

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND	)	
CONSUMER SERVICES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 97-0043
	)	
HUGH H. WARNOCK and TERMINIX	)	
INTERNATIONAL COMPANY, L.P.,	)	
	)	
Respondent.	)	
_____	)	

**RECOMMENDED ORDER**

A hearing was held in this case in Tampa, Florida on April 25, 1997, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

**APPEARANCES**

For Petitioner: Linton B. Eason, Esquire  
Department of Agriculture and  
Consumer Services  
Room 515 Mayo Building  
Tallahassee, Florida 32399-0800

For Respondent: James M. Nicholas, Esquire  
1815 South Patrick Drive  
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**STATEMENT OF THE ISSUE**

The issue for consideration in this case is whether Respondents, Hugh H. Warnock and Terminix International Company, L.P. (Terminix), should be administratively disciplined by the

Department Of Agriculture and Consumer Services, (Department), because of the matters alleged in the Notice to Impose Fine dated September 10, 1996.

#### **PRELIMINARY MATTERS**

By letter dated September 10, 1996, Phillip R. Helseth, Jr., acting chief of the Department's Bureau of Entomology and Pest Control, advised Mr. Warnock and Terminix that as a result of an investigation into a written consumer complaint filed with it, the Department intended to impose a fine of \$500.00 on the Respondents because, it alleged, on January 22, 1996, Mr. Warnock failed to report visible and accessible damage and evidence caused by subterranean termites at a property he inspected. Thereafter, counsel for Respondents requested a formal hearing on the allegations and this hearing ensued.

At the hearing, Petitioner presented the testimony of Hugh H. Warnock, Respondent and Todd P. Caudill, a pest control environmental specialist with the Department. It also introduced Petitioner's Exhibits One through Six. Respondent testified in his own behalf and presented the testimony of Curt Chandler, branch manager of Terminix' New Port Richey office, and Dr. John R. Mangold, an entomologist and technical specialist with Terminix. Respondent also introduced Respondent's Exhibits A through C.

A transcript of the proceedings was provided and subsequent to the receipt thereof, counsel for both parties submitted Proposed Findings of Fact which were carefully considered in the preparation of this Recommended Order.

### **FINDINGS OF FACT**

1. At all times pertinent to the issues herein, the Department of Agriculture and Consumer Services was the state agency responsible for the licensing of pest control companies and applicators in Florida. Respondent, Terminix, was licensed as a pest control company and Respondent, Warnock, was licensed as a pest control applicator in Florida, and was employed by Terminix International Company, L.P.

2. On January 22, 1996, Mr. Warnock conducted a termite inspection at property owned by Gordon C. Williamson located at 704 Court Street in Clearwater, at Mr. Williamson's request. The property was a single story commercial building.

3. Upon completion of his inspection, Mr. Warnock prepared and issued to the owner a wood-destroying organisms inspection report on which he certified he had inspected the premises, except for the attic which was inaccessible. Mr. Warnock noted that he found no visible evidence of wood destroying organisms, no evidence of visible damage and no visible evidence of previous treatment. He noted, however, that in January 1988, the premises previously had been treated for dry wood termites. As a matter of record, the January 1988 inspection and treatment was

conducted by ARAB Pest control which, since that time, had been taken over by Terminix.

4. Mr. Warnock qualified his inspection report by the comment, "This report is based on what was visible to me at the time of inspection." The purpose of a wood destroying organism report is to note existing or present activity of wood destroying organisms, or damage done as a result of that activity. Most frequently, the inspection is done for buyers of property or those who are lenders to those who buy, though quite often owners of property have it done as a part of or in preparation for a treatment program to protect against the organisms.

5. On the visit in issue, Mr. Warnock did the inspection by himself. Having seen vents in the lower portion of the outer wall on his way up to the property, he thought there might be an air space, not necessarily a crawl space, under the floor. After speaking with the owner, and telling him what was intended, Warnock started his inspection at the north end of the building where he found sheet rock against the walls and a dropped ceiling. This particular area was one where old furniture was stored.

6. Mr. Warnock went from area to area in the building, and was able to do his inspection better in some places than in others because of the clutter inside. He also inspected around the outside of the building, after which he went to ask Mr. Williamson how he could get to the space beneath the floor in the

center of the building. In response, according to Respondent, Mr. Williamson said he didn't know of any access to that area and suggested Warnock ask someone else. With that, Warnock inquired of the other individual working in the building, who, Warnock asserts, also said he didn't know of an access. Though Warnock claims he looked as best he could throughout those portions of the building accessible to him, because of sawdust and lumber on the floor, and the wood working machinery there, he could not see any access ports. It was subsequently determined that there are three crawl spaces located under the north part of the building which are separated by concrete footings. These spaces are accessible through access ports in the floor above them.

7. Mr. Warnock definitively states that had he known of any access ports to the crawl space, he would have gone down into it to look for damage or organisms. It is so found. Mr. Warnock takes exception to the photographs introduced by the Department, taken by Mr. Caudill several months after his initial visit, contending they do not accurately reflect the conditions he encountered during his January 1996 visit. The major difference is that at that time, sawdust and machinery covered the floor access panels that appear unencumbered in the pictures, and they were not visible to him when he looked. Admittedly, he did not ask that any of the equipment or wood be moved or that the sawdust be swept away.

8. Subsequent to Warnock's inspection, Mr. Williamson

called the Terminix office and advised he had discovered damage at the north end of the building. This damage was found by Warnock on a return visit to be behind the drywall previously mentioned, and was determined to have been caused by drywall as

opposed to subterranean termites. The treatment done under the contract with ARAB in 1988 was for drywall termites, and there was no contract to treat for subterranean termites.

9. On the second visit Warnock again asked Mr. Williamson about any access ports, and, according to Respondent, Williamson again denied knowing of any. A second inquiry of the other gentleman on the premises met with the same response again, but on this occasion, when he looked down at the floor, Warnock saw an access hole in the floor, and when asked directly about it, the man admitted he had cut it into the floor about two years previously. Warnock claims that when he asked if there were other holes, the man said there were not, but this individual did not appear or present testimony at hearing. The hole was no more than a series of cuts across the floor boards between the floor joists which, since there was no handle, were removed one at a time by being pried up.

10. When Respondent and his assistant manager, who was present with him on this visit, got down into the crawl space, they found no evidence of infestation. At that time, the other access holes subsequently found to exist were not known to be there. Respondent steadfastly contends that none of the access holes were visible to him or pointed out to him on inquiry of the occupants at the time of his January 1996 visit. As such, he claims, they were not accessible to him at that time.

11. It was only after the second visit by Mr. Warnock that

on June 4, 1996, Williamson submitted his complaint to the Department. In response, on June 7, 1996, Todd Caudill, a pest control environmentalist with the Department, went to the site and re-inspected it. During his inspection, done some six months after Warnock's initial visit, Mr. Caudill found termite tubes and other evidence of infestation in the crawl space under the building when he went into it. He took photographs of what he saw. Mr. Caudill is 5'11' tall and weighs about 260 pounds. Notwithstanding, he had no trouble getting down into the crawl space through the existing access holes.

12. Mr. Caudill could easily see the termite tubes, and in his opinion, they were there before Warnock's January 1996 inspection of the property. He bases this opinion on the dryness of the tubes, the lack of active termites there, and the extent of the damage existing. He could look up into the rafter area because the ceiling had been removed due to renovation, but could see no termite activity there.

13. Mr. Caudill returned to the property for a second visit on June 25, 1996, at which time he took additional photographs. This second series of pictures included the second crawl space, on the East side of the building, and several additional access holes in the floor of the building. Mr. Caudill indicates that when he asked about additional access holes, he was directed to a portion of the building where, when he went there, he was able easily to find the portals without having them pointed out to



him. He could not see where any of the access portals had been covered by machinery nor did it appear to him that any of the machinery recently had been moved. The machinery was not so big that it would cause a major obstruction.

14. It was on this second that Mr. Caudill procured an affidavit from Mr. Williamson which indicates that when Mr. Warnock was there for his inspection, the access ports were not obstructed and had not been obstructed for the six years the tenant has occupied the space. Mr. Williamson was not present at the hearing to testify in person nor was his absence explained by counsel for the Department. No explanation was given by the Department as to why Williamson could not be present or his testimony preserved by deposition. Therefore, it is found that Mr. Williamson's affidavit is inadmissible as hearsay evidence and is not considered.

15. In Mr. Caudill's opinion, Warnock's report of his inspection of the Williamson property in January 1996 is not a complete report since it did not cover the area of the crawl space. Based on his investigation of the situation, Mr. Caudill recommended a fine of \$500.00, after which, on September 10, 1996, the Department issued its Notice of Intent on which the alleged violations found are listed.

16. At the time Mr. Caudill did his investigation of Mr. Warnock's inspection, he had been employed by the Department less than a year. He is not licensed as a pest control operator, but

had been trained in the classroom and in on the job training with other operators, and had done three inspections on his own.

17. According to Mr. Chandler, the Terminix branch manager who went with Mr. Warnock to the Williamson property in May 1996 as a result of Mr. Williamson's call, termite damage was discovered in the walls of the building when the covering was removed for repairs and renovation. Williamson seemed to feel that this area had been missed by Respondent when he was there in January. In response, Mr. Chandler supported Respondent, indicating the damage, as it existed and where it was, could not have been found by Respondent's inspection. He offered to put in place a new treatment plan.

18. Whether Mr. Chandler also spoke with Mr. Williamson about access holes is questionable. On one hand, Chandler said he did speak with him about them, yet at another point in his testimony, he could not recall asking Williamson about access ports. When the ports were discovered and opened, and Chandler went down into the crawl space, he found no evidence of infestation in that crawl space. The only evidence of termite damage observed by Chandler did not extend up from the crawl space, but existed in a beam which rested on a concrete slab in the area opened for renovation.

19. Dr. John Mangold has worked in the pest control industry for seventeen years and is familiar with the laws and rules relating to wood destroying organism reports. To his

understanding, equipment on the floor of a building renders the area underneath it inaccessible, and an inspector cannot deface an area in order to do an inspection.

20. The inspection report done in 1988 reflects that a crawl space was not inspected at that time because it was N/A. Counsel agree this means "not accessible." The second report, done by Mr. Warnock, is consistent with the former in that it also reflects the crawl space was not inspected because it was inaccessible. Since the vents on the side of the exterior wall, near the ground give rise to a presumption there is a crawl space there, if the inspector cannot find access ports, he should note that fact in the report and indicate why he could not get to it. Though Respondent did not do this, it does not invalidate a finding that at the time of his inspection, the crawl space was not reasonably accessible to him.

#### **CONCLUSIONS OF LAW**

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

22. Chapter 482, Florida Statutes, grants authority to the Department of Agriculture and Consumer Services to administer and enforce the provisions of the Structural Pest Control Act, (Chapter 482, Florida Statutes), to adopt rules to carry out the intent and purpose of the Act and to impose an administrative fine not to exceed \$5,000 for any violation of the Act.

23. The burden of proof rests with the Department to establish its allegations of violation by substantial competent evidence. Martuccio vs. Department of Professional Regulation, 622 Sp.2d 607 (Fla. 1DCA 1993); Young vs. Department of Community Affairs, 625 So.2d 831 (Fla. 1993).

24. Section 482.226, Florida Statutes, provides that whenever a wood-destroying organism inspection is made by a licensee for purposes of a real estate transaction, and either a fee is charged for the inspection or a written report is

requested, such report and inspection will be made in accordance with good industry standards and practice, as established by rule.

25. Rule 5E-14.142(2)(1), Florida Administrative Code, dealing with the completion of wood destroying organism inspection reports, provides:

The inspection will include all areas accessible by normal means, but does not cover those areas that are enclosed or inaccessible, areas concealed by wall coverings, floor coverings, furniture, equipment, stored articles, insulation, or any portion of the structure in which inspection would necessitate moving or defacing any portion of the structure.

26. No evidence was introduced in this case to indicate the purpose for which the wood destroying organism inspection was made. However, for the purpose of discussion, it will be concluded here that a fee was charged and a request for written report was submitted. Therefore, Respondent was, consistent with the terms of the Department's rule, as cited, required to inspect all areas accessible by normal means.

27. The evidence of record indicates that there were crawl spaces under the north portion of the building, and that these crawl spaces were accessible through access ports in the floor. It is unquestioned that the ports were not marked as such, nor were there handles set into them for the purpose of removal which might have given some indication of their existence. Instead, the evidence shows that they were an afterthought of

construction, and consisted not of a single piece, but merely

individual floor boards cut within the parameters of the floor joists which, when removed singly from between two joists, allowed access to the crawl space.

28. In addition, the evidence reflects that while machinery might not have been placed over the ports, concealing them, clearly wood stock and sawdust did fall freely to the floor and, as Respondent contends, may well have concealed or obscured their location. Therefore, when Respondent inquired as to the location of any access ports, if, as he claims, he was told neither occupant had knowledge of any, he could logically assume the holes on the side of the building were air ports, and there was no accessibility to that area from inside the building.

29. This leaves for determination whether Respondent was advised the ports existed or whether he was not. No admissible direct evidence on this point was presented by the Department. The comments allegedly made to Mr. Caudill by the tenant, constitute hearsay evidence which, by itself, cannot form the basis for a finding of fact. The affidavit of Mr. Williamson is in the same category, and hearsay evidence cannot support other hearsay evidence. Mr. Warnock categorically denies he was told of any access port and contends he could not find any on his own. In this mode, the evidence that the crawl space was accessible to Mr. Warnock and that he knew of or should have known of its existence is not substantial and is insufficient. The evidence of record does not support a conclusion that Respondent is guilty

of any misconduct.



**RECOMMENDATION**

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Agriculture and Consumer Services enter a final order dismissing its Notice of Intent to Impose Fine.

**DONE and ENTERED** this 23rd day of May, 1997, in Tallahassee, Florida.

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**ARNOLD H. POLLOCK**

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Filed with the Clerk of the  
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**COPIES FURNISHED:**

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**NOTICE OF RIGHT TO SUBMIT EXCEPTIONS**

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.