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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. DENV 78-51-P A/O No. 41-02632-02002
v.	Docket No. DENV 78-485-P A/O No. 41-02632-02001
TEXAS UTILITIES GENERATING CO., RESPONDENT	Docket No. DENV 78-503-P A/O No. 41-02632-02003
	Martin Lake Strip Mine
	Docket No. DENV 78-486-P A/O No. 41-01900-02002
	Docket No. DENV 78-487-P A/O No. 41-01900-02003
	Monticello Fuel Facilities Strip Mine
	Docket No. DENV 78-491-P A/O No. 41-01192-02001
	Docket No. DENV 78-492-P A/O No. 41-01192-02002
	Big Brown Strip Mine

DECISION

Appearances: John H. O'Donnell, Esq., U.S. Department of Labor, Office of the Solicitor, MSHA, on behalf of Petitioner; Richard L. Adams, Esq., Dallas, Texas, on behalf of Respondent.

Before: Forrest E. Stewart, Administrative Law Judge.

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned civil penalty proceedings were brought pursuant to section 109(FOOTNOTE 1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819 (1970), hereinafter referred to as the Act.

These proceedings were consolidated pursuant to a motion submitted by Petitioner on September 19, 1978. Hearings were held on October 18 and 19, 1978, in Dallas, Texas. The Petitioner called three witnesses and introduced 55 exhibits. The Respondent called three witnesses and introduced eight exhibits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket Nos. DENV 78-51-P, DENV 78-485-P, and DENV 78-503-P, concern conditions which were allegedly observed at Respondent's Martin Lake Strip Mine. The Martin Lake Strip Mine is a surface lignite mine located in Beckville, Texas. Production started at this mine in the early part of 1977. At the time of the hearing, 200 to 300 men were employed at the mine. A total of six prior paid violations occurred there in the period from September 15, 1976 through May 16, 1977.

Docket No. DENV 78-51-P

Inspector Larry Maloney issued section 104(b) Notice of Violation No. 2-LGM on May 17, 1977. The inspector cited 30 CFR 77.1605(d) and described the condition allegedly in violation of this standard as follows: "The Caterpillar V 300 forklift (company #3405) was not provided with an operative audible warning device. The forklift was located in the shop yard."

The testimony of Inspector Maloney clearly established the existence of a violation of section 77.1605(d). This section requires

that mobile equipment be provided with audible warning devices. The inspector tested the horn on the forklift and found that it was not working. The cause of this malfunction was a faulty control button.

At the time the notice was issued, there was no operator on the machine and it was not running. However, one of Respondent's mechanics told the inspector that the forklift was operational. At this mine, a tag forbidding use is normally placed on a machine in need of repair. No such tag had been placed on the forklift and nothing prevented its use.

The inspector testified that it was improbable that an accident would occur because of the inoperative horn.

No showing was made of negligence on the part of the Respondent. The inspector estimated the probability that the Respondent knew of the malfunction to be minute.

The parties stipulated that the condition was abated with a normal degree of good faith.

Docket No. DENV 78-485-P

Four alleged violations of mandatory standards are included within Docket No. DENV 78-485-P. All four were objects of notices of violation issued at the Martin Lake Strip Mine. They are discussed below in the order of their issuance.

A. Notice of Violation No. 2-LGM (September 15, 1976)

Inspector Maloney issued Notice of Violation No. 2-LGM on September 15, 1976. He cited 30 CFR 77.1711 and described the condition allegedly in violation of this standard as follows:

> An employee was smoking a cigarette in close proximity (approximately 2 feet) with the Chevrolet service truck's cargo bed (company #3516). The truck was provided with warning signs prohibiting smoking or open flames in the immediate area of the employee. The truck was carrying a one thousand gallon diesel storage tank (over 1/2 full), oil, grease, and varsol.

Inspector Maloney testified that he had stopped the service truck in order to inspect it. The inspector had twice before issued notices of violation directed at this same truck. Because of this, the operator of the vehicle was very nervous. He climbed down from the cab, leaned against a pipe at the top of which was a sign which read "No smoking or open flame," took out a cigarette and lit it in the presence of the inspector. The truck was transporting a large quantity of oil, varsol, grease and diesel fuel.

30 CFR 75.1711 states that "No person shall smoke or use an open flame where such practice may cause a fire or explosion." A clear violation of this standard on the part of one of Respondent's employees is evident here.

This violation was not accompanied by negligence on the part of the Respondent. The Texas Utilities Safety Manual contains a provision which reads, "Employees shall not smoke on company property where this act constitutes a fire hazard." Respondent's safety representative, David Thompson, testified that the company made a diligent effort to enforce this provision. The operator of the truck was immediately given a strong oral reprimand and, later, was issued a written reprimand which was placed in his file. It should be noted once again that the employee lit the cigarette directly under a "No smoking" sign.

It is probable that this type of activity, if left unchecked, would cause a fire or an explosion. A disabling injury or a fatality would be the likely result of such an accident. At the time this infraction occurred, three people, including the truck operator, a representative of the Respondent, and Inspector Maloney, were threatened with injury.

The parties stipulated that the Respondent demonstrated a normal degree of good faith in abating these conditions once the notice of violation was issued.

B. Notice of Violation No. 5-LGM (September 15, 1976)

Inspector Maloney issued 104(b) Notice of Violation No. 5-LGM on September 15, 1976, citing 30 CFR 77.1702(c). The citation was issued because it was reported to the inspector that the company had not submitted a report on emergency medical or ambulance service arrangements to the MSHA subdistrict or district offices.

Section 77.1702(c) requires that each operator shall, on or before September 30, 1971, report emergency medical or ambulance service arrangements to the MSHA district office. The Martin Lake Strip Mine had not yet produced coal by September of 1976. Even so, the definitions of "operator" and "coal mine" in sections 3(e) and (h) of the Act are broad enough to have encompassed the Respondent and its mine at that time. The Respondent was required to comply with the provisions of section 77.1702(c).

The testimony of Inspector Maloney established a technical violation of section 77.1702(c). The Respondent failed to file the report in question because it was unaware that such a report was required.

There is no indication that the Respondent was negligent in its failure to file this report. Approximately 6 weeks before the citation was issued, the inspector delivered a "new mine packet" which contained forms to be submitted by the Respondent. The inspector did not set a date by which these forms had to be submitted. This packet did not contain a form for the report in question and the inspector could not remember if the need for the report had been discussed.

Prior to September 15, 1976, the Martin Lake Strip Mine had not been issued a mine I.D. number. This number is the legal identification of the mine and must accompany an operator's submissions to MSHA. Without this identification, there is a possibility that the information would be misplaced.

The inspector did not consider the failure to submit the report to be a serious infraction. The company had provided for emergency medical and ambulance services, but failed only in its duty to notify MSHA of these arrangements. Emergency phone numbers had been posted on the bulletin board and each supervisor carried a pocket card with these numbers.

The parties stipulated that the operator demonstrated a normal degree of good faith in abating the condition, once the notice of violation issued.

C. Notice of Violation No. 1-LGM (September 16, 1976)

Inspector Maloney issued section 104(b) Notice of Violation No. 1-LGM on September 16, 1976, citing 30 CFR 77.1713(c). The citation was issued because the onshift examination of the mine shop had not been recorded for the 12 a.m. to 8 a.m. shift. The inspector asked to see the onshift examination book for the shop area and was informed by Chad Abernathy, the operating engineer, that this book was not yet being kept.

The operator was negligent in its failure to maintain an onshift examination record book. The inspector testified that the mine superintendent and other personnel had worked at mines where the record books were required. The superintendent and certified individuals qualified to make the examinations knew or should have known of the requirement.

The inspector was of the opinion that this was not a serious violation. No showing was made that the operator failed to carry out the onshift examination. In the event that such an examination was carried out, it is improbable that the failure to keep a record would result in accident and injury. The record serves primarily as a check to make certain that such an inspection did occur.

The parties stipulated that there was a normal degree of good faith demonstrated in the abatement of the condition, once the notice of violation was issued.

D. Notice of Violation No. 2-LGM (February 2, 1977)

Notice of Violation No. 2-LGM was issued by Inspector Maloney on February 2, 1977. He cited 30 CFR 77.1110 and issued the notice because he observed that the fire extinguisher in a winch truck was "not maintained in a useable and operative condition." The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

The parties agreed to settle this case for $43, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing and this approval is affirmed here.

Docket No. DENV 78-503-P

A single alleged violation is included under this docket number. On October 12, 1977, Inspector Maloney issued Notice of Violation No. 1-LGM at the Martin Lake Strip Mine. The inspector cited 30 CFR 77.1104 and described the condition found by him as follows:

> Excessive oil spillage and oil soaked rags were allowed to accumulate creating a fire hazard on and around the swing gear case and hydraulic control valves on the Koehring 1266 backhoe. The gear case and control valves are located in the front of the machine house next to the operator's cab. The backhoe is used to load coal in 001 pit.

The testimony of the inspector established that the condition existed as alleged. The backhoe had leakage problems. At the time the condition was first observed by the inspector, the machine had been out of service for approximately 1 hour and had been removed 200 to 300 feet from the location at which it had been working. The machine had not been tagged to prevent its use because the repair to be made was considered minor.

Oil covered a 4-foot by 8-foot plate. Some of the oil had gathered in puddles of approximately one-quarter inch deep. In other places, it was smeared. Two to four rags of a size approximately 2 feet by 2 feet had been thrown in the oil.

No plans to clean up the oil spillage had been made by the Respondent. Before issuing the notice, the inspector spoke with

representatives of mine management and ascertained that a cleanup program had not been initiated. The machine operator also denied responsibility.

The inspector believed that this condition created a fire hazard. The accumulations were beside the operator's cab and in the area of the hydraulic tanks.

Given the absence of a cleanup program and the hazard presented by these accumulations, their presence was in violation of section 77.1104.

No showing was made that the Respondent was negligent in its failure to keep the backhoe free of accumulations.

It was improbable that a fire would start and cause injuries. There were no ignition sources in the immediate vicinity. In the opinion of the inspector, the two most likely sources of fire were discarded cigarettes or welding activities. The engine on the backhoe sits towards the rear of the machine and was considered not to be an ignition source by the inspector. Not only was there an absence of ignition sources, but the hydraulic oil was fire-resistant. The temperature at which this oil would ignite was considerably higher than that of untreated hydraulic oil.

Finally, the inspector testified that the operator of the backhoe was the individual most endangered by the accumulations. Since the backhoe had been removed from service, this threat no longer existed.

The Respondent demonstrated a normal degree of good faith in abating the condition, once the notice of violation was issued.

Docket No. DENV 78-486-P

Eleven alleged violations of mandatory standards are included within Docket No. DENV 78-486-P. Each of the 11 occurred at Respondent's Monticello Fuel Facilities Strip Mine. This lignite mine is located in Winfield, Texas. It has an annual production of between 6 and 7 million tons and employs approximately 400 employees. In the period from April 18, 1975, through January 10, 1977, there were a total of 22 prior paid violations at the Monticello Fuel Facilities Strip Mine.

Each of the violations alleged herein was the object of a 104(b) notice of violation. These notices are discussed below in the order of their issuance.

A. Notice of Violation No. 1-JF (March 4, 1976)

Notice of Violation No. 1-JF was issued on March 4, 1976, by inspector John Franco. He issued the notice on the basis of information contained on a printout received from the MSHA Denver Office. This printout indicated that the Respondent had submitted only eight of the 10 valid respirable dust samples required under the provisions of 30 CFR 71.106(c). The Respondent had submitted 10 samples, but two of these were subsequently invalidated. Glen Hood, Respondent's employee in charge of the submission of this data, testified that he filled out a form incorrectly so that the sample appeared to have been taken in the wrong location. He had wrtten "001-0" where he should have written "001-1." The second sample contained oversized particles. Respondent's failure to submit 10 valid samples was in violation of section 71.106(c).

The inspector was of the opinion that the operator would not necessarily know that one of the submitted dust samples contained oversized particles. No showing was made that the Respondent was negligent with respect to the sample invalidated because of clerical error.

It is improbable that the failure to submit valid samples in this instance would lead to the occurrence of accident, illness, or injury. This is particularly true because no respirable dust problem exists at this mine.

The operator demonstrated a normal degree of good faith in complying with the requirements of section 77.106(c), once the notice of violation issued.

B. Notice of Violation No. 1-JDC (May 6, 1976)

Notice of Violation No. 1-JDC, May 6, 1976, was issued in error. It was alleged that the Respondent failed to submit a respirable dust sample for a particular miner as required by the provisions of 30 CFR 71.108. After the notice had issued, it was determined that the Respondent no longer employed the miner in question. A card had been sent to MSHA with this information, but it had been misfiled.

The proceeding with respect to this notice was dismissed at the hearing. This dismissal is ratified here.

C. Notice of Violation No. 1-LGM (May 12, 1976)

Inspector Maloney issued Notice of Violation No. 1-LGM on May 12, 1976, citing 30 CFR 77.1110. He did so because he observed that the automatic halogen gas fire-extinguishing unit on the B.E. 1350 W. dragline did not have a current examination tag. Section 77.1110 requires that an examination of fire extinguishers be carried out

every 6 months and that the date of this examination be recorded on a tag attached to the extinguisher. The last date recorded on the tag of the halogen unit was October 1975. This failure to examine the unit and note the examination within 6 months was in violation of section 77.1110.

There is no indication on the record that the Respondent was negligent in its failure to examine the halogen unit and record this examination on the attached tag.

It is improbable that this violation would result in the occurrence of an accident or injury. The inspector believed that the halogen unit was operational and gauges indicated that its cylinders were full. The unit protects a 12-foot by 24-foot room where the 7200 volt cable enters the dragline. Moreover, it is only one of a number of extinguishers on the machine. The other extinguishers were in good condition and had current examination tags.

The operator abated the condition in good faith, once the notice of violation was issued.

D. Notice of Violation No. 1-LGM (May 13, 1976)

Inspector Maloney issued Notice of Violation No. 1-LGM on May 13, 1976, citing 30 CFR 77.604. Section 77.604 requires that trailing cables be adequately protected to prevent damage by mobile equipment. The inspector issued the notice when he observed that a power cable had been damaged by a bulldozer to such an extent that the current breakers had been tripped and the cable was deenergized. The outer jacket of the cable was noticeably damaged.

The inspector felt that the best way to avoid this kind of accident was to provide a spotter for the operator of the bulldozer.

No showing was made that the operator was negligent in its failure to adequately protect the cable. The person operating the bulldozer should have seen the cable which was clearly visible at the point where it was run over. The cable is black and the sand on which it lies is light-colored. Yellow flags are also used to mark the location of the cable. This use of flags was of limited effectiveness because they were frequently knocked out.

No injury resulted from this accident. When the circuit breaker system is functioning properly, the cable is deenergized after a small time lag. An individual sitting on the bulldozer would not be injured. There was some risk of injury to a person if he were to touch the bulldozer while standing on the ground. It was unlikely, however, that anyone would have been in contact with the machine when it was in motion.

This condition was abated with a normal degree of good faith, once the notice of violation was issued.

E. Notice of Violation No. 1-LGM (May 24, 1976)

The inspector issued Notice of Violation No. 1-LGM on May 24, 1976, citing 30 CFR 77.1605(d). He did so after discovering that the "trouble shooter's" truck did not have an operative audible warning device. This condition was quickly abated. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

The operator and MSHA agreed at the hearing to settle this case for $78, the amount originally assessed by MSHA's Office of Assessments. The settlement was approved by the administrative law judge at the hearing and this approval is affirmed here.

F. Notice of Violation No. 3-LGM (May 24, 1976)

Inspector Maloney issued Notice No. 3-LGM on May 24, 1976, citing 30 CFR 77.1110. He did so when he observed that the fire extinguisher on the "trouble-shooter's" truck had not been inspected in the prior 6 months. The order was terminated within 3 hours of its issuance. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent.

At the hearing, the operator and MSHA agreed to settle this case for $55, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved at that time by the administrative law judge and this approval is affirmed here.

G. Notice of Violation No. 1-LGM (May 25, 1976)

The inspector issued Notice of Violation No. 1-LGM on May 25, 1976, citing 30 CFR 77.410. He issued the notice because he discovered that a four-wheel drive buggy had a nonoperational backup alarm. The inspector based his decision that a backup alarm was necessary on the type of equipment involved and the visibility from the operator's seat. In this instance, the operator of the vehicle would be unable to see an individual immediately behind the vehicle if that individual was crouching, kneeling, or on the ground. Because the operator's vision was impaired, the absence of an automatic backup alarm was in violation of section 77.410.

There was no negligence on the part of the Respondent in its failure to equip the buggy in question with an operable backup alarm.

The truck was equipped with an alarm, but it was not functioning. No showing was made which would establish when the warning device stopped functioning. Although it is probable that the driver of the vehicle knew the horn was not working, there is no evidence that the Respondent or any of its agents, knew or should have known of the problem.

It is improbable that this violation would result in accident or injury. Only a small area immediately behind the machine could not be seen from the operator's seat.

The parties stipulated that the Respondent demonstrated a normal degree of good faith in abating this condition, once the notice of violation was issued.

H. Notice of Violation No. 1-LGM (August 16, 1976)

The inspector issued Notice No. 1-LGM on August 16, 1976, citing 30 CFR 77.1004(b). This section requires that overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted. The inspector discovered visible cracks at the top of the highwall, a few feet from the edge. In addition, a seam of sand with water running through it undercut the top of the highwall. Because of these conditions, the inspector believed that the highwall was unstable. Immediately prior to the issuance of the order, one of Respondent's operations foremen brought two employees into the area and began to post it. The inspector felt that the unstable condition of the highwall had developed prior to the beginning of the shift, and that it had not been posted in a timely fashion. The failure to correct the condition or to post the area of the unstable highwall in a timely fashion was in violation of section 77.1004(b).

There is no evidence on the record which would indicate that the Respondent negligently violated section 77.1004(b).

It is improbable that an accident and injury would have occurred because the area in question was not marked off. There was no pedestrian traffic in the area. The coal trucks which passed the highwall did so on the spoils side of the cut, at least 60 feet from the wall. Men are required periodically to walk in the area threatened in order to set pumps. There are safety procedures which must be followed at these times, including the requirement that one man watch the highwall at all times for sloughage. These procedures make it improbable that a pump setter would be injured.

This condition was abated with a normal degree of good faith.

I. Notice of Violation No. 2-LGM (August 16, 1976)

Inspector Maloney issued Notice No. 2-LGM on August 16, 1976, immediately after he issued Notice No. 1-LGM. He again cited section 77.404(b) because he believed that a section of Respondent's highwall was unstable. The notice dealt with a separate pit along the same highwall approximately one-half mile down from the area at which the first notice was directed. The inspector believed the second area to be worse than the first. The upper portion of the highwall had been undercut by ground water. The inspector observed a section of wall break and fall while he was in the area. A violation of section 77.404(b) existed in this instance because the area was unposted even though the highwall was in an unstable condition.

No showing was made that the Respondent was negligent in its failure to post this area, as required by section 77.404(b).

It was improbable that this violation would have resulted in injury. As discussed above, coal-bearing trucks do not travel within 60 feet of the highwall and safety procedures were in effect to prevent an accident when pumps are reset in the area. Immediately prior to the inspector's arrival in this pit, a loading shovel had been moved through the area. Because of this, it was necessary for four of Respondent's employees to carry cable past the affected area on the highwall side of the pit. As a safety precaution, one of these employees did nothing but watch the highwall for hazardous areas, in order to give warning if sloughage occurred.

This condition was abated with a normal degree of good faith, once the notice of violation was issued.

J. Notice of Violation No. 1-LGM (September 29, 1976)

Inspector Maloney issued Notice No. 1-LGM on September 29, 1976, citing 30 CFR 77.1109(c)(1). The notice was issued because a "cherry picker" which was being operated in the 001 pit was not equipped with a fire extinguisher. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. This violation was immediately abated.

At the hearing, the parties agreed to settle this case for $78, the amount originally assessed by the MSHA Office of Assessments. The administrative law judge approved the settlement at that time. This approval is affirmed here.

K. Notice of Violation No. 2-LGM (September 30, 1976)

Notice of Violation No. 2-LGM was issued by Inspector Maloney on September 30, 1976. The inspector cited 30 CFR 77.513 which reads as follows: "Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist." (Emphasis added.) The inspector issued the notice because the Respondent had not placed electrically nonconductive material on the floor at the power switch for the dust suppression system. The power switch was located on the ground floor of a crusher plant and a considerable amount of water was present on the floor around it. The switchboard in question had two grounding systems. There was a grounding system for the conduit and case, and a separate system for the conductors themselves.

The inspector believed at the time he issued the notice that the power switch itself presented a shock hazard and that this hazard was aggravated by the wet floor. He did not examine the switchboard's grounding systems. At the hearing, he admitted that he no longer believed the condition presented a hazard. Section 77.513 requires nonconductive platforms or mats only if a shock hazard exists. A violation of this section is not evident here because no shock hazard existed.

Docket No. DENV 78-487-P

Seven alleged violations of mandatory standards are included within Docket No. DENV 78-487-P. Each of these alleged violations was the object of a 104(b) notice of violation issued at Respondent's Monticello Fuel Facilities Strip Mine. These notices are discussed below in the order of their issuance.

A. Notice of Violation No. 1-CH (December 28, 1976)

Inspector Clarence Horn issued Notice No. 1-CH on December 28, 1976, during the course of a spot electrical inspection. He cited 30 CFR 77.902 which requires that three-phase, low-voltage resistance-grounded systems to portable and mobile equipment shall include a fail-safe ground check circuit or other no less effective device to monitor continuously the grounding circuit to assure continuity. The inspector issued this notice after observing two portable welders were without a fail-safe monitoring device on their ground circuit. These welders were located at the field house between pits A and C. The power to these welders was supplied from a portable transformer through a 440-volt three-phase, resistance-grounded system. The transformer was equipped with a ground circuit breaker, but it was not hooked up to the welders.

The two welders were low-voltage, portable equipment and were subject to the provisions of section 77.902. The inspector based

his conclusion that this equipment was portable on the manner in which the welders were wired. The absence of a monitoring device on these two welders was in violation of section 77.902.

The operator was negligent in its failure to provide a ground monitor on this equipment. Inspector Maloney was told by David Nesmith, fuel engineer at Respondent's mine, that the monitoring circuit was not hooked up because it could not be stopped from tripping out. The operator knew of the absence of a ground monitor on this equipment, yet continued to operate it.

In order for an accident and injury to occur, two events would have to occur simultaneously. A ground failure would have to occur at the same time as a phase-to-ground fault. The inspector testified that such an occurrence was probable. At least two of Respondent's employees were subjected to the hazard in question. If a phase-to-ground fault occurred, the frame of the welders would be charged with 227 volts. An individual who came into contact with the frame could be severely injured.

The operator demonstrated good faith in abating the condition, once the notice of violation was issued.

B. Notice of Violation No. 1-LGM (January 5, 1977)

Inspector Maloney issued Notice No. 1-LGM on January 5, 1977, citing 30 CFR 77.1607(a). The inspector issued the notice because a coal haulage truck was not properly trimmed so as to prevent coal from falling off. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

At the hearing, the parties agreed to settle this case for $115, the amount originally proposed by MSHA's Office of Assessments. The settlement was approved at that time by the administrative law judge. This approval is affirmed here.

C. Notice of Violation No. 2-LGM (January 5, 1977)

Inspector Maloney issued 104(b) Notice of Violation No. 2-LGM on January 5, 1977. He cited 30 CFR 77.1605(k). This section requires that berms or guards shall be provided on the outer banks of elevated roadways. The notice was issued because the inspector observed that a 300-foot section of the coal haulage roadway at the bottom of the No. 3 ramp in pit 001 was without berms or guards on its outer bank. The roadway turned approximately 90 degrees to the left at this point and was elevated approximately 15 feet. It was being used by three 100-ton haulage trucks. Despite its being in

the pit, this area was a "roadway" within the meaning of section 77.1605(k). The absence of berms or guards in this area was in violation of section 77.1605(k).

The operator was negligent in its failure to place guards or berms in this area. It had not done so because it did not consider this area to be part of the roadway.

The inspector was of the opinion that the berms would not prevent a haulage truck which was out of control from running off the roadway. However, berms might be of assistance in guiding a truck, thereby keeping it on the roadway.

The operator demonstrated good faith in abating the condition, once the notice of violation was issued.

D. Notice of Violation No. 1-LGM (January 6, 1977)

Inspector Maloney issued Notice No. 1-LGM on January 6, 1977, citing 30 CFR 77.409(b). This section requires that handrails shall be provided around all walkways and platforms on shovels. The notice was issued because the inspector observed one handrail to be missing and another to be damaged on Respondent's loading shovel in pit 002. These handrails had been struck and damaged by parts of the shovel which perform the function of running the bucket in and out when the shovel is in operation.

At the time the notice was issued, the shovel had been walked out of the pit a distance of 200 to 300 feet. The machine had been taken out of service in order to allow repairs to be made. One of the repairs to be made was the replacement of these handrails. The inspector testified that he would not have issued the citation if his supervisor had not been there with him.

In view of the above, no violation of section 77.409(b) existed here. The shovel had been provided with handrails as required, but these rails were damaged. Thereafter, the machine had been removed from service so that repairs could be made, including the replacement of these handrails.

E. Notice of Violation No. 2-LGM (January 6, 1977)

Inspector Maloney issued 104(b) Notice of Violation No. 2-LGM on January 6, 1977, citing 30 CFR 77.1607(d). This section requires that cabs of mobile equipment shall be kept free of extraneous materials. The inspector issued the notice because he observed goggles, rubber gloves, air hoses, five welding rod cans, rags, four aerosol cans, and a headlight lying on the floorboard inside the cab of a boom truck. This truck was being used in pit 002 at the time the notice was issued.

No showing was made that the Respondent knew or should have known of the failure to keep the truck's cab free of extraneous materials. The record does not contain evidence of the length of time which the materials had been left in the cab and these materials could be observed only when the cab door was open.

The inspector testified that this material presented a hazard because it might strike the operator of the truck if it ever overturned. It is improbable that this condition would cause accident or injury. The truck was not moving at the time the condition was observed by the inspector. Even if it was moving, it is highly unlikely that it would overturn under the circumstances.

The operator demonstrated a normal degree of good faith in abating the condition, once the notice of violation was issued.

F. Notice of Violation No. 1-LGM (January 10, 1977)

Inspector Maloney issued 104(b) Notice No. 1-LGM on January 10, 1977, citing 30 CFR 77.1605(a). This section requires that cab windows be of safety glass or equivalent, in good condition. The inspector issued this notice when he observed a shattered upper right side window in the cab of a coal haulage truck. Gray tape was used to hold the window together, further obscuring the truck operator's vision. The operator of the truck agreed with the inspector that the cracked window and tape obscured his vision.

The operator was negligent in its violation of this safety standard. Even though the condition was readily observable, the operator failed to replace the window.

It was improbable that an accident and injury would occur because of this condition. The driver of the truck did not feel that the window interfered with the truck's operation. The righthand window was seldom used in maneuvering.

The Respondent demonstrated a normal degree of good faith in abating the condition.

G. Notice of Violation No. 2-LGM (January 10, 1977)

Notice of Violation No. 2-LGM was issued by Inspector Maloney on January 10, 1977. He cited 30 CFR 77.1605(b) which requires that front-end loaders shall be equipped with parking brakes. The inspector issued this notice when he observed a front-end loader which was not equipped with an operative parking brake. This condition was abated by the following day with the installation of a new parking brake. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent.

The parties agreed to settle this case at the hearing for $98, the amount proposed by MSHA's Office of Assessments. The administrative law judge approved the settlement at that time. This approval is affirmed here.

Docket No. DENV 78-491-P

Nine alleged violations of mandatory standards are included within Docket No. DENV 78-491-P. Each of these alleged violations was the object of a 104(b) notice of violation issued at Respondent's Big Brown Strip Mine. The Big Brown Strip Mine is located in Fairfield, Texas, produces from 4 to 5 million tons per year of lignite, and employs approximately 300 men. There were 16 prior paid violations at this mine between August 18, 1975, and June 16, 1977.

The notices are discussed below in the order of their issuance.

A. Notice of Violation No. 3-JF (March 29, 1976)

Inspector John Franco issued Notice No. 3-JF on March 29, 1976, citing 30 CFR 77.505. This section requires that cables shall enter metal frames, splice boxes, and electrical compartments only through proper fittings. The inspector issued the notice when he observed that the fittings around a cable were not secured with proper fittings where the cable entered the frame of a circuit breaker. The cable was comprised of two segments. The first segment, the trailing cable, led from the dragline to the circuit breaker. The second segment, the power cable, led from the circuit breaker to the main power source. Wooden fittings had been placed around the cable at both entry points, but they were not bolted or clamped to the cable.

The Respondent was negligent in its failure to secure the cable with proper fittings. The inspector was of the opinion that the fittings had never been secured. Moreover, the condition was readily observable. The Respondent should have known of the condition.

It was improbable that an accident would occur. No damage to the cables was observed.

The condition was abated with a normal degree of good faith.

B. Notice of Violation No. 1-LGM (July 28, 1976)

Inspector Maloney issued 104(b) Notice of Violation No. 1-LGM on July 28, 1976, citing 30 CFR 77.1605(a). The inspector issued this notice because the front windshield on a grader had shattered badly. It had shattered to the extent that the wiper blades would be damaged if used. At the time the notice was issued, the window had been raised. The condition was clearly in violation of section 77.1605(a), which requires that cab windows be kept in good condition.

No showing was made that the Respondent was negligent in its failure to maintain the cab window in good condition. The inspector testified that he was unsure whether the Respondent knew of the condition and he did not give an indication of the length of time which the windshield had been damaged.

It was improbable that the shattered windshield would lead to an accident or injury. Because the windshield was up, its condition did not reduce visibility. The weather conditions were not such that the operator would need to lower the windshield.

The operator demonstrated a normal degree of good faith in abating this condition, once the notice of violation was issued.

C. Notice of Violation No. 1-LGM (August 4, 1976)

This notice of violation was issued on August 4, 1976. The inspector cited 30 CFR 77.1110, which requires that an examination of fire extinguishers be carried out once every 6 months, and that the date of this examination be recorded on a permanent tag attached to the extinguisher. The inspector issued the notice when he observed that the fire extinguisher on the trouble-shooter's truck did not have an attached tag. He did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard, or that the violation was caused by an unwarrantable failure on the part of Respondent. The condition was abated within the time prescribed by the inspector.

The parties agreed at the hearing to settle this case for $61, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

D. Notice of Violation No. 2-LGM (December 20, 1976)

Inspector Maloney issued Notice of Violation No. 2-LGM on December 20, 1976, citing 30 CFR 77.400(a). He issued the notice after he observed that the V-belt and pulleys on a gasoline motor and air compressor mounted on the bed of a service truck were unguarded. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by unwarrantable failure on the part of the Respondent. The condition was abated within the time prescribed by the inspector.

The parties agreed at the hearing to settle this case for $90, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval should be affirmed here.

E. Notice of Violation No. 1-LGM (December 22, 1976)

Inspector Maloney issued Notice No. 1-LGM on December 22, 1976, citing 30 CFR 77.1104. The inspector issued the notice when he observed that the ground in the area of the storage tanks was saturated with diesel fuel. Diesel fuel oozed from the ground when the inspector kicked away a surface layer of pea gravel. The inspector did not observe an ignition source in the area and warning signs against smoking and open flames were present. This accumulation of diesel fuel was in violation of section 77.1104.

It was improbable that an accident would occur because of the absence of ignition sources. Fire extinguishers are set in the area to stop fire which occurred outside the tanks. However, if a fire were to occur within the tanks, it could not be stopped.

No negligence on the part of the Respondent was shown. The inspector testified that the condition was not readily observable. People did not walk in the area on a regular basis.

The condition was abated with a normal degree of good faith, once the notice was issued.

F. Notice of Violation No. 4-LGM (February 17, 1977)

Inspector Maloney issued Notice of Violation No. 4-LGM on February 17, 1977, citing 30 CFR 77.1607(d). This section requires that cabs be kept free of extraneous material. The inspector issued the notice when he observed extraneous items in the cab of a truck being used by welders. These extraneous materials were as follows: welding rod containers, tank regulators, a cutting torch, a welding hood, a jumbo air chuck, a fire extinguisher and other miscellaneous materials. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that the condition was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time limit prescribed by the inspector.

The parties agreed at the hearing to settle this case for $74, the amount originally assessed by MSHA's Office of Assessments using the approved formula. This settlement was approved at the hearing by the administrative law judge. This approval is affirmed here.

G. Notice of Violation No. 1-LGM (March 9, 1977)

Inspector Maloney issued Notice No. 1-LGM on March 9, 1977, citing 30 CFR 77.1110. He issued the notice when he observed that a permanent tag recording a current examination date had not been attached to the fire extinguisher in a coal haulage truck. The inspector did not find

that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

The parties agreed at the hearing to settle this case for $74, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

H. Notice of Violation No. 2-LGM (March 9, 1977)

Inspector Maloney issued Notice No. 2-LGM on March 9, 1977, citing 30 CFR 77.1110. He issued this notice when he observed that the extinguisher on a coal haulage truck did not have an examination date tag affixed to it and its pin had been pulled. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by unwarrantable failure on the part of the Respondent. The condition was abated within the time prescribed by the inspector.

The parties agreed at the hearing to settle this case for $46, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

I. Notice of Violation No. 1-LGM (March 10, 1977)

Inspector Maloney issued Notice No. 1-LGM on March 10, 1977, citing 30 CFR 77.204(b). He issued the notice when he observed a buildup of grease in two places along a catwalk which went up the boom on the dragline. The grease covered steps and handrails in the affected area.

At the hearing, the inspector testified that he had incorrectly cited 30 CFR 77.204(b) in the notice when he had intended to cite 30 CFR 77.205(b). Because of this, the parties agreed to settle this case for $25, rather than the $58 originally assessed by MSHA's Office of Assessments.

There is no indication on the record that this was a serious violation or one involving negligence on the part of the Respondent. The condition was abated within the time prescribed by the inspector.

This settlement was approved at the hearing by the administrative law judge. This approval is affirmed here.

Three violations of mandatory standards are included within Docket No. DENV 78-492-P. Each of these alleged violations was the object of a 104(b) notice of violation issued at Respondent's Big Brown Strip Mine. These notices are discussed below in the order of their issuance.

A. Notice of Violation No. 3-LGM (March 14, 1977)

Inspector Maloney issued Notice No. 3-LGM on March 14, 1977, citing 30 CFR 77.1102. The inspector issued this citation when he noted that a service truck was equipped with a sign warning against smoking, but not with one warning against open flame. At the time the notice was issued, the truck had been hauling a quantity of oil and diesel fuel on the mine haul road. Section 77.1102 requires that signs warning against smoking and open flame be posted so that they can be readily seen in places where fire or explosion hazards exist. In view of the cargo carried by the truck, the failure to equip it with a sign warning against open flame was in violation of section 77.1102.

The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated with a normal degree of good faith.

The parties agreed at the hearing to settle this case for $46, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

B. Notice of Violation No. 1-LGM (March 16, 1977)

Inspector Maloney issued Notice No. 1-LGM on March 16, 1977, citing 30 CFR 77.1607(p). While in the No. 2 pit, the inspector stopped a front-end loader which had been loading coal. The operator of the vehicle left the cab and stepped to the ground without lowering the bucket to the ground first. The bucket remained suspended approximately 3-1/2 feet in the air. This failure to lower the bucket was in violation of section 77.1607(p) which requires that "buckets * * * shall be secured or lowered to the ground when not in use."

No negligence existed on the part of the Respondent. It was not a policy at the mine to allow buckets to remain suspended when not in use. This violation was the fault of the machine operator.

It was improbable that the machine operator's failure to lower this bucket would cause accident or injury. There were four people

in the area at the time the violation occurred. All four were immediately aware of the condition and the danger presented by it.

The condition was abated immediately.

C. Notice of Violation No. 1-LGM (June 16, 1977)

Inspector Maloney issued Notice No. 1-LGM on June 16, 1977, citing 30 CFR 77.1605(a). The inspector issued the notice because the bottom windows in the cab doors of a bulldozer had been removed. These windows had been removed by the machine operator to allow better ventilation of the cab. The absence of this glass was technically a violation of section 77.1605.

It is improbable that this violation would cause accident or injury. The inspector testified that he saw very little danger to be presented by this condition.

The inspector had no knowledge of the length of time the window had been missing.

The Respondent demonstrated good faith in abating the condition, once the notice of violation was issued.

There is no evidence that any penalty which might be assessed in the cases discussed above would affect Respondent's ability to continue in business.

Penalties

In consideration of the findings of fact and conclusions of law in this decision based on stipulations and evidence of record, the following assessments are appropriate under the criteria of section 109(a) of the Act.

Docket No. DENV 78-51-P	
Notice of Violation No. 2-LGM (May 17, 1977)	$100
Docket No. DENV 78-485-P	
Notice of Violation No. 2-LGM (September 15, 1976)	$24
Notice of Violation No. 5-LGM (September 15, 1976)	$28
Notice of Violation No. 1-LGM (September 16, 1976)	$28
Docket No. DENV 78-503-P	
Notice of Violation No. 1-LGM (October 12, 1977)	$82

Docket No. DENV 78-486-P

Notice of Violation No. 1-JF (March 4, 1976)	$61
Notice of Violation No. 1-LGM (May 12, 1976)	$55
Notice of Violation No. 1-LGM (May 13, 1976)	$74
Notice of Violation No. 1-LGM (May 25, 1976)	$78
Notice of Violation No. 1-LGM (August 16, 1976)	$78
Notice of Violation No. 2-LGM (August 16, 1976)	$78

Docket No. DENV 78-487-P

Notice of Violation No. 1-CH (December 28, 1976)	$98
Notice of Violation No. 2-LGM (January 5, 1977)	$120
Notice of Violation No. 2-LGM (January 6, 1977)	$90
Notice of Violation No. 1-LGM (January 10, 1977)	$90

Docket No. DENV 78-491-P

Notice of Violation No. 3-JF (March 29, 1976)	$110
Notice of Violation No. 1-LGM (July 28, 1976)	$78
Notice of Violation No. 1-LGM (December 22, 1976)	$86

Docket No. DENV 78-492-P

Notice of Violation No. 1-LGM (March 16, 1977)	$90
Notice of Violation No. 1-LGM (June 16, 1977)	$64

Settlements

The settlements discussed above were negotiated and approved in conformance with the statutory criteria for assessment of civil penalties. In each instance, the approval of settlement by the administrative law judge at the hearing is affirmed here. The settlements and corresponding penalties are as follows:

Docket No. DENV 78-485-P

Notice of Violation No. 2-LGM (February 2, 1977)	$43

Docket No. DENV 78-486-P

Notice of Violation No. 1-LGM (May 24, 1976)	$78
Notice of Violation No. 3-LGM (May 24, 1976)	$55

Notice of Violation No. 1-LGM (September 29, 1976)	$78
Docket No. DENV 78-487-P	
Notice of Violation No. 1-LGM (January 5, 1977)	$115
Notice of Violation No. 2-LGM (January 10, 1977)	$98

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Docket No. DENV 78-491-P

Notice of Violation No. 1-LGM (August 4, 1976)	$61
Notice of Violation No. 2-LGM (December 20, 1976)	$90
Notice of Violation No. 4-LGM (February 17, 1977)	$74
Notice of Violation No. 1-LGM (March 9, 1977)	$74
Notice of Violation No. 2-LGM (March 9, 1977)	$46
Notice of Violation No. 1-LGM (March 10, 1977)	$25

Docket No. DENV 78-492-P

Notice of Violation No. 3-LGM (March 14, 1977)	$46

ORDER

The civil penalty proceeding with respect to Notice of Violation No. 1-JDC (May 6, 1976), Notice of Violation No. 2-LGM (September 30, 1976), and Notice of Violation No. 1-LGM (January 6, 1977), are hereby DISMISSED.

With respect to the remaining notices of violation included within the above-captioned civil penalty proceedings, it is ORDERED that payment in the amount of $2,395 be made within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. Section 109(a)(1) of the Act reads as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard * * * shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."