



MEMORANDUM

President
William Duff
Toyota Motor Sales
bill_duff@toyota.com

First Vice President
Robert Heinrich
Novartis Pharmaceuticals
Robert.Heinrich@pharma.novartis.com

Second Vice President/Treasurer
Christopher Palabrica, CPM, CHMM
Mays Chemical Co.
chrisp@mayschem.com

Secretary
Jeanne Zmich
Labelmaster
JEANNEZ@alc-net.com

Executive Committee Member
Richard Lattimer
Eli Lilly and Company
R.Lattimer@lilly.com

Board of Directors
Donald Bossow
JohnsonDiversey, Inc.
donald.bossow@johnsondiversey.com

John D'Aloia
Mary Kay Inc.
john.d'aloia@mkcorp.com

Steven Dishion
Procter & Gamble
dishion.sl@pg.com

David Evans
Purolator Courier Ltd.
devans2@purolator.com

Amy Fischesser
Sun Chemical Corporation
amy.fischesser@na.sunchem.com

Janet Kolodziej-Nykolyn
Roche
Janet_L.Kolodziej-Nykolyn@roche.com

Claudia Meeks
Ford Motor Company
cmeeks@ford.com

Thomas Paciga
New Century Transportation
Tpaciga@NCTrans.com

General Counsel
Richard Schweitzer, PLLC

TO: COSTHA Members

FROM: Richard P. Schweitzer, COSTHA General Counsel

RE: PHMSA Appellate Decisions on HMR Violations

DATE: April 6, 2006

The Pipelines and Hazardous Materials Safety Administration has recently issued two decisions of interest to COSTHA members in appeals of violations of the Hazardous Materials Regulations. Both decisions reinforce the concept that re-shippers of hazardous materials have an independent duty to ensure proper classification, marking and labeling of a product received from a supplier and then re-shipped to a customer. The second decision also notes that the fact that a finding of a violation resulted from a complaint filed by a third party is not relevant to whether the violation is valid, and also reviews the criteria for assessing penalties for HMR violations.

The first case, *Aldrich Chemical Com., Inc.*, PHMSA Case No. 04-068-FSB-EA, DMS Docket No. RSPA-04-19015, involved a U.S. distributor of a PIH material. The distributor received the material from a foreign manufacturer that apparently misclassified the material and therefore failed to describe the material properly on shipping papers, package and mark and label the product. The distributor relied on the manufacturer's classification and related compliance efforts and re-shipped the product to a customer in the U.S. A RSPA/PHMSA inspector noted the violations during an inspection at the customer's site. A civil penalty of \$12,190 was originally proposed for the violations, which included a reduction of 25% because the respondent was a re-shipper.

The decision on appeal stated:

[T]he HMR do not explicitly require re-shippers to reanalyze and reclassify all potentially hazardous materials prior to shipping; however, a re-shipper “independently is responsible for ensuring that the shipment complies with Federal hazmat law.” 49 C.F.R. § 107, Subpart D, App. A. Therefore, re-shippers are required to investigate when there is sufficient information to suggest the shipper’s original; classification was incorrect and then, if necessary, to reclassify those materials prior to re-shipping.

The decision noted that the re-shipper’s reliance on the original shipper’s classification was not reasonable because there was a discrepancy between the packaging and the information available on the MSDS and the listing for the component chemicals in the HM Table. The inspector contacted the manufacturer for the actual concentrations of the material, and the inspector then concluded that the material was misclassified. PHMSA determined that the re-shipper could and should have taken the same steps to reach the same conclusions.

The second case, *East Fork Enterprises, Inc.*, PHMSA Case No. 03-501-SB-SW, Docket No. RSPA-2005-20270, also involved a U.S. distributor for hazmat received from foreign manufacturers. The eventual U.S. customer filed a complaint with PHMSA that the product was not offered with a shipping paper or properly packaged, labeled or marked. East Fork Enterprises, the U.S. distributor, re-shipped the product within the U.S. without complying with the HMR.

Once the violation was noted, the distributor took remedial steps: it contacted the manufacturers to verify the product contents, established shipping papers and included the distributor as an authorized user under the vendors’ contacts for emergency response services. The distributor also obtained labels, shipping papers and a copy of the HMR, and instituted a policy that two employees must verify that each shipment meets the HMR.

The initial penalty determination was \$4,770. PHMSA noted that the “motivations of the person filing the complaint” do not mitigate HMR violations and are not relevant to the distributor’s culpability or the amount of the penalty.

On appeal, it was clarified that the distributor began taking corrective actions before the PHMSA inspection occurred, not after. The Acting Administrator further reduced the penalty to take into account the timing of these corrective actions, and ordered another reduction of 40 percent on the basis of hardship. But PHMSA refused to impose only a minimal penalty, finding that failing to identify a hazardous material in transportation is “particularly dangerous.” The final civil penalty imposed amounted to \$2,500.