

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

In the Matter of:

Garrett's Worldwide Enterprises, LLC,

Appellant.

**PHMSA Case No. 10-0056-SE-SO
Docket No. PHMSA-2012-0145**

DECISION ON APPEAL

On July 30, 2012, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued an Order to Garrett's Worldwide Enterprises, LLC (Appellant or Garrett's) assessing a civil penalty in the amount of \$25,000 for two violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. parts 171-180. The Order was issued after Garrett's and PHMSA were unable to reach settlement in the case following the issuance of the June 24, 2010 Notice of Probable Violation (Notice) in this case.

In the Order, which is incorporated by reference, the Chief Counsel found that Garrett's committed two violations of the HMR, when:

1. Garrett's made multiple shipments of Class 1 explosive materials, which were forbidden for transportation in commerce because the explosive materials had not been approved by PHMSA, in violation of 49 C.F.R. §§ 171.2(a), 173.22, 173.51(a), 173.54, and 173.56; and
2. Garrett's failed to maintain copies of EX approvals and supporting documentation, in violation of the terms of issued approvals and the HMR.

The Notice alleged that Garrett's committed three violations of the HMR, but, in the Order, the Chief Counsel combined Probable Violations Nos. 1 and 2, into Violation 1. The Chief Counsel found that "multiple counts" of a single violation of § 173.56 occurred when Garrett's made five shipments of "GPC5024 American Orbiter," for which Garrett's had received a denial letter from PHMSA and when Garrett's made six shipments of fireworks for which Garrett's had not received approval and for which no approval existed. Furthermore, in the Order, the Chief Counsel reduced Probable Violation No. 3, failure to maintain approvals documentation, to a warning without civil penalty, which is still considered a violation. For purposes of clarity in this document, I will refer to shipments of the American Orbiter, which was specifically denied for classification as a 1.4G explosive as "forbidden," and shipments of fireworks for which Garrett's had not received approval and for which no approval existed, as "unapproved."

For the multiple instances of Garrett's commission of the violation of shipment of forbidden and unapproved Class 1 explosives, the Chief Counsel assessed a civil penalty of \$25,000. This

amount was reduced from the \$94,750 civil penalty that was proposed in the Notice. The Chief Counsel explained that the Notice did not provide justification for the proposed civil penalties, which were significantly higher than the “Baseline assessments” recommended for the shipment of forbidden/unapproved Class 1 Explosives in the “Guidelines for Civil Penalties.”¹

In recalculating the civil penalty in the Order, the Chief Counsel assessed the \$10,000 recommended baseline assessment for violation of § 173.56(j) and then added \$2,500 for each additional shipment (6 x \$2,500) or count of “forbidden” fireworks and \$1,250 for each shipment (5 x \$1,250) or count of “unapproved” fireworks.² Based on Appellant’s submission of an extensive corrective action plan, “Plan 2011,” the Chief Counsel provided a 20% corrective action credit, reducing the civil penalty to \$25,000. The Chief Counsel declined to apply the reshipper reduction or make any reduction based on Appellant’s claimed poor financial condition.

Discussion

Garrett’s filed a timely Appeal of the July 30, 2012 Order on September 13, 2012, after requesting and receiving an extension to the 20-day time limit. In its Appeal, Garrett’s requests that PHMSA eliminate all civil penalties or reduce the civil penalties for the combined Violation 1 (combined Probable Violations 1 and 2 from the Notice) to the statutory minimums of \$250 each. Garrett’s did not specifically request dismissal of the warning item of Violation 2. In support of its plea for reduction, Garrett’s raises three principal arguments. First, it alleges that certain PHMSA employees used overzealous enforcement practices and exhibited retaliatory conduct. Next, Garrett’s argues that PHMSA’s “flawed classification procedures and inconsistent interpretation of [APA Standard 87-1]” along with the confusing nature of PHMSA’s regulations and PHMSA’s failure to share information, led to Garrett’s failure to understand the legal requirements and ship unapproved fireworks.³ Finally, Garrett’s argues that it was unfairly prejudiced by PHMSA’s consideration of outdated financial documents for the “ability to pay” and “jeopardy of ability to continue in business” analyses pursuant to the “Guidelines for Civil Penalties.”⁴

Garrett’s Claims about the PHMSA Investigators are Not Relevant to the Disposition of this Case.

First, I address Appellant’s claims about PHMSA’s employees’ conduct. In support of its allegations, Garrett’s cites alleged intimidating statements and retaliatory actions by PHMSA investigators. PHMSA investigators and employees are obligated to act respectfully and ethically towards all members of the public and regulated entities. However, most of the alleged statements by PHMSA employees are reported to have occurred after the issuance of the Notice, and are not relevant to the violations at issue in this case. Furthermore, Garrett’s has provided no evidence or argument as to how the alleged statements interfered with its ability to represent itself during the

¹ Appendix A to Subpart D of Part 107—Guidelines for Civil Penalties.

² Garrett’s had applied for approvals for many of the unapproved fireworks that it shipped (e.g. “Pyro Cola,” “Optical Illusions,” “High Voltage,” and “Great Balls of Fire.” See Investigation Report 10461002, Exhibit 15.) but had not received a response from PHMSA.

³ Appeal at 5.

⁴ Appendix A to Subpart D of Part 107, IV. “Miscellaneous Factors Affecting Penalty Amounts, D. Financial Considerations.”

investigation or its ability to reach a settlement with PHMSA after the issuance of the Notice. I will assess Garrett's arguments in this case based on the facts and applicable regulations without regard to the alleged post-hoc statements and conduct that do not relate to whether the violations occurred.

Garrett's Presents No Facts that Mitigate its Culpability for its Commission of the Violations

Garrett's argues that it is not culpable for the violations it committed. Garrett's bases this claim on three premises. First, Garrett's claims that PHMSA has flawed classification procedures and has inconsistently interpreted APA Standard 87-1. Second, Garrett's claims that PHMSA's delay in issuing decisions on Appellant's various applications, along with the fact that PHMSA's website was under construction, created confusion and an "uneven playing field" that prevented Appellant from knowing the status of its applications.⁵ Lastly, Garrett's argues that, as a small business, it lacked understanding of the relevant regulations.

It is not in dispute that on October 1, 2008 Garrett's received a letter from PHMSA stating that "GPC5024 American Orbiter cannot be approved for shipment" because it did not meet the criteria set forth in APA 87-1. This letter from PHMSA directly informed and notified Garrett's that this device was forbidden from shipment. Nonetheless, Garrett's shipped the device multiple times after receiving PHMSA's denial. Therefore, Garrett's arguments about PHMSA's delay and poor communication causing or contributing to its violations are not applicable to Garrett's shipment of the "American Orbiter." Nonetheless, I will address these arguments in connection with the explosives that were unapproved at the time of shipment.

With respect to Garrett's first argument that PHMSA's fireworks approvals program was or is flawed, Garrett's does not state how these alleged flaws specifically affected it. Nowhere in its Appeal does Garrett's disagree with or take issue with any denial or approval issued by PHMSA. Therefore, this argument does not support withdrawal of the violations or reduction of the civil penalties.

In support of its contention that PHMSA's poor communication was to blame for Garrett's shipment of unapproved and forbidden fireworks, Garrett's states that during 2009, it had approximately 130 pending, unanswered EX applications with PHMSA. Also, Garrett's states that the PHMSA website was "under repair during large periods of 2009 and 2010," and that fact prevented Garrett's from verifying the validity of EX numbers described in shipping papers it received from other entities.⁶ Finally, Garrett's argues that PHMSA's policy against providing chemical formulations and diagrams of approved fireworks on the PHMSA website prevents importers and shippers from verifying the accuracy of an EX approval.

Garrett's did experience delay in awaiting PHMSA's decisions on the status of its applications. However, the record indicates that during 2008 and 2009, PHMSA issued 28 explosive (EX) classification approvals for Division 1.4G Fireworks to Garrett's and at least one denial. Given Garrett's history of correspondence and interaction with PHMSA, Garrett's should have understood that if it had not received an approval for an unapproved device, the application was still under review, and the device remained unapproved. In its appeal, Garrett's failed to

⁵ Appeal at 4.

⁶ *Id.*

provide any explanation for how delays in the application process reasonably led Garrett's to believe that its devices had been approved for shipment. Therefore, I am not convinced that delay created a basis for Garrett's purported confusion.

Garrett's is correct that the approvals search function on the PHMSA website was undergoing updates during parts of 2009 and 2010. I clarify that the search page was still functional, but it included a disclaimer stating that due to the migration to a new system, there could be data discrepancies, and information could be approximately two weeks out of date. However, the site always included at least one phone number for members of the public or regulated entities to call to receive "immediate assistance" regarding the status of approvals.⁷ If Garrett's was confused about the status of its approvals application, it could have called PHMSA. Garrett's did not provide any account of phone calls made to the phone number(s) listed on the approvals search page.

As stated above, Garrett's third argument in support of its contention that it should not be held culpable for its violations is that, as a small business, it lacked adequate understanding of §173.56(j) and APA 87-1, the industry standard incorporated by reference into that provision. More specifically, Garrett's maintains that when it received PHMSA's denial of the American Orbiter application, Garrett's did not understand that incompatibility with APA Standard 87-1, as reported in the letter, barred a firework configuration from being classified as 1.4G firework. Appellant argues that "Garrett's is permitted to presume that APA 87-1 is not the exclusive method of obtaining approval" because it is a "small seasonal business."⁸ However, Garrett's poses no explanation of what this alternative approval method might have been.

I am not persuaded that Garrett's ignorance of the regulatory standard excuses its violations. Garrett's was responsible to know, and "a reasonable person acting in the circumstances and exercising reasonable care" would have learned that PHMSA reviewed fireworks applications against the APA Standard 87-1. 49 C.F.R. §171.2(b). The controlling regulation, 49 C.F.R. § 173.56(j), has been in place since 1990 and explicitly states that Division 1.3 and 1.4 fireworks must be manufactured in accordance with APA Standard 87-1.⁹ Furthermore, since well before 2009, PHMSA has included various guidance documents on the Approvals page of its website providing information about applying for fireworks approvals. Each guidance document focused on how applicants should demonstrate compliance with APA Standards 87-1.¹⁰

Finally, Garrett's claims that it was warranted in relying on alleged assertions from its fireworks manufacturer in China that the "American Orbiter" was actually approved by PHMSA. Garrett's maintains it cannot be held culpable for relying on the false claim and that, "[I]t is entirely appropriate for GWE to rely upon the open and arms-length representations of such

⁷ For the purposes of research, the internet archive known as the "WayBack Machine," at <http://archive.org/web/web.php> was consulted to view the status of the PHMSA website on various dates throughout 2009 and 2010.

⁸ Appeal at 4.

⁹ 49 C.F.R. §173.56(f) allows the Associate Administrator to approve a new explosive on the basis of an approval issued by a foreign government. Appellant makes no claim and the record gives no indication that Appellant ever believed or suspected that PHMSA had issued an approval based on a foreign government's approval. Therefore, compliance with APA Standard 87-1 would be the only method of approval.

¹⁰ See "Sample Approval Application" and "Guidelines on Completing an EX Number Application," available on the "WayBackMachine," at: http://web.archive.org/web/20090701000000*/http://www.phmsa.dot.gov

manufacturers.”¹¹ As described in the Order, the relationship between Garrett’s was a long-standing business partnership, rather than simply an occasional buyer-seller relationship. Regardless, Garrett’s should have required that its manufacturer(s) provide it with copies of approvals and applications for each device prior to purchase or shipment.

In conclusion, I do not find any of Appellant’s arguments in support of its contention that it should not be held culpable persuasive. It was Garrett’s obligation in entering into the regulated field of transportation of explosive devices to be familiar with applicable regulations and to ensure that each device it shipped was properly approved for transportation. Each entity, no matter the size, nor the claims of other entities, must apprise itself of the applicable regulation(s) when it enters into a regulated field. Therefore, any delay or shortcomings in PHMSA’s communication with Garrett’s or Garrett’s ignorance of the importance of the APA Standard do not excuse Appellant’s shipment of fireworks that had been specifically denied, i.e. “forbidden,” by PHMSA or that were unapproved.

Garrett’s is Capable of Paying the Civil Penalty Assessed in the Order

Finally, Garrett’s argues that PHMSA’s consideration of its financial condition was flawed because it did not consider Garrett’s financial condition contemporaneous to the issuance of the Order. Garrett’s also asserted that the civil penalty assessed in the Order would result in Garrett’s becoming insolvent and filing for bankruptcy.¹² Therefore, for the preparation of this Decision, PHMSA requested updated financial records from Garrett’s, including its most recent corporate Federal tax returns. Garrett’s refused to provide its tax returns for reasons it did not explain. Instead, Garrett’s provided updated, non-certified financial statements.

In considering whether mitigation of a civil penalty is appropriate, PHMSA must consider the factors in “Guidelines for Civil Penalties.” The Guidelines require that PHMSA consider whether a penalty would 1) exceed an amount the respondent is able to pay, or 2) have an adverse effect on the respondent’s ability to continue in business. Among the factors that PHMSA may consider in performing this analysis are: ratio of current assets to current liabilities and the net worth of Appellant. The Guidelines go on to say, “[A] current ratio close to or below 1.0 means that the company may have difficulty in paying a large penalty. . .” and that, “[N]egative net worth alone does not always warrant reduction of a civil penalty.”¹³

An examination of Garrett’s income statement for the 2012 fiscal year end shows that it has a ratio of current assets to current liabilities of 3.9. Although Garrett’s has a negative net worth of (\$39,569), the 2012 income statement also shows total income of \$1,105,529 and a gross profit of \$504,472. Based on Garrett’s healthy ratio of current assets to current liabilities and relatively high gross profits, I find that a \$25,000 civil penalty is unlikely to jeopardize Garrett’s ability to continue

¹¹ Appeal at 5.

¹² Appeal at 2. Garrett’s description of its interactions with this Chinese manufacturer as “arm’s length” is not entirely accurate since on September 12, 2011, Garrett’s requested that PHMSA “transfer . . . all approvals granted to Uncle Sam’s Fireworks & Innovations (Garrett’s former name) to our primary manufacturer, Wu Zhi Hong Mo Import and Export Co. LTD.”

¹³ Appendix A to Subpart D of Part 107 – “Guidelines for Civil Penalties, IV. Miscellaneous Factors Affecting Penalty Amounts, D. Financial Considerations.”

in business. However, the arrangement of a payment plan is warranted and will assist Garrett's in meeting its obligations.

Findings and Financial Condition

Based on the reasons stated above, I affirm the findings in the Order of the Chief Counsel that Garrett's knowingly committed eleven counts of one violation of the HMR, when it offered for transportation in commerce Class 1 explosive materials which were forbidden and/or unapproved for transportation in commerce, in violation of 49 C.F.R. §§ 171.2(a), 173.22, 173.51(a), 173.54, and 173.56. As stated above, Garrett's did not challenge the Order's issuance of the warning for failure to maintain copies of approvals.

I find that there is no justification for reduction of the penalties assessed in the Order based on legal or factual matters. I reject Garrett's various denials of culpability for its admitted violations. I also find that its financial condition does not warrant reduction of the civil penalty. However, I do find justification for the arrangement of an installment plan.

I assess Garrett's Worldwide Enterprises a civil penalty of **\$25,000** for eleven counts of violation of 49 C.F.R. § 173.56.

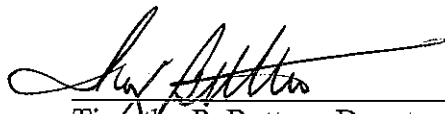
Payment

Garrett's may pay the civil penalty of \$25,000 in five payments of \$5,000. It must make the first payment of \$5,000 within 30 days of this Decision on Appeal and the following payments 30 days thereafter, respectively, until the entire \$25,000 has been paid. Instructions for making payment are set forth in Addendum A.

Final Administrative Action

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

JUL 25 2013
Date



Timothy P. Butters, Deputy Administrator,
Acting Chief Safety Officer

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on July 25th 2013 the undersigned served in the following manner the designated copies of this Decision on Appeal with attached addendum to each party listed below:

Mr. Eric J. Garrett
President
Garrett's Worldwide Enterprises, LLC
P.O. Box 418
Eudora, KS 66025

Original Decision
Certified Mail – Return Receipt

Donald E. Creadore, Esq.
The Creadore Law Firm, P.C.
305 Broadway – 14th Floor
New York, NY 10007

One Copy (without enclosures)
Certified Mail – Return Receipt

John Heneghan
Director, Southern Region
Office of Hazardous Materials Safety
233 Peachtree Street NE, Suite 602
Atlanta, GA. 30303

One Copy (without enclosures)
Electronic Mail

U.S. DOT Dockets, M-30
U.S. Department of Transportation
West Building Ground Floor, Room W12-14
1200 New Jersey Ave., SE
Washington D.C. 20590

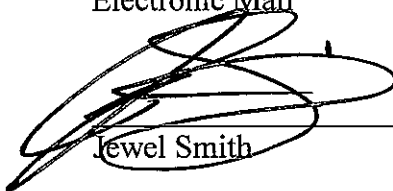
One Copy
Personal Delivery

Vince Lopez, Attorney
Office of Chief Counsel

One Copy (without enclosures)
Electronic Mail

Amelia Samaras, Attorney
Office of Chief Counsel

One Copy (without enclosures)
Electronic Mail



Jewel Smith

Payment of Civil Penalty

The U.S. Department of Transportation's Federal Aviation Administration (FAA) is authorized to receive and process payments of civil penalties assessed by PHMSA.

Respondent must pay a total civil penalty of \$25,000. Respondent may pay this civil penalty in five monthly installments of \$5,000 each.

Respondent must pay the first \$5,000 installment of the civil penalty installment plan within 30 days of the date of this Decision on Appeal. Respondent must pay a further \$5,000 installment each 30 days thereafter until the total civil penalty has been paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first installment is due.

Respondent must pay each installment of the civil penalty by (1) wire transfer, (2) certified check or money order, or (3) credit card via the Internet, in accordance with the following instructions.

(1) Wire Transfer.

Detailed instructions for sending a wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury are contained in the attachment to this Addendum. Please direct any questions concerning wire transfers to:

AMZ-341
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 269039
Oklahoma City, OK 73125
Telephone (405) 954-8893

(2) Check or Money Order.

Make check or money order payable to "U.S. Department of Transportation" (include the Ref. No. of this case on the check or money order) and send to:

AMZ-341
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 269039
Oklahoma City, OK 73125

(3) Credit Card.

To pay electronically using a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

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 Decision. 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 the Decision.

Treasury Department Collection

FAA's Financial Operations Division may also refer this debt and associated charges to the U.S. Department of 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 prior to an offset. You, as the debtor, have 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 Decision constitutes written notification of these procedural rights.

**INSTRUCTIONS FOR ELECTRONIC FUNDS TRANSFER TO
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION**

1. <u>RECEIVER'S ABA NO.</u> 021030004	2. <u>TYPE SUBTYPE</u> (provided by sending bank)
3. <u>SENDING BANK ARB NO.</u> (provided by sending bank)	4. <u>SENDING BANK REF NO.</u> (provided by sending bank)
5. <u>AMOUNT</u>	6. <u>SENDING BANK NAME</u> (provided by sending bank)
7. <u>RECEIVER NAME:</u> TREAS NYC	8. <u>PRODUCT CODE</u> (Normally CTR, or sending bank)
9. <u>BENEFICIAL (BNF) – AGENCY LOCATION CODE</u> BNF=/ALC-69-14-0001	10. <u>REASONS FOR PAYMENT</u> <i>Example: PHMSA Payment for Case #/Ticket.</i>

INSTRUCTIONS: You, as sender of the wire transfer, must provide the sending bank with the information for Block (1), (5), (7), (9), and (10). The information provided in blocks (1), (7), and (9) are constant and remain the same for all wire transfers to the Pipeline and Hazardous Materials Safety Administration, Department of Transportation.

Block #1 - RECEIVER ABA NO. - "021030004": Ensure the sending bank enters this nine digit identification number; it represents the routing symbol for the U.S. Treasury at the Federal Reserve Bank in New York.

Block #5 - AMOUNT - You as the sender provide the amount of the transfer. Please be sure the transfer amount is punctuated with commas and a decimal point.

EXAMPLE: \$10,000.00

Block #7 - RECEIVER NAME- "TREAS NYC." Ensure the sending bank enters this abbreviation, it must be used for all wire transfer to the Treasury Department.

Block #9 - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/ALC-69-14-0001" Ensure the sending bank enters this information. This is the Agency Location Code for Pipeline and Hazardous Materials Safety Administration, Department of Transportation.

Block #10 - REASON FOR PAYMENT – "AC-Payment for PHMSA Case#/To ensure your wire transfer is credited properly, enter the case number/ticket number or Pipeline Assessment number."

Note: - A wire transfer must comply with the format and instructions or the Department cannot accept the wire transfer. You, as the sender, can assist this process by notifying, at the time you send the wire transfer, the General Accounting Division at (405) 954-8893.