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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. SE 80-66-M  
A.O. No. 09-00017-05005 H

v.

DOVE CREEK GRANITE COMPANY, INC.,  
RESPONDENT

Blue Ribbon Quarry

DECISION

Appearances: Michael Hagan, Attorney, Office of the Solicitor, U.S.  
Department of Labor, Atlanta, Georgia, for the petitioner;  
John Strong, Elberton, Georgia, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of a civil penalty 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 one alleged violation of mandatory safety standard 30 C.F.R. 56.15-5.

Respondent filed a timely answer and notice of contest and a hearing was convened on November 25, 1980, in Athens, Georgia. The parties waived the filing of written proposed findings and conclusions, but were afforded an opportunity to present oral arguments in support of their respective positions. A bench decision was rendered which is herein reduced to writing as required by Commission Rule 65, 29 C.F.R. 2700.65.

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 proposal for assessment of civil penalty filed in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation 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 this decision.

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, (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

Citation No. 099053, August 22, 1979, 30 C.F.R. 56.15-5 states as follows: "Clarence Thornton and Julius Langston were drilling a lift hole using a 12 inch piece of channel iron for a working platform. The platform was just above water which was about 30 feet deep. Neither man was wearing safety line or life jacket."

#### Stipulation

Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (Tr. 7).

#### Testimony and Evidence Adduced by the Petitioner

MSHA inspector Tom Hubbard confirmed that he issued the citation and withdrawal order after inspecting the mine and discovering two men who were in danger of falling off a 12-inch wide channel iron. He noticed that the channel iron had a 2-inch lip running along either side of its approximate 10-foot length (Tr. 13). One side of the channel iron was on the quarry wall and the other end was resting on a pile of submerged stone or quarry bottom. The section of the iron on which the men were standing was suspended over water which vibrated when the men moved on the iron. According to the workmen, the water was 30 feet deep. Mr. Hubbard himself took a 15-foot pole and unsuccessfully attempted to touch bottom with it. Upon questioning the two men, Mr. Hubbard determined that neither could swim (Tr. 14-15).

Mr. Hubbard testified that the men were using a jackhammer drill which released oil during use. This oil, he concluded, would make the walking surface of the channel iron slippery. The 2-inch lip on the iron was also thought to provide a tripping hazard. Since the men could possibly drown if they fell, Mr. Hubbard felt that the men should have been tied down or have worn

safety belts while performing the operation (Tr. 15-17).

Inspector Hubbard testified that Mr. Thornton, the foreman, was aware that the men were working without safety belts or lines, although a reasonable person should have known of the danger. After Mr. Hubbard issued the 107(a) withdrawal order, the operator withdrew the men and sent them to town to purchase the proper equipment (Tr. 17-18).

In response to bench questions, Mr. Hubbard testified that on the day following the issuance of the withdrawal order, there was full compliance with the safety requirements. He reiterated the fact that the reason he issued the original citation and withdrawal order was because of the danger of falling or drowning, and not because the operator used a channel iron as a work platform. Mr. Hubbard stated that it was not unusual to allow water to fill up part of a nonworking quarry, because it could always be pumped out at a later date. At the time of the citation, he found this to be a working quarry (Tr. 18-22).

#### Testimony and Evidence Adduced by the Respondent

Respondent attempted to introduce two sworn affidavits, but these were rejected because it was not shown that the affiants were unavailable (Exhs. R-1, R-2). Respondent conceded the fact of a violation, but then referred to the company's financial statements as evidence of its unstable financial condition (Exh. R-3). The defense rested its case on the fact that the company was no longer in business (Exh. R-4, Tr. 25-27).

#### Findings and Conclusions

##### Fact of Violation

Respondent is charged with a violation of 30 C.F.R. 56.15-5 which requires men to wear safety belts and lines when there is a danger of falling. Respondent concedes, and I find, that allowing men to work on a channel iron where there was a danger of falling, without providing safety belts and lines, violated this regulation.

##### Good Faith Compliance

The record supports a finding of good faith compliance with the withdrawal order. The inspector testified that the men immediately ceased working and were sent to buy ropes. The next time he visited the site, the workers were securely tied down (Tr. 17-18).

##### Gravity

The evidence establishes that this was a serious violation. Since the water was at least 15 feet deep, and neither man could swim, there was a good possibility of drowning.

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## Negligence

I find that this violation was a result of ordinary negligence. A reasonable man would have recognized the danger and would have required the workers to wear safety belts and lines.

## History of Prior Violations

Respondent's record indicates that there was no significant history of prior violations warranting an increase in the assessment (Exh. P-2).

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

The evidence indicates that the quarry was run by a small operator (Exh. P-2), and petitioner agreed that this was the case (Tr. 8). Both parties agree, and I find, that the respondent is no longer in business. Further, I am persuaded by respondent's financial records that the mine operated at a loss in 1979, and petitioner does not dispute that this was in fact the case (Tr.9).

## Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, a civil penalty of \$100 is assessed for Citation No. 099053, issued on August 22, 1979, for a violation of 30 C.F.R. 56.15-5. I conclude that since the mine operator is no longer in business, a \$500 penalty will serve no useful deterrent purpose, but due to the gravity of the violation, I believe that an assessment of \$100 is appropriate.

## ORDER

Respondent is ORDERED to pay the civil penalty assessed by me in the amount of \$100 within thirty (30) days of the date of this decision. Upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras  
Administrative Law Judge