

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

In the Matter of:

**Desco Carbonic Inc.
d.b.a. Knox Fire Extinguisher,

Respondent.**

PHMSA Case No. 04-554-CR-SO

DECISION ON APPEAL

I. Background

On April 28, 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 Desco Carbonic Inc., d.b.a. Knox Fire Extinguisher (Respondent), finding Respondent had committed the following three violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of \$1,950:

Violation No. 1. Representing, certifying, and marking DOT specification cylinders as having been successfully retested in accordance with the HMR, when Respondent failed to confirm the accuracy of the test equipment, in violation of 49. C.F.R. §§ 171.2(c) and 180.205(g)(3)(1).

¹ Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline 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. Representing, certifying, and offering DOT specification cylinders as having been successfully retested in accordance with the HMR, without maintaining complete retest and reinspection records, in violation of 49 C.F.R. §§ 171.2(c) and 180.215(b)(2).

Violation No. 3. Allowing employees to perform a function subject to the HMR, when the employees' records of training were not created and retained, in violation of 49 C.F.R. §§ 172.702(a), 172.702(b), and 172.704(d).

The Order, which is incorporated by reference, modified the \$3,865 civil penalty originally proposed in the Notice of Probable Violation (NOPV), dated December 22, 2004. In accordance with PHMSA's² regulations, Respondent had 20 days from the receipt of the Order to appeal to this office. The appeal was received on June 7, 2005, well after the 20-day filing deadline, as defined in 49 C.F.R. § 107.1; therefore, the appeal is denied, for the reasons discussed more fully below, and Respondent is assessed a civil penalty in the amount of \$1,950.

II. Discussion

In its appeal, Respondent requests the civil penalties be reduced or withdrawn because of its financial condition.

Respondent had 20 days in which to appeal the Order issued on April 28, 2005. The U.S. Postal Service's records show Respondent received the Order, via certified mail, on May 4, 2005. Respondent then responded to PHMSA in a letter dated May 5, 2005, which, according to the U.S. Postal Service's records, PHMSA received on May 16, 2005. The HMR requires an appeal "[s]tate with particularity the findings in the order that the appealing party challenges, and include all information and arguments pertinent thereto" (49 C.F.R. §107.325(c)(2)). Respondent's letter failed to meet these

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

requirements because it did not challenge any of the findings in the order and it did not present any arguments for consideration. Rather, the letter stated Respondent would pay \$100 per month for 10 months and, in form and substance, constituted a counteroffer, not an appeal.

Subsequently, in a letter dated May 17, 2005, PHMSA's Office of Chief Counsel informed Respondent its April 28, 2005 letter did not meet the requirements of a proper appeal under 49 C.F.R. §107.325(c)(1) and outlined in the Order. The May 17, 2005 letter further informed Respondent its letter merely constituted a counteroffer to pay \$1,000 and that, in order to meet the 20-day response period, Respondent was required to submit a proper appeal by May 27, 2005. According to Federal Express' records, Respondent received this letter on May 19, 2005, 8 days before the appeal deadline.

Respondent then sent this appeal to PHMSA in a letter dated June 2005. The U.S. Postal Service's records indicate PHMSA received this letter on June 7, 2005, well after the May 27, 2005 deadline. The appeal is, therefore, untimely. Though Respondent claims it did not receive the May 17, 2005 letter until June 2, 2005, it is apparent Respondent received it on May 19, 2005, as indicated in Federal Express' records. As such, Respondent's appeal is untimely. Therefore, Respondent's appeal is denied.

For these reasons, Respondent's appeal is denied and Respondent is assessed a civil penalty of \$1,950. However, as indicated in the May 17, 2005 letter from PHMSA to Respondent, Respondent may pay \$100 per month for 19 months and \$50 for one additional month. Should Respondent wish to utilize this payment plan, it must contact Gail Mayhew in the Office of Chief Counsel at (202) 366-4400 within 30 days. Otherwise, Respondent must pay the penalty in its entirety as specified in Part IV below.

III. Findings

There is no justification to grant Respondent's appeal and withdraw the civil penalties previously assessed. The civil penalty of \$1,950 is warranted in light of the seriousness of Respondent's violations and its failure to participate in the appeals process in a timely manner. Therefore, the Order of April 28, 2005 is affirmed as being substantiated by the record and issued in accordance with the assessment criteria prescribed in 49 C.F.R. § 107.331.

IV. Payment

Respondent must pay this \$1,950 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: 08-24-2005

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of August, 2005, the undersigned served in the following manner the designated copies of this Decision of Appeal with attached addendums to each party listed below:

Desco Carbonic Inc. Original Order with Enclosures
d.b.a. Knox Fire Extinguisher Company, Inc. Certified Mail Return Receipt
1201 University Avenue
Knoxville, TN 37921
ATTN: Mr. Lonnie Parrot, MGR

Desco Carbonic Inc. One copy with Enclosures
124 16th Street South
Birmingham, AL 35233-1617

Mr. Doug Smith, Enforcement Officer One Copy (without enclosures)
U.S. Department of Transportation Personal Delivery
Pipeline and Hazardous Materials Safety Administration
Office of Hazardous Materials Enforcement
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

Mr. John Heneghan, Chief One Copy (without enclosures)
Office of Hazardous Materials Enforcement First Class Mail
Southern Region Office
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
233 Peachtree Street NE, Suite 602
Atlanta, Georgia 30303

Tina Mun, Esq. One Copy
U.S. Department of Transportation Personal Delivery
Pipeline and Hazardous Materials Safety Administration
Office of the Chief Counsel
400 Seventh Street, S.W., Room 8417
Washington, D.C. 20590-0001

U.S. DOT Dockets One Copy
U.S. Department of Transportation Personal Delivery
400 Seventh Street, S.W., Rm. PL-401
Washington D.C. 20590

/s/
Tina Mun

ADDENDUM A
PAYMENT INFORMATION

Due Date. Respondent must pay this \$1,950 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 on 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.