FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2006-9-M
Petitioner	:	A. C. No. 30-03254-72284
v.	:	
	:	Docket No. YORK 2006-16-M
	:	A. C. No. 30-03254-74704
DAVID SCHEER,	:	
d/b/a D. A. S. SAND & GRAVEL,	:	Docket No. YORK 2006-31-M
Respondent	:	A. C. No. 30-03254-80332
	:	
	:	Docket No. YORK 2006-45-M
	:	A. C. No. 30-03254-77405
	:	
	:	Docket No. YORK 2006-46-M
	:	A. C. No. 30-03254-85164
	:	
	:	Docket No. YORK 2006-64-M
	:	A. C. No. 30-03254-90790
	:	
	:	DAS Sand & Gravel
	:	

DECISION DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION AND GRANTING PETITIONER'S CROSS MOTION FOR PARTIAL SUMMARY DECISION

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act," charging , as amended, David Scheer d/b/a D.A.S. Sand & Gravel (DAS) with violations under the Mine Act. DAS answered the Secretary's petitions in these six cases by asserting several jurisdictional defenses. At the request of the parties, these cases were consolidated for an interlocutory decision on the jurisdictional issues.[1]

For purposes of this decision the parties have agreed and stipulated (1) that "David Scheer

[1] The Respondent filed a pleading on these issues captioned "Motion to Dismiss" and the Petitioner replied to the motion. Since these pleadings were conditioned upon factual assertions that have now been stipulated, they are deemed to be a Motion for Summary Decision and Cross Motion for Partial Summary Decision, respectively, under Commission Rule 67(b), 29 C.F.R. § 2700.67(b).

d/b/a D.A.S. Sand and Gravel" is the successor-in-interest to D.A.S. Sand and Gravel Inc." and that "privity" exists between these parties; and (2) that the cited facility produced sand and gravel and that such sand and gravel was sold solely within the state of New York at the time of all charging documents at issue in these cases as it was in the cases before Commission Judge Schroeder in *D.A.S. Sand and Gravel, Inc.* 25 FMSHRC 364 (July 2003)(ALJ).[2] As noted, the parties have agreed that the jurisdictional facts in these cases are the same as presented before Judge Schroeder in *D.A.S. Sand & Gravel Inc.*, 25 FMSHRC 364 (July 2003) (ALJ), aff'd *D.A.S. Sand & Gravel v. Chao*, 386 F.3d 460 (2d Cir. 2004), cert. denied 125 S.Ct. 2294 (2005).

Respondent first argues in its motion to dismiss that the Secretary does not have jurisdiction over the Respondent's operation because sand and gravel extracted at the subject facility are not "minerals" as that term is used in the Mine Act. While ordinarily resolution of the factual question of whether a material is a "mineral" would require expert testimony presented at hearing, because there is both case law and legislative history supporting Mine Act jurisdiction over sand and gravel operations, there is no need in these cases for such expert testimony.

There is now well-established case law that sand and gravel operations are subject to the jurisdiction of the Act. *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979), cert. denied 100 S.Ct. 665; *Marshall v. Cedar Lake Sand and Gravel Company, Inc.*, 480 F. Supp. 171, 173 (E.D. Wis. 1979). In addition, the U.S. Court of Appeals for the Second Circuit in the earlier case involving D.A.S. Sand and Gravel, Inc. in *D.A.S. Sand and Gravel Inc. v. Chao*, 386 F3rd 460 (2nd Cir. 2004) did not question its jurisdiction over that sand and gravel operation as a "mine" under the Mine Act. The Commission and its judges have also continued to exercise jurisdiction over sand and gravel operations. See e.g. *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994) and *Nicholson, employed by A-Rock, Inc.*, 16 FMSHRC 1967 (September 1994) (ALJ).

As the Secretary also notes, the legislative history of the Act confirms that Congress intended to place sand and gravel operators under Mine Act jurisdiction. The Mine Act repealed and replaced the Federal Metal and Nonmetallic Mine Safety Act of 1966, formerly 30 U.S.C. 721 *et seq*. (the 1966 Act). Both acts use the same words to define "mine"as "an area of land from which minerals [other than coal or lignite] are extracted in nonliquid form or, if in liquid form, are extracted with workers underground". As several courts have noted, the 1966 Act regulated sand and gravel pits as mines. See *Marshall v. Texoline Co.* 612 F.2d 935,938(C.A. Rex., 1980)("Although the sand and gravel industry does not have the long history of regulation found in the coal mining industry, Congress clearly found that sand and gravel excavations could be almost as dangerous as underground coal mines and consequently in need of similar supervision.") (citing U.S. Code Cong. & Admin. News, p. 2851 (1966)); *Marshall v. Nolichuckey Sand Co., Inc.* 606 F.2d 693, 695-696 (6th Cir. 1979) ("statistics before Congress in 1966 [...] 'conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries."') (citing S.Rep.No. 1296, 89th Cong. 2d Sess., reprinted in 1966 U.S.Code Cong. and Admin. News. Pp. 2846-2851)*;Marshall v. Halquist Stone Co. Inc.,* 512 F. Supp. 379, 379-380

[2] Commission Docket Nos. YORK 2001-67-M, 2002-59-M, 2002-30-M and 2003-11-M.

(E.D.Wis., 1981) (citing U.S. Code Cong. & Admin. News, pp. 2851-2852, 2870 and 2874. In drafting the Mine Act, Congress copied the 1966 Act's definitional language verbatim, thus indicating that the new Mine Act was intended to regulate the same mines (including sand and gravel pits) as the 1966 Act which it superceded.

Both the House and Senate reports on the Mine Act address sand and gravel mines. The Senate report incorporates a chart tallying the number of mining operations in various subgroups, "to assist the Senate in understanding the scope of the industry affected". This chart includes a category labeled "Sand and Gravel", noting that there are 5,368 year-round mines and 2,450 intermittent mines in this category. S. Rep. No. 95-181 (1977). Furthermore, the Senate report acknowledges public statements received from, *inter alia*, the National Sand and Gravel Association. S. Rep. No. 95-181 (1977).

The House report notes that:

> A serious problem remains, however, when one views the safety record for metal and nonmetal mining relative to that for coal mining. For the 10 year period since the Metal and Nonmetallic Mine Safety Act was passed, 1967 through 1976, the overall fatality rate for metal and nonmetal miners, including those in underground mines, surface mines (including open pit and sand and gravel mines, and stone quarries) and mills, averaged slightly over half that for coal miners, who work in underground mines, surface mines, and mechanical cleaning plants.

H. Rep. No. 95-312 (1977) (emphasis added). As this legislative history shows, Congress actively considered the scope of the sand and gravel industry, and the hazards posed by that industry, when it passed the Mine Act.

Since the passage of the Mine Act, Congress has frequently revisited the issue of sand and gravel mine regulation. In sixteen appropriation acts dating from 1982 through 1998, Congress specifically restricted the Mine Safety and Health Administration's (MSHA's) expenditures on the "enforcement of any training requirement, with respect to shell dredging, or with respect to any sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mine." (emphasis added).[3] These successive enactments confirm that Congress was aware that it had granted jurisdiction over sand and gravel mines to MSHA under the Mine Act.

Thus, Congress actively considered regulation of sand and gravel pits before, during and after the passage of the Mine Act - - in its enactment of the predecessor 1966 Act, in its deliberations

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[3] Public Law 105-277, 112 Stat 2681, 2681-345; Public Law 105-78, 111 Stat 1467, 1475; Public Law 104-134, 110 Stat 1321, 1321-217; Public Law 104-208, 110 Stat 3009, 3009-240; Public Law 103-333, 108 Stat 2539, 2546; Public Law 103-112; 107 Stat 1082, 1088; Public Law 102-394, 106 Stat 1792, 1798; Public Law 102-170, 105 Stat 1107, 1112; Public Law 101-517, 104 Stat 2190, 2195; Public Law 101-166, 103 Stat 1159, 1164; Public Law 100-436, 102 Stat 1680; Public Law 100-202, 101 Stat 1329; Public Law 99-178, 99 Stat 1102; Public Law 98-619, 98 Stat 3305; Public Law 98-139, 97 Stat 871; Public Law 97-377, 96 Stat 1830

over the Mine Act itself, and in subsequent referencing the Mine Act. Therefore, based on both the case law and an analysis of the legislative history of the Mine Act, there can be no doubt that the extraction of sand and gravel is within Mine Act jurisdiction.

Respondent next argues that the Mine Act does not apply to its operations because its products do not affect or enter interstate commerce as required under Section 4 of the Mine Act. Section 4 of the Mine Act provides that: "[e]ach coal or other mine, the products of which enter commerce or the operations or 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." As the Secretary notes, the U.S. Court of Appeals for the Second Circuit directly addressed this issue when it was raised in an earlier Mine Act proceeding brought by the cited facility's previous owner, D.A.S. Sand & Gravel Inc., in *D.A.S. Sand & Gravel Inc., v. Chao*, 386 F.3d 460 (2nd Cir. 2004), cert. denied 125 S. Ct. 2294. As previously noted, the parties have stipulated that privity exists between that corporation and the present ownership. The Secretary argues that the doctrine of collateral estoppel therefore precludes Respondent from again raising the issue.

A party is collaterally estopped from raising an issue in a proceeding if: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgement on the merits. See e.g., *Interoceanica Corp. v. Sound Pilots, Inc.* 107 F.3d 86, 91 (2nd Cir. 1997), citing *Central Hudson Gas & Elec. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995), *Davis v. Halpern*, 813 F.2d 37, 39 (2d Cir. 1987)(internal quotations omitted). See also *Bethencrgy Mines, Inc*., 14 FMSHRC 17, 26 (January 1992).

As the Secretary notes, the four elements of the collateral estoppel test are satisfied here. Accordingly, the second circuit decision on the issue at bar constitutes a valid and final judgement on the merits and its holding is binding on the Respondent herein. More specifically the circuit court concluded that "[b]ecause we hold that the Commerce Clause grants Congress the authority to regulate DAS's mine, and because we hold that Congress intended to wield its regulatory authority to the full extent provided it by the Commerce Clause, the mine is within the scope of Section 4 of the Mine Act, and is therefore subject to regulations promulgated by the Secretary of Labor." *D.A.S. 2nd Cir.* at 464.

In finding that Respondent's mine was subject to the jurisdiction of the Mine Act, the second circuit assumed that the materials sold by Respondent did not travel in interstate commerce. *D.A.S. 2nd Cir.* at 461 and 463. Thus, the test for collateral estoppel is fully met i.e. the identical defense asserted here was raised, litigated, and decided in a prior case, and formed the basis of the judgment entered in that prior case. The jurisdictional defense contained in Respondent's motion must therefore be denied.

Within the above framework of law then, it is clear that Scheer's operations at the cited facility are within Mine Act jurisdiction. Respondent's Motion for Summary Decision (Motion to Dismiss) filed September 19, 2006, is accordingly denied. Petitioner's Cross Motion for Partial

Summary Decision is granted. Hearings will accordingly be scheduled in the near future regarding whether the violations alleged in the petitions for civil penalties have been committed and, if so, the amount of civil penalties to be assessed.

Gary Melick
Administrative Law Judge
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