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DIVISION III CASE NO. 361454

SUPREME COURT OF THE STATE OF WASHINGTON

AG AIR FLYING SERVICES, INC. AND LENARD BEIERLE

PETITIONERS

v.

WASHINGTON STATE DEPARTMENT OF AGRICULTURE

RESPONDENT

PETITION FOR REVIEW

Timothy M. Coleman
WSBA # 22866
Attorney for Appellants

1030 N Center Parkway, Ste. 220
Kennewick, WA 99336
(509)735-5082
tim@tcolemanlaw.com

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A. IDENTITY OF PETITIONER

Lenard Beierle and Ag Air Flying Service, Inc. ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioners Beierle and Ag Air Flying Service, Inc. seek review of the Court of Appeals for Division III unpublished opinion dated July 16, 2019. Said opinion is attached as Appendix A. The Court of Appeals denied Petitioner's motion for reconsideration on September 10, 2019. A copy of the denial is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. WAC 16-228-1220(1) and WAC 16-228-1200(2) provide that no person may distribute pesticides in a manner as to endanger humans and their environment. RCW 15.58.150(2)(c) provides that an applicator may not utilize pesticides contrary to label directions. WAC 16-228-1500 allows the director of the Washington State Department of Agriculture to suspend the license of an applicator who uses a pesticide inconsistent with the pesticide label.

On August 27, 2014, Lenard Beierle/Ag Air Flying Service, Inc. made an application of pesticide on a target field in Grant County, Washington. Almost ¾ of a mile away (between 3,400 and 4,000 feet away in an apple orchard were a number of farm workers. The Department alleged that Mr. Beierle's application drifted that distance during the time he made his initial application (approximately 8 minutes) and exposed the farm workers to the pesticide Lambda-cyhalothrin (trade name Silencer). Following an adjudication, the Director issued a Final Order that found Mr. Beierle had violated the aforementioned WAC's and RCW and had exposed the farm workers to the pesticide. This was based the Department having found lambda-cyhalothrin on several sample of the farm workers clothing and in some foliage, samples taken in the

general area where the farm workers were working (no samples from where they were actually working).

RCW 34.05.570(3)(e) of the Washington Administrative Procedures Act provides that the order of an administrative agency may be overturned by the reviewing court if the reviewing court finds that the order is not supported by evidence that is substantial when viewed in light of the whole record before the reviewing court. At issue is whether the Court of Appeals erred in finding that the Final Order of the Director of the Washington State Department of Agriculture was supported by evidence that is substantial when viewed in light of the whole record before the Court of Appeals.

D. STATEMENT OF THE CASE/PROCEDURAL HISTORY

1. Procedural History.

On April 28, 2015, a "Notice of Intent to Assess a Civil Penalty and to Suspend License and Notice of Rights and Opportunity for Hearing was issued to Lenard Beierle/Ag Air Flying Service by the Department of Agriculture for an alleged exposure of farm workers to a pesticide applied by Mr. Beierle on August 27, 2014. CP 6.

Lenard Beierle/Ag Air Flying Service timely requested a hearing. (CP 15). The hearing was held in front of ALJ Courtney Beebe in Yakima, Washington on December 8-10, 2015 (CP 26) and telephonically on January 4, 2016. (CP 463). On April 27, 2016 the ALJ issued an Initial Order which found that Lenard Beierle/Ag Air Flying Service, Inc. violated RCW 15.58.150(2), WAC 16-228-1200(1) and WAC 16-28-1220(2) but modified the penalty to $550 fine and nine-day license suspension. CP 555-574. Both parties petitioned the Director of the Department for Administrative Review before the May 17, 2016 deadline. CP 555-574.

On October 31, 2016 the Director issued his Final Order which upheld the Initial Order of

the ALJ as to both the penalty and findings. CP 639-659. On November 29, 2016 Lenard Beierle/Ag Air Flying Service, Inc. filed a Petition for Judicial Review in the Grant County Superior Court, Cause No. 16-2-01394-1. On May 24, 2018, a hearing was held before Judge John Antosz who upheld the Final Order. On June 25, 2018, Lenard Beierle/Ag Air Flying Services filed a Notice of Appeal in Grant County Superior Court. The appeal was perfected on July 10, 2018.

On July 16, 2018 Division III of the Court of Appeals upheld the lower decisions. A Motion for Reconsideration was on September 10, 2019.

2. Statement of the Case.

Lenard Beierle is an experienced pilot and is licensed by the Department of Agriculture. CP 1197.

Mr. Beierle was contracted via a Work Order (CP 1791) to apply 7.89 gallons of Silencer (active ingredient Lambda-Cyhalothrin) and 9.86 gallons of WETCIT (active ingredient Alcohol Ethoxylate) on 263 acres of potatoes. The 263 acres comprised two fields, one of 114 acres, what we will refer to as the "Target Field", and one of 149 acres. The application rate was 3.84 oz. per acre of the Silencer and 48 oz. per 100 gallons of the WETCIT. CP 1453-1454, 1791.

Mr. Beierle first application under the Work Order was on the Target Field. The Target Field is shown on Department Exhibit 11 (CP 001856).

Mr. Beierle utilizes a "Satloc" system on his airplane. The Satloc is the data recording system and logs data system on the airplane and logs the flight path of the plane and when the nozzles are open (spraying) and when they are closed (not spraying) and can be overlaid on Google Earth maps to give an accurate flightlog. CP 1212:22-001212:8, CP 1231-1232. CP 1890-1954 is the Satloc data overlaid on Google Earth map of the Target Field.

Mr. Beierle began his application on the Target Field at 7:54:04 a.m. with a smoke pass to gauge windspeed and direction and finished at 8:04.22. CP 1217-1218, 1229. He determined that the wind was out of the southeast, compass point 165°, at between one and two miles per hour. CP 1218, 1791, 1915. After completing the initial application at the Target Field, Mr. Beierle left the Target Field and applied the same mixture on another Jones field to the south/southeast. He returned to the Target Field at approximately 8:27 a.m. to finish that field. CP 1698. The only application that is claimed to have exposed the farm workers was the initial application on the Target Field.

At the time he began his initial application his spray booms had e approximately 10 gallons of the Oberon solution (Oberon diluted with water), with about 35 gallons of that solution mixed in with the Silencer and WETCIT in the plane's 600-gallon tank that was left from an earlier application that morning of a different field. CP 1388-89. His airplane was properly configured to comply with and was set up to be safer than the label requirements. CP 1108-1109, 1224, 1699. No evidence was presented that there was any mechanical malfunction of his equipment.

At the same time, working in an apple orchard between .6 and .7 miles to the west from the west edge of the Target Field were a number of farm workers. The farm workers saw the plane over their heads and immediately smelled a strong odor and began immediately to feel sick. CP 715-716, 760, 797. All the farm worker witnesses testified they smelled a "strong odor" and immediately became ill. None of the workers could describe the odor other than it was very strong, biting, worse even than sulfur. E.g., CP 716, 726, 761-762, 774. Gail Amos, the Department's senior investigator testified that Lambda-cyhalothrin does not have much if any odor (CP 1001) and the WETCIT was basically odorless (CP 1001). Mr. West, the Department

investigator testified that Lambda-Cyhalothrin has an odor but not a strong odor and pegged it at about a 5 on the same 1-10 scale utilized with the workers (CP 1095) but made no effort to determine what might have caused the strong odor. CP 1095.

No medical evidence was presented that directly tied any feeling of illness with the pesticides applied by Mr. Beierle. The Department of Health conducted an investigation and concluded that there was exposure to pesticides but made no conclusions as to the pesticide that actually caused any of the symptoms experienced by the farm workers. The Health Department's report was not included in the materials presented at trial. The determination by the Department of Health is only included in the Department's Case Investigative Report in the form of hearsay. No actual medical evidence was introduced that definitively found that the pesticide applied by the Petitioners was in fact what caused any of the farm workers symptom. In fact, as found by the ALJ, some of the symptoms complained of by farm workers were not consistent with pesticide related illness. The Farm Workers complained of gastrointestinal symptoms that are not consistent with exposure to Lambda-cyhalothrin/WetCit in their diluted application concentrations as per the labels. Finding of Fact 41 was that the gastrointestinal symptoms were not identified as a reaction to exposure to Mana Silencer, Oberon or WetCit (CP 647). Numerous other pesticides were found on the clothing samples taken from the farm workers (CP 1996-1999) which was not addressed by the Department of Health.

Sometime between his second and third loads, a Mr. Ron Turner left Mr. Beierle a note to contact him. Mr. Beierle did so and was accused by Mr. Turner of spraying workers in the orchard. Because of the accusation, Mr. Beierle contacted the WSDA and requested the WSDA investigate. CP 1699.

The WSDA did an investigation headed up by Matt West. As part of his investigation Mr. West took one sample in the Timothy field that borders the Target Field on the West, approximately 1,000 feet from the edge of the Target Field. Mr. West did not take another sample between the Timothy Field sample, and the sample he took on the north edge of the Apple Orchard a distance of over 2,000 feet. CP 1754-1757. Mr. West did not sample any of the apple tree foliage facing East and did not take sample where the workers were working when Mr. Beierle made his first spray pass.

Following the investigation, the Department issued a Notice of Infraction (NOI) alleging violations of RCW 15.58.150(2)(c), C 16-288-1500(1)(b), WAC16-288-1200(1) a WAC 16-288-1220(2). CP 5-15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept this Petition for Review because it involves a matter of substantial public interest.

RAP 13.4(b)(4) states that a petition for review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Such is the case here.

The significance of the public interest in this matter is expressly set out in the Washington Pesticide Control Act (RCW 15.58.020) which states that:

> The formulation, distribution, storage, transportation, and disposal of any pesticide and the **dissemination of accurate scientific information as to the proper use, or nonuse, of any pesticide, is important and vital to the maintenance of a high level of public health and welfare** both immediate and future, and is hereby declared to be a business affected with the public interest. The provisions of this chapter are enacted in the exercise of the police powers of the state for the purpose of protecting the immediate and future health and welfare of the people of the state. (My emphasis).

RCW 15.58.150(2)(c) makes it illegal to use pesticides contrary to label direction WAC

16-228-1200(1) and WAC 15-228-1220(2) makes it illegal for any person to apply pesticides in a manner as to cause harm to human WAC 16-228-1220(5) makes it illegal to "apply pesticides if weather conditions are such that physical drift or volatilization may cause damage to adjacent land, humans, sirable plants or animals." WAC 16-228-1500(b) allows for suspension of a license if a pesticide is "used" in a manner inconsistent with the labeling.

It is alleged that Mr. Beierle violated these statues and regulations when allegedly pesticide drifted three quarters of a mile in 2 mile per hour winds during the time he made his initial application and almost instantaneously harmed farmworkers in an apple orchard.

The Department's position in this case can be fairly summed up as:

1. Lambda-cyhalothrin was found on the workers cloths and in foliage samples.

2. Only Mr. Beierle was applying lambda-cyhalothrin on August 27, 2014 in the general vicinity of the farm workers.

3. Farm workers complained of symptoms consistent with pesticide exposure.

4. Ergo there as an off-target application of pesticide by Mr. Beierle.

In reaching his conclusion, the Director and subsequently the Court of Appeals relied on speculation as opposed to direct and circumstantial evidence, and completely ignored the actual risk and probability of the farm workers having been exposed to the pesticide application made by Mr. Beierle.

It has been long established that any fact or issue may be proved either by direct or by circumstantial evidence. Direct evidence relates directly to factual questions and is produced by witnesses testifying from their direct personal observation or other direct sensory perceptions. Circumstantial evidence relates to facts and circumstances from which the jury may infer other or connected facts which usually and reasonably follow according to the common experience of

mankind. See, e.g., *Ste v. Gosby*, 85 Wn.2d 758, 539 P.2d 680, (1975). Proximate cause may be shown by circumstantial evidence and the standard of proof is a greater probability that the conduct in question was the proximate cause of the damages than there is that it was not and circumstantial evidence is sufficient if it affords room for men of reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not. *Hernandez v. Western Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020, (1969).

While circumstantial evidence can be as probative as direct evidence and may create a chain of facts from which the trier of fact may draw reasonable inferences of ultimate facts, circumstantial evidence establishing proximate cause must still "rise above speculation, conjecture, or mere possibility." *Attwood v. Albertson's Food Ctrs., Inc* 92 Wash.App. 326, 330-31, 966 P.2d 351 (1998), (citing *Reese v. Stroh*, 128 Wash.2d 300, 309, 907 P.2d 282 (1995)).

There is insufficient evidence, whether circumstantial or direct, to support the Final Order.

1. Direct Evidence.

There is no real disagreement as to the direct evidence in this case. Lambda cyhalothrin was found on the workers clothes, however, clothing samples also contained numerous other agricultural chemicals that were not applied by Mr. Beierle on the potato field. CP 1996-1999. It is just as reasonable to infer that the lambda-cyhalothrin on the clothes came from other sources since clearly the other chemicals came from other sources. It is simply speculation to infer that this was evidence that the farm workers were exposed to pesticide applied by Mr. Beierle to the potato field.

Lambda-cyhalothrin was found in foliage samples tested by both parties. There is no disagreement that Mr. Beierle made an application of a pesticide containing lambda-cyhalothrin.

However, there is no direct evidence that this was lambda-cyhalothrin from Mr. Beierle's application.

The pesticide in the spray booms on the first pass on the potato field contained Oberon (spiromesifen), but no spiromesifen was found in the foliage samples at the orchard or on the farm workers clothes. E.g. CP 1119:17 – 1120:11. The Department has no explanation as to why no spiromesifen was found in the orchard other than they don't have sensitive enough equipment.

Mr. Beierle made the actual application in conformance with the pesticide labels. His airplane was properly configured to comply with and was set up to be safer than the label requirements. CP 1108-1109, 1224, 1699. No evidence was presented that there was any mechanical malfunction of his equipment. Is it not just as reasonable an inference from this direct fact that there was not an off-target application by Mr. Beierle?

There direct evidence regarding wind speed and direction. That evidence was supplied by Mr. Beierle who testified that the wind was out of the south/southeast at 1-2 miles per hour. E.g., CP 1791.

There is direct evidence regarding the odor smelled by the farm workers. The farm worker witnesses testified as to the strong smell and seeing the airplane at the time they were smelling the odor and feeling sick. E.g. The farm workers saw the plane over their heads and immediately smelled a strong odor and began immediately to feel sick. CP 715-716, 760, 797. However, the Silencer MSDS sheet describes Silencer (Lambda-Cyhalothrin) as having an "aromatic of solvent" odor. CP 1881. The Oberon (Spiromesifen) MSDS describes Oberon as having a "musty earth odor." CP 1875. The WETCIT MSDS sheet describes it as having a "light citrus" odor. CP 1888. The MSDS sheets describe the odor of the product as it is delivered in the container to the applicator, and the products are mixed with water for application on the fields.

CP 1722 and 1859. Given the dilution of the products, the identified odor of the various products on the MSDS sheets, it is more reasonable than not that the strong odor smelled by the workers did not come from any of the products applied by Mr. Beierle.

2. Circumstantial Evidence/Speculation.

The Department beginning on page 10 of its briefing to the Court of Appeals set out what the Department calls "five key" Findings of Fact that support a violation. The five are (i) that Mr. Beierle applied pesticides to a potato field (Finding of Fact ("FOF") 2, 5, 122 CP 1791), (ii) that the labels for the pesticides in his tank indicate that the pesticides are hazardous to humans (FOF 12, 13), (iii) that no lambda-cyhalothrin applications were made that day within a 1-mile radius (FOF 20), (iv) that no purchases of lambda-cyhalothrin were made during the one month before the date of the application by growers within the 1-mile radius of the orchard (FOF 21), (v) that samples from the orchard tested positive for lambda-cyhalothrin (FOF 32, 39).

These five things are not direct evidence of anything other than that (i) Mr. Beierle applied pesticides to the potato field, (ii) that pesticide labels tell us that pesticides are hazardous, (iii) that no other recorded applications of lambda occurred on the day in question, (iv) that in the one month period prior to the date of Mr. Beierle's application there were no other recorded applications of lambda to the potato field or orchard, and (v) that samples tested positive for lambda. While this may be considered direct evidence, none are direct evidence that Mr. Beierle's application drifted off site and exposed the farm workers to lambda-cyhalothrin.

If we are to infer (circumstantial evidence) that an exposure occurred based on the aforementioned "facts", we also have to accept that the application that began at 7:54:04 a.m. with a smoke pass to gauge windspeed and direction and finished the initial application at approximately 8:05 (CP 1217-1218, 1229, 1901-1919 (Appellant Exhibit 1 pp. 1- 29) drifted

almost three quarters of a mile (between 3,600 and 4,000 fee) in that period of time. The Department offers no evidence how such a drift occurred. In fact, Conclusion of Law 14 states it cannot be determined by the evidence presented how the aerial application resulted in a pesticide drift. CP 0651.

The allegation that the symptoms experienced by the farm workers were caused by the pesticide applied by Mr. Beierle on the potato field does not demonstrate that there is sufficient evidence that it was Mr. Beierle's application that caused their symptoms. The testimony regarding the symptoms comes from the farm workers (e.g., CP 719, 730, 736-37, 777-78, 819), who are simply describing what their symptoms were, but are not dispositive of the cause of the symptoms or that it was any of the pesticides applied by Mr. Beierle to the potato field that caused any illness or symptoms.

The symptoms and alleged illnesses should be viewed as analogous to medical evidence. Our courts have held that "medical testimony must demonstrate that the alleged negligence 'more likely than not' caused the later harmful condition leading to injury; that the defendant's actions "might have," "could have," or "possibly did" cause the subsequent condition is insufficient." *Merriman v. Toothaker*, 9 Wash.App. 810, 814, 515 P.2d 509 (1973). The Final Order imposes a penalty at least in part based on "symptoms" where no medical evidence was introduced that show that it was actually lambda-cyhalothrin that caused the symptoms. This particularly evident from Finding of Fact 41 that the farm workers were also suffering symptoms that were not consistent with exposure to pesticides. (CP 647).

It is speculation, not circumstantial evidence, to draw an inference that the odor smelled by the farm workers was from the applications made by Mr. Beierle. As we discussed in our section on direct evidence, the pesticide labels all describe the odor of the various pesticides, and it is

speculation to equate the strong odor reported by the farm workers with the pesticides applied by Mr. Beierle.

With regard to wind speed and direction, the only actual witness who testified or recorded in any manner wind speed and direction at the site of the application was Mr. Beierle. All other wind speed and direction evidence came from weather stations located between 2 and 3 miles from the potato field. CP 1702-03. The Department would have a trier of fact agree that it is a reasonable inference from the weather station data that was between two and three miles distant that the wind was blowing hard enough at the potato field to move the 7:56 a.m. pesticide application 3,600 to 4,000 feet while the farm workers were seeing the airplane and smelling the strong odor and becoming sick. That is not a reasonable inference, that is speculation.

3. Expert testimony.

We agree that the statutes and regulations governing pesticide applications are not written in terms of exposures to certain levels. However, they are written in terms of "adverse effect or potential adverse eect at the time of violation" (WAC 16-228-1220) and "apply . . . in such a manner as to endang humans and their environment" (WAC 16-28-1200).

Dr. Alan Felsot an acknowledged expert in the area of drift and toxicology testified the drift model program that he utilized in preparing his report that was submitted as part of the adjudication was AgDrift. CP 02017. AgDrift is utilized by the EPA, has undergone exhaustive testing, and has proven to be a very reliable predictor of drift. He explained that the purpose of doing the drift modeling is to determine the likelihood that someone would experience symptoms at different distances downwind from where the application occurred. CP 1253-1257. The modeling does not mean that there is no product in the air but shows that even if there is product in the air, it is not at a level sufficient to negatively affect the exposed person. CP 1272-1273.

Dr. Felsot discussed at length how the EPA tests products prior to licensing them to establish what is called the "lowest observable effects level." There are no observable adverse effects from the product being tested below this dosage level. Once that no observable effects dose level has been established, the EPA builds in a safety factor of 100. In other words, they divide the no observable effects dose level by 100 to come up with what is called the "acute reference dose level" or RfD. Exposure below the RfD is not considered harmful to humans. CP 1259-1263.

In doing the modeling, Dr. Felsot used a very conservative, "worst case" scenario. In this instance, he plugged in the airplane variables (nozzle count, type of nozzles, boom length, etc.) and used a 10 mile per hour wind (far in excess of any of the wind speeds reported) with the wind blowing directly at the workers. The modeling showed that within 150 feet of the spray swath, the potential exposure is already below the RfD and continues to drop the further out we go. CP 2030-2041. Dr. Felsot concluded that at the distance between the application source and the workers, any potential exposure was not likely to have caused any adverse effect to the workers, not only from dermal exposure, but also from inhalation and regard to the amount of Lambda-cyhalothrin found on the clothing samples that given the amount of Lambda-cyhalothrin on the clothing, the workers wearing that clothing would have had to be very close and really within the spray swath, and unlikely that it came from the aerial application. CP 1281-1282.

4. **Discussion of Cases and Statutes.** In *American Nursery Products, Inc. v. Indian Wel Orchards*, 115 Wn.2d 217, 797 P.2d 477, (1990)the court noted that then WAC 16-228-180(1)(b) declares that "[use of] a pesticide inconsistent with [its] labeling" is a violation. (*Id.,* at p. 248) and that under federal law, it is "unlawful for any person ... to use any registered pesticide in a manner inconsistent with its labeling...." 7 U.S.C. § 136j(a)(2)(G) (1988). 7 U.S.C.

§ 136(ee) provides that use of a pesticide in a manner inconsistent with its label "shall not include ... (3) employing any method of application not prohibited by the labeling...." but that the Washington act does not contain a provision comparable to the latter federal provision. *American Nursery Products v.ndian Wells Orchard,* 15 Wn 2d at. Pp. 247-248.

However, subsequently the legislature enacted the current WAC16-228-1220(5) which as noted above, makes application of pesticides if weather conditions are such that physical drift or volatilization may cause damage to adjacent land, humans, desirable plants or animals illegal. The corollary to that would necessarily be that application in weather conditions where physical drift or viloatisation would not cause damage to adjacent lands or humans is permissible. In the case at bar, the farm workers were not even present on adjacent land.

In their briefing to the Court of Appeals, the Department cited to *Langan v. Valipter, Inc.* 88 Wn.2d 855, 567 P.2nd 218 (1977) for the proposition that strict liability should apply to aerial applications of pesticide since aerial application of pesticides create a high degree of risk that cannot be eliminated by the exercise of reasonable care. *Id.* at p. 864. However, since the *Langan* case was decided in 1977 clearly advances have been made in both application process and in scientific understanding of the risks of exposure to humans. As pointed out above, WAC 16-228-1220(5) creates at least the implication that an application in weather conditions where physical drift or volatilization would not cause damage to adjacent lands or humans a permissible application. That is the case we find here.

The Department is tasked with the ". . . dissemination of accurate scientific information as to the proper use, or nonuse, of any pesticide . . ." RCW 15.58.020. If the Department can rely on speculation and ignore science, particularly where it comes to the levels of exposure below which there are no discernable effects on humans as established by the EPA, and bring actions to

suspend and fine applicators, it will have a chilling effect on agriculture as a whole as fewer applicators are likely to be willing to do something that is clearly beneficial to the citizens of the state of Washington.

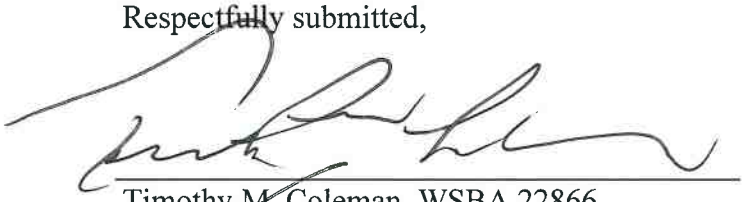
The same holds for review by the Court of Appeals. The Court of Appeals decision relies on the same speculation and ignores the critical testimony of Dr. Felsot with regard to the danger of harm to the farm workers. If Final Orders are upheld were here is insufficient evidence to support the Final Order of the Department, where the crucial evidence relied on is speculative at best, it creates uncertainty which should be addressed by this Court.

F. CONCLUSION

For the reasons set out in this Petition, Lenard Beierle respectfully ask the Supreme Court to grant review of this case and to reverse the decision of the Court of Appeals.

October 9, 2019.

Respectfully submitted,



Timothy M. Coleman, WSBA 22866
Attorney for Petitioner

APPENDIX A

FILED
JULY 16, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LENARD BEIERLE and AG AIR FLYING SERVICE, INC., a Washington Corporation, Appellant, v. WASHINGTON STATE DEPARTMENT OF AGRICULTURE, Respondent.	)	No. 36145-4-III UNPUBLISHED OPINION

KORSMO, J. — Lenard Beierle and Ag Air Flying Services, Inc., appeal from administrative sanctions imposed after an aerial spraying application was found to have drifted on to workers on nearby land. We affirm.

FACTS

Although this appeal is unusually factually-dependent, with error assigned to 17 findings of fact and 7 conclusions of law (several of which include findings of fact), the circumstantial nature of the case suggests a generic view of the evidence will suffice. The evidence developed at the hearing consisted of testimony from expert witnesses and some of those present at the scene on August 27, 2014. There are also a number of uncontested factual findings that permit a fair summary of the case.

Mr. Beierle, an employee of Ag Air Flying Services, received a work order to spray a potato field in the Mattawa area. He applied one load of pesticides between 7:55 a.m. and 8:05 a.m., reloaded his plane, and applied a second load between 8:27 a.m. and 8:37 a.m. The pesticides were Mana Silencer and ORO WetCit. The main ingredient of the Silencer is lambda-cyhalothrin (lambda). Farm workers were tying vines in an apple orchard to the west of the potato field. The workers saw Beierle's plane around 8:00 a.m. and immediately thereafter many reported smelling a strong odor and experiencing symptoms. Among the symptoms reported were scratchy eyes and throats, respiratory discomfort, dizziness, skin rash, and nausea.[1]

Upon being accused that day of spraying the workers, Mr. Beierle immediately requested an investigation by the Department of Agriculture (DOA); investigator Matt West started an investigation that same day. He interviewed witnesses, collected samples and weather station data, reviewed records, communicated with the Department of Health, and generated aerial maps of the area. West found lambda in several of the samples he took in the orchard, on worker clothing, and on a truck driven by a worker who reported that the vehicle had been sprayed.

At the conclusion of the investigation, DOA issued a Notice of Intent determining that Beierle had violated RCW 15.58.150(2)(c), WAC 16-228-1500(1)(b), WAC 16-228-

[1] It appears none of the workers suffered long-term health problems.

1200(1), and WAC 16-228-1220(2) by exposing the farm workers to pesticide drift. DOA sought a 90-day suspension of Beierle's pesticide applicator license and a $7,500 fine.

The matter went to hearing. An administrative law judge (ALJ) found the violations committed, but modified the penalty to $550 and a nine-day license suspension. Both sides appealed to the Director of DOA. The Director affirmed the ALJ's order. Beierle then sought review in the Grant County Superior Court. Concluding that there was sufficient evidence to support the findings, the superior court affirmed.

Mr. Beierle appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

This appeal challenges the evidentiary basis for numerous findings and the sufficiency of the evidence to support the sanctions. We first note the standards of review governing this appeal before turning, in the order stated, to the two issues presented.

Review of administrative hearing appeals is governed by well settled standards. We review the final administrative decision, not that of the superior court. *Alpha Kappa Lambda Frat. v. Wash. State Univ.*, 152 Wn. App. 401, 413, 216 P.3d 451 (2009). The nonprevailing party below bears the burden of proving the decision was incorrect. *Id.* Under the Washington Administrative Procedure Act, ch. 34.05 RCW, an appellate court will reverse an administrative decision solely for specific, enumerated reasons. RCW

34.05.570. As relevant here, those reasons include the situation where an agency's order is not supported by substantial evidence or is based on an error of law. RCW 34.05.570(3)(d), (e). Like the superior court, this court reviews an administrative determination for substantial evidence and gives de novo review to the conclusions of law. *Heidgerken v. Dep't of Nat. Res.*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000).

Factual Findings

This appeal challenges 17 factual findings and portions of 7 conclusions[2] that also include factual determinations. Only two of those challenges have merit.

In evaluating a challenge to the sufficiency of the evidence to support a finding, this court looks to see if the finding is supported by "substantial evidence" in the record as a whole. RCW 34.05.570(3)(e). "Substantial evidence" is evidence sufficient "to persuade a rational, fair-minded person that the finding is true." *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012). This court views "the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

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[2] Conclusions of Law 7, 14, and 15 are actually findings of fact and we will treat them as such. *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Each is supported by the evidence.

DOA concedes Mr. Beierle's challenge to Finding of Fact 43: "There is insufficient information in the record to determine whether either Mana Silencer or Oro WetCit has an identifiable odor when sprayed from an aerial applicator." Clerk's Papers (CP) at 648. Six farm workers testified that they smelled an odor shortly after observing Beierle's plane and the onset of their symptoms, although none could agree on what the odor smelled like. Since the evidence suggests that the application does have an odor, although perhaps difficult to describe, this finding is not supported by the evidence.

Finding of Fact 46 indicates that DOA properly handled all samples collected by Mr. West during his investigation and that there was no evidence of improper handling. CP at 648. However, DOA was unable to find one of the clothing samples when Beierle desired to test it and a DOA lab manager testified it could not be located. Thus, to the extent that this finding indicates *all* samples were properly handled, it is erroneous.

The remaining factual challenges are without merit and need not be discussed in detail. Some of the challenges are to inferences drawn from the evidence or involve credibility determinations. For instance, both sides presented evidence concerning whether the pesticide particles could travel to the orchard, which was slightly more than one-half mile from the potato field, given their size and the weather conditions at the time of application. The DOA expert's testimony indicated that it could, while Mr. Beierle's expert did not believe it was possible. The Director, like the ALJ, was free to credit the testimony of the DOA expert. Given the supporting evidence showing the presence of

the lambda on the workers and in the orchard, it is understandable that the Director concluded that the DOA expert was correct.

The other challenges are similar in nature or are mere quibbles with the language used in the findings. For instance, Beierle challenges Finding of Fact 4 which states: "The next field to the west of the Timothy Field, also paralleling Road 24 SW, is the Grant 24 apple orchard (Apple Orchard)." Mr. Beierle argues that the two fields are separated by two roads, a strip of land, and an irrigation canal and are not immediately adjacent to each other. This claim is without merit. The finding says that the orchard is the *next field.* It does not indicate that the two fields abut. The finding is correct.

With the exception of the two noted findings, the remaining findings all are supported by the testimony or by inferences properly drawn from the testimony. Accordingly, substantial evidence supports them.

Violation Determination

Mr. Beierle next argues that some conclusions of law supporting the violation determination are incorrect, largely for factual reasons. Since the conclusions were reasonably drawn from the evidence, we affirm.

The typical burden of proof in an administrative proceeding is the preponderance of the evidence standard. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999). "The preponderance of the evidence standard requires that the evidence

establish the proposition at issue is more probably true than not true." *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

Mr. Beierle challenges Conclusion of Law 16:

> Because the Mana Silencer and Oro WetCit labels provide that an application must avoid contact with human skin and eyes, and be conducted under certain conditions to avoid drift, it is concluded that the Appellant conducted the aerial application "inconsistent with labeling" in violation of RCW 15.58.150(2)(c).

CP at 651.

RCW 15.58.150(2)(c) provides in part: "It shall be unlawful . . . For any person to use or cause to be used any pesticide contrary to label directions." The label for Silencer directs: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift." CP at 1722. The label for WetCit directs: "Do not get in eyes or on clothing. Avoid contact with skin." CP at 1858.

The evidence strongly supported the determination that the orchard workers were sprayed with lambda. They reported being sprayed, smelling a strange odor, and they suffered symptomology largely consistent with exposure to the pesticides. The investigation found samples of lambda on the workers' clothing, on a truck, and in the orchard. Mr. Beierle applied the pesticides that day, and no one else had used similar products within a mile of the field for at least a month. The evidence certainly supported the determination that the orchard workers were exposed to the pesticides contrary to the warnings on the labels.

Mr. Beierle also challenges Conclusion of Law 17:

> Also, given that the Appellant's aerial application of the pesticides directly impacted the Farm Workers in the Apple Orchard to the extent that the Farm Workers left work and sought either medical treatment or recovery time, it must be concluded that the Appellant applied pesticide ". . . in such a manner as to endanger humans and their environment. . ." in violation of WAC 16-228-1200(1) and ". . . caused damage or injury to . . . humans. . ." in violation of WAC 16-228-1220(2).

CP at 652.

Two provisions of the Washington Administrative Code are at issue. "No person shall handle, transport, store, display, apply, dispose of or distribute pesticides in such a manner as to endanger humans and their environment." WAC 16-228-1200(1). "No person shall transport, handle, store, load, apply, or dispose of any pesticide . . . in such a manner as to . . . cause damage or injury to . . . humans." WAC 16-228-1220(2).

As explained previously, the evidence allowed the Director to conclude that the orchard workers were sprayed with pesticide(s) containing lambda and that Mr. Beierle was the one whose application of those pesticides in a nearby field was responsible for accidentally spraying the workers. The investigation eliminated other possible causes and the onset of the symptomology at the same time Mr. Beierle was spraying created a strong case against him. The evidence supported the conclusion.

Based on the previous two conclusions, the Director entered one final conclusion of law that is challenged by Mr. Beierle. Conclusion of Law 18 states:

> Based on the findings of fact and conclusions above, it is concluded that the Department has shown by a preponderance of the evidence that the Appellant violated RCW 15.58.150(2), WAC 16-228-1200(1) and WAC 16-228-1220(2), and the April 28, 2015 Notice of Intent should be affirmed.

CP at 652.

Mr. Beierle presented evidence that he performed his application in an appropriate manner and could not be the responsible party. DOA weighed the contrary evidence presented after the investigation and found it sufficient to support a determination that Mr. Beierle was the one who sprayed the workers. Since the evidence supported that determination, the administrative adjudication has a solid basis in fact and in law.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Pennell, A.C.J.

Siddoway, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

September 10, 2019

Timothy M. Coleman
Coleman Law Office PC
1030 N Center Pkwy
Kennewick, WA 99336-7160
tim@tcolemanlaw.com

Christopher Phillip Wright
WA State Office of Attorney General
PO Box 40109
7141 Cleanwater Dr SW
Olympia, WA 98504-0109
christopher.wright@atg.wa.gov

Robert W. Ferguson
Office of the Attorney General
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100
judyg@atg.wa.gov

CASE # 361454
Lenard Beierle, et al v. Washington State Dept. of Agriculture
GRANT COUNTY SUPERIOR COURT No. 162013941

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy (unless filed electronically) of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attachment

APPENDIX B

FILED
SEPTEMBER 10, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

LENARD BEIERLE and AG AIR FLYING SERVICE, INC., a Washington Corporation, Appellant, v. WASHINGTON STATE DEPARTMENT OF AGRICULTURE, Respondent.	)	No. 36145-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 16, 2019 is hereby denied.

PANEL: Korsmo, Siddoway, Pennell

FOR THE COURT:

Lawrence-Berrey C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

COLEMAN LAW OFFICE PC

October 09, 2019 - 2:33 PM

Transmittal Information

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Appellate Court Case Title:	Lenard Beierle, et al v. Washington State Dept. of Agriculture
Superior Court Case Number:	16-2-01394-1

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