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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

PETITIONER

Civil Penalty Proceeding

Docket No. WILK 79-24-PM  
A.O. No. 43-00134-05001

v.

Derby Granite Quarry & Mill

DERBY GRANITE, INC.,

RESPONDENT

DECISION

Appearances: Michael D. Felsen, Attorney, U.S. Department of  
Labor, Boston, Massachusetts, for the petitioner

Before: Judge Koutras

STATEMENT OF THE CASE

This proceeding concerns a proposal 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 four alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

Respondent answered and contested the proposed penalty assessments and the case was scheduled for hearing at Montpelier, Vermont, on September 17, 1980. Petitioner appeared at the hearing but the respondent did not. Under the circumstances, the hearing proceeded without him and petitioner presented testimony and evidence in support of the citations and its proposal for assessment of civil penalties.

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 this proceeding, 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.

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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, Pub. L. 95-164, 30 U.S.C. 801 et 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

The citations issued in this proceeding are as follows:

104(a) Citation No. 211881, May 4, 1978, 30 C.F.R. 56.14-1: "Mandatory standard 56.14-1 was not complied with in that a guard was not provided on the rope drum gears of the wooden derrick hoist."

104(a) Citation No. 211882, May 4, 1978, 30 C.F.R. 56.12-23: "Mandatory standard 56.12-23 was not complied with in that the 440 volt energized primary wooden derrick hoist turn meter brushes were not guarded to prevent contact by persons."

104(a) Citation No. 211886, May 4, 1978, 30 C.F.R. 56.16-5: "Mandatory standard 56.16-5 was not complied with in that compressed gas cylinders were not secured in the hoist room."

104(a) Citation No. 211895, May 5, 1978, 30 C.F.R. 56.15-4: "Mandatory standard 56.15-4 was not complied with in that the mill foreman was not wearing safety glasses while breaking stone."

#### Petitioner's Testimony and Evidence

MSHA inspector John Rouba testified as to his training and experience, and stated that prior to the issuance of the citations in question during the course of an inspection at respondent's mining operation, he had previously inspected the mine and he detailed the dates of those inspections (Tr. 10-12; Exhs. P-a, P-b). He described the mining operation as a granite mine, and indicated that the operation consists of mining granite in "block" form approximately 8 feet long and 4 feet thick. The quarried granite is removed from the quarry by means of a derrick hoist and either stockpiled in the storage yard or stored in trucks for sale and transportation to quarry

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customers. The operation also includes a milling operation on the mine property where some of the mined granite is sawed into blocks and finished and manufactured into curbing or monumental stone. Some of the granite is also used for stone chipped to a customer's specifications. He was advised and informed that some of the mined granite products from the quarry are sold and shipped to Canadian buyers and that some is shipped to buyers in New York and New Jersey (Tr. 12-14). He also indicated that sometime in July of 1980, respondent sold his quarry business and no longer operates the mine.

Inspector Rouba testified that as of May 4, 1978, MSHA's records reflect that the mine in question employed 31 employees, that it is located in Derby, Vermont, some 5 miles or so south of the Canadian border, and Exhibit P-2(a), a mine profile, reflects that the mine operated 5 days a week during one 9-hour shift each day (Tr. 14; Exhs. P-1, P-2(a)).

Inspector Rouba confirmed that he issued each of the citations in question in this proceeding during the course of an inspection at the mine on May 4, 1978, and he indicated that mine owner Bianchi accompanied him during the inspection. The unguarded drum gears on the derrick hoist were adjacent to a travelway and he identified a copy of a sketch he prepared indicating the location of the area in question (Exh. P-7). The derrick was located in a hoist room, and he indicated that a hoistman is on duty in the room to operate the hoist and that as many as seven men regularly traveled through the area and that the men usually ate their lunch in the hoist room. The unguarded gears presented a potential hazard to the men who could have slipped or fallen into the unguarded gear pinch point and received serious injuries while walking along the travelway which had a clearance of some 20 inches on one side of the hoist and some 30 inches on the opposite side. Mr. Rouba believed that the respondent should have been aware of the guarding requirements of section 56.14-1 because a second hoist located in the hoist room had its gears guarded and the respondent had been previously cited for other equipment guarding violations discovered during previous inspections (Tr. 23-28; Exh. P-2(b)). Mr. Rouba also identified several photographs of the hoist in question taken by him on September 10, 1980, showing the gears and the location of the derrick hoist before it was removed from the hoist room and dismantled (Exhs. P-4 through P-6).

Mr. Rouba stated that respondent exercised rapid good faith compliance by installing a guard on May 5, 3 days in advance of the May 8, date that he initially fixed for abatement (Exh. P-8; Tr. 29).

Regarding Citation No. 211882 concerning the unguarded derrick hoist turn meter brushes, Inspector Rouba identified two recent photographs of the motor electrical connections which he was concerned with and he indicated that the location of the motor in the proximity of the travelway, coupled with the fact that miners regularly passed through the area, presented a shock hazard if they were to contact the unguarded connectors. The

unguarded motor was in plain view and he believed that the respondent should have been aware of the hazard and the fact that a guard was required. Abatement was achieved

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the day after the citation issued and 3 days prior to the date he fixed for abatement and he considered this to be rapid good faith compliance (Tr. 33-48; Exhs. P-7, P-10 through P-12).

Mr. Rouba stated that Citation No. 211886 concerning the unsecured compressed gas cylinders involved only one such cylinder which he observed standing upright on the hoist room floor and it was not secured in any way to prevent it from being struck or knocked over. Failure to secure it in any way presented a hazard of the valve being struck and damaged by a tool. He did not determine whether the cylinder was full or empty and he described it as being approximately 5 feet high. He also indicated that men regularly passed through the area, and he stated that the cylinder was not in use but was either awaiting transport into the quarry or out of the hoist room to a storage area, but he was not sure as to which was the case. Abatement was achieved within the 50 minutes which he fixed by securing the cylinder against a wall with a rope. He believed the respondent should have been aware of the requirements of section 56.16-5, because he had previously been cited for identical violations (Tr. 48-57; Exhs. P-2(b), P-13).

Inspector Rouba identified the mill foreman without safety glasses as Ronald Le Clair, and he indicated that he was breaking and chipping stone when he observed him. The foreman had no safety glasses of his own on his person and had to borrow a pair from another employee. Abatement was achieved immediately, and Mr. Rouba indicated that respondent had previously been cited for safety glasses violations (Tr. 60; Exhs. P-14, P-2(b)). In support of his contention that the respondent's milling operation was owned and operated by the respondent, the inspector identified an MSHA accident report, Form 7000-1, reflecting that the accident (unrelated to the citation in question) occurred at respondent's mill or plant. The form is signed by respondent Bianchi's wife and that form reflects that respondent Derby Granite, Incorporated, owns the Derby Quarry and Plant (Tr. 58-60; Exh. P-15).

### Findings and Conclusions

#### Failure of Respondent to Appear

I consider respondent's failure to enter an appearance in this matter to be a waiver of any further rights on his part to be heard. The record reflects that respondent received the two notices of hearing issued by me in this proceeding. In addition, although respondent's initial answer to the petitioner's proposals for assessment of civil penalties was not timely filed, prompting a show-cause order to be issued by Judge Broderick proposing to hold him in default, upon further consideration of his answer, and out of deference to respondent's apparent failure to comprehend the consequences of his failure to file a timely answer, I accepted his late-filed answer and accommodated him with a hearing site within reasonable commuting distance of the mine. Under these circumstances, I find that respondent has been given more than an adequate opportunity to be heard, but he

obviously has failed to take advantage of it. Accordingly, I conclude that respondent has waived his right to any further hearing and that the issuance of any show-cause order

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would be a fruitless gesture. I have considered this case de novo and my decision in this regard is made on the basis of the evidence and testimony of record as presented by the petitioner in support of its case at the hearing.

#### Fact of Violations

I conclude and find that petitioner's testimony and evidence establishes the fact of violation as to each of the citations issued by the inspector in this proceeding. The conditions described on the face of each citation are supported by his testimony and the conditions establish violations of each of the cited mandatory safety standards. The citations are therefore AFFIRMED.

#### Negligence

I find that the respondent failed to exercise reasonable care to prevent the conditions cited by the inspector and which resulted in the issuance of the citations in question and that such a failure on respondent's part constitutes ordinary negligence.

#### Gravity

With the exception of the citation for the unsecured gas cylinder, I find that the testimony of the inspector supports a finding that Citation Nos. 211881, 211882, and 211895 were serious violations. The conditions described in each of these citations, coupled with the inspector's testimony, establish that they exposed workers to the possibility of serious injuries. As for the one unsecured cylinder, I find that the possibility of a tool striking the gas valve to be highly remote, and since the inspector failed to determine whether the cylinder was full or empty, I have no basis for finding that the situation was hazardous. The cylinder was not in use, and there is no indication that it was located near or in the proximity of any travelway where it may have been in a position to topple over and strike someone. Under the circumstances, I conclude that Citation No. 211886, was nonserious. I also take note of the fact that while the citation refers to unsecured cylinders, the inspector candidly admitted that only a single cylinder was present.

#### Good Faith Compliance

The record supports a finding that Citation Nos. 211881, 211882, and 211895, were rapidly abated before the time fixed by the inspector, and that Citation No. 211886 was abated within the time fixed by the inspectors. Respondent's compliance in this regard has been considered by me in the penalties assessed for the citations which have been affirmed.

#### History of Prior Violations

Inspector Rouba stated that the respondent has a poor



compliance record and that MSHA's records reflect that for the period prior to the issuance of the citations in question, respondent was issued 264 notices of violations

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and 27 orders of withdrawal (Exh. P-2(a)). In addition, Mr. Rouba stated that during his inspection of May 4, 1978, he issued 15 additional citations and one order for various violations but he was unaware of the current status of those citations or whether or not civil penalties have been assessed.

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

I find that respondent conducted a small-to-medium-sized mining operation, and since he did not appear at the hearing, there is no information that the civil penalties assessed in this case will adversely affect the respondent's ability to continue in business.

#### Penalty Assessments

Petitioner's counsel asserted that the proposed civil penalties advanced in this case accurately reflect, and take into account, an evaluation of all of the statutory criteria found in section 110(i) of the Act, and that it is petitioner's position that as a minimum, those proposed assessments should be affirmed.

Although the record establishes that respondent's history of prior violations is not a good one for an operation of its size, I have considered the fact that respondent achieved rapid and timely abatement of the citations in question, that the citations were issued over 2 years ago, less than 2 months after the effective date of the Act, and that respondent has apparently sold his business and no longer operates the quarry. Under the circumstances, I conclude that the proposed penalties are reasonable and they are accepted and affirmed as the civil penalties assessed and imposed by me in this matter, as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment
211881	5/4/78	56.14-1	\$106
211882	5/4/78	56.12-23	90
211886	5/4/78	56.16-5	78
211895	5/4/78	56.15-4	130

#### ORDER

Respondent IS ORDERED to pay civil penalties in the amount of \$404 within thirty (30) days of the date of this decision.

George A. Koutras  
Administrative Law Judge