

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

In the Matter of:

**Wescold, Inc. d/b/a W.E. Stone
and Company,
Appellant.**

**PHMSA Case No. 06-0063-SC-EA
DMS Docket No. PHMSA-2006-26214-4**

DECISION ON APPEAL

I. Background

On March 15, 2007, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued a Default Order¹ to Wescold, Inc. d/b/a/ W.E. Stone and Company (Appellant) finding Appellant knowingly committed one violation of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. Specifically, the Order found Appellant had offered compressed flammable and non-flammable gases for transportation in commerce accompanied by improperly prepared shipping papers. The Default Order, which is incorporated herein by reference, assessed a civil penalty in the amount of \$6,270. Respondent filed a timely appeal of the Default Order on March 27, 2007.

II. Discussion

PHMSA regulations require a respondent who wishes to contest the factual allegations underlying the probable violations cited in a Notice of Probable Violation (NOPV) to file a reply

¹ DMS Docket Number RSPA-2005-20270-1 at <http://dms.dot.gov>.

within thirty (30) days of receipt of the NOPV. Appellant does not contest the finding in the Default Order that it did not respond to the Notice.

Appellant seeks waiver of the violation found and the civil penalty assessed in the Default Order on the grounds that the violation was not an “actual” violation and was merely a “probable” violation. When Appellant received the NOPV, the violation was a ‘probable’ violation in that Appellant had an opportunity to correct or supplement the enforcement record. When Appellant failed to respond to the NOPV, Appellant waived its opportunity to challenge the facts as stated in the NOPV. Accordingly, the Chief Counsel reviewed the enforcement record and found that Appellant did commit the violations as stated in the Notice.

The NOPV clearly states that a failure to respond constitute waiver of the opportunity to challenge the facts alleged. In addition, the Default Order clearly states that a party appealing a default order must provide justification for its failure to respond in order for its appeal to be considered. Appellant does not contest the finding that it had improperly prepared its hazardous materials shipping papers nor does it provide any information to explain its failure to respond to the NOPV.²

III. Conclusion

I find Appellant waived its opportunity to contest the allegations in the Notice when it failed to respond. There is no justification to grant the appeal and withdraw the civil penalties previously assessed. The appeal is denied.

Respondent must pay the \$6,270 civil penalty assessed in the Default Order within 30 days of the date of this Decision on Appeal. See Addendum A for payment information.

² The appeal discusses background checks on its employees. The Notice did not raise this issue nor did the Default Order make any findings on that subject. Therefore, Appellant’s argument on this subject is irrelevant to this appeal.

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

Judicial review is available under 49 U.S.C. § 5127.

A handwritten signature in black ink, appearing to read "Stacey Gerard", is written over a horizontal line.

Stacey Gerard for
Thomas J. Barrett
Administrator

Date Issued: AUG - 7 2007

Attachment

CERTIFIED MAIL – RETURN RECEIPT REQUESTED