

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF AGRICULTURE AND  
CONSUMER SERVICES,

Petitioner,

Case No. 21-2325

vs.

LUIS CARDENAS (JD282778),

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge Mary Li Creasy by Zoom conference on September 27, 2021.

APPEARANCES

For Petitioner: Lee Damessous, Esquire  
Department of Agriculture  
and Consumer Services  
407 South Calhoun Street, Suite 520  
Tallahassee, Florida 32399-0800

For Respondent: Luis Cardenas, pro se  
2922 Southwest 14th Street  
Miami, Florida 33145

STATEMENT OF THE ISSUES

Whether Respondent, a fumigator, committed the violations alleged in the Administrative Complaint of failing to lock a shed connected to a house under fumigation and failing to post warning signs; and, if so, what is the appropriate penalty.

### PRELIMINARY STATEMENT

After an inspection of a house under fumigation, the Department of Agriculture and Consumer Services (“Petitioner” or “the Department”) issued an Administrative Complaint on February 16, 2021, against the fumigator in charge, Respondent, Luis Cardenas. Respondent timely requested an administrative hearing, and the matter was referred to the Division of Administrative Hearings (“DOAH”) on July 28, 2021.

The hearing was held as scheduled on September 27, 2021. The Department presented the testimony of Victor Zuclich, Department Investigator. Petitioner’s Exhibits 2, 6, 9, 12, and 14 were admitted. Respondent testified on his own behalf and offered no exhibits.

The Transcript was filed on October 5, 2021. The Department timely filed a Proposed Recommended Order, which was taken into consideration in the drafting of this Recommended Order. Respondent did not file a post-hearing submittal. Unless otherwise indicated, citations to the Florida Statutes refer to the version in effect at the time of the application denial.

### FINDINGS OF FACT

1. Pursuant to chapter 482, Florida Statutes, the Department is charged with the regulation of the pest control industry in Florida. The Legislature created stringent requirements and standards within the pest control controlling statute. The Department’s pest control regulation includes oversight and inspections over fumigations performed in Florida.

2. Fumigation, the use of a restricted use pesticide (fumigant), brings with it a particular set of dangers. The chemicals used in the fumigation process are restricted use pesticides. They are odorless, tasteless, and invisible gases. The Legislature has recognized the inherent danger of restricted use

pesticides. It is for this reason that the statutes and rules related to fumigation are particularly stringent. *See* § 482.051(1), (4), and (7), Fla. Stat.

3. The Department regulates the precautions necessary when there is a structure connected to one under fumigation. When a primary structure (like a home) is fumigated, any structure connected to it by electrical conduits or other pipes could become subjected to the fumigant gas because the gas may travel through these construction elements. Fla. Admin. Code R. 5E-14.102(17). For this reason, the connected structure must be posted with warning signs and secondarily locked in accordance with the label on the fumigant and Florida Administrative Code Chapter 5E-14.

4. On January 22, 2021, Department Inspector Victor Zuchich conducted a lawful inspection of a fumigation operation conducted by SPC Services, LLC (“SPC”), at 10945 Southwest 179th Street, Miami, Florida 33157 (“the property”).

5. SPC is owned and operated by Cristy Fernandez. Ms. Fernandez was the “certified operator in charge” (“COIC”) and considered by the Department as 100 percent responsible for the supervision and fumigation activities in the field by her company even when she is not present.

6. Respondent was the special identification cardholder (fumigator in charge or “shooter”) who performed the subject fumigation at the property. Respondent used the restricted use pesticide fumigant Vikane during the fumigation of the subject property.

7. The Vikane label<sup>1</sup> and rule 5E-14.112(7)(b) require warning signs and secondary locks be posted on all “connected structures” during fumigation.

8. The property consists of a house with a screened-in pool and a nearby stand-alone shed. At the time of Mr. Zuchich’s inspection, the house was tented and undergoing termite fumigation, but the shed was not covered.

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<sup>1</sup> The Vikane label was admitted into evidence as Petitioner’s Exhibit 12.

9. Respondent posted warning signs on, and secondarily locked, the primary structure under fumigation. Respondent did not post any warning signs or secondarily lock the shed.

10. Mr. Zulich observed a plastic conduit running from the outside lower wall of the shed into the grass. He was not able to tell whether the conduit connected the shed to the house. He took photos of the shed and made a note to inquire whether the shed was a connected structure.

11. On January 22, 2021, Mr. Zulich sent a request for information to SPC by email. After receiving no response, he made several phone calls and spoke to Ms. Fernandez and her husband who identified himself as “Roger.”

12. Neither Ms. Fernandez nor her husband had been on-site at the property. Roger was not familiar with the shed. He called Respondent who advised that he had placed tape over the breaker to the shed in the main breaker box and had also dug up and disconnected the conduit pipe and taped the ends.

13. Mr. Zulich met with Ms. Fernandez and her husband on February 1, 2021, and presented Ms. Fernandez with the Notice of Inspection. Respondent was present in the office but did not speak to Mr. Zulich. Mr. Zulich did not ask Respondent any questions.

14. Ms. Fernandez represented to Mr. Zulich that the shed was not a “connected” structure because Respondent had placed tape over the breaker to the shed.

15. Ms. Fernandez made no mention of the disconnection of the conduit. Based on his conversation with Ms. Fernandez, Mr. Zulich prepared an affidavit for her signature as the COIC. The affidavit was passed to Respondent, but Respondent’s first language is not English, and he did not read it.

16. Based on the representations in the affidavit of Ms. Fernandez, the Department cited Respondent for failing to affix the proper warning

notification on the shed and to secure it with a secondary lock to prevent entry during fumigation of the house.

17. After receipt of the Administrative Complaint, Respondent became aware of the Department's position that the shed was a connected structure. Roger returned to the property and took pictures, as directed by Respondent, showing a disconnected conduit in the ground with a taped end.

#### CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

19. Chapters 482 and 5E-14 set forth the substantive requirements for the practice of pest control operations in Florida.

20. Because the Department is seeking to discipline Respondent's license as a fumigator, the Department has the burden of proof in this proceeding, and must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996).

21. Rule 5E-14.106(1) states that "it shall be unlawful to use any registered pesticide in a manner inconsistent with its label and labeling ... ." This requires that fumigants be used according to the label.

22. A "Connected Structure" is any structure physically connected with the structure to be fumigated by construction elements (e.g. pipes, conduits, drains, ducts, etc.), which may allow passage of fumigant between the structures. *See Fla. Admin. Code R. 5E-14.102(17)*.

23. The Vikane label, under the heading "Connected Structures," specifically states that, "If state rules and regulations do not describe or permit a process to isolate and seal a connected structure ... then the connected structure must be vacated during the fumigation." Further, if a structure must be vacated, "the structure shall be considered as a fumigated

structure and all applicable rules, regulations and label instructions apply, such as ... posting, securing ... .”

24. The Department’s rules and regulations do not describe or permit a process to “isolate and seal a connected structure to prevent passage of fumigant to the fumigated structure.”

25. Thus, a connected structure must be vacated and is considered a “fumigated structure,” requiring the adherence to regulations for posting and securing fumigated structures. Fumigated structures must be posted with warning signs and secondarily locked. *See Fla. Admin. Code R. 5E-14.112(7)(b)* and the Vikane label.

26. Respondent admitted that he did not post warning signs or secondarily lock the shed.

27. In an abundance of caution, Respondent taped the electric panel to cut any potential power running through the conduit to the shed. He also disconnected the conduit and taped the two ends to prevent any fumigant from possibly entering the shed.

28. The Department makes much of the fact that the COIC affidavit only mentions the electric panel and not the disconnected pipe. The Department also questions why, when Respondent was present at the meeting with the inspector and the business owner, he would not speak up to explain the pipe disconnection.

29. The Department’s argument assumes facts not in evidence--that the shed, in fact, was a connected structure. No evidence was presented by the Department’s witness that the conduit, regardless of whether it was disconnected in the yard or not by Respondent, ran to the main house. To the contrary, Mr. Zulich testified:

I saw gray conduit, which *gave the appearance* that it was connected to the main structure, but the conduit disappears under the grass, and I’m not able to see exactly where it leads to. ... I was *under the assumption* during my inspection, that the shed

was connected, and I didn't notice a secondary lock or warning sign, so I made sure I included it in my documentation so I could follow up with the company. (Emphasis added).<sup>[2]</sup>

30. The Department relies on the affidavit of Ms. Fernandez as the COIC, which states, "There was a connected shed to the main fumigated structure ... ." Although the document was admitted without objection as part of the inspection report (Petitioner's Exhibit 6), it contains uncorroborated and, therefore, inadmissible hearsay. Ms. Fernandez had no personal knowledge of the situation at this property. Her company, Respondent's employer, is not the "party opponent" in this proceeding. There was no evidence that Respondent adopted this statement expressly or implicitly.

31. Respondent credibly testified that although the affidavit was passed to him for review, he could not understand it due to his limited ability to read English. He also credibly asserted that the citation and proposed penalty (and this litigation) could have been avoided if the inspector talked directly to him, rather than Ms. Fernandez.

32. The Department failed to demonstrate by clear and convincing evidence that the shed in question was, in fact, a connected structure, or that any violation occurred.

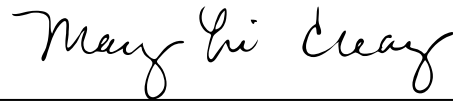
#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administrative Complaint be dismissed.

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<sup>2</sup> See Tr. P. 18, line 15, through p. 19, line 3.

DONE AND ENTERED this 2nd day of November, 2021, in Tallahassee, Leon County, Florida.



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MARY LI CREASY  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of November, 2021.

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.