



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ECE 03477-14

AGENCY DKT. NO. PEA

110001-005033

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION –
BUREAU OF HAZARADOUS WASTE
ENFORCEMENT,**

Petitioner,

v.

THE HOME RUBBER CO.,

Respondent.

Bernadette Hayes, Deputy Attorney General, for petitioner (John J. Hoffman,
Acting Attorney General of New Jersey, attorney)

Richard Balka, for respondent, pro se

Record Closed: August 11, 2015

Decided: September 25, 2015

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, New Jersey Department of Environmental Protection, Bureau of Hazardous Waste Enforcement (Department) imposed an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) on April 10, 2013, for failure to properly register an underground storage tank. Respondent, The Home Rubber Company, filed a request for hearing on April 22, 2013. The Department granted the request on July 31, 2013, and agreed to transmit the matter as a contested case to the Office of Administrative Law (OAL), where it was filed on March 24, 2014. A settlement conference was held and the parties were unable to resolve the matter. Mr. Balka submitted a certification attesting to his ability to represent the company pursuant to N.J.A.C. 1:1-5.4(a)(5). A hearing was scheduled for and held on August 11, 2015, on which date the record closed.

FINDINGS OF FACT

Respondent Home Rubber Company is a manufacturer of rubber and rubber products located in Trenton, New Jersey. It has been in business since 1881 and was acquired by Mr. Balka in 1996. It is owned and operated by Richard Balka. Respondent owned an underground storage tank (UST). Respondent failed to properly register the underground storage tank. Respondent filled out a Facility Certification questionnaire in which it was supposed to supply insurance information, even if the other information had not changed from the previous certification. Respondent's employee, Donald Slowicki, failed to fill out three sections of the questionnaire, one of which required insurance information. (P-1.) The failure to fill out the section of the questionnaire with the insurance information meant that the Department could not register the company. The Department drafted a Notice of Deficiency letter to respondent dated March 14, 2007. (P-2.) The Notice was sent to an incorrect address. Respondent's mailing address is P.O. Box 878, Trenton, NJ 08605 (R-1) and the physical address is 31 Woolverton Road, Trenton, NJ 08611. The deficiency letter had a zip code of 08601, which did not match either address. Respondent did not reply to the Notice.

Janelle Pearson, Environmental Specialist II, testified that on September 10, 2007, she went with Michael Hollis to a routine inspection of Home Rubber Company. Her duties include inspecting underground insurance tanks to ensure compliance with regulations, equipment, tanks, paperwork, insurance and registration information. She was a trainee who began working in March 2007. Prior to conducting an inspection, she searches for a company's registration and insurance information from the New Jersey Environmental Management System (NJEMS) database. (P-1.) Home Rubber Company did not submit all of its registration information, so it received a deficiency letter from the registration and billing department. (P-2.) Companies with USTs must provide insurance information every three years along with registration information. The insurance is for liability for pollution leaks and spills. Once at the company, she asks for registration, insurance, and testing paperwork then she proceeds to check the equipment. She noted that Home Rubber Company did not have an active registration certificate. It had expired. After she inspected Home Rubber Company, she issued a Field Notice of Violation due to the expired registration. (P-3.) Regulations for operation of a UST require updated registration. Home Rubber Company was also cited for not having a release response plan. (P-3). Mr. Balka had submitted the financial responsibility plan, but missed some sections. The registration certificate is supposed to be ready for inspection upon entering the facility, but theirs was clearly expired. She did not recall the 2007 inspection specifically, but knows that if she had seen an insurance certificate, she would not have placed it on the deficiency notice.

Janelle Pearson also inspected the Home Rubber Company on June 7, 2010. At that inspection, the registration certificate had expired on March 31, 2010. (P-5.) She issued a Field Notice of Violation. (P-6.) Prior to the inspection, she had seen the deficiency letter that had issued because Mr. Balka had not provided all of the information to update his registration. Even after the 2010 inspection, Mr. Balka had not updated the registration. It was still expired. (P-8.) If a company is found to be not registered and the owner then registers the UST, the company is marked back into compliance.

On cross-examination, Ms. Pearson noted that she mostly inspects gasoline stations, and not manufacturers such as Home Rubber Company. The time frame for a company to comply with the deficiency letter is as soon as possible. There is no grace period with registration. Registration should not lapse, so a company should comply the day of or the day after receipt. She agreed that Mr. Balka's approval of registration on September 15, 2007 after the September 10, 2007 failed inspection was an "ASAP" response. NJDEP sends out notices of the need to register USTs three months prior to expiration. Ms. Pearson agreed that there were different addresses for Home Rubber Company on each of the documents provided:

- P-2 31 Woolverton Avenue Trenton 08601
- P-5 31 Woolverton Avenue Trenton 08611 (facility address)
31 Woolverton Avenue P.O. Box 878 Trenton 08601 (Mr. Balka's address)
- P-7 31 Woolverton Avenue P.O. Box 878 Trenton 08601
- P-8 P.O. Box 878 Trenton 08650
- P-9 31 Woolverton Avenue PO Box 878 Trenton 08611
- R-1 P.O. Box 878 Trenton 08605 (Mr. Balka's business card)

The Department is not required to send deficiency letters, but it does so to remind the owner of a facility that he or she did not submit something that is required for the facility's UST registration to be effective. The addresses that the Department uses come from the questionnaires that the owners fill out. They do not come from the registration and billing department.

Michael Hollis, Environmental Specialist III, testified that he supervises and trains inspectors in UST inspections. He reviews all inspections, notices of violation, timesheets and handles any difficulties in the field. He is now Ms. Pearson's supervisor, but he was not when the AONOCAPA issued. The AONOCAPA issued against The Home Rubber Company for operating without a valid certificate. Certification questionnaires are online along with guidance documents, and presentations he has done with John Olko, the other supervisor. It orders the company to comply and register the tank. The company also had the option of closing the tank.

Mr. Hollis explained the matrix upon which the penalty was based. N.J.A.C. 7:14-8.5(f)(P-4 at 2.) The ranges of penalties apply to a wide variety of facilities. Violations fall under minor, moderate or major conduct and minor, moderate or major seriousness. The degree of conduct depends on the intent and foreseeability. In the present case, he deemed the conduct moderate because the violation was foreseeable, but unintentional. The seriousness was also moderate as it was a substantial deviation from the requirement. In the present case, there were multiple offenses of the same violation and Home Rubber was noncompliant for three years from July 2010 to when the document was drafted in 2013. The Department could have assessed penalties for even more days than it did, one for each inspection, but Mr. Hollis said that it tries to be reasonable and not put any company out of business. The penalty would be enormous if assessed for every day of violation. Here the range was from \$10,000 to \$20,000. In addition, the Department checked four other violations on the deficiency letter and did not penalize Home Rubber for those violations using its enforcement discretion. The penalty would have been \$50,000 if the Department issued a penalty for every offense. Instead, Mr. Hollis testified, the Department issued the lowest penalty it could consistent with the regulations. If a UST operator wanted to see whether the company was registered, he would only have to go to "Data Mine" which is connected to NJEMS. On that site, he will see the last inspection, whether his company is registered and any violations pending against the company.

On cross-examination, Mr. Hollis said that if a company was missing insurance information and was offered it, he would not take it because it has to be on the official form. He had no recollection of whether Ms. Pearson asked for insurance when he was with her for the inspection in 2007. He reiterated Ms. Pearson's testimony that the company's address comes from the questionnaire the company submits, which is then put into the NJEMS database. He has no idea why the discrepancy in addresses exists. The company must submit any changes. Regarding penalty, the Bureau Chief Mike Hastry determined it. Where a penalty falls in the matrix is determined by previous cases. It was his discretion to move it from the midpoint to the top of the range. He did so in order to maintain consistency. Foreseeable means that the rules require an action and companies know that they must comply with the rules. He

clarified that, on the notice of deficiency, the reference to section c, page three of the form is a reference to the space for insurance information. The \$20,000 penalty is based on past case law and policy as well as the fact that there are multiple violations of the same citation. He believes the penalty to be reasonable under the circumstances since the Department could have issued a higher penalty for the additional day of not having registration as well as the additional violation unrelated to the registration.

Richard Balka testified that he is the owner of Home Rubber Company, the second oldest rubber manufacturing company in the United States. They have been at the same location in Trenton since 1881. He bought it in 1996 from a three-generation family owner. The physical address of the company is 31 Woolverton Avenue, Trenton, NJ 08611. The post office address of the company is PO Box 878, Trenton, NJ 08605. Donald Slowicki, who has since passed away, was responsible for the registration paperwork. Mr. Balka guesses that he never received the Notice of Deficiency because it has a street and a P.O. Box listed and it does not have the correct zip code. Mr. Balka said that if Ms. Pearson had asked for insurance information, it would have been easy to produce. He had the insurance in his file.

Mr. Balka continued testifying that the facility address is accurate on the registration certificate. (P-5.) However, if mail was sent to the address of the owner on the certificate, he may or may not get it. There is no residential real estate where his company is located. He has no recollection of getting the registration certificate. He recalls receiving the Notice of Violation upon the inspection. He testified that his financial responsibility information was incomplete and doubts that he received it due to the address being incorrect. (P-7.) He does not recall receiving the March 3, 2011 Notice of Deficiency either and doubts that he did since the zip code is transposed, "08650" instead of "08605." He received and responded to the AONOCAPA. It was delivered certified mail to the correct street address. He does not understand the code and the matrix and the Department's request for \$20,000. He believes that his company made mistakes, but the Department also made mistakes. He believes that the time, energy and money spent on this is far more significant than the violation itself.

On cross-examination, Mr. Balka testified that he did not fill out or review the questionnaire before submission. (P-1.) His staff member made an inadvertent mistake in not filling out section C. He acknowledged that he has never produced the insurance information either in discovery or at the hearing. However, he testified that the Department must have it or they would not have issued the registration certificate in 2007. (P-5.) Although he testified that he acted quickly upon the Notice of Violation, he could not recall specifically what he did.

CONCLUSIONS OF LAW

The Department issued an AONOCAPA to Home Rubber Company for violating the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. and the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq. Specifically, pursuant to N.J.A.C. 7:14B-2.1(a), the owner or operator shall register each underground storage tank with the Department. The Department has the burden of proving that Home Rubber Company violated the statute or regulation. The Department proved and I **FIND** Home Rubber Company owned a UST and was required to register it with the Department. The registration requirement means that the owner must make available to the Department a current registration certificate upon inspection. I **FIND** that on two separate inspections, September 10, 2007 and June 7, 2010, Home Rubber Company could not produce a valid registration certificate because its registration had expired. Based on the foregoing, I **CONCLUDE** that Home Rubber Company violated the Water Pollution Control Act and the Underground Storage of Hazardous Substances Act.

Mr. Balka showed that the Department had the wrong address on various documents including the Notice of Deficiency and Notice of Violation. He did receive the AONOCAPA that somehow had the correct address. The Home Rubber Company is not being charged with not responding to the Notice of Deficiency. The violation was failing to have a valid registration certificate at the time of inspection. The Notices were courtesies. There was no date certain by which the Home Rubber Company could have gotten a registration certificate and not be considered in violation of the regulation.

I will consider as mitigation; however, that the Department does generally send out Notices of Deficiency, but cannot show that Mr. Balka actually received one due to the different addresses. I will also consider that the registration did not issue because one of the workers, who is now deceased, inadvertently neglected to send in a completed application. Again, it does not mean that The Home Rubber Company was not in violation, but it militates against the intentionality of the violation. Mr. Balka notes also that he is not in the business of using USTs, like gas stations. Home Rubber Company manufactures rubber products and uses oil only for processing. It is a small company that does not have a team of workers to handle the administrative tasks such as registration of the UST. It is hoped that Mr. Balka will take greater responsibility for the filing of the form to ensure that it is completed fully and that the registration of Home Rubber Company's UST will not lapse in the future.

Mr. Balka argues that the imposition of a \$20,000 fine exceeds the mistake that Home Rubber Company made. However, as the Department notes, there are several cases adopting the matrix regulation that inadvertent failure to register a UST is an offense of moderate seriousness and moderate conduct. Specifically, in N.J. Dept. of Env't'l Prot. v. Excellent Care, EWR 00084-06 Final Decision (March 14, 2008) <http://njlaw.rutgers.edu/collections/oal/> and N.J. Dept. of Env't'l Prot. v. Egg Harbor Gas & Go, LLC, EWR 2907-05, Final Decision (August 21, 2006), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner concluded that the failure to register the USTs was a moderately serious violation and was moderately improper conduct. Both were gas stations whose business was dependent upon USTs rather than manufacturers, whose UST use is limited to needing it in production, not selling it outright. I **CONCLUDE** that the range the Department chose for its penalty is in line with case law and regulations. That range for moderate seriousness and moderate conduct is from \$10,000 to a \$20,000 penalty. The Department chose the upper end of the range because there were two inspections and two times that Home Rubber Company was found without proper registration. I now modify and reduce the penalty for the violation to \$15,000 based on the mitigating factors presented by the respondent and set forth in this decision. Thus, there is no argument that respondent violated the

WPCA and the USHSA but the penalty should be moderately reduced to reflect the mitigating factors.

ORDER

I hereby **ORDER** that respondent's determination that Home Rubber Company violated the applicable law is **AFFIRMED** and the fine is **MODIFIED** to \$15,000.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



September 25, 2015
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

Date Mailed to Parties:

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APPENDIX

WITNESSES

For petitioner:

Michael Hollis
Janelle Pearson

For respondent:

Richard Balka

EXHIBITS

For petitioner:

- P-1 Facility Certification Questionnaire, February 12, 2007
- P-2 Deficiency Letter, March 14, 2007
- P-3 FNOV, September 10, 2007
- P-4 Regulations, N.J.A.C. 7:14B-2.1 and 2.2; N.J.A.C. 7:14-8.5
- P-5 Registration Certificate, September 15, 2007-March 31, 2010
- P-6 FNOV, June 7, 2010
- P-7 Deficiency Letter, August 2, 2010
- P-8 Deficiency Letter, March 3, 2011
- P-9 AO/P, April 10, 2013
- P-10 Hearing Request Supplement

For respondent:

- R-1 Business card of Richard A. Balka