

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION**

IN THE MATTER OF

**AUSTIN & PRUITT
FIRE AND SAFETY EQUIPMENT, INC.**
2 Brookside Drive
Wilmington, DE 19804

RSPA Case No. 01-083-CR-EA

DMS Docket No. RSPA-04-17966

ACTION ON APPEAL

Background

On April 30, 2004, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Austin & Pruitt Fire and Safety Equipment, Inc. (Respondent) assessing a civil penalty in the amount of \$22,185 for the following violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180:

Violation No. 1 – Representing, marking, and certifying DOT specification cylinders as having been successfully retested in accordance with the HMR, when Respondent did not hold a current DOT approval, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(2)(i) (as in effect prior to October 1, 2002).

Violation No. 2 – Representing, marking, and certifying DOT specification and exemption cylinders as having been successfully retested in accordance with the HMR, when the results of the hydrostatic test indicated that the cylinders had permanent expansion in excess of the condemnation criteria, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(6)(i)(D) (as in effect prior to October 1, 2002), and the terms of the applicable exemptions.

Violation No. 3 – Representing, marking, certifying, and offering DOT specification and exemption cylinders as having been successfully retested in accordance with the HMR, when Respondent failed to maintain a current copy of the HMR and current copies of the applicable exemptions, in violation of 49 C.F.R. §§ 171.2(c), 173.34(e)(2)(v)(A), and 173.34(e)(2)(v)(B) (as in effect prior to October 1, 2002).

Violation No. 4 – Failing to provide a cylinder owner written notification that the results of the hydrostatic test indicated that the cylinder had permanent expansion in excess of the condemnation criteria, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(6)(iii) (as in effect prior to October 1, 2002).

Violation No. 5 – Representing, marking, certifying, and offering foreign cylinders as meeting the requirements of the HMR, when Respondent marked the cylinders with its retester identification number, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(j)(1)(i) (as in effect prior to October 1, 2002).

Violation No. 6 – Representing, marking, and certifying DOT specification cylinders as having been successfully retested in accordance with the HMR, when Respondent did not maintain accurate records of its inspections and hydrostatic tests, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(8)(ii)(B) (as in effect prior to October 1, 2002).

Violation No. 7 – Representing, marking, certifying, and offering DOT specification cylinders as having been successfully retested in accordance with the HMR, when Respondent failed to verify, on each day it retested cylinders, that its test equipment was accurate to within one percent of each cylinder's test pressure, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(2)(i) (as in effect prior to October 1, 2002).

Violation No. 8 – Allowing an employee to perform a function covered by the HMR, when Respondent was not maintaining hazardous material training records, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(2)(i) (as in effect prior to October 1, 2002).

In the Order, which is incorporated herein by reference, RSPA's Chief Counsel modified the \$24,650 civil penalty originally proposed in the March 23, 2001 Notice of Probable Violation (Notice).

In an undated letter, postmarked May 20, 2004, Mr. Thomas Williams submitted a timely appeal of the Order on behalf of Respondent.

Discussion

In his letter, Mr. Williams stated that Respondent is appealing "all violations and fines that are pending against Austin & Pruitt Fire & Safety and Greg Austin for the following reasons:

"1. Greg Austin does not hold any position with the company.

"2. The company does not feel he should be responsible for any fines that he may have occurred.

"3. Gregory Austin is just an employee and has no say in the hydrotesting area and is not licensed to do so."

This enforcement case arose out of an inspection at Respondent's facility on September 27, 2000. During that inspection, Respondent was represented by its president, Mr. Austin, and a retester operator, John Till. Both Mr. Austin and Mr. Till signed the inspector's Cylinder Retester Inspection Report, on which RSPA's inspector recorded Mr. Austin's statement that he had 18 years experience retesting compressed gas cylinders (Exhibit 2 to RSPA's inspection/investigation report). Mr. Austin also signed the exit briefing acknowledging (but not admitting) the probable violations noted by RSPA's inspector (Exhibit 1 to RSPA's inspection/investigation report).

On October 2 and 31, 2000, RSPA's inspector returned to Respondent's facility to resolve concerns about numerous DOT exemption cylinders that had previously been tested and returned to service by Respondent. On October 31, Mr. Austin performed hydrostatic retests of several of these cylinders which he had recovered from Respondent's customers and achieved successful results. See RSPA's inspection/investigation report at p. 4-5 and Exhibit 14.

Based on the information obtained by RSPA's inspector, this civil penalty enforcement case was brought against Respondent (and not against Mr. Austin personally). This case is separate from the criminal proceeding against Mr. Austin for false statements – made after RSPA's inspection -- concerning actions he asserted had been taken to correct violations alleged in this case. RSPA understands that the criminal charges were brought only against Mr. Austin and not against Respondent.

One violation in this case involves Respondent's actions in retesting and recertifying compressed gas cylinders during the period after July 17, 2000, when its prior approval – or retester identification number (RIN) – had expired. RSPA's July 17, 1995 approval letter (Exhibit 4 to RSPA's inspection/investigation report) was addressed to Mr. Austin for Respondent. That approval was based on the recommendation of an independent inspection agency (IIA), and the IIA's report in RSPA's files lists Mr. Austin as the "Responsible Person Contacted." The last page of the IIA's report was signed by Mr. Austin on June 27, 1995, to verify that "all inspection items and discrepancies from CFR, Title 49, Section 173.34 as noted in this inspection report were discussed with the responsible person of the retesting facility at the time of the inspection."

Respondent promptly arranged for an inspection by an IIA in order to renew its RIN. The IIA's report and Respondent's renewal application, both dated September 29, 2000, list Mr. Austin as Respondent's president, and Mr. Austin signed the certification on Respondent's renewal application that: "I certify that I am familiar with all applicable Federal regulations relating to functions I will perform and will operate the facility in compliance with the applicable requirements of 49 CFR 173.34, Qualification, maintenance and use of cylinders. All statements made by me on this application are to the best of my knowledge true and correct." The penalty proposed in the Notice for this violation was reduced to reflect Respondent's renewal of its RIN immediately after RSPA's inspection.

A corporation can act only through its officers and employees. It is clear that all of the activities that gave rise to the violations in this case were performed by Mr. Austin or other

employees of Respondent in furtherance of Respondent's cylinder retesting business. None of these activities can be considered unauthorized or outside of the scope of Respondent's business (as Mr. Austin's later false statements may have been). For this reason, Respondent has been properly charged with the violations in this case. There is no basis to overturn the findings of violation in the Order.

Findings

I have determined that there is not sufficient evidence to set aside the findings of violation or warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of \$22,185 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior violations, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors. The total penalty is allocated to the eight violations as follows:

- Violation No. 1 - \$1,440
- Violation No. 2 - \$12,150
- Violation No. 3 - \$540
- Violation No. 4 - \$900
- Violation No. 5 - \$720
- Violation No. 6 - \$2,700
- Violation No. 7 - \$3,285
- Violation No. 8 - \$450.

Therefore, the Order of April 30, 2004, 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.

Payment

Due Date. Respondent must pay this \$22,185 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 for 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 Division (AMZ-120)
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125
Telephone No.: 405-954-8893

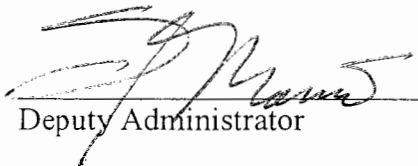
Interest and Administrative Charges. If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late-payment penalty, and administrative 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 this 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 Respondents. 31 C.F.R. § 901.3. Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights prior 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.

Final Administrative Action

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


Deputy Administrator

Date Issued: 6.18.04

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Original to:

Mr. Thomas Williams
Austin & Pruitt Fire and Safety Equipment, Inc.
2 Brookside Drive
Wilmington, DE 19804