FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 7, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-104
Petitioner	:	A.C. No. 05-02820-03729
	:	
v.	:	Golden Eagle Mine
	:	
BASIN RESOURCES, INCORPORATED,	:	
Respondent	:	

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

This case is before me on a petition 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 petition alleges one violation of the Secretary's health regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I.

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

A. Background

At the time the order of withdrawal in this case was 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. Basin Resources contested the penalty in this case and in 29 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 FMSHRC 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. 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). If an operator is no longer in business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary's safety and health standards. 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. ("Entech"), and Montana Power Company ("Montana Power") as respondents in this 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). She points to the fact that Basin Resources is a wholly owned subsidiary of Entech and that Entech is a wholly owned subsidiary of Montana Power Company. She argues that these companies own and operate other coal mines and that they were also operators of the Golden Eagle Mine. The Secretary maintains that the parent companies should be financially responsible for the penalties assessed and that her proposed penalties should not be reduced under the "ability to continue in business" criteria.

Basin Resources opposes the Secretary's motion for a number of reasons. First, it argues that the motion is improper because of the extreme delay between the issuance of the citations and the date of the proposed amendment. Basin Resources contends that this delay is contrary to Commission case law and is procedurally improper under Rule 15 of the Federal Rules of Civil Procedure. Basin Resources also maintains that the motion should be denied because neither Entech nor Montana Power are operators under the Mine Act.

B. Delay in Filing Motion

Although I believe that Basin Resources' arguments concerning the Secretary's

delay in filing her motion have some merit, I do not deny the Secretary's motion based on this procedural issue because of the unusual set of circumstances in the Basin Resources cases. The order of withdrawal in the present case was issued to Basin Resources on June 22, 1994. The citations and orders in the majority of the other Basin Resources cases pending before me were issued in the first nine months of 1995. The Secretary's petition for the assessment of a penalty in this case was filed with the Commission on January 23, 1995. The Secretary's motion to amend her petition to add Entech as a respondent was filed on October 25, 1996, a few days before the start of the hearing in this case. The Secretary's motion to add Montana Power as a respondent was included in her brief on this issue, which was filed January 24, 1997.

There is no doubt that a delay of this magnitude is significant and could prejudice putative operators when challenging citations and orders issued by the Secretary. In this case, however, I find that the delay did not prejudice Entech or Montana Power. First, the issue was raised solely in context of the amount of the penalty that should be assessed. Basin Resources takes the position that since it is out of business, the penalty in this case and all of the other cases in which I find a violation, should be reduced to a nominal amount. The Secretary filed the motion to amend the petition for penalty because she believes that penalties should not be reduced. If Basin Resources had not closed, the Secretary would not have filed her motion.

Second, as of this date, hearings have been held in all but ten of the Basin Resources dockets. Basin Resources presented evidence with respect to the citations and orders at these hearings. As discussed below, neither Entech not Montana Power could have presented additional evidence because they did not have any significant presence at the mine. Any violations at the Golden Eagle Mine were the responsibility of Basin Resources' employees not Entech's nor Montana Power's employees. In sum, the evidence presented by the parties at the hearings would not have been different if Entech or Montana Power had been named in the original petition for penalty.

Third, the Secretary is not entirely responsible for the delay. Through discovery, the Secretary learned that Basin Resources owed Entech a large sum of money. The Secretary was not able to depose an Entech employee about this issue until October 25, 1996. After the motion was filed, the parties agreed that I should rule on the Secretary's motion for partial summary decision, filed November 27, 1996, before the parties briefed the issue of whether Entech or Montana Power should be added as respondents. Accordingly, for the reasons set forth above, I find that the Secretary's motion to amend her petition for penalty should not be denied on the basis of the procedural arguments raised by Basin Resources.

C. Entech and Montana Power are not Operators of the Mine

I deny the Secretary's motion because I find that Entech and Montana Power are

not operators of the Golden Eagle Mine under section 3(d) of the Mine Act. An operator is defined at section 3(d) of the Mine Act as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The Secretary is not contending that either company was an independent contractor, rather she argues that Entech and Montana Power had complete financial control over Basin Resources.

The Secretary points to evidence that Entech acted as a banker for all of its subsidiaries, including Basin Resources. She also points to the fact that Entech provided financial management services to Basin Resources, provided administrative services for Basin Resources' 401(k) plan, prepared its income tax returns, and provided cash advances when necessary. She also points to the fact that management of the three companies often overlapped. For example, the chairman of the board and chief executive officer of Montana Power was Basin Resources' only board member. The president of Basin Resources spent most of his time in Butte, Montana, the headquarters of Montana Power, and only visited the Golden Eagle Mine from time-to-time. Basin Resources's corporate secretary was also the secretary of Entech and is an officer with Montana Power. The Secretary also relies on the fact that Entech's board of directors made the decision to close the mine and that the bulk of Basin Resources' debt is owed to Entech. Finally, she states that Entech officials visited the mine on a regular basis.

There is no dispute that Basin Resources is a wholly owned subsidiary of Entech and that Entech is a wholly owned subsidiary of Montana Power. Other subsidiaries or divisions of Entech operate surface coal mines. These facts, in themselves, do not establish that they were operators of the Golden Eagle Mine. Mining companies are often subsidiaries of other companies that may or may not be directly involved in mining. The Secretary does not name the parent company as a respondent in civil penalty cases when a subsidiary of that parent operates the mine. A normal parent/subsidiary relationship should not be the basis for determining that the parent is also an operator.

The Secretary has not shown that the financial relationship between Basin Resources and Entech was anything other than typical in such situations. It appears that all financial transactions were properly accounted for in the books of both companies and that there was no commingling of funds. It is not unusual for a subsidiary to engage in financial transactions with its corporate parent or for a parent corporation to manage a subsidiary's 401(k) plan or to prepare its tax returns. Likewise, it is not uncommon for officers of a parent corporation to also serve as officers of a subsidiary.

The Secretary did not present credible evidence that Entech or Montana Power employees exercised day-to-day control over the operation of the Golden Eagle Mine. People from Butte would, of course, visit the mine to obtain information or work with

mine officials in the budget and forecast planning process. This type of activity is not uncommon between parent and subsidiary corporations. It appears that Entech made the decision to close the mine. Assuming that the Entech board made that decision, it essentially put Basin Resources out of business because the Golden Eagle Mine is Basin Resources' only asset. I believe that the decision by a parent corporation to permanently shut down a wholly owned subsidiary should not be used to establish that the parent controlled the mine under section 3(d). The decision to put a subsidiary out of business must be made by the parent corporation. To establish Mine Act jurisdiction on that basis would automatically transform most parent corporations of mining companies into mine operators.

I find that the evidence presented by Basin Resources on this issue to be more persuasive. The evidence submitted by Basin Resources establish that all of the following activities were performed by Basin Resources employees at the mine in Weston, Colorado: (1) engineering, including planning for mine development; (2) human resource functions, including labor negotiations with the UMWA; (3) safety matters, including interaction with MSHA; (4) underground mining, including the production of coal; and (5) general management of the mine. These activities were performed without any major input from either Entech or Montana Power. I credit the affidavit of John Reynolds, the mine manager, that personnel from Entech and Montana Power "did not participate at all on a day-to-day basis, either directly or indirectly, in any of the operations, control or supervision of the day-to-day activities of the mine." (B.R. Response, Ex. F). He further stated that his only involvement with personnel from Entech or Montana Power was to provide information concerning production or to obtain approval for major capital expenditures. The only time he was given a direct order from Entech was when he was told to shut down the mine at the end of 1995. *Id.*

The Secretary relies heavily on Commission cases discussing whether a mine operator should be held liable for violations of an independent contractor. In *W-P Coal Co.*, 16 FMSHRC 1407 (July 1994), W-P was the lessee of the property and another company operated the mine as an independent contractor. The issue was whether W-P could be held liable for violations of the Secretary's safety standards. In holding that the Secretary could hold W-P liable, the Commission noted that W-P was substantially involved in "the mine's engineering, financial, production, personnel, and safety affairs." 16 FMSHRC at 1411. The Commission also noted that W-P calculated mining projections, prepared the mine plan, visited the mine frequently to discuss production, and met with MSHA personnel regarding safety matters. *Id.* Neither Entech nor Montana Power exercised such control over the Golden Eagle Mine.

In *Berwind Natural Resources Corp.*, 18 FMSHRC 202 (February 1996), *petition for review granted* April 2, 1996, Commission Judge Barbour set forth his analysis of the Mine Act's definition of operator. He stated that the purpose of the statutory definition is to "place responsibility for health and safety upon those entities that create the

conditions at the mine or that have actual authority over the conditions on the theory that such responsibility will further compliance." 18 FMSHRC at 231. He further held that "[c]ontrol may be either direct or indirect, but it must be actual." *Id.* An "operator must `call the shots' at a mine regarding its day-to-day operation, or have the authority to do so." *Id.* In conclusion, Judge Barbour held that "in order to establish an entity as an `operator' subject to the Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control, or supervision of the day-to-day operations of the mine, or had authority to do so." *Id.* I believe that Judge Barbour's analysis is a fair reading of the definition of "operator" and is harmonious with the Commission's decision in *W-P Coal*.

The evidence presented by the parties establishes that Entech and Montana Power did not substantially participate in the operation, control, or supervision of the day-to-day operations of the Golden Eagle Mine. As the corporate parent, Entech took an interest in and was involved in the financial affairs of Basin Resources, but it did not directly or indirectly control or supervise the operation of the mine. It is not clear from the record if Entech had the authority to take control of the operation of the mine. I believe that such a consideration should come into play only if the facts demonstrate that there is a particular reason to disregard the corporate structure. For example, under certain circumstances, a parent corporation may be deemed to be an operator if it creates a subsidiary to operate a mine and fails to provide sufficient capital to ensure that the subsidiary is able to provide a safe working environment or comply with the requirements of the Mine Act. It also may be necessary to pierce the corporate veil in certain circumstances. In the present case, however, Basin Resources was fully responsible for the safe operation of the mine. The companies appear to have a normal parent/subsidiary relationship. Any oversight over the mine exercised by Montana Power or Entech was insufficient to render them operators of the Golden Eagle Mine. The Secretary's motion to amend the petition for penalty is denied.

II.

ORDER OF WITHDRAWAL NO. 3590955

A. Fact of Violation

On June 22, 1994, MSHA Inspector Melvin Shiveley issued an order of withdrawal to Basin Resources under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. ? 70.100(a), as follows:

> Results of the five most recent samples received by MSHA and collected from the working environment in

> mechanized mining unit MMU 009-0 shows an average concentration of 2.52 mg/m^3 due to the obvious lack of effort by the operator to control respirable dust. Since 11-1-92 there [have] been 6 excessive dust violations[s], 12 citations issued for excessive dust on MMU 009-0, (1) 104(d)(1) citation issued for excessive dust on MMU 009-0.

Inspector Shiveley determined that the alleged violation was of a significant and substantial nature ("S&S") and was caused by Basin Resources' unwarrantable failure to comply with the standard. The Secretary of Labor proposes a civil penalty of $9,000.00 for the alleged violation. Section 70.100(a) provides, in part, that each operator "shall continuously maintain the average concentration of respirable dust in the mine atmosphere to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air...."

The dust samples upon which the order is based were taken at the mine on June 15, 1994, by Inspector Tony Duran. The samples were mailed to MSHA's laboratory in Pittsburgh where they were weighed. The average concentration of respirable dust was found to be 2.52 mg/m^3.

Basin Resources contends that the order should be vacated because the dust samples taken by Inspector Duran are not valid. First, it argues that the samples were taken on a day in which normal activities were not taking place. On June 15, Basin Resources was attempting to make changes in its ventilation and dust control practices on MMU 009-0 (the "unit"). Basin Resources argues that because the conditions were not normal on the unit, the samples are not representative of typical conditions. The Secretary contends that what is "normal" is for the MSHA inspector to decide, not the mine operator. She notes that the health standard contains no exceptions for days in which "normal activities" are not taking place. Second, she argues that changing ventilation to correct dust problems is a normal activity at a mine, especially at the Golden Eagle Mine.

I agree with the Secretary's arguments. What is "normal" in an active longwall section is rather subjective. Miners in a longwall section may frequently be engaged in activities that are not production-related. It would be impossible to draw a clear line between what are normal activities and what are not. The health standard does not draw such a distinction and requires that the operator "continuously maintain" the average concentration of dust at or below 2.0 mg/m^3. In addition, making changes in ventilation at a coal mine to control respirable dust is not outside what should be considered a normal activity.

Basin Resources also maintains that one of the samples taken by Inspector Duran was turned over ("dumped") when a miner was removing the cassette from his

clothing. Basin Resources states that when the sample fell upside down in Inspector Duran's presence, he merely tapped it on the table and submitted it to MSHA's laboratory without any notation that this had occurred. Basin Resources argues that MSHA did not follow correct procedures when the sample was dumped and that the citation is invalid.

The Secretary contends that the evidence relied upon by Basin Resources to establish that correct procedures were not followed is unreliable. The evidence consists of the notes of Mr. Salerno, an employee of the company's safety department, setting forth a conversation he had with another employee of the company. (Ex. R-1, Tab U). The note states that the sample for the shield operator was dumped when it was removed from the employee. The Secretary notes that a shield operator was not sampled on that shift and that, in any event, if a single sample of an hourly employee had been dumped in this instance, the results still would have been above that permitted by the health standard.

I find that the Secretary established that the samples taken by Inspector Duran were valid. While turning a cassette upside down may invalidate that sample, it is not entirely clear that such an event occurred in this case. There is no direct proof that a sample was dumped. It is not clear whether the individual referred to in Basin Resources' exhibit was actually sampled. At a minimum there is some confusion about this event. The highest reading obtained for an hourly employee was 2.8 mg/m^3. If that reading is not included in the average, the result is still above the minimum requirement of the health standard. (Tr. 202). Accordingly, for the reasons set forth above, I find that the Secretary established a violation of 30 C.F.R. ? 70.100(a).

B. Significant and Substantial

I find that the Secretary established that the violation was S&S. The Commission has held that if the Secretary establishes a violation of section 70.100(a), a presumption arises that the violation is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986), *aff'd* 824 F.2d 1071 (D.C. Cir 1987). Basin Resources did not present any evidence or argument to rebut this presumption.

C. Unwarrantable Failure

The order alleges an unwarrantable failure to comply with the standard. The order itself states that the violation was the result of "the obvious lack of effort by the operator to control respirable dust." Basin Resources argues that it was engaged in aggressive efforts to control dust at the mine and that MSHA did not take the time to acquaint itself with these efforts. It states that the unwarrantable failure determination was made based on the mine's history of respirable dust violations. Basin Resources contends that MSHA's analysis of this history was simplistic and misleading. It states

that almost all of the previous violations occurred when the unit was in a different panel.

In addition, Basin Resources states that it was doing everything that it could to try to control respirable dust at the mine. It argues that dust control was one of the safety department's highest priorities. It contends that such aggressive efforts are not consistent with an unwarrantable failure finding. Basin Resources also points to the fact that MSHA permitted the mine to resume mining a few hours after the order was issued, based on steps that the mine had taken to control dust before the order was issued.

Finally, Basin Resources maintains that the unwarrantable failure finding must be vacated based on the Commission's decision in *Peabody Coal Co.* 18 FMSHRC 494 (April 1996). Basin Resources states that the operator in that case was engaged in significant efforts to reduce respirable dust and that MSHA determined that the violation was the result of an unwarrantable failure based on the mine's dust sampling history. The Commission reversed the judge's unwarrantable failure finding.

The Secretary argues that Basin Resources knew or had reason to know of the conditions which resulted in the violation and had ample opportunity to correct these conditions, yet failed to take effective measures to comply with the health standard. She states that management knew that excessive dust was a significant problem at the mine. She further maintains that mine management made several changes to the dust control and ventilation plan ("dust plan"), but did not follow through to make sure that the dust plan was adhered to on the unit. The Secretary argues that although Basin Resources adopted "temporary or short term fixes to deal with dust at a particular moment, none of [its] efforts resulted in a real or long term solution, largely because the plans or amendments were not followed on a consistent basis." (Sec. Br. at 7).

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 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 FMSHRC 189, 194 (February 1991).

In analyzing the evidence in the present case using this test, I find that the violation was caused by the aggravated conduct of Basin Resources. The violation was not the result of intentional misconduct, indifference, or a reckless disregard of the dangers posed by respirable dust. I find, however, that Basin Resources' failure to meet the requirements of 30 C.F.R. ? 70.100(a) was the result of a serious lack of reasonable care that constituted more than ordinary negligence.

I reach this conclusion for a number of reasons. First, Basin Resources had a

history of dust control problems and mine management was well aware of these problems. MSHA officials discussed the mine's dust problems with management on a number of occasions. MMU 009-0 had been out of compliance thirteen times between November 1992 and June 22, 1994. The Secretary contends that this figure indicates that the unit was out of compliance about 50% of the time. While the record does not contain sufficient evidence to support this allegation, it is clear that the unit was having difficulty meeting the 2.0 mg/m^3 requirement. Basin Resources points to the fact that the unit had been out of compliance only once in the ten months prior to the date the order was issued. Although this fact may indicate that progress was being made, it does not establish that the mine's dust problem was under control.

Second, although Basin Resources made changes to its dust plan to try to eliminate its respirable dust problems, it did not take sufficient steps to make sure that its dust plan was being followed in the longwall section. For example, miners would turn off water sprays designed to control dust because they did not want to get wet. Mr. Hallows testified that the unit would be in compliance with the dust plan when "miners were convinced to follow procedures and they followed those procedures." (Tr. 164, 184). He stated, however, that miners often failed to follow the company's safety procedures including the requirements of that dust plan. (Tr. 156, 164, 180-81, 183-88). It is apparent the management-labor relations were rather poor at the mine. Basin Resources' safety director admitted that miners did not always follow the requirements of the mine's dust plan and that management was aware of that fact. I find that Basin Resources' efforts to ensure that miners adhered to the dust plan were insufficient. (Tr. 65-68, 80-81, 143-11).

Basin Resources argues that it presented evidence that it had taken extraordinary efforts to fix its dust problems. I agree with the Secretary that the efforts presented by Basin Resources at the hearing were routine actions taken by most medium to large coal mine operators to comply with the requirements of the Mine Act. For example, the company was training its miners on respirable dust control. (Tr. 104-05; Ex. R-1, Tabs G, H - J, M, & P).

Third, Basin Resources states that MSHA allowed the mine to resume mining without requiring it to take additional steps to control dust. It argues that this fact demonstrates that the company did not engage in aggravated conduct. This argument is based on an incomplete chronology of events. Although the order is dated June 22, the dust samples were taken on June 15. Basin Resources made a number of changes between the time the samples were taken and MSHA's allowing mining to resume. Moreover, MSHA required the mine to file an addendum to its dust plan. (Ex. R-1, Tab Y). It is not uncommon for an order to be lifted following an amendment to a dust plan.

Basin Resources also relies on the Commission's decision in *Peabody Coal Co.* to

support its argument. In that case, the Commission reversed an administrative law judge's unwarrantable failure finding because he, in essence, created a rebuttable presumption that the violation was unwarrantable based on the mine's compliance history. 18 FMSHRC at 498. The Commission also held that the judge erred in finding an unwarrantable failure based on "the operator's `failure to leave any stone unturned' and take `every conceivable step' in attempting to eliminate the violations." *Id.* The Commission went on to state:

> Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that "greater efforts are necessary for compliance" with the standard. That an operator has received such notice, however, is not dispositive of whether a subsequent violation of the standard is unwarrantable. An operator's good faith efforts in attempting to achieve compliance must be examined in making that determination.

Id. (citations omitted). *See also Jim Walter Resources, Inc.* 19 FMSHRC _____, No. SE 94-74, slip op. at 5 (March 17, 1997).

There can be no question that Basin Resources was on notice that greater efforts were necessary to control dust in the mine. I find that, although Basin Resources had taken some steps to improve dust conditions, it was not doing enough to ensure that its efforts were actually carried out in the longwall section. I do not doubt that mine management, including the director of safety, was sincerely concerned about the problem, but I do not believe that management, particularly front line supervisors, were doing enough to make sure that the mine's dust plans were being properly implemented.

As stated above, Basin Resources was not indifferent to the respirable dust problem at the mine. Mr. Hallows only started working at the mine as the director of safety a few months before the order was issued and was trying to get a handle on the situation. Thus, I disagree with Inspector Shiveley's statement in the order that there was an "obvious lack of effort by the operator to control respirable dust" at the mine. Nevertheless, as of June 1994, Basin Resources' remedial measures did not "demonstrate a good faith, reasonable belief" that management was taking sufficient steps to solve its dust problem. *Id.* at 499. I find that the violation was the result of a serious lack of reasonable care on the part of management, which constitutes high negligence.

III.

APPROPRIATE CIVIL PENALTY

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 502 citations and orders in the 24 months preceding June 21, 1994, and that Basin Resources paid penalties for 486 of these citations and orders during the same period. (Ex. G-1). I also find that Basin Resources was a medium mine operator with 738,776 tons of production in 1993. (Ex. J-1). Basin Resources' parent company was large with 20,204,994 tons of production in 1993. *Id.* 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 FMSHRC 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. The Secretary has not alleged that Basin Resources failed to timely abate the order. Based on the penalty criteria, I find that a penalty of $5,000.00 is appropriate for the violation.

IV.

ORDER

Accordingly, the Secretary's motion to amend the petition for assessment of penalty is **DENIED**, Order of Withdrawal No. 3590955 is **AFFIRMED** and Basin Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $5,000.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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