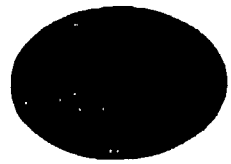
RIVER PRODUCTS COMPANY, INC.

TELEPHONE (319) 338-1184
FAX (319) 338-8510

www.riverproducts.com

Crushed Limestone Products
Sand & Gravel
CORPORATE OFFICES
3273 DUBUQUE STREET N.E.
P.O. BOX 2120
IOWA CITY, IOWA 52244-2120



October 3, 2008

Senator Charles Grassley
135 Hart Senate Office Building
Washington, D. C. 20510

Dear Chuck:

I thought you might be interested in MSHA's latest rule making, which true to form is both sweeping in nature and applied across the board, i.e. to all mining without any distinctions made for type, form, classification, working conditions – many of the same sins they've committed in the past, i.e. all the rules apply to everyone regardless of their responsibility.

I'm also enclosing our policy on drug and alcohol misuse from our company policy manual. It to me is far more defensible, logical and legitimate for our workplace and our workforce.

Thanks for any response.

Sincerely,

River Products Company, Inc.

Thomas R. Scott
President and CEO

TRS/dlt

Enclosures (3)

Cc: Senator Tom Harkin
Representative Bruce Braley
Representative Dave Loebsack
Representative Leonard Boswell
Representative Tom Latham
Representative Stephen King
Joy Wilson, President, National Stone, Sand and Gravel Association, Inc.
Rich White, Executive Director, Iowa Limestone Producers Association, Inc.
Joe McGuire, President, Iowa Limestone Producers Association, Inc.
Todd A. Scott, Vice President & Legal Counsel, River Products Company, Inc.
Matt Banning, Vice President & CFO, River Products Company, Inc.
William Mossman, Safety and Training Director, River Products Company, Inc.
File

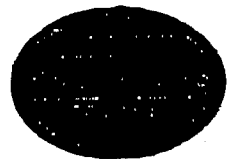
AB41-COMM-86

RIVER PRODUCTS COMPANY, INC.

TELEPHONE (319) 338-1184
FAX (319) 338-8510

www.riverproducts.com

Crushed Limestone Products
Sand & Gravel
CORPORATE OFFICES
3273 DUBUQUE STREET N.E.
P.O. BOX 2120
IOWA CITY, IOWA 52244-2120



October 3, 2008

Joy Wilson
President
National Stone, Sand and Gravel Association
1605 King Street
Alexandria, Virginia 22314

RE: Proposed MSHA Rulemaking for drug and alcohol testing

Dear Joy:

Presently in our industry, workers are subjected to additional requirements for specific job functions under the following conditions:

a) Department of Transportation definition of a "safety sensitive function" ...as one who holds a current CDL (Commercial Driver's License) for both A and B classifications and are employed as an "over the road driver". They are required to undergo pre-employment and post employment random drug and alcohol testing; and,
b) ATF (Alcohol, Tobacco and Firearms) definition of a "safety sensitive job function"...as one who handles, works with or has access to, or orders, takes delivery of or purchases explosives in the course of their employment. They are subject to background checks for criminal history, including fingerprinting. And in Iowa, we are required to maintain a current registration list of these individuals with the State Fire Marshal's office and have on file an Explosives license with said office.

Now, for MSHA to claim that all workers who are employed in the quarrying, mining and sand and gravel industries, without exception, are subject to safety sensitive job duties or that industry safety statistics are such that they need to invoke sweeping rules (RE: Section 66.2) requiring alcohol and drug testing of all employees who work in any mine setting, whether it be underground or open-pit, coal, metal or non-metal, i.e. limestone, granite, quartzite, sand and gravel, et alia, is in this writers opinion

an overextension of MSHA's Congressional mandate, unsupported by fact and a knee jerk reaction to a perceived problem. Thus, it should be opposed by NSSGA as our national industry organization and by our member companies enmasse.

It seems without merit and without justification to make the argument that every person who works in the "mining industry" performs safety sensitive job duties without first setting forth legitimate and logical criteria to define what is a safety sensitive job function.

Nor is there any verifiable or empirical evidence that supports the premise that merely being employed in the mining industry makes one more susceptible to the misuse of drugs and alcohol. In the absence of the above, what supporting data does MSHA offer to conclude that this proposed rule, which will be burdensome to operators in both time and money and potentially damaging to workers' privacy rights is a necessary safety related intrusion into the workplace.

And finally, when MSHA proposes that "the alcohol and drug testing and training requirements will apply to all those required to take comprehensive safety training under 30CFR parts 46 and 48," how will this impact independent contractors, from custom stripping/overburden removal, drilling, crushing to vendor mechanics doing equipment repairs? Will the implementation and enforcement of this proposed rule get dumped onto the operators just as MSHA presently dumps the enforcement of their (MSHA) regulations as they apply to independent contractors today onto us now? Not only have they made us as operators responsible for independent contractors safe work practices when on our premises, but also for any of their equipment safety violations, lack of employee training, documentation and a host of other issues that should be the responsibility of the independent contractor and part of their relationship with MSHA as a registered contractor with that agency. Now MSHA wants us to monitor independent contractors drug and alcohol policies and employee testing? Why should we want to do this, or more importantly, why should we be forced to do this? Where does contractual obligations and responsibilities come into play. Evidently no where according to a recent U. S. Court of Appeals for the Fourth Circuit decision in "Speed Mining Inc. vs. FMSHRC" (Federal Mine Safety and Health Review Commission). Not only that, from one author's interpretation of that decision, it appears we have no administrative appeal rights with the Agency nor standing in court to challenge MSHA's actions (see enclosed article entitled, "Court Allows MSHA to Cite Multiple Employers" by Adele Abrams from the September 2008 edition of **Rock Products** magazine, Volume III, Number 09). And as the author rightfully notes, these are "violations over which they (the operator's) have little control and may have no prior knowledge."

Unless and until MSHA comes forth with empirical, logical, legitimate and justifiable studies, data and reasons for the need to require pre-employment and post-employment random drug and alcohol testing for ALL workers, merely because they are employed in the mining industry, this proposed MSHA rule should be opposed by our industry, our leadership and NSSGA. To do otherwise would be a disservice to our

membership, to our employees and to ourselves. Joy, keep me apprised of NSSGA's position and actions.

Thank you.

Sincerely,

River Products Company, Inc.

Thomas R. Scott
President and CEO

TRS/dlt

Cc: Senator Charles Grassley
Senator Tom Harkin
Representative Bruce Braley
Representative Dave Loebsack
Representative Leonard Boswell
Representative Tom Latham
Representative Stephen King
Rich White, Executive Director, Iowa Limestone Producers Association, Inc.
Joe McGuire, President, Iowa Limestone Producers Association, Inc.
Todd A. Scott, Vice President & Legal Counsel, River Products Company, Inc.
Matt Banning, Vice President & CFO, River Products Company, Inc.
Bill Mossman, Safety and Training Director, River Products Company, Inc.
File

"Mine operators can expect many more citations in the future arising from contractor actions or equipment defects, when present at their mines."

COURT ALLOWS MSHA TO CITE MULTIPLE EMPLOYERS

The U.S. Court of Appeals for the Fourth Circuit affirmed citations issued to a mine operator for the sins of its contractor. More disturbingly, in the case of *Speed Mining Inc. v. FMSHRC*, the appeals court held that MSHA had "unreviewable discretion" to cite the mine operator (or owner), the contractor or both in such circumstances. Another U.S. Court of Appeals—for the D.C. Circuit—came to the same conclusion in 2006, in the Twentymile Coal case. Having the new decision affirm the authority of MSHA, and some statements made by the judges that this power is "settled law" will make it far more difficult for production operators to distance themselves from violations over which they have little control and may have no prior knowledge.

SPEED MINING INC.

The Speed Mining Inc. (SMI) case has been in the courts for a while, and the facts presented are worth some consideration. SMI is the owner-operator of an underground coal mine in West Virginia, and it engaged a contractor (Cowin and Co. Inc.) to sink an elevator shaft at the mine. The court found it somewhat significant that, when retaining Cowin, SMI did not check its history of safety violations nor its history concerning employee injuries ... and that Cowin's injury rate was four to 10 times higher than the national average over the preceding eight years.

SMI and Cowin's contract gave Cowin "almost complete discretion" to sink the shaft as it saw fit and specifically stated that Cowin "maintained complete control at all times over its employees and any Subcontractors, Vendors or others working under Cowin's supervision." The contractor also explicitly said that Cowin was responsible for complying with all laws, rules, order and regulations—federal, state and local—applicable to the sinking of the mine shaft.

In August 2004, Cowin began work and MSHA issued four citations to Cowin a month later (but not to SMI). A second independent contractor at SMI's site (American Electrical Inc.) also received citations. SMI only was cited in relation to that contractor for failure to provide hazard training to the electrical contractor's workers. Weeks later, an accident occurred at Cowin's shaft-sinking site, when a crane hoist failed and a six-ton bucket fell near five Cowin employees. No one was seriously injured. In addition, no SMI miners appear to have had any exposure to the hazardous condition.

MSHA MAKES CITATIONS

MSHA cited Cowin for six violations of the agency's safety standards: failure to correct crane defects, failure to adequately train its operator, failure to comply with the MSHA shaft-sinking plan (two citations), failure to remove the crane from service, and failure to do an adequate pre-operational check of the crane. SMI received six citations, nearly identical to those issued to Cowin, except that SMI was charged with a lesser degree of negligence.

SMI contested its citations and, based on the then-precedential ruling by the Commission in Twentymile Coal (which held that MSHA abused its discretion in citing a production operator for contractor's violations), an Administrative Law Judge agreed to vacate SMI's citations. MSHA appealed to the Commission, and the case was stayed because the Twentymile Coal case was pending appeal to the D.C. Circuit of the U.S. Court of Appeals.

In July 2006, the D.C. Circuit held that the Secretary of Labor possessed discretionary authority to "cite owner-operators, their independent contractors, or both for safety violations committed by the independent contractors," and that the Commission lacked authority to review these discretionary decisions. Subsequently, the Commission remanded SMI's case back to the ALJ, who affirmed all six citations based on the Twentymile ruling. The Commission denied SMI's petition for discretionary review, and its appeal to the Fourth Circuit followed.

Adele Abrams is an attorney and Certified Mine Safety Professional who specializes in MSHA and OSHA enforcement litigation. She has been involved with the aggregate industry for more than 15 years. Adele can be reached at safetylawyer@aol.com

AUTHOR INFORMATION

SMI'S DEFENSE

SMI made two arguments: (1) The Mine Act bars the Secretary from citing an owner-operator for violations committed by an independent contractor; and, in the alternative, (2) that even if the Secretary had discretionary authority, she abused her discretion in the SMI case. The first argument rested on language in Section 104(a) of the Mine Act, concerning the Secretary's citation power. It states:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator ... has violated [the Act], or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to [the Act], he shall, with reasonable promptness, issue a citation to the operator." [emphasis added]

Since another provision of the Mine Act deems both production operators and independent contractors to be "mine operators" by definition, SMI argued that the use of the definitive article "the" before operator in Section 104(a) indicated that the Secretary only had statutory authority to cite "the operator" that "has violated" the standard. Since Cowin, not SMI, violated the standard and was "the operator," MSHA lacked authority to cite SMI, it argued.

The Secretary's counsel rebutted that this was a fundamentally flawed interpretation of the statute, and the Fourth Circuit agreed that the Act granted the Secretary discretionary authority to site either the production-operator, the contractor or both for any violations committed by an independent contractor. It also pointed to two early cases: *Cyprus Indus. Minerals Co. v. FMSHRC* (9th Circuit 1981), and *BCOA v. Secretary of the Interior* (4th Cir. 1977), which had the same finding under the 1969 Coal Act (prior to the establishment of MSHA).

THE HOLDING

In discussing its holding, the SMI court also noted the strict liability aspect of the Mine Act, which dictates that mine operators can face civil penalties if a violation merely occurs at its mine, regardless of fault. It also stressed that the early BCOA decision held that the owner of a mine may be held "jointly and severally liable for violations committed by" its independent contractor. The Coal Act's provisions, upon which the BCOA court relied, were largely unchanged in the 1977 Mine Act, other than the 1977 law added "independent contractors" expressly to the definition of "mine operator." The Fourth Circuit also examined the legislative history of the Mine Act and found that the Senate Report stated that the "purpose of [one of the accepted amendments] was to give statutory expression to the doctrine of BCOA." Other appeals court decisions also were cited, although those basically affirmed citations issued to the mine operator for contractor violations but stopped short of claiming that MSHA's discretion to do so was unreviewable.

The SMI decision stressed it was consistent with the purpose of the Mine Act: protection of the health and safety of miners. Precluding liability for contractor violations would encourage owners to use contractors as a means of insulating themselves from safety regulations, it said, and because owner/operators are in continuous control of mine conditions and are more likely to know federal safety and health requirements. Thus, mine safety would not be encouraged by letting the owner "exonerate itself ... merely by establishing a private contractual relationship." The court held that owner/operators possess ultimate authority over contractors in terms of retaining, supervising and dismissing them, if necessary. The court declined to adopt an interpretation of the Act that "would encourage owner-operators to remain willfully blind to the safety histories of their independent contractors," which it claimed SMI did in this case.

The court dismissed SMI's alternative argument on abuse of discretion, saying the claim was "unreviewable." The court did take note of MSHA's "Enforcement Guidelines" on multi-employer citation policy. However, even though SMI argued that these guidelines provided an objective framework to use when considering abuse of discretion, the court pointed out that the guidelines were non-binding and the Secretary was not required to observe them. The court also balked at using a "factual basis" standard of review under vicarious liability tort principles or under a principal/agent theory. It again noted that it concurred with the "joint and several" liability approach taken in the BCOA decision.

IN CONCLUSION

The court said that the decision on which operator to cite for a Mine Act violation rested on a "complicated balancing of a number of factors." It found that the agency, not the courts, was best equipped to balance these factors and determine its enforcement priorities. In short, the Federal Mine Safety & Health Review Commission—despite being an independent appellate agency—must defer to the Secretary's expertise in its enforcement choices.

Bottom line: Mine operators can expect many more citations in the future arising from contractor actions or equipment defects, when present at their mines. Prequalifying and thoroughly training contractors, and documenting enforcement of safety provisions when it comes to contractor oversight, may help convince MSHA at the outset not to cite the mining company. But if a citation is issued, the operator will be limited to challenging the fact of violation, gravity, negligence and penalty issues ... not the propriety of citing the mine operator in lieu of, or in addition to, its contractor.

DRUG FREE WORK PLACE POLICY

RIVER PRODUCTS COMPANY, INC. has a strong commitment to the health, safety, and welfare of its employees, their families and its customers. We must provide a workplace that is free from the distribution, possession, sale and use of illegal drugs and alcohol.

All employees are to be in suitable mental and physical condition while at work, allowing them to perform their job tasks satisfactorily. If an employee is not able to perform their job tasks satisfactorily, the Supervisor must approach the employee and determine cause. Some recognizable signs could be emotional distress and impaired physical condition. Recognizing the signs and symptoms are not solely the Supervisor's job. Co-workers, likewise have a responsibility to relate incidents to their immediate Supervisor. The Supervisor has certain responsibilities in administering the policy procedures if such a situation exists.

Once the Supervisor has recognized the signs or symptoms of an employee's behavior as potentially hazardous to themselves, their co-workers, our customers, equipment or the work environment due to alcohol or drugs, the employee shall be subject to the following:

1) The first time a Supervisor determines cause, the employee will check-out and be sent home for the remainder of the work day. They will be counseled to seek assistance through the Employee Assistance Program (EAP) as a supplement to **RIVER PRODUCTS COMPANY, INC.'s** Health Insurance program. The Supervisor is to file a written report of their discussion with the affected employee and document any action taken including whether the employee needs transportation home. This report is to be forwarded within a twelve (12) hour time frame to the office for review by the Company Safety Officer.
2) The second time a Supervisor determines cause, the employee will check-out and be sent home for three (3) days without pay and be directed to seek assistance through the Employee Assistance Program (EAP). The Supervisor is to send a written report of their discussion with the employee and the action taken including whether the employee needs transportation home. This report is to be forwarded within a 24 hour time frame to the office for review by the Company Safety officer and General Manager.

3) The third time a Supervisor determines cause, the employee will check-out and be sent home for one (1) week without pay. The Supervisor will send a written report of their discussion with the employee and the action taken including whether the employee needs transportation. This summary must be filed within a 24 hour time frame with the office for review by the Company Safety Officer and the General Manager.
   a) if all three (3) incidents occur within a twelve (12) month time period, the employee, their Supervisor, the Company Safety Officer and General Manager will hold a conference to review the situation and outline corrective measures. This conference is to be held within a five (5) day period of the latest incident.
   b) If the third incident occurs within eighteen (18) months after the first incident, it will be noted as the first or second occurrence and the action taken will be as prescribed in 1 or 2 above.
4) If a **RIVER PRODUCTS COMPANY, INC.** employee is found with alcohol or illegal drugs on Company premises, they will be subject to an automatic three (3) day suspension without pay.
5) If an employee is charged, pleas or is convicted of the possession, and/or use of illegal drugs or a controlled substance including driving while under the influence (OWI) on or off the workplace premises, rehabilitation and drug testing will be mandatory as corrective measures. Circumstances similar to the above also happen when an employee is not at work. It will then be the responsibility of the employee charged with any of the above violations to notify the Company Safety Officer within five (5) working days after the incident. The Company Safety Officer must be notified in these five (5) prescribed working days, or the employee may be subject to termination.
6) If an employee is charged, pleas or is convicted of the manufacture, distribution or sale of illegal drugs or controlled substances (not to include alcohol) on or off the workplace premises, the employee will be terminated.

RIVER PRODUCTS COMPANY, INC. will not sponsor, allow, or be a party to the authorization or consumption of alcoholic beverages on Company property. This likewise includes any off premises Company sponsored event. Exceptions to this policy MUST be pre-approved in writing by the Company General Manager. Consumption of alcohol on Company property is a

violation of BOTH MSHA regulations and **RIVER PRODUCTS COMPANY, INC.** policy guidelines. (See Numbers 1 through 4 for corrective action)

RE-ENTRY AND CONTINUATION OF EMPLOYMENT WHILE UNDERGOING EMPLOYER MANDATED REHABILITATION

RIVER PRODUCTS COMPANY, INC. recognizes the rehabilitation process as an acceptable medium during employment, providing the employee passes all tests and evaluations during the rehabilitation program. People involved with the rehabilitation efforts will discuss the amount of time needed from work and agree to schedule any conflicts beneficial to all parties' interests. When an employee satisfactorily completes rehabilitation, employment will continue. Under employer mandated rehabilitation, certification of successful completion will be required. Employees who fail to successfully complete an employer mandated rehabilitation program with in six (6) months of the initial charge will not have their employment continued by the **RIVER PRODUCTS COMPANY, INC.** and will be terminated without being paid their accrued benefits.

This policy is a guideline and does not alter the at-will relationship. Both parties can terminate the employment relationship with or without advance notice and with or without cause.

RIVER PRODUCTS COMPANY, INC., reserves the right to take any disciplinary action, including suspension or termination, in all cases it deems appropriate.