

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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August 7, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-53
Petitioner	:	A. C. No. 15-14492-03838
v.	:	
	:	Docket No. KENT 2001-64
LODESTAR ENERGY INCORPORATED,	:	A. C. No. 15-14492-03836
Respondent	:	
	:	Docket No. KENT 2001-166
	:	A. C. No. 15-14492-03837
	:	
	:	Docket No. KENT 2001-198
	:	A. C. No. 15-14492-03840
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	:	Docket No. KENT 2001-199
	:	A. C. No. 15-14492-03841
	:	
	:	Docket No. KENT 2001-200
	:	A. C. No. 15-14492-03843
	:	
	:	Docket No. KENT 2001-201
	:	A. C. No. 15-14492-03844
	:	
	:	Docket No. KENT 2001-295
	:	A. C. No. 15-11704-03565
	:	
	:	Docket No. KENT 2001-346
	:	A. C. No. 15-14492-03849
	:	
	:	Docket No. KENT 2001-347
	:	A. C. No. 15-14492-03850
	:	
	:	Docket No. KENT 2001-349
	:	A. C. No. 15-14492-03852

	:	Docket No. KENT 2001-350
	:	A. C. No. 15-14492-03853
	:	
	:	Baker Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-52
Petitioner	:	A. C. No. 15-13920-03942
v.	:	
	:	Docket No. KENT 2001-141
	:	A. C. No. 15-13920-03944
LODESTAR ENERGY INCORPORATED,	:	
Respondent	:	Wheatcroft Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-223
Petitioner	:	A. C. No. 15-16855-03555
v.	:	
	:	
LODESTAR ENERGY INCORPORATED,	:	
Respondent	:	Miller Creek Mine No. 1

**DECISION**

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner;  
Stanley Dawson, Esq., Lodestar Energy Incorporated, Lexington, Kentucky, on behalf of Respondent.

Before: Judge Melick

These cases are before me upon petitions 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 (1994) *et seq.*, the “Act” charging Lodestar Energy Incorporated (Lodestar) with multiple violations of mandatory standards and proposing civil penalties for those violations. Citations No. 7646106, 7646137, 7647120 and 7645346 were vacated by the Petitioner at hearing and other citations were the subject of settlement agreements submitted and approved at hearing. A corresponding order approving settlement for the appropriate citations will be incorporated herein.

Six citations remained in dispute and were the subject of evidentiary hearings. Citations

No. 7646256, 7646257, 7646233, 7646103 and 7646265, each allege violations of the mandatory standard at 30 C.F.R. § 75.321(a)(1). That standard provides, as relevant hereto, that “the air in areas where persons work or travel . . . shall contain at least 19.5% oxygen . . .”

More specifically, Citation No. 7646256 charges as follows:

The oxygen reading taken at the upper right side of Seal #2 of the #10 set was 18.8%. The upper right side of the #1 seal of the #10 set was 19.1%.

Inspector Abel De Leon, of the Department of Labor’s Mine Safety and Health Administration (MSHA), has an associate degree in mining technology and significant underground coal mining experience. He also received specific classroom and on-the-job training by MSHA in the proper methods for taking air readings. In particular, he was taught of the need to take air samples at least 12 inches from the roof, ribs, faces and seals.

On December 16, 2000, De Leon, accompanied by miner’s representative Kenneth Mallory, was approaching Seal No. 2 of the No. 10 Set when the alarm went off on his “spotter.”<sup>1</sup> Using his “spotter” and taking readings at least 12 inches from the roof, ribs and seal, De Leon obtained a reading only 18.8% oxygen at the upper right side of seal No. 2 of the No. 10 set. De Leon obtained a bottle sample at the same location and forwarded this sample for analysis. The undisputed result of the sample analysis at that location was 18.34% oxygen (Gov’t Exh. No. 3). De Leon also took a second reading with his “spotter” at the upper right side of the No. 1 seal at the No. 10 set. Holding the “spotter” more than 12 inches from the roof, ribs and seal, he obtained a reading of 19.1% oxygen. A bottle sample taken at this location showed 19.09% oxygen (Gov’t Exh. No. 3).

Citation No. 7646257 alleges a violation of the same standard and charges as follows:<sup>2</sup>

The #1 seal of the #11 set of seals had an oxygen reading of 15 percent and a methane reading of 2.1 percent, (upper right side) and upper left side. Also the #5 seal, middle to right side of the seal, 19.2 - 19.4%. No. 6 seal, middle to left side, 19.1 - 19.4 percent. Air bottle samples were taken.

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<sup>1</sup> De Leon described his “spotter” as a hand-held TMX 412 mechanical detector used to ascertain oxygen, carbon monoxide and methane levels. The detector is set to sound an alarm in an atmosphere of less than 19.5% oxygen.

<sup>2</sup> In its posthearing brief, Lodestar offered to “withdraw its contest of this citation and the associated penalty.” To date the Secretary has not assented to this proposal. Accordingly the citation remains at issue in this decision.

Inspector De Leon testified that he took readings with his “spotter” at the locations noted in the citation, making sure that he was more than 12 inches from the roof, ribs and seal. He obtained readings of 15% at both locations. He also obtained bottle samples at the same locations and the results of those samples showed 15.37% at the No. 1 seal of the No. 11 set of seals and 18.91% at the No. 5 seal, middle to right side of seal. (Gov’t Exh. No. 3).

Miner’s representative Kenneth Mallory testified that he accompanied De Leon on his December 16, 2000, inspection into the sealed areas and he too detected low oxygen with his “spotter.” The alarm on his “spotter” was triggered two or three feet from the seal at the same time that De Leon’s was also triggered. He observed De Leon take his bottle samples more than 12 inches from the roof, ribs and seals. Mallory had previously accompanied De Leon on at least 50 occasions during some of which De Leon obtained gas samples. According to Mallory, De Leon always performed his inspections in a professional manner and within the law.

Citation No. 7646265, issued February 20, 2000, as amended at hearing, alleges a violation of the same standard on December 20, 2000, and charges as follows:

The air quality was 17.1 percent oxygen and 2.1 percent methane in front of the #3 seal of the #8 set. An air bottle sample was taken.

De Leon testified without contradiction that he found oxygen levels of 17.1% in front of the No. 3 seal of the No. 8 set. Analysis of a bottle sample taken at the same location showed 17.08% oxygen. (Gov’t Exh. No. 6).

Citation No. 7646233, issued November 27, 2000, alleges another violation of the same standard and charges as follows:

The air bottle sample taken on 11/03/2000 showed an oxygen analysis 19.19%. This bottle sample was taken at Seal #2, #14 Set of Seals. A minimum of 19.5% Oxygen is required.

According to Inspector De Leon, on November 3, 2000, he obtained a reading at the cited location close to the 19.5% oxygen level. He therefore deferred issuing a citation until obtaining the analysis of a bottle sample taken at the same location. The analysis of the bottle sample showed 19.19% oxygen and, therefore, on November 22, 2000, De Leon issued the instant citation. (See Gov’t Exh. No. 9).

Citation No. 7646103, issued November 20, 2000, alleges another violation of the same standard and charges as follows:

The upper left portion of the #2 Seal of the #24 set of Seals had an oxygen reading of 18.8% and a Methane reading of 2.0%. A bottle sample was taken.

According to Inspector De Leon, on November 20, 2000, he detected 18.5% oxygen with

his “spotter” at the cited location. Analysis of a bottle sample taken at the same location showed an oxygen level of 13.95%. (Gov’t Exh. No. 11).

Within the above framework of evidence I conclude that the violations have been proven as charged. This credible evidence demonstrates that Inspector De Leon obtained his “spotter” samples as well as his bottle samples at least 12 inches from the ribs, roof and seals, in each of the cited cases. The test results are indeed undisputed and each shows oxygen levels below the minimum required by the cited standard.

In reaching these conclusions I have not disregarded Lodestar’s arguments that there will invariably be oxygen deficiencies in the vicinity of seals and that Inspector De Leon moved his “spotter” around the seal areas until he obtained an oxygen deficient reading. However, even assuming, *arguendo*, that these statements were factually accurate, such facts nevertheless would not negate the existence of the violations as charged.

I have also not disregarded Lodestar’s argument that the Secretary must prove that the oxygen deficient air is located precisely in the same area in which the exposed person would intake a breath. According to this argument Lodestar would require the Secretary to prove the location of the mouth and nostrils of each person who would work or travel in the cited areas and then limit oxygen testing to only those precise locations where such mouths and nostrils would appear. I find no such requirement in the cited standard and accordingly reject Lodestar’s argument in this regard.<sup>3</sup>

The parties conditionally stipulated (assuming that the violations had been proven) that the violations were of low gravity and the result of only moderate negligence. These conclusions were based upon the fact that there had been prior low oxygen readings near the seals thereby giving Lodestar some notice of potential oxygen deficiencies in these areas. They were also based on the fact that the cited oxygen deficiencies were only slightly below the required level and that no one in the inspection party suffered any ill effects from the oxygen deficient atmosphere. It has also been stipulated by the parties that the penalties issued herein would have no affect on the operator’s ability to continue in business and that the operator abated the violations in a good faith and timely manner. Lodestar is a large mine operator and has a significant history of violations (Gov’t Exh. No. 1). Considering all of the “section 110(i)” criteria, I find that the civil penalties originally proposed by the Secretary are appropriate: i.e., Citation No. 7646256 - \$55.00, Citation No. 7646257 - \$55.00, Citation No. 7646265 - \$55.00, Citation No. 7646233 - \$55.00 and Citation No. 7646103 - \$55.00.

Citation No. 7646334, issued February 27, 2001, alleges a violation of the standard at 30

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<sup>3</sup> Respondent’s additional argument - - that these citations should be vacated because they were written as to areas where “persons” do not work or travel - - was previously rejected in an Order Denying Motions for Summary Decision issued March 8, 2002. The substance of that Order is incorporated herein by reference.

C.F.R. § 75.1722(c) and, as amended at hearing, charges as follows:

Because of the position of the No. 3 Unit ID 007 belt tail roller and tail piece, the tail roller guard needed to be extended to an area where the belt hung below the conveyor belt frame exposing miners to the hazard of being pulled into the tail roller. An expanded metal guard providing this protection was present but was not secured to the conveyor belt frame.

The cited standard, 30 C.F.R. § 75.1722(c), provides that “[e]xcept when testing the machinery, guards shall be securely in place while machinery is being operated.” MSHA inspector Ronald Oglesbee testified that on February 27, 2001, he was performing an inspection at Lodestar’s Baker Mine when he observed in the feeder area of the conveyor, what he believed to be an extension to the tail roller guard that was not secured. The item was propped onto the conveyor frame and was not attached to the frame. The tail roller was admittedly guarded however. According to Oglesbee, there was a danger to the section foreman and belt workers who frequently traveled the area. In particular he believed that a shovel could become caught under the moving belt thereby dragging a miner into the belt. He concluded that the violation was of low gravity because the area was guarded although not secured.

Lodestar’s compliance coordinator, Kevin Vaughn, testified that he was present at the time the citation was issued. According to Vaughn, the guard found by Inspector Oglesbee lying against the belt frame was actually an old guard that had been removed and replaced by a welded steel guard protecting the tail roller. According to Vaughn, the welded guard provided full protection for the tail roller area and there were no moving parts exposed beyond the guard. Vaughn further testified that the new welded guard had been in place for about two months and one or two inspectors had examined this condition without issuing any citations. He also admitted however that the subject tailpiece would have been moved every four days thus altering the extant conditions. He also testified that Lodestar had utilized similar guards elsewhere in the mine without citation by inspectors.

I find Vaughn’s testimony sufficient to vacate the citation at issue. His testimony is undisputed that the old guard had been replaced by a new welded guard and it is acknowledged by the Secretary that the welded guard fully protected the tail roller. The fact that the old guard had remained in the vicinity of the tail roller leaning against the belt structure cannot be taken, under the circumstances, to mean that it was intended to be, or was needed as, a fixed guard. Within this framework of credible evidence I find that the item, which was formerly a guard, could not, at the time the citation was issued, be considered a “guard” within the meaning of 30 C.F.R. § 75.1722(c). At the same time the welded guard protecting the tail roller was securely in place as required by the cited standard. Indeed, if the welded guard was deemed inadequate then a violation should properly have been charged under subsection (a) or (b) of the cited standard -- not subsection (c). Citation No. 7646334 must accordingly be vacated.

**ORDER**

Citation No. 7646334 is hereby vacated. Citation Nos. 7646256, 7646257, 7646265, 7646233 and 7646103 are hereby affirmed and Lodestar Energy Incorporated is hereby directed to pay civil penalties of \$55.00 for each violation within 40 days of the date of this decision. In addition, pursuant to the settlement agreement submitted at hearing, Lodestar Energy Incorporated is directed to pay civil penalties of \$11,353.00 within 40 days of the date of this decision.

Gary Melick  
Administrative Law Judge

Distribution: (By Certified Mail)

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