

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0092

In re:

JOHN (JACK) HENNEN,
Respondent.

Thomas N. Bolick, Esq., for Complainant
John (Jack) Hennen, pro se, for Respondent

DECISION AND ORDER

This matter is before me pursuant to a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (“USDA”; “Complainant”) against John (Jack) Hennen (“Respondent”), alleging violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 (“the Act”) and prevailing regulations set forth at 9 C.F.R. part 88.

This Decision and Order¹ is based upon the pleadings and arguments of the parties, and the photographic, documentary and testamentary evidence.

I. ISSUES

1. Whether Respondent was the owner-shipper as defined by the regulations for the shipment of horses commercially transported for slaughter on February 8, 2007 and March 6, 2007;
2. Whether Respondent violated 9 C.F.R. § 88.4(b)(2) by failing to obtain immediate veterinary assistance for horses that were in obvious physical distress;

¹ Complainant’s evidence shall be denoted as “CX-#”; Respondent’s evidence shall be denoted as “RX-#”; and references to the transcript of the hearing shall be designated “Tr. at [page number]”.

3. Whether Respondent violated 9 C.F.R. § 88.3(a)(1) by commercially transporting horses to slaughter in a conveyance which did not provide adequate protection for the health and well-being of the animals;
4. Whether Respondent failed to handle horses as carefully and expeditiously as possible so as not to cause them unnecessary discomfort, stress, physical harm or trauma in violation of 9 C.F.R. § 88.4(c);
5. Whether Respondent failed to prepare a complete and accurate owner-shipper certificate (Veterinary Services (VS) Form 10-13) in violation of 9 C.F.R. § 88.4(a)(3);
6. Whether Respondent violated 9 C.F.R. § 88.4(b)(4) by offloading horses during the commercial transportation to slaughter and failing to prepare a certificate documenting when and where the horses were reloaded;
7. Whether a civil money penalty should be assessed against Respondent, and if so, the amount of the penalty.

II. STATEMENT OF THE CASE

1. Procedural History

On November 30, 2011, Complainant filed a complaint against the Respondent with the Hearing Clerk for the Office of Administrative Law Judges for USDA (“OALJ”). On December 9, 2011, Respondent filed an Answer. The parties exchanged evidence and filed witness and evidence lists pursuant to my Order, and I set the hearing to commence on August 28, 2012. The parties convened at that time, and testimony was taken by appearance in Washington, D.C., by audio-visual connection with Minneapolis, Minnesota, and by telephone.

At the hearing, Complainant dismissed Count II (c) and Count V of the complaint. I admitted to the record Complainant’s exhibits, identified as CX-1 through 20; CX-30 through CX-33. I held the record open for the receipt of the transcript of the hearing and written closing argument.

Complainant filed proposed findings of fact and conclusions of law on December 6, 2012. On January 22, 2013, Respondent submitted correspondence in which he advised that he would not be engaged in the business of transporting horses under the Slaughter Horses Program. In addition, he provided a copy of a notice of default on a mortgage, and he advised of his intention to file for bankruptcy protection. I have identified this submission as “RX-1” and admit it to the record.

The record is now closed and the matter is ripe for adjudication.

2. Statutory and Regulatory Authority

The Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note et seq.) was included in the 1996 Farm Bill and was intended to assure that horses being transported for slaughter would not be subjected to unsafe and inhumane conditions. Congress directed the Secretary of Agriculture to issue guidelines to accomplish this purpose, and the Secretary delegated this rulemaking authority to APHIS. APHIS established the Slaughter Horse Transportation Program (“SHTP”) to identify how to accomplish Congress’ mandate, and in December, 2001, published a final rule, effective April, 2002, which incorporated the results of SHTP’s studies. See, 9 C.F.R. Part 88.

The regulations include standards for constructing conveyances so that horses can be safely loaded, unloaded, and transported, and rules for the care of horses before and during shipment. The final rule set forth conditions that determine whether horses being transported to the slaughterhouse are fit to travel. Horses must be weight-bearing on all four legs; must not be blind in both eyes; must be able to walk unassisted; must be older than six months of age; and must not be about to give birth. They are to be transported in a manner so as not to cause injury; must be observed at least once every six hours while being transported; and must be offloaded and fed and watered on trips lasting over 28 hours. 9 C.F.R. § 88.4(b).

“During transit to the slaughtering facility, the owner-shipper must obtain veterinary assistance as soon as possible from an equine veterinarian for any equines in obvious physical distress.” 9 C.F.R. § 88.4(b)(2). Further, “if offloading is required en route to the slaughtering facility, the owner-shipper must prepare another owner-shipper certificate...and record the date, time, and location where the offloading occurred. In this situation both owner-shipper certificates would need to accompany the equine to the slaughtering facility.” 9 C.F.R. § 88.4(b)(4).

The regulations apply to any “owner-shipper”, which is defined as someone who commercially transports more than 20 equines a year to slaughtering facilities. 9 C.F.R. § 88.1. The regulations also impose record-keeping requirements. Each horse must be identified with a backtag supplied by USDA. In addition, each horse being shipped must be accompanied by an owner-shipper certificate, VS 10-13, which must contain pertinent information about the owner-shipper, the receiver (the slaughterhouse), the shipping vehicle, and the horse, including a statement of the animal’s fitness to travel.

The regulations authorize the Secretary to assess civil penalties of up to “\$5,000 per violation of any of the regulations” set forth at 9 C.F.R. part 88. 9 C.F.R. § 88.6(a). Further, “each equine transported in violation of the regulations of this part will be considered a separate violation”. 9 C.F.R. § 88(b). The amount of the civil penalty shall be based on the severity of the violation. In re: William Richardson, 66 Agric. Dec. 69 (2007).

3. Summary of the Evidence

A. Documentary and Photographic Evidence

CX 1-20; CX 30-33 include copies of owner-shipper certificates, VS Form 10-13; photocopies of photographs of horses and trailers at Cavel International Inc.; affidavits and statements drafted by inspectors and investigators; photocopies of invoices; and shipment information forms.

RX-1 consists of correspondence from Respondent regarding his ability to pay any penalty imposed herein.

B. Testamentary Evidence

Harry Dawson (Tr. at 17 – 67; corroborated by CX-2 through CX-10)

Mr. Dawson has worked as an investigator with APHIS' Investigative Enforcement Services for 24 years. He has worked for APHIS for more than 35 years. Mr. Dawson was asked to conduct an investigation into Respondent's business by Dr. Knight, the veterinarian in charge of Veterinary Services in Illinois. Dr. Knight's request was prompted by a report of an APHIS inspection of a load of horses owned by Respondent and delivered to Cavel International Slaughterhouse ("Cavel") on February 9, 2007. Former APHIS inspector Ellen Kroc² described her inspection of that date of a load of horses from Mr. Hennen, driven by James Hall. Ms. Kroc had no prior experience with Mr. Hennen or Mr. Hall, but Cavel's manager told her that Mr. Hall had called before the shipment arrived to report that horses on his trailer were down. The manager arranged for Respondent's horses to be unloaded as soon as they arrived.

Ms. Kroc observed one horse down on the trailer floor, which she photographed. The plant veterinarian recommended that the horse be euthanized in the trailer. She noted that the horses appeared generally unsettled. Mr. Hall explained that the horses seemed uneasy from the start, and he stopped 60 miles into the trip and found down horses that he couldn't get up. He traveled to a stockyard in St. Paul, Minnesota where he unloaded the horses to check for injuries. They were all on their feet, but Mr. Hall allowed the horses to rest for about thirty minutes, before he re-loaded them. He stopped for a third time at Osseo, where he discovered two horses down. Mr. Hall managed to get them on their feet and continued his journey. He stopped again in Beloit, where he

² Ms. Kroc no longer worked for USDA at the time of Mr. Dawson's investigation, but she provided an affidavit regarding her inspection, in evidence at CX-6, 7.

found three horses down that he could not get up. All but one was on their feet when he arrived at Cavel in DeKalb.

Ms. Croc's inspection report suggested that Mr. Hennen's shipment violated the Act because horses must be able "to withstand the rigors of the transport". CX-7. Mr. Dawson averred that a veterinarian should have been called to examine the downed horses to assess their ability to weather the travel and to provide treatment.

Mr. Dawson's investigation also revealed violations of recordkeeping requirements. The documents that he reviewed included an owner-shipper certificate, VS Form 10-13, in the name of Jack Hennen, dated February 8, 2007. CX-1. The VS Form 10-13 documented a shipment of horses to Cavel originating from Hennen Farms in Paynesville, Minnesota. Mr. Dawson testified that several sections of the VS Form 10-13 were not complete. The USDA tag number was not completely listed for all of the horses and the form failed to identify the sex and color of all the horses.

In addition, Mr. Hall should have prepared a new owner-shipper certificate when he unloaded and then reloaded the horses at the stockyard in St. Paul. Mr. Dawson explained that Mr. Hall had custody for the load when he unloaded them and reloaded them, and USDA would have accepted him as a shipper from the point of reloading in St. Paul. Tr. at 64.

Douglas Hoffman (Tr. at 67-109; 239 - 241)

Mr. Hoffman worked for APHIS for seven years until he took a new position in March, 2008. His worked as APHIS' primary inspector under the Act at Cavel. He trained Ms. Croc, who was hired to also conduct inspections at Cavel for compliance with the Act. He was working at Cavel on March 6, 2007, when a load from Respondent arrived. The paperwork associated with the load identified Mr. Hennen as the owner. Mr. Hoffman observed that one of the horses had fresh cuts on its face and about both of its eyes. He took pictures of the horse and its injuries, and

inspected the conveyance, where he observed a shovel with the blade turned out suspended on two mounts near the ceiling of the conveyance. He took photographs of blood-stains on the wall of the conveyance. The documents that accompanied the load did not note a pre-existing injury on any of the horses.

Mr. Hoffman saw nothing in the conveyance that could have injured the horse but the shovel. He believed it was dangerous to store a shovel with the blade turned out as horses can jump and be injured on the blade. He did not believe that the shovel could have been stored with the blade turned inward and then later dislodged. Mr. Hoffman referred to his photographs, which he believed depicted blood on the blade of the shovel. Mr. Hoffman confirmed that bungee cords with hooks were used to secure the shovel. No horses were on the trailer when he inspected it, and he did not know the height of the horse relative to the shovel, or the distance from the shovel of a large blood stain on the trailer wall.

In Mr. Hoffman's opinion, the cause of injury to the horse did not matter, because the owner-shipper is responsible for ensuring its safety during transport. Mr. Hoffman testified that horses can get hurt during transport due to a number of reasons, including their temperaments, the temperaments of other horses, or the metal construction of a trailer. He believed that the injuries he observed were caused by something metal, and not by other animals. Mr. Hoffman believed that the presence of the shovel posed a higher risk of injury to the horses in the trailer, as the animals could be pushed against the shovel.

Mr. Hoffman clarified that although one of the horse's eyes appeared to be white, suggesting cataract or blindness, the white area was actually the reflection of his camera's flash. He noted that blindness is a condition that owner-shippers are required to describe on the VS 10-13, and the Form listing the horses in this shipment did not identify such a condition (CX-11).

Leslie Vissage (Tr. at 110 – 122; corroborated by CX-20)

Ms. Vissage has worked as an investigator with the Investigative and Enforcement Division of APHIS since 2003. Her primary duty is to conduct investigations into alleged violations of statutes and regulations that fall within APHIS' jurisdiction from her duty station Minnesota. Ms. Vissage was asked to assist Mr. Dawson's investigation of Respondent's activities on March 6, 2007 by interviewing John Eveslage. She spoke with Mr. Eveslage by telephone, but he declined to meet with her to sign an affidavit. Mr. Eveslage confirmed that he had delivered a load of horses for slaughter for Respondent on that evening, and that one of the horses reared up and cut its head on a shovel that was mounted on the wall of the trailer near the ceiling. Mr. Eveslage told Ms. Vissage that he wasn't aware that a horse could do such a thing. Mr. Eveslage did not place the shovel in the trailer, and he did not prepare the paperwork for the load.

Ms. Vissage also interviewed Mr. Hennen with respect to the March 6, 2007 load and prepared an affidavit that Mr. Hennen signed. Mr. Hennen had confirmed that Mr. Eveslage was the driver, and he told Ms. Vissage that any injury to a horse on that load must have happened in transit.

Dr. Timothy Cordes (Tr. at 123 – 180; 245 -268)

Dr. Cordes has worked for APHIS' Veterinary Services for twenty years as the agency's equine expert, and he is currently the Senior Veterinarian for the agency. In 2007, Dr. Cordes was the Director of the Slaughter Horse Transport Program ("SHTP") which the doctor had developed in the 1990s. Before his government service, Dr. Cordes worked with horses in private practice for twenty years. His experience with horses includes serving as the veterinarian for the United States Equestrian Team.

Dr. Cordes reviewed photographs of downed horses in the trailer (CX-7; CX-8) and stated that the amount of fecal matter on the trailer floor was "treacherous", as horses would have

difficulty standing on the uneven surface in a swaying trailer. Tr. at 131. The amount of fecal matter evident on the trailer floor would not have accumulated in the 24 hours or less that would have transpired in moving the horses on this occasion. Dr. Cordes concluded that the owner of the trailer did not thoroughly clean it out before loading and transporting the horses, and the doctor opined that “Mr. Carter knows better than that”. Tr. at 148. The trailer should have been cleaned to the metal floor and then lined with shavings to give the horses traction.

In Dr. Cordes’ experience, it is unusual for horses to fight as much as the horses apparently did on the February 8, 2007 trip. The regulations segregate stallions to avert aggression during transport, and the doctor believed that horses scheduled for slaughter should be observed for behavioral risks before loading.

Dr. Cordes reviewed the photograph of the injured horse (CX-18) and offered his opinion that the injury to the horse’s eye was caused by trauma. The doctor pointed to lacerations along the front of the horse’s head that he believed to be compatible with striking the shovel. Dr. Cordes surmised that the injured horse reared up and struck its head and eye on the shovel, which was affixed to its mount with its blade facing out. The doctor explained that since horses have limited close vision, the injured horse may not have seen the shovel. He further testified that horses often rear up during transit. The doctor’s studies and experience with the SHTP demonstrate that 80% of injuries to horses in transit to slaughter occur to the head. Dr. Cordes testified that the shovel was “the most likely etiology” of the injury to the horse’s eye and face.

Dr. Cordes explained that whether the trailer was six feet, nine feet, or twelve feet high, a horse could easily rear up and strike its head on a shovel blade one foot lower than the ceiling. He did not believe the injury was caused by fighting with other horses because he would have expected to see other horses injured. Dr. Cordes credited the statements of the driver, who was unfamiliar with horses and who was not aware that they could have jumped and injured themselves on the

shovel. The doctor conceded that an almost horse-head shaped blood stain was evident on the photographs at a place much lower than the shovel and closer to what appears to be a horizontal rail around the trailer. Although the rail appeared smooth, the doctor observed that it would not take much of a protuberance to gravely injure a horse's eye and head.

Dr. Cordes believed that the injury to the horse's eye may have healed if the horse had been meant to live. He also thought that what looked like a cataract in the horse's other eye in the picture he reviewed was actually a reflection of the camera's flash.

The doctor believed it was "unconscionable" to have stored a clean-out shovel in the same space as the horses, given how easily horses sustain head injuries during transit. Tr. at 135. Dr. Cordes described how the regulations and SHTP imposed standards for transporting horses, but did not mandate a particular design for the trailers used to carry them. The overall purpose of the regulations was to ensure transportation methods least likely to hurt horses.

Dr. Cordes addressed the requirement to fill out a new VS Form 10-13 when a shipment of horses is unloaded and reloaded en route to slaughter, explaining that the regulations are meant to ensure that USDA can ascertain exactly what horses are being transported. USDA adopted the term owner-shipper to address the reality that often the driver of the transport is not the actual owner of the horses, and to impute the obligations of the owner to the driver where circumstances warranted.

Dr. Cordes testified that owner-shippers had been required to document the contents of their loads from the inception of the SHTP. Tr. at 249. He explained that civil penalties were provided for in the Act to encourage compliance and uniformity with the mandates for the program. In the current case, the SHTP recommended a civil penalty of \$17,375.00. In making the recommendation, such factors as the seriousness of the violations, their frequency, and the history of the Respondent's compliance with the Act and regulations were considered. Serious violations

are those that result in injury to horses, such as transporting horses in poorly maintained equipment, or failing to provide veterinary care.

The SHTP concluded that Respondent had committed serious violations of the Act, when Respondent failed to provide veterinary care on February 8, 2007, when at least one horse went down during transport. Dr. Cordes believed that the condition of the trailer, added to the failure to provide veterinary care, demonstrated a failure to carefully transport horses in a manner designed to minimize injury, stress and discomfort. Each of these violations merits a penalty of \$5,000.00. In addition, the injury to the horse's head during the transportation of the load on March 6, 2007 represented failure to carefully transport horses in a manner designed to minimize injury, stress and discomfort, which merited a sanction of \$5,000.00. The injury to the horse also reflected the failure to provide cargo space that would protect the health and well-being of the transported horses, for which a penalty of \$2,000.00 was sought.

Dr. Cordes considered Mr. Hennen's lapses with paperwork to be "minor offenses". Tr. at 252. Nevertheless, SHTP recommended a penalty of \$25.00 each for erroneously prepared health certificates, for a total of \$175.00, and a penalty of \$200.00 for unloading and reloading horses without preparing a new certificate.

In requesting the maximum penalty, Dr. Cordes testified that he considered Respondent's otherwise unblemished history of transporting horses under the Act, but nevertheless believed that the violations were egregious enough to merit the maximum sanction. The doctor believed that the injury to horse's eye was severe enough to merit the maximum penalty, particularly given that he believed the harm could have been avoided. Dr. Cordes did not assess the maximum penalty for the presence of the shovel. Dr. Cordes did not credit Respondent's contentions that he was being unfairly held responsible for the actions of others, because the intent of the program is to hold the self-designated owner-shipper liable under the Act.

*John Hennen*³

Mr. Hennen has worked with horses and cattle since he was fifteen (15) years old. Tr. at 186. He primarily farms and raises cattle, but he also hauls horses for slaughter at times because there is a need for people to do that. Id. He testified that he special-hires transportation to get horses to the slaughterhouse. Tr. at 61 – 65. Mr. Hennen had not shipped horses for slaughter for months before the agency implemented the reporting requirements. Tr. at 162-163. He contacted USDA to get some advice about how to proceed, and received only the tags and forms in the mail, without instruction on how to use them. Tr. at 65; 163.

Mr. Hennen was not aware of the requirement to prepare another form whenever horses are unloaded, but maintained that even if he had known, the driver should be the person held responsible for completing the form. Tr. at 188. Mr. Hennen agreed with Dr. Cordes that the driver of the load that had been offloaded should have prepared an additional VS-10-13. Tr. at 146. He did not understand why he was responsible for the driver's failure to complete the form. Tr. at 63; 187. Mr. Hennen acknowledged that the hired driver may not have had a VS 10-13 form because USDA provides them to Mr. Hennen as the owner. Tr. at 65. However, he believed that "it [is] totally wrong that I am responsible especially in the one case of a driver being hired by Cavel, which is proved by the documents. They paid him, they lined him up. They sent him out with a trailer that was froze up so bad that if I was there, I would never have loaded it". Tr. at 187. Mr. Hennen did not know which trucking company would be dispatched by Cavel to pick up his February 8, 2007 load of horses. Tr. at 228; 230. He was contacted by Cavel and put together the

³ Because Mr. Hennen's questioning often took the form of testimony, I have referenced each of his statements to the transcript.

load in a hurry. Tr. at 228-229. He was not involved in paying the trucker. Tr. at 229. Mr. Hennen had never met Charlie Carter, but he was aware that Mr. Carter did not have the best reputation. Id.

Mr. Hennen concurred with Dr. Cordes' observations about the condition of the trailer that Cavel had hired to transport his horses. Tr. at 145. He agreed that the frozen floor was responsible for the horses being "jittery" and then downed. Tr. at 146. He compared the floor of the trailer on that load with the other load at issue in this case, and observed that the second trailer's floor looked as he would have expected for the number of horses and distance traveled. Tr. at 188. Mr. Hennen explained that his hired man loaded the trailer, which he never saw. Tr. at 187.

Respondent remembered receiving a call from the driver of the February load, and instructing him to go to St. Paul and unload the trailer because horses were down. Id. Mr. Hennen testified that the driver failed to state in his affidavit that he left two horses at St. Paul, which accounts for the discrepancy between the head count and the paperwork. Tr. at 187-188. In his opinion, the driver took an inordinate amount of time to reach his destination; the distance was 550 miles and is usually covered in 10 hours. Tr. at 188.

Respondent praised the driver of the other load as "about the most conscientious that hauls livestock". Tr. at 194-195. He compared the pictures depicting the two loads and observed that the floor of Mr. Eveslage's trailer was clean, and had been salted and covered with sand and shavings. Tr. at 195.

Respondent took good care of his horses, fattening them up so that he could get a good price. Tr. at 189. Mr. Hennen referred to the pictures of horses as examples of how well fed his horses were. Tr. at 190. Mr. Hennen has shipped "hundreds of loads of horses" and never had a horse injured or condemned. Tr. at 190. He observed that there was no advantage to him to have horses downed or injured, as that would affect how he was paid. Id. Mr. Hennen believed that the

driver should be held responsible for the horses en route because he could not do anything for horses from 500 miles away. Tr. at 190. He did not know that a horse was injured. Tr. at 191.

Mr. Hennen has purchased his own floor trailers, and he loads compartments separately. Tr. at 191. Before loading horses, he keeps them together in a pen to observe their behavior, as Dr. Cordes recommended. Tr. at 191-192. If he notices a horse fighting, that animal is loaded in a separate compartment from the others. Tr. at 192.

Mr. Hennen disputed that the injured horse was hurt by the shovel, observing that the blood print on the wall was closer to a hog panel around the trailer. Tr. at 192-193. He speculated that the trailer may not have been appropriate for hauling horses to slaughter. Tr. at 193. Even if the shovel did not hurt the horse, Mr. Hennen would have removed it if he had seen it. Tr. at 194.

The driver, Mr. Eveslage, had hauled as many as ten loads of slaughter horses for Mr. Hennen during the spring in question, but refused to transport any more horses after the horse was injured. Tr. at 193. Mr. Hennen asserted that it was not unusual for horses in transport to be injured, but he acknowledged that the injury to the eye of the horse at issue here was “terrible”. Tr. at 194. Nevertheless, he testified, “it isn’t like I inflicted it. So, I can’t see why I should be judged and fined eight, \$10,000 for something a third party totally did. I have no control over it. I took care of them as well as I know how and that I have for 40 years. No different today as I did then.” Tr. at 194.

Mr. Hennen addressed the photographs showing the dirty trailer floor and testified that the horses in the trailer would have had trouble staying up. Tr. at 196. He also noted that the driver was aware that the horses were fractious, and unloaded them. Id. Mr. Hennen was not on the scene for the unloading and reloading, and did not understand how he would be held accountable for what the driver did. Tr. at 198. He also was not responsible for the time the trailer spent at Cavel waiting to be unloaded. Tr. at 199-200. Mr. Hennen observed that he suffered the financial loss of the horse

that died, and stated that it was in his interest to assure that the horses arrived safely at their destination. Tr. at 202-205.

Respondent explained that he was not present when his hired hand loaded the horses on February 8, 2007 (CX-1; CX-8). Tr. at 206-208. The horses are loaded at night so they may be delivered in the morning because the Cavel plant has no pens to hold horses that are unloaded. Tr. at 208-209. Mr. Hennen's drivers have told him that they sometimes have to wait in line for six hours for the horses to be unloaded. Tr. at 210. The driver who transported the load on February 8, 2007, Mr. Hall, called Mr. Hennen approximately 100 miles into the trip to report down horses, and Mr. Hennen directed Mr. Hall to a location in St. Paul, where he could unload the horses and leave them until Mr. Hennen could collect them the following week. Tr. at 211. Instead, Mr. Hall unloaded the horses, reloaded all but two (which remained in St. Paul), and continued on his trip. Tr. at 211-212.

Although he acknowledged that his hired hand should have noticed the condition of the trailer and reported it, Mr. Hennen explained that his help generally only perform the jobs they are assigned. Tr. at 212. Also, the hired hand probably did not go onto the truck, as the driver generally leads the horses. Tr. at 214. The horses are sorted by temperament and size in an effort to eliminate aggressive behavior. Tr. at 212-213. Mr. Hennen was not familiar with the truck used on that trip, and his own trucks are designed specifically to accommodate the horses. Tr. at 214-215.

Mr. Hennen maintained that the trucking company, Carter, should be held responsible for the down horses, and explained that the driver called him to ask about unloading them because Carter would not have known where to send the driver. Tr. at 218. He recalled that he was attending a social function when he received the call, and he was contacted again by the driver at about 2:00 a.m., after the horses were unloaded. Tr. at 218-219.

Mr. Hennen had used Mr. Eveslage and his equipment frequently before the load of March 6, 2007, and his equipment had always been maintained and power washed, and always had fresh

shavings on the trailer floor. Tr. at 220-221; 227. Mr. Hennen had been in Mr. Eveslage's trailer at times and had not noticed a shovel. Tr. at 221. He learned that Mr. Eveslage had always stored a clean-out shovel in the trailer after the horse was injured during the load of March 6, 2007. Tr. at 224. Mr. Hennen noted that he was not present when the horses were loaded for that trip by a hired hand, Mr. Lahr. CX-11; Tr. At 224. He did not learn about the injury to the horse's eye until Ms. Vissage told him, possibly a year or more after the fact. Tr. at 225.

Mr. Hennen agreed that he had made mistakes with filling out paperwork, but noted that he had no instructions on how to prepare the paperwork, which showed up unexpectedly. Tr. at 61-62.

4. Discussion

A. Violations

Status of Respondent as "owner-shipper" under the Act. See, 9 C.F.R. § 88.1

Documents prepared to accompany both loads of horses at issue herein list Respondent's name as the owner-shipper and bear Mr. Hennen's signature. See, CX-1; CX-11. In both instances, the horses were loaded at Respondent's place of business. Documents from Cavel International reflect that Mr. Hennen was the consignor, vendor, or payee for both shipments of horse. See, CX-2; CX-3; CX-13; CX-14. The driver of the February 8, 2007 shipment identified Mr. Hennen as the owner and shipper of the horses he transported, and also identified Mr. Hennen as the person who loaded the horses at Respondent's business site in Paynesville, Minnesota. See, CX-7; CX-9.

I reject Respondent's contention that he should not be held responsible for the condition of the trailer or the events that transpired during the transportation of the horses on February 8, 2007. I accept Mr. Hennen's testimony that this shipment of horses was expedited upon the request of Cavel, who arranged for the transportation company and driver. However, Mr. Hennen had no obligation to use that shipper, and as he testified that Mr. Carter did not have a stellar reputation, the

wise course of action would have dictated the use of another conveyance. At the very least, the conveyance should have been inspected for suitability. Mr. Hennen's employee helped to load the horses, and while Mr. Hennen testified that he would have hoped that his hired hand would have noticed the dirty trailer floor, it is clear that the employee was not charged to do so. Mr. Hennen believes that because the driver is responsible to keep his trailer in good condition, and not hired help, the driver and Carter should be held responsible for what happened to horses that night. Tr. at 214-215.

This attempt to shift responsibility to the driver is without merit. Respondent benefited from the sale of the horses, and it is clear from the record that he was in contact with the driver during the trip and directed his actions. I give little weight to Mr. Dawson's contention that APHIS would have accepted Mr. Hall as a shipper if he had filled out a new VS 10-13 when he unloaded the horses. Respondent bore the ultimate responsibility for the load's safety and took no action to assure that the horses were being transported in compliance with the Act and regulations.

Although it is true that there was little Mr. Hennen could have done for the horse injured in March, 2007, it is not apparent that the driver would have known what to do. He was not familiar with horses. Moreover, Mr. Hennen neglected to confirm that a trailer generally used to transport cattle was appropriate to meet the regulatory demands of transporting horses to slaughter.

Other indicia of Mr. Hennen's obligation for the horses are that he signed the owner-shipper documents that accompanied the horses to their final destination, and directed the driver's conduct during the trip. Though Mr. Hennen protested that there was nothing he could do for loads that were traveling 500 miles from where he was, he nevertheless managed to dispatch Mr. Hall to a stockyard in St. Paul when Hall called to report that the horses were unsettled. As Mr. Hennen explained, the driver was not familiar with facilities in Minneapolis. Respondent was aware that the driver left two horses behind at the facility, and Mr. Hennen presumed that he paid for their board

during the interim before he retrieved them. Further, Mr. Hennen testified that it was to his advantage to have horses arrive in good health, as he financially benefited from their sale.

There is no affirmative evidence of record that Carter or Cavel assumed responsibility for the animals at any time during the transaction. I find Mr. Hennen's suggestion that Carter could have provided Mr. Hall with paperwork to complete is not consistent with the fact that Mr. Hennen signed the VX 10-13 prepared at the start of the trip. All of the circumstances suggest that Mr. Hennen remained in control of the loads until they were delivered to Cavel. I find it significant that Mr. Hall did not call either Mr. Carter or anyone at the Cavel facility when he first encountered difficulties with the horses during his trip. Although Mr. Hall called Cavel in advance of his arrival, it was to give warning of his problem and allow him to advance to the front of the line of trailers waiting to be unloaded. It is undisputed that hours could pass in line while waiting to be unloaded.

The preponderance of the evidence establishes that Respondent was the owner-shipper of the two loads of horses at issue herein, and is responsible under Act and prevailing regulations for non-compliant conduct.

February 8, 2007 Shipment

Cavel contacted Mr. Hennen and asked if he could send them a load of horses on a conveyance arranged for by Cavel. A trailer owned and operated by C.C. Horse Transport, owned by Charles Carter ("Carter") was sent to Respondent for that purpose on February 8, 2007. Although Mr. Hennen did not personally load the horses, his employee helped James Hall, the driver hired by Carter, to load them. Approximately one hour into his trip, Mr. Hall called Mr. Hennen to report that the horses in the trailer had seemed fractious and unsettled, thereby prompting Mr. Hall to stop to inspect the horses. He found horses down and had trouble getting them on their feet. After seeking advice from Mr. Hennen by telephone, Mr. Hall drove to a stockyard in St. Paul, where he unloaded the horses and rested them before re-loading them and continuing his trip. Mr.

Hall felt constrained to stop again en route because he was concerned about the horses. Again, he found downed horses that were not easily put on their feet. Mr. Hall called Cavel to report the situation and when he arrived at his destination, all but one horse was standing. That horse was euthanized.

The record reflects that the trailer used to transport horses on February 8, 2007 was less than optimum for its purpose. The floor of the trailer was covered with a thick layer of frozen manure that in all likelihood contributed to the problems that the horses experienced during this trip. I accord substantial weight to Dr. Cordes' testimony that the surface of the floor made it difficult for horses to maintain their footing, and I note that Mr. Hennen agreed with Dr. Cordes' observations. That numerous horses fell during transit and one horse could not be roused and had to be euthanized demonstrates the de facto dangerous condition of the conveyance. The failure to provide a trailer with a floor that would stabilize the horses in transit constitutes a violation of the mandate to handle the horse as carefully as possible so as to avoid unnecessary discomfort, stress, physical harm or trauma in violation of 9 C.F.R. § 88.4(c).

Further, by failing to call a veterinarian when confronted with numerous downed horses, Respondent demonstrated that he was more committed to fulfilling Cavel's expectations than to meet the regulatory mandate to safeguard his horses. Mr. Hennen testified that the trip took an inordinate amount of time, apparently not considering that Mr. Hall was concerned enough about the horses to stop several times to inspect them. Other than to assert that the driver was responsible for the trip, Mr. Hennen provided no explanation for why he did not find a veterinarian to assess the fitness of the horses to continue their journey, despite several calls from Mr. Hall reporting their distress and condition. Mr. Hennen perceived that Mr. Hall was not familiar with the area and therefore directed him where to unload the animals. It strains credibility that Respondent would not have reached the same conclusion about Mr. Hall's knowledge of local veterinarians. An

examination of the animals and inspection of the conveyance by a qualified veterinarian may have resulted in the cleaning of the trailer, and prevented the need for a horse to be euthanized.

Complainant has established that Respondent violated 9 C.F.R. § 88.4 (c) when he failed to provide prompt veterinary care.

March 6, 2007 Shipment

Respondent shipped a number of horses to Cavel on March 6, 2007, in a conveyance driven by John Eveslage, whom Mr. Hennen trusted and admired. Mr. Hennen described the trailer containing the horses as being kept in “spotless” condition, and explained that the trailer floor was always lined with shavings, and that the equipment was always power-washed after a load. Tr. at 234. Nevertheless, during transit, one horse suffered a severe injury to its head and eye. Inspector Hoffman inspected the load upon its arrival at Cavel and observed and photographed the injured animal and the trailer. His photographs include one of a triangle-shaped blood-stain on the trailer wall. He also noticed the presence of a shovel that was used to clean out the trailer, affixed by bungee cords to an improvised rack near the ceiling of the compartment holding the horses. The blood stain was on the wall midway between the trailer floor and the shovel, which was placed so that its blade faced outwards toward the trailer space.

Mr. Hoffman concluded that the horse had injured itself on the shovel blade. Referring to his photographs, Mr. Hoffman described reddish marks on the shovel as blood stains. Dr. Cordes similarly testified that the horse’s injuries were caused by impact with the shovel blade, based upon the photographs, the testimony, and documentary evidence. The doctor explained that horses had poor eyesight and thin skin on their heads, making them susceptible to injury. Dr. Cordes further described their tendency to jump and rear up, thereby putting them at risk of harm. He said they often fight and injure each other. Investigator Vissage interviewed the driver of the load, who told

her that one of the horses injured its head when it reared up and struck its head on a clean out shovel that was hung high on the wall of the trailer. CX-20.

I find that the evidence regarding the cause of the horse's injury is inconclusive. There were no witnesses to the incident that caused the injury. Although the driver believed the horse injured itself on the shovel, he had little experience with horses as he usually transported cattle. Mr. Eveslage's conclusions may have been influenced by the opinion of Mr. Hoffman. As Mr. Eveslage did not testify, I am unable to discern the basis for his opinion. The horse sustained lacerations on its head, but considering Dr. Cordes' testimony about the poor eyesight of horses and the susceptibility of their heads to injury, impact with the shovel is but a theory. Upon questioning, Mr. Hoffman conceded that the horse could have reared up and struck the metal bungee cord hooks that held the shovel in place. Mr. Hennen believed that the horse could have been hurt on hog panel construction of the trailer.

The preponderance of the evidence does not clearly point to the shovel as the instrument of the horse's harm. Mr. Hoffman did not know the height of the trailer, or the distance of the shovel from the floor or from the ceiling. Tr. at 86-87. Although Mr. Hoffman testified that the shovel, which remained affixed to the wall despite the conjectured contact with the horse, had blood stains on the blade, no forensic tests are in evidence to confirm the presence of blood on the shovel. The photographs depict reddish stains evenly distributed along the outside edges of the shovel blade, and another small, discrete stain on the handle of the shovel, away from the blade. The reddish stains on the shovel could have been caused by rust, as Mr. Hennen suggested. The presence of rust is consistent with the use of the shovel to clean a trailer in cold climate in winter time.

I further note that the stains are uniform, and appear along both edges of the blade, which seems incongruous with a jarring impact that created the wounds sustained by the horse. The photographs show no splatter pattern on the surface of the shovel and no blood stains on the wall

near the shovel, which remarkably was not dislodged when the horse supposedly struck it. The pictures of the horse's wounds suggest a violent impact, and Dr. Cordes described the eye injury as "severe". Tr. at 257. There is no streak of blood running down the trailer wall consistent with the horse jumping up, hitting the shovel, and returning to a standing position.

By contrast, there is a large blood stain, shaped convincingly like a horse's head, on the trailer wall, some feet below the location of the shovel and generally at the height of a standing horse's head. Despite Mr. Hoffman's description of the trailer wall as smooth, the photographs show some kind of fitting running horizontally along the trailer wall, suggestive of a chair rail. It is as likely that the horse injured itself by hitting its head on a jagged edge of that rail as it is that the injury was caused by the horse jumping up and hitting the shovel or bungee cord hooks. I decline to accord substantial weight to speculations and theories, and accordingly, I find that the preponderance of the evidence fails to establish how the horse was injured in transit.

Although I am unable to determine the cause of the horse's injury, the fact remains that an animal was brutally harmed during transport to slaughter. The regulations demand that the conveyance used for such animals be maintained in a manner to assure their safety and well-being. Given the evidence regarding the fragility of horses and their propensity for injury, it appears that one may not entirely guarantee that horses shall be entirely free of the risk of harm during transportation to slaughter. Dr. Cordes observed that horses often fight and injure each other. Nevertheless, I accord substantial weight to Dr. Cordes' opinion that the shovel presented a risk of injury to horses, particularly as it was stored with its blades turned outward. Respondent concurred with this conclusion, saying he would not have had the shovel in the cargo area, and observing that "if anything could happen, it would happen to a horse". Tr. at 237.

Mr. Hennen testified that he had not observed that shovel in the cargo area of Mr. Eveslage's conveyance. He generally used Mr. Eveslage to transport cattle, which would not be at

the same risk as a horse from the shovel. After the March 6, 2007 incident, Mr. Eveslage admitted to Mr. Hennen that he always kept his clean out shovel in the animal cargo area, but stored it with the blade turned towards the wall. Since Mr. Eveslage was more familiar with transporting cattle, Mr. Hennen should have made more efforts to establish that the trailer was safe to carry horses. It is not clear whether Mr. Hennen helped load the horses for the March 6, 2007 trip, as his testimony about that load was vague at best. However, I infer from the gravamen of his testimony that Mr. Hennen relied upon his experience with the cleanliness of Mr. Eveslage's equipment and did not inspect further for potential risks. Mr. Hennen admitted that the conveyance may not have been suitable for horses.

It is immaterial that the source of the horse's injuries cannot be identified, since the very presence of the shovel in the cargo area violated the mandate that the conveyance used to transport horses to slaughter be maintained in a manner to avoid unnecessary discomfort, stress, physical harm, or trauma. The responsibility for the horses' welfare in transit, and for assuring that the container conveying them would pose no risk of harm, lies on Respondent. Although the conveyance did not belong to Respondent, Mr. Hennen contracted for its use, was the acknowledged owner-shipper, and profited from the sale of the horses. I find that the preponderance of the evidence demonstrates that Respondent failed to transport horses bound for slaughter in a manner that at all times protected their health and well-being in violation of 9 C.F.R. § 88.4(c).

Recordkeeping Violations

Respondent admitted that he had little experience with completing owner-shipper certificates, and that errors and omissions on the forms were inadvertent. On the two certificates at issue, the drivers of the loads of horses listed their information and Mr. Hennen completed the rest of the form. Tr. at 119-120. Mr. Hennen was not aware that a new certificate was required when

horses were unloaded; but he argued that the driver could not have prepared a new certificate because he did not have one with him. Tr. at 188.

I credit Mr. Hennen's explanation that he did not receive instruction on completing the required certificates. Dr. Cordes corroborated Mr. Hennen's testimony when he acknowledged that information about the SHTP did not always reach all participants. Tr. at 160-162. However, when he undertook to transport horses to slaughter, Respondent assumed full responsibility to comply with the regulations controlling such transportation. The regulations were published, and Mr. Hennen had at least constructive notice of their content. Since he was sent VX 10-13 forms and backtags, Respondent was provided some actual notice of regulatory requirements. Mr. Hennen did not make a persuasive case that he aggressively sought direction about the requirements imposed by regulation on owner-shippers in the SHTP. Mr. Hennen testified that he sought instructions on filling out paperwork. When he received no response to his inquiry, he proceeded as best he could. There is no evidence that Mr. Hennen willfully violated recordkeeping requirements pertaining to the SHTP, but I conclude that his attempts to determine his obligations were half-hearted at best.

Accordingly, I find that Respondent violated the recordkeeping requirements imposed by regulations implementing the Act when he failed to accurately record information on VS Form 10-13. A further violation occurred on February 8, 2007, when he failed to instruct his driver to complete a new certificate that would have reflected that the load was unloaded and reloaded, and that two horses were left behind in St. Paul. I accord full weight to Dr. Cordes' explanation that SHTP needs accurate information regarding the identify of horses shipped for slaughter. See, Tr. at 142-143.

The record establishes that Respondent's dereliction regarding paperwork led to violations of 9 C.F.R. § 88.4(a)(3) and 9 C.F.R. § 88.4(b)(4).

B. Sanctions

Dr. Cordes testified that the events that led to a downed horse that had to be euthanized and the severe injury to a horse during transit culminated in serious violations of the Act and regulations. SHTP concluded that Respondent's actions were serious enough to merit the imposition of the maximum civil penalty per violation for the failure to obtain veterinary assistance for the downed horse; the failure in two instances to transport horses in a manner that did not cause unnecessary discomfort, stress, physical harm or trauma; and the failure to maintain the animal cargo space in a manner that at all times protected the health and well being of the horses. Dr. Cordes characterized these violations as very serious to moderately serious. Dr. Cordes acknowledged that Respondent had no record of previous violations, but he observed that the circumstances merited the maximum penalty because he perceived the violations as preventable. The paperwork violations were considered relatively minor.

The preponderance of the evidence supports the imposition of civil money penalties in this case. Respondent's actions regarding the two loads under discussion herein demonstrate a naïve, if not cavalier, approach to his duty of care to the horses. Although I credit Mr. Hennen's testimony that he sorted horses to prevent trouble in transit, and fed horses in advance of their trip, both of those actions accreted to Mr. Hennen's benefit by bringing him a good price at their destination. Meanwhile, Mr. Hennen sought to transfer responsibility for the horses' welfare to the drivers of the loads. He failed to inspect either trailer used for the trips. When informed about downed horses, he failed to call for veterinary care. He remained ignorant of his responsibilities regarding paperwork. Although there is no evidence that Respondent intended to violate the Act and regulations, neither is there much evidence that he strove to comply with them.

Although I generally agree with the sanctions recommended by SHTP, I find that the facts suggest a different apportionment of the penalties than what was proposed. I concur with the maximum penalty of \$5,000.00 for the failure to obtain veterinary care and \$5,000.00 for the failure

to transport the horses in a manner designed to prevent stress and harm during the load shipped on February 8, 2007. A cleaner trailer may have been all that was needed to prevent horses from going down throughout their journey.

Although I find that the circumstances leading to the horse's injuries on March 6, 2007 warrant sanctions, the recommended penalties are not consistent with the facts⁴. As I explained in detail herein, supra., the fact that the horse was injured during transport in a manner suggesting impact with something man-made represents a failure to transport horses in compliance with the regulations, and merits the imposition of the maximum penalty of \$5,000.00. Dr. Cordes ruled out a fight with another horse as the cause of the injury. A simple inspection of the conveyance by Mr. Hennen may have led to the removal of the shovel, and the potential determination that the trailer was not good to transport horses, as he speculated at the hearing. Mr. Hennen pointed out that hog panels could have caused injury.

Since I cannot conclusively identify the cause of the horse's injury, I decline to impose the maximum penalty of \$5,000.00. However, the severity of the injury, which logically was related to some condition in the trailer, merits a penalty of \$2,000.00.

I adopt SHTP's calculation of sanctions for the paperwork violations, and hereby impose a penalty of \$25.00 for each omission or mistake on the VS 10-13 prepared for the February 8, 2007 shipment, for a total of \$175.00. I further impose a penalty of \$200.00 for the failure to prepare a second certificate when some of the horses from that load were left behind in St. Paul.

Mr. Hennen has presented testamentary and documentary evidence of his financial inability to pay any penalties. However, the ability to pay is not a factor for consideration when determining the merits of imposing sanctions. In re: Leroy H. Baker, Jr. et al, 67 Agric. Dec. 1259 (2008). The

⁴ Although one might find my approach to be a matter of semantics as the proposed sum of the penalties remains unchanged, I have endeavored to relate the penalty with the factual evidence of a violation in furtherance of the purpose of sanctions to deter similar conduct.

imposition of sanctions is designed to further the congressional purposes of the Act and to deter violations of the Act and its regulations. In re: Spencer Livestock Commission Co., and Mike Donaldson, 46 Agric Dec. 268, 431 (1987).

III. FINDINGS OF FACT

1. Respondent John (Jack) Hennen is a resident of the state of Minnesota and was, during the time relevant to this proceeding, in the business of buying and selling livestock, including horses intended for slaughter.
2. On February 8, 2007, Respondent commercially transported 32 horses to Cavel for slaughter but failed to properly complete required owner-shipper certificate VS Form 10-13, in that the form failed to include the color and sex of all of the horses and did not completely include the prefix for the USDA back tag for one horse.
3. During the February 8, 2007 transportation, Respondent instructed his driver to stop at a stockyard in St. Paul, Minnesota after learning that horses were down, but failed to instruct the driver to complete a second VS Form 10-13 that would have reported that the horses had been unloaded and reloaded, and the fact that two horses were left behind.
4. Respondent failed to obtain veterinary care for the horses transported on February 8, 2007, despite being aware that some had been downed during the trip.
5. Upon arrival of the February 8, 2007 shipment at Cavel, one downed horse needed to be euthanized.
6. The unsanitary condition of the floor of the trailer used to transport the horses on February 8, 2007, was the most likely cause of horses being down.
7. Respondent had not inspected the trailer to assure that it would provide safe transportation for the horses.
8. On March 6, 2007, Respondent commercially transported 26 horses to Cavel for slaughter.

9. Respondent had frequently used the driver and his equipment to transport cattle with positive results.
10. Respondent did not inspect the cargo space of the container used to transport the horses and did not identify the presence of a shovel with its blade turned toward the cargo space, which was affixed by bungee cords to the wall near the ceiling.
11. Upon the arrival of the March 6, 2007 shipment at Cavel, one of the horses was observed to have severe lacerations on its head and eye.
12. A triangular blood stain was present midway up the wall of the container, beneath the area where the shovel was affixed.
13. It was hypothesized that the horse reared and struck the shovel, but no one witnessed the accident and no forensic testing established the cause of the horse's injuries.
14. The construction of the trailer may have posed a risk of injury to horses as well as the presence of the shovel.

IV. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Respondent is an owner-shipper as defined by the Act and prevailing regulations.
3. By failing to accurately complete VS Form 10-13, Respondent violated 9 C.F.R. §§ 88.4(a)(3)(v) and (vi).
4. Respondent violated 9 C.F.R. § 88.4(b)(4) by failing to instruct the driver of the February 8, 2007 load to prepare a VS Form 10-13 when the horses were unloaded and reloaded on that date in St. Paul, Minnesota.
5. Respondent violated 9 C.F.R. § 88.4(b) when he failed to obtain veterinary assistance for horses that were downed during the February 8, 2007 trip.

6. As evidenced by the need to euthanize one horse upon the load's arrival at Cavel, Respondent failed to handle horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm, or trauma in violation of 9 C.F.R. § 88.4(c).
7. By failing to inspect the cargo space used to transport horses to slaughter on March 6, 2007, and assuring that it was an appropriate conveyance for the transportation of horses which did not present obvious risk of injury, Respondent failed to maintain the animal cargo space of the conveyance used in a manner that at all times protected the health and well being of the horses transported in violation of 9 C.F.R. § 88.3(a)(1).
8. As evidenced by the injury sustained by one horse during transit on March 6, 2007, Respondent failed to handle slaughter horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm, or trauma in violation of 9 C.F.R. § 88.4(c).
9. The imposition of sanctions is warranted in these circumstances.

ORDER

Respondent John (Jack) Hennen is assessed a civil penalty of seventeen thousand three hundred and seventy-five (\$17,375.00). Within thirty (30) days from the effective date of this Order, Respondent shall send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall include a notation of the docket number of this proceeding.

This Order shall be final and effective thirty (30) days after the date of service of this Order on the Respondent unless there is an appeal to the Judicial Officer for the USDA, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145)

So Ordered this 21st day of February, 2013 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge