

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 28, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-254
Petitioner	:	A.C. No. 05-02820-03735
	:	
v.	:	Docket No. WEST 95-255
	:	A.C. No. 05-02820-03737
BASIN RESOURCES INCORPORATED,	:	
Respondent	:	Golden Eagle Mine

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, 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 a civil penalty 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 11 violations of the Secretary's safety regulations. For the reasons set forth below, I affirm four of the citations and vacate the remaining citations and orders.

A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I.

DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time the citations and orders were issued, 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.

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 726 citations and orders in the 24 months preceding January 3, 1995. (Ex. G-1). I also find that Basin Resources was a medium-to-large operator at the time the citation was issued. The mine is no longer operating and 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. (Ex. R-A). I have taken its financial condition into consideration in assessing penalties and I find that the civil penalties assessed in this decision would not have affected its ability to continue in business. The citations and orders were abated in good faith. The Secretary has not alleged that Basin Resources failed to timely abate the citations.

A. Tailgate for the Third Left Longwall Section

On October 27, 1994, Inspector Cord Cristando of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the third left longwall section of the mine. He entered the longwall section through the headgate entries, inspected the longwall face and entered the tailgate entries just outby the last shield of the longwall near crosscut 16. (Ex. R-T). Inspector Cristando was accompanied by a union representative and Tom Sciacca, the company representative. The section foreman on the afternoon shift was Frank Holley.

When Inspector Cristando entered the tailgate entries, the conditions he observed led him to believe that the roof was not supported. (Tr. 82-83). He stated that the floor was heaving and that it appeared to him that the "tailgate was impassable, not travelable." *Id.* He testified that the tailgate entry was not "safe to be travelable." (Tr. 85). He described the conditions, as follows:

Bolts were hanging from the mine roof, bearing plates were not secured against the mine roof, cribs were rolled out, kicked out, not against the mine roof. It was very obvious that [the roof] wasn't supported. I could see that no miner would be able to get out underneath it in [the] condition it was [in].

(Tr. 86). Inspector Cristando asked Mr. Holley how long the conditions had existed. Mr. Holley replied that it started on

the 26th at the end of his shift around 10 p.m. (Tr. 87).

Inspector Cristando decided that he wanted to look at the conditions in the tailgate from the outby side. He traveled back through the longwall face, down the intake entries, and into the tailgate entries from the returns. He was accompanied by the miners' representative and Mr. Sciacca. Inspector Cristando was able to travel about 30 feet inby crosscut 15 before the conditions started to deteriorate. (Tr. 87). He had to zig-zag between cribs and the rib. (Tr. 92-93). Inspector Cristando believed that the longwall was putting pressure on the area so that the conditions had become "considerably worse." (Tr. 88). Inspector Cristando testified that the conditions he observed in the tailgate entry made the entry "a real risky area to be in." (Tr. 95). Inspector Cristando observed danger tape that had been placed in the area "as a warning sign to let people know that there was some unsafe top." (Tr. 89). He did not observe any danger tape on the longwall side of the tailgate entry.

As a result of these conditions, Inspector Cristando issued three citations under section 104(a) of the Mine Act and three orders of withdrawal under section 104(d)(2). Each citation and order is discussed below.

1. Order No. 3849438

Order No. 3849438 alleges a violation of 30 C.F.R. ' 75.220(a)(1). The order states that the approved roof control plan was not followed because the "longwall foreman detected ground failure in the tailgate entry that prevented travel out of the longwall tailgate and did not notify the MSHA Field Office Supervisor" or "implement the longwall tailgate travelway blockage plan." In the order, the inspector indicated that the alleged violation was significant and substantial ("S&S") and was caused by Basin Resources' unwarrantable failure to comply with the roof control plan. The applicable portion of the roof control plan states that Basin Resources must take certain steps "[w]hen a ground failure is detected in the tailgate entry that prevents travel out of the longwall tailgate" (Ex. G-4). The Secretary proposed a penalty of \$9,950.

Basin Resources contends that a blockage did not exist in the tailgate entry, that the conditions observed by the inspector had just occurred, and that Mr. Holley did not know about these conditions. Accordingly, it maintains that the Secretary did not establish a violation or that any violation was the result of its unwarrantable failure. Basin Resources states that Inspector

As pertinent here, the safety standard requires each mine operator to follow the roof control plan approved by the MSHA District Manager.

Cristando's actions at the mine were inconsistent with his testimony. It argues that Inspector Cristando did not determine that the area was blocked until after he inspected the tailgate entry from the outby side. Basin Resources states that the conditions could not have been "obvious" if it took Inspector Cristando more than three hours to determine whether a violation existed. It also maintains that Inspector Cristando's testimony was inconsistent and should not be credited.

Mr. Holley testified that at the time of Inspector Cristando's inspection he did not believe that the tailgate entry was blocked. (Tr. 332-33). He stated that there were "roof falls off and on throughout the tailgate" and that the longwall crews "would danger the roof falls off and reroute [the] escape-way around the roof fall." (Tr. 333). Mr. Holley testified that when Inspector Cristando asked him about the condition of the tailgate, the inspector was standing in the entry but that he was standing underneath the longwall shields, three shields from the tailage end of the longwall. (Tr. 334; EX. R-T). Mr. Holley does not deny that the inspector asked him if he was aware of the conditions in the tailgate and how long the conditions had existed. *Id.* Mr. Holley stated that he replied that he was aware of the condition because he believed that Inspector Cristando was referring to the general roof conditions in the ribboned-off areas, not to a blockage of the entire tailgate entry. (Tr. 335). He testified that the inspector did not use the terms "tailgate blockage" or "blockage" during their conversation. *Id.*

The fact that a tailgate entry is blocked does not in and of itself establish a violation of the roof control plan. As stated above, the plan provides that Basin Resources must take a number of steps when a "ground failure is *detected* in the tailgate entry that *prevents travel* out of the longwall tailgate." (Ex. G-4) (emphasis added). Thus, if Basin Resources detects a ground failure that prevents travel out of the longwall tailgate entries, it must take the steps set forth in the roof control plan. See *Blue Diamond Coal Co.*, 12 FMSHRC 2565, 2567-71 (December 1990) (ALJ).

In order to meet its burden of proof under the subject provision of the roof control plan, the Secretary must establish that a blockage existed and the mine operator knew or should have known about the blockage and did not implement the steps set forth in the roof control plan. If the Secretary cannot prove that the operator had actual knowledge of the blockage, the Secretary can prove a violation by showing that the operator was negligent in failing to detect the blockage. In this case, the Secretary did not establish that Basin Resources detected a ground failure of such a magnitude that it prevented travel out of the longwall tailgate. In other words, the Secretary did not prove that Basin Resources knew or should have known that the

ground failure in the tailgate entry blocked the entry in such a manner as to prevent such travel.

The Secretary tried to establish actual knowledge of a blockage through the conversation that occurred between Inspector Cristando and Mr. Holley. I credit Mr. Holley's testimony that he was not aware of any blockage at the time of the inspection. Inspector Cristando walked out into the tailgate entry and looked down the entry in the direction of the returns. Mr. Holley stayed underneath the longwall shields and could not see down the subject entry because he was about 15 feet from the end of the longwall machine. According to Inspector Cristando's own testimony, he asked Mr. Holley how long "the condition existed like this." (Tr. 86-87). The inspector testified that Mr. Holley replied that "it started ... the night before, on the 26th." *Id.*

Inspector Cristando did not ask Mr. Holley if he was aware that the entry was blocked or that travel down the entry was not possible. Indeed, Inspector Cristando admitted on cross-examination that he was not sure that the tailgate entry was blocked at the time of this conversation. (Tr. 142-44). Inspector Cristando's testimony establishes that he concluded that the entry was blocked about three hours later after he traveled to the outby side of the area and observed the conditions from about 30 feet inby crosscut 15. *Id.* Yet, Inspector Cristando testified on direct examination that the blockage was "obvious" at the time he first observed the area when he stepped out from under the longwall shields. Although I appreciate Inspector Cristando's caution in not making a determination that the entry was blocked until he observed the area from the other side, I find that his inquiry of Mr. Holley was insufficient to establish that Mr. Holley knew that the entry was blocked. Asking Mr. Holley whether he was aware of the "condition" of the entry without describing what he meant or inviting Mr. Holley to step out into the entry did not establish knowledge of the blockage.

I credit Mr. Holley's testimony that he did not understand that Inspector Cristando was asking whether he was aware that the entry was blocked. Mr. Holley credibly testified that he interpreted Inspector Cristando's inquiry to mean whether he was aware that the roof was taking weight and that certain areas of the roof had fallen. It was not disputed that the area in the tailgate entry immediately outby the longwall takes a significant amount of weight during the mining process as a result of frontal abutment pressure and that the roof is often unstable in these areas. It is clear that Mr. Holley was aware that the roof was not stable, but the record does not establish that he had knowledge that the entry was blocked so that miners could not travel down the tailgate entry in the event of an emergency.

In addition, the record does not establish that Basin Resources was negligent in failing to detect any blockage. First, there is a dispute as to whether the tailgate entry was blocked on October 27. Mr. Sciacca, who accompanied the

inspector, testified that the tailgate entry was not blocked.

(Tr. 380). He stated that although "it was tight through there, and there was sloughage through there, rib sloughage," he did not think "there was ever a blockage." *Id.* Second, Mr. Holley took the necessary precautions to make sure the longwall section was safe. The record does not contain sufficient evidence for me to make a determination that he or anyone else was negligent in failing to detect the alleged blockage. Mr. Holley had last been in the tailgate entry during his previous shift on October 26 between 3 and 4 p.m. and he did not observe any blockage at that time. (Tr. 346). He testified that Basin Resources' procedure was to monitor the tailgate entry, ribbon off areas where the roof had deteriorated, and reroute the escapeway as necessary. (Tr. 347-48). During his shift on October 26, two employees told him that there had been a "cave" in the tailgate entry. (Tr. 349-50; Ex. G-5). Mr. Holley looked at the entry and determined that the conditions were the same as they had been at the start of the shift. (Tr. 350, 354). He did not detect any blockage.

At the start of his shift on October 27, Mr. Holley reviewed the preshift examination report that was made by Larry Sandoval at the end of the previous shift. (Tr. 338, 351). This report did not indicate that there were any hazards in the tailgate Entry. In addition, the air readings taken along the longwall as shown on this report were satisfactory in that they did not indicate a major roof fall or blockage in the tailgate entry. (Tr. 339, 351-52). Although the air flow had varied during the shifts immediately preceding Mr. Holley's shift on October 27, the measurements did not show an interruption that he felt was consistent with blockage. (Tr. 149, 339, 351-52; Ex. Q, R). Rich Cordova, a fire boss, was in the tailgate entry at about 4 a.m. on October 27. He observed that there was "some blockage" in the entry but that miners could get around it and that air was passing through the area. (Ex. R-J, R-H, dated 10/27 4 a.m.; Tr. 220-21, 301-03). He stated that there were no roof problems in areas where he traveled except between some of the cribs that had been dangered off. (Ex. R-J).

Finally, during the period between the start of Mr. Holley's shift on October 26 and the start of his shift on October 27, the longwall was producing coal and the longwall would have retreated about 45 feet. (Tr. 353). The area observed by Inspector Cristando on October 27 was different from that observed by Mr. Holley on October 26. Inspector Cristando testified that he could see about 18 to 20 feet down the entry. (Tr. 408). The Secretary is attempting to infer that because Inspector Cristando saw a blockage on the evening of October 27, that blockage must have existed since at least 10 p.m. the previous day because Mr. Holley said he was aware of roof problems at that time. I cannot accept the Secretary's inference for two reasons. First, Mr. Holley did not tell Inspector Cristando that he was aware

that the entry was blocked. Second, given that one can only see about 20 feet down the entry and the longwall would have advanced about 40 feet, the area of the tailgate that Mr. Holley observed on October 26 was a completely different area. Mr. Holley testified that all areas of bad top had been dangered off when he observed the entry on October 26. Inspector Cristando testified that Basin Resources generally does a good job of ribboning-off bad areas and that he observed dangered-off areas on previous inspections along the tailgate entry in places that had been mined through on October 27. (Tr. 154-55). Thus, the Secretary cannot dispute Mr. Holley's testimony that the hazardous areas were dangered off on October 26. The Secretary's inference is too speculative and is not supported by credible evidence; the blockage could have occurred at any time during Mr. Holley's October 27 shift.

Based on this evidence and the record as a whole, I conclude that the Secretary did not establish that the alleged blockage existed prior to the time that Inspector Cristando discovered it. I also find that Mr. Holley did not have any knowledge of this blockage prior to the time Inspector Cristando discovered it. In addition, I find that the Secretary did not establish that Basin Resources was negligent in not detecting the blockage at an earlier time.

2. Order No. 3849440

Order No. 3849440 alleges a violation of 30 C.F.R. ' 75.360(b)(3). The order states that an inadequate preshift examination was performed for the oncoming afternoon shift on

In his brief, the Secretary argues that Inspector Cristando's inference is supported by information he obtained from other production foremen, the preshift and on-shift examiners, and miners working in the area. I find that the record on this issue does not corroborate the inspector's inference because the evidence on this issue is ambiguous.

Based on the testimony of Inspector Cristando, I find that the tailgate entries were blocked at the time of his inspection so as to prevent safe travel out of the longwall tailgate entries. Accordingly, I reject Mr. Sciacca's opinion to the contrary.

As pertinent here, the safety standard requires that a certified person conduct a preshift examination for hazardous conditions in each working section.

October 26, 1994. The order states that the longwall foreman told the inspector that "he observed the tailgate blockage, but took no action to correct the hazardous condition." The order alleges that inadequate preshift examinations were conducted in all of the subsequent shifts until the condition was detected by the inspector. In the order, the inspector indicated that the alleged violation was S&S and was caused by Basin Resources' unwarrantable failure to comply with the safety standard. The Secretary proposed a penalty of \$9,500.

As I held with respect to Order No. 3849438 above, the Secretary did not establish that the blockage existed prior to the time that Inspector Cristando discovered it. In addition, the assertion in the order that Mr. Holley told Inspector Cristando that he observed the tailgate blockage is not supported by the evidence. Inspector Cristando asked whether Mr. Holley was aware of the conditions in the tailgate entry without providing any explanation of what he was referring to or asking Mr. Holley to observe the conditions firsthand. Such a conversation is too limited and unfocused to show that Mr. Holley had knowledge of the blockage.

The basis for the Secretary's contention that the preshift examinations were inadequate is the brief conversation between Inspector Cristando and Mr. Holley and the assumption that the blockage must have existed for some period of time. Neither the conversation nor the Secretary's assumptions establish a violation. It could be argued that the preshift examination for the oncoming afternoon shift of October 27 must have been inadequate in any event because Inspector Cristando discovered the condition at 7:55 p.m. and the shift started at 3 p.m. While it is possible the hazardous conditions existed at the time of this preshift, there is no proof that such conditions existed at that time. Roof conditions in the tailgate can deteriorate rapidly.

3. Citation No. 3848272

Citation No. 3848272 alleges a violation of 30 C.F.R. ' 75.360(g). The citation states that a hazardous condition was observed on the afternoon shift of October 26 and on subsequent shifts, but no record of the hazard was entered into the book provided for that purpose. The alleged hazard was "roof failure-unsafe roof in the tailgate of the longwall." In the citation,

As pertinent here, the safety standard requires that a record of hazardous conditions and their location found by the preshift examiner be recorded in a book kept for such purposes.

the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$1,298.

Although the wording of the citation is different from the order, they both relate to the same conditions and Inspector Cristando's conversation with Mr. Holley. Based on his brief conversation, Inspector Cristando concluded that the blockage had existed for at least 24 hours and that this hazardous condition was not recorded in the preshift examination book. As stated above, on October 26, Mr. Holley was aware that there were areas in the tailgate entry where the roof was not supported and that these areas were ribboned off with danger tape to keep miners out of those areas. The individual conducting the preshift examination is not required to travel the length of the tailgate entry.

Rather, the examiner measures air flow, checks for methane, and looks for hazardous conditions. During this examination, the examiner is required to enter the tailgate entry just off the longwall face. There is insufficient evidence to show that the examiners entered this area, saw the blockage or areas of unsafe roof that were not dangered off, and failed to record the hazard.

In addition, the longwall was in production during this period, so the area in the tailgate entry that the preshift examiners observed would have been different from that observed by Inspector Cristando.

4. Order No. 3849138

Order No. 3849138 alleges a violation of 30 C.F.R. ' 75.362(a)(1). The order states that an inadequate on-shift examination was performed during the afternoon shift on October 26, 1994. The order states that the longwall foreman told the inspector that "he observed the tailgate blockage or roof failure, but took no corrective action to correct the condition." The order alleges that inadequate on-shift examinations were conducted in all of the subsequent shifts before the afternoon shift of October 27. In the order, the inspector indicated that the alleged violation was S&S and was caused by Basin Resources' unwarrantable failure to comply with the safety standard. The Secretary proposed a penalty of \$9,500.

A certified person is required to examine the tailgate entry in its entirety for hazardous conditions on a weekly basis. 30 C.F.R. ' 364(b)(3). There is no showing that the most recent weekly examination was not completed because the tailgate entry was blocked.

As pertinent here, the safety standard requires that a certified person conduct an on-shift examination for hazardous conditions in each working section.

As stated above, the Secretary did not establish that the blockage existed prior to the time that Inspector Cristando discovered it or that Mr. Holley knew of the blockage on October 26. There is no dispute that there were areas that had been dangered off in the tailgate entry. Some of these areas had been mined through by the time Inspector Cristando examined the area on the afternoon shift of October 27. The areas of the tailgate inspected by Inspector Cristando on that shift were not the same areas that the on-shift examiners observed on preceding shifts because the longwall had advanced. There is insufficient proof that the cited hazardous conditions existed in those areas at the time of the on-shift examinations. Basin Resources was not required to have completed the on-shift exam for the afternoon shift of October 27 at the time of Inspector Cristando's inspection. (Tr. 120).

5. Citation No. 3848271

Citation No. 3848271 alleges a violation of 30 C.F.R. ' 75.362(g). The citation states that a hazardous condition was observed on the afternoon shift of October 26, and on subsequent shifts but no record of the hazard was entered into the book provided for that purpose. The alleged hazard was "roof failure-unsafe roof" in the tailgate of the longwall. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$1,298.

Based on a brief and confused conversation with Mr. Holley, Inspector Cristando concluded that the blockage in the tailgate had existed for at least 24 hours and that this hazardous condition was not recorded in the on-shift examination book. For the reasons stated above, the Secretary did not meet his burden of proof. The individual conducting the on-shift examination is not required to travel the length of the tailgate entry. The examiner measures air flow, checks for methane, and looks for hazardous conditions. During this examination, the examiner is required to enter the tailgate entry just off the longwall face. There is insufficient evidence to show that the examiners entered this area, saw the blockage or areas of unsafe roof that were not dangered off, and failed to record the hazard. The

As pertinent here, the safety standard requires that a record of hazardous conditions and their location found by the on-shift examiner be recorded in a book kept for such purposes.

longwall was in production during this period, so the area in the tailgate entry that the on-shift examiners observed was different from that observed by Inspector Cristando.

6. Citation No. 3849439

Citation No. 3849439 alleges a violation of 30 C.F.R. ' 75.202(a). The citation states that the mine roof in the tailgate entry between crosscuts 15 and 16 was not supported or controlled to protect persons from hazards of falling roof. The citation states:

The fully grouted 8 ft roof bolt bearing plates were 2 to 3 feet from the existing mine roof. The supplemental supports, 3 X 3 ft cribs on five foot centers were knocked out in places due to the roof deterioration, rib sloughage, and floor heaving for a distance of approximately 60 ft.

In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$506.

This citation is based on conditions observed by Inspector Cristando during his inspection. It is not based on speculation as to what the conditions were like 24 hours earlier in a area that had been mined through and it was not based on a brief conversation with Mr. Holley. At the time Inspector Cristando observed the conditions, some of the areas with bad roof were dangered off, but some areas were not. There was no evidence that at any time during the existence of the dangerous roof conditions any miner worked or traveled in the cited area. Nor did the job duties generally require miners to enter the affected area.

In *Cyprus Empire Corp.*, 12 FMSHRC 911, 917 (May 1990), the Commission held that when a mine operator dangers-off an area of bad roof in a tailgate entry and there is no showing that miners worked, traveled or were required to enter this area, a violation of this safety standard is not established. I find that the Commission's holding is not applicable to the facts of this case. The entire entry was not dangered-off, only some areas were. The inspector observed areas of dangerous roof that were not dangered-off. Miners were required to enter the area a few times a

As relevant here, this safety standard requires that the roof of areas where persons work or travel be supported or otherwise controlled to protect persons from hazards related to falls of roof.

week to check rock dust lines. (Tr. 358-59). In addition, the area was a designated escapeway. Thus, I find that the Secretary established a violation.

I also find that the Secretary established that the violation was S&S. The four elements of the *Mathies* test were met. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element, whether there was a reasonable likelihood that the hazard contributed to will result in an injury, presents the closest question. It is likely that the area of bad roof would have been mined through assuming continued mining operations. Nevertheless, it is not disputed that miners had to enter the area at least a few times a week. In addition, an emergency could occur at any time requiring the evacuation of miners. Although the tailgate entry was not the primary escapeway, it was a designated escapeway. Accordingly, I find that the Secretary established that it was reasonably likely that the hazard contributed to would result in an injury. Based on the penalty criteria, I assess a civil penalty of \$506 for this violation.

B. Other Citations and Orders

1. Order No. 3848330

The Secretary agreed to vacate this order at the hearing.

2. Citation No. 3849271

Citation No. 3849271 alleges a violation of 30 C.F.R. ' 75.1722(a). The citation states that a guard was not provided for the head roller of the F.C.T. continuous haulage machine. The citation states that it was about 72 inches from the edge of the machine to the pinch point and that the area of exposure was about 30 inches. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$506.

I find that the Secretary established a violation. There is no dispute that the conditions described by Inspector Melvin Shiveley existed. Basin Resources argues that the evidence shows that the equipment was new and was delivered to the mine in the

The relevant part of the safety standard provides that gears, sprockets, chains, pulleys, flywheels, and similar exposed moving machine parts which may be contacted by and injure persons shall be guarded.

same condition. It further maintains that an MSHA supervisor inspected the equipment and did not issue a citation for failing to guard this area. Finally, it argues that the equipment was operated by remote control and there were no controls near the

unguarded area. I find that these factors relate to the gravity of the violation and the negligence of the operator and not to the fact of violation.

Inspector Shiveley testified that the unguarded head roller was about 36 inches from the ground and that the operator and a miner helper would normally work in the area. (Tr. 25, 52). In addition, he testified that the unguarded area was adjacent to a travelway. (Tr. 26). Inspector Shiveley testified that he believes that if the condition were left unabated someone could get clothing or tools caught in the pinch point. (Tr. 27). He stated that a serious injury would result in such an event. Based on this evidence, I find that the Secretary established that the violation was S&S. There was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature.

Basin Resources produced evidence that MSHA Field Office Supervisor Larry Ramey inspected this equipment a few days before this inspection and did not issue any citations. (Tr. 209-15; Ex. R-B). I credit this evidence and find that Basin Resources' negligence was low with respect to this citation. Based on the penalty criteria, I assess a civil penalty of \$150 for this violation.

3. Citation No. 3849319

Citation No. 3849319 alleges a violation of 30 C.F.R. ' 75.511. The citation states that electrical work was being performed on an Eimco roof-bolter lighting system and the bolter was not locked or tagged out at the power center. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$506.

I find that the Secretary established a violation. There is no dispute that the roof bolter was not locked out or tagged out.

The relevant part of the safety standard provides that no electrical work shall be performed on equipment until the disconnecting device has been locked and suitably tagged by the persons who will perform such work.

Instead, the miners turned off the bolter at the circuit breaker and one of them stayed at the breaker to make sure that no one energized it. (Tr. 215-16). The miners were changing a light bulb on the breaker, which on this particular piece of equipment requires that the wires be exposed. (Tr. 32).

Basin Resources contends that this violation was of a technical nature and was not S&S. It states that the power was disconnected at the breaker, the breaker was being watched by a miner, and it was not reasonably likely that anyone would be injured. Although this is a close case, I find that the Secretary established that the violation was S&S. The purpose of the safety standard is to prevent electrical components from becoming energized when they are being worked on. In this case, electrical contacts on wires were exposed when the light bulb was changed. Assuming that this practice continued, it is reasonably likely that the hazard contributed to would result in an injury.

The miner "guarding" the circuit breaker could become distracted or he could be called to attend to other duties. In addition, it is possible for the breaker to malfunction and not de-energize the circuit. An injury would be of a reasonably serious nature.

I find that Basin Resources' negligence was moderate. Based on the penalty criteria, I assess a civil penalty of \$250 for this violation.

4. Citation No. 3849284

Citation No. 3849284 alleges a violation of 30 C.F.R. ' 75.202(a). The citation states that the "mine roof was not supported or controlled inby the main roof slope in that wooden planking was cracked and loose above the track entry." The citation alleges that loose roof material was observed on the wooden planks and that the area is the main travelway into and out of the mine. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$595.

The parties offered conflicting testimony about the cited conditions. Inspector Shiveley testified that planking had been installed on steel beams along the roof to prevent loose material from falling into the travelway. He testified that the planking was "old, deteriorated, and cracked." (Tr. 40). He stated that

As relevant here, this safety standard requires that the roof of areas where persons work or travel be supported or otherwise controlled to protect persons from hazards related to falls of roof.

some had broken and he could see the rubble sitting on them, sticking out of the cracks. (Tr. 40, 58). He further said that the planks were "bowed down" because of the weight of the rock. The planks were not broken, they were just bowed and cracked. (Tr. 60). He believed that this rubble could fall and injure

someone. (Tr. 40). Inspector Shiveley did not know if there were roof bolts in the area. (Tr. 57). He estimated that the planks were three inches thick and about ten inches wide. (Tr. 59). There was a small opening between each plank through which Inspector Shiveley could see the loose rubble. (Tr. 77).

Mr. Sciacca testified that the roof was supported by roof bolts in the area cited by Inspector Shiveley. (Tr. 382). He stated that the roof was also supported by steel I-beams. The I-beams were on four-foot centers and each was supported by two timbers. (Tr. 382; Ex. R-U). Mr. Sciacca stated that the planks were bowed and cracked a little, but not enough to present a safety problem. (Tr. 384). He testified that the cracks in the planks were not serious enough to allow loose material to fall into the travelway. The planks were installed "skin-to-skin" so there were no gaps between the planks. *Id.* He stated that when the citation was abated, the workers were unable to rip the planks down, "[y]ou couldn't get them out of there." *Id.* To abate the citation, Basin Resources installed new planks under the existing ones.

A violation has not been established. I credit the testimony of Mr. Sciacca that the planks were not sufficiently cracked to present a hazard. In order for rock or other debris to fall, the planks would have to break completely through or a gap in the planks would have to be created. I also credit his testimony that the planks were closely abutted and that the roof was bolted. He was present when the citation was abated and the workers were unable to force the planks down. I find that the condition of the planks did not present a hazard of falling material.

5. Citation No. 3849285

Citation No. 3849285 also alleges a violation of 30 C.F.R. ' 75.202(a). The citation states that a loose coal rib was present in the third north mains that was not supported or controlled. It states that the loose rib measured three by four feet and was six to eight inches thick. The rib was at a parking area for the crew. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negli-

gence was moderate. The Secretary proposed a penalty of \$506.

Basin Resources does not dispute the fact of violation or that the violation was S&S. It argues that the it was only slightly negligent and that the penalty is too high. It states that the loose rib was obvious and that a scaling bar was nearby.

Basin Resources states that the miners on the crew "chose not to

take responsibility to correct it." (B.R. Br. at 18). It offered evidence that miners sometimes failed to correct hazardous conditions and called MSHA instead. It maintains that the negligence of the miners should not be imputed to Basin Resources.

It is impossible for me to evaluate Basin Resources' negligence defense. There was no showing that miners purposefully failed to support or take down the loose rib in this instance. Accordingly, I find that the violation was caused by Basin Resources' moderate negligence. Based on the penalty criteria, I assess a civil penalty of \$250 for this violation.

II.

CIVIL PENALTY ASSESSMENTS

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 or Order No.</u>	<u>30 C.F.R. '</u>	<u>Assessed Penalty</u>
<u>WEST 95-254</u>		
3848330	75.370(a)(1)	vacated
3849271	75.1722(a)	\$150.00
3849319	75.511	\$250.00
<u>WEST 95-255</u>		
3848271	75.362(g)	vacated
3848272	75.360(g)	vacated

3849138	75.362(a)(1)	vacated
3849438	75.220(a)(1)	vacated
3849439	75.202(a)	\$506.00
3849440	75.360(b)(3)	vacated
3849284	75.202(a)	vacated
3849285	75.202(a)	\$250.00

III.

ORDER

Accordingly, the citations and orders listed above are **VACATED** or **AFFIRMED** as indicated above, and Basin Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,156.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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