

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 3, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 96-21
	:	A.C. No. 05-02820-03768
	:	
	:	Docket No. WEST 96-123
	:	A.C. No. 05-02820-03776
v.	:	
	:	Docket No. WEST 96-134
	:	A.C. No. 05-02820-03782
	:	
BASIN RESOURCES INCORPORATED, Respondent	:	Docket No. WEST 96-180
	:	A.C. No. 05-02820-03784
	:	
	:	Docket No. WEST 96-195
	:	A.C. No. 05-02820-03785
	:	
	:	Golden Eagle Mine

DECISION

Appearances: Richard Bury, Conference and Litigation Representative, Mine Safety and Health Administration, Price, Utah, and Ned D. Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Incorporated ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege 53 violations of the Secretary's safety regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and Basin Resources filed a post-hearing brief. With the exception of Order No. 4057563, all of the citations were issued to Basin Resources under section 104(a) of the Mine Act.

I.

SECRETARY'S MOTION TO ADD ENTECH, INC., AND
MONTANA POWER COMPANY AS RESPONDENTS

At the time the citations and orders were issued in these cases, Basin Resources operated the Golden Eagle Mine in Las Animas County, Colorado. The mine is now closed. The mine was an underground mine that used the longwall method to extract coal. Basin Resources contested the penalties in these cases and in other dockets because it believes that the penalties are excessive especially since its only mine is closed and it is in the process of winding down. It contends that the penalties should be significantly reduced under the criteria set forth in section 110(i) of the Mine Act, specifically the "effect on the operator's ability to continue in business" criterion. 30 U.S.C. ' 820(i). The Secretary disagrees and argues that when an operator is out of business, the "ability to continue in business criteria" no longer applies and the penalties should not be reduced.

The Secretary moved for partial summary decision on this issue. By order dated January 7, 1997, I denied the Secretary's motion. 19 FM SHRC 211. I held that if a mine operator establishes that it is no longer in the mining business and does not intend to reopen its mines or otherwise return to the mining business, this fact should be taken into consideration when assessing a civil penalty under the ability to continue in business criterion. My reasons for this conclusion are set forth in my order which I hereby incorporate by reference. To summarize, I held that civil penalties are remedial, not punitive, and are designed to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." *Id.* at 212 (citation omitted). I indicated that I would assess lower penalties against Basin Resources than proposed by the Secretary because it was no longer a mine operator.

The Secretary filed a motion to add Entech, Inc., and Montana Power Company as respondents in these and the other Basin Resources cases. The Secretary contends that these entities were "operators" of the Golden Eagle Mine as that term is used in section 3(d) of the Mine Act. 30 U.S.C. ' 802(d). In my decision issued on April 7, 1997, in *Basin Resources, Inc.*, Docket No. WEST 95-104, 19 FM SHRC_____ (April 1997), I addressed this issue in detail and denied the Secretary's motion. I incorporate my analysis of that issue into this decision by reference. For the reasons set forth in that decision, the Secretary's motion is denied.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE CITATIONS AND ORDER AT ISSUE

A. Roof and Rib Support Citations

1. Citation No. 4058042

On July 20, 1995, MSHA Inspector Earl Simmons issued a citation alleging a violation of 30 C.F.R. ' 75202(a). In the citation, the inspector alleged that the roof in the 4-Left 009-0 longwall was not being supported or controlled to protect persons from falls of roof. The citation states that the No. 4 shield was "down from the immediate roof approximately 12 inches." He determined that the alleged violation was not significant and substantial ("S&S"). The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. Section 202(a) provides, in part, that the roof and ribs of "areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls" of the roof or ribs.

Inspector Simmons stated that the condition was obvious and could have been caused by a leak in the shield hydraulic system or by a failure to make sure that the shield was raised against the roof. (Tr. 123-24). He testified that material could fall through the 12-inch opening and strike a miner below. (Tr. 124). He was not sure if the shield was in contact with the roof at some point along its length. (Tr. 129).

Jim Peterson, a former safety supervisor with Basin Resources, testified that loose material against the roof prevented the shield from making full contact with the roof. (Tr. 133). He believed that the condition observed by the inspector did not violate the roof control plan. (Tr. 134-35) He also believed that miners working under the shields were protected from falling rock because there was very little space between the shields. (Tr. 135-36). He testified that only small pieces of material could fall between the shield and the adjacent shields. *Id.*

I credit the testimony of Inspector Simmons and find that the Secretary established a violation. I reject Basin Resources' argument that the Secretary failed to introduce evidence that the conditions were as described in the citation. (B.R. Br. 10). I find, however, that only small pieces of material could fall between the shield and adjacent shields. Thus, I find that the violation was not serious. A penalty of \$200 is appropriate.

2. Citation No. 4057583

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75202(a). In the citation, the inspector alleged that loose ribs were present that needed to

be controlled between crosscut No. 20 and crosscut No. 23 along the No. 8 belt conveyor. The inspector estimated the distance to be about 300 feet. Inspector Simmons determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$2,072.00 for the alleged violation.

Inspector Simmons was concerned that the loose ribs could fall and injure a miner. (Tr. 158). He testified that the belt examiner and beltman were exposed to this hazard. *Id.* The inspector believed that an injury was reasonably likely, in part, because miners have been injured at the mine as a result of rib falls. (Tr. 161). He stated that the violation was S&S because it was reasonably likely that the loose rib would fall and seriously injure a miner. (Tr. 162). He admitted that the roof was adequately supported in the area. Inspector Simmons testified that he based his citation solely on his visual observation of cracks in the ribs and he did not test nor attempt to take down the ribs. (Tr. 165-66). He had never inspected the Golden Eagle Mine prior to this inspection. *Id.*

Mr. Peterson testified that the ribs along the No. 8 belt conveyor had not changed much in the days prior to July 6 and the ribs did not present a hazard of falling. (Tr. 167). He further testified that one cannot determine whether ribs are loose in the mine by visual observation alone. (Tr. 168). He stated that when miners started barring down the area cited by Inspector Simmons, they had difficulty getting any material down. (Tr. 168-69). Mr. Peterson stated that the fact that material could not be barred down establishes that the ribs were not loose. *Id.* Kay Hallows, the former safety director at the mine, testified that the people responsible for abating the citation tried to find loose material in the cited area and could not get a significant amount of material down because the ribs were not loose. (Tr. 172).

I find that the Secretary failed to establish a violation. I credit the testimony of Messrs. Peterson and Hallows that, upon closer examination, the ribs were not loose. The citation is vacated.

3. Citation No. 4057964 and Order No. 4057203

On November 14, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75202(a). In the citation, the inspector alleged that loose roof was not controlled in the No. 3 entry of 3-left tailgate beginning 20 feet in by crosscut 25 and extending 50 feet out by the crosscut. The citation states that roof cutters have broken the roof in the cited travelway. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$4,600.00 for the alleged violation.

Inspector Simmons testified that the weekly examiner must travel through the cited entry at least once a week. (Tr. 174). He stated that "cutters" are areas in the roof where pressure causes the roof to break up along weak zones. (Tr. 175). The cutter he observed was running through the cited entry. *Id.* Broken rock was hanging over the area where people would travel. Inspector Simmons testified that roof bolts were present and cribs had been set in the area. (Tr. 176). He stated that these supports were not controlling the loose roof

created by the cutter. Inspector Simmons further testified that it was reasonably likely that a person walking through the area would be seriously injured by falling roof. (Tr. 176-77).

In the citation, Inspector Simmons established a termination due date of November 17, 1995. On November 22, 1995, Inspector Simmons issued Order No. 4057203 under section 104(b) of the Mine Act alleging that no apparent effort had been made to correct the cited condition. He stated that he did not observe any materials in the area to abate the condition and did not observe any changes in the roof support. (Tr. 181). A company representative did not accompany the inspector on his inspection, so he did not know why the condition had not been corrected. (Tr. 179). He stated that abatement would require the installation of planks, steel rails, or J-channels. (Tr. 182-83).

Jeffrey Salerno, a former safety inspector with Basin Resources, testified that at the time the citation was issued the roof was supported by roof bolts and straps. (Tr. 262). He stated that there was some loose material above the straps down the center of the entry. *Id.* He testified that Inspector Simmons wanted the area above the straps to be barred down. Mr. Salerno believed that barring down the area would increase the risk of a roof fall. Jack Schuster, a former miner and fireboss with Basin Resources, was with Inspector Simmons as a UMW A representative when the section 104(b) order was issued. He testified that planks had been installed above the straps where coal and rock had fallen out. (Tr. 281). This testimony was supported by Mr. Hallows. (Tr. 295). He further testified that he did not believe that the roof presented a hazard on November 22. *Id.* Mr. Schuster testified that Inspector Simmons wanted the mine to install more planks or J-channels. He stated that it would not have been practical to install additional planks or J-channels. (Tr. 283).

The Commission has held that the "adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Cannon Coal Co.*, 9 FM SHRC 667, 668 (April 1987). I find that the Secretary established that additional support was necessary to protect persons from falling material, taking into consideration the reasonable prudent person test.

I find, however, that the section 104(b) order should be vacated. I credit the testimony of UMW A walkaround representative Schuster that additional planks had been installed before November 22. He believed that the roof did not present a hazard on that date. I credit this testimony. I find that the violation described in the underlying citation had been abated and no longer existed at the time the section 104(b) order was issued. *See Mid-Continent Resources, Inc.*, 11 FM SHRC 505, 509 (April 1989). Accordingly, Order No. 4057203 is vacated.

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FM SHRC 1, 3-4 (January 1984). The third element of the test is the key element in this situation: whether it was reasonably likely that the hazard contributed to

would result in an injury. It is important to recognize that this element does not require the Secretary to establish that it was more probable than not that an injury will result from the hazard contributed to by the violation. *U. S. Steel Mining Co., Inc.*, 18 FM SHRC 862, 865 (June 1996). The test is whether such an injury is reasonably likely. Assuming continued normal mining operations, it was reasonably likely that the conditions would result in a serious injury.

I further find that Basin Resources' negligence was moderate. Although extensive roof support had been placed in the area, there was loose material down the center of the entry. (Tr. 262). Basin Resources should have known that this condition needed to be taken care of. A penalty of \$1200 is appropriate.

4. Citation No. 4057201

On November 22, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75202(a). In the citation, the inspector alleged that additional roof support was required in the headgate area of mechanized mining unit ("MMU") 009-0 about 30 feet inby crosscut 29 in the No. 1 entry, 4-left panel. The citation states that the rib on the travelway side had rolled away from the solid pillar so that the row of roof bolts adjacent to the rib was about 6 to 7 feet from the rib for a distance of about 18 feet. The citation further states that cap coal about 12 inches thick was loose in the cited area where persons normally travel. Inspector Simmons determined that the violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Inspector Simmons stated that pressure in the roof caused the rib to fall. (Tr. 186). The rib had recently fallen at the time the inspector observed it. (Tr. 189-90). This condition left the roof adjacent to the rib unsupported. Roof bolts are required to be within five feet of the ribs. He testified that additional support had not been provided in the area and barricades or warning devices were not present. Inspector Simmons further stated that persons entering the longwall section would have to pass by the cited area. (Tr. 187-88; Ex. P-5). He testified that it was reasonably likely that someone would be seriously injured if the roof was not supported. (Tr. 188-89).

Mr. Hallows testified that the preshift and onshift reports indicate that the rib must have fallen immediately prior to Inspector Simmons' inspection. (Tr. 195-96; Ex. R-8). He also testified that he talked to Mr. Schuster, the UMW A walkaround representative, after the citation was issued. Mr. Schuster advised Mr. Hallows that the rib had only recently fallen. (Tr. 197). Mr. Schuster told Hallows that the fallen coal looked black and fresh. *Id.* He also stated that rock dust and footprints were not on the fallen coal.

Mr. Schuster testified that he was with Inspector Simmons at the time he issued this citation. (Tr. 287). The citation was issued at 2:55 pm, during the shift change. He said that the day crew had already left the section and the swing shift crew had not arrived. *Id.* Mr. Schuster testified that in his opinion the rib fell between the two shifts, because the coal was

fresh. (Tr. 288). He said that the oncoming miners traveled through the area but that they walked under supported roof. (Tr. 289). Once the swing shift crew arrived, the condition was abated.

Basin Resources contends that the citation should be vacated because there was no indication that additional roof support was necessary prior to the rib fall. (B.R. Br. 17). The Commission considers the reasonable prudent person test when analyzing alleged violations of this safety standard. *Cannon Coal Co.*, 9 FM SHRC at 668 (April 1987). I believe that a reasonably prudent person would have recognized that the support observed by Inspector Simmons was inadequate. Prior to the rib fall, on the other hand, such person would not have known that additional roof support was required.

I find that the Secretary established a violation. The fact that the rib fall occurred just before the citation was issued does not negate the fact that additional support was necessary. The Mine Act imposes strict liability on mine operators. Based on the testimony of Messrs. Hallows and Schuster, I find that Basin Resources was not negligent with respect to the violation. I credit their testimony that the ribs fell during the shift change. I also find that the violation was not S&S because, assuming continued normal mining operations, it is highly likely that supplemental roof support would have been installed before miners were exposed to the hazard. Thus, it was not reasonably likely that anyone would be injured by the violation. A penalty of \$100 is appropriate.

5. Citation No. 4057352

On December 21, 1995, MSHA Inspector Melvin Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75202(a). In the citation, the inspector alleged that the mine roof was not supported or controlled in crosscut No. 27 between entry Nos. 2 and No. 4, 5 Left section. The citation states that the coal rib had sloughed exposing the roof in an area seven feet long by six feet wide from nearest permanent roof support. No equipment or material was located in the crosscut. Inspector Shiveley determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Inspector Shiveley testified that the ribs at the Golden Eagle Mine slough easily exposing unsupported roof. (Tr. 50-51). The roof is made up of shale that cracks easily and falls if not supported. (Tr. 51). At the time he observed the roof, it was stable but subject to change. (Tr. 52). He believed that miners travel through the area frequently. He did not know how long the condition had existed. (Tr. 53-54).

For the reasons set forth above, I find that the Secretary established a violation. A n area of roof was exposed by the sloughage but was not supported. Because it is likely that the rib fell a short time before the citation was issued, Basin Resources's negligence is low. A penalty of \$200 is appropriate.

6. Citation No. 4057588

On July 7, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75202(a). In the citation, the inspector alleged that Basin Resources failed to support or control loose coal ribs on the 0110 working section. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of \$1200 is appropriate.

7. Citation No. 4057351

On December 21, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the roof on the east main. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of \$1200 is appropriate.

8. Citation No. 4057589

On July 7, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75211(d). In the citation, the inspector alleged that a bar for taking down loose material was not provided for the roof bolting machine operating on the 0110 MMU in the No. 5 entry. The citation states that loose ribs were present in the area. Inspector Simmons determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation. The safety standard provides, in part, that a "bar for taking down loose material shall be available in the working place or on all face equipment except haulage equipment."

Inspector Simmons testified that a bar was not available in the working place or in the last open crosscut. (Tr. 60). He stated that it was his understanding that the bar was subsequently found at the tailpiece on the section. *Id.* Inspector Simmons was not present when the scaling bar was found. (Tr. 64).

Mr. Peterson was with Inspector Simmons when he issued the citation. (Tr. 74). He testified that a mechanic had the scaling bar where he was working on a shuttle car in the working place. (Tr. 75). The mechanic used the bar to pry down loose material near the shuttle car. *Id.* He testified that although the bar was in the same entry as the tailpiece, it was not at that location. He further stated that it would take a miner about ten minutes to

get the scaling bar and return to the area where Inspector Simmons issued the citation. (Tr. 77).

The safety standard provides that a scaling bar must be made available in the working place. It does not require that the bar be in any particular location within the working place. I credit the testimony of Mr. Peterson that the bar was being used at another location in the working place. While it might be advisable to have several bars available, the regulation does not include such a requirement. Accordingly, the citation is vacated.

9. Citation No. 4057590

On July 7, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75220(a)(1). In the citation, the inspector alleged that the mine failed to follow the approved roof control plan because the last row of roof bolts was more than five feet from the face in the No. 5 entry of MMU 0110. The distance measured between five feet eight inches and six feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the basic facts set out in the citation, but argues that the roof bolter put the roof bolts as close as he could to the face. (Tr. 86-87). Mr. Peterson testified that muck is often present at the face and the bolting machine could not get close enough to the face to place the roof bolts within five feet of the face. *Id.* He also stated that the presence of the muck prevented anyone from going under the cited area.

I find that the Secretary established a violation. It is clear the Basin Resources violated the plan provision. I find that the gravity was low because of the location of the unsupported roof. A penalty of \$200 is appropriate.

10. Citation No. 4057269

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75208. In the citation, the inspector alleged that Basin Resources failed to post a sign warning miners of unsupported roof at the last row of roof support in the 3rd north main. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of \$1,000 is appropriate.

B. Ventilation Citations

1. Citation No. 4057800

On June 8, 1995, MSHA Inspector Jeffrey Fleshman issued a citation alleging a violation of 30 C.F.R. ' 75.360(f). In the citation, the inspector alleges that an adequate preshift examination was not performed in the 4-Left active longwall section where miners were scheduled to work. The citation states that the date, time, and initials were not present where miners were observed working at the following locations: (1) 4-Left kitchen, crosscut No. 56, between entry Nos. 1 and 2; (2) 4-Left tool room, crosscut No. 56, between entry Nos. 2 and 3. Inspector Fleshman determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation. Section 75.360(f) is now at 75.360(e) and provides, in part, that "at each working place examined, the person doing the preshift examination shall certify by initials, date, and time, that the examination was made." The standard further provides that in areas outby a working section, the preshift examiner "shall certify by initials, date, and the time at enough locations to show that the entire area had been examined."

Inspector Fleshman testified he observed miners working in the cited area. (Tr. 2123). He stated that there were date boards inby the cited area that showed that a preshift examination had been made in those areas and that there were date boards outby the cited area that showed that a preshift examination had been made all along the intake roadway. (Tr. 25-26). Inspector Fleshman testified that he did not know whether the cited areas had been preshifted, but he was sure that the examiner did not enter his initials, date, and the time on the boards in the cited areas. (Tr. 26).

Mr. Hallows testified that he spoke with the miner who performed the preshift examination. That miner advised Mr. Hallows that he examined the cited areas but that he did not enter his certification on the board at the kitchen or the tool room. (Tr. 31). Mr. Hallows testified that the examiner did not think that his initials were necessary because he entered the required certification at numerous other locations throughout the area. *Id.*

The safety standard specifically provides that in outby areas, such as the cited locations, the examiner must enter his certification "at enough locations to show that the entire area had been examined." The Secretary did not establish that Basin Resources violated this requirement. Inspector Fleshman stated that certifications were present throughout the area. (Tr. 25-26). Accordingly, the citation is vacated.

2. Citation No. 4058041

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.370(a)(1). In the citation, the inspector alleged that the mine failed to follow the approved ventilation plan in the 4-Left 009-0 longwall because only 348 feet per minute ("fpm") of air was passing by shield No. 15 on the intake side. The plan requires 450 fpm at that location. (Tr. 106; Ex. P-3). He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,779.00 for the alleged violation.

Mr. Peterson testified that an air measurement of 480 fpm was taken at shield No. 15 at the beginning of the shift and a reading of 511 fpm was obtained on the previous shift. (Tr. 113; Ex. R-2). He also testified that methane was not present at the time Inspector Simmons took his reading. He stated that as the shields on a longwall are pulled in, the gob behind the shields may not immediately cave in and the air velocity will drop. (Tr. 114). Once the area caves, the velocity increases again. The shields in the cited area had recently been advanced.

Basin Resources argues that the citation should be vacated because the inspector did not testify that the air reading was 348 fpm. (B.R. Br. 9). It states that the parties stipulated that the contents of the citations were not admitted for the truth of the matters asserted therein. Although it is true that Inspector Simmons did not state that his measurement was 348 fpm, he was asked how he obtained the 348 fpm reading. (Tr. 105).

I find that the Secretary established a violation. Although I recognize that the velocity may fluctuate over the mining cycle, the plan establishes the minimum amount of air that is required. The violation was not serious because the reading was obtained while the shields were moved. The shear was not cutting coal at that location and methane was not present. A penalty of \$200 is appropriate.

3. Citation No. 4057978

On November 28, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.380(d)(1). In the citation, the inspector alleged that the primary escapeway in the No. 4 entry, 3rd north panel, for 0110 MMU was not maintained in a safe condition. The citation states that water had accumulated to a depth of 20 inches beginning about 10 feet irby crosscut No. 66 and extending irby to crosscut No. 67, a distance of about 100 feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation. The safety standard requires escapeways to be maintained in a safe condition to assure passage of persons.

Inspector Simmons testified that the water presented an unsafe condition in the escapeway. (Tr. 230). The water was murky and the bottom could not be seen. He determined that an injury was unlikely because miners could exit the section through the alternate escapeway. (Tr. 231).

Mr. Hallows testified that a pump was running in the cited area at the time of Inspector Simmons' inspection. (Tr. 232; Ex. R-14). Mr. Salerno confirmed that the mine had at least one pump running in the area to remove the water. (Tr. 276).

I find that the Secretary established a violation. There is no dispute that there was a significant amount of water in the escapeway. The violation was not particularly serious because there was at least one alternate route out of the section. Basin Resources' negligence

was low because it was attempting to remove the water at the time the citation was issued. A penalty of \$100 is appropriate.

4. Citation No. 4057229

On February 20, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.312(g)(3). In the citation, the inspector alleged that the examinations of automatic fan signal devices for three fans had not been recorded since December 31, 1995. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard requires automatic fan signal devices to be checked at least once a month.

Inspector Simmons testified that the purpose for testing automatic fan signal devices and recording the results of the test is to determine if the fans are functioning properly. (Tr. 234). He determined that it was unlikely that anyone would be injured as a result of this violation.

Mr. Hallows testified that the mine was shut down at the time Inspector Simmons issued the citation. (Tr. 236). No coal was being produced and all miners had been terminated from employment at the mine. He further testified that the disputed examinations were performed, but were not entered in the record book. (Tr. 236-37; Ex. R-15).

I find that the Secretary established a violation. The mine was still being ventilated at the time the citation was issued. The mine was closed but had not been sealed at that time. I reject Basin Resources' argument that the Secretary failed to introduce evidence in support of the allegations in the citation. The violation was not serious. A penalty of \$100 is appropriate.

5. Citation No. 4057798

On June 8, 1995, Inspector Fleshman issued a citation alleging a violation of 30 C.F.R. ' 75.340(a)(1). In the citation, the inspector alleged that the power center in 4-left, crosscut No. 36, was not ventilated into return air. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$2,606.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

6. Citation No. 4057799

On June 8, 1995, Inspector Fleshman issued a citation alleging a violation of 30 C.F.R. ' 75.333(b)(3). In the citation, the inspector alleged that the stopping in 4-left,

crosscut 56, between the belt and intake entries was not coated in its entirety on the belt side with a flame retardant material. Wood was exposed along the top of the stopping. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

7. Citation No. 4057748

On October 10, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.360(c). In the citation, as modified, the inspector alleged that the preshift examiner did not take his air measurements in the proper location, the last open crosscut of the working section. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

8. Citation No. 4057425

On January 10, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.351(f). In the citation, the inspector alleged that the AMS sensors that monitor the mine atmosphere in the NW 1 through 6 bleeders had not been calibrated since November 17, 1995. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$200 is appropriate.

C. Accumulation and Rock Dusting Citations

1. Citation No. 4058025

On August 1, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation, the inspector alleged that loose coal and coal fines were allowed to accumulate on the 0110 MMU. The citation states that the accumulations extended from crosscut 64 in entry Nos. 1 through 3 and extended inby to crosscut 65. It states that the accumulations measured up to 18 inches in depth. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard provides that coal dust, including float coal dust,

loose coal, and other combustible materials shall be "cleared up and not be permitted to accumulate in active workings, or on electric equipment therein."

Inspector Simmons testified that he was concerned that if an ignition occurred, the accumulations could enhance a fire. (Tr. 138). Grab samples of the accumulations revealed that the accumulated material was 77 percent combustible in one sample and 88 percent combustible in the other. (Tr. 140; Ex. P-4). Inspector Simmons determined that the condition was not S&S because he did not observe an ignition source in the area. (Tr. 141). No mining was taking place at the time the citation was written because of a vacation shutdown. (Tr. 143). Mr. Hallows testified that the mine was shut down for vacation at the time the citation was issued and that the accumulation would have been cleared up before production resumed. (Tr. 144-45; Ex. R-3).

The Secretary established a violation of the safety standard. The fact that the mine was not producing coal at the time the citation was issued is not controlling. The accumulation was created while the mine was producing coal and still existed when miners re-entered the mine to resume operations. Inspector Simmons took into consideration the fact that ignition sources were not present when he determined that the violation was not S&S. The violation was serious. A penalty of \$500 is appropriate.

2. Citation No. 4057977

On November 28, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation, the inspector alleged that loose coal and coal fines were allowed to accumulate on the 0110 MMU in the No. 1 entry between crosscut Nos. 67 and 68 for a distance of about 120 feet. The citation states that the accumulations were in the roadway and along both ribs to a depth of 18 inches. It further states that similar accumulations were present in crosscut No. 68 between the Nos. 1 and 2 entries for a distance of about 70 feet. The citation states that an energized machine was in the area. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Inspector Simmons testified that he was concerned that these accumulations could enhance a fire. (Tr. 220). He stated that if a fire started, the accumulations could develop into a major fire or explosion, especially if methane were present. Grab samples of the accumulations revealed that the accumulated material was 86 percent combustible in one sample and 85 percent combustible in the other. (Tr. 222; Ex. P-8). Inspector Simmons further testified that it was reasonably likely that the accumulations would help propagate a fire and a miner would be seriously injured because at least one ignition source was present. (Tr. 224).

Mr. Hallows testified that a miner was cleaning up the accumulations at the time the citation was issued. (Tr. 226). He stated that the cleaning operation took longer than usual because a hole had to be filled to get a scoop into the area. (Tr. 226; R-13). He also stated that there was no production on the section when the citation was issued or during the two

previous shifts. (Tr. 227). Mr. Salerno testified that the section contained a "horrendous amount of water" so that cleaning the accumulations took longer than usual. (Tr. 269). He stated that one miner was using a scoop to clean the area at the time the citation was issued. (Tr. 270).

I find that the Secretary established the violation. I reject Basin Resources' argument that the Secretary failed to introduce evidence of a violative condition. I also find that the Secretary established the four elements of the Commission's S&S test. *Mathies*, 6 FM SHRC at 3-4 (January 1984). Assuming continued normal mining operations, it was reasonably likely that the conditions would result in a serious injury.

I also find that Basin Resources' negligence was moderate. I have considered its evidence that the cited accumulations were particularly difficult to clean up because of the problems encountered on the section and the fact that cleanup operations had commenced. A penalty of \$1200 is appropriate.

3. Citation No. 4057265

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that combustible material, hydraulic oil, and motor oil were allowed to accumulate in the engine compartment on a mantrip. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

4. Citation No. 4057271

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that hydraulic oil was allowed to accumulate on a roof bolter in the 3rd north main. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1457.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$1200 is appropriate.

5. Citation No. 4057564

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that damp loose coal and coal fines were

allowed to accumulate under the bottom rollers of the No. 8 conveyor, for a distance of about 1900 feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

6. Citation No. 4057272

On July 7, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that combustible material, loose coal, and coal fines were allowed to accumulate at the tail of the No. 11 belt and in entry No. 3 on the 3rd north main. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

7. Citation No. 4057679

On November 11, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that loose coal and coal dust were allowed to accumulate in the 4th left section, No. 2 intake travelway at two locations. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

8. Citation No. 4057202

On November 22, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate on the working 009-0 longwall section in the No. 1 entry of the 4 left panel. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$1200 is appropriate.

9. Citation No. 4058092

On December 12, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate on the 0110 MMU in the No. 3 entry of the 4 left panel. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

10. Citation No. 4057208

On December 5, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate on and around the energized 009-0 stageloader power cables and electrical components on the working MMU. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$1200 is appropriate.

11. Citation No. 4057434

On January 22, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate in the travelway of the No. 2 intake entry of the 5 left panel. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

12. Citation No. 4057268

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.402. In the citation the inspector alleged that rock dust was not applied to coal ribs in entry No. 4, 3rd north main. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

D. Electrical Citations

1. Citation No. 4057565

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.512. In the citation, the inspector alleged that the energized 480-volt electrical control box for the No. 8 belt line was not maintained in a safe operating condition because there was a 2-inch hole at the end of the box. He states that this hole allowed coal dust and moisture to enter the box. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation. The safety standard provides that when a potentially dangerous condition is found on electric equipment, it shall be removed from service until the condition is corrected.

Inspector Simmons stated that he looked into the box and did not observe any coal dust. (Tr. 154). He was concerned that coal dust in the electrical box could burn, creating a smoke inhalation hazard, and that moisture in the box could create a shock hazard. He agreed that MSHA does not require such control boxes to be perm issible or air tight. (Tr. 155-56). I find that the Secretary established a violation because the hole presented a potentially dangerous condition. The violation was not serious and Basin Resources' negligence was low. A penalty of \$100 is appropriate.

2. Citation No. 4058022

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1002-1(a). In the citation the inspector alleged that a non-perm issible martrip was 95 feet from the operating longwall pillar line of the 009-0 MMU. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

3. Citation No. 4057270

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.503. In the citation the inspector alleged that a roof bolter was not maintained in permissible condition in the 3rd north mains. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

4. Citation No. 4057586

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.512. In the citation the inspector alleged that the 480-volt take-up control box for the No. 11 belt was not maintained in a safe operating condition. The citation indicates that because of a defect in the control switch, a miner would not know whether the switch was on or off. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$800 is appropriate.

5. Citation No. 4057587

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.515. In the citation the inspector alleged that the power cable for the No. 2 belt conveyor motor for the No. 8 belt was not adequately bushed. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

6. Citation No. 4057749

On October 11, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.900. In the citation the inspector alleged that a 480-volt power cable circuit in entry No. 9 for the east mains was not protected by a suitable circuit breaker. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

E. Fire Protection Citations

1. Citation No. 4057467

On June 15, 1995, Inspector Flesham issued a citation alleging a violation of 30 C.F.R. ' 75.1100-2(f). In the citation the inspector alleged that a portable fire extinguisher was not provided in the 4-left section where six 5-gallon drums of hydraulic oil were stored. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

2. Citation No. 4057267

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.1104. In the citation the inspector alleged that hydraulic oil in crosscut No. 59, 3rd north main, was not being kept in fireproof, closed metal containers. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

3. Citation No. 4057560

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1107-16(b). In the citation the inspector alleged that fire suppression device for a tractor at the underground mantrip station was not being maintained. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

4. Citation No. 4057230

On February 5, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1106-3(a)(2). In the citation the inspector alleged that an oxygen cylinder was not placed securely in a designated storage area but was loose in a pickup truck. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

F. Machinery and Equipment Citations

1. Citation No. 4058021

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1725(a). In the citation, the inspector alleged that the front left headlight was not working on a martrip. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation. Section 75.1725(a) requires, in part, that mobile equipment be maintained in safe operating condition.

There is no dispute that the headlight was not working. Mr. Hallows testified that it was his understanding that a safeguard issued at the mine in 1989 required only one headlight be provided for martrips. (Tr. 102). He stated that the safeguard was not violated and that Basin Resources should not be cited for a violation of section 75.1725(a) if it complies with the safeguard. Inspector Simmons understood that the safeguard only concerned the need for a single light at the rear of each martrip. (Tr. 93). The safeguard was not produced at the hearing.

I find that the Secretary established a violation. A safeguard is issued when an inspector observes a transportation hazard that is not being addressed at a mine. 30 C.F.R. ' 75.1403. He issues a notice that establishes a mine-specific safety standard. In this instance, it is not clear what the safeguard notice required. In any event, the cited martrip was equipped with dual headlights. One of the headlights was not working. Inspector Simmons determined that the condition created a safety hazard. I credit his testimony. A penalty of \$200 is appropriate.

2. Citation No. 4057266

On July 6, 1995, Inspector Shiveley issued a citation alleging that a martrip was not maintained in a safe condition in violation of 30 C.F.R. ' 75.1725(a). The citation states that because the right front headlight was not working and the windshield was dirty, the

operator of the martrip could not see clearly. Inspector Shiveley determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$2,384.00 for the alleged violation.

Inspector Shiveley testified that the rubber-tired martrip normally carries up to ten people into the mine. He stated that the route it travels includes many turns and that it was reasonably likely that someone would be injured if the condition was not corrected. (Tr. 41-43). He testified that the operator of the martrip would not be able to see very well and he could hit an object in the road or possibly a miner. (Tr. 43-44). He stated that the condition was obvious.

Basin Resources does not deny the condition of the martrip, but alleges that only one headlight was required. For the reasons, set forth above, the fact that a safeguard was issued does not invalidate the citation. In this instance, the inspector determined that the condition of the martrip created a safety hazard in violation of section 75.1725(a). The Secretary established a violation.

I also find that the Secretary established that the violation was S&S. Basin Resources points to the fact that Inspector Simmons issued a citation for a similar violation and determined that the violation was not S&S. (Tr. 46-47; Ex. R-1). In that instance, however, the windshield was clean. (Tr. 97). In the citation at issue, Inspector Shiveley considered the fact that the windshield was dirty, the roadways were wet and heavily traveled, the martrip was required to go around corners, and rib falls are relatively common. (Tr. 41-44). He also stated that the martrip operator could inadvertently run over an object and the passengers could jam their heads against the canopy. (Tr. 44).

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies*, 6 FM SHRC at 3-4 (January 1984). I find that the factors set forth by Inspector Shiveley establish that an injury was reasonably likely and that any injury would be of a reasonably serious nature. A penalty of \$500 is appropriate.

3. Citation No. 4058111

On August 16, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1725(a). In the citation, the inspector alleged that the coal feeder on the 011-0 MMU was not being maintained in a safe operating condition. He alleged that hydraulic oil was leaking into the motor compartment from the hose connected to the pump motor. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Inspector Simmons testified that the condition created a fire hazard. (Tr. 147-48). He was concerned about smoke inhalation. Mr. Hallows testified that the condition was abated by tightening the fitting and that the employee who examined the equipment failed to fix the condition. (Tr. 151-52; Ex. R-4). The Secretary established a violation. Basin Resources'

negligence was low because the miner operating the equipment failed to take action to correct an obvious safety hazard. A penalty of \$100 is appropriate.

4. Citation No. 4058043

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1725. In the citation the inspector alleged that the energized 4-left longwall machine (009-0 MMU) was not maintained in safe operating condition because of a number of tripping hazards. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$500 is appropriate.

5. Citation No. 4057581

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1722(b). In the citation the inspector alleged that the guard for the rear take-up roller was not large enough to prevent a person from reaching behind the guard and becoming caught in the roller and belt. He determined that the alleged violation was S&S and could result in a permanently disabling injury. The Secretary of Labor proposes a civil penalty of \$2,173.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

6. Citation No. 4057584

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1722(a). In the citation the inspector alleged that the guard for the No. 8 belt conveyor tail rollers was inadequate because it contained a 34-inch opening. He determined that the alleged violation was S&S and could result in a permanently disabling injury. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

7. Citation No. 4057585

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1722(b). In the citation the inspector alleged that the guard for the head roller of the No. 11 belt conveyor was not large enough to prevent a person from reaching behind the guard

and becoming caught in the roller and belt. He determined that the alleged violation was S&S and could result in a permanently disabling injury. The Secretary of Labor proposes a civil penalty of \$2,173.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

8. Citation No. 4057582

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1403-5(g). In the citation the inspector alleged that a clear travelway was not provided along the No. 8 belt in certain areas. Loose rock and coal were present on both sides of the belt. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

G. Surface Citations

1. Order No. 4057563

On July 6, 1995, Inspector Simmons issued an order under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. ' 48.31(a). In the order the inspector alleged that Basin Resources failed to provide hazard training for two technicians from Wagner Rents. The inspector observed the technicians performing work near the surface maintenance shop. The order states that Basin Resources' employees did not check to see if they had been given hazard training. The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$3,000.00 for the alleged violation. The regulation requires that specified persons be provided with surface hazard training.

Inspector Simmons testified that he observed the technicians working in an area that was somewhat isolated from mining hazards. (Tr. 239). The inspector determined that the violation was unwarrantable because the technicians were working at the mine and nobody from Basin Resources checked to see if they had been trained. (Tr. 240-41). The inspector apparently talked to the technicians and Mr. Peterson. (Tr. 243). Inspector Simmons did not ask the security guard at the mine entrance whether he inquired about the technicians' training. (Tr. 244).

Mr. Hallows testified that the two Wagner Rents technicians were given their job assignments over the phone. (Tr. 245-46). Mr. Hallows further testified that the security

guard at the mine entrance asked the technicians whether they had received hazard training. (Tr. 248; Ex. R-16). He testified that the technicians told the security guard that they had received hazard training. *Id.* Apparently, employees of Wagner Rents frequently worked at the mine and were generally trained. Mr. Hallows also stated that if either of the technicians had stated that he had not received surface hazard training, such training would have been provided before he proceeded to work. (Tr. 250-51).

Basin Resources does not contest the violation, but contends that it was not the result of its unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FM SHRC 1997 (December 1997). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FM SHRC 189, 194 (February 1991).

I find that the Secretary did not establish aggravated conduct. The security guard inquired about the technicians' hazard training. Apparently, the technicians pointed to some papers in the truck as if to indicate that they had their training cards. (Tr. 248, 254-55, Ex. R-16). Mr. Hallows' testimony is supported by company records. (Ex. R-16). I find that Basin Resources' negligence was moderate. The service technicians were at the mine to repair equipment owned by Wagner Rents and were familiar with the equipment. The violation was not serious. Order of Withdrawal No. 4057563 is modified to a section 104(a) citation. A penalty of \$200 is appropriate.

2. Citation No. 4057970

On November 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 77.408. In the citation the inspector alleged that the maintenance shop was not ventilated while welding was being conducted in the shop. The citation states that smoke was settling throughout the shop. The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard provides that welding operations shall be shielded and well-ventilated.

Inspector Simmons was concerned that the welder would breathe the smoke and damage his lungs. (Tr. 201). The inspector observed the smoke during his inspection. He stated that a vacuum had been provided to eliminate the smoke, but it was not operating at the time of the inspection because the filters were clogged up. (Tr. 203). He did not test the vacuum to see if it worked. (Tr. 205-06). Inspector Simmons did not detect any carbon monoxide in the area.

Mr. Hallows testified that Basin Resources had purchased equipment to alleviate any problems created by welding fumes, including a vacuum collector. (Tr. 212; Exs. R-10, R-11, & R-12). Filters for the vacuum were stocked in the warehouse. He further testified that when the vacuum was tested the next day, it was working properly. (Tr. 216). He believes that the welder did not have the vacuum turned on when the welding was performed. Mr. Salerno

testified that the vacuum operated without any problems when it was tested the following day. (Tr. 266).

I find that the Secretary established a violation. I find that the violation was not serious. Based on the testimony of Messrs. Hallows and Salerno, I find that Basin Resources' negligence was low. A penalty of \$100 is appropriate.

3. Citation No. 4057264

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 77.408. In the citation the inspector alleged that shielding was not provided at the mine shop where welding was being performed. It states that persons were traveling in the area. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

4. Citation No. 4058000

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 77.205. In the citation the inspector alleged that stumbling and slipping hazards were present in the maintenance shop work area and travelway to the tool room. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$500 is appropriate.

5. Citation No. 4057426

On January 10, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 77.400(d). In the citation the inspector alleged that the guard provided for the bottom take-up pulley for the load-out belt was not secured in place. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$500 is appropriate.

III.

A P P R O P R I A T E C I V I L P E N A L T I E S

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 888 citations and orders in the 24 months preceding July 5, 1995, and that Basin Resources paid penalties for 816 of these citations and orders during the same period. (Ex. P-10). I also find that Basin Resources was a rather large mine operator with 23,505,829 tons of production in 1994 and 15,002,375 tons of production in 1995. (Stipulation). The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FM SHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. With one exception, the Secretary has not alleged that Basin Resources failed to timely abate the citations and order. Unless otherwise noted above, all of the violations were serious and the result of Basin Resources' moderate negligence. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

IV.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties, as discussed above:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
<u>WEST 96-21</u>		
4057798	75.340(a)(1)	\$500.00
4057799	75.333(b)(3)	200.00
4057800	75.360(f)	vacated
4057467	75.1100-2(f)	200.00
4057588	75.202(a)	1200.00
4057589	75.211(d)	vacated
4057590	75.220(a)(1)	200.00
4058000	77.205(b)	500.00
4058021	75.1725(a)	200.00
4058022	75.1002-1(a)	200.00
4058041	75.370(a)(1)	200.00
<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>

4058042	75.202(a)	200.00
4058043	75.1725(a)	500.00
4058025	75.400	500.00
4058111	75.1725(a)	100.00

WEST 96-123

4057264	77.408	200.00
4057265	75.400	500.00
4057266	75.1725(a)	500.00
4057267	75.1104	200.00
4057268	75.402	200.00
4057269	75.208	1000.00
4057270	75.503	500.00
4057271	75.400	1200.00
4057560	75.1107-16(b)	200.00
4057564	75.400	500.00
4057565	75.512	100.00
4057581	75.1722(b)	800.00
4057582	75.1403-5(g)	800.00
4057583	75.202(a)	vacated
4057584	75.1722(a)	800.00
4057585	75.1722(b)	800.00
4057586	75.512	800.00
4057587	75.515	200.00
4057272	75.400	500.00

WEST 96-134

4057748	75.360(c)	500.00
4057749	75.900	200.00
4057679	75.400	500.00
4057964	75.202(a)	1200.00
4057201	75.202(a)	100.00
4057202	75.400	1200.00
4058092	75.400	500.00
4057351	75.202(a)	1200.00
4057352	75.202(a)	200.00

Citation No.

30 C.F.R. '

Penalty

WEST 96-180

4057970	77.408	100.00
4057977	75.400	1200.00
4057978	75.380(d)(1)	100.00
4057208	75.400	1200.00
4057425	75.351(f)	200.00
4057426	77.400(d)	500.00
4057434	75.400	500.00
4057229	75.312(g)(3)	100.00
4057230	75.106-3(a)(2)	200.00

WEST 96-195

4057563	48.31(a)	200.00
	Total Penalty	\$24,400.00

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is DENIED, the citations and order listed above are hereby VACATED, AFFIRMED, or MODIFIED as set forth above, and Basin Resources, Inc., is ORDERED TO PAY the Secretary of Labor the sum of \$24,400.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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