

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP . 3 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
WINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 80-57-M
Petitioner : A.O. NO. 12-01397-05001
v. :
MULZER CRUSHED STONE COMPANY, : Docket No. LAKE 80-201-M
Respondent : A.O. No. 12-01423-05002
: Derby UG Quarry

DECISIONS

Appearances: William C. Posternak, Attorney, Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for the
petitioner;
Philip E. Balcomb, Tell City, Indiana, for the respondent.

Before: Judge Koutrae

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety standards found in Part 57, Title 30, Code of Federal Regulations.

Respondent filed timely answers contesting the civil penalty proposals and requested a hearing. A hearing was convened on June 25, 1980, in Evansville, Indiana, and the parties appeared and participated fully therein.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Docket No. LAKE 80-201-M

Citation No. 366596, November 27, 1979, 30 C.F.R. § 57.6-168, states as follows: "Two missed holes were noted in the left rib of tunnel 14, crosscut 3 East Drift. The area had been mucked out and missed holes were readily visible to indicate that they had not been reported or no effort was made to dispose of them."

30 C.F.R. § 57.6-168 provides as follows: "Misfires shall be reported to the proper supervisor and shall be disposed of safely before any other work is performed in that blasting area."

By motion filed June 20, 1980, petitioner moved to amend its pleadings to charge a violation of section 57.6-177 rather than 57.6-168. In support of the motion, petitioner asserted that standard 57.6-168 was cited in error in that the standard applies to surface mines, whereas the mine in question was an underground mine. Standard 57.6-177 is the appropriate standard in that it pertains to reporting and disposing of misfired holes in underground mines, and the condition charged has not changed, and the obligation of the respondent under both 57.6-168 and 57.6-177, as it pertains to the citation, is the same.

The parties were afforded an opportunity to present arguments in support and opposition to the motion, and after due consideration of those arguments, petitioner's motion was granted (Tr. 3-16).

Stipulations (Exhs. P-1 and P-5)

1. Respondent's Derby Slope Mine and Underground Quarry are subject to the provisions of the Act.

2. Respondent is a small mine operator and the proposed penalties will not adversely affect its ability to remain in business.

3. During the **24-month** period prior to the issuance of Citation No. 366596, respondent had only two assessed violations at its Derby Slope Mine, and three citations at its quarry.

Petitioner's Testimony and Evidence

MSHA inspector George **Lalumondiere** confirmed that he conducted a safety inspection of respondent's Derby Underground Mine, that he was accompanied by mine superintendent Bill Tsantis, assistant safety engineer Bob Scheible, MSHA inspector Jerry Spruell, and that he issued Citation No. 366596 after finding two misfired blasting holes that did not totally detonate during an ammonium nitrate blast. Ammonium nitrate was still in the two holes. He observed two lead wires with an electric cap protruding some 6 inches out of the holes in the face, and since there were no indications that the misfires were reported or disposed of, he issued the citation. Mr. Tsantis and Mr. Scheible denied any prior knowledge concerning the two misfired holes, and one cannot determine whether they had been fired until they were washed out. He saw no evidence that any attempts were made to dispose of the misfires since the rock from the blast had already been loaded and cleaned out and the holes were still there. The two wires he observed were not shunted off, and he believed that respondent should have known of the two misfires because the area should have been checked before the men went back in to work.

Inspector Lalumondiere explained that he marked the Item "improbable" on the gravity portion of his inspector's statement (Exh. P-4) because at the time of his observations the area had been cleaned up and no work was taking place. However, he indicated that ammonium nitrate is an explosive that could possibly be detonated by a sudden jarring or striking by a loading machine, and since there was no way to determine whether the firing cap was still "live," this added to the potential hazards. Eight to nine men are usually underground at the mine, but no one was working at the location cited (Tr. 19-26). The misfires were immediately taken care of by washing them out with water under pressure and abatement was rapidly achieved (Tr. 31, **35-40**).

On cross-examination, Inspector Lalumondiere testified that one of the misfired holes was located in the upper **lefthand** corner of the face and the second misfired hole was located in the lower **lefthand** corner. **The likelihood** of an accidental explosion was very low, but an accidental drilling into the misfired holes from the back of the drift could result in an accident. **While** he could not-determine whether the caps and primer had fired; it was obvious to him that there was a partial firing failure because parts of the holes were still present in the face area noted (Tr. **40-53**).

The inspector stated that he believed the respondent was negligent because section 57.3.3-20 requires each worker to check **his** work area before

he starts work and periodically while work is being performed. He **identi-** fied **Exhibit R-2** as an **MSHA** program directive dealing with the examination of working places under mandatory standards 55, 56, and 57.18-2. He confirmed that the directive defines "working place" as "anyplace in or about a mine where work is being performed," and that no work was being performed when he discovered the conditions cited. The work had been completed and the **area had** been cleaned and no workers were there. He could not determine when the **area had** last been worked, and he believed that the holes were not subsequently checked because they were so readily visible and stated that "I don't see how anybody could miss them, if they had checked the area at **all**" (Tr. 54-63).

In response to bench questions, the inspector stated that it was not likely that the remaining charges could have detonated by a stray charge, and that normally a face is drilled and loaded for 30 holes to detonate, but in the **instant case**, he was told that less than 30 were loaded, two holes remained, and the cap wires were not shunted or tied together to prevent **stray current** from getting to it (Tr. 64-73). However, until such time as the hole is washed out, it is difficult to determine all of the conditions by observation (Tr. 78).

Respondent's Testimony and Evidence

Dennis Riddle testified that he has worked at the mine in question for some 4 years as a miner and was present during the inspection of November 27. He identified Exhibit R-1 as a sketch of the face area in question, and explained that the dimensions of the face were 32 feet wide and 21 feet high with standard-sized drill holes prepared for blasting. Nine men were working in the mine on the day **in** question, and he identified the locations of the holes which were drilled for blasting and the two which did not totally detonate by marking them with an "X" on the sketch. He also explained the drilling, shooting, and cleanup procedures, and indicated that it was impossible to see holes which may have misfired until the blasted rock is removed because the bulk of the face area which is shot **is** covered by blasted rock. The night-shift mucking crew is responsible for cleaning and removing the rock, but there are times when all of the rock is not removed and the next oncoming shift may not detect misfires which may be covered or obscured by rock which is still left in the area. One man usually loads the rock out with a front-end loader and he checks for misfires, and if any are detected he shunts them out, reports it, and tests may then be made with a **galvanometer**. If it is not tested, the hole is washed out. He also explained that up to seven headings a day may be shot and cleaned up in a routine and progressive manner, and a person has no reason to go back into an area that has been shot out and is uncleaned until the routine procedure is followed. On the day in question, the nearest men were some 400 feet away in several other rooms and he believes they were well protected from any possible **hazard** (Tr. 83-97).

Mr. Riddle stated that in his opinion the top hole was not a misfire, but he was not sure about the bottom one without testing **it**. The shot was fired between **3:30** and **4 p.m.** on the evening before the citation issued,

and it **is** normal procedure to fire shots at the end of the day shift so that the night shift can start mucking and loading out the rocks. Misfires are not common occurrences, average less than one a month, and they are generally very obvious because one can see the rock still protruding. Five to seven faces are drilled and fired every day, and it **is** common for a hang-up to occur **in** the corner of the face, and the top holes are difficult to check because of the bad top which has **to be** roof bolted first (Tr. 96-103).

On cross-examination, Mr. Riddle stated that his duties include drilling and loading holes for blasting, and that the day before the citation issued, he was helping with the loading and mucking operations. He was not in the section cited and was working 400 feet away and saw the holes only after they were brought to his attention. **He** saw the two holes and they were not obstructed by any rocks. He agreed that the detonating wires were protruding from the two holes and that anpho explosive was in the two holes, a little in the top one, but quite a bit in the bottom one. The top hole had blown at the backside of the face, but that before he could examine it closely, there was no way to determine how much anpho was still in the hole by standing and looking at it from 21 feet below the face. The clean-up loader operator is responsible for inspecting for and reporting misfires. No one was cleaning in the area in question because the morning shift was working **in** another heading (Tr. 104-111). If the holes are not visible, one cannot tell whether the detonator has fired until the hole is tested or washed out (**Tr. 112**). Anpho-blasting agent sometimes does not detonate or explode if it **is** wet and he did not inspect the face on the morning of the inspection before the inspector arrived because no one had been in the area that morning and the boss had not conducted his daily inspection of that area (**Tr. 113-117**). Abatement was achieved by bringing in a generator from another area 400 feet away to pump in water used to wash the hole (Tr. 122). The misfired holes which he washed out would have been visible the night before after the mucking operation had taken place if someone had gotten out of their machine to inspect them but the night shift does not leave their equipment to inspect if they do not observe any knots humped out of the face, and on this occasion, the face was straight and square. If drilling were to take place, the driller would inspect the face area, and if not, Superintendent Tsantis would inspect it sometime during the day (Tr. 123-124).

Findings and Conclusions

Fact of Violation

As indicated earlier, respondent was originally charged with a violation of section 57.6-168, and the petitioner was permitted to amend its pleadings to charge a violation of section 57.6-177, which provides as follows:

- Misfires shall be reported to the proper supervisor. The blast area shall be dangered-off until misfired holes are disposed of. Where explosives other than black powder have been used, misfired holes shall be disposed of as soon as possible by one of the following methods:

(a) Washing the stemming and charge from the **borehole** with water;

(b) Reattempting to fire the holes if leg wires are exposed; or

(c) Inserting new primers after the stemming has been washed out.

Petitioner's counsel asserted that its charges of a violation are limited to the contention that the misfired holes were not reported and were not disposed of in any manner. Counsel also asserted that petitioner is not charging the respondent with a failure to danger off the area, nor is petitioner requiring that respondent undertake to dispose of the misfires by alternative method (c) found in section 57.6-177. The essence of the charge, asserted counsel, is the contention that respondent failed to dispose of the misfires by any method (Tr. 8-12). Counsel asserted that respondent is obliged to report misfires and to dispose of them as soon as possible and that the critical question is whether the misfires were disposed of as soon as possible (Tr. 141). Insofar as the requirement that misfires be reported, counsel conceded that the standard contains no time frame as to when they must be reported, but the implication is that they must be reported as soon as they become known (Tr. 151).

Petitioner argues that the misfired holes should have been detected and properly disposed of during the evening shift at the time the mucking **cycle** was taking place. Since **such** misfires can be readily detected by observation, and since the presence of the explosive anpho is a sign that a misfire has occurred, the holes in-question should have been detected at the conclusion of the mucking operation since both holes would not have been obstructed by the materials which were shot from the face. Since the mucking crew had left the area and the oncoming crew was working in another **section**, petitioner asserts that it is reasonable to infer that no one detected or reported the misfires, and had the inspector not discovered them, it is also reasonable to infer that mine management would not have discovered them until such time as men had **some** reason to go back to the area when the mining cycle again reached that **point**, and this would not have been "as soon as possible." Both holes were clearly **identifiable** at the conclusion of the mucking operation and the **failure to** dispose of them at that time constitutes a violation since they were not disposed of as soon as possible as required by the cited **standard**. Correction and disposition of the misfires was no monumental task and immediate detection and disposition of the condition should have been made by the respondent (Tr. 127-133, **140-143**).

Respondent argues that while it is true that the large bulk of the material blasted had been mucked out, the final cleanup of the area cited, including the careful examination of the face, had not been accomplished. In addition, no one was working in the area, but as soon as the orderly mining cycle had returned the men back to the area which had been shot, the misfired holes would have been discovered and disposed of in the normal course of business. Respondent maintains that its mining method,

which entails proceeding in an orderly manner from one heading to the next, by blasting, mucking, and then cleaning carefully while inspecting for misfires and disposing of them as soon as they are discovered, is reasonable, proper, and safe. Respondent further argues that during the mucking operation, the loader operator is working with a machine which is nearly as high as the roof in front of him and he has a large bucket in front of him. Thus, he is in no position to alight from his machine to carefully inspect for misfires as an inspector would do when he goes in later with his head lamp. Respondent believes it is proper to do as was done in this case, since within a few hours after the face was blasted, the face area would have been cleaned out (Tr. 143-146).

Respondent believes further that any misfires could not have been determined by any reasonable standards until such time as the cleanup man returned to the face area to make a detailed inspection for such misfires (Tr. 147). The thrust of respondent's defense is its belief that since five to seven headings are shot down every day, there are five to seven muck piles which obscure most of the holes constituting the blasting pattern, and some reasonable judgment must be exercised as to when it is feasible to realistically make a determination as to the presence of any misfires. That determination, maintains the respondent, cannot be made until total cleanup has been accomplished (Tr. 153). In its operation, the superintendent inspects the faces and muck piles immediately after firing before he goes home at the end of the day shift and after the air is cleared out enough to facilitate his inspection, and this cannot be done until the face is totally exposed and the holes can be observed. In the instant case, respondent maintains that the area cited **had** been mucked out, but not totally cleaned up. While most of the material is removed during any mucking operation, a third of the material may still be present which would obscure some of the face (Tr. 154). Respondent submits that the reason the standard language contains no specific time frame is to permit an operator some flexibility to follow his own mining cycle which, in this case, calls for orderly and safe sequential mining procedures which are so necessary to any successful mining operation (Tr. 151-152).

The inspector conceded **that he** could have cited the respondent with a violation of section 57.6-106, which specifically requires examination of faces and muck piles by a competent person for undetoned explosives or blasting agents, and requires the disposition of such explosives or agents when they are found. He did not do so because he considered the holes to be misfires and believed that section 57.6-177 was more appropriate (Tr. 137). **MSHA's** counsel also believed that the misfire standard is more specific than the general requirement found in section 57.6-106, requiring a general inspection after an explosion (Tr. 138).

When asked whether there is any specific mandatory standard requiring examination of any area-which has been blasted for hazards such as misfires, the inspector replied "**57.3-22**" (Tr. 65). That section requires that miners examine and test the back, face, and rib of their working places "at the beginning of each shift and frequently thereafter." "Working place" is defined by section 57.2 as "any place in or about a mine where work is being

performed." (Emphasis added.) There is no dispute that at the time the citation issued no one was working in the face area in question, and the inspector issued no citation for failure to examine the area during the mucking operation. I assume that he did not do so because he made no determination that the face area was not inspected while work was being carried out there.

In addition to section 57.2, section 57.18-2 requires examinations of working places by a competent person designated by the operator or at least once each shift for conditions which may adversely affect safety or health. If such conditions are detected, an operator is required to promptly initiate appropriate action to correct such conditions. **MSHA's** program directive dealing with the application of this standard (Exh. R-21, indicates that this standard shall be cited where there is a failure to conduct an examination of the working place or to record the fact such an examination has been made.

The theory of petitioner's case rests on its assertion that the inspector discovered two misfired holes which were clearly visible to him after the face area had been blasted and cleaned out. Since the misfires were still present, petitioner believes that it is obvious that they were not reported, nor disposed of, since respondent's own people advised the inspector that they had no knowledge of the existence of the misfired holes (Tr. 148-149). Petitioner's counsel conceded that section 57.6-177 contains no specific time frame for the disposition of misfired holes and that the language "as soon as possible" implies that they are to be reported when they become known (Tr. 150151). It seems obvious to me, however, that petitioner's case relies on an assumption that there was no way that the respondent could not have known about the existence of the misfires.

At the time the citation issued, the inspector did not inquire of Mr. Riddle as to when the face was blasted, but he did ask Mr. Scheible, the assistant safety engineer, who told him that he did not know when the blasting had taken place (Tr. 59). The inspector made no determination as to the time interval between the mucking of the face area in question and the time he observed the misfires, nor did he know when the blasting had taken place (Tr. 67). He also testified that he has operated front-end loaders, has engaged in mucking out places in a mine, and believed the one top misfired hole should have been visible at anytime during the mucking process, and that it would take very little mucking to be able to detect the bottom misfire. **He** knew of no reason which would have prevented the mucking operator from observing the misfired holes on the day in question (Tr. 133-135). **He** agreed that the mining cycle calls for mucking to be done on the evening shift and that it was possible that the face area was shot down the day before his inspection and that it was cleaned out the night before his arrival on the scene (Tr. 136).

As indicated earlier, the thrust of petitioner's case, including the basis for the alleged violation of section **57.6-177**, rests on petitioner's assertion that the respondent failed to dispose of the two misfired holes

as soon as possible after they were detected **or** should have been detected. Since it is obvious from the evidence adduced in this case that they were not detected by the respondent until the inspector arrived on the scene and issued the citation, the threshold question is whether the respondent's failure to detect the two misfires after it completed its initial mucking operation and prior to the final cleanup and inspection of the area which had been blasted constitutes a violation. In other words, does the requirement "as soon as possible" impose an obligation on the respondent **to** detect and dispose of any misfires immediately after completion of any blasting, or **may** the respondent wait until it completes its final cleanup and inspection of the area before it is obligated to inspect for and dispose of misfires?

Respondent's testimony regarding its mining cycle, including the blasting and cleanup sequence, is not rebutted by the petitioner. Further, I have to assume that the mining sequence and cleanup procedures are accomplished in accordance with an MSHA approved plan, and petitioner has not indicated otherwise. In these circumstances, I believe that it is permissible for an operator to complete its regularly approved and routine mining cycle before conducting any inspection for misfired holes, and if its plan calls for the inspection and disposition of such misfires after it has completed its cleanup, then I believe it is reasonable to find **that the operator is** in compliance with section 57.6-177, because complete inspection of **a face** cannot be thoroughly examined until such time as all of the blasted material has been removed from the face area, and once that is accomplished, I believe that it then becomes possible to inspect for misfires. However, on the facts of this case, I cannot conclude that the respondent complied with the standard, and I find that the petitioner has established a violation. My reasons for this follow.

Inspector Lalumondiere testified that the face area which had been blasted on the evening before his inspection had been cleaned up and no one was working there. The mining crew had obviously moved on to another section of the mine. Although respondent's witness Riddle testified as to the general cleanup procedure and indicated that no one has any reason to go back to an area which had previously been blasted until it is completely cleaned up, he also indicated that when the two misfires **were** called to **his** attention after the issuance of the citation, he observed that the two holes were not obstructed by any debris or rocks. This leads me to conclude that the face area in question had been cleaned up to the point where the two misfired holes were readily visible to anyone in the area, and it **supports** the inspector's testimony that the area had been cleaned up. In other words, while I accept respondent's assertions concerning the general cleanup and mucking procedures, I conclude and find that on the day the **citation** issued, mucking and cleanup had been completed, the two misfired holes were readily visible, and at that point in time they should have been detected and disposed of.

Respondent's assertion that it should have been given an opportunity to go into the face area to inspect for misfires as part of its routine mining cycle in advance of the inspector's arrival on the scene is rejected as a

defense to the citation issued in this **case**. According to the testimony, the responsibility for inspecting the area after it is shot down and mucked rested with the loader operator who mucked the area out after it was shot down. However, he did not testify. Under the circumstances, the **only** credible testimony of the conditions which prevailed on the day the citation issued is the testimony of the inspector and Mr. Riddle, and, as indicated above, the inspector's testimony supports the citation as issued. In addition, I also find that petitioner has established the fact that the two holes were in fact misfires as that term is defined in section 57.2. The citation is AFFIRMED.

Gravity

While it is true that no one was working in the area which had been blasted on the day the citation issued, the fact remains that men were underground working some 400 feet away in another section. Although the possibility of an accidental detonation was rather remote due to the fact that no one was working in the area, the fact is that no one can predict such an occurrence, and I believe that failure to detect or dispose of misfired holes constitutes a serious violation, particularly in an underground mine. I find that the violation was serious.

Negligence

Respondent's suggestion that it is not feasible or convenient for a loader operator to alight from his machine during the mucking operation to inspect for misfired holes is rejected. Mr. Riddle testified that after the initial mucking operation, it is the **responsibility** of the front-end loader operator to inspect the area for misfires during the asserted "final and careful" cleanup of the area. Since I have found that the testimony adduced supports a finding that the area had been cleaned up when the inspector arrived on the scene, I conclude that it is reasonable to assume that the loader operator either did not inspect the area at all after finishing his cleanup chores, or he did so in such a casual manner that he did not detect the two holes located in the corner of the face which was blasted. In these circumstances, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Good Faith Compliance

The evidence adduced reflects that the two misfired holes were immediately washed out as soon as they were brought to the attention of mine management, and I conclude that this constitutes rapid good faith compliance on respondent's part.

Prior History of Violations

The evidence adduced supports a finding that respondent has a good safety record and that its prior history of violation at the mine in question is excellent.

Size of Business and Effect of Penalty on Respondent's Ability to Continue in Business

The parties stipulated that respondent is a small mine operator and that the penalties assessed will not adversely affect its ability to remain in business. I adopt these stipulations as my findings on these issues.

Docket No. LAKE 80-57-M

Citation No. 364712, May 9, 1979, 30 C.F.R. § 57.20-20, states as follows:

The unattended mine openings were not restricted by gates or doors. Two men were seen in the mine. These men did not have self rescuers, individual lights, and had not checked in. This mine has not operated for at least 6 months and is being used for some storage at present time. The men in the mine work at the Derby Quarry.

30 C.F.R. § 57.20-20 provides as follows: "Access to unattended mine openings shall be restricted by gates or doors, or the openings shall be fenced and posted."

Petitioner's Testimony and Evidence

MSHA inspector Raymond Roesler testified that he conducted a safety inspection of respondent's Derby Underground Mine on May 9, 1979, and that he **was accompanied** by Bill Tsantis and-inspector George Lalumondiere. He confirmed that he issued the citation charging that the respondent failed to have gates or doors to entrances of the mine. He observed two men working underground, and they were loading a pickup truck with some lumber in the second crosscut from the mine face. The mine had been shut down for some 6 months and the two men did not check in and were not equipped with self-rescuers or cap lamps. He described the mine as an underground limestone mine which uses the room and pillar mining method, and he observed some five mine openings which were not restricted by any barrier devices. The only barrier he observed was a large pipe that swung across the surface road by the entrance to the property approximately a quarter of a mile from the five openings. Although the pipe barrier was swung open at the time, even if it were closed, anyone could easily climb over, under, or around it.

Inspector Roesler stated that he cited section **57.20-20** because the mine **adit** is on the surface and the required barriers are for installation on the surface of an underground mine, and the area cited was just that. The mine was not abandoned, but was worked on an intermittent basis when the weather is good. He discussed the lack of gates or doors with underground superintendent Bill Tsantis, and Mr. Tsantis advised him that the two men were in fact surface miners who normally worked at the quarry and that they were not his responsibility. The pipe gate was some 4 feet high, and while it could prevent someone from driving on the property if it were locked closed, anyone on foot could go past it while it was closed. None of the

other four openings were restricted by gates , doors, or other barriers. He extended the abatement time because work was still required to be done to correct the conditions when he first went back to the mine, and the conditions were subsequently abated the **next** time he had occasion to visit the mine (Tr. 161-173).

Mr. Roesler described one of the mine openings as large enough for a truck to drive through, or some 15 feet high by 20 feet wide. The smallest opening **was** approximately 10 feet by 10 feet, and all of the openings were provided with gates and fences to abate the citation. **He** determined that the respondent should have been aware of the conditions cited because the opening were plainly visible, but the chances of the men in **the** mine being injured as a result of the cited conditions were remote. However, for a **nonminer** who might venture into the mine, loose rocks or pillars could present a possible hazard. There was a mine check-in and check-out system at the **adit** and he and his Inspection party checked In, but the two men underground had **not**. Abatement was achieved in good faith (Tr. 173-177).

On cross-examination, Mr. Roesler identified Exhibit R-3 as a sketch of the area cited, and it depicts the approximate locations of the pipe entrance gate and the unguarded **adits** he was concerned with. He conceded that many underground limestone quarries are used for a variety of **non-**mining purposes, including storage facilities (Tr. 180-182).

In response to bench questions, the inspector indicated that the unattended mine openings were in fact **adits** that had been shot out from the inside of the mine to the outside. Several were originally intended to be used as **adits**, but since the rock, shale, and roof conditions were bad in these areas, they were barricaded from the inside of the mine and not used as **adits**, but they would extend into the mine for approximately a quarter of a mile (Tr. 180-188). The usual procedure for attending these openings when active mining is taking place is to check in and out **when** anyone goes into the mine. The normal check-in location is at the mine office across the highway alongside the Derby Slope Mine (Tr. 190).

Respondent's Testimony and Evidence

Arnold Mulzer, one of the mine owners, testified that he has been engaged in limestone quarrying since 1942. He confirmed that mining underground was dependent on dry **weather** and he indicated that the mine roof is in good condition and that the mine is used for storage of lumber, tires, and other mining equipment and materials. Storage of materials underground is a **common** practice because the roof is high and storage costs are cheap. Anyone who wishes to get into a mine can do so regardless of what type of barriers are installed. Four of the open **adits** in question are used only for ventilation and vehicles cannot drive through the openings. They are **simply** shot out and left that way, and are not intended to be used as a regular means of mine access. They are barred from the inside some 50 feet into the mine (Tr. 197-201).

On cross-examination, Mr. **Mulzer** could not state whether any **limestone** production had taken place subsequent to May 9, 1979, and that he visits the operating drifts and slopes about once a week. He did not deny that the two miners were underground securing lumber on the day in question, but maintained that the **adits** were primarily used for ventilation and the mine was primarily a storage area (**Tr. 203**). The truck drove through the truck mine opening and not through any of the ventilation **adit** openings, which he characterized as "holes" which are simply shot through to facilitate **ventilation** so that the installation of mine fans is unnecessary (**Tr. 204**). The pipe gate at the main road entrance was installed at the insistence of a **MESA** mine inspector in 1973 to achieve compliance with the identical standard cited by Mr. Roesler (**Tr. 206**), and respondent takes the position that this should satisfy the requirements imposed by MSHA in this case (**Tr. 207**). The men in the mine were simply picking up some lumber and were not bolting faces or mining and the place is clean (**Tr. 208**).

Findings and Conclusions

Fact of Violation

Petitioner takes the position that since no one was attending the mine area cited by the inspector, that is, no one was physically present to check people in and out, the mine openings in question were unattended **within** the meaning of the cited standard. Petitioner's counsel took the position that if someone were stationed at the main road entrance where the pipe gate was swung open to check people in and out of the mine, compliance would have been achieved since that person would have prevented unauthorized persons from going beyond that pipe gate and into the remaining **adit** openings which were unprotected by gates or barriers and possibly injuring themselves. **On** the other hand, if the pipe gate were swung shut and locked and no one was present to check anyone in and out, compliance would not be achieved because anyone could easily go through or around the closed pipe gate and gain entry into the remaining open **adits** (**Tr. 190-193**). Since the mine was totally unattended, it necessarily follows that the mine openings were also and that a violation has been established (**Tr. 214**).

Respondent does not dispute the fact that the mine openings cited and testified to by the inspector did in fact exist and that they were unattended and not provided with gates or other devices restricting anyone who wanted to enter the mine at those openings from doing so, nor were they fenced or posted. Respondent's defense is that the pipe gate at the main road entrance to the mine sufficiently restricted any unauthorized persons from entering the mine, and that regardless of the type of devices installed to prevent persons from entering mine openings, someone will find a way to enter if they so desire.

Respondent's reliance on the pipe gate as a defense to the citation is rejected. While that gate may have offered some protection against unauthorized entry, I cannot conclude that it was sufficient to provide protection against entry into the other unattended mine openings. Section 57.20-20 requires that unattended mine openings be restricted by gates or doors or that they be fenced and posted. Since none of these devices were being utilized at the time the citation issued, I conclude and find that the petitioner has established a violation and Citation No. 364712 is **AFFIRMED**.

Negligence

The inspector found two miners underground who went into the mine through one of the larger openings used for vehicle entry and there was no indication that they had checked in with anyone, although the usual mine procedure is for persons who go underground to check in and out at the mine office used for that **purpose**. Although Respondent maintained that the pipe gate at the mine road entrance was placed there in 1973 in order to comply with a prior citation for section **57.20-20**, I do not consider that to be a defense to the citation issued by another inspector on May 9, 1979, some 6 years later. The fact is that aside from the pipe gate, the other mine openings cited were the direct result of respondent's blasting them out to facilitate its mine ventilation and to permit vehicles to enter for purposes of storing and retrieving equipment, and there is no evidence that these openings were present during any prior inspection which may have resulted in the 1973 inspection. Further, since the prior inspection resulted in a citation, I believe it is reasonable to expect an operator to be aware of the fact that additional mine openings may require him to install barriers or other protective devices to provide the protection required by section 57.20-20. In these circumstances, I conclude and find that the respondent failed to exercise reasonable care to prevent the conditions cited and that its failure in this regard constitutes ordinary negligence.

Gravity

The evidence adduced in this proceeding reflects that the underground mine in question was mined on a seasonal and intermittent basis and that at the time the citation issued, no mining was taking place and the men underground went there only to retrieve some lumber from the **storage** area. Further, the mine road is usually locked with the pipe gate, and a check-in and out system is in use at the mine, although there **is** no indication that the two men underground used it on the day the citation issued. **Based** on the circumstances of this case, and in light of the inspector's finding that the possibility of the men underground being injured as a result of the conditions cited was rather remote, I conclude that the violation is nonserious.

Good Faith Compliance

The evidence establishes that abatement was achieved within the extended time fixed by the inspector and the open **adits** were protected with gates or fences to achieve compliance. I conclude that respondent exercised good faith abatement in correcting the cited conditions.

History of Prior Violations

Respondent's history of prior violations at its Derby Slope Mine consists of two prior citations during the **24-month** period prior to the issuance of the citation in issue in this **case**. I conclude that this is an indication of a good record of prior citations on respondent's part and I have considered this fact in the amount of the penalty assessed in this matter.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business

The parties stipulated that respondent is a small mine operator and that the penalties assessed will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions on these issues.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and after consideration of the criteria for penalty assessments set forth in section 110(i) of the Act, civil penalties are assessed as follows in these proceedings:

Docket No. LAKE 80-201-M

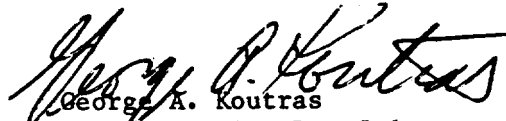
<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
366596	11/27/79	57.6-177	\$75

Docket No. LAKE 80-57-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
364712	05/09/79	57.20-20	\$25

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings, in the amounts shown above, within thirty (30) days of the date of these decision. Upon receipt of payment by MSHA, these proceedings are DISMISSED.


George A. Koutras
Administrative Law Judge

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