

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 02-0415
)
STEPHEN W. DANIELS, EARL G.)
PETTIJOHN, AND ENVIRONMENTAL)
SECURITY OF PANAMA CITY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Panama City, Florida, on August 23, 2002.

APPEARANCES

For Petitioner: Jack W. Crooks, Esquire
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STATEMENT OF THE ISSUES

The issue to be resolved in this proceeding concerns whether the above-named Respondents applied pesticide chemicals to a pre-construction application site for pre-treatment for termites and wood-destroying organisms, which was contrary to label instructions, by not applying the specific amount (volume) and concentration designated by the label in alleged violation of Section 482.051(5), Florida Statutes, and Rule 5E-14.106(6), Florida Administrative Code.

PRELIMINARY STATEMENT

This cause arose subsequent to a field investigation by the Department's (Petitioner) field inspector, George Owens. He conducted an investigation on October 16, 2001, to determine whether the Respondents, Stephen W. Daniels and Earl G. Pettijohn, were applying pesticides improperly in a pre-construction, soil, subterranean, termite treatment at 1360 Brickyard Road, Chipley, Florida (job site). As a result of the investigation, an Administrative Complaint was filed and served, charging the Respondents with failure to apply a termiticide in an amount and concentration specified by the product label, an alleged violation of Section 482.051(5), Florida Statutes, and Rule 5E-14.106(6), Florida Statutes.

The Administrative Complaint was addressed to Mr. Daniels, certified operator-in-charge (COIC) and applicator;

Mr. Pettijohn, applicator; and Environmental Security of Panama City. No charges were actually alleged against Environmental Security of Panama City, Inc., however. On January 18, 2002, the Respondents, through counsel, requested a formal hearing.

The cause came on for hearing, as noticed, on August 23, 2002. The Petitioner presented the testimony of its field investigator or inspector, George Owens, and introduced five exhibits into evidence. The Respondents presented the testimony of Stephen W. Daniels and Cliff Killingsworth.

Upon conclusion of the hearing, a transcript thereof was ordered and the parties submitted Proposed Recommended Orders, which have been considered in the rendition of this Recommended Order. Subsequent to the hearing, a Motion to Conform the Charges of the Administrative Complaint to the Evidence was filed. It was opposed on due process grounds related to notice and the opportunity to defend a new charge.

FINDINGS OF FACT

1. The Respondents are certified operators and applicators employed by pest control companies in the Panama City area. Stephen W. Daniels holds License No. 43026. Earl G. Pettijohn holds License No. 92006. Mr. Pettijohn is an applicator at Killingsworth Environmental, Inc., and Mr. Daniels is a certified operator for Environmental Security of Panama City. The Petitioner is an agency of the State of Florida charged with

regulating the licensure, operations, and practices of pest control operators, applicators, and licensed pest control businesses in the State of Florida.

2. The pre-construction termite treatment in question occurred on October 16, 2001. The treatment or job site was at the new construction of the Northwest Florida Community Hospital at 1360 Brickyard Road, in Chipley, Florida. Two trucks were used on the October 16, 2001, job: one was a truck marked "Killingsworth Environmental," driven by Mr. Pettijohn; the other truck was marked "Atlas" and was driven by Mr. Daniels. The chemical used in the pre-treatment for termites at the job site was a soil pesticide known as "Cyren-TC." The label for Cyren-TC indicates a requirement of 0.50 percent to 1.0 percent concentration, with an aqueous emulsion used for pre-treatment for termites.

3. The laboratory report and analysis of the pesticide sample taken from Mr. Daniels' truck tank, at the hose end, was found to contain 0.38 percent chlorpyrifos (active ingredient), which represents a 24 percent deficiency from the minimal required rate of 0.50 percent per the Cyren-TC label.

4. The Respondents, Mr. Daniels and Mr. Pettijohn, were called by the contractor of the job in Chipley on the evening of October 15, 2001, with his request that they perform a pre-treatment termite treatment the next morning for a

monolithic slab described as being of an area of 12,000 square feet. The Respondents, therefore, filled their trucks, mixing the pesticide, based upon that measurement on the evening of October 15, 2001. They arrived at the job site the following morning at 7:15 a.m. They did not use the two trucks to treat any other sites between the filling of the trucks and their arrival on the job site in question on the morning of October 16, 2001. Upon inspecting the job site, Mr. Daniels measured the slab and determined the actual square footage to be approximately 9,300 square feet. That figure is not disputed.

5. The truck Mr. Daniels was driving had a tank and spray capacity of 700 gallons. The 700 gallons was represented by a 500-gallon tank and by an additional 200-gallon tank. The truck was completely filled when it arrived on the job site. The truck Mr. Pettijohn was driving contained a capacity of 600 gallons in two tanks of 300 gallons each. It was completely full when it arrived at the job site. Mr. Owens, the Department's field inspector who testified in support of the Administrative Complaint, did not inspect either truck to determine or estimate their total capacities. He was not aware of how much either truck employed on the job in question actually held in total volume. He also did not observe how much chemical was left over still in the tanks in each truck when the

first treatment application effort had concluded, on or shortly before 9:00 a.m., on October 16, 2001.

6. The Respondents applied an aqueous emulsion of Cyren-TC to the 9,300 square foot monolithic slab by spraying a volume from each truck. Mr. Daniels' truck pumped five to seven gallons per minute, and Mr. Pettijohn's truck pumped seven to nine gallons per minute. Both trucks were fitted with gravity-fed pumps. The pumps on each truck would pump a higher volume, closer to seven gallons per minute or nine gallons per minute respectively, as to Mr. Daniels' and Mr. Pettijohn's trucks when the tanks were more nearly full because of the higher pressure feeding the gravity-fed pump. The volume per minute pumping rate would gradually decrease as the level in the tank became lower.

7. Both Mr. Daniels and Mr. Pettijohn started pumping at essentially the same time or within one minute of each other. Mr. Daniels testified that he and Mr. Pettijohn applied the pesticide for 73 minutes measured by the digital clock on his radio. Mr. Daniels determined the amount of time necessary to pump the pesticide on the site from both trucks by taking an average of the output volume of the pumps on each truck. He began timing the application when he pulled the hose to the far end of the slab and turned it on.

8. When the treatment application was complete, Mr. Daniels had approximately 50 gallons of chemical remaining in the 500-gallon tank on his truck. He had not yet used any of the 200-gallon tank on his truck. Mr. Pettijohn had approximately 55 to 60 gallons of chemical left from the two tanks totaling 600 gallons on his truck when he started the application. The testimony as to the amount of chemicals left in the tanks after this first application is unrefuted and is accepted.

9. Mr. Daniels established that, although when the tanks were approaching empty (when the calibration was made by Mr. Owens), at which time Mr. Daniels' tank would only pump at a rate of five gallons per minute, that the pumps would pump at a higher rate, approaching seven gallons per minute as to Mr. Daniels' truck and nine gallons per minute as to Mr. Pettijohn's truck, when the tanks were full. Consequently, if one takes an average of the output volume for each truck of slightly over six gallons per minute for Mr. Daniels' truck and slightly over seven gallons per minute for Mr. Pettijohn's truck, one arrives at an application volume for Mr. Daniels' truck of 438 to 450 gallons of chemical applied. One also arrives at a volume applied for Mr. Pettijohn's truck of approximately 547 gallons if one uses an average application rate of 7.5 gallons per minute.

10. Since the testimony as to the remaining product in the tanks is unrefuted because Mr. Owens did not observe the amount of product left in the tanks on the two trucks, and if one uses an average application rate of 7.5 gallons per minute for Mr. Pettijohn's truck and six gallons per minute or slightly more for Mr. Daniels' truck, one arrives at a figure of between 50 and 60 gallons of product remaining in Mr. Pettijohn's truck, and approximately 50 to 60 gallons remaining in Mr. Daniels' truck if one uses Mr. Daniels' factor of 73 minutes to multiply times that average application per minute rate. Thus, the approximate amount of product remaining in the tanks of both trucks being unrefuted, it is thus established that Mr. Daniels' figure of 73 minutes as the application time is most nearly correct.

11. While the pre-treatment application was being performed, Investigator Owens was parked at a nearby parking area observing the application procedure and timing it with a stopwatch. Mr. Owens determined that Mr. Daniels had pumped for 45 minutes and 30 seconds and Mr. Pettijohn pumped for 45 minutes. Using Mr. Owens' figure of seven gallons per minute for Mr. Pettijohn's truck and five gallons per minute for Mr. Daniels' truck (the lowest pumping rates) for the entire pumping operation (which for the reasons found above is not accurate), Mr. Owens came up with an approximate application

volume for Mr. Daniels' truck of 228 gallons and approximately 315 gallons for Mr. Pettijohn's truck. This figure is not realistic when one considers the amount of product left in the tanks of the two trucks at the end of the first application operation. There certainly was not an excess of 250 gallons of product left in the 500-gallon tank of Mr. Daniels' truck and 285 gallons of product left in the tank of Mr. Pettijohn's truck at the end of that first pumping operation on or before 9:00 a.m., on October 16, 2001. It cannot be determined from the testimony and evidence why there is such a great disparity in the time period Mr. Owens postulated for the treatment operation he observed, versus the most accurate 73-minute period established from Mr. Daniels' testimony.

12. After confirming that the Respondents had completed their application effort, Mr. Owens conducted an inspection with regard to both trucks, obtaining information, and filling out necessary paperwork. Mr. Owens then took a sample from Mr. Daniels' truck only when he completed the calibrations of the trucks. That calibration, as found above, noted an application rate of five gallons per minute for Mr. Daniels' truck at a point when there was only approximately 50 gallons of product left in the 500-gallon tank to feed the gravity-supplied pump on Mr. Daniels' truck.

13. Mr. Owens took a sample of the pesticide from the hose-end of the pump on Mr. Daniels' truck and placed it in a 32-ounce jar covered with a lid. The jar was not pre-labeled with a sample number. Mr. Owens taped the lid of the jar, and initialed it, so that the tape seal could not be broken without disturbing his initials and put the jar in the trunk of his car in an ice chest with ice. As a matter of practice, Mr. Owens does not offer a duplicate sample to an operator unless he asked for one and he did not ask Mr. Daniels to sign the tape on the jar. Mr. Owens did not take a chemical sample from Mr. Pettijohn's truck and there is no evidence as to what concentration of pesticide was in the tank on Mr. Pettijohn's truck. In the two pesticide applications on the morning of October 16, 2001, Mr. Pettijohn's truck pumped a total of 600 gallons of product on the site. It is not possible to make a factual determination as to the chemical concentration of the volume of product in Mr. Pettijohn's truck.

14. The water used to mix the chemical for application at the job site was obtained from the water plant in Panama City. It had been, at some point, chemically treated with chlorine. There is no evidence as to any chlorine content in the water, which is chemically treated with chlorine, at least in the potable water stage and possibly in the waste water treatment stage. The sample was collected, as noted above, on October 16,

2001, but was not delivered to the laboratory to be analyzed as to the pesticide concentration until October 26, 2001. There is no indication on the laboratory report of the actual date of processing by the lab, but the final report was issued on November 14, 2001. There was at least a lapse of ten days from collection to analyzation by the laboratory. Testimony was presented concerning a study done by a Clemson University scientist which indicated that chlorine in municipal tap water was enough to degrade pesticides like that involved in this case by a factor of 32 percent in three hours. It has not been established that that occurred here, although logically some chlorine content may have been in the water that was used to mix the chemical. It is also well-known in the pesticide industry that an appropriate reaction and safeguard for a chemical spill of Chlorpyrifos is the application of bleach or chlorine to neutralize or degrade the chemical.

15. It is not clear whether the deficient concentration pumped from the Daniels'-operated truck resulted from only chlorine content in the mix water or by the lapse of time caused by mixing the chemical the evening before it was to be used the following morning (in the interest of arriving at the job site early that morning per the instructions of the contractor). It may have been simply operator error in the proportions of water

to chemical which were mixed when the tanks were filled or a combination of these three factors.

16. Moreover, it cannot be determined precisely what concentration was actually deposited on the surface at the job site because Mr. Pettijohn's truck pumped approximately 600 gallons of total volume on the site in two applications and Mr. Daniels' truck pumped approximately 438 to 450 gallons in the first application and approximately 220 gallons in the second application, and the concentration of the chemicals pumped from Mr. Pettijohn's truck is unknown in so far as the evidential record in the case is concerned. Thus, it cannot be definitively determined what concentration of chemical actually was deposited on the surface of the job site.

17. In any event, after Mr. Owens had calibrated the pump on Mr. Daniels' truck and taken his sample, both Mr. Daniels and Mr. Pettijohn rolled up their hoses, got in their trucks, and left the job site. After they left the job site, Mr. Owens notified the builder that the pre-treatment had been inadequate in terms of the volume of pesticide applied and so the builder requested that Mr. Daniels and Mr. Pettijohn return and apply more chemical. They arrived at the job site some 15 to 20 minutes after they had initially left and began spraying the additional chemical in the second application that morning. When Mr. Daniels and Mr. Pettijohn returned to the site,

Mr. Daniels told Mr. Owens that he disagreed with Mr. Owens' volume calculations.

18. In any event, Mr. Owens directed both Mr. Daniels and Mr. Pettijohn to pump additional volume onto the site. Thus, at Mr. Owens' direction, they pumped the volumes remaining in their trucks onto the site (with the exception of approximately 30 gallons, which was finally remaining in Mr. Daniels' truck), for a total of approximately 1,280 to 1,300 gallons being pumped on the job site. Thus, in light of the above calculations and findings, the site actually received approximately 280 to 300 gallons more than the prescribed labeled rate.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.569 and 120.57, Florida Statutes.

20. Section 482.051(5), Florida Statutes, in pertinent part, confers on the Petitioner agency the authority to adopt rules requiring "[t]hat any pesticide used for pre-construction treatments for the prevention of subterranean termites be applied in the amount, concentration and treatment area in accordance with the label," Rule 5E-14.106(6), Florida Administrative Code, provides, in pertinent part:

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 site immediately prior to application

21. Section 482.161(7), Florida Statutes, states:

(7) The department, pursuant to chapter 120, in addition to or in lieu of any other remedy provided by state or local law, may impose an administrative fine, in an amount not exceeding \$5,000, for the violation of any of the provisions of this chapter or of the rules adopted pursuant to this chapter. In determining the amount of fine to be levied for a violation, the following factors shall be considered:

(a) The severity of the violation, including the probability that the death, or serious harm to the health or safety, of any person will result or has resulted; the severity of the actual or potential harm; and the extent to which the provisions of this chapter or of the rules adopted pursuant to this chapter were violated;

(b) Any actions taken by the licensee or certified operator in charge, or limited certificateholder, to correct the violation or to remedy complaints;

22. In a penal proceeding such as this, which implicates significant property rights such as potential license revocation or the imposition of administrative fines, the agency has the burden of proving the charged violations by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

23. The Petitioner has not met its burden of proving by clear and convincing evidence that Mr. Daniels and Mr. Pettijohn violated the above-cited and quoted legal authority by failing to apply the correct volume of chemical pesticide to the site in accordance with label instructions, in light of the above findings of fact concerning the determination of the volume applied. Moreover, the question of any violation that may have occurred, in the view of Mr. Owens' investigation, as a result of insufficient application time on the site, was cured when Mr. Pettijohn and Mr. Daniels returned to the site and applied more pesticide such that the ultimate application exceeded the labeled rate somewhat as to volume. Thus, the allegations of Count One have not been established as to either the Respondents Mr. Daniels or Mr. Pettijohn.

24. Concerning Count Two, Mr. Owens' sample, when tested, resulted in a reported concentration less than that designated by label instructions. The evidence, however, shows that the time from taking the sample to the processing of the sample was excessive (at least ten days), and there could have been a breakdown of the active chemical in the pesticide caused by chlorine-related agents in the water used by the applicator. However, it is also true that the above rule requires the pesticide to be mixed at the pre-construction site immediately prior to application. This was not done, and even if some

chlorine-related agents were present in the mix water to cause the breakdown of the active chemical of the pesticide emulsion, this potential breakdown may have been avoided if Respondent Daniels had mixed the product at the pre-construction site immediately prior to application, as the rule requires.

25. Thus, Mr. Daniels, particularly as the COIC of the application job, must be determined to be at least partially responsible for the sample test result which showed an inadequate concentration of the chemical in that he violated the above rule by mixing the product the evening before its application.

26. The Petitioner has not met its burden of proof by clear and convincing evidence that Mr. Pettijohn violated the above rule by applying a mixture of pesticide at a concentration level less than that designated by the label instructions because, simply, no test sample of the product in Mr. Pettijohn's truck was ever taken to establish a concentration. It is determined that Mr. Daniels violated Section 5E-14.106(6), Florida Administrative Code, by mixing the subject pesticide emulsion a substantial period of time before it was taken to the job site, instead of mixing the pesticide at the pre-construction site immediately prior to application, in violation of this rule. This could have contributed to the sample demonstration of less than the required concentration of

the pesticide. In light of the entire circumstances of this case, depicted in the above findings of fact, a minimal penalty is warranted. It is also determined that the Petitioner's Motion to Conform the Administrative Complaint to the Evidence is denied for the reasons advanced in the response to the motion.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered assessing a fine against Respondent Stephen W. Daniels in the amount of \$350.00, and it is further recommended that the Administrative Complaint as to Respondents Earl G. Pettijohn and Environmental Security of Panama City be dismissed.

DONE AND ENTERED this 3rd day of January, 2003, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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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.