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

In the Matter of: **Oz Technologies, Inc. and/or** **Gary Lindgren, and/or** **Roger Henry, and/or** **Don Harkin,** **Respondent.**

DMS Docket No. RSPA-2005-20505
RPSA Case No. 03-139-CMS-CE

DECISION ON APPEAL

I. Background

On February 17, 2005, the Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA),[1] U.S. Department of Transportation (DOT), issued an Order (Order) to Oz Technologies, Inc. (Respondent), finding Respondent had committed the following two violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of $16,800:

> Violation No. 1: Filling and offering DOT specification 2Q containers containing – Liquefied petroleum gas, 2.1, UN 1075 – for transportation in commerce in unauthorized containers, in violation of 49 C.F.R. §§ 171.2(a) and (c), 173.304(d)(3)(ii), and DOT Exemption 12038.

[1] Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline transportation and hazardous materials transportation. See, section 108 of the Norman Y. Mineta Research and Special Programs Improvement Act (Public Law 108-426, 118 Stat. 2423-2429 (November 30, 2004)). See also, 70 Fed. Reg. 8299 (February 18, 2005) re-delegating the hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to the Administrator, PHMSA.

Violation No. 2: Filling and offering DOT specification 2Q containers containing – Liquefied petroleum gas, 2.1, UN 1075 – for transportation in commerce under the provisions of a DOT exemption when that exemption did not permit transportation of the hazardous material by air, in violation of 49 C.F.R. §§ 171.2(a) and (c) and DOT Exemption 12038.

The Order, which is incorporated by reference, assessed the $16,800 civil penalty originally proposed in the August 22, 2003, Notice of Probable Violation (NOPV). In accordance with PHMSA's[2] regulations, Respondent had 20 days from the receipt of the Order to appeal to this office (49 CFR §107.325(c)(1)). In a letter dated March 9, 2005 Respondent timely submitted an appeal of the Order.

II. Discussion

Respondent requests the Chief Counsel's Order of February 17, 2005 be vacated For the reasons set forth below, Respondent's appeal must be denied.

This enforcement case arose out of an April 29, 2002 compliance inspection at Respondent's facilities in Rathdrum, Idaho. Respondent fills and offers for transportation in commerce a freon replacement product, Liquefied Petroleum Gas, UN 1075, in DOT specification 2Q containers under exemption DOT-E 12038 (Exemption). During the inspection, Mssrs. Don Harkin, Roger Henry and Gary Lindgren answered the inspectors' questions, provided copies of paperwork, and guided the inspectors through the facility.

During the compliance inspection, PHMSA's inspectors observed and photographed a carton of product, HC-12(a), which had been offered to Airborne Express for transportation on April 22, 2002 and was accompanied by airway bill 9221838382. Airborne Express had returned the carton to Respondent because it did not have the requisite hazardous materials paperwork. The inspectors purchased that carton and another carton of product for testing purposes. The

[2] For ease of reading and clarity, when an action occurred at RSPA, this order will refer to PHMSA.

inspectors also requested and obtained a copy of a shipping paper for the transportation of cases of the product, HC-12(a), by UPS on September 20, 2001.

The inspectors then went to Airborne Express's facilities at the Spokane International Airport and asked for all documentation related to airway bill 9221838382. Mr. Tom Hall, Field Services Supervisor of Airborne Express, provided copies of Airborne's Customer Service Airbill Summary and History. This paperwork showed the shipment was picked up from Respondent on April 22, 2002 and returned to Respondent on April 23, 2002, after an Airborne Express hazardous materials inspector determined it did not have the necessary accompanying hazardous materials shipping paper. Mr. Hall also explained all cargo from Spokane International Airport is flown to the Airborne sort facility in Wilmington, Ohio.

Subsequently, an independent laboratory, Materials Engineering, Inc. (MEI), tested the container pressure at 70°F, 100°F, and 130°F and performed a hydraulic burst test at room temperature. According to paragraph 7(c)(3) of the Exemption, the DOT specification 2Q containers' pressure may not exceed 72 psig at 70°F. MEI tested twenty cans at 70°F and the test results indicate all twenty cans exceeded the 72 psig limit. Paragraph 7(b) of the Exemption also states the minimum burst pressure of each container may not be less than 350 psig. MEI tested twenty-one cans, five of which burst at a pressure of less than 350 psig.

After completing the investigation, on April 25, 2003, the inspectors provided an exit briefing by telephone to Ms. Robin Rabb, Respondent's Secretary, and faxed a copy of the exit briefing to Respondent. On February 17, 2005, the PHMSA Office of Chief Counsel issued the Order, finding Respondent had committed two violations of the HMR. Each violation will be discussed in turn below; however, an issue of general consideration will be discussed first.

Respondent states the Order of February 17, 2005 "alludes to the conclusion that [Respondent] was given and signed an exit briefing the day of the inspection on April 29th,2002" because the Order stated, "[a]t the conclusion of the inspection, the inspectors provided Respondent with an exit briefing...." Respondent then clarifies it was not given an exit briefing until approximately one year after the initial inspection date. It is unclear what Respondent is attempting to argue; however, it is worth noting that the Order's reference to the "inspection" probably would be better described with the word "investigation." In any event, Respondent was not prejudiced because of this confusion in terminology; rather, the additional testing and interviews ensured a thorough investigation, which was necessary before the inspectors could accurately assess whether a probable violation had occurred.[3]

A. Violation Number 1

In the Order of February 17, 2005, the Office of Chief Counsel held Respondent filled and offered for transportation in commerce DOT specification 2Q containers filled with Liquefied Petroleum Gases, 2.1, UN 1075, in unauthorized containers as prescribed in DOT-E 12038, paragraphs 7(b)(1) and 7(c)(3), in violation of 49 C.F.R. §§ 171.2(a), 171.2(c), 173.304(d)(3)(ii) and DOT-E 12038.

Respondent disputes the Chief Counsel's finding, contending MEI's test results on the containers were flawed. In support of its argument, Respondent offers its own expert's mathematical computations on the chemical analysis provided by Davis Chemical (a sub-contractor of MEI) and a material compatibility study prepared in 1993 on the hazardous material in question. Respondent first argues the mathematical computations provided by its

[3] Respondent has also argued the Order of February 17, 2005 mischaracterized the settlement negotiations between itself and PHMSA. Consideration of settlement negotiations at this stage, however, are inappropriate and, therefore, irrelevant to the outcome of this Decision (See Fed. R. Evidence 408).

expert "shows the contents of the cans cannot produce the vapor pressures submitted by MEI." Respondent further claims "MEI was an inappropriate choice to conduct any burst pressure testing of DOT2Q cans" because it holds two U.S. patents on enhanced aerosol containers.

Respondent has made speculative assertions regarding MEI's underlying motivations. The record shows MEI is accredited by the American Association for Laboratory Accreditation and an independent party to this action. MEI provided the inspectors with detailed testing methodology and results and conducted the tests on over 20 containers for each test. Respondent's expert, on the other hand, has only offered a mathematical analysis of the tests conducted by MEI. It also appears Respondent has not conducted any actual testing on any containers to refute MEI's results. Based upon the factors above, and because Respondent's speculations about MEI's motivations are unsubstantiated in the record, Respondent's first argument on appeal is an improper basis for vacating the Order's findings.

B. Violation Number 2

The Order of February 17, 2005, also held Respondent filled and offered for air transportation in commerce DOT specification 2Q containers filled with Liquefied Petroleum Gases, 2.1, UN 1075 under provisions of DOT-E 12038 when the exemption did not permit transportation by air, in violation of 49 C.F.R. §§ 171.2(a), 171.2(c), and DOT-E 12038.

Respondent does not dispute the Chief Counsel's finding with respect to Violation No. 2. In fact, in its appeal, Respondent states it "has stated in previous correspondence that [it] erred by offering a hazardous material for cargo air transportation in violation of DOT-E 12038." Nonetheless, Respondent requests the penalty be reduced for several reasons. First, Respondent argues it had no criminal intent when it offered the containers for shipment. The HMR, which authorizes civil penalties, does not require a finding of criminal intent in determining whether a

person has violated the regulations. The mere act of offering or accepting a hazardous material for transportation in commerce subjects a person to the HMR and any civil penalties associated with violations of the HMR.[4] Thus, a reduction based on a lack of criminal intent is unwarranted.

Respondent next argues the shipment of Liquefied Petroleum Gases, 2.1, UN 1075 via cargo air is legal, for shipments within Canada as well as shipments into the United States from Canada. The HMR allows shipments of hazardous materials by highway and rail from Canada to comply with the Canadian Transportation of Dangerous Goods (TDG) in lieu of the HMR, but also details certain conditions for the use of the TDG in 49 C.F.R. §171.12(a). However, a shipper may not follow the TDG in lieu of the HMR when transporting hazardous materials by air. Notwithstanding these limitations, Respondent shipped these packages under DOT-E 12038, which only authorizes transportation by motor vehicle, rail freight and cargo vessel. Therefore, any Canadian or other international regulations are irrelevant in this instance and Respondent's second argument does not form a basis for a reduction in the penalty assessed.

Finally, Respondent argues the penalty should be reduced because it was not actually transported by cargo air but was transported by motor freight only. This argument must also be rejected because Respondent offered the shipment for transportation by cargo air. The HMR states "[n]o person may *offer* or accept a hazardous material for transportation in commerce unless the hazardous material is properly...packaged...as required or authorized by applicable requirements of...an exemption..." (emphasis added) (49 C.F.R. § 171.2(e)).

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[4] On the other hand, although it does not apply in this instance, a finding of criminal intent would subject a person to criminal penalties, in addition to any civil penalties assessed. 49 C.F.R. § 107.333

As shown above, a person violates the HMR at the time it offers the hazardous material for transportation in violation of the exemption it is relying on, and whether or not the shipment was actually transported by air is not of any consequence. In this instance, Respondent offered the shipment to Airborne Express for transportation by cargo air and, therefore, violated DOT-E 12038's prohibition of transportation of the hazardous material by air. Therefore, this argument is also denied.

Based on the foregoing factors, it is clear the Chief Counsel, in its Order of February 17, 2005, took into consideration and made a careful analysis of all facts and statutory requirements before assessing a civil penalty of $16,800. Therefore, Respondent's appeal is denied.

III. Findings

There is no basis to grant Respondent's appeal and withdraw the civil penalties assessed by the Office of the Chief Counsel. The civil penalty of $16,800 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors. Therefore, the Order of February 17, 2005 is affirmed as being substantiated in the record and as being in accordance with the assessment criteria prescribed in 49 C.F.R. § 107.331.

IV. Payment

Respondent must pay this $16,800 civil penalty within 30 days of the date of this Action on Appeal. See Addendum A for payment information.

V. Final Administrative Action

This Decision on Appeal constitutes the final administrative action in this proceeding.

Brigham A. McCown
Acting Administrator

Date Issued: 09-19-05

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 19TH day of SEPT., 2005, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Oz Technology, Inc. 10278 N. Church Road Rathdrum, ID 83858 ATTN: Mr. Gary M. Lindgren, President/CEO	Original Order with Enclosures Certified Mail Return Receipt
Mr. Doug Smith, Enforcement Officer Office of Hazardous Materials Enforcement 400 Seventh Street, S.W. Washington, D.C. 20590-0001	One Copy (without enclosures) Personal Delivery
Mr. Kevin Boehne, Chief Office of Hazardous Materials Enforcement Central Region Office 8701 South Gessner Road, Suite 1110	One Copy (without enclosures) First Class Mail
Tina Mun, Attorney Pipeline and Hazardous Materials Safety Administration 400 Seventh Street, S.W. Washington, D.C. 20590-0001	One Copy Personal Delivery
U.S. DOT Dockets U.S. Department of Transportation 400 Seventh Street, S.W., RM PL-401 Washington D.C. 20590	One Copy Personal Delivery

for Tina Mun

ADDENDUM A
PAYMENT INFORMATION

Due Date. Respondent must pay this $16,800 civil penalty within 30 days of the date of this Action on Appeal.

Payment Method. Respondent must pay the civil penalty by wire transfer. Detailed instructions or sending a wire transfer through the Federal Reserve Communication System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Action on Appeal. Please direct questions concerning wire transfers to:

Financial Operations Divisions (AMZ-120)
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125
Telephone No.: (405) 954-8893

Interest and Administrative Charges. If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late payment penalty, and administrative charges under 31 U.S.C. § 3717, 31 C.F.R § 901.9, and 49 C.F.R. 89.23.

The rate of interest is determined under the above authorities. Interest accrues from the date of Action on Appeal. A late-payment penalty of six percent (6%) per year applies to any portion of the debt that is more than 90 days past due. The late-payment penalty is calculated from the date Respondent receives this Action on Appeal.

Treasury Department Collection. FAA's Financial Operations Division may also refer this debt and associated charges to the Department of the Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Respondent. 31

C.F.R. § 901.3. Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights to an offset. The debtor has the right to be notified of: (1) the nature and amount of the debt; (2) the agency's intention to collect the debt by offset; (3) the right to inspect and copy the agency records pertaining to the debt; (4) the right to request a review within the agency of the indebtedness; and (5) the right to enter into a written agreement with the agency to repay the debt. This Action on Appeal constitutes written notification of these procedural rights.