

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 15, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

TRAPPER MINING, INC.,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2015-214
A.C. No. 05-02838-366343

Docket No. WEST 2015-317
A.C. No. 05-02838-368857

Trapper Mine

DECISION

Appearances: Michelle A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Karl C. Koehler, Safety Manager, Trapper Mining, Inc., Craig, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Trapper Mining, Inc. (“Trapper”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Steamboat Springs, Colorado, and presented oral argument following the hearing. Three section 104(a) citations were adjudicated at the hearing. Trapper operates a surface coal mine in Moffat County, Colorado.

**I. DISCUSSION WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all of the evidence.

The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a

valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

A. Citation No. 8478965; WEST 2015-214

On September 20, 2014, MSHA Inspector Art C. Gore¹ issued Citation No. 8478965 under section 104(a) of the Mine Act, alleging a violation of section 77.513 of the Secretary’s safety standards. (Ex. G-1). The citation alleges that there was no dry wooden platform, insulating mat, or other electrically nonconductive material kept in place at the electrical boxes and power-control switch for the aerator at a pond near the pit.

Inspector Gore determined that an injury was unlikely, that the violation was not of a significant and substantial (“S&S”) nature, but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that Trapper’s negligence was moderate and that one person would be affected. Section 77.513 provides, in part, that “[d]ry 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.” (30 C.F.R. § 77.513). The Secretary proposed a penalty of \$100.00 for this citation.

Discussion and Analysis

1. Evidence

Inspector Gore issued the citation at a pond, often called Trapper Lake, which is used as a source of water for water trucks. (Tr. 10-11). Trapper uses a snow-making machine to aerate the pond to increase the evaporation rate when the water level gets too high. (Tr. 45-46). The cited electrical boxes were mounted on a stand with two metal poles in the ground. (Ex. G-3). This installation provided power to a barge floating on the pond. A pump and the aerator were mounted on the barge. There is a switch on one of the two electrical boxes. The inspector testified that the metal stand for the boxes was probably grounded. (Tr. 12). Nothing had been placed in front of the electrical boxes that would insulate anyone operating the switch from the earth. A dry wooden platform, insulating mat, or other nonconductive material would have

¹ Inspector Gore is currently the supervisor of MSHA’s Craig, Colorado, Field Office. He has been an inspector since 1992. (Tr. 9). He previously held numerous positions in the coal mining industry including as a mechanic, electrician, and electrical supervisor. He is an electrical specialist with MSHA. (Tr. 9-10).

protected a miner from a shock hazard. (Tr. 12-13, 22). The inspector believed that there was a chance that, if an electrical component in one of the boxes failed, the box could become energized even though it was grounded. (Tr. 18-19). Inspector Gore testified whether someone would receive a shock would depend on various factors including “body resistance, the type of shoes the person was wearing, [and] the ground moisture[.]” (Tr. 13). It does not take much current to damage someone’s heart. (Tr. 13-14). Although the surface of the earth appeared dry at the time of the inspection, conditions can change and it can be wet just beneath the surface when it is dry on top. The condition was abated by moving a wooden pallet in front of the stand. (Ex. R-3). If this same installation had been inside a building, there would not have been a violation. (Tr. 28).

Inspector Gore determined that it was not reasonably likely that anyone would be injured by the violation. (Tr. 16). He said that he reached that conclusion because it was unlikely that the electrical components would fail and he did not believe that anyone used the switch very often. “[I]t’s pretty much mostly automated.” *Id.* He determined that Tapper’s negligence was moderate because the “mine has a very safe history” and a “very good crew that maintains their electrical system.” (Tr. 17). The electrical “equipment is well maintained” at this mine. *Id.*

Chet Steele², the electrical supervisor at the mine, testified that section 77.901 requires that three-phase portable electrical equipment be held to a higher standard than non-portable equipment. Because the equipment on the barge is portable, the circuit employs neutral ground resistors that limit ground fault current to 15 amps. (Tr. 45). This ground phase protection will trip if there is any current at all flowing on the ground wire. *Id.* It also employs a ground monitor circuit that continuously monitors the grounding system, and it opens if there is any failure of the grounding conductors. *Id.* Steele testified that the electrical installation did not present an electric shock hazard. (Tr. 48). A series of unlikely events would have to occur before a shock hazard would be present. (Tr. 48-49, 58, 61).

He also testified that, whenever the water level in the pond gets too high, the pump and aerator are activated in order to increase the evaporation rate. Once the water level recedes, the system is turned off. (Tr. 45-46). Someone comes to the installation about once a week to turn the system on or off.

Trapper introduced into evidence the Secretary’s Program Policy Manual (“PPM”) for section 77.513. The PPM states “[e]nclosed power-control switches such as portable circuit breakers of switch houses that are supplied power from a resistance-grounded system, as required by Section 77.802 or 77.901, are not considered to pose a shock hazard.” (Ex. R-1, V MSHA, U.S. Dep’t of Labor, *Program Policy Manual, Part 77*, at 180 (2015)). Trapper contends that the cited electrical installation fits within this exception to the safety standard because the power-control switch was enclosed and it was supplied power from a resistance-grounded system as required by section 77.901. (Tr. 51, 61-62). As a consequence, it believes that the Secretary has administratively determined that the installation did not present a shock hazard.

² Steele has worked in the coal mining industry since 1980. (Tr. 42). He has been an MSHA qualified electrician since 1981. (Tr. 43). He has extensive experience working with MSHA’s electrical standards to make sure that the mine is in compliance with these standards.

The Secretary agrees that the switch in question was a “power-control switch” and that power to the switch was supplied from a resistance-grounded system. (Tr. 31). The factual dispute concerning the application of this provision of the PPM concerns whether the switch was “enclosed” as that term is used in the PPM. Steele testified that the switch for the pump was enclosed and only the switch operator was outside the box. “The only thing that protrudes on the outside of this box is a switch operator made of plastic.” (Tr. 49). The electrical switch is totally enclosed and protected by the box. (Tr. 49-50). What Steele called the “switch operator” is the plastic knob for the switch. To use the analogy of a light switch, the electrical components of the switch are enclosed but the plastic device used to activate the switch protrudes outside the enclosed box. In this case the plastic device was a red knob. (Exs. G-3, R-3). Steele testified that he has been confused about the requirements of the safety standard his entire career and he has received conflicting advice from MSHA inspectors. (Tr. 50-51, 55). He believes, however, that the PPM makes it quite clear that an insulating mat or dry wooden platform was not required at the cited electrical installation. (Tr. 51-53).

Inspector Gore admitted that the language in the PPM is confusing. (Tr. 30, 40). He testified, however, that in his opinion the switch includes the red knob that protruded outside the box. (Tr. 39; Exs. G-3, R-3). Thus, it is his belief that the sentence from the PPM quoted above does not apply to the facts of this case because the switch was not an “enclosed” power switch.

2. Violation

This alleged violation raises a number of legal issues. This standard, unlike some other standards, specifically requires that the Secretary prove that a hazard existed, in this case an electric shock hazard. Without proof of an electric shock hazard, there is no violation.

The safety standard does not limit its application to “enclosed power-control switches.” Rather it provides that insulating material must be provided at “all switchboards and power-control switches where shock hazards exist.” In the PPM, the Secretary attempted to give some definition as to when a shock hazard exists. First, the PPM makes clear that the standard applies “only if a shock hazard exists.” (Ex. R-1). It then lists examples of situations where a shock hazard does exist and it provides the example cited above and states that such an installation does not present a shock hazard.³

I credit the testimony of Inspector Gore that situations could arise in which a platform or mat would be necessary to prevent an electric shock to a person using the switch at issue here. He determined that it was unlikely that anyone would receive an electrical shock, but it was possible. (Tr. 16). A number of safety devices would have to fail for a shock hazard to be present. Consequently, Inspector Gore determined that the condition created was not S&S. Although both the inspector and Steele had extensive experience in electrical safety issues, I credit the testimony of the inspector that an electric shock was possible but unlikely.

³ It appears that Inspector Gore does not agree with the PPM. He believes that there are situations where a shock hazard can be present even if an enclosed electrical switch is powered from a resistance-grounded system. (Tr. 32).

The difficulty comes from the fact that there has been confusion about the application of this standard at the mine. Inspector Gore admitted that the PPM is confusing. (Tr. 30, 40). Inspector Gore testified that “[s]ometimes when they say power switch [in safety standards or the PPM] it’s not actually talking about like a light switch that you throw. It’s talking about a disconnect that is inside this box, a line starter or some form of disconnect that will disconnect the power.” (Tr. 40). I find that this PPM contemplated switches that are fully enclosed, including the knob for the switch. Otherwise, a significant number of switchboards and other power-control switches would be exempted from the requirements of the safety standard. The broad interpretation of the exception in the PPM suggested by Trapper would defeat the purpose of the safety standard. The intent was to carve out a narrow exception for fully enclosed switches.

Trapper is, in essence, raising a fair notice defense. It is arguing that it was not able to determine when insulating material is required at switchboards and power-control switches under the safety standard. When evaluating a party’s fair notice argument the judge should first look to see if the language of the standard “provides clear and unambiguous notice of its coverage and requirements[.]” *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014) (citing *Bluestone Coal Co.*, 19 FMSHRC 1025, 1029 (June 1997) and *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000)). Here, the language of the standard is clear and unambiguous. It requires that operators place dry wooden platforms, insulating mats, or other nonconductive materials at switchboards and power control switches where shock hazards exist. The only question is whether an installation presents a shock hazard.

The confusion arises because the PPM attempted to provide guidance as to the risk of a shock hazard at different types of installations in a clumsy manner. The Commission has explained that a PPM is not binding on either the Secretary or the Commission. *D. H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981). While the PPM may provide guidance on an issue, it “lack[s] legal effect and thus cannot be used against the Secretary as grounds to estop a finding of violation.” *Consolidation Coal Co.*, 22 FMSHRC 340, 364 n. 31 (Mar. 2000) (citing *King Knob Coal Co.*, 3 FMSHRC at 1419-1422). Moreover, where the PPM creates an exception to the clear language of a standard, the standard controls and operators must comply with the express language of the mandatory standard. *King Knob Coal Co.*, 3 FMSHRC 1417, 1420-1421 (June 1981); *See Jim Walter Res., Inc.*, 27 FMSHRC 757, 824 (Nov. 2005) (ALJ). In this instance, the exception in the PPM must be narrowly construed to effectuate the objectives of the safety standard.

Because the PPM could be construed as granting an exemption to the requirements of 77.513 at the cited electrical installation, I find that Trapper was not negligent with respect to this violation. Inspector Gore admitted that the Secretary’s interpretation of the safety standard is confusing. Trapper relied on the language of the PPM when it determined that it was not required to place an insulating mat at the cited location. In *King Knob Coal Co.*, the Commission explained that, while an operator’s reliance on an exception set forth in MSHA’s policy guidance will not prevent the finding of a violation of a mandatory standard, the judge may properly address that reliance in his negligence findings. 3 FMSHRC at 1421-1422.

The gravity of the violation was low and Trapper was not negligent. A penalty of \$100.00 is appropriate for this violation.

B. Citation No. 8479045; WEST 2015-317

On October 7, 2014, MSHA Inspector James E. Ellenberger⁴ issued Citation No. 8479045 under section 104(a) of the Mine Act, alleging a violation of section 77.1007(a) of the Secretary's safety standards. (Ex. G-4). The citation was subsequently modified to allege a violation of section 72.620. The citation alleges that a drill being used at the L-Dip Pit was not effectively controlling the drilling dust being generated. The citation notes that a surveyor was observed on the ground at the same drill pattern and a corner of the front dust curtain had been tied in an up position with a rope.

Inspector Ellenberger determined that an injury was unlikely, that the violation was not S&S, but that any illness or injury would reasonably be expected to be permanently disabling. He determined that Trapper's negligence was moderate and that one person would be affected. Section 72.620 provides, in part, that "[h]oles shall be collared and drilled wet, or other effective dust control measures shall be used, when drilling non-water-soluble material." (30 C.F.R. § 72.620). The Secretary proposed a penalty of \$127.00 for this citation.

Discussion and Analysis

1. Evidence

Inspector Ellenberger testified that he was at the top of the L-Dip Pit observing the drill pattern when he saw that the drill was "putting out a lot of drill dust as it was drilling." (Tr. 67). The drill is a large piece of mobile equipment on caterpillar tracks. (Ex. G-5). The operator of the drill sits in an enclosed cab. Rubber skirting material was mounted on the underside of the framework of the drill to contain dust. It was drilling on "sandy clay-type overlay material" with solid rock underneath. (Tr. 67). The material being drilled was not water soluble. "[C]ompressed air blows the drill cuttings out of the hole and they inject water into that system so it goes into the hole and suppresses the dust." (Tr. 67-68). The inspector observed dust escaping from under the drilling machine because a corner of the rubber skirting had been tied so that it was lifted off the ground. (Tr. 69; Ex. G-5).

Inspector Ellenberger observed someone walking on the drill pattern. This person was a surveyor and he was within 120 feet of the drill and downwind from the dust. (Tr. 70). The inspector asked the drill operator why he had the dust skirt tied up and was told that he encountered wet conditions as he was drilling so he turned the water sprays down and lifted a corner of the dust curtain. (Tr. 71).

⁴ Inspector Ellenberger has been a coal mine inspector with MSHA since January 2008. (Tr. 64). He has worked in the mining industry since 1970 in a wide verity of positions. (Tr. 64-66). He is a certified dust sampler. (Tr. 100).

Justin Fedinec⁵, a safety engineer at the mine, is a certified dust sampler. (Tr. 83). He was with the inspector when this citation was issued. He said that the surveyor was at a lower elevation at the time the citation was issued. (Tr. 85). He testified that the drill operator said that muddy conditions were making drilling difficult so he turned the water down. He pulled back part of the dust curtain so he could look down from the cab and see whether he had hit the coal seam by looking at the cuttings. (Tr. 86-87, 91-92). The drill operator is protected because he works in an environmental cab with seals around the door and windows and the air entering the cab is filtered. (Tr. 92).

Inspector Ellenberger testified that an injury or illness was unlikely and that the violation was not S&S. (Tr. 71). The surveyor was not close to the drilling machine, the drill operator was in an enclosed booth and was not exposed, and not all of the dust was escaping into the atmosphere. (Tr. 72). Inspector Ellenberger marked the citation as “permanently disabling” because silicosis is a serious disease. (Tr. 77-78, 101). He marked the negligence as moderate because there was no supervisor around and when he showed the drill operator the photo he took of the escaping dust, the operator responded that he did not know that he “was making that much dust.” (Tr. 73). The inspector did not take a dust sample.

Fedinec testified that the conditions he observed did not create a health risk for anyone and that other activities at the mine were producing dust as well, such as a dozer clearing off brush and top soil at a different location. (Tr. 87-88). A dust sample is necessary to determine whether a health hazard has been created. (Tr. 88). When Trapper takes its own dust samples, the results are typically ten times below MSHA’s requirement for silica dust. (Tr. 89-90). The surveyor would not have spent more than 20 minutes on the drill pattern that day so he was not exposed in any meaningful way.

2. Violation

I find that the Secretary established a violation. The safety standard does not require the inspector take a dust sample or the Secretary to establish that the dust observed exceed the threshold limit value for coal or silica dust. The Secretary established that Trapper had elevated one of the dust curtains around the drill, which allowed dust to escape. As a consequence “effective dust control measures” were not being “used” at the time the citation was issued. 30 C.F.R. § 72.620. *See Hobet Mining Inc.*, 20 FMSHRC 889, 898 (Aug. 1998) (ALJ). In this instance, raising the corner of the dust curtain rendered a dust control device ineffective and it was permissible for the inspector to make this determination by visual examination alone.⁶

⁵ Fedinec has about 15 years’ experience in the mining industry with Peabody Twentymile and Trapper. (Tr. 82).

⁶ The preamble to the health standard provides: “Under the final rule, MSHA will cite a mine operator when a dust control is missing, defective, or obviously ineffective by visual inspection.” 59 Fed. Reg. 8318, 8324 (Feb. 18, 1994).

The Secretary is not contending that the violative condition was reasonably likely to result in an injury or illness. The violation was serious because overexposures to silica or coal dust can, over time, have a significant negative effect on the lungs of miners. The exposure was minimal in this instance because the only affected miner, the surveyor, was a considerable distance away and he was only in the area for a short time.⁷

I find that the evidence establishes that Trapper's negligence was low in this instance.⁸ Management was not aware of the condition and the drill operator did not realize that he was producing so much dust. A penalty of \$100 is appropriate for this violation.

C. Citation No. 8479046; WEST 2015-317

On October 7, 2014, MSHA Inspector Ellenberger issued Citation No. 8479046 under section 104(a) of the Mine Act, alleging a violation of section 77.405(a) of the Secretary's safety standards. (Ex. G-6). The citation alleges that several miners were observed working on or from the Queen Ann dragline, located at the K-Strike Pit, with the bucket suspended in the air as they rerouted the trailing cable and then reconnected it at the pothead on the dragline's tub, under the drag rope fairleads.

Inspector Ellenberger determined that an injury was unlikely, that the violation was not S&S, but that any injury would reasonably be expected to result in lost workdays or restricted duty. He determined that Trapper's negligence was moderate and that one person would be affected. Section 77.405(a) provides:

Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely. This

⁷ Because he was in a climate-controlled cab, the drill operator was not affected. In this regard, the Secretary stated in the preamble to the health standard: "MSHA agrees that positive pressure cabs are effective in controlling exposures to dust for persons located within the cabs. However, other miners may be working in the area. Because cabs do not control drill dust at the source of generation, they are not adequate to protect the health of miners located outside the cabs who are exposed to the drill dust." 59 Fed. Reg. at 8324

⁸ The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

does not preclude the use of equipment specifically designed as elevated mobile work platforms.

(30 C.F.R. § 77.405(a)). The Secretary proposed a penalty of \$100.00 for this citation.

Discussion and Analysis

1. Evidence

Inspector Ellenberger testified that he was at the K-Strike Pit when he saw people working around the large dragline known as the Queen Ann and the bucket was suspended in the air. (Tr. 104). The bucket is very large and heavy but it did not have any material in it. The inspector saw electricians in the area. The miners had disconnected the trailing cable from the dragline. He understood that the electricians had inserted another section of trailing cable and they were about to reconnect the trailing cable to the dragline. There were also mechanics present. (Tr. 107). Nobody was working on the bucket or using the bucket as a work platform. (Tr. 124). Everyone was on the ground near the dragline. (Tr. 128). The power was off at this time. The inspector testified that when the power is off, the bucket should be on the ground. (Tr. 106, 112). He saw them working in the fairleads area.⁹ He was “astounded” when he saw that the bucket was in a raised position because he had “never seen that before.” (Tr. 107). He did not observe anyone walking under the bucket. *Id.*

The inspector believed that the only thing holding up the bucket were the brakes on the hoisting mechanism. *Id.* The Queen Ann was equipped with a disc braking system. The disc brakes clamp a rotor by way of mechanical components. (Tr. 108). All of these parts are subject to wear and tear. (Tr. 108, 119). The bucket is suspended from cables that go up through the boom. (Tr. 109). Inspector Ellenberger’s primary concern was that the dragline operator no longer had any control over the bucket because the power was off. (Tr. 110-11). The entire hoist system was under load. (Tr. 132-33; Ex. G-9). The inspector saw “energy that [was] not controlled.” (Tr. 110). If this energy was released and the bucket fell, it would be “catastrophic.” (Tr. 111). Parts and wire rope would be flying around and someone could be injured. (Tr. 111, 120-23).

He determined that failure of any of the numerous components helping to hold up the bucket was unlikely, however. (Tr. 111, 131-32). He also did not observe anyone in the machine house or underneath the suspended bucket. (Tr. 112). If someone were to be injured as a result of this violation, he would suffer lost workdays or restricted duty at the very least. (Tr. 112-13). He determined that the violation was a result of the Trapper’s moderate negligence because management personnel were not present. *Id.*

⁹ A “fairlead” is a “device that lines up cable so that it will wind smoothly onto a drum.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 199 (2d ed. 1997). This term applies to “the swivel pulley on the drag rope of a dragline[.]” *Id.*

Brian Smith,¹⁰ a maintenance manager for Trapper, testified that he disagreed with the inspector's characterization of the disc brakes on the dragline as a "service brake" because in normal operations the disc brakes are not used. (Tr. 138). The bucket load is controlled by the dynamic braking system using the direct current motors on the dragline. *Id.* The disc brakes are rarely used and are not subject to much wear. They are only used in an emergency. *Id.* Given the testing that Trapper performed on the disc braking system on draglines, he believes that the disc brakes were capable of safely holding the bucket in the air for a lengthy period of time. (Tr. 140-41, 145-46). Whenever the power is off, including during an unexpected power failure, the disc brakes automatically set. (Tr. 148).

Trapper regularly completes preventative maintenance on its draglines, including the Queen Ann, after about 168 hours of operation. (Tr. 142). The disc brakes are carefully examined for wear during these examinations. The rigging for the boom and bucket are also examined and replaced, as necessary. Smith has never seen rigging fail in a static condition. (Tr. 143). If the bucket had fallen while the miners were working on the drag line, it would have fallen straight down and the drag ropes would not have snapped back towards the machine. (Tr. 144). Because the miners were working at the base of the dragline, they were not located in the zone of danger. (Tr. 149). They were about 100 feet away. *Id.*

2. Violation

I find that the Secretary established a violation. The safety standard states that "men shall not work on . . . a piece of mobile equipment in a raised position until it has been blocked in place securely." As stated above, the Secretary is not required to establish that a violation of a safety standard created a significant safety hazard. If conditions exist which violate a standard, a citation is proper. There is no allegation that miners were working from the bucket, but they were performing work on the dragline while the bucket was in a raised position. Although they were not working directly under the bucket, they were working on the same side of the dragline as the boom and bucket. I find that it was unlikely that anyone would have walked directly under the bucket while it was in a raised position, but I credit the inspector's testimony that, if there was any sort of mechanical failure that caused the bucket to fall, it could be catastrophic. The cables could snap about and strike someone working in the vicinity of the boom. The photograph introduced by Trapper shows the general position of the miners when the citation was issued. (Ex. R-5). Although the miners were about 100 feet from the bucket, there was a chance that something could go terribly wrong and one of the men could have been injured in the event of a catastrophic failure.

Trapper relies, in part, on the language in the Secretary's PPM. The PPM states with respect to section 77.405 that "[m]echanical means that are manufactured as an integral part of the machine for the purpose of securing a portion of the machine in a raised position are acceptable as meeting the requirements of this section." (Ex. R-4, PPM, Part 77, at 173). It is quite obvious that this provision is not contemplating braking systems. As stated by Inspector

¹⁰ Smith has been working in the maintenance department at Trapper since 1984. (Tr. 137). He has a bachelor's degree in mechanical engineering and he holds a professional engineering certificate from the State of Colorado. *Id.*

Ellenberger, this provision is directed to mechanical locks or other devices that block the raised component from movement. (Tr. 114-15). I credit his testimony in this regard. Allowing miners to work on or about raised equipment that is kept in place only by means of a mechanical brake would defeat the purpose of the safety standard.

The inspector determined that it was unlikely that anyone would be injured as a result of the violation. He reached this conclusion because he determined that it was unlikely that the disc brakes or any other component on the dragline would fail. I credit the testimony of Smith concerning the strength of the disc brakes and their use in day-to-day operations. I find that the violation did not significantly contribute to the risk of an injury. I affirm the inspector's gravity determinations.

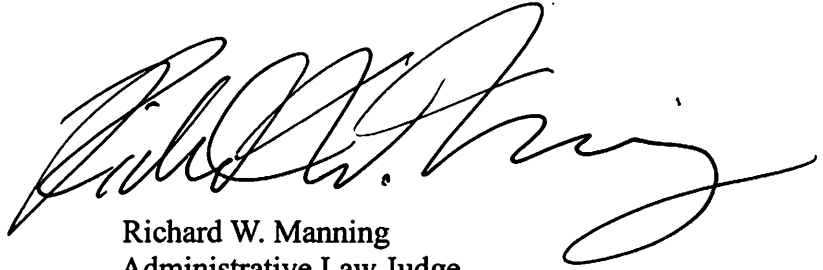
I also affirm Inspector Ellenberger's negligence determination. Trapper's negligence was moderate with respect to this violation because a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard would have recognized that the bucket should have been lowered to the ground before any work was performed on the bucket side of the dragline. The Secretary's proposed penalty of \$100 is appropriate for this violation.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Trapper had a history of 30 violations during the 15 months preceding the issuance of subject citations but only six were designated as S&S. (Ex. G-8). Respondent is a large coal mine operator. The violations were abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Citation No. 8478965 is **MODIFIED** to show that Trapper was not negligent with respect to the cited violation. Citation No. 8479045 is **MODIFIED** to show that Trapper's negligence was low with respect to the cited violation. In all other respects the citations are **AFFIRMED**. Trapper Mining, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$300.00 within 30 days of the date of this decision.¹¹



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

¹¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.