NO. 97767-4

SUPREME COURT OF THE STATE OF WASHINGTON

LENARD BEIERLE AND AG AIR FLYING SERVICE, INC., a Washington Corporation,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF AGRICULTURE,

Respondent.

DEPARTMENT'S ANSWER TO PETITION FOR REVIEW

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II. INTRODUCTION

Pesticides are an important but dangerous tool for the control of agricultural pests in Washington State. Application of pesticides, however, presents a danger to health and the environment. These dangers are particularly acute in the context of aerial application of pesticides. Consequently, in order to engage in the business of applying pesticides in Washington State, one must comply with the comprehensive regulatory program the Legislature and the Department of Agriculture (Department) implemented to protect the public from the risks of pesticide use. An applicator must obtain a license issued by the Department, and must apply pesticides in accordance with legally mandated labeling in a manner that does not injure or endanger humans. RCW 15.58.150(2)(c); WAC 16-228-1200(1), -1220(2).

In August 2014, Petitioner Lenard Beierle (Beierle) sprayed pesticides from an airplane onto potatoes growing in a field in Eastern Washington. The pesticides drifted beyond the potato field into an apple orchard and onto farmworkers working in the orchard. The workers then began experiencing physical symptoms from contact with pesticides. Following an investigation, the Department issued Beierle a Notice of Intent to Impose a Civil Penalty and Suspend License, which he appealed.

An administrative law judge (ALJ) heard the evidence in the administrative case against Beierle and entered an Initial Order imposing a $550 civil penalty and nine-day license suspension. The Director of the Washington State Department of Agriculture (Director) entered a Final Order upholding the ALJ's Initial Order. The Grant County Superior Court upheld the Director's Final Order, finding it was supported by substantial evidence. The Court of Appeals, in an unpublished decision, issued without oral argument, upheld the Final Order.

The Petition for Review (Petition) filed by Beierle and Ag Air Flying Service, Inc. attempts to manufacture an issue of substantial public interest in this case. However, it presents no more than a routine review of an agency final order following an adjudicative proceeding under the Administrative Procedure Act (APA), RCW 34.05. Beierle's Petition fails to establish that this case presents an issue of substantial public interest. RAP 13.4(b)(4). This Court should deny Beierle's Petition.

III. COUNTERSTATEMENT OF THE ISSUE

Does substantial evidence support the Director's Final Order?

IV. COUNTERSTATEMENT OF THE CASE

A. Background

Lenard Beierle holds a Commercial Pesticide Applicator license issued by the Department under the authority of the Washington Pesticide

Application Act (RCW 17.21) and owns and operates Ag Air Flying Service, Inc. On the morning of August 27, 2014, Beierle applied pesticides from a fixed wing airplane to 114 acres of potatoes located near Mattawa, Washington (Clerks Papers (CP) 1696, 1698). Beierle applied a pesticide with the active ingredient of lambda-cyhalothrin, trade name "Mana Silencer," to the potato field (CP 1696–98). For the application, Beierle mixed the lambda-cyhalothrin with a surfactant, with the active ingredient alcohol ethoxylate, trade name "ORO WETCIT" (CP 1698).

That same morning, about sixty farmworkers were working in an apple orchard located approximately 0.6 miles west of the potato field (CP 1015, 1698). At about 8:00 a.m. on that morning, some of the farmworkers observed Beierle's airplane flying overhead (CP 715–16, 724, 779–83, 796–98, 818–19). Shortly after they saw the airplane, the same farmworkers smelled a strong odor and started to experience physical symptoms including itchy nose/throat/eyes, tingling or numbness on the face/lips, sneezing, runny nose, coughing, shortness of breath, headache, sore throat, upset stomach, nausea, vomiting, diarrhea, and dizziness (CP 716, 719, 730, 737, 777, 797, 819). Beierle reported the incident to the Department after he was told he sprayed the farmworkers with pesticide (CP 1698–99).

Department Investigator Matt West (West) conducted an investigation of the incident. During this investigation, West interviewed a number of the farmworkers (CP 1697–1703, 1705–09). To determine whether drift occurred, West took samples from various locations in and around the apple orchard and potato field (CP 1016, 1698), including from the foliage in the potato field where the pesticide application occurred, in the timothy field between the potato field and apple orchard, and from grass in the north end of the apple orchard (CP 1710–13). West also took samples from the windshield of a truck driven by Mr. Alberto Aguilar, which was driving down a road adjacent to the potato field, timothy field, and apple orchard during Beierle's application. West took samples of foliage on both sides of the road at the location of the drift in addition to the truck windshield (CP 1016–21). West also obtained clothing samples from three of the workers in the apple orchard (CP 1038–39). Nearly all of the samples, including those from the apple orchard, from the potato field itself, from Mr. Aguilar's truck, and from the farmworker's clothing, tested positive for lambda-cyhalothrin (CP 1710–13). In addition, West collected pesticide application records from nearby farms and sales records of lambda-cyhalothrin from local dealers. West found no evidence of any other applications of lambda-cyhalothrin within approximately one mile of the area in the month preceding the application by Beierle (CP

1029–35). West was not able to identify any other possible source of lambda-cyhalothrin other than Mr. Beierle's application (CP 1062), nor did Beierle present evidence of any other possible source of lambda-cyhalothrin at hearing. West also collected weather data from nearby recording stations (CP 1702–03, 1051–56), and talked with Beierle extensively about his application and his equipment (CP 1698–1702). The Washington State Department of Health conducted an independent investigation and found that sixty-six workers had confirmed pesticide-related illness (CP 1046–48, 1704–05).

Based on the information gathered in the course of the investigation, the Department concluded that Beierle's application of lambda-cyhalothrin drifted beyond the potato field and into the apple orchard, contacting the farmworkers, and violating state pesticide laws and Department rules.

B. Procedural History

Following the completion of its investigation, on April 28, 2015, the Department issued a "Notice of Intent to Assess a Civil Penalty and to Suspend License and Notice of Rights and Opportunity for Hearing" to Beierle. This Notice of Intent assessed a $7,500 civil penalty and a license suspension of ninety days (CP 5–14). Beierle timely requested a hearing, and the ALJ held a hearing in Yakima, Washington on December 8

through 10, 2015, and telephonically on January 4, 2016 (CP 463). The ALJ issued an Initial Order finding Beierle violated RCW 15.58.150(2), WAC 16-228-1200(1), and WAC 16-228-1220(2), and imposed a $550 civil penalty and a nine-day license suspension (CP 555–74).

After administrative appeals by both the Department and Beierle, on October 31, 2016, the Director issued the Final Order, which upheld the Initial Order (CP 639–59). On November 29, 2016, Beierle timely filed his Petition for Judicial Review appealing the Director's Final Order in Grant County Superior Court. The Superior Court held a hearing on Beierle's Petition for Judicial Review on May 24, 2018, and issued an order affirming the Director's Final Order on June 11, 2018.

Beierle appealed the Superior Court's order to the Court of Appeals on June 25, 2018. The Court of Appeals, Division III, upheld the Director's Final Order in an unpublished decision. *Beierle v. Dep't of Agric.*, No. 36145-4-III, 2019 WL 3202294 (Wash. Ct. App. July 16, 2019). Beierle requested reconsideration. After the Court of Appeals denied reconsideration on September 10, 2019, Beierle petitioned for review by this Court.

V. REASONS WHY THE COURT SHOULD DENY REVIEW

The Court will accept a petition for discretionary review only if one of the criteria in RAP 13.4(b) is met. Beierle attempts to manufacture

a substantial public interest in this case under RAP 13.4(b)(4) by contending that substantial evidence does not support the Final Order and, therefore, the order is inconsistent with the public interest section of the Pesticide Control Act (RCW 15.58). This argument is without merit and the Court should deny review.

A. This Case Presents an Unremarkable Petition for Judicial Review of an Agency Order Under the Administrative Procedure Act That Does Not Warrant Review by This Court

Nothing about the Final Order in this case presents an issue of "substantial public interest" warranting review by this Court—it simply represents the findings of the Director following an adjudicative proceeding under the APA. Relief from agency orders in adjudicative proceedings is granted only if the court determines that one of the bases for relief set forth in RCW 34.05.570(3) applies. Here, the question is whether the Final Order is supported by evidence that is substantial when viewed in light of the whole record before the court, under RCW 34.05.570(3)(e). Beierle nonetheless argues that this Court should accept review of this decision because the Director's Final Order violates the Pesticide Control Act's requirement that the Department disseminate accurate and scientific information about pesticides. *See* RCW 15.58.020. As substantial evidence clearly supports the Final Order, and that evidence

supported the conclusion that Beierle violated the state pesticide laws and rules, this Court should decline review.

B. Substantial Evidence Supports the Findings of Fact in the Final Order

The APA directs a reviewing court to consider all of the evidence in the record when making a decision under the substantial evidence standard. RCW 34.05.570. The Supreme Court "appl[ies] the standards of [the APA] directly to the record before the agency, sitting in the same position as the Superior Court." *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133, 138 (2000), (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)). A reviewing court can only grant relief when the agency's decision "is not supported by evidence that is substantial when viewed *in light of the whole record* before the court." RCW 34.05.570(3)(e) (emphasis added). In the context of review under the APA, substantial evidence means "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), amended, 909 P.2d 1294 (Wash. 1996).

The substantial evidence standard is highly deferential to the agency factfinder, *Arco Prods. Co. v. Utils. & Transp. Comm'n*,

125 Wn.2d 805, 812, 888 P.2d 728 (1995), and requires a reviewing court to view evidence in the light most favorable to the prevailing party in the highest administrative fact finding forum below. *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 565, 309 P.3d 673 (2013), (citing *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)). A reviewing court does not weigh the evidence or substitute its judgment. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 831–32, 256 P.3d 1150 (2011). Even if "there are several reasonable interpretations of the evidence," evidence is "substantial if it reasonably supports the finding." *Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.,* 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Unchallenged findings are verities on appeal. *Hilltop Terrace Homeowner's Ass'n v. Island Cty.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). The burden of demonstrating the invalidity of the Final Order lies squarely with Beierle. RCW 34.05.570(1)(a); *King Cty*, 142 Wn.2d at 553.

The whole record in this case, including both circumstantial and direct evidence, supports the Director's findings of fact. In considering evidence, "circumstantial evidence is as good as direct evidence." *Rogers Potato Serv.,* 152 Wn.2d at 391, (citing *State v. Gosby*, 85 Wn.2d 758, 766–67, 539 P.2d 680 (1975)). A review of the entire agency record

before this Court clearly supports a finding in favor of the Director under the substantial evidence standard.

The Department provided extensive documentary evidence and sworn testimony detailing its thorough investigation of the incident. Samples tested by the WSDA Chemical and Hops Lab from the ground in the area where the pesticide contacted the farmworkers in the orchard, as well as samples from the workers' clothing, indicated the presence of lambda-cyhalothrin (CP 1763–90). Further samples from the foliage in the potato field where the pesticide application occurred, in the timothy field between the potato field and apple orchard, and from grass in the north end of the apple orchard, indicated a presence of lambda-cyhalothrin. (CP 1710–13). The truck driven by Alberto Aguilar also tested positive for lambda-cyhalothrin. (CP 1710). Testing by Anatek Labs of split samples obtained by Beierle largely confirmed and were generally consistent with the Department's results. (CP 1169–70). Beierle collected and tested additional samples that the Department never tested, which returned positive results for lambda-cyhalothrin in the apple orchard (CP 1467).

In addition to testing for lambda-cyhalothrin, Anatek Labs and WSDA Chemical and Hops Lab also tested for spiromesifen, which Beierle testified at hearing remained in his airplane's tank when he started the offending application (CP 1449). The results from Anatek Labs

contained two positive results for spiromesifen, including foliage from the potato field and foliage in the timothy field between the potato field and apple orchard (CP 1375–77). These results of Anatek Lab's testing further confirmed Beierle's tank mix was detected outside the area of application and in a direction toward the location of the farmworkers in the apple orchard (CP 1461–62).

Numerous farmworkers experienced symptoms, which coincided in time and place with the presence of Beierle's airplane. At least five witnesses testified that they went to the health clinic following their exposure on August 27, 2014, and received some treatment for their symptoms (CP 717, 777–78, 799–800, 823, 835).

The Department eliminated any other potential source of exposure to lambda-cyhalothrin, including use in the workers' homes (CP 1043–46). Beierle was spraying lambda-cyhalothrin the same morning that the farmworkers experienced their symptoms (CP 1791). The overwhelming evidence in the record shows that the farmworkers experienced symptoms consistent with the human health warnings on the pesticide labels for the product containing lambda-cyhalothrin sprayed by Beierle (CP 1721–53).

Two expert witnesses, one for the Department and one for Beierle, presented testimony at hearing. The experts presented conflicting testimony. The Department presented testimony from expert

Dr. Robert Wolf. Dr. Wolf testified that he had reviewed the case report, maps, and weather information, and that a drift event could account for the exposure of the workers (CP 1519–20).

Beierle presented expert testimony from Dr. Alan Felsot of Washington State University. Dr. Felsot's testimony and related exhibits focus on a simulation that Dr. Felsot performed with the AgDrift model (CP 1253). Dr. Felsot based his report on assumed numbers for variables such as wind speed and temperature, but did not try to simulate the actual wind speed and direction on the date of the application (CP 1268, 1283, 1306–07), and used a model that can only calculate estimated drift out to 2,650 feet from the model's start point (CP 1268). Dr. Felsot concluded that no harm was likely in this case—however his model only considers the human health effects of long-term exposure to lambda-cyhalothrin through the skin, (CP 1271) and he based his conclusion primarily on a one-year dietary study with dogs (CP 1307–10, 1335).

The Director properly weighed the evidence presented by the expert witnesses in this case and determined that Dr. Wolf's testimony was more credible. Beierle again attempts to argue that the Director should have adopted the view of his expert in this case. However, the Director was well within his discretion to weigh conflicting testimony—and that weight should be accorded deference. *Affordable Cabs, Inc. v. Dep't of*

Emp't Sec., 124 Wn. App. 361, 367, 101 P.3d 440, 443 (2004), *see also Peterson v. Dep't of Labor & Indus.*, 22 Wn.2d 647, 652, 157 P.2d 298 (1945).

Beierle re-argues the sufficiency of the evidence presented to the factfinder. In particular, Beierle argues that the Director and the Court of Appeals relied on "speculative" evidence in concluding that he violated the law. The Director was entitled to rely on both circumstantial and direct evidence. Indeed, a case can be proven by circumstantial evidence only—direct evidence is not necessary. *Vitalich v. Port of Seattle*, 20 Wn.2d 182, 188, 146 P.2d 819 (1944). While evidence must "rise above speculation, conjecture, or mere possibility" *Reese v. Stro*h, 128 Wn.2d 300, 309, 907 P.2d 282 (1995), it is apparent from the Court of Appeals decision in this case that the evidence did not just rise above speculation, but strongly supported the Director's conclusions in the case. *See Beierle*, 36145-4-III, 2019 WL 3202294 at *3–4.

Beierle quibbles with individual evidentiary findings stating that the circumstantial evidence presented to the Director was "speculative" in nature. However, just because evidence is circumstantial does not mean it is necessarily speculative. Beierle conflates circumstantial evidence and speculative evidence. Further, much of Beierle's brief makes conclusory statements that evidence was speculative, based seemingly on the premise

that because the finder of fact chose to adopt a view of the totality of the facts in this case that does not comport with Beierle's own views, that evidence must thus be speculative and therefore disregarded. Beierle's view of the facts has repeatedly been rejected at all lower levels of review.

The factual evidence presented in this case supports the conclusion that Beierle violated Washington State's pesticide laws and rules. Over the course of the three-day administrative hearing in this case, the evidence presented to and relied upon by the Director to support his conclusions of law were not based on speculation—they were based on direct and circumstantial evidence presented at hearing through documentary evidence and witness testimony discussed *supra*. Further, as the Court of Appeals found, when the evidence presented in this case is considered in whole, rather than as individual circumstantial elements, it "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." *Beierle*, 36145-4-III, 2019 WL 3202294 at *4.

Based on the substantial evidence before him, the Director correctly determined that Beierle was responsible for accidentally spraying the workers. He then correctly determined that Beierle violated the law

regarding application of pesticides in accordance with labeling, and prohibiting the use of pesticides in such a manner as to endanger or injure humans. Beierle argues that because substantial evidence does not support the Final Order, the Court of Appeals erred in concluding that he violated the law.

The Director correctly determined that Beierle violated RCW 15.58.150(2)(c) by applying pesticides in a manner contrary to their labels. The labels of the pesticides Beierle applied prohibit applications that result in drift (CP 1721–53, 1858–59). The Director found, based on substantial evidence, that Beierle's pesticide application drifted when it contacted the farmworkers (CP 651–52). Thus, Beierle did not follow the pesticides' labels and violated the law by permitting his pesticide to drift off target, contacting the farmworkers.

The Director also properly determined that Beierle violated WAC 16-228-1200(1) and WAC 16-228-1220(2). WAC 16-228-1200(1) prohibits the use of pesticides "in such a manner as to endanger humans and their environment," and WAC 16-228-1220(2) prohibits the application of pesticides in a manner that causes injury to humans. The Director found that Beierle's application of lambda-cyhalothrin endangered the farmworkers because they became ill when the pesticide drifted and contacted them. (CP 652). Substantial evidence supports the

Final Order. The Final Order does not disseminate information relating to the use of pesticides.

Finally, the Final Order is consistent with the public interest section of the Pesticide Control Act. When the Legislature adopted the Pesticide Control Act in 1971,[1] it included a statement of public interest. RCW 15.58.020. Paramount to the Legislature and the Department is the protection of the public health and welfare,[2] which the Final Order supports. The Director protected the public health and welfare by holding Beierle accountable for violating state law, thus making the Final Order consistent with RCW 15.58.020.

Beierle nonetheless argues that substantial evidence does not support the Final Order, making the Final Order inconsistent with the statute's statement of public interest. However, as described above, the Final Order is supported by substantial evidence; therefore, Beierle's argument that there is a substantial public interest involved in this case under RAP 13.4(b)(4), that somehow stems from the statute's statement of public interest, fails.

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[1] Ch. 190, Sec. 13, Laws of 1971.

[2] This Court has recognized the danger and unpredictability of aerial application of pesticides by adopting a strict liability standard in the tort context for aerial application of pesticides. *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 567 P.2d 218 (1977). Beierle attempts to distinguish the *Langan* case by arguing that the advancement of technology since 1977 makes this case obsolete. However, this Court has not overturned the *Langan* case. Though not directly applicable to review of an agency order under the APA, it remains good law and demonstrates the danger of pesticides that this Court has recognized in the past.

Moreover, this case centers around nothing more than a final agency order in an adjudicative proceeding against a commercial pesticide applicator license—the order does not set agency policy or rule, or bind the agency in the future. *See Stericycle of Wash. Inc. v. Wash. Util. & Transp. Comm'n*, 190 Wn. App. 74, 93, 359 P.3d 894 (2015) (holding that "[s]tare decisis . . . plays only a limited role in administrative agency decisions.)" The Department does actively participate in the spreading of accurate information about pesticide use in Washington State through many methods, consistent with RCW 15.58.020. For example, WAC 16-228-1400 and WAC 16-228-1450 set out requirements for what information must appear on a pesticide label. The Department also has authority over "misbranded" pesticides. RCW 15.58.130. The Department "disseminat[es] [. . .] accurate scientific information as to the proper use, or nonuse," of pesticides in Washington State through a number of routes—final orders in adjudicative proceedings are not one of those routes.

C. Beierle's Additional Legal Arguments Fail

Beierle makes an additional legal argument citing to *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990), WAC 16-228-1220(5), and 7 U.S.C. § 136(ee) to support the proposition that he should not be held accountable for his violation of the

State's pesticide laws and rules. The case cited is inapposite for several reasons. First it relates to a contract dispute between private parties, and does not apply the standards under the APA. Further, the portions of the opinion Beierle cites to support his proposition are from Justice Brachtenbach's *dissent* in the case, not the opinion of this Court. *Am. Nursery Prods.*, 115 Wn.2d at 247–48 (J. Brachtenbach, dissenting). In addition, this case cites WAC 16-228-180, which the Director repealed twenty years ago. WSR 99-22-002, filed 10/20/99, effective 11/20/99.

Beierle also points to the definition of "contrary to label instructions" from the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to argue that he can do any activity not prohibited by a pesticide label under FIFRA. However, FIFRA expressly permits states to place requirements on pesticide applicators which are more strict than federal requirements in FIFRA. 7 U.S.C. § 136v(a). *See also Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612–14, 111 S. Ct. 2476, 2486, 115 L. Ed. 2d 532 (1991) (holding that FIFRA does not field preempt state law). The Department did not charge, nor did the Director find in his Final Order, that Beierle violated FIFRA. This case only relates to violations of state law. Thus, Beierle's citation to FIFRA is inapplicable.

Beierle cites to 7 U.S.C.A. § 136(ee)(3), and uses WAC 16-228-1220(5) to support the proposition that if weather conditions are not such

that drift is likely to occur, a pesticide application is impliedly permitted because the rule only prohibits applications in conditions likely to cause drift. However, neither the Department's Notice of Intent issued to Beierle, nor the Final Order address any violations of WAC 16-228-1220(5). Rather, the Director ultimately found that Beierle violated WAC 16-228-1220(2) which prohibits the application of pesticides in a manner that causes damage or injury to humans, and WAC 16-228-1200(1), which prohibits the application of pesticides "in such a manner as to endanger humans and their environment." The Director also found that Beierle applied pesticides contrary to label directions in violation of RCW 15.58.150(2)(c). Thus, citation to WAC 16-228-1220(5) to support acceptance of review by this Court is unwarranted.

VI. CONCLUSION

Beierle sprayed lambda-cyhalothrin from his plane, resulting in off-target drift that contacted a group of farmworkers, causing several farmworkers to become ill. The petition for discretionary review presents no issues of substantial public interest. The Final Order imposed sanctions on Beierle for this conduct which it held violated RCW 15.58.150(2)(c), WAC 16-228-1200(1), and WAC 16-228-1220(2). The substantial public interest in this case was to make sure that Beierle is held to account for violating these laws and rules. The Final Order and the Court of Appeals'

decision upholding it assures that the public interest in this matter is satisfied. Substantial evidence supports the Final Order. This Court should deny review.

RESPECTFULLY SUBMITTED this 4th day of December 2019.

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CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of December 2019 at Olympia, Washington.

/s/ Noeli Gifford
NOELI GIFFORD
Legal Assistant

WA STATE OFFICE OF ATTORNEY GENERAL

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