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DIVISION III CASE NO. 361454

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

AG AIR FLYING SERVICES, INC. and LENARD BEIERLE

Appellants

v.

WASHINGTON STATE DEPARTMENT OF AGRICULTURE

Respondent

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Department's rebuttal 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 relied on direct and circumstantial evidence, and completely ignored expert testimony with regard to the risk and probability of the farm workers having been exposed to the pesticide application made by Mr. Beierle.

II. DISCUSSION

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., State 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) Washington Pattern Jury Instructions (WPI) 1.03 states:

WPI 1.03 Direct and Circumstantial Evidence

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

However, as a jury instruction cited with approval by the court in *State v. Dobbs*, 14 Wn. App. 613, 619, 544 P.2d 134, (Div. 3 1975), states:

A conclusion based upon direct evidence depends upon your belief in the truthfulness and accuracy of observation of the witness testifying to the fact observed; a conclusion based upon circumstantial evidence depends upon your belief as to whether such a conclusion reasonably results or is naturally inferable from the physical facts and other circumstances that have been proven.

The facts and circumstances relied upon should be consistent with each other, and with the guilt of the defendant. They should be inconsistent with any reasonable theory of innocence. They should be of such character as to exclude every reasonable hypothesis other than that of guilt. Circumstantial evidence meeting these requirements is entitled to the same weight as direct evidence.

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)).

As was discussed in our opening brief, it is the position of the Appellant that 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 (Appellant's Exhibit No. 4). 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 brief, sets 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 have to infer 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 feet) 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* (my emphasis) the aerial application resulted in a pesticide drift.

The Department's discussion beginning on page 18 of its brief regarding the symptoms experienced by the farm workers that those symptoms 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 DOH report is simply a conclusion based on nothing but reports by the farm workers. It is not direct evidence except to the extent it parrots what DOH was told by the farm workers. Frankly does not even rise to the level of circumstantial evidence. It was not a physician's report, it did not include any opinions by any health care provider.

In reality 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). Obviously, we are not arguing that this is a medical malpractice case or there was medical negligence. However, 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 rises beyond simply circumstantial evidence where we can infer from the fact that Mr. Beierle was spraying a pesticide containing lambda-cyhalothrin and farm workers exhibited symptoms, to speculation. 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, there 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 Respondent would have this Court 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 and its application to statutes.

The Respondent attempts to parse Dr. Felsot's testimony but misunderstands the import of that testimony. Dr. Felsot's testimony was not to try and establish that no drift could have occurred, or to establish the direction of drift or wind speed. 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 effect at the time of violation" (WAC 16-228-1220) and "apply . . . in such a manner as to endanger humans and their environment" (WAC 16-28-1200).

As we pointed out in our opening brief, Dr. Felsot's testimony was that at the distance the farm workers were from the target field (3,600 to 4,000 feet), even if the farm workers had been exposed, they would not have been exposed to enough pesticide to cause harm or risk of harm or create an adverse effect.

III. CONCLUSION

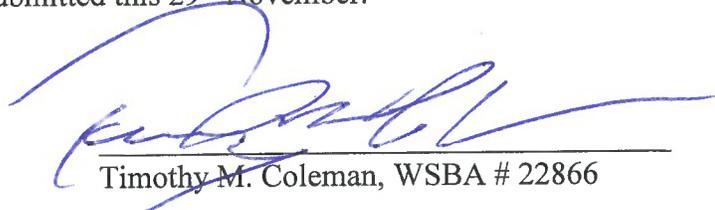
Considering all the record, it is more probable than not that Mr. Beierle did not violate RCW 15.58.150(2)(c) and WAC 16-288-1500(1)(b) by using the pesticide Silencer (active ingredient lambda-cyhalothrin) and the surfactant WetCit (active ingredient alcohol ethoxylate) contrary to

label direction. Nor did he violate WAC 16-288-1200(1) by utilizing the pesticides in such a manner as to endanger humans and their environment because of an off-target movement by pesticides. Neither did he violate WAC 16-288-1220(2) by allowing an off-target movement of pesticides that allegedly injured sixty-six people.

The actual application was properly done regarding all the safety factors set out in the pesticide labels. It is speculation, not circumstantial evidence that Mr. Beierle's application travelled between 3,600 and 4,000 feet during that time in which the farm workers say they saw the plane, smelled the strong odor and got sick.

We respectfully ask that this Court find that the Final Order is not supported by substantial evidence when viewed in a light most favorable to the Department and in light of the whole record before this Court and relieve Mr. Beierle/Ag Air Flying Service, Inc. from all penalties associated therewith.

Respectfully submitted this 29th November.



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