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

2007 SEP 12 P 2:55

In the Matter of: **Dive World,** **Respondent**	**PHMSA Case No. 06-0095-SC-SO** **DMS Docket No. PHMSA-2007-29225**

ORDER OF THE CHIEF COUNSEL

This matter is before the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for a determination regarding the Notice of Probable Violation (Notice) issued to Dive World (Respondent) on October 18, 2006. The Notice formally initiated proceedings against Respondent for two violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171–180. The Notice advised Respondent that PHMSA proposed to assess a civil penalty in the amount of $8,100 for: (1) filling and offering for transportation in commerce DOT specification cylinders (hazard class 2.2, UN1002), when the cylinders had not been requalified at the required intervals and records of testing were not maintained, in violation of 49 C.F.R. §§ 171.2(g), 180.205(c); and (2) permitting employee(s) to perform functions subject to the HMR when the employee(s) had not received training and testing and records of such training were not created and retained, in violation of 49 C.F.R. §§ 171.2(a), 172.702(b) and 172.704(a)(2), (d).

Background

Respondent fills and offers DOT specification cylinders containing hazardous materials for transportation within the United States. Respondent also transports DOT specification

cylinders containing hazardous materials. Therefore, Respondent is subject to the jurisdiction of the Secretary of Transportation, PHMSA's Associate Administrator for Hazardous Materials Safety, and PHMSA's Office of Chief Counsel.[1]

On February 8, 2006, inspectors from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Respondent's facility in the U.S. Virgin Islands. During the course of the inspection, the inspectors observed scuba tanks that had been refilled and were prepared for use but were past the required requalification date. DOT 3AL cylinders must be requalified every five years prior to being refilled and transported. Three of the cylinders were marked with the following manufacture dates: 4/95, 5/97, and 4/97. No requalification markings were on the cylinders.

Respondent provided copies of requalification records for some cylinders; however, the cylinders observed by the inspectors were not listed on those records. Several of Respondent's employees who were interviewed by the inspectors did not understand the manufacture and requalification markings on cylinders. As a result, the employees were unable to detect out-of-test cylinders prior to refilling. One employee indicated he had received training approximately eight years prior. Respondent had no documentation of any hazardous materials training for any employees.

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, on October 18, 2006, the Office of Chief Counsel issued the Notice to Respondent, proposing a civil penalty in the amount of $8,100 for two violations of the HMR, which included a $2,700 reduction for corrective actions taken prior to the issuance of the Notice. Respondent replied to the Notice by email on

[1] *See* 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

November 17, 2006.[2] Respondent indicated it is a small business and is unable to pay the proposed civil penalty. The Office of Chief Counsel requested evidence of financial hardship and additional corrective action. Respondent has not replied. The case now comes before the Chief Counsel for decision.

Discussion

Filling, offering and transporting out-of-test cylinders is a serious violation of the HMR. In this case, Respondent was refilling and offering these cylinders for scuba diving. Tourists then obtained these cylinders through several cruise ship lines. In response to the Notice, Respondent stated that it was "sorry for the slight mistake." Serious risks to life and property can result from cylinders which have gone extended periods without requalification – in this case, about four years beyond the required requalification date.

Although Respondent submitted a statement from an independent requalifier listing cylinders Respondent had sent for requalification, the list did not include the cylinders identified by the inspector during the inspection. Respondent has failed to provide evidence that those cylinders have been requalified as required. Respondent admitted it had not provided hazmat training to its employees.

Conclusion

Based on the above facts, I find that Respondent knowingly committed two violations of the HMR. In reaching this conclusion, I have reviewed the Inspection/Investigation Report and accompanying exhibits, the exit briefing, and Respondent's reply.

[2] Due to difficulties with the delivery of the Notice, Respondent's reply is considered timely.

Accordingly, under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.317 and 107.329, I assess a total civil penalty of $8,100 for the two violations of the HMR. The total penalty is allocated as follows:

Violation No. 1: $7,800, as proposed in the Notice; and
Violation No. 2: $300, as proposed in the Notice.

In assessing this civil penalty, I have taken into account the following statutory criteria (49 U.S.C. § 5123(c) and 49 C.F.R § 107.331):

1. The nature, circumstances, extent, and gravity of the violations;
2. with respect to the Respondent, its degree of culpability, any history of prior violations, its ability to pay, and any effect on its ability to continue to do business; and
3. other matters as justice may require.

In consideration of Respondent's status as a small business and professed financial hardship, Respondent may request a payment plan. Due to the serious nature of the violations and Respondent's failure to provide evidence of complete corrective action, a reduction in the civil penalty is inappropriate.

Payment and Appeal

Respondent must either pay the civil penalty in accordance with the attached instructions (Addendum A), or appeal this Order to PHMSA's Administrator. Respondent may request a payment plan extending up to six months by contacting the Office of Chief Counsel; however, the first payment must be made within 30 days of this Order. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325.[3]

[3] The requirements of section 107.325 include the following: (1) File a written appeal within twenty (20) days of receiving this Order (filing effective upon *receipt* by PHMSA); (2) address the appeal to the Administrator, c/o Office of Chief Counsel – PHC, Pipeline and Hazardous Materials Safety Administration, East Building 2nd Floor, 1200 New Jersey Ave. SE, Washington, DC 20590; and (3) state with particularity in the appeal (a) the findings in the Order that are challenged; and (b) all arguments for

This Order constitutes written notification of these procedural rights.

9/12/07
Date

David E. Kunz
Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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setting aside any of the findings in the Order or reducing the penalty assessed in the Order. The appeal must include all relevant information or documentation. *See* 49 C.F.R. § 107.325(c)(2). PHMSA will not consider any arguments or information not submitted in or with the written appeal. PHMSA will regard as untimely any appeal that is received after the twenty (20) day period, and it will not consider the request; therefore, PHMSA recommends the use of fax (202.366.7041) or an overnight service as documents received late will not be accepted.

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of Sept., 2007, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Dive World PO Box 12140 St. Thomas, VI 00801 Attn: Jeanne Bowen	Original Order with Enclosures Certified Mail – Return Receipt
Ryan Posten Director, OHME PHH-40, East Building, 2nd Floor 1200 New Jersey Ave., SE Washington, D.C. 20590	One Copy Internal E-Mail
John Heneghan, Chief Office of Hazardous Materials Enforcement Southern Region Office 233 Peachtree Street, NE, Suite 602 Atlanta, GA 30303	One Copy Internal Email
U.S. DOT Dockets U.S. Department of Transportation [redacted] 1200 New Jersey Ave., SE Washington D.C. 20590	One Copy Personal Delivery

Willard Walker