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SOL (MSHA) V. MARTIN MARIETTA AGGREGATES  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDINGS

Docket No. SE 88-87-M  
A.C. No. 31-00064-05515

v.

Belgrade Quarry

MARTIN MARIETTA AGGREGATES,  
RESPONDENT

Docket No. SE 88-97-M  
A.C. No. 31-00048-05511

New Bern Quarry

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor,  
U.S. Department of Labor, Atlanta, Georgia, for  
Petitioner (Secretary); W. Scott Hunt, Safety  
Engineer, Martin Marietta Aggregates, Rocky Point,  
North Carolina, for Respondent (Martin Marietta).

Before: Judge Broderick

STATEMENT OF THE CASE

Each docket involves a single citation charging a violation of 30 C.F.R. 56.16006 because stored oxygen and acetylene tanks were not provided with covers over the valves. The first citation involved tanks at Respondent's Belgrade Quarry, the second involved tanks at the New Bern Quarry. Respondent denies that it violated the standard, and asserts that the tanks were not stored, but were in use. The cases were consolidated for the purposes of hearing and decision. Pursuant to notice, they were heard on March 14, 1989, in Jacksonville, North Carolina. Inspector Ronald D. Lilly testified on behalf of the Secretary; William Fennell and Lynwood Yates testified on behalf of Martin Marietta. At the conclusion of the hearing, each party orally argued its position on the record, and waived its right to file a post hearing brief. I have reviewed the entire record and considered the contentions of the parties, and make the following decision.

FINDINGS OF FACT

Respondent Martin Marietta Aggregates is the owner and operator of aggregate mines in Onslow County and Craven County, North Carolina, known as the Belgrade Quarry and the New Bern Quarry. The mines produce stone which enters interstate commerce. There is no evidence in the record as to the size of the operator or either of the mines. The Belgrade Quarry has a history of ten violations during the 24 month period prior to the violation at issue here. The New Bern Quarry has a history of six violations during the 24 month period prior to the violation charged in these proceedings. The history is not such that penalties otherwise appropriate should be increased because of it.

CITATION 2859521 BELGRADE QUARRY

On June 26, 1988, an oxygen and an acetylene gas cylinder were located in the shop area of the Belgrade Quarry. They were located under a tin-roofed canopy and were securely chained to the steel leg of the canopy. The valves were turned off; the regulators and hoses were attached, and the valves were not covered. No workers were in the immediate area; a mechanic was seen in a truck across a small creek. Ronald Lilly issued a citation alleging a violation of 30 C.F.R. 56.16006. At the time the citation was issued (11:00 a.m.), the Inspector did not observe any apparent tasks to be performed with the gas cylinders. The violation was abated and the citation terminated the following day, when Martin Marietta had placed the original covers on the cylinders. Later Martin Marietta constructed metal boxes over the top of the cylinders; the inspector considered the metal boxes as compliance with the requirement of a cover on gas cylinder valves even if the original covers were not in place.

CITATION 2859530 NEW BERN QUARRY

On July 6, 1988, an oxygen and an acetylene gas cylinder were standing upright at the shop of the New Bern Quarry. They were attached to the leg of the shop. The regulators and hoses were attached but the valves were not covered. There was no equipment in the shop. A mechanic was present in the shop, but there were no apparent tasks to be performed with the cylinders. The mechanic told the inspector that the cylinders "were used . . . mostly every day." Inspector Lilly issued a citation for a violation of 30 C.F.R. 56.16006. The violation was abated and the citation terminated the following day when the tanks were placed in a metal cage.

REGULATION

30 C.F.R. 56.16006 provides:

Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

ISSUES

1. Whether the cylinders at the Belgrade Quarry were stored or in use when the subject citation was issued?

2. Whether the cylinders at the New Bern Quarry were stored or in use when the subject citation was issued?

3. If violations are established, what are the appropriate penalties?

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Mine Safety Act in the operation of its Belgrade and New Bern Quarries. I have jurisdiction over the parties and subject matter of these proceedings.

The crucial issue on which the parties disagree in this case is whether the cited compressed gas cylinders were "being stored" and thus required to have their valves protected by covers, or were "in use" and thus merely required to be protected by a safe location. It is not disputed that the gauges and hoses were attached, and therefore the cylinders were available for use, when the citations were issued. Neither is it disputed that the cylinders were not actually being operated at the time. Respondent argues that the cylinders are in use whenever the regulators, gauges and hoses are attached. Therefore, they are in use throughout the working day even between shifts. The Secretary takes the position that if the cylinders are not actually being used, and there are no apparent "tasks to be performed," i.e., there is no equipment in the area to be repaired or otherwise worked on, the cylinders are being stored.

In the case of *Secretary v. Phelps Dodge Corporation*, 6 FMSHRC 1930 (1984), Chief Judge Merlin concluded that gas cylinders which had not been used for two hours or more were "being stored temporarily or semi-permanently." He upheld a citation alleging a violation of 30 C.F.R. 55.16-6. Judge Merlin relied in part on the Commission decision in *FMC Corporation*, 6 FMSHRC 1566 (1984) in which the temporary placement of explosives in a supply yard for more than an hour,

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and some for more than six hours was found to constitute storage. The term storage, the Commission held, "is sufficiently broad to include short-term, long-term and semi-permanent storage . . . "

The standard in 56.16006 has two facets: (1) valves on gas cylinders shall be covered when being transported or stored; (2) the cylinders shall be in a safe location when in use. By a separate standard, namely 56.16005, compressed gas cylinders are required to be secured in a safe manner.

In the Belgrade Quarry, there was no equipment at the site to be worked on, and there was no mechanic or other worker at the site to operate the gas cylinders. Full time welders, however, were employed at the quarry. Part of the time they worked with the cylinders involved here, and part of the time on welder trucks. There is no evidence in the record as to when the gas cylinders involved here were last used, or when they might next be used. The quarry is in operation from 7:00 a.m. to 5:00 p.m. The Martin Marietta official to whom the citation was served did not testify. I conclude that the evidence clearly establishes that the cylinders were not in use, but were in temporary storage under the Commission's definition of the term. Therefore, failure to cover the valves constituted a violation of the standard.

The facts surrounding the New Bern Quarry cylinders differ somewhat: the New Bern Quarry operated "[m]ost of the time around . . . the clock," (Tr. 73-74), ten hours on production and fourteen on a maintenance shift. At the New Bern Quarry a mechanic was present in the shop area when the citation was issued. He was not called to testify. The Plant Manager testified that the tanks (cylinders) were "used all during the day." (Tr. 61) However, he also stated that he could not say whether they were used on the day the citation was issued, "but there's very seldom a day goes by when it's not used off and on during the day." (Tr. 67) Nor could he say whether they had been used the previous day, or how often they are used. Although the question is closer with respect to the New Bern Quarry than with respect to Belgrade, I conclude that the cylinders were not in use when the citation was issued but were in temporary storage. Therefore, failure to cover the valves constituted a violation of the standard.

#### PENALTIES

Each of the violations involved herein was assessed at \$20. The parties have agreed that if violations are established, the amount assessed is appropriate. The Secretary does not contend that the violations were serious or the result of more than moderate negligence. However, I cannot ignore the fact that the

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violation cited at the New Bern Quarry was the same as that cited more than a week previously at Belgrade. Therefore, I conclude that Respondent was guilty of greater negligence in permitting the violation to occur at New Bern. The violations were not serious because they were unlikely to cause injury. The conditions were abated promptly in good faith. The violations resulted from Respondent's negligence; the violation at New Bern resulted from a high degree of negligence. Based on the criteria in section 110(i) of the Act, I conclude that penalties of \$30 and \$70 are appropriate for the violations found.

ORDER

Based on the above findings of fact and conclusions of law Respondent is ORDERED to pay within 30 days of the date of this decision the following civil penalties.

Citation	Penalty
2859521	\$ 30
2859530	70
TOTAL	\$100

James A. Broderick  
Administrative Law Judge