Respondent instruct her to leave the house or give her any instructions except to tell her to wear shoes when she walked on the carpet. He did not tell her to stay off the carpet until it dried. According to Mrs. Tipton, while Respondent was applying the pesticide, on occasion she was in the same room with him, and she could smell the spray. At no time did he advise her to leave the room while he sprayed. Respondent also got behind the baseboards to spray, and put pesticide on the ground outside the house. He then left.

4. According to Mrs. Tipton, the smell was worse this time than after the first spraying. Though she opened all the windows, even while Respondent was spraying, the smell remained for hours, and at 11:30 PM, the carpet was still damp, she claims. As she recalls it, the smell stayed in the house until the following day.

5. After Mrs. Tipton realized there was a problem, she contacted several experts to come out and see what could be done. Her husband contacted Mr. Bowen, the Department's local representative, and told him what had happened, but no other complaint was filed. Mrs. Tipton called Terminix the Monday after the spraying to tell them that all the people in the house were sick. They did not respond promptly, so she had the carpets cleaned and a maid service in to clean the house, but even after that the smell was still present.

6. Mrs. Tipton does not know what chemical was applied in her home by Respondent either in July or in September. She recalls only that in July Mr. Kaeler also told her to wear shoes on the damp carpet. On that occasion, the carpet was damp for three to four hours after spraying, but she does not know how much chemical was applied.

7. During the September application, Mrs. Tipton remained in the family room and the kitchen while Mr. Kaeler was applying the substance throughout the house, and even when he was applying in the kitchen, which is tiled. Though he used a broadcast spray in those areas which were carpeted, including the living room, the dining room, the family room, the master bedroom, the halls, and the entrances to the children's bedrooms, he used a pin spray in the kitchen. Whereas the broadcast spray gives a wide application, the pin spray is exact and puts the pesticide in a very limited area. She had told him not to spray in the children's rooms, and claims she asked him not to use the same spray he had used in the earlier visit.

8. Mrs. Tipton claims Mr. Kaeler did not tell her he had used the same spray but in a diluted strength or in a lesser volume. She claims he said he would not use the same spray and would not spray the daughter's bedroom. It would appear he did not spray the children's rooms, but there is no indication he used a different spray in September than in July. Mrs. Tipton claims the carpet remained damp far longer than it did during the July spraying and she thought this was unusual.

9. When Mr. Bowen, the Department's entomologist inspector, was contacted by Mr. Tipton, he gave Mr. Tipton some advice on how to deal with the problem. The children's doctor also called Bowen about what Bowen had told Mr. Tipton. When Mr. Tipton finally suggested that the pesticide had been applied improperly, Bowen opened his investigation. He took Mrs. Tipton's statement and got the doctor's comments. He also took a statement from Mr. Kaeler and his records for the July and September applications, as well as copies of the labels from the containers of the pesticide applied.

10. The Department requires that all products be used consistent with the labeling instructions and the standards of the Department and the Environmental Protection Agency, (EPA). From his investigation, Mr. Bowen determined that the Respondent used Dursban L.O. Mr. Bowen is familiar with that product and determined that the Respondent applied the product at a concentrated rate in a broadcast pattern over the carpets. This was appropriate, but if it were done while people other than the applicator were in the structure, he contend this was specifically prohibited by the label. In his opinion, Mr. Kaeler's actions constitute a violation of the statute and the Department's rule.

11. None of the information received by Mr. Bowen from the family doctor or the Health Department related to the propriety of Respondent's application of the product. These contacts related only to the health of the children. The only reference to possibly improper application is found in Mrs. Tipton's undated statement.

12. The label on the Dursban L.O. product indicates, "Other than the applicator, treated areas should be vacated during application. Do not permit humans or pets to contact treated surfaces until the spray has dried." Mr. Bowen did not contact the manufacturer to see what "areas" being treated meant. He feels that the interpretation is up to his agency, and he agrees with the agency determination that the entire residence must be vacated. No direct evidence was presented to show the agency determination, however, and it appears the determination of propriety of application was left up to Mr. Bowen.

13. A broadcast spray is used for large areas. A pin stream is used for cracks and crevices. A pin stream application does not, in Mr. Bowen's opinion, require vacation of the structure. The broadcast spray for flea control does,

however, as he sees it. If the manufacturer were to hold that application did not require evacuation of the entire structure, but only the room being treated, then in that case, Mr. Bowen would conclude that the application by Mr. Kaeler was appropriate. As he recalls, Mr. Kaeler used one half gallon of 1/4 percent solution for an 1800 square foot application. This was a fairly light treatment. Mr. Bowen has, himself, applied Dursban L.O. at this rate.

14. Mr. Kaeler has been employed by Terminix since November, 1993 as a service technician. He underwent 30 days of a training program in identification of insects and application techniques and requirements of pesticides, including Dursban, with the company. He is not licensed. Terminix holds the license under which he operates.

15. Mr. Kaeler admits that when he treated the Tipton house on September 16, 1994, Mrs. Tipton complained of her daughter's head aches resulting from the prior application and asked him not to spray the child's bedroom, but she did not object to the use of this pesticide. He broadcast sprayed all the carpeted area up to the entry to the girls' bedrooms. In all the girls' rooms there were clothes, books and toys on the floor so he did not spray inside. In the kitchen, which, he claims, was the only location where Mrs. Tipton was present while he sprayed, he used the pin stream technique.

16. The entire spraying took about 30 minutes. Mr. Kaeler also sprayed the windows and doors from the outside and the garage, using the pin stream spray in all those locations. The one half gallon of solution was used to do all the spraying at the Tipton's house that day, both inside and out.

17. Mr. Kaeler believes that the solution he sprayed on the carpeted areas on September 16, 1994 should have dried in no more than an hour. He confirms that Mrs. Tipton opened the windows and turned on the fans while he was still spraying. He had told her to do this the first time. As Mr. Kaeler understands it, Terminix's policy is that occupants of property being broadcast sprayed for insects should stay off the carpet being sprayed but need not vacate the structure.

18. Dr. Ellen Thoms, an entomologist working for the manufacturer of the chemical in issue, indicates that the label instructions on containers of Dursban L.O. were intended by the company to mean that the term "area" where the chemical is being applied by broadcast spray includes not the entire structure but the immediate area of the application because of the possibility of spraying the chemical on someone. The danger is in contact with the substance through the skin or through oral ingestion, not in the odor or the fumes. In Dr. Thoms' opinion, Mr. Kaeler's application was consistent with the terms of the label, which uses the term "should" rather than the term "must".

19. The drying time for carpet sprayed with Dursban L.O. by broadcast spray is effected by the thickness of the carpet and the relative humidity in the sprayed area. Since a greater amount of applied substance dried more quickly in the high humidity of July, in Dr. Thoms' opinion it is unlikely a smaller amount applied in September would take more than 14 hours to dry. She does not know what the climate factors were that day, however.

20. Dr. Mangold, a technical specialist for Terminix, and an entomologist certified in all four categories of pest control, reviewed all the material evidence in this case and heard the testimony given at hearing. He has concluded that what Mr. Kaeler did was conservatively to apply a very diluted spray, usually applied at a rate of one gallon per 1,600 square feet. His one

half gallon application for an 1,800 square foot house, plus outside, is an appropriate maintenance application.

21. In Dr. Mangold's opinion, Mr. Kaeler's application in September, 1994 was consistent with the label requirements in amount, concentration and percent, and with the requirement that all other persons be out of the area being treated. He does not believe, in light of what was shown, it could have taken in excess of fourteen hours for this application to dry. In his opinion, drying should have taken between twenty minutes and an hour, and he can see no possible explanation for it having taken as long as Mrs. Tipton claims.

22. Dr. Mangold defines the term "area treated" as being the immediate area being treated - an eighteen inch swath and some adjacent area, to-wit: the area being contacted by the spray.

23. Mr. Lemont, a fully certified entomologist-consultant reviewed the file on this case and heard the testimony given at hearing. In his opinion, the term, "area treated" includes the contact area, not the entire structure. He believes Mr. Kaeler performed consistently with the label instructions and there was no violation. The words, "should" and "may", are interpreted in the trade as permissive and non-enforceable. Stronger words, such as "shall" and "must", are directive and enforceable.

24. Mr. Lemont agrees that the application by Mr. Kaeler was a light application. Drying depends on humidity, but often an application dries before the operator leaves. He cannot believe this application would have taken more than two to three hours, even under the most adverse atmospheric conditions. Certainly, it would not have taken more than fourteen hours.

25. In Lemont's opinion, the issue of how close an applicator can come to others while applying Dursban L.O. by broadcast spray is a judgement call. The issue is contact. Mrs. Tipton was not positive on the issue of Mr. Kaeler's being in the room with her, other than the kitchen, while applying the substance.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

27. The Department seeks to issue the Warning Letter based upon the allegation that Mr. Kaeler applied a pesticide, Dursban L.O., in a manner inconsistent with the label directions provided by the manufacturer of the product, and that this action constitutes a violation of section 482.051(1), Florida Statutes, and Rule 5E-14.106(1), F.A.C.

28. The cited statutory provision states:

The department shall adopt rules to carry out the intent and purpose of this Chapter. Prior to proposing the adoption of a rule, the department shall counsel with members of the pest control industry concerning the proposed rule. The department shall adopt rules for the protection of the health, safety, and welfare of pest control employees

and the general public, in conformity with this chapter and chapter 120, which require:

(1) 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.

29. Rule 5E-14.106(1), F.A.C., promulgated consistent with the above authority, provides:

Only the pesticides having federal or state registration clearance shall be used. It shall be unlawful to use any registered pesticide in a manner inconsistent with its label and labeling, except as provided by the United States Environmental Protection Agency, the United States Department of Agriculture, or the Department.

30. In laymen's language, the above cited authority says that, ordinarily, pesticides will be used consistent with the instructions on the label provided by the manufacturer. The Department, therefore, has the burden to prove, by a preponderance of the evidence, that Mr. Kaeler's application of Dursban L.O. in the Tipton house on September 16, 1994, was not in accordance with the instructions provided by Dow Lanco on the label of the container in which it was packaged.

31. An examination of the label clearly indicates that applicators are instructed that "... treated areas should be vacated during application," and "Do not permit humans or pets to contact treated surfaces until the spray has dried." The Department's expert, Mr. Bowen, has construed those instructions as meaning that the entire structure being treated should be vacated, and Mr. Kaeler's failure to get Ms. Tipton out of the house during the application supports the intended warning letter. Ordinarily, an agency's interpretation of its rules and operable statutes is entitled to great deference and should not be overruled as long as the interpretation is consistent with legislative intent and supported by competent evidence. *Citizens of State of Florida v. Wilson*, 568 So.2d 1267 (Fla. 1990); *Mariner v. Canal Authority of State*, 467 So.2d 989 (Fla. 1985).

32. On the other hand, the manufacturer's scientist, that of Terminix, and the entomologist-consultant presented by Terminix all agree that only the immediate area being treated should be vacated during application. It is clear that the danger of the substance is in contact with the body and not through inhalation of fumes or odor. Mrs. Tipton at one point said that Mr. Kaeler applied the substance while she was in the room with him, but at other times, she merely indicated she was in the house as he applied it. Consequently, it cannot be concluded that Mr. Kaeler actually applied the substance while in the same room with Ms. Tipton, but even if he did, there is some evidence from the testimony of the scientists testifying for the Respondent, that this is not proscribed. The important thing is that individuals not be exposed to contamination from touching or being sprayed with the substance and it was not shown that this happened. Further, the instructions on the label are more advisory, (should), rather than directory, (must).

33. Assuming that Mr. Bowen had that authority to interpret the Department's rule, his determination is not an interpretation of the rule but of

the label. In addition, the Department offered no evidence to support Mr. Bowen's position and the Respondent presented substantial evidence to contradict it. Taken together, the evidence does not show an actionable infraction by Mr. Kaeler.

RECOMMENDATION

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

RECOMMENDED THAT a Warning Letter not be issued to either Michael A. Kaeler or Terminix International Co., LP., as a result of Mr. Kaeler's application of Dursban L.O. at the Tipton residence in New Port Richey, Florida on September 16, 1994.

RECOMMENDED this 24th day of July, 1995, in Tallahassee, Florida.

ARNOLD H. POLLOCK, Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 1995.

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 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency which will issue the Final Order in this case concerning its rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency which will issue the Final Order in this case.