

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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June 21, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 2001-37  
Petitioner : A. C. No. 15-11704-03562  
v. :  
LODESTAR ENERGY, INC., :  
Respondent : Preparation Facilities

**DECISION**

Appearances: Arthur J. Parks, Conference and Litigation Representative, U.S. Department of Labor, Madisonville, Kentucky, on behalf of Petitioner;  
Stanley S. Dawson, Esq., Lodestar Energy, Inc., Lexington, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994), the “Act,” charging Lodestar Energy Inc. (Lodestar) with one violation of the mandatory standard at 30 C.F.R. § 77.207 and proposing a civil penalty of \$55.00 for the alleged violation. The general issue before me is whether Lodestar violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7642691 alleges a violation of the standard at 30 C.F.R. § 77.207 and charges that “sufficient illumination was not being provided in the working area of the slurry pond where refuse was being dumped to cover up the slurry.” The cited standard provides that “[i]llumination 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.” The Commission held in *Secretary v. Capital Aggregates Inc.*, 3 FMSHRC 1338 (June 1981) that what constitutes “illumination sufficient to provide safe working conditions” requires a factual determination based on the working conditions in a cited area and the nature of illumination provided.

Inspector Keith Ryan of the Department of Labor’s Mine Safety and Health Administration (MSHA), has been a surface mine inspector for eight years. He has an Associate Degree in Mining Technology and seven years mining experience. On July 26, 2000, Ryan was conducting a regular inspection at the Lodestar Preparation Facilities accompanied by a miner’s representative. The

miner's representative did not testify. During the course of his inspection he proceeded to the slurry pond refuse area - - a holding pond that collects a mixture of water and coal slurry. The slurry pond was being covered with refuse material pursuant to the operator's dumping plan. Trucks would back up to a barrier zone marked by a 55-gallon drum identified with reflective tape. After dumping, a bulldozer would push the material over the slurry pond. Ryan did not observe the truck at issue back past the drum marker. He assumed that the area into which the truck was backing was hard-packed and therefore he considered that an accident would be unlikely. He therefore did not characterize the violation as "significant and substantial."

According to Inspector Ryan, although the terrain over which the truck was backing was hard packed, it was uneven and rutted with a danger of sinkholes. He observed that the truck had lights on both the front and back but he was concerned whether the driver could see when backing up. He did not "feel" he had sufficient lighting to back up. Ryan thought there was only one backup light on the truck and that the light, comparable to a standard automobile headlight, was covered with dirt and mud. There was a portable light plant approximately 50 to 75 yards from the dumping area, but it was not then being utilized.

Lodestar truck driver Paul Harmon testified that he was driving the cited Euclid 50-ton truck that night. Harmon testified that the truck had two backup lights (depicted in the upper right hand photograph of Joint Exhibit No. 2) thereby contradicting the inspector's testimony. Harmon further testified that he had performed a pre-operational check that evening and at that time cleaned the lights. Harmon had no problem seeing that night. He noted that the light plant was present but that he preferred it not being used because it actually impaired his visibility. He he had no difficulty seeing the barrel marking the dump area.

Third shift Lodestar foreman Harold Hunt testified that he personally examined the truck's two 150 watt backup lights and found them to be clean. He later met with Inspector Ryan after the citation had been issued and told him that it was his practice to leave the decision to use the portable lights to the employees discretion.

The Secretary has the burden of proving a violation by a preponderance of the evidence. In this case I find that the Secretary has not met her burden of proof. The citing inspector testified that he was standing adjacent to the portable light plant when he made his observations that the lighting was inadequate behind the cited dump truck. Admittedly, this point of observation was some 50 to 75 yards away from the truck and the cited area was at least partially obstructed from view by the truck itself. (Joint Exhibit No. 1). I therefore can give but little weight to the inspector's observations in this regard. I also find credible the photograph (Joint Exhibit No. 2) and testimony of truck driver Harmon that the cited truck had two backup lights providing sufficient illumination, thereby further discrediting the inspector's observations in this regard. Under all the circumstances I give greater weight to the testimony of truck driver Harmon and find that the Secretary has not sustained her burden proving the violation at issue. Citation No. 7642691 must accordingly be vacated.

### **ORDER**

Citation No. 7642691 is hereby vacated and these civil penalty proceedings dismissed.

Gary Melick  
Administrative Law Judge

Distribution: (By Certified Mail)

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