

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582

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April 7, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY
PROCEEDINGS	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-494
Petitioner	:	A.C. No. 05-02820-03766
	:	
	:	Docket No. WEST 96-22
	:	A.C. No. 05-02820-03769
v.	:	
	:	Docket No. WEST 96-23
	:	A.C. No. 05-02820-03770
	:	
BASIN RESOURCES, INCORPORATED,	:	Docket No. WEST 96-24
Respondent	:	A.C. No. 05-02820-03771
	:	
	:	Docket No. WEST 96-36
	:	A.C. No. 05-02820-03773
	:	
	:	Docket No. WEST 96-128
	:	A.C. No. 05-02820-03781
	:	
	:	Golden Eagle Mine

DECISION

Appearances: Tambra Leonard, Esq., with Margaret A. Miller, Esq. on brief, 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 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 42 violations of the Secretary's safety and 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

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 penalty in these cases and in 24 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., 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 this date in *Basin Resources, Inc.*, Docket No. WEST 95-104, 19 FMSHRC _____ (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 ORDERS AT ISSUE

A. Accumulation Violations, 30 C.F.R. ? 75.400.

1. Order No. 4057257

On February 2, 1995, MSHA Inspector Melvin Shiveley issued an order of withdrawal to Basin Resources under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400, as follows:

Accumulations of combustible material, loose coal, and fine coal was allowed to exist in #1 entry, 4 left section starting at crosscut #30 inby to crosscut #32. Loose coal measured 8" to 11" deep and was in contact with the belt. Accumulations existed on the off side of the belt starting at crosscut #25 through to crosscut #32. The depth of the loose coal measured 8" deep under the belt and along the belt structure. Float coal dust was present along the mine floor and ribs starting at crosscut #25 to crosscut #22. The belt record showed accumulations were present on 1-30-95, 2-1-95, and 2-2-95. The record is signed by the shift foreman.¹

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 \$9,500.00 for the alleged violation. Section 75.400 provides, in part, that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible material shall be cleaned up and not be permitted to accumulate in active workings....

Basin Resources does not contest the fact of violation or the S&S designation, but

¹ I have edited the language in the citations and orders quoted in this decision to correct minor grammar and punctuation errors.

argues that the violation was not the result of its unwarrantable failure to comply with the standard. Basin Resources contends that the accumulations had not been present for three days and that it was taking active steps to remove them. It states that Inspector Shiveley relied exclusively on its preshift examination books when reaching his conclusion. Basin Resources believes that the company's daily production reports and outby mine daily operations planner show that the accumulations were being cleaned up and that the coal observed by the inspector was of recent origin.

Kay Hallows, the Director of Safety, testified that the continuous mining section was using a flexible coal transport system ("FCT") in lieu of shuttle cars to transport coal to the belt. He stated that the accumulations were the result of a misalignment of the FCT and that Basin Resources was engaged in continuous efforts to correct this alignment problem. He also testified that the mine was continuously cleaning up accumulations caused by this misalignment along the belt, but that new spills were constantly occurring. (Tr. 250-52).

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 applying the evidence in the present case to 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 accumulations of coal and float coal dust. I find, however, that Basin Resources' failure to meet the requirements of 30 C.F.R. ? 75.400 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 significant history of coal accumulation problems. Between January 1992 and February 1995 the Golden Eagle Mine was cited for 190 violations of section 75.400. (Tr. 228-29; Ex. P-5).

More importantly, I find that the physical conditions observed by Inspector Shiveley are consistent with his determination that the accumulations had existed for some time. He observed accumulations under the belt and on the off side of the belt to the rib. The coal was getting caught in the belt and the rollers causing the coal to become pulverized. (Tr. 214-15). The coal was so deep that it was in contact with the moving bottom belt. Many of the rollers under the belt were stuck in the accumulations. The coal was pushing the bottom belt up. (Tr. 244). Inspector Shiveley testified that such conditions cannot be created in just a few hours. *Id.* He stated that the large accumulations under the belt must have developed over a period of at least

two to three shifts. (Tr. 247-48).

It is not clear why this accumulation existed. Basin Resources believes that it was caused by the FCT, which was subsequently taken out of service. The Secretary believes that rib sloughage contacted the belt and caused it to become misaligned. In any event, I credit the testimony of Inspector Shiveley that the accumulations under the belt must have existed for some period of time. The conditions observed by the inspector establish that a significant portion of the accumulations had existed for a significant length of time.

The accumulations were large and readily obvious. Parts of these accumulations extended from crosscut 32 to crosscut 22, a distance of about 1600 feet. (Tr. 212, 216-17). Under the belt, the accumulation extended for a distance of about 280 feet. *Id.* Many individuals worked or traveled through this area, including belt cleaners, belt examiners, preshift examiners and the foreman. (Tr. 225). The accumulations are noted in the preshift examination records. (Ex. P-6).

Basin Resources maintains that its production records indicate that the mine was not producing coal during many of the shifts preceding the inspection because miners were cleaning coal that was spilled as a result of the malfunctioning FCT. (Tr. 253-57; Ex. R-3). The records show that between January 30 and February 1, the section was producing coal on seven out of nine shifts. (Ex. R-3). The records also show that miners were cleaning coal along the 4 left belt during all of these shifts, but there is no specific record that coal under the belt between crosscuts 30 and 32 was completely removed. *Id.* No miners were in the area cleaning coal at the time of Inspector Shiveley's inspection. (Tr. 229). In finding that the violation was the result of an unwarrantable failure, I rely more on the physical conditions observed by the inspector than on the records offered by the parties. (Ex. P-6; R-3).

It is also important to recognize that at least nine miners were required to work about ten hours to clean up the cited accumulations. (Tr. 235-36). Thus, assuming that a few miners had been cleaning in the area on the days preceding the inspection, their efforts were insufficient to remove such an enormous amount of accumulated coal and coal dust. For the reasons set forth above, I find that the violation was the result of a serious lack of reasonable care on the part of Basin Resources to prevent or promptly remove the accumulations cited by Inspector Shiveley. This lack of care was aggravated conduct constituting more than ordinary negligence. A penalty of \$5,000 is appropriate.

2. Order No. 4057838

On February 8, 1995, MSHA Inspector Shiveley issued an order of withdrawal to

Basin Resources under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 75.400, as follows:

Accumulation of combustible material, loose coal, and fine dry coal was allowed to exist in the form of stock piles in crosscut #15, 4 left section. The piles measured 13 feet long, 12 feet wide, and 6 feet high. The condition could clearly be seen by operator when driving through #2 entry. The coal pile was being stored due to rib sloughage from along the #2 entry roadway.

Inspector Shiveley determined that the alleged violation was not S&S and was caused by Basin Resources' unwarrantable failure to comply with the standard. The Secretary of Labor proposes a civil penalty of \$5,000.00 for the alleged violation.

Basin Resources contests the fact of violation and the unwarrantable failure finding. It argues that the order should be vacated because the material in the stockpile was mostly incombustible material. It states that the record does not contain "substantial evidence to support a finding that the material created a hazardous condition subject to the standard." (B.R. Br. at 16).

I find that the Secretary established a violation. The material that was stockpiled at the crosscut was removed from an underground travelway. This material contained loose coal that had sloughed from the ribs as well as material scraped from the floor of the travelway. A significant portion of the material was loose coal and coal dust. This loose coal and coal dust was not cleaned up and was permitted to accumulate in an active working of the mine.

In her brief, the Secretary moved to amend the order to allege an S&S violation. Inspector Shiveley testified that it was unlikely than anyone would be injured as a result of this violation. (Tr. 317-18). Although he stated that the violation presented a fire and smoke inhalation hazard, he believed that such an event was unlikely. Inspector Shiveley may have reached this conclusion for a number of reasons that are not set forth in the record. The Secretary did not present any evidence to contradict his determination. Accordingly, the Secretary's motion to amend the order is denied. The violation was serious.

I find that the Secretary did not establish that the violation was the result of Basin Resources's unwarrantable failure to comply with the standard. Inspector Shiveley testified that he determined that the violation was unwarrantable because he believed that it was a practice at the mine to shove loose coal from rib sloughage into crosscuts. (Tr. 315). He stated that the company had received numerous citations for violations of section 75.400 and that management had been told that "anytime you get

loose coal in the mine, you can't stockpile it. It's got to be removed from the mine." *Id.* He testified that he had no idea how long the accumulation had been in the crosscut, but that it had some road and rock dust on it. (Tr. 316).

Basin Resources presented evidence that the accumulation had been in the crosscut for about one shift. Its records indicate that the roadway was graded on the swing shift of February 7 and was watered on the following graveyard shift. (Tr. 342-44; Exs. R-5, R-6). The order was issued at the beginning of the day shift on February 8. Basin Resources argues that rib sloughage is a problem at the mine and the company was in the middle of its cleanup cycle when the inspector issued the order. (Tr. 347-48). Different equipment is used when removing accumulations from an area than is used to grade the roadways.

I find that it is likely that the accumulation had only existed since the beginning of the previous graveyard shift and that it would have been cleaned up on the day shift of February 8. I credit the testimony of Mr. Hallows with respect to the mine's clean up cycle. The fact that the mine has a history of similar violations cannot be the sole basis for an unwarrantable failure finding. *Peabody Coal Co.* 18 FMSHRC 494 (April 1996). Although Basin Resources had been put on notice that "storing" coal accumulations in crosscuts is not permitted, the evidence indicates that Basin Resources regularly removed such accumulations as part of its clean up program. The evidence does not establish "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care" with respect to the cited accumulation. Accordingly, I find that the accumulation was not caused by Basin Resources' aggravated conduct, but was caused by moderate negligence. A penalty of \$2,000 is appropriate.

3. Citation No. 4057855

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400, as follows:

Accumulation of combustible material, empty rock dust sacks, wood, torn rubber belting, old electrical cable, was allowed to exist in entry #10 between crosscut #3 and #4, East Mains.

Inspector Shiveley determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,155.00 for the alleged violation.

Basin Resources contests the fact of violation on the basis of its evidence that the trash would have been removed at the end of the shift as part of its regular clean up program. Inspector Shiveley testified that he did not know how long the trash had

been in the cited area. (Tr. 351, 357, 363-64). He also testified that a mine operator may collect trash at various areas in the mine without violating the standard as long as the mine has a clean up program to remove the trash on a daily basis and the mine follows the program. (Tr. 351-52, 357, 359). Inspector Shiveley stated that he issued the citation because the trash was not in one of the mine's designated trash areas and he was concerned it would not be picked up in a timely manner. (Tr. 352-53, 363-64).

Mr. Hallows testified that Basin Resources has a regular clean up program that includes all of the mine, not just the few designated trash areas. (Tr. 365-6). He stated that most trash is removed within a 24-hour period. *Id.*

It is not clear how long the cited trash had been in the entry. The preshift and onshift reports do not indicate how long the trash was there. (Ex. R-9). I agree with Inspector Shiveley that section 75.400 does not require that a mine operator immediately remove combustible trash, such as rock dust bags. Such a requirement would not be practical. Removing such material at least once a day may be sufficient. The citation was issued at 7:40 a.m. The cited material could have been placed in the entry during the previous graveyard shift and, assuming continued normal mining operations, may well have been removed by the end of the day shift. I find that the Secretary has not established a violation and the citation is vacated.

4. Citation No. 4057859

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400, as follows:

Accumulation of combustible material, loose paper sacks, oil cans, were present in #1 entry in crosscut where overcast is being developed outby the 5 left section.

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 he issued the citation based on his belief that the combustible material had been in the area for longer than one day and possibly a week. (Tr. 571-72). He believes that the material in the entry was generated during the construction of the overcast. He stated that an overcast takes about a week to build. (Tr. 572-73).

Mr. Hallows testified that the cited trash had been placed in the area on the

previous day by a scoop. (Tr. 577-78; Ex. R-11) He further stated that the trash would have been removed as part of its trash collection program. He further stated that the material observed by the inspector is used throughout the mine and was not necessarily generated at that location when the overcast was built. (Tr. 581).

Inspector Shiveley's estimate of the length of time that the combustible material had been in the entry was based on his conclusion that the material was created during the construction of the overcast. He also believed that the oil cans were from a roof bolter. (Tr. 571-72). He was not sure if he asked anyone when the trash had been put in the cited location. (Tr. 575).

As with the previous citation, it is not clear how long the cited material had been in the area. The material may well have only been in the cited area since the previous afternoon and may have been removed from the mine the day the citation was issued, assuming continued normal mining operations. I find that the Secretary has not established a violation and the citation is vacated.

5. Citation No. 4057854

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400. In the citation, the inspector alleged that an accumulation of motor oil and fine coal dust was allowed to exist in the engine compartment on a diesel tractor used underground. 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 but not S&S. A penalty of \$500 is appropriate.

6. Citation No. 4057857

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400. In the citation, the inspector alleged that float coal dust and loose coal were allowed to exist in the 3rd North Mains for a distance of about 60 feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,155.00 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 but not S&S. A penalty of \$500 is appropriate.

7. Citation No. 4057860

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400. In the citation, the inspector alleged that an accumulation of hydraulic oil and fine coal was allowed to exist on the coal feeder at the tail of #11 belt. The citation states that the accumulations were present on the deck of the motor compartment and hydraulic valve control compartment. 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 but not S&S. A penalty of \$500 is appropriate.

8. Citation No. 4057481

On May 1, 1995, MSHA Inspector Jeffrey Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400. In the citation, the inspector alleged that float coal dust was present on the rock dusted ribs and floor in the 4-Left belt entry between crosscuts 0 and 7. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,971.00 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 \$1,500 is appropriate.

9. Citation No. 4057786

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400. In the citation, the inspector alleged that he observed accumulations of damp, loose, packed coal and coal dust under the 4th Left conveyor belt from crosscut 54 to 56. 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 but not S&S. A penalty of \$1,000 is appropriate.

10. Citation No. 4057507

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400. In the citation, the inspector alleged that he observed loose coal, diesel fuel, and motor oil in 4 Left, crosscut 56 between entry Nos. 1 and 2. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,971.00 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 but not S&S. A penalty of \$500 is appropriate.

11. Citation No. 4058078

On August 30, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.400. In the citation, the inspector alleged that he observed float coal dust on rock dusted surfaces in entry No. 1 in the 5th Left 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 but not S&S. A penalty of \$500 is appropriate.

B. Ventilation Violations, 30 C.F.R. ? 75.300 etc.

1. Citation No. 4057475

On June 22, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.370(a)(1), as follows:

Page No. 8, item No. 1 of the ventilation plan

approved on 12-22-93 was not being followed. The required minimum 3,000 cfm of air was not maintained in the 3rd north working section in the 5-left turn-off, entry No. 1, inby crosscut No. 1, where 1.9% methane was detected in the idle face. An air quantity reading could not be made by chemical smoke.

Inspector Fleshman 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, but contests the inspector's negligence finding and the civil penalty. It contends that the disruption in the ventilation was temporary and was caused by miners moving ventilation curtains to allow materials to be brought in to build stoppings. (Tr. 510-11, Ex. R-7). In her brief, the Secretary moved to amend the citation to allege an S&S violation.

Inspector Fleshman testified that the negligence was moderate because the violation occurred in a working section and an onshift examination is required. (Tr. 508). I find that the Secretary established a moderate level of negligence. An operator is required to put ventilation curtains back in place after they are opened for legitimate reasons. There has been no showing that the construction materials were being brought in at the time the citation was issued. The curtains were not promptly reestablished after the materials were brought through the area.

The Secretary's motion to amend the citation is denied. No evidence was presented by the Secretary to support an S&S finding. Her motion is based on a conclusion that these types of violations are generally considered to be S&S. The Secretary must present evidence to support her allegations and cannot simply point to general case law in lieu of such evidence. A penalty of \$300 is appropriate.

2. Citation No. 4057262

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.364(g). In the citation, the inspector alleged that weekly examinations were not posted in the 3 Left Section, #3 entry. 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.

3. Citation No. 4057295

On April 12, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.340(a)(1), as follows:

The energized power center located in 4 Left, Crosscut No. 36, between entry 2 and 3, was being ventilated with intake air, and was not ventilated into a return air course. The intake air passing by the power center was used to ventilate the 4 Left working section.

Inspector Fleshman determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$2,800.00 for the alleged violation. Section 340(a)(1) provides, in part, that power centers shall be ventilated with intake air that is coursed into return air or to the surface and is not used to ventilate working places.

Basin Resources does not contest the fact of violation, but contests the inspector's S&S determination and the amount of the penalty. It argues that Inspector Fleshman did not find any problems with the power center and he did not allege that there was a reasonable possibility that a malfunction would occur in the power center that could create a fire. It states that the power center is a dry contact type that does not contain any fuel. (Tr. 546-48).

The Secretary maintains that the power center was about 40 to 60 feet from the working section, where 14 miners were working. The air that passed by the power center was carried directly into the working face. In the event of a fire, smoke and fumes would be carried to the working area exposing the miners. Given the nature of power centers, the Secretary contends that it was reasonably likely that a fire would occur in the normal course of mining.

In her brief, the Secretary seeks to amend the citation to allege an unwarrantable failure. The power center was subject to preshift inspections and was frequently used by

miners to turn power off and on. The Secretary believes that Basin Resources' failure to correct the violation was aggravated conduct.

Inspector Fleshman testified that transformers can "go at any time." (Tr. 541). He stated that a newly installed power center can last 20 years or it can blow up in a short period of time. *Id.* He determined that the violation was S&S not because of any particular defect he observed, but because power centers can explode or catch fire

without warning at any time. He testified that if a power center failed in such a fashion, the 14 miners in the working section would quickly be overcome with smoke.

Mr. Hallows testified that the power center was a mobile unit. (Tr. 546-47). He stated that the power center did not contain oil filled pots, but used only dry contacts. He further testified that this type of power center does not blow up or create smoke when it fails. (Tr. 548). The dry contact points might burn in the event of a failure, but there would be no fuel to propagate a fire or explosion, according to Mr. Hallows.

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is the key in this case: 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 FMSHRC 862, 865 (June 1996). The test is whether such an injury is reasonably likely. In this case, the Secretary established that it was reasonably likely that the power center would malfunction and that, if it did, smoke and fumes would quickly travel the 40 to 60 feet to the working area. I have taken into consideration the fact that the power center does not use oil and that Mr. Hallows is not aware of any instance in which a dry contact transformer exploded.

I deny the Secretary's motion to modify the citation to allege an unwarrantable failure. The Secretary did not establish that the violation was caused by the operator's aggravated conduct. Inspector Fleshman presented the facts he relied upon to determine that the violation was caused by Basin Resources' moderate negligence. (Tr. 543-44). In the motion, the Secretary relies upon the same facts to allege that the violation was caused by Basin Resources' aggravated conduct. At the hearing, Basin Resources did not contest the citation and offered evidence only with respect to the S&S issue. It did not present any evidence to refute an unwarrantable failure determination because the Secretary did not allege that the violation was the result of its unwarrantable failure. The record in this case is now closed. It would violate basic concepts of due process to enter an unwarrantable failure finding when Basin Resources was not given the opportunity to present facts to counter such a finding. A penalty of \$1,000 is appropriate.

4. Citation No. 4057300 & Order No.4057784

On May 1, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.380(d)(1), as

follows:

The alternate escapeway in the 4 Left working section was not maintained in a safe condition for passage of personnel. Water was allowed to accumulate in Entry No. 3 inby crosscut 53, the width of the entry, for a distance of 40 feet. The water was 12 to 14 inches deep.

Inspector Fleshman determined that the alleged violation was S&S. On May 24, 1995, Inspector Fleshman returned to the mine and issued Order of Withdrawal No. 4057784 under section 104(b) of the Act alleging that "[n]o apparent effort was made to pump the water in the alternate escapeway in the 4 Left working section." The order was subsequently modified to delete the "no apparent effort" language and to insert "the effort made was not sufficient." The Secretary proposes a penalty of \$6,250 for the alleged violation.

The safety standard states that each escapeway shall be maintained in a "safe condition to always ensure passage of anyone, including disabled persons." Basin Resources does not contest the fact of violation or the inspector's S&S determination, but contests the section 104(b) order and the penalty.

The evidence makes clear that Basin Resources had been pumping water out of the cited area between May 1 and May 24. There were two holes where a pump would be alternately placed to pump water. The area had been pumped "dry" on at least one occasion. (Tr. 457-58). Basin Resources was pumping almost continuously during this period. *Id.* Inspector Fleshman and MSHA Field Supervisor Larry Ramey do not deny that the area may have been pumped out during the intervening weeks. (Tr. 428, 454-55). MSHA contends that Basin Resources was not doing enough to keep the water at acceptable levels for the escapeway. Fleshman and Ramey testified that the operator could have built a floating bridge over the area, built a ditch to drain the area, or brought in additional pumps to better control the water level.

Section 104(b) provides that if an inspector finds "(1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein ..., and (2) that the period of time for the abatement should not be further extended" he shall issue an order of withdrawal. 30 U.S.C. ? 814(b). In *Mid-Continent Resources, Inc.* 11 FMSHRC 505, 509 (April 1989), the Commission held that the Secretary bears the burden of proving that the "violation described in the underlying citation had not been abated within the time period" originally fixed. The Commission went on to state:

[T]he Secretary establishes a prima facie case that a section

104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying citation existed at the time the section 104(b) order was issued. The operator may rebut the prima facie case by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

Id.

The Secretary established a *prima facie* case. The issue is whether the violative condition had been abated but recurred. I find that under the facts of this case and the particular standard at issue, Basin Resources did not establish that the condition had been totally abated. The evidence establishes that water was a continual problem in the cited area. When Basin Resources pumped out the area, it refilled with water within a short period of time. Indeed, Basin Resources maintains that the area had been "pumped dry" on a number of occasions after the citation was issued, but refilled. Given that fact and the requirement that escapeways be maintained to "always ensure passage of anyone," I find that each cycle of pumping and refilling cannot be viewed as independent or discrete events. The almost continuous succession of flooding and pumping must be considered as one related incident. It is evident that using one pump to remove water from this area was insufficient to abate the violation, given the constant inflow of water. It appears that Basin Resources was using inadequate resources to correct the problem. I agree with the Secretary that it may have been necessary for Basin Resources to install more pumps or use ditches to channel the water. In sum, temporarily removing the water from the area did not abate the cited condition.

Basin Resources did not argue that the time set for abatement was inadequate. Thus, the Secretary established the two elements set forth in section 104(b). Accordingly, the order is affirmed. A penalty of \$5,000 is appropriate.

5. Citation No. 4057491

On May 17, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.370(a)(1). In the citation, the inspector alleged that the ventilation plan was not being followed in that the 3rd North shuttle car roadway was dry and dusty in entry No. 2 between crosscut Nos. 61 and 62. He 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.

Basin Resources does not contest the violation but contends that its negligence was low and that the penalty is excessive. The cited section of the ventilation plan

states: "Dust on haulageways shall be controlled by water wetting or ... other dust suppressants as needed to maintain respirable dust on intake at or below 1.0 mg/m³." (Ex. P-17). Inspector Fleshman testified that he did not know when the last time the roadway was watered. (Tr. 529). He did not take any samples to determine if the condition created respirable dust in excess of 1.0 mg/m³. (Tr. 530-31). Based on this evidence, I find that the violation was not serious. The condition was obvious, however, and I affirm the inspector's moderate negligence determination. A penalty of \$200 is appropriate.

6. Citation No. 4057782

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.370(d). In the citation, the inspector alleged that Basin Resources failed to review a ventilation plan amendment with the miners that were affected by the revision. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,155.00 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.

7. Citation No. 4057783

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.333(b)(3). In the citation, the inspector alleged that Basin Resources failed to maintain a stopping at crosscut 57 on the 4th Left 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. A penalty of \$200 is appropriate.

8. Citation No. 4057785

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.333(b)(3). In the citation, the inspector alleged that Basin Resources did not install a permanent stopping in the 4th Left section setup room, at crosscut 57, to separate the main intake from the belt entry. 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

standard provides that permanent stoppings or "other ventilation control devices ... shall be built and maintained ... to separate belt conveyor haulageways from intake air courses...."

Basin Resources contests the alleged violation. It argues that at the time the citation was issued, it was in the process of building a regulator at that location. (Tr. 500-02). It states that the ventilation device being constructed was never intended to be a stopping. *Id.* The citation was terminated by the inspector with the following justification: "The stopping has been designated as a regulator and the slant side of the regulator has been fully coated." Inspector Fleshman testified that a regulator was permissible under the standard at the cited location. Although his testimony is confusing, he apparently issued the citation because the ventilation device was not marked on the mine map. (Tr. 492). He stated that if a regulator is not labeled as a permanent ventilation control device on the map, "we don't accept it as such." *Id.*

I credit Mr. Hallows' testimony that the regulator was in the process of construction. (Tr. 500-02). At the time the citation was issued, the construction of the regulator was almost completed. Basin Resources abated the alleged violation by completing the construction of the regulator and marking the device as a permanent ventilation control device on the mine map. I find that the Secretary failed to establish a violation of the standard and I vacate the citation.

9. Citation No. 4057509

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.333(b)(3). In the citation, the inspector alleged that Basin Resources failed to maintain two stoppings at crosscut 58 on the 4th Left section. The citation states that the stoppings were not coated. 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. A penalty of \$200 is appropriate.

10. Citation No. 4057801

On May 30, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.333(d)(3). The citation states the air lock doors at crosscut No. 19 in the East Mains were open when not in use allowing air to leak from the belt to the intake entry. 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.

11. Citation No. 4058077

On August 30, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.344(a)(1), as follows:

The air compressor room in crosscut #6, off #7 entry, West Mains was not totally enclosed with fire-proof material in that the front part of the room was open to track entry #7. The area is above the maintenance loading and unloading area, where personnel are present during the shift. Fire protection provided on unit to shut it down in case of fire.

Inspector Shiveley determined that the alleged violation was not S&S and that Basin Resources' negligence was moderate. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard provides, in part, that "electrical compressors shall be located in a noncombustible structure or area."

Basin Resources does not contest the violation but contends that its negligence was low. It states that the evidence shows that the compressor was enclosed except on one side, the area was rock dusted, and the compressor was equipped with a fire suppression system. Inspector Shiveley testified that the air compressor was in a temporary location while the roof was being fixed in another area. (Tr. 606). The regulation requires that the compressor be totally enclosed in a fireproof structure or area. The compressor was enclosed on all sides except the front. (Tr. 608-09). Inspector Shiveley determined that the operator's negligence should be moderate because when he spoke with the foreman about the condition, the foreman was aware that the compressor should be shut down when no miners are present. (Tr. 607-08). No miners were at the operating compressor at the time the inspector observed it. (Tr. 607). Mr. Hallows testified that Basin Resources had ordered a door for the enclosure but that it had not arrived. (Tr. 610; Ex. R-16).

In her brief, the Secretary moved to modify the citation to allege high negligence and unwarrantable failure. The basis for the motion is that Basin Resources knew that a noncombustible structure was required but did not have one in place and that it also knew that a miner should be at the compressor when in operation.

Although the standard does not provide for an alternative method of compliance, the Secretary seems to believe that the "mine was required to either totally enclose the compressor in a fireproof structure or to keep a miner in the area continuously while the unit was in service." (Sec. Br. at 52; *see also* 30 C.F.R. ? 75.344(b)(1)). I do not find such a provision in the regulation. In any event, I deny the Secretary's motion to modify the citation. There has been no showing of aggravated conduct or high negligence. In addition, it would violate basic concepts of due process to enter an unwarrantable failure or high negligence finding when Basin Resources was not given the opportunity to present evidence at the hearing to contest such an allegation. For the reasons set forth by Basin Resources, I find that its negligence was relatively low. A penalty of \$100 is appropriate.

C. Roof and Rib Support Violations, 30 C.F.R. ? 75.202(a).

1. Citation No. 4057858

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.202(a), as follows:

A loose and uncontrolled rib was present in #1 entry of 5 left section. The rib pulled down easy and was 5 feet high, 5 feet wide, and 12" thick. The preshift examiner needs to pass this location during his examination.

Inspector Shiveley determined that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary of Labor proposes a civil penalty of \$1,610.00 for the alleged violation. The safety standard provides that the "roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of roof, face or ribs and coal or rock bursts."

Basin Resources contests the alleged violation, but agrees that if a violation is found, it would be S&S. It contends that any hazard created by the condition was confined to an area along the rib. It points to Inspector Shiveley's testimony that the hazard was limited to an area five feet from the rib. (Tr. 398). Because the entry was 16 feet wide, it argues that the examiner would not be exposed to a hazard. Loose cleanup material was present along the same side of the entry as the cited condition, so the examiner could not have walked in a hazardous area. In addition, Basin Resources argues that the loose rib was difficult to detect and there is no evidence that someone should have recognized that the area needed to be barred down.

I find that the Secretary established a violation. The inspector testified that the loose rib was easy to see, that it was five feet high, five feet wide, and one foot thick, and that it would have fallen into the entry. (Tr. 390, 396-97). He stated that he was concerned that an examiner doing methane checks might not see the crack in the rib and expose himself to the hazard. (Tr. 398-99). I credit his testimony. The fact that an examiner might walk more than five feet from the rib does not establish that he would not be exposed to the hazard. I cannot assume that a rib will always fall straight down or that an examiner will always walk in a particular area of an entry. There is no question that the loose rib was in an area where miners work or travel. Although the muck that was piled along the rib line may have made it less likely that miners would travel directly under the loose rib, it did not eliminate the hazard and cannot form the basis for vacating the citation. The Secretary is not required to show that loose roof or rib will fall directly onto someone's head in order to establish a violation. In addition, I must assume continued normal mining operations when considering whether a violation occurred. I reject all of the other arguments presented by Basin Resources' with respect to this citation. A penalty of \$1,000 is appropriate.

2. Citation No. 4057479

On July 11, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.202(a). In the citation, the inspector alleged that the mine roof was not adequately supported or controlled to protect the weekly examiner from the hazards of loose roof where sloughage occurred at two locations in the West 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 but contends that its negligence was low and that the penalty is excessive. Inspector Fleshman testified that the examiner should have been recording the loose roof because the condition had existed for a long time. (Tr. 515). Roof bolts were hanging and plates were loose on the bolts. *Id.* He stated he did not designate the negligence as high because the cited area was endangered off in some areas. *Id.*

Mr. Hallows testified that the cited area had been subject to weekly examinations for only a short time. (Tr. 518-20; Ex. R-12). Basin Resources argues that because the evidence shows that certain of the hazardous areas were endangered off, the hazardous conditions in areas that were not endangered off must have recently occurred. The evidence to support Basin Resources' arguments is very speculative. (Tr. 518-24). I find that the Secretary established moderate negligence and that the violation was serious. A penalty of \$500 is appropriate.

3. Citation No. 4057276

On July 27, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the roof at entry #10, crosscut #2, in the East Mains. 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.

4. Citation No. 4057277

On July 27, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the rib at entry #10, inby crosscut #2, in the East Mains. 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.

5. Citation No. 4057484

On May 4, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.202(a). In the citation, the inspector alleged that Basin Resources failed support or control the roof at entry #5, crosscut #58, 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 but not S&S. A penalty of \$500 is appropriate.

6. Citation No. 3848279

On May 24, 1995, MSHA Inspector Ramey issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the ribs on the intake entry of the 4th Left section near crosscut #53. 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.

D. Electrical Violations, 30 C.F.R. ? 75.500 etc.

1. Order No. 3849625

On January 11, 1995, MSHA Inspector Shiveley issued an order to Basin Resources under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. ? 75.503. In the order, the inspector alleged the overload protection for a water pump in the last open crosscut of the 3rd North Mains was defeated by splicing the overload wires together inside the control box. He determined that the alleged violation was S&S and was caused by the operator's unwarrantable failure. The Secretary of Labor proposes a civil penalty of \$6,000.00 for the alleged violation.

At the hearing the parties reached an agreement to modify the order to a section 104(a) citation with moderate negligence. (Tr. 613-14). With that stipulation, Basin Resources does not contest the violation or the S&S designation. It only contests the amount of the penalty. Based on the stipulation, I find that the violation was serious and S&S. A penalty of \$4,000 is appropriate.

2. Citation No. 3849795

On April 7, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.503, as follows:

The Allco approved ... face ventilating fan installed in entry #3 return, 4 Left section was not maintained in permissible condition, in that the motor used to provide traction was broken off and pulled away from main frame,

main power to motor was pulled inside control.

The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$50.00 for the alleged violation.

Basin Resources contests the violation. Based on the evidence, I find that the citation should be vacated. (Tr. 583-604; Ex. P-18). The mobile face ventilating fan contained two motors. The motor that operates the fan is not involved in this citation. The other motor can be used to move the fan to another area. This motor was on a small platform attached to the frame for the mobile fan. At some point in time, the motor had been struck by another piece of equipment rendering it inoperable. The motor was no longer attached to the equipment in a way that it could be used to move it. The electric power wires were disconnected from the motor at the control box. The coupler between the motor and the speed reducer was not connected. Thus, the motor was not connected to any electrical circuits and was totally inoperable.

The mobile fan was equipped with four wheels and was designed to be moved without using the cited motor. Mr. Hallows testified that the motor would not move the fan even before it was damaged, so it was moved manually. There is no requirement that such fans be equipped with electric motors to move them. For all practical purposes, the cited motor was no longer a piece of electric equipment because all power had been disconnected from it. The concept of permissibility is not really applicable to the motor. Assuming continued normal mining operations, the motor did not pose a hazard of propagating a fire or explosion. All of the other components of the ventilating fan were in permissible condition. The citation is vacated.

3. Citation No. 4057492

On May 17, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.512. In the citation, the inspector alleges that the record of required weekly electrical examinations for the energized power center on the 3rd North section at crosscut No. 7 had not been made since 4/22/95. The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019 for the alleged violation.

Basin Resources contests the violation. It argues that the required examinations were made and recorded but that the inspector did not look in the correct records. At the hearing, Basin Resources presented records of weekly examinations that indicate that the required weekly inspections were done. (Tr. 470-71; Ex. R-15). Neither the inspector nor Jeff Salerno, a safety official with the company, could find these records at the time of the inspection. The company's records were not well organized. (Tr. 467, 468-69). The safety standard requires that the weekly examinations be made and provides that a "record of such examinations shall be kept and made available to"

MSHA inspectors. Since Inspector Fleshman with the help of a company official could not find the correct records, I find that they were not made available for inspection. I affirm the citation, find that the violation was not serious. A penalty of \$100 is appropriate.

4. Citation No. 4057856

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.900-1, as follows:

The 480 volt portable distribution center, located in entry #4 between crosscuts #60 and #61 was not protected from mobile equipment, in that entry #4 is the main haulroad leading into the 3rd North Mains. The distribution center was not energized at time of inspection. Entry measured 18 feet wide and distribution box measured 30" wide.

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, in part, that "[c]ircuit breakers used to protect low- and medium-voltage circuits underground shall be located in areas which ... are clear of any moving equipment used in haulageways."

Basin Resources contests the violation. It contends that the distribution center was not in use and was not a functioning piece of equipment. I reject Basin Resources' arguments. It is not disputed that the cited distribution center contained circuit breakers. I credit Inspector Shiveley testimony that the entry was a main haulageway and that he observed tire tracks near the distribution center. (Tr. 376-79). The distribution center extended about 46" into the entry, when the plugs and receptacles are included, and large equipment used the haulageway. (Tr. 373-76; Ex. P-11). I find that the distribution center was not in an area that was clear of "moving equipment used in haulageways."

The fact that the distribution was not in use at the precise time of the inspection is not controlling. It was connected to the power center with a trailing cable. Although the circuit breaker at the power center was off, it could be easily switched on. (Tr. 382-83). Assuming continued normal mining operations, the distribution center could have been energized. Mr. Hallows testified that the distribution center was not "a functioning piece of equipment," but he did not provide any explanation of what he meant. (Tr. 383). He relied on a document prepared by Mr. Salerno that indicated that the distribution center was not energized or in use. (Ex. R-10). The exhibit does not

state that the distribution center was not a functioning piece of equipment. I do not credit Mr. Hallows testimony in this regard.

In her brief, the Secretary moved to modify the citation to allege an S&S violation. The Secretary filed the motion after the record in these cases was closed. Basin Resources was not given the opportunity to present evidence on the S&S issue. Accordingly, I deny the Secretary's motion. A penalty of \$200 is appropriate.

5. Citation No. 4057730

On November 15, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.503. In the citation, the inspector alleged that the lighting system for the 4 left longwall was not maintained in permissible condition because the cable gland was not assembled properly where it entered into the ballast box at shield #95. 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.

6. Citation No. 4057731

On November 15, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.503. In the citation, the inspector alleged that the lighting power cable between shield #88 and #95 on the 4 left longwall was not maintained in permissible condition because additional insulation was not provided where it contacted hydraulic hoses and equipment. 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.

7. Citation No. 4057498

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources

under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.515. In the citation, the inspector alleged that the cable entering the switch for the inby airlock door between Crosscut Nos. 23 and 24, in entry No. 5, 3rd North Section, was not suitably bushed and that the insulation was pulled out of the metal switch box. 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.

E. Other Violations

1. Citation No. 4057261

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.1100-3. In the citation, the inspector alleged that water would not flow from three fire hose valves along the #11 coal belt. 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.

2. Citation No. 4057478

On July 11, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.1003(a). In the citation, the inspector alleged that the energized trolley wire in entry No. 7, West Mains, was not guarded between crosscut Nos. 14 and 15. The main door in the stopping was in the area. 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 \$1,000 is appropriate.

3. Citation No. 4057487

On May 16, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.1725(a), as

follows:

The first bottom roller inby the No. 11 belt drive was not maintained in a safe operating condition. The No. 11 belt was running and smoke was coming out of the hot left side bearing, on the referenced roller.

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. The safety standard provides, in part, that stationary equipment shall be maintained in safe operating condition and equipment in unsafe condition shall be removed from service immediately.

Basin Resources does not contest the violation, but argues that the violation was not S&S, its negligence was low, and that the penalty is excessive. The Secretary contends that the violation was S&S and also moved in her brief to modify the citation to allege an unwarrantable failure.

I find that the Secretary established the four elements of the Commission's *Mathies* S&S test. 6 FMSHRC 3-4. The third element of the test is whether it was reasonably likely that the hazard contributed to would result in an injury. Assuming continued normal mining operations, I find that an injury was reasonably likely. The roller, which was on the bottom belt, was hot and smoking. (Tr. 553-4). Although there were no coal accumulations in the immediate vicinity, the violation created the hazard of a fire. *Id.* The cited condition could have ignited coal fines on the belt and started a fire. *Id.*

I deny the Secretary's motion, filed after the close of the hearing, to amend the citation to allege an unwarrantable failure. First, it would violate basic concepts of due process to enter an unwarrantable failure or high negligence finding when Basin Resources was not given the opportunity to present evidence at the hearing to contest such an allegation. Second, I find that under the circumstances here it would not be appropriate to impute the actions of the beltman, an hourly employee who apparently knew about the condition of the roller, to Basin Resources. A penalty of \$1,000 is appropriate.

4. Citation No. 4057500

The Secretary agreed to vacate this citation at the hearing. (Tr. 483).

5. Citation No. 4057781

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources

under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.403. In the citation, the inspector alleged that five rock dust samples did not meet the required incombustible content requirement of the safety standard. 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.

6. Citation No. 4057511

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.403. In the citation, the inspector alleged that no rock dust had been applied to the floor in the belt entry between crosscut 57 and 58, on the 4th left section. Very little rock dust was on the ribs in the area. 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. A penalty of \$200 is appropriate.

7. Citation No. 4057508

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ? 75.1104. In the citation, the inspector alleged that three open diesel fuel drums were in crosscut No. 56, between entry Nos. 1 and 2, in the 4th Left section. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$690.00 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.

III.

APPROPRIATE CIVIL PENALTIES

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 937

citations and orders in the 24 months preceding November 11, 1995, and that Basin Resources paid penalties for 722 of these citations and orders during the same period. (Ex. P-21). 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 citations and orders, with the exception of Citation No. 4057300 for which a ? 104(b) order was issued. Unless otherwise noted above, all of the violations were 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/Order No.</u>	<u>30 C.F.R. ?</u>	<u>Penalty</u>
<u>WEST 95-494</u>		
3849625	75.503	\$4,000.
4057257	75.400	5,000.
4057838	75.400	2,000.
4057475	75.370(a)(1)	300.
 <u>WEST 96-22</u>		
4057261	75.1100-3	200.
4057262	75.364(g)	200.
4057854	75.400	500.

4057855	75.400	vacated
4057856	75.900-1	200.
4057857	75.400	500.
4057858	75.202(a)	1,000.
4057859	75.400	vacated
4057860	75.400	500.
4057478	75.1003(a)	1,000.
4057479	75.202(a)	500.
4057276	75.202(a)	1,000.
4057277	75.202(a)	1,000.

Citation/Order No.

30 C.F.R. ?

Penalty

WEST 96-23

3849795	75.503	vacated
4057295	75.340(a)(1)	\$1,000.
4057300	75.380(d)(1)	5,000.
4057481	75.400	1,500.
4057484	75.202(a)	500.
4057487	75.1725(a)	1,000.

WEST 96-24

4057491	75.370(a)(1)	200.
4057492	75.512	100.
3848279	75.202(a)	1,000.
4057498	75.515	200.
4057500	75.1103-4(a)(1)	vacated
4057781	75.403	200.
4057782	75.370(d)	200.
4057783	75.333(b)(3)	200.
4057785	75.333(b)(3)	vacated
4057786	75.400	1,000.
4057507	75.400	500.
4057508	75.1104	200.
4057509	75.333(b)(3)	200.
4057511	75.403	500.
4057801	75.333(d)(3)	200.

WEST 96-36

4058077	75.344(a)(1)	100.
4058078	75.400	500.

WEST 96-128

4057730	75.503	200.
4057731	75.503	200.

Total Penalty	\$32,600.
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Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations and orders 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 \$32,600.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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