CCASE:
MSHA V. CAPITOL AGGREGATES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 24, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket Nos. DENV 79-163-PM
DENV 79-240-PM
v.

CAPITOL AGGREGATES, INC.

DECISION
This civil penalty case involves the interpretation of 30 CFR $56.17-1, a mandatory illumination standard. In a decision issued on April 14, 1980, the administrative law judge found multiple violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979) and assessed penalties. We vacated that decision on procedural grounds, and on remand the judge reaffirmed his prior decision. The operator, Capitol Aggregates, Inc., filed a petition for discretionary review, which we granted in part. For the following reasons, we affirm in part and reverse in part.
On May 17, 1978, an MSHA inspector issued Citation Nos. 169705 and 169706 alleging violations of 30 CFR $56.17-1 in Capitol's cement plant. The standard provides:
Mandatory.
Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walk-ways, stairways, switch panels, loading and dumping sites, and work areas.
The question in this case is what constitutes "[i]llumination sufficient to provide safe working conditions." Resolution requires a factual determination based on the working conditions in a cited area and the nature of illumination provided.
Citation No. 169705 alleged a violation of the standard because the lights over the coke storage bin and adjacent walkways were not operable. In concluding that the operator violated the standard, the judge was persuaded by the inspector's unrebutted testimony that the illumination was insufficient. In the absence of negligence, the judge assessed a $25 penalty. On remand, he saw "no reason to disturb [his] previous finding...." We conclude that substantial evidence

supports the judge's findings.
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The facts are undisputed. The only permanent lighting in a 30-40 foot area was provided by a mercury vapor light which was not operable at the time of the inspection, about 9:00 p.m. 1/ Electrical outlets, extension cords, and auxiliary lighting were available, however, and workers were equipped with flashlights. There was little reflected light in this coke area. Because the coke storage bin continuously supplied coke to the kiln, Capitol's employees might have to make repairs or do maintenance on the bin/kiln system at any time, including the evening shift. The lack of illumination created hazards, such as tripping or falling, for employees performing such work.

We reject Capitol's argument that, notwithstanding the failure of the permanent lighting, there was adequate illumination to ensure safe working conditions, because it also provided electrical outlets for portable lighting equipment and flashlights for night work. Portable lighting could satisfy the standard where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances. That is not the case before us, however.

Capitol states only that it provided such lighting and outlets; it does not indicate where such lighting was stored or how easy it was to reach. Although a worker could carry a flashlight, extension cord, and auxiliary light in one hand, that practice may be neither safe nor desirable. Capitol concedes that a worker might have to climb a ladder to get to the top of the storage bin. It does not rebut the inspector's testimony that climbing a ladder and performing maintenance or repairs require the use of a worker's hands, and do not leave the hands free for carrying a flashlight or extension cord with auxiliary lights. Nor has Capitol established the adequacy of such portable lighting equipment; it does not show the amount of illumination this lighting would shed. Similarly, Capitol fails to prove that, under these facts, a flashlight provided sufficient illumination. The evidence and the case law demonstrate otherwise. The inspector testified without contradiction that a flashlight would not provide sufficient light if an employee were simultaneously holding a flashlight and working on equipment. The case law indicates that a directed beam of light such as that supplied by a cap lamp--or, by analogy, a flashlight may not shed sufficiently diffuse light to provide a safe work area. Clinchfield Coal Co. at 3, March 1979 FMSHRC, 1 MSHC 2027 (Chief Administrative Law Judge Broderick, March 12, 1979), aff'd. sub nom., Clinchfield Coal Co. v. Secretary of Labor, No. 79-306, 1 MSHC 2337 (4th Cir. 1980) (unpublished). (Clinchfield involved the identical coal standard at 30 CFR $77.207).

1/ This light failed because a photoelectric cell, which normally

activated the lamp as the sun went down, malfunctioned. Although Capitol concedes the malfunction, it makes much of its lack of knowledge of the malfunction. Capitol's lack of knowledge relates only to its possible negligence. Because the judge found no negligence, Capitol's knowledge is not at issue here. Nor did we direct that issue for review.

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In the absence of evidence to the contrary, we are persuaded that the judge properly credited the inspector's testimony that the lighting was inadequate. Clinchfield, supra; J. P. Burroughs and Son, Inc., 2 FMSHRC 3266, 3269, 1 MSHC 1165, 1166 (Chief Administrative Law Judge Broderick, 1980). We hold that, under these facts, the illumination provided by the operator did not satisfy the standard and we thus affirm the judge.

Citation No. 169706 alleged a violation of the standard because there was insufficient illumination in the area under the coke impact crusher, around the tail pulley of the C-58 conveyor belt, and by the tail section of the apron feeder under the coke hopper. The judge found that there were no lights and concluded that Capitol had violated the standard "[i]nasmuch as miners might have to travel in the area at night." In our view, his finding that miners might have to work in the cited area at night is not supported by substantial evidence. Consequently, we reverse his finding of a violation and vacate the underlying citation.

There was undisputed testimony that, when work was performed in the area during daytime, there was adequate light. The judge impliedly found that the daytime lighting was adequate, and the Secretary does not argue otherwise. Although the inspector testified to his belief that emergency nighttime repairs might be necessary, he did not observe any employees there at night, nor did he testify as to the likelihood of such nighttime repairs. By contrast, Capitol's witness testified that employees would not have to go into C-58 conveyor area at night because a bypass system provided sufficient fuel storage capacity so that the plant could run all night. Even if the bypass system failed at night, the plant had two additional days of fuel and other fuel systems available to substitute for the bypass system; hence any necessary repairs would not have to be made immediately. Under these facts, we do not believe that substantial evidence supports the judge's finding that employees might have to work in the area at night. We hold that, because there was adequate light for safe working conditions during the day and there was no probability of work being performed at night, there was no violation of the standard. Accordingly, we reverse the judge and vacate the citation. 2/

If even some sporadic nighttime work or the probability of nighttime work had been shown, the result might have been different.

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