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SOL (MSHA) V. TEXAS UTILITIES GENERATING
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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 78-537-P
A/O No. 41-01900-02007 V

v.

Docket No. DENV 78-82-P
A/O No. 41-01900-02009 F

TEXAS UTILITIES GENERATING CO.,
RESPONDENT

Monticello Fuel Facilities Strip
Mine

Docket No. DENV 79-80-P
A/O No. 41-02632-02004 V

Docket No. DENV 79-81-P
A/O No. 41-02632-03001

Martin Lake Strip Mine

DECISION

Appearances: Eloise Vellucci, Esq., and Douglas White, Esq., U.S.
Department of Labor, for Petitioner
Richard L. Adams, Esq., Worsham, Forsythe & Sampels,
for Respondent

Before: Judge Forrest E. Stewart

PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant either to section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819 (1970), or to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977).

On August 9, 1978, Petitioner filed with the Federal Mine Safety and Health Review Commission a petition for assessment of a civil penalty for the violation included under Docket No. DENV 78-153-P. Respondent filed its answer to this petition on January 3, 1979. Petitions for assessment of civil penalty in Docket Nos. DENV

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78-80-P, DENV 78-81-P and DENV 78-82-P, were filed on November 22, 1978. Respondent's answers were filed on January 2, 1979. The hearing in these matters was held on February 21, 1979, in Dallas, Texas. Posthearing briefs were filed by the parties on April 9, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the hearing, the parties stipulated to the following:

(a) The computer printouts of Respondent's prior violation history at the Martin Lake Strip Mine and the Monticello Fuel Facilities Strip Mine offered in evidence at the hearing were authentic and admissible.

(b) Respondent's company had produced 16,653,961 tons of coal in 1978.

(c) Respondent produced 3,072,199 tons of coal in 1978 at its Martin Lake Strip Mine.

(d) Respondent produced 6,278,289 tons of coal in 1978 at its Monticello Fuel Facilities Strip Mine.

There is no indication on the record that any penalty assessed in these proceedings would have an adverse effect on Respondent's ability to remain in business.

DOCKET NO. DENV 78-537-P

A single violation was alleged within Docket no. DENV 78-537-P. On June 22, 1977, Inspector Maloney cited a violation of 30 CFR 77.410 at Respondent's Monticello Fuel Facility Strip Mine. At the hearing, Respondent admitted the existence of the violation, contesting only the amount of the proposed penalty.

Inspector Maloney discovered that a troubleshooter's truck was not equipped with the required operative automatic backup alarm. The truck was equipped with a toggle switch which had to be tripped manually whenever the vehicle was placed in reverse. This warning system was not automatic and at the time, it was inoperative.

The inspector did not know how long the toggle switch had been in use or whether the condition was known to supervisory personnel. He was of the opinion that a supervisor should examine the cab of the truck at least once a shift. Albert Schwarzer, one of Respondent's fuel superintendents, testified that the operator of each vehicle had been designated as the party responsible for inspection of his vehicle during each shift. He asserted that there was not enough time for supervisory personnel to inspect daily each of the 100 vehicles used at the mine on a preshift basis.

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From zero to seven employees usually work in the area. Visibility behind the truck was obstructed, but the area was not noisy.

An automatic backup alarm was installed on the truck within an hour.

DOCKET NO. DENV 78-80-P

A single violation was alleged within Docket No. DENV 78-80-P. Inspector Maloney issued Notice of Violation No. 3-LGM on February 15, 1978, at Respondent's Martin Lake Strip Mine. He cited a violation of 30 CFR 77.1401 after observing that a crane which was not provided with overspeed and overwind devices was being used to hoist personnel. Two men were suspended 35 to 40 feet above the ground in a cage. This condition was in violation of section 77.1401.

The condition or practice was known to mine management. Inspector Maloney had informed them of the requirement in October of the previous year. A member of mine management admitted knowledge of the crane's use at the time the notice was issued.

It is improbable that the condition would result in an accident. The capacity of the crane was 200 tons. The inspector testified that it was safe to use the crane to hoist men and that a modification would have been granted Respondent if it had applied for one.

The violation was abated by the posting of signs prohibiting use of the machine for hoisting men.

DOCKET NO. DENV 79-81-P

Nine violations were alleged within Docket No. DENV 79-81-P. These alleged violations are discussed below in the order in which the corresponding citations were issued.

1. Citation No. 00391705

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391705, citing a violation of section 103(f) of the Act. Section 103(f) reads in pertinent part as follows:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no

authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine.

Inspector Maloney, his immediate supervisor, and a trainee inspector arrived at the mine office at approximately 7:30 a.m. The shift change at Martin Lake Strip Mine occurs at 8 a.m. Just prior to the shift change, the inspectors chose Thomas Hopkins, a union steward on the day shift, to accompany them during the course of the inspection as the authorized miner representative. Inspector Maloney testified that permission for Mr. Hopkins to accompany the inspectors was given by an assistant maintenance foreman on the midnight shift.

At approximately 8:15 a.m., Mr. Hopkins was approached by his immediate supervisor, Fred Overton, who ordered Mr. Hopkins back to work. Thereafter, the opportunity for Mr. Hopkins to accompany the inspectors was also refused by Mr. Reedy, Respondent's fuel superintendent. Mr. Hopkins was permitted to continue with the party of inspectors only after a citation was issued. The failure to give Mr. Hopkins an opportunity to accompany the inspectors was in violation of section 103(f) of the Act.

The inspector did not find that the violation was significant and substantial and there is no indication that it could have led to an accident or injury. Immediately after the citation was issued, mine management permitted Mr. Hopkins to accompany the inspectors.

2. Citation No. 00391708

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391708, citing a violation of 30 CFR 77.208(e). He observed three oxygen cylinders and four acetylene cylinders stored in two racks at the dragline erection site. The valves on these cylinders were not provided with protective covers. The inspector was of the opinion that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. Because the cylinders could easily be seen, the condition should have been known to the operator. The condition was corrected 10 minutes after the citation was issued.

At the hearing, the parties proposed a settlement of this case for \$150, the amount originally proposed by MSHA's Office of Assessments. The Administrative Law Judge approved the settlement at that time, and this approval is affirmed here.

3. Citation No. 00391709

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391709, citing a violation of 30 CFR 77.208(a). He observed that

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a cable sheave which was stored at the dragline erection site was not blocked to prevent it from being accidentally tipped over. In addition, the gantry sheave was resting on a center shaft approximately 20 inches in diameter and the bottom circumference of the sheave was approximately 10 inches above the ground. The inspector found that this condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. The condition was abated 25 minutes after the citation was issued.

At the hearing, the parties proposed a settlement of this case for \$210, the amount assessed by MSHA's Office of Assessments. The Administrative Law Judge approved the settlement at that time. This approval is affirmed here.

4. Citation No. 00391711

On March 21, 1978, Inspector Maloney issued section 104(a) Citation No. 00391711, citing a violation of 30 CFR 77.408. Section 77.408 requires that welding operations shall be shielded. At the dragline construction site, the inspector observed three welding operations which did not have the required shielding. The operator quickly abated this condition by placing portable canvas shields around each welding operation.

The operator was negligent in its failure to shield the welding operations. The failure to shield was visually obvious. The inspector was of the opinion that the welding had been ongoing at least from the beginning of the shift.

The hazard presented by this condition was flashburn. If such an accident were to occur, the probable result would be lost workdays or restricted duty.

There were approximately eight people in the area. Two of the welders were within 20 feet of each other. Leroy Churchill, Respondent's technical engineer who was in charge of the welding operations at issue, testified that the welders might operate as close as 4 or 5 feet to one another. Each of the welders was experienced and each wore a personal shield. Although the normal path of the construction workers was approximately 100 to 150 away, the area was not fenced off to prevent someone from approaching. Given the nature of the hazard and the number of people subjected to it, the occurrence of an accident was probable.

The operator made a good faith effort to abate the condition once the citation was issued. Portable shields were immediately placed around the welding operators.

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5. Citation No. 00391712

On March 21, 1978, Inspector Maloney issued 104(a) Citation No. 00391712, citing a violation of 30 CFR 77.208(d). The inspector observed that an oxygen cylinder and an acetylene cylinder in a tool room area for the dragline erection site were not secured in a safe manner. A rope had been tied around the cylinders and their wooden frame supports, but it had slipped down to within 6 inches of the base of the cylinders. The inspector found it improbable that an accident would occur. He remained of the opinion that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. However, he also found that the condition either could not have been known or predicted, or occurred due to circumstances beyond the operator's control. The condition was abated 10 minutes after the citation was issued.

At the hearing, the parties proposed a settlement of this case for \$122, the amount assessed by MSHA's Office of Assessments. The settlement was approved by the Administrative Law Judge at that time. This approval is affirmed here.

6. Citation Nos. 391719 and 391720

Inspector Maloney issued 104(a) Citation Nos. 391719 and 391720 on March 23, 1978, after observing a badly burned front-end loader which was parked on the access road to the main office. Upon investigation, it was determined that the vehicle had caught fire and burned for 1-1/2 to 2 hours. Thereafter, it had been removed from the accident site to the mine office. The operator of the vehicle suffered second degree burns and a broken nose in the incident. Respondent did not report the fire to MSHA officials.

An accident is defined in 30 CFR 50.2(h) as being "an unplanned mine fire not extinguished within 30 minutes of discovery." Because this fire may be characterized as an accident, the failure to report it to MSHA was in violation of section 50.10 and removal of the vehicle from the site of the fire was in violation of section 50.12.

Mine management was unaware of the requirement to notify MSHA immediately of the accident. It is improbable that these violations of 50.12 and 50.10 would result in an accident. The injury to the employee was reported promptly, and an effort had been made to preserve the equipment to help determine the cause of the fire.

7. Citation No. 00391724

Inspector Maloney issued Citation No. 00391724 on March 27, 1978, citing a violation of 30 CFR 77.1605(b). Section 77.1605(b)

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requires that all trucks be equipped with parking brakes. The inspector observed an ArdcO "Kando" vehicle with an inoperative parking brake. This vehicle had four-wheel drive and five seats, as well as a bed used to transport tools, supplies and other materials. It may be characterized as a truck within the meaning of section 77.1605(b). The absence of an operative parking brake on the Kando vehicle was in violation of that section.

The inspector did not know if the employees who were using the vehicle knew that the parking brake was inoperative, and there is no indication that mine management was aware of the fact.

At the time the citation was issued, the vehicle was parked on level ground and it was unoccupied. It had been left in gear to prevent it from rolling. The inspector testified that there was no real danger unless the vehicle was left out of gear on an incline. Repair efforts were undertaken immediately and the condition was corrected within the time set by the inspector for abatement.

8. Citation No. 00391726

On March 28, 1978, Inspector Maloney issued 104(a) Citation No. 00391726, citing a violation of 30 CFR 77.404(a). He observed that the passenger-side door on one of Respondent's boom trucks was badly bent and would not latch. A nylon rope and rubber strap were used to tie the door shut. The inspector found that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. The condition could have interfered with emergency escape from the vehicle. Alternatively, the door could open unexpectedly. The defect should have been known to the operator because it was visually obvious. A replacement was found in a local town and the condition was corrected within the time set for abatement.

At the hearing, the parties proposed a settlement of the case for \$305, the amount assessed by MSHA's Office of Assessments. The settlement was approved at that time by the Administrative Law Judge and the approval is affirmed here.

DOCKET NO. DENV 78-82-P

The single violation alleged within Docket No. DENV 78-82-P arose out of an incident which occurred at Respondent's Monticello Fuel Facilities Strip Mine on the morning of December 31, 1977. A fatal injury was sustained by one of Respondent's employees after he fell into a coal hopper.

The hopper in question was being used as a dump site for bottom dump trucks. There were two openings in the hopper about 4-1/2 feet wide. Tracks had been placed across the opening to allow trucks to

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drive over the hopper and dump coal into it. During the shift on which the accident occurred, trucks had been dumping coal into the northernmost opening. A bulldozer was being used to push a stockpiled coal into the second opening. At the time of the accident, the northernmost of these two openings was covered by a large coal hauling truck. The building which housed the dump station operators was adjacent to this side of the dump site

On the morning of December 31, 1977, Charles White, a pumper operator, was working in the control room at the coal crusher at the Monticello Fuel Facilities Strip Mine of Respondent. At approximately 4 or 5 o'clock that morning, one of Respondent's foremen called the control room and asked that a certain coal hauling truck be stopped and the operator told to bring the truck to the shop for maintenance. White failed to stop the coal hauler before it reached the dump site. He then apparently walked around behind the control room building to meet the hauler. He entered the dump site, walked up beside the left front wheel of the coal hauling truck and began to speak to the driver of the truck. White then took a step backward and fell into the open coal dump.

Notice of Violation No. 1-JDC, January 1, 1978, was issued in the course of the ensuing accident investigation. The inspector cited a violation of 30 CFR 77.204 and alleged that "openings in the haulage truck dumping facilities §y(3)5C were not protected by railings, barriers, covers, or other protective devices."

Section 77.204, in pertinent part, provides the following: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices."

There were no permanent protective or warning devices in the area other than a low concrete wall which ran between the hopper and the control room building, and which extended 3 feet beyond each side of the hopper, and two unilluminated signs located on each end of the wall which stated "Danger Open Pit". A barrier was placed across the roadway when the hopper was not being used. This comprised approximately 15 percent of the time during which the mine was operating. The barrier was not in place when the accident occurred.

The absence of protection over or around the opening at the time of the accident was in violation of section 77.204.

The operator evinced a small degree of negligence in its failure to protect the hopper opening. A barrier was erected when the site was not in use. It was in fact, the pumper's responsibility to erect this barrier. In addition, signs had been posted warning against the danger presented by the open hopper. Respondent's safety

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manual prohibits entry into the area when the dump site is in use. Two of Respondent's witnesses testified that they had never seen a person in the dump site area other than for maintenance purposes. Finally, 22 inspections had been conducted by MSHA at Respondent's Monticello Mine prior to the accident. The condition in question was not found by MSHA inspectors to be a violation in the course of any of these inspections. Even so, the hazard presented by the open pit was obvious and should have been known to the operator.

Respondent demonstrated good faith in rapidly complying with section 77.204 and indicates its continued good faith in attempting to find the most workable and affective means of protection.

ASSESSMENTS

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:

DOCKET NO. DENV 78-537-P

Notice of Violation No. 1-LGM (June 22, 1977) \$500

DOCKET NO. DENV 79-80-P

Notice of Violation No. 3-LGM (February 15, 1978) \$300

DOCKET NO. DENV 79-81-P

Citation No. 00391705	\$ 200
Citation No. 00381708	150
Citation No. 00391709	210
Citation No. 00391711	195
Citation No. 00391712	122
Citation No. 00391719	130
Citation No. 00391720	130
Citation No. 00391724	200
Citation No. 00391726	305

DOCKET NO. DENV 79-82-P

Notice of Violation No. 1-JDC (January 1, 1978) \$800

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

ORDER

It is ORDERED that the settlement negotiated between Petitioner and Respondent with respect to Citation Nos. 00391708 (March 21, 1978), 00391709 (March 21, 1978), 00391712 (March 21, 1978), and 00391726 (March 28, 1978), is hereby APPROVED.

It is further ORDERED that the Respondent pay the sum of \$3,242 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge