BEFORE THE
DEPARTMENT OF FOOD AND AGRICULTURE
STATE OF CALIFORNIA

In the Matter of the Appeal of: Yalda Inc. dba Super #2 Attn: Hani Toma 1090 Broadway El Cajon, CA 92021 Appellant	**DECISION AND ORDER ON APPEAL**

I
PROCEDURAL HISTORY

On June 19, 2015, San Diego County Department of Agriculture, Weights and Measures (hereinafter "Respondent") issued a Notice of Proposed Action (hereinafter "Notice") against Yalda Inc., DBA Super #2 (hereinafter Appellant), and mailed it to 1090 Broadway, El Cajon, CA 92021. The Notice set forth eighteen (18) violations of Business and Professions Code (hereinafter "BPC") § 12510 (a) (1); two violations of BPC § 12107 (a) (1); and two violations of BPC § 13480 (a). The Notice set forth a total civil penalty for all violations of eight thousand nine hundred dollars ($8,900).

On September 30, 2015, Hearing Officer Thomas L. Marshall (hereinafter "Hearing Officer") conducted an administrative hearing. Appellant, represented by counsel, appeared at the hearing and contested all eighteen alleged violations of BPC §12510 (a) (1) primarily on the basis that the Respondent's inspection could not be independently verified and the tests were not validated. The remaining violations were not contested. The Hearing Officer determined that the Appellant had committed 18 violations of BPC § 12510 (a) (1); two violations of BPC § 12107 (a) (1); and two violations of BPC § 13480 (a). The Hearing Officer also determined that fines were set at appropriate levels for the violations cited.

On October 9, 2015, the Respondent adopted the Hearing Officer's determination and imposed a penalty in the amount of eight thousand nine hundred dollars ($8,900). Copies of the Notice of Decision, Order and Right of Appeal were delivered and signed for by Appellant on October 15, 2015. On November 12, 2015, Appellant submitted a timely Notice of Appeal to the California Department of Food and Agriculture (hereinafter "Department"). Appellant is appealing the Respondent's decision on the basis that Respondent's inspection procedures are inaccurate, direct testimony from the inspector was necessary to reach a fair decision, and the fine imposed presents a financial hardship to the Appellant.

II
STATEMENT OF FACTS

Inspector Mark Griffin, who conducted the routine inspection of Appellant's retail gasoline business located on 1090 Broadway, El Cajon, CA on March 24, 2015 that led to the Notice, resigned his position with the Respondent and was not available to testify. The Respondent introduced Inspector Griffin's qualifications into the record. Inspector Griffin had nearly five years of experience as an Agricultural Standards Inspector and held a certificate in measurement verification from the California Department of Food and Agriculture at the time of inspection.

Respondent's Supervising Agriculture Standards Inspector John Kinkaid testified that he has a Bachelor of Science Degree in Biology and has been an Inspector for the Respondent for approximately four years. Inspector Kinkaid testified that he holds all six types of inspector certifications issued by the Department. Inspector Kinkaid explained the standard procedure used to conduct routine inspections of retail gasoline businesses that would have been used by Inspector Griffin to conduct the routine inspection. Inspector Kinkaid explained that these tests include visual inspection of pumps and conducting test measures of five gallons dispensed into a clean, certified five-gallon measuring device known as a "prover".

Respondent submitted the official records of Inspector Griffin's inspection, which indicated that Inspector Griffin tested all the retail fuel dispensers at that business. Supervising Agricultural Standards Inspector Claudia Verdugo was Inspector Griffin's direct supervisor and reviewed the reports generated by Griffin detailing his inspection and testing of Appellant's business. The records indicated that six of the fuel dispensers tested out of acceptable tolerance levels pursuant to California Code of Regulations, Title 4, § 4000. This test data and results were presented as evidence by the County. Each of the six pumps tested below tolerance for each of the three grades dispensed resulting in three violations per dispenser. Additionally, two of the dispensers had missing price displays and two of the dispensers did not contain the correct label of product for sale, or gasoline. Accordingly, Inspector Griffin cited Appellant for eighteen violations of BPC § 12510 (a) (1), two violations of BPC § 12107 (1) (missing price labels), and two violations of BPC § 13480 (a) (missing product labels). Based upon her review of Griffin's reports, she agreed that Appellant did commit the twenty-two violations as cited.

Appellant argued that the evidence presented by the Respondent was invalid. Appellant contended that the tests conducted by Inspector Griffin were done improperly, that no witnesses or third-party observers were available to validate test procedures and results, and that inventory records of Appellant indicate that no under-registrations of dispensed fuel could have occurred.

Appellant testified on his behalf that inspections of the dispensers in question were completed by a licensed third-party company on the same day after Inspector Griffin informed Appellant of violations and claimed that the third party informed Appellant that there was "nothing wrong with the dispensers." This assertion by the Appellant was invalidated with direct evidence from the licensed third-party repair company, indicating that corrections were necessary.

III
STANDARD OF REVIEW

The Department addresses Appellant's contentions by adopting the standard utilized by the courts when reviewing administrative decisions on mandamus. It may not consider evidence outside the record, but must consider the entire record, and deny the appeal if there is any substantial evidence to support the findings. (*Smith v. County of Los Angeles* (1989) 211 Cal.App. 3d 188, 198-199.) Substantial evidence is defined as evidence of "ponderable legal significance" which is "reasonable in nature, credible and of solid value," distinguishable from the lesser requirement of "any evidence." (*Newman v. State Personnel Board* (1992) 10 Cal.App. 4th 41, 47; *Bowers v. Bernards* (1984) 150 Cal.App. 3d 870, 873) In other words, the Department cannot substitute its judgment for the judgment of the finder of fact if there is enough relevant and reliable information to establish a fair argument in support of the result, even if other results might have also been reached. (*Smith v. County of Los Angeles, supra; Bowers v. Bernards, supra,* 10 Cal.App. 4th at 873-874)

IV
DETERMINATION

The Department finds that Respondent presented sufficient evidence during the hearing to substantiate that Appellant committed eighteen violations of BPC § 12510 (a) (1), two violations of BPC § 12107 (1) (missing price labels), and two violations of BPC § 13480 (a) (missing product labels). Evidence showed that Respondent followed proper procedures and used proper equipment to determine Appellant committed the violations. Appellant's presentation of inventory logs do not counter the accuracy of a state-certified test prover used during the inspection.

Appellant did not present any evidence to support the assertion that the routine inspection conducted by Inspector Griffin was improper. Respondent appropriately introduced the inspection records, which were supported by the testimony of Inspector Kinkaid and Inspector Verdugo. Furthermore, the evidence supported that the Appellant's dispensers did test below tolerance levels.

Violations of BPC §§ 12510(a)(1), 12107(1), and 13480(a) are strict liability statutes and claims of economic hardship are not relevant to determining the penalty assessed for these violations. Accordingly, the Department finds that the civil penalties assessed are appropriate for the level and severity of violations cited and fall within the penalty guidelines established in California Code of Regulations, Title 4, section 4802 (b), Table A.

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V
DECISION

For the foregoing reasons, the Respondent's decision is affirmed and the civil penalty of eight thousand nine hundred dollars ($8,900) is upheld in this matter. Appellant is required to pay the civil penalty in the amount of eight thousand nine hundred dollars ($8,900) to the San Diego County Department of Weights and Measures.

This Decision and Order shall be effective January 27, 2016.

IT IS SO ORDERED this 28 day of DECEMBER, 2015.

Crystal D'Souza
CRYSTAL D'SOUZA
Staff Counsel
Department of Food and Agriculture

APPELLANT'S RIGHT TO SEEK JUDICIAL REVIEW

Judicial review of the decision of the Department may be sought within thirty (30) days of the effective date of this decision pursuant to section 1094.5 of the Code of Civil Procedure.