BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF THE ADMINISTRATOR

In the Matter of: **Letica Corporation,** **Appellant.**	**PHMSA Case Nos. 04-120-PPM-CE** **& 04-121-PPM-CE** **DMS Docket No. PHMSA-2005-23122**

DECISION ON APPEAL

I. Procedural History

On November 22, 2005, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued an Order[1] to Letica Corporation (Appellant) finding Appellant knowingly committed two violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. Specifically, the Order found Appellant had represented, certified and sold two different types of pails as meeting the requirements of the HMR when the pails were not capable of passing all of the required tests. The Order, which is incorporated herein by reference, assessed a civil penalty in the amount of $16,800. The assessed penalty did not provide any mitigation from the baseline penalty recommended in the Guidelines for Civil Penalties, as Appellant did not provide any evidence of corrective action or financial hardship.

Respondent filed a timely appeal of the Order on December 21, 2005.

[1] DMS Docket Number RSPA-2005-20270-1 *at* http://dms.dot.gov.

II. Summary

In this appeal, Appellant, incorporated in Michigan, requested the case be submitted for a formal hearing before an Administrative Law Judge. Appellant did not preserve its right to a hearing as required by 49 C.F.R. § 107.319. Appellant also challenges the test results upon which the Order of the Chief Counsel was based. As discussed below, Respondent's appeal is denied.

III. Background

PHMSA[2] purchased two pail configurations manufactured by Appellant from Cul-Mac Industries, who shipped the pails directly to the DOT/PHMSA-contracted packaging testing facility. The testing facility determined neither pail configuration met the requirements of the HMR. Both configurations failed the drop test, the leakproofness test, and the internal pressure/hydrostatic pressure test.

Appellant received a Notice of Probable Violation (Notice) informing it of the test results on May 18, 2004. A complete copy of the test report and the video tape recordings of the tests were enclosed with the Notice. The Office of Chief Counsel received a response to the Notice on June 1, 2004. In its letter, Appellant requested all documentation and other materials related to the case. Regarding the issue of a formal hearing, Appellant stated: "I am also requesting a formal hearing in order to preserve Letica Corporation's right to such hearing."

IV. Discussion

Appellant now reasserts its request for a formal hearing. PHMSA's procedural regulations require a respondent to request a hearing under 49 C.F.R. § 107.319 within 30 days of receipt of a notice of probable violation. A request for a hearing "must: … (2) State which

allegations of violations, if any, are admitted; and (3) State generally the issues to be raised by the respondent at the hearing."[3] Although a respondent is not barred from raising other issues at a formal hearing, the respondent must provide some information to establish a basis for its request for a formal hearing. To emphasize this point, paragraph (c) of section 107.319 states the Chief Counsel obtains an ALJ to preside over the hearing only "after a request for a hearing that complies with the requirements of paragraph (b)."[4]

Appellant's request consisted of a single sentence: "I am also requesting a formal hearing in order to preserve Letica Corporation's right to such hearing." The request for a hearing did not indicate which allegations of violations, if any, were admitted and did not state *any* issues to be raised at the hearing.

Appellant now claims its September 17, 2004 letter was a response to the August 2, 2004 letter from the Office of Chief Counsel which requested corrective action or financial information. Appellant did not request an extension of time to respond to the Notice in its response and did not indicate Appellant intended to file a supplementary response. Therefore, Appellant's letter of September 17, 2004, was not a supplement to its response to the Notice and is not an extension of its earlier request for a formal hearing.

A formal hearing on the record is not mandated by the Federal hazardous materials law, PHMSA's regulations or due process. PHMSA's regulations provide an opportunity for a formal hearing on the record only if a respondent completes a few basic prerequisites. Appellant did not have an unconstrained right to a formal hearing. Appellant failed to preserve its opportunity for a formal hearing when it did not provide the required information in its request.

---

[2] The purchases were made by the Research and Special Programs Administration, PHMSA's predecessor agency. For ease of reading, this Order will refer to both organizations as PHMSA.
[3] 49 C.F.R. § 107.319(b).
[4] 49 C.F.R. § 107.319(c).

Appellant also challenges the test results upon which the Chief Counsel based his decision. Appellant asserts the test results were invalid due to alleged failures to follow required testing protocols. Some of the irregularities alleged by Appellant were not raised in the record below.[5] Unless the Appellant can show justification for its failure to raise an issue below, only those facts previously challenged may be contested on appeal.

Appellant raised the following issues in the record below: the closure procedures, determination of the fill level, equalization of pressure following the drop test, and the grate used in the leakproofness test. After careful review of the evidence in the case file, Appellant's arguments in its appeal and prior correspondence, and the Office of Chief Counsel's Brief in Opposition to Respondent's Appeal to Final Order, I find no error in the factual findings in the Order of the Chief Counsel.

V. Findings

I find Appellant failed to meet the requirements for the Chief Counsel to obtain an administrative law judge to preside over a formal hearing on the record. In its reply to the Notice, Appellant did not state which allegations it admitted, if any, and failed to state the issues it wished to raise at the formal hearing. Therefore, Appellant did not preserve its opportunity for a formal hearing on the record.

Appellant's factual challenges raised for the first time on appeal are barred. The record supports the findings of the Chief Counsel. I find the testing procedures used did not result in packaging failures which would not have otherwise occurred.

The appeal is denied.

VI. Payment

[5] Although Appellant indicated in a December 23, 2004 email it would provide additional information, the Office of

Respondent must pay the $16,800 civil penalty assessed in the Order of the Chief Counsel within 30 days of the date of this Decision on Appeal. See Addendum A for payment information.

VII. Final Administrative Action

This Decision on Appeal constitutes the final administrative action in this proceeding. Judicial review is available under 49 U.S.C. § 5127.

Stacey Gerard for
Thomas J. Barrett
Administrator

Date Issued: JUL - 2 2007

Attachment

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Chief Counsel never received additional information.