# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW, Suite 9500
Washington, D.C. 20001

July 7, 2003

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. YORK 2001-67-M |
| Petitioner | : | A.C. No. 30-03254-05508 |
| | : | |
| v. | : | Docket No. YORK 2002-59-M |
| | : | A.C. No. 30-03254-05510 |
| | : | |
| | : | Docket No. YORK 2002-30-M |
| D.A.S. SAND & GRAVEL, INC., | : | A.C. No. 30-03254-05509 |
| Respondent | : | |
| | : | Docket No. YORK 2003-11-M |
| | : | A.C. No. 30-03254-05511 |
| | : | |
| | : | D.A.S. Sand & Gravel |

DECISION

Appearances: Terrence Duncan, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York, for the Petitioner;
David A. Scheer, President, D.A.S. Sand & Gravel, Inc., Newark, New York, for the Respondent.

Before: Judge Schroeder

These cases are before me on Petitions by the Secretary for the assessment of Civil Penalties for the alleged violation of mine safety regulations. The cases were consolidated without opposition in the interest of economical adjudication. A hearing was held in Rochester, New York, on April 23, 2003. Both sides were given an opportunity to submit written argument on the legal and factual issues raised at the hearing. After giving the record and the several presentations of counsel careful consideration, I make the following findings and conclusions:

Factual Findings

**Jurisdiction**

D.A.S. Sand and Gravel is a small business engaged in the extraction of sand and gravel from a native deposit for sale to the general public. David Scheer has been the owner, president

and chief executive since 1998. It is not disputed that D.A.S. has sold sand and gravel only to buyers within New York State although purchasers may have used the materials for purposes with multi-state consequences, e.g., road construction. Equipment used in the business has been purchased from suppliers in other states.

An essential element of the D.A.S. operation is the use of a front-end loader. A loader is used to remove native materials and transport them to a sorter. After the sorted material is moved to stockpiles by belt, a loader is used to move material from an appropriate stockpile to a buyer's truck. At least three front-end loaders in various mechanical condition were identified in the record as used by D.A.S. The majority of the citations issued by MSHA in these cases involve mechanical defects alleged to be present in the front-end loaders.

An MSHA inspector visited the Respondent's business on two occasions relevant to these cases, September 19, 2000, and November 8, 2001. There was no apparent change in the way the business was conducted between those two dates. Respondent does not claim any significant changes in the period since the last inspection.

**Citations**

The facts regarding specific alleged violations of mine safety regulations can be best grouped by business function. The allegations concern (1) front-end loaders, (2) handrails, (3) electric faults, (4) guards, and (5) record keeping. Respondent's evidence was directed more to the potential significance of the violations than to the actual occurrence of a violation.

(1) Front-end loaders

Of the fifteen (15) citations at issue, nine deal with some aspect of the front-end loaders used by the Respondent. Three citations, 7724561, 7741669, and 7741667 allege that back-up alarms were not functional. Back-up alarms are the noise- makers that are intended to alert people other than the driver that the vehicle is in reverse and the driver is probably unable to clearly see the immediate area behind the vehicle. The MSHA inspector, William Korbel, testified that he observed the vehicles in operation backing up and did not hear a back-up alarm. He also testified the vehicles constitute a very significant safety risk to other persons in the area, both those on foot and those in other vehicles. It was his opinion that the operator was at risk even in low speed impacts to other vehicles because of the persistent failure to wear seat belts. Mr. Scheer testified to facts intended not to dispute the violations (failure to have working back-up alarms) but to lessen the perceived risk of injury. He testified the business is small. The customers are usually repeat buyers that are familiar with the operations that involve the front-end loaders. People do not wander around the grounds on foot, but stay in the truck they drove to pick up sand or gravel. Mr. Scheer did not deny knowing the regulatory requirement for a back-up alarm.

Four citations, 7724562, 7724564, 7724574, and 7741668, deal with the brakes on the front-end loaders, either the parking brakes or the services brakes. Mr. Korbel testified he

observed the vehicles, had operating tests performed on both level ground and inclines, and found serious defects in the brakes. Mr. Scheer testified to facts which he believed minimized the likelihood of injury from inadequate brakes. He testified most of the work with front-end loaders is performed on level ground at very low speeds by people familiar with the operation. It was his opinion that the weight of the machines made stopping the engine an effective braking technique. He did concede that some ramps and inclines are part of the area used by the front-end loaders. He also conceded that the area is sometimes wet and slick.

Two Citations, 7741666 and 7724560, deal with the failure to use seat belts in operating the front-end loaders. Mr. Korbel testified that on his first visit to D.A.S. in September 2000, the seat belts were stuffed under the seat to keep them out of the way. A similar scene greeted him on his return in October 2001. Mr. Scheer did not dispute the failure to wear seat belts, but merely testified as to the slow speeds in limited circumstances in which the vehicles were operated as lessening the likelihood of injury from failure to wear seat belts. He did not dispute his knowledge of the regulatory requirement to use seat belts.

(2) Hand Rails

One citation, 7724567, was issued for failure to have adequate handrails on an elevated catwalk. A slack rope was draped across an opening of approximately twenty-five feet. The deck was more than ten feet in the air. Workers were required to be on the deck on a regular basis for service of the sorter. Mr. Korbel testified the rope was more of a tripping hazard than a safety aid for people working on the deck. Mr. Scheer testified he was instructed to use a rope by a MSHA inspector, whose name he could not recall. He testified the risks of injury were small because the deck is used only for short periods of time by people familiar with the location.

(3) Electric Faults

Two citations, 7724568 and 7724570, were issued for electrical problems. One citation involved the alleged failure to include adequate circuit overload protection in the sorter motor circuits. The other citation involved an alleged failure to perform and document ground resistance or continuity tests of the sorter electrical circuits. Mr. Korbel testified the lack of circuit overload protection presented a risk of fire. The lack of testing of the circuits, in his opinion, made monitoring of the adequacy of electrical protection very difficult, and hence, the prevention of serious shock hazards was made more difficult. The electric current levels are sufficient to cause serious injury or death if shock hazards are not avoided. Mr. Scheer testified the electric circuits were created by a qualified electrical contractor familiar with MSHA requirements. He denied instructing the contractor to omit necessary, but expensive, components in the circuits. He attempted to articulate a theory under which ground resistance or continuity tests were unnecessary. He claimed extensive knowledge of electrical circuits and their hazards because of work experience prior to owning a sand and gravel facility. I found his testimony confusing and unpersuasive.

(4) Guards

Two citations, 7741670 and 7741671, were issued for failure to maintain guards on the conveyer belt tail pulleys. Mr. Korbel testified the tail pulleys were at a working level and had exposed pinch points that presented a significant risk of injury to hands and feet of workers. Mr. Scheer did not dispute the lack of guards at the time of inspection and merely testified as to the small number of persons exposed to the risk because of the small size of his business.

(5) Record Keeping

One citation, 7741672, was issued for failure to maintain records of ordering parts to correct previously identified safety risks. Mr. Scheer did not testify as to any reason for failure to maintain the necessary records.

## Legal Conclusions

The legal issues in these cases divide easily into two groups: (1) those associated with the jurisdiction of the Secretary over the activities of D.A.S., and (2) those associated with the obligation of the Secretary to provide evidence of particular violations of mine safety regulations with an appropriate sanction. Unless the Secretary is successful on the first issue, the second issue need not be decided.

### Jurisdiction

In contesting jurisdiction of the Secretary, D.A.S. argues it does not operate a "mine" as that term is used in the Mine Safety Act. D.A.S. contends its products are not introduced into interstate commerce as required under the Act.[1] Mr. Scheer testified the essential economic realities of transportation costs compared to value make it impossible for a sand and gravel pit to sell to buyers more than a relatively short distance from the material source. The location of the D.A.S. source, goes the argument, makes it economically impossible for any of its product to cross a state line.

With one exception noted below, all of the Respondent's arguments were raised and answered in favor of jurisdiction in the Secretary in the case of *Secretary of Labor v. Tide Creek Rock, Inc.*, 24 FMSHRC 210 (February 2002). *Tide Creek* involved a small, family-run, crushed stone operation quite similar to the D.A.S. facility. Judge Barbour specifically noted:

[1]Section 4 of the Federal Mine Safety & Health Act of 1977 provides "[e]ach coal or other mine, the products of which enter commerce, or the operations of products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

> It is true that Tide Creek is small and most of its product is sold locally. However, even under these circumstances, it has been found that interstate commerce is affected because of the cumulative effect small scale operation can have in interstate pricing and demand.

D.A.S. attempts to avoid the effect of this and similar cases over the years by relying on a recent decision of the Supreme Court in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers,* 531 U.S. 159 (2003), which involved the use of an abandoned sand and gravel pit for a municipal waste dump. The Supreme Court overturned the position of the Corps of Engineers on the requirement for a permit under the Clean Water Act to allow the filling of the abandoned pit. The language used by the Supreme Court is enticing. Chief Justice Rehnquist discusses limitations on federal power under the Commerce Clause of the Constitution in terms that suggest the Court intends a retreat from prior holdings on the limits of this power. But a careful reading of the case leads to the conclusion the decision was not intended to limit authority of the federal government such as that exercised by the Secretary in this case.

The Supreme Court was faced with the question of whether the jurisdictional definition in the Clean Water Act of "navigable waters of the United States" included the ponds which remained after the abandonment of a sand and gravel pit. The Corps of Engineers argued that the regular use of those ponds by migratory birds supplied a Commerce Clause nexus sufficient for Congress to exercise power to regulate the use of the ponds. Chief Justice Rehnquist responded that the hypothetical limits of the power of Congress were not at issue. At issue were the actual limits of the exercise of the power of Congress with respect to the gravel pit ponds. On this issue the Chief Justice replied that Congress has not expressed an intent to exercise its power over the ponds, assuming it had power to exercise. The opinion is actually limited to a interpretation of the statutory language of the Clean Water Act. Chief Justice Rehnquist specifically notes that the potential constitutional issue is not being decided in this case.

Nothing in the *Solid Waste* decision would inhibit Congress from exercising Commerce Clause power over health and safety in small sand and gravel pits. The question is whether it chose to exercise that power. The legislative history of the Mine Safety Act is very different from the Clean Water Act on the issue of congressional intent to occupy the field.

The Federal Mine Safety and Health Act of 1977, 30 U.S. C. § 801 *et.seq.*, was passed after a series of mine disasters had illustrated the need for consistent and uniform standards for the mining industry that would be enforced at the federal level. Attempts to secure adequate state enforcement of health and safety standards had been unsuccessful, with some states doing more than others. The Congress, in passing the Mine Safety Act, specifically noted that the business of extracting minerals from the earth is an inherently dangerous activity that must be carefully administered if it is to serve the needs of both customers and employees. To assure that consistent and uniform standards and practices would be implemented, Congress included in the Mine Safety Act a very broad definition of a mine. The Senate Committee which drafted the bill that became the Mine Safety Act noted "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it

is the intention of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. " U.S. Code Congressional and Administrative News, 1977, 3401, 3414. This legislative intent was early recognized and implemented by the courts. *United States v. Lake,* 985 F. 2d 265 (C.A. 6, 1993), *Marshall v. Kraynak,* 604 F.2d 231 (C.A. 3, 1979)

It is clear to me that Congress intended to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine. For the purpose of this case, I conclude that Congress exercised sufficient authority under the Commerce Clause of the Constitution to make the Respondent's sand and gravel business subject to regulation by the Mine Safety and Health Administration and this Commission.

**Citations**

In evaluating the claims by the Secretary, my responsibility is to follow a two-step process: (1) determine whether a regulation was violated, and (2) determine the appropriate penalty for any violations under the criteria in Section 110(i) of the Mine Safety Act. *Secretary of Labor v. Lexicon, Inc.,* 24 FMSHRC 1014, 1029 (Nov. 2002). D.A.S. is a small company with no established history of prior violations, but which has not established a practice of good faith efforts to abate violations or correct safety problems. The Respondent made no attempt to show that its financial condition is such that payment of any particular level of Civil Penalty would endanger its ability to stay in business.

(1) Front-end Loaders

In Citations 7724561, 7741669, and 7741667, Respondent is alleged to have violated 30 C.F.R. §56.14132, which provides:

> *(b) (1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have - (i) An automatic reverse-activated signal alarm;*

This regulation was violated. The front-end loaders must be equipped with a functioning back- up alarm. It is a mandatory safety standard. It was known by the Respondent to be a mandatory safety standard. Because of the setting in which operations occurred, the gravity of the violation is moderate. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $600.00 for the three Citations.

In Citations 772462, 7724564, 7724574, and 7741668, Respondent is alleged to have violated 30 C.F.R. §56.14101(a)(1) which provides:

> *(1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the*

*maximum grade it travels*.

This regulation was violated. The front-end loaders must be equipped with functioning brakes that make it possible for the operator to stop a loaded vehicle on a ramp within a reasonable distance. This regulation seems such an obvious mandatory safety standard that the Respondent must be presumed to have been aware of the requirement. Because of the setting in which operations occurred, the gravity of the violation is moderate. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $1,000.00 for the three Citations.

In Citations 7741666, and 7724560, Respondent is alleged to have violated 30 C.F.R. §56.14130(g), which provides:

> *(g) Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.*

This regulation was violated. The operators, including the owner and supervisor, regularly failed to wear seat belts in the front-end loader. This regulation was known to the supervisor and operators. Because of the low speeds involved in the setting in which operations occurred, the gravity of the violation is minimal. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $200.00 for the two Citations.

(2) Hand Rails

In Citation 7724567, Respondent is alleged to have violated 30 C.F.R. §56.11002, which provides:

> *Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.*

This regulation was violated. The catwalk was not provided with a substantial handrail in place of a designating rope. There is a reasonable dispute as to Respondent's knowledge of this requirement, and the gravity of the violation is minimal. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

(3) Electric Faults

In Citation 7723568, Respondent is alleged to have violated 30 C.F.R. §56.12001, which provides:

*Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.*

This regulation was violated. The motor circuits did not include protection against overload in the form or either fuses or circuit breakers. Respondent claimed to have relied upon a qualified electrician in the creation of the circuits. Mr. Scheer claimed, on the other hand, to be knowledgeable on the subject of electrical circuits. The need for overload protection seems so clear as to make it impossible to claim ignorance of the requirement. Mr. Scheer did not claim ignorance but, rather, claimed the equivalent safety factor was provided by other means. His explanation of the other means was unpersuasive. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

In Citation 7724570, Respondent is alleged to have violated 30 C.F.R. §56.12028, which provides:

*Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.*

This regulation was violated. Respondent was quite candid in testifying that the testing was not performed so a record could not be maintained. Mr. Scheer testified as to various theories of electric circuits under which such information would not be required. His testimony on this subject was unpersuasive. No electrical injuries have been sustained in the Respondent's business. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

(4) Guards

In Citations 7741670 and 7741671, Respondent is alleged to have violated 30 C.F.R. §56.14107, which provides:

*(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades and similar moving parts that can cause injury.*

This regulation was violated in both instances. The conveyer belt pulleys contain pinch points that can cause injury to people moving in the area. Respondent made no claim the pulleys were guarded, but merely attempted to minimize the risk because of the small number of people exposed to the unguarded machinery. I find the appropriate penalty, after consideration of all the statutory criteria, to be $250.00.

(5) Record Keeping

In Citation 7741672, Respondent is alleged to have violated 30 C.F.R. §56.14100(d), which provides:

> *(d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.*

This regulation was violated. The testimony indicates records were not kept of either brake or back-up alarm malfunctions, and this failure was the reason why records were not produced at the request of the MSHA inspector. I find the appropriate penalty, after consideration of all the statutory criteria, to be $200.00.

## Summary

It is my conclusion that the Respondent has violated a variety of mine safety regulations, perhaps in part motivated by his strongly held conviction as to his legal position, with serious consequences for the health and safety of his employees and customers. The total Civil Penalty appropriate to redress these violations is $2,400.00.

## ORDER

The Respondent is directed to pay a Civil Penalty of $2,400.00 within 40 days of the date of this Order. The parties are to bear their own costs.

Irwin Schroeder
Administrative Law Judge

Distribution: (Certified Mail)

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