

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 8, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-200
Petitioner	:	A. C. No. 15-14492-03843
v.	:	
	:	
	:	
LODESTAR ENERGY INCORPORATED,	:	
Respondent	:	Baker Mine

**ORDER DENYING MOTIONS FOR SUMMARY DECISION /  
NOTICE OF RESCHEDULED HEARING**

Before:           Judge Melick

On February 5, 2002, Respondent, Lodestar Energy Inc., (Lodestar) filed a motion for summary decision in the captioned proceeding as to Citation Nos. 7646256, 7646257 and 7646265, seeking vacation of the citations and the related civil penalties. Each of the citations at issue charges violations of the standard at 30 C.F.R. § 75.321(a)(1). That standard provides, as relevant hereto, that “the air in areas where persons work and travel . . . shall contain at least 19.5% oxygen. . . .” On February 20, 2002, the Secretary filed an opposition to that motion and filed her own motion for summary decision seeking to affirm those citations and the proposed civil penalties.

Lodestar argues that it is entitled to summary decision because the areas cited were areas where “persons” did not work or travel. In support of this position Lodestar cites the affidavit of Kevin Vaughn, compliance coordinator for Lodestar’s Baker Mine, that “the only individuals who would be in the general areas where the citations were written would be the examiner employed by Lodestar, who would examine the area once each week; and an MSHA inspector; and, perhaps, a miner’s representative accompanying the MSHA inspector.” Lodestar cites no legal authority nor other rationale to support its contention that mine examiners, MSHA inspectors and miner’s representatives are not “persons” within the meaning of the cited standard. No definition of “persons” has been proffered, moreover, that would exclude mine examiners, MSHA inspectors and miner’s representatives from the scope of the term “persons.”

Under Commission Rule 67, 29 C.F.R. § 2700.67 “a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any

material facts; and (2) that the moving party is entitled to summary decision as a matter of law.”

Since it is undisputed that at least mine examiners, MSHA inspectors and miner’s representatives were working and/or traveling in the cited areas and since there is no legal reason to exclude those individuals from the definition of “persons” within the meaning of the cited standard, Lodestar’s Motion for Summary Decision in this regard must be denied as a matter of law.

Lodestar also argues in the alternative, “that some of the testing methods used by the inspector are unclear at best, and it is impossible to tell from the available information whether they properly depict the oxygen content in the areas where people actually [*sic*] or travel within the mine.” This argument on its face however acknowledges that there is a genuine issue as to material facts. Accordingly this alternative argument likewise cannot support a summary decision.

The Secretary, in essence, argues in her motion for summary decision that the material facts set forth in the citations and affidavit of Inspector DeLeon are undisputed and entitles her to summary decision establishing the cited violations and a civil penalty of “at least \$55” for each violation. Lodestar in its motion, made an anticipatory challenge to the credibility of the inspector’s affidavit “given the lack of contemporaneous documentation and the amount of time between the dates the citations were written and now.” Since the credibility of witnesses needed to establish essential facts is in dispute, those essential facts are likewise in dispute. Accordingly the Secretary’s motion for summary decision must also be denied.

### **ORDER**

The motions for summary decision are denied. This case (as to Citation Nos. 7646256, 7646257 and 7646265) is accordingly rescheduled for hearings on the merits on April 30, 2002 at 9:00 a.m. in Evansville, Indiana. The assigned courtroom will be designated at a later date.

Gary Melick  
Administrative Law Judge  
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Distribution: (Certified Mail)

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