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

MOUNTAIN DRIVE COAL COMPANY, CONTESTANT	Contest of Citation
v.	Docket No. KENT 81-110-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 993137 March 10, 1981 No. 1 Strip Mine

DECISION

Appearances: Lloyd R. Edens, Esq., Middlesboro, Kentucky, for Contestant; Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, for Respondent

Before: Administrative Law Judge Steffey

A hearing in the above-entitled proceeding was held on May 11 and 12, 1982, in Barbourville, Kentucky, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. After the parties had completed the introduction of evidence, counsel for the parties made closing arguments, and I rendered a bench decision.

When the reporter failed to submit a transcript of the hearing within a reasonable period of time, efforts to call him by telephone were unsuccessful. A letter written to his post office box number was not answered. Finally, I wrote him a letter by certified mail on October 19, 1982. The letter was returned by the post office with a notation on the front of the envelope that the addressee had not claimed the registered letter. A telephone call to the post office resulted in our being advised that the reporter does still pick up his mail at that post office, but he would not claim the registered letter when he was given three notices that a registered letter was being held for his signature.

The only address I have for the reporter is a post office box number. I assume that I could personally travel to Tazewell, Virginia, and ask enough questions to determine where the reporter lives and I probably could find his home and he might be willing to give me, or sell me, the stenographic notes which he made of the hearing. I do not know, of course, whether his notes are legible or whether another reporter could produce a transcript of the hearing from his notes.

An alternative way to obtain a written transcript would be for me to hold a second hearing, but I am reluctant to burden the parties with a second hearing in view of the fact that 11 witnesses testified at the

previous hearing. Even if they could all be assembled again for a second hearing, a period of more than 20 months has elapsed since the citation being contested was issued, and it is unlikely that they would recall the occurrences vividly enough to produce a satisfactory record.

Fortunately, I retained all of the exhibits which were introduced at the hearing. The issue in this case dealt exclusively with whether contestant was providing sufficient illumination to provide safe working conditions at its surface mine. Twelve of the exhibits consisted of color photographs which contestant had had made of its mine and the equipment used at the mine. Many of my findings of fact are based on contestant's color photographs. Although my bench decision resulted in an unfavorable decision for the Secretary of Labor, it is entirely possible that counsel for the Secretary will not believe that it is necessary to file a petition for discretionary review with the Commission because the decision is based almost entirely upon evidentiary facts. Therefore, my decision will have little precedential value for any operator other than the contestant in this proceeding.

In view of the circumstances described above, I have decided to issue the bench decision in final form. If counsel for the Secretary of Labor should decide, after evaluating the decision, that it is necessary to file a petition for discretionary review, the case can be remanded to me so that I can either hold another hearing or try to obtain a transcript from the notes made by the reporter who appeared at the first hearing.

The material which follows is the bench decision which was orally given on May 12, 1982, after counsel for the parties had completed their closing arguments.

> This proceeding involves a notice of contest filed on April 8, 1981, in Docket No. KENT 81-110-R by Mountain Drive Coal Company alleging that Citation No. 993137 issued on March 10, 1981, under section 104(a) of the Federal Mine Safety and Health Act of 1977 is invalid because the citation incorrectly alleged that Mountain Drive had violated 30 C.F.R. 77.207. Section 77.207 reads as follows:
>
> > Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.
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> At the hearing MSHA presented its case through the testimony of one coal mine inspector supervisor and Mountain Drive supported its case through the testimony of 10 witnesses. My decision will be based on the following findings of fact:
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> 1. It was stipulated that Mountain Drive is subject to

the jurisdiction of the Act, that Mountain Drive operates the No. 1 Strip Mine here involved, that Mountain Drive is a large operator,

that Mountain Drive has no history of having previously violated section 77.207, and that payment of penalties will not adversely affect Mountain Drive's ability to continue in business.

2. As to the penalty criterion of contestant's good-faith effort to achieve rapid compliance, MSHA agreed that Mountain Drive could continue to use the illuminating methods which were in operation when Citation No. 993137 was issued, pending the rendering of a decision in this proceeding as to whether Mountain Drive's illumination method is a violation of section 77.207.

3. It was further stipulated that Citation No. 993137 was issued on March 10, 1981, alleging a violation of section 77.207 by Federal Coal Mine Inspector Supervisor Kenneth T. Howard who was accompanied by another inspector named H. M. Callihan. The stipulations are given in a two-page document which is Exhibit 1 in this proceeding.

4. The inspector supervisor testified that he and another inspector went to Mountain Drive's No. 1 Strip Mine on March 10, 1981, at about 5:30 to 6 p.m. and examined various areas of the mine for a period of about 4 or 5 hours. He was concerned about the adequacy of lighting in two different areas.

5. The first area was at a dumping site in N Section where large trucks were dumping overburden into a hollow about 20 feet in depth. A dozer was leveling dumped materials and the inspector supervisor was told by Mountain Drive's safety director that the dozer was available for extra illumination or spotting if needed. The inspector supervisor said the dozer's lights, when he observed them, were shining toward the dump trucks so as to be in the truck drivers' eyes as the drivers approached the dumping site. The inspector supervisor was accompanied by Mountain Drive's safety director, Buddy Johnston, and the inspector supervisor asked Johnston to have the dozer turn so that its lights were shining on the dumping area rather than toward the approaching trucks coming in to dump overburden.

6. The inspector supervisor would have accepted the dozer's lights as adequate supplemental illumination for the dumping area except for his belief that the dozer operator would normally be engaged in spreading overburden and could not be expected to shine his lights on the dumping site every time a truck approached. Moreover, he believed that the dozer had been placed in a supplemental lighting position to impress upon him that adequate lighting was available at the dumping site.

7. The inspector supervisor did not get out of his truck to discuss lighting with any truck driver or the dozer operator and did not actually examine the number of lights on the front of the truck or its rear, but he estimated that each truck had two lights on its front end and one back-up light on its rear end. The inspector supervisor concluded that the lighting was inadequate in the dumping area on the basis of the above-described examination.

8. The second area which the inspector supervisor believed to be insufficiently illuminated was a pit area known as the N-3 pit. He recalled the equipment he had observed in the N-3 pit as two dozers, but the citation was written over a year prior to the date of the hearing and the inspector supervisor's memory was not sufficiently keen to enable him to say for certain whether he had observed two end-loading machines in the N-3 pit or two dozers or one of each in the N-3 pit. The only aspect of the N-3 pit's illumination as to which the inspector supervisor was certain was that while the light from the dozers or loaders was sufficient for the operators to see the material they were pushing, the lighting on the equipment was not bright enough to enable the equipment operators to see all the way to the top of the highwall near which they had to work from time to time.

9. It was the inspector supervisor's opinion that a highwall may become hazardous during any given 8-hour shift and that equipment operators must be able to observe the highwall all the way to the top to be certain that it does not develop cracks which may release loose material which may fall into the pit where the equipment is being used. In fact, the inspector supervisor indicated that a fatality had occurred at another mine not owned by Mountain Drive a short time before he wrote the citation here involved and that fatality occurred shortly after a new shift had begun to work following a preliminary inspection of a highwall. Therefore, the inspector supervisor concluded that supplemental lighting was needed in the N-3 pit.

10. Based on the facts summarized in Finding Nos. 4 through 9 above, the inspector supervisor and Inspector Callihan both signed Citation No. 993137. The condition or practice on that citation reads as follows: "Sufficient illumination to provide safe working conditions was not provided at dumping location in "N" section and the "N-3" pit area. At the dumping locations only vehicle headlights and/or back-up lights were available and in the pit area, sections of the highwall where equipment was required to work in close proximity were not illuminated."

11. Charles Warren, a commercial photographer, was hired by Mountain Drive to take some color pictures showing the degree of illumination provided by the lights on Mountain

Drive's equipment. The photographer did not provide any illumination in addition to that supplied by the existing lights on the equipment. Exhibit A is an 8" x 10" photograph of lighting provided by an end loader like the one operating in the N-3 pit when the inspector supervisor cited the N-3 pit for insufficient lighting. Exhibits B through E are 8" x 10" photographs of illumination provided by the Euclid 75 trucks being used in the dumping area cited by the inspector supervisor for insufficient lighting. Those photographs support a conclusion that the trucks and end loaders provided a great deal of light.

12. Buddy Johnston, Mountain Drive's safety director, accompanied the inspector supervisor and the other inspector on March 10, 1981. He introduced six 5" x 7" color photographs of one of the Euclid 75 trucks which was being used in the dumping area on March 10, 1981. Exhibit I is a close-up picture of the front of the truck. Johnston explained that the manufacturer installs four lights on the front and that Mountain Drive additionally installs four supplemental lights on the front of the truck, one on each end of the bumper and one on each side of the hood about even in height with the last rung of the ladder used by the truck driver to climb up to the truck's cab. Exhibit H is a close-up of the rear of the same Euclid truck showing the two sealed beam back-up lights which are standard equipment installed by the manufacturer and two supplemental lights which are installed by Mountain Drive to shine diagonally toward the left and right sides of the rear dual wheels. Exhibits F and G are two photos of the same Euclid truck showing a supplemental light which Mountain Drive adds just behind each front wheel so as to illuminate the area in front of the rear dual wheels. The actual illumination is illustrated by the 8" x 10" photographs described in Finding No. 11 above.

13. Johnston also introduced as Exhibits K and L two 5" x 7" photographs of a 992 Caterpillar end loader like the two being used in the N-3 pit when the N-3 pit was cited for insufficient lighting. Johnston's Exhibits K and L show that the manufacturer equips the loader with lights on the boom on each side near the lower part of the windshield and with one light on each side of the top of the cab. Mountain Drive supplements the manufacturer's cab lights with two lights between the two top cab lights and the middle lights are directed upward so that the operator of the end loader may see the highwall above him. Johnston also testified that the inspector supervisor found the lights on the end loaders to be insufficient only when they were being used in a position which was parallel to the highwall.

14. James Courtney is an operator of a 992 Caterpillar end loader and he was operating it in the N-3 pit on March 10, 1981, when Mountain Drive was cited for insufficient lighting.

He testified that he had worked for another company, Pine Mountain Industries, at a time when that company had installed six portable power plants to provide lighting for a pit area as shown in Exhibit M, and that he was unable to work at all until the portable light plants were removed because they created an unacceptable amount of glare in his eyes by reflecting off of mirrors and by shining directly into his eyes. He insisted that he could see the entire highwall and that he could see it clearly enough to have known it if any hazardous conditions had developed on the highwall in N-3 pit. He said he nearly always approached the highwall at a 45 angle which enabled him to see to the top of the highwall and he further said that if he were to drive his end loader exactly parallel and close to the highwall, he would in that position be unable to see to the top of the highwall because of the roof of his cab and not because he lacked sufficient light to see to the top of the highwall.

15. George Brock was a truck driver on the day shift but he was fairly often asked to report for work at 3 a.m. and work to 1 p.m. During such shifts, he had worked when Mountain Drive had experimented with portable lighting units. No matter how those units were positioned, they blinded him so as to make his work more hazardous and difficult when they were used than when they were not used.

16. Three other truck drivers supplemented Brock's testimony. Their names were B. B. Wilson, B. Eugene Johnston, and Mike Polly. All of them testified that they were driving Euclid 75's on March 10, 1981, when Citation No. 993137 was written and that they could see very well where they were dumping with the lights installed on the trucks as described in Finding Nos. 11 through 13 above. All of them said they would come into the dumping area and make one pass around the dumping site so as to choose the place where they wanted to dump. Then they would back up and dump their trucks by looking first into their top rear view mirror and then into the lower mirror, as those mirrors are shown on Exhibits F, G, I, and J and as the areas are illustrated in Exhibits B, C, and D.

17. Doug Hoskins has worked for Mountain Drive since 1970 and he became the mine manager in January 1980. He was not available to testify in person at the hearing held on May 11, 1982, but his deposition was taken on May 5, 1982, in Knoxville, Tennessee, at which time he was questioned by MSHA's counsel. It was agreed that his deposition could be received as evidence in this proceeding. According to pages 7 and 8 of that deposition, Mountain Drive expanded its overburden removal ability in 1975 and the company experimented with portable lighting units for a few

months to determine whether such units could be used to maximize safety and upgrade efficiency. After the lights in

the portable units had been positioned both high and low without overcoming the equipment operators' objections to the glaring and blinding characteristics, they discontinued the use of the portable units and had operated for about 6 years without using any illumination other than the lights installed on the equipment as hereinbefore described. During that 6-year period, Mountain Drive was not cited for having insufficient lighting until the citation involved in this case was written on March 10, 1981.

18. After Citation No. 993137 was issued, Hoskins discussed the matter of illumination with other management personnel and management decided that their record of no equipment operators' complaints and their safety record free of disabling injuries justified their conclusion that their methods of illumination provided safe operating conditions and merited their filing a notice of contest with respect to the citation.

Consideration of Parties' Arguments

Counsel for Mountain Drive argued that his witnesses had carried their burden of showing that the supplemental lights installed by Mountain Drive on its trucks and end loaders provided sufficient light to satisfy the requirements of section 77.207, that is, illumination sufficient to provide safe working conditions.

I agree with Mountain Drive's counsel that the testimony of its witnesses and its exhibits support a finding that there was sufficient illumination in the N dumping area and N-3 pit to provide safe working conditions. I also agree with Mountain Drive's counsel that the testimony of the inspector supervisor lacked the certainty which is required for me to find that the inspector supervisor's testimony alleging insufficient lighting should be found to preponderate over the testimony of the truck drivers and end loader operators who said that they could see perfectly well.
In his argument, counsel for the Secretary of Labor correctly stated that there is nothing in section 77.207 which specifically requires an operator to provide illuminating or self-generating plants. The Secretary's counsel also agreed that Mountain Drive's equipment operators are uniform in their dislike for lighting plants.

The Secretary's counsel was critical of Mountain Drive for its failure to present as a witness the operator of the dozer in the dumping area. I am not certain that the dozer operator could have contributed much useful information as to the sufficiency of the illumination provided by his dozer's

lights when it is considered that the inspector supervisor testified that the dozer's lights would have provided sufficient illumination to satisfy the provisions of section 77.207, but the inspector supervisor rejected use of the dozer's lights as a consistent supplemental light source because the inspector supervisor was unwilling to accept the fact that the dozer operator would always be alert and willing to shine his dozer's lights on the dumping area at the time each truck was dumping.

Also it must be recalled that the inspector supervisor criticized the use of the dozer for supplemental lighting because the dozer's lights, when the inspector supervisor came to the N-3 pit, were shining toward the oncoming trucks. The inspector supervisor said that, in his opinion, the dozer's lights were blinding the truck drivers rather than helping them to see. To that extent, the inspector supervisor was in complete agreement with the equipment operators' objections to lighting plants because the equipment operators said that the glare from the lighting units made it difficult for them to see where they were dumping. While a dozer operator can move his dozer to keep his lights from shining into a truck driver's eyes, there is no way for a stationary lighting plant to vary its position so as to eliminate its glare from an equipment operator's eyes. Moreover, every truck driver was segregated prior to testifying but, without exception, each driver testified that the operator of the dozer turned off the dozer's lights when the trucks were dumping so that the dozer's lights would not shine in their eyes.

Therefore, I do not find that Mountain Drive's failure to add an eleventh witness to its list of witnesses is an evidentiary gap which would support a finding that Mountain Drive has failed to carry its burden of countervailing the testimony of the inspector supervisor. It is not my practice to cite shortcomings in testimony, but it is a fact that Inspector Callihan did jointly sign Citation No. 993137. I do not know what effect his testimony would have had on the outcome of this proceeding, but his failure to testify constitutes a larger gap in the Secretary's proof than the absence of the dozer operator's testimony creates in Mountain Drive's case.

The Secretary's counsel also objects because I sustained objections of Mountain Drive's counsel to questions about how the truck drivers could see when they were in N-3 pit area. The Secretary's counsel says that he relies on all the language in Citation No. 993137 as to the N-3 pit and that he was prevented by my ruling from developing his arguments in support of the citation. The total claim of insufficient light in the N-3 pit is " * * * in the pit area, sections of

the highwall where equipment was required to work in close proximity were not illuminated". The violation of section 77.207 as to the N-3 pit depends exclusively on what the inspector supervisor used to support his conclusion that the highwall was not sufficiently illuminated. The inspector supervisor does not claim to have seen a single truck in the N-3 pit. He supported the violation in the N-3 pit exclusively by saying that the operator of the dozer or end loader (he didn't know which it was) couldn't see the top of the highwall when the loader or dozer was in close proximity to the highwall.

Assuming, arguendo, that the Secretary's counsel should have been allowed to develop the question of how much illumination trucks could have provided in the N-3 pit, the evidence is overwhelming that all of the lights on the trucks were directed to the ground so that the truck drivers could see where they were backing their trucks before dumping their overburden. Thus, it is certain that the lights on the trucks would not have illuminated the highwall and no amount of cross-examination of the truck drivers could have changed the basis for the inspector supervisor's claim that the highwall was not sufficiently illuminated to provide safe working conditions.

In its decision issued in Capital Aggregates, Inc., 3 FMSHRC 1388 (1981), the Commission considered two alleged violations of section 56.17-1 which reads the same as section 77.207 involved in this proceeding. The Commission stated on page 1388 that the question presented is what constitutes illumination sufficient to provide safe working conditions. The Commission then added that resolution of the question " * * * requires a factual determination based on the working conditions in a cited area and the nature of the illumination provided". The Commission found a violation in that case because lights at a coke storage bin and adjacent walkways were not operable. The operator in that case argued that it had provided adequate illumination because it had provided electrical outlets for portable lighting equipment. The Commission then stated at page 1389, "[p]ortable lighting could satisfy the standard where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances". The Commission stated that the operator in that case had presented no evidence to show that it had the portable equipment nor how much light it would provide even if it had been available.

In this proceeding, Mountain Drive has gone far beyond the evidence considered in the Capital Aggregates case. Mountain Drive has presented a large number of witnesses who have used portable lighting in strip mining and those witnesses have shown without any

equivocation that portable

lighting, when used, failed to make conditions safer than the conditions were without such equipment. In short, portable lighting has been shown by Mountain Drive's evidence to be neither feasible nor safe.

I believe that Mountain Drive has established by a preponderance of the evidence that the lights on its trucks and end loaders furnished sufficient illumination to provide safe working conditions in the N dumping area and N-3 pit and that no violation of section 77.207 has been proven.

Since I have found that no violation was proven, there is no need to consider the civil penalty issues which were consolidated for consideration in this proceeding.

WHEREFORE, it is ordered:

The notice of contest filed on April 8, 1981, in Docket No. KENT 81-110-R by Mountain Drive Coal Company is sustained and Citation No. 993137 issued March 10, 1981, alleging a violation of section 77.207 is vacated.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)